

**Draft Response to Public Comments on  
DRAFT Butte Area One  
Draft Restoration Plan Amendment  
Parrot Tailings Waste Removal**

Prepared by:



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**June 1, 2016**



**Draft Response to Public Comments on  
December 2015 Draft Restoration Plan Amendment  
Parrot Tailings Waste Removal**

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## **Section I. Introduction**

On December 31, 2015, the State of Montana Department of Justice Natural Resource Damage Program (NRDP), released the Draft Restoration Plan Amendment – Parrot Tailings Waste Removal for public comment through February 1, 2016. For outreach on this public comment period, the NRDP sent notices of this opportunity for public comment to 373 individual/entities on its mailing lists and over 200 individuals on its e-mailing list, issued a press release, placed two sets of display ads in the Butte area newspaper, and conducted a public meeting on January 14, 2016, where NRDP also received oral public comments. The BNRC/NRDP also summarized the Draft Restoration Plan Amendment at the December 29, 2015 meeting of the Butte Natural Resource Council (BNRC).

The NRDP received a total of fifteen (15) comment letters during the public comment period. An additional eight (8) individuals provided oral comments at the public meeting. See Attachment B for a list of commenters, identified by a specific number that serves as a reference to the comment throughout this document. Attachment B also provides copies of the comment letters and oral comments from the public meeting, which are also available on the NRDP website at: <https://doj.mt.gov/lands/advisory-councils/>.

This draft document summarizes the comments received, with similar comments grouped together by category, and provides the responses organized by these categories. Some comment letters included information that is addressed in multiple categories. Oral comments received at the public meeting are noted with a “PH” prefix for the purposes of this document. Attachment A provides a table that lists all public comments by category.

Consideration of public comment coupled with the evolution of the Parrot Project design has led to modification of the proposed Parrot Project in two respects. First, Parrot Tailings wastes would be placed on the south ramp of the Berkeley Pit rather than into the Berkeley Pit water itself. Second, an ET cover system would no longer be placed in the park between Texas Avenue and the BSB county shops. Further rationale for these modifications is set forth below in the responses to public comment.

These draft responses are the subject of consideration at the June 2, 2016 BNRC meeting and will be considered at the June 6, 2016 meeting of the Trustee Restoration Council. The draft responses are to be revised based on input from the BNRC and the Trustee Restoration Council and forwarded to the Governor for his consideration.

## Section II. Comment Summary and Response by Category

### Category 1: General Support of the Draft Restoration Plan Amendment.

**Comments:** Six comment letters and two public comments at the public meeting indicated general support of the Draft Restoration Plan Amendment – Parrot Tailings Waste Removal (#3, #6, #9, #12-14; PH #7, #8). Trout Unlimited (#12) indicated general support for the plan amendment, but urged NRDP and its partners to approach the project with a very sharp pencil, and requests the final decision provide more detail on costs.

**Response:** NRDP appreciates the indicated support of the Draft Restoration Plan Amendment. In response to Trout Unlimited comment, final project costs will be determined upon bidding of the project. The State will consider the qualifications of contractors, bid price, and other appropriate factors when awarding a contract to the responsible bidder whose bid is in the best interest of the project.

### Category 2: General Opposition of the Draft Restoration Plan Amendment.

Three comment letters and one comment at the public meeting were received in general opposition to Draft Restoration Plan Amendment (#1, #11, #15; PH #6).

**Comment:** Two of the four comments were received by same person, Larry Winstel (#1; PH #6). Mr. Winstel's comments state that the removal is unnecessary, and refers to conflicting information provided by EPA and the NRDP.

**Response:** The 2012 Butte Area One Final Restoration Plan (BAO Plan) calls for the removal of mine wastes, including the Parrot Tailings, left in place along the floodplain of upper Silver Bow Creek through BAO, with an allocation of \$10 million towards that removal.<sup>1</sup> The BAO Plan identifies these wastes as a primary source supplying inorganic contaminants to the alluvial groundwater, surface water, and instream sediment resources within the Upper Silver Bow Creek corridor. EPA's remedy for the Parrot Tailings allows the waste to remain in place. The State has studied the removal of the Parrot Tailings and concluded that these tailings and other associated wastes (Diggings East and Northside Tailings) are a primary source of contamination to the alluvial groundwater aquifer. This alluvial groundwater ultimately discharges to Blacktail Creek and Silver Bow Creek and continues to contaminate instream sediments and surface water.

Injury to groundwater in BAO has been demonstrated by the occurrence of concentrations of inorganic contaminants (including cadmium, zinc, iron, lead, copper, arsenic, and sulfate) that greatly exceed State water quality standards in the alluvial aquifer. The concentration of copper in Parrot Tailings area groundwater can exceed 1,000,000 parts per billion (ppb or ug/L). These

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<sup>1</sup> The BAO Plan refers to the area as the Upper Silver Bow Creek corridor.

tailings and wastes will continue to release hazardous substances to the groundwater, surface water, and instream sediments of Blacktail Creek and Silver Bow Creek for many centuries, if not thousands of years, unless addressed. The Parrot Tailings wastes negatively impact natural resources associated with this area, including groundwater, surface water, instream sediments and aquatic life.

Area groundwater has a conductivity of 600 feet/day allowing the contaminated groundwater to be highly mobile (MBMG, 2012). The ultimate discharge point for all alluvial groundwater in the Butte Area One is Blacktail Creek and Silver Bow Creek. Preferential loading to instream sediments from low pH, highly contaminated groundwater has been shown on Silver Bow Creek as well as in national studies (Benner et al., ES&T, Vol. 29, No. 7, 1995; Davis et al, Applied Geochemistry 1996; Ford EPA, EPA/600/S-05/002). Riparian biota and fish that are dependent on instream sediment quality will be adversely impacted by this flux of acidic, contaminant-rich groundwater in the instream sediment zone. In addition, these contaminated instream sediments are mobilized and recontaminate sites within Subareas 1 and 2 of the SSTOU. (Respec, December 2014).

**Comment:** Tyler Pullman (#11) states that removal would result in a “substantial washout that would pollute the area that was already reclaimed.”

**Response:** The Parrot Project will have an erosion and sediment control plan prepared as part of construction activities that will protect any sediment or waste from reaching surface water. In addition, the excavation will not extend into the Silver Bow Creek channel, thereby preventing any washout of contaminated materials into the stream.

**Comment:** William Duffy submitted comments on behalf of Patricia Gallery and the Atlantic Richfield Company (AR, #15). Ms. Gallery’s letter disagrees with the NRDP’s position that the Parrot Tailings wastes should be removed, arguing that the existing remedy is effectively capturing groundwater and protecting the creek. The letter requests that the Parrot Project not interfere with existing remedies, and notes the need to coordinate remedy and restoration work moving forward.

**Response:** The NRDP and other State agencies have studied the removal of the Parrot Tailings and have concluded these wastes are a primary source of contamination to the alluvial groundwater aquifer and a source of contamination to Silver Bow Creek instream sediments and surface water. The September 22, 2006 Partial Concurrence letter from Richard Opper, Montana Department of Environmental Quality Director, to Max H. Dodson, EPA Assistant Regional Administrator, regarding the BPSOU Record of Decision, states: “DEQ does not concur with the overarching decision to leave accessible, major sources of groundwater contamination in place. We refer specifically to the Parrot Tailings, Diggings East Tailings and the North Side Tailings. Our concern is that leaving these wastes in place poses a significant and permanent threat to

groundwater and to the long-term water quality in Silver Bow Creek.” The draft Amendment seeks to implement the Parrot Project ahead of a future consent decree, while still reserving and maintaining the State’s positions regarding groundwater and surface water resources. The excavation associated with the Parrot Project will not extend into the Silver Bow Creek channel, and does not impact existing remedy features.

NRDP also favors coordination of remedy and restoration. This has worked successfully in the Streamside Tailings Operable Unit, the Clark Fork River Operable Unit, and the Milltown Operable Unit. A Butte Priority Soils Operable Unit consent decree remains the State’s goal. The consent decree must be fair, reasonable, in the public interest, and consistent with the goals of CERCLA. This requires acceptable remedy/restoration coordination and an acceptable remedy funding contribution, as well as implementation of a protective and compliant remedy.

**Category 3: Use of Remedy versus Natural Resource Damage Funds.**

Seven comment letters and three comments at the public meeting addressed funding issues related to the project (#3, #4, #6, #7, #10, #12, #13; PH #1, #3, #8). Generally, comments state the desire for the Parrot Tailings waste removal to be paid for with remedy funds instead of natural resource damage funds, although some comments support the use of natural resource damage funds as a backup funding source. A comment letter from Northey Tretheway (on behalf of Restore Our Creek Coalition) addresses two issues related to funding of the project (#13): the group supports the “use of SSTOU/SBC Remediation Funds for Upper Silver Bow Creek remediation work,” and they concur “that remedy funds are the correct use for the proposed cleanup.”

Three comment letters and one public meeting comment were submitted by Dr. John Ray (#4, #7, #10; PH #1). These comments are similar in that Dr. Ray’s desire is to reopen the Record of Decision for the Butte Priority Soils Operable Unit and require that wastes in the Silver Bow Creek corridor (Parrot Tailings, Northside Tailings, Diggings East, and Blacktail Berm) be removed under remedy.

Fritz Daily also submitted a comment requesting that the Parrot Tailings be removed with remedy funds, as well as the Diggings East, Northside Tailings, and Blacktail Berm; however, Mr. Daily’s letter does support the use of natural resource damage dollars if remedy dollars are not used (#3). Mr. Daily also comments there are sufficient funds to accomplish this task: \$70 million from the original settlement, \$45 million remains in the SBC cleanup, \$32 million from the Montana Pole settlement cleanup, and \$20 million from the Butte Priority Soils settlement.

**Response:** Natural resource damage funds may be used to restore, replace or acquire the equivalent of injured natural resources. In the case of the Parrot Tailings, EPA’s remedy allows these wastes to be left in place. The State believes removing these wastes is necessary to (1)

protect Blacktail and Silver Bow Creeks from ongoing and future contaminated groundwater discharge to the creeks and sediments, and (2) shorten the groundwater restoration recovery time. The BAO Plan directs the removal of mine wastes, including the Parrot Tailings, with a \$10 million allocation. Last year, Governor Bullock asked the State to take the necessary steps to initiate removal of the Parrot Tailings wastes. The Amendment to the BAO Restoration Plan for the Parrot Tailings Waste Removal is being developed by NRDP to implement the Governor's request, while still reserving and maintaining the State's positions regarding groundwater and surface water resources. NRDP agrees with commenters who believe there should be a remedy funding contribution towards removal. The State believes that a significant portion of the Upper Silver Bow Creek corridor work is a responsibility of remedy. The State expects an acceptable remedy funding contribution to be received as part of the BPSOU consent decree.

In response to Mr. Daily's comment that there are sufficient funds from other settlements to complete the remediation and restoration in BAO, these other settlements typically have different scopes, purposes, and requirements beyond the work necessary within BAO. The funds from other settlements have been allocated in consent decrees (SST OU and Montana Pole OU) or in restoration plans for specific actions in other areas based on resource priorities and public input (UCFRB Aquatic and Terrestrial Resources Restoration Plans). The BAO Restoration Plan allocated \$10 million for the upper Silver Bow Creek corridor; the UCFRB Aquatic and Terrestrial Resources Restoration Plans allow allocation of monies received in SSTOU/SBC Excess Remediation Funds, and NRDP is proposing to allocate \$8.5 million toward the Parrot Project, as discussed in the SSTOU/SBC Excess Remediation Funds Revision.

**Category 4:** Disposal in the Berkeley Pit.

**Comment:** Nine comment letters and two public comments were received that contained comments related to disposal of waste into the Berkeley Pit (#1, #2, #3, #6, #9, #11, #12, #13, #14; PH#5, PH#6). Six comment letters state their approval/concurrence with waste disposal in the Berkeley Pit (#3, #6, #9, #12, #13, #14). One comment letter voiced concern for dumping waste into the pit (#2), and one public comment voiced concerns over potential changes to the pit water level and chemistry (PH#5). Three comment letters stated general concerns regarding the rising pit water level and long-term treatment options.

**Response:** The comments focused on the proposed placement of the wastes directly into the Berkeley Pit waters. Consideration of public comment coupled with the evolution of the Parrot Project design has led to an alteration of this placement, with placement onto the south ramp of the Berkeley Pit rather than into the Berkeley Pit water itself. As part of design and with consideration of public comment, the design team focused on the Berkeley Pit, determining the safest placement would be to place the waste within the Pit area but not into the Pit water or below the critical water level. Analysis by the State design team shows that placement on the Berkeley Pit south ramp will lead to added safety within Berkeley Pit since it requires the least

amount of worker and equipment access below Montana Resource's 100-foot buffer. The design team also performed a stability analysis which determined placement of wastes on the Berkeley Pit south ramp area would be stable and safe. The State design team has also been performing both a geochemical and volumetric analysis to quantify any potential geochemical effects and to quantify the volumetric displacement of pit water due to waste disposal into the pit water or below the critical water level. The results of these analyses support NRDP's expectation that the volumetric change and change to chemistry is negligible. Though the Berkeley Pit volumetric and chemical change is shown to be negligible if the waste was placed into the pit waters, placement on the south ramp will lead to added safety in implementation of the Parrot Project.

As noted in the Draft Restoration Plan Amendment, disposal of wastes into the Berkeley Pit is subject to approval by EPA and the involvement of Montana Resources and Atlantic Richfield. In addition, as noted in the amendment, access would need to be granted by Montana Resources, and for the railroad right of way and crossing, Burlington Northern Santa Fe (BNSF).

**Category 5: Evapotranspiration (ET) Cover Systems.**

**Comment:** Two comment letters and two public comments were received regarding the use of Evapotranspiration (ET) cover systems and the testing of ET cover materials for lead and cadmium. (#8, #13, #14; PH#2, PH#3).

Dr. John Ray submitted a comment letter stating concerns with the protectiveness, installation, and maintenance of ET cover systems (#8).

Northey Tretheway, on behalf of the Restore Our Creek Coalition, included comments on ET cover systems in his letter (#13). Specifically, questions are raised about the appropriateness of an ET cover system in the park between Texas Avenue and the county shops. Mr. Tretheway also asks questions regarding what passive recreational activities would be allowed on an ET cover systems, and he states that ET cover systems should be used as a last resort.

Doug Coe provided public comment asking about the ET cover systems and their location relative to the groundwater divide and the potential for groundwater to mobilize wastes under the covers (PH#2).

Dan O'Neill provided public comment questioning whether long term studies have been done on ET caps (PH #3).

**Response:** ET cover systems have been installed at numerous mine waste locations in the intermountain west for over 30 years. ET cover systems have proven extremely effective at eliminating infiltration on sites in semi-arid to arid environments and with appropriate soils and vegetation when designed and constructed properly. Specific responses to general ET cover system construction, maintenance, and effectiveness concerns include the following responses:

- Cover System Tested Best Management Practices will be implemented to minimize the effect associated with burrowing animals, runoff, and erosion. (EPA Evapotranspiration Cover Systems for Waste Containment Fact Sheet, EPA 542-F-11-001)
- The State design team will use appropriate materials to construct ET covers for waste. Cracking caused by desiccation, freeze-thaw cycles, and differential settling is primarily associated with soils that have a high percentage of clays. The design will include the use of soils for ET cover systems that are typically well graded with some fine fractions and are classified as silty loams. Excessive cracking in these types of soil is not common. A robust inspection and maintenance program will ensure proper long-term effectiveness of the ET cover systems.
- There are numerous guidance documents provided by individual states that describe how to effectively install ET cover systems, which will assist the State in the design, construction, and maintenance.
- “ET cover systems are expected to cost less to construct. They are often aesthetic because they employ naturalized vegetation, require less maintenance once the vegetative system is established, including eliminating mowing, and may require fewer repairs than a barrier system.” (Rock, S., Myers, B., Fielder, L., Int j. of Phytoremediation, Evapotranspiration (ET) Covers, 2012).

Further investigation of the property between Texas Avenue and the BSB shops shows that there does not appear to be sufficient waste beneath this property. In addition, the presence of several major utilities (including the Texas Avenue Hydrodynamic Device and Silver Lake Water Line) as well as existing grade challenges limits the ability to properly install an ET Cover in this area. As a result, an ET cover system will not be installed in this location.

The groundwater in the Parrot area flows south, away from the groundwater divide, towards, and discharges into, Blacktail and Silver Bow Creeks. It is anticipated that ET cover systems will only be placed in areas where waste removal is not technically or financially feasible to implement, and where waste material is not in direct contact with groundwater. ET cover systems by design will prevent precipitation from infiltrating through the waste, thereby eliminating any potential for leaching of contaminants to groundwater or surface water.

End land use for areas with ET cover systems will be open space. The areas will be revegetated with appropriate native species, and a weed management plan will be implemented as part of the maintenance program. NRDP is currently evaluating sources of soil that are appropriate for the ET cover systems. The soil source will be selected as close to the project area as possible.

**Comment:** Comment #14 from Mary Kay Craig (on behalf of the Citizens for Preservation and Environmental Justice) requests that overburden be tested for lead and cadmium before being reused as cap material.

**Response:** NRDP does not anticipate that overburden excavated from the site will be used for the top layer of the ET cover systems; ET cover systems require a specific type of soil that will need to be imported to the site. NRDP will ensure that any surface material is protective of residential exposure, including for lead and cadmium.

**Comment:** Dan O'Neill (PH#3) made several comments in the public meeting related to the use of different construction equipment, methods, and other logistics during removal activities.

**Response:** Selected contractors must meet all design requirements and specifications. NRDP does not, however, determine the means and methods contractors will use to implement the design. NRDP will hold an informational public meeting on the design prior to construction.

**Category 6: Groundwater.**

**Comment:** Two comment letters and one public comment contained comments related to groundwater (#13, #14, PH#2). Northey Tretheway (on behalf of Restore Our Creek) asked about future plans for groundwater treatment and coordination with end land use, as well as predictions on temporary impacts associated with removal activities (#13). The remaining two comments are related to the migration of groundwater through tailings and their location downstream of the groundwater divide (#14, PH#2).

**Response:** During construction, groundwater dewatering and treatment will likely be necessary in order to complete waste removal activities near or below groundwater. Water from the dewatering operations will be appropriately addressed, either through the existing treatment system or by use in an industrial system, but will not be discharged untreated to waters of the State. Construction activities can result in short term impacts to water quality; the Parrot Project will meet construction stormwater requirements. The overall long-term water quality impact to area ground and surface waters in the Silver Bow Creek corridor will be positive as a result of the Parrot Project. End land use in the removal area will be determined by BSB, as the land owner, but uses will be implemented in a manner that includes any appropriate engineering controls needed to protect the waste removal action, the Silver Bow Creek corridor, and do not impact existing remedy features or future waste removal activities downstream.

**Category 7: Waste Removal Comments.**

NRDP received three comment letters and one public meeting comment concerning areas of waste removal.

**Comment:** Comment #5 by Dr. John Ray states that institutional controls are problematic and that wastes associated with the Parrot Tailings should be removed and not managed by institutional controls.

**Response:** NRDP agrees that institutional controls alone should not be relied upon too heavily to manage Parrot Tailings wastes. The goal of the Draft Restoration Plan Amendment – Parrot Tailings Waste Removal is to remove the maximum volume of waste; however, significant infrastructure limitations are present in certain areas that limit the ability to achieve complete waste removal. In locations where waste cannot be feasibly removed, appropriate institutional controls must be implemented to ensure that end land uses (ET cover systems, redevelopment, etc.) are constructed and maintained to function properly in perpetuity. Institutional controls are commonly and successfully used on remediation projects across the country, and will be necessary here where removal is not feasible.

**Comment:** Comment #11 from Tyler Pullman states that “the state should be required to prove via water samples taken from the Clark Fork drainage that the Parrot Tailings are contributing to the pollution of the watershed to a statistically significant amount before action is taken.”

**Response:** The ground and surface water, and instream sediment data clearly show that there are ongoing impacts to surface water and instream sediments from contaminated groundwater. Exceedances of aquatic life standards for surface water occur and instream sediments contaminant concentrations are extremely elevated above various benchmarks for risks to stream environments, exceeding EPA sediment screening benchmarks by up to 4 orders of magnitude.

**Category 8: Miscellaneous Comments.**

NRDP received a number of comments on miscellaneous items related to the Draft Restoration Plan Amendment – Parrot Tailings Waste Removal, which are addressed individually in this section.

**Comment:** Comment #1 by Larry Winstel questions why the NRDP reports that the county shops will be moved when demolition is clearly intended. Comment #14 from Mary Kay Craig (on behalf of the Citizens for Preservation and Environmental Justice) comments the County Shops not be placed at the Montana Pole Treatment Plant Superfund site because no exposure to dioxin is safe.

**Response:** Section 3.6 of the Draft Restoration Plan Amendment is titled “Butte-Silver Bow County Shop Demolition” which describes the proposed demolition of the shops. A separate but coordinated effort to relocate the county shops prior to demolition is being conducted by Butte-Silver Bow officials. The selection of a new shop location has been completed by Butte-Silver Bow and it is NRDP’s understanding that a location on Centennial Drive has been selected.

**Comment:** Comment #3 by Fritz Daily makes several references to establishing a “quality meandering Silver Bow Creek” flowing through Butte.

**Response:** The wastes along the Upper Silver Bow Creek corridor are the primary sources supplying inorganic contaminants to the alluvial groundwater, surface water, and instream sediment resources within the Upper Silver Bow Creek corridor. The excavation associated with the Parrot Project will not extend into the Silver Bow Creek channel, and does not impact existing remedy features. Through the removal of contamination, the Parrot Project will help the State meet the goals of the BAO Plan by improving water quality, streambed sediments, and ultimately the fishery of Silver Bow Creek.

**Comment:** Comment #9 by Christopher Gammons states a desire to collect samples of soil and groundwater in order to conduct research and analysis.

**Response:** Waste removal activities will be conducted in accordance with an approved Sampling and Analysis Plan (SAP)/Quality Assurance Project Plan (QAPP). The SAP/QAPP will clearly define construction protocol, data collection methods, and quality control procedures. NRDP will collect numerous samples throughout the project, and is willing to share these samples with appropriate entities for the purposes of research and analysis.

**Comment:** Comment #13 from Northey Tretheway (on behalf of Restore Our Creek) states that final grading should support the end land use and not detract from the aesthetics of the area. The comment letter also states that easements should be requested from the railroad to allow for future access for pedestrians as well as future removal activities.

**Response:** During the design process, NRDP will develop a post-removal grading plan in coordination with landowner BSB. BSB will determine the end land use. Areas that are not immediately developed will be revegetated to minimize erosion and stormwater runoff.

**Comment:** Comment #14 from Mary Kay Craig (on behalf of the Citizens for Preservation and Environmental Justice) states that bidders comply with prevailing wage requirements.

**Response:** NRDP will be following the State of Montana procurement laws and policies throughout the bidding process and the selection of contractors for work on the project. All bid documents will clearly state that the successful bidder must comply with all state prevailing wage requirements.

**Comment:** Dan O'Neill (PH#3) asked a question in the public meeting why waste material under the Civic Center is not being removed while waste material under the county shops is being removed, since both are capped with asphalt.

**Response:** NRDP is proposing waste removal under the BSB county shops because this area contains a significant volume of waste that is also in contact with groundwater. The presence of waste near the Butte Civic Center building and to the north of the Civic Center is very limited; as a result, removal is not warranted or cost-effective.

**Comment:** Kellee Anderson stated in the public meeting (PH#4) that she would offer her services as a horticulturist during revegetation activities at the site.

**Response:** NRDP appreciates the offer of assistance during revegetation. This project must be completed by contractors procured through the State procurement process.

**Comment:** Fritz Daily (Comment #3) commented that the cleanup and restoration must include removing the tailings, addressing the French drain issue that the State claims is not collecting all of the contaminated groundwater as EPA and ARCO claim, and responsibly address the storm water issue. Commenter does not support using stormwater retention ponds to address the storm water issue.

**Response:** Although the State has consistently voiced concerns about the effectiveness of the subdrain system, as this system is a component of EPA's remedial action, NRDP will not take actions that may alter this system. A discussion of stormwater retention ponds is outside the scope of the Amendment, but the State has consistently advocated for robust stormwater controls.

**Comment:** Tyler Pullman comment about traffic issues if Continental Ave is closed as a result of the project.

**Response:** Continental Ave is not planned to be closed during the project. The only street to be closed will be Civic Center Drive east of the Civic Center to Texas Ave.

**Comment:** Northey Tretheway commented because of the unprecedented levels of public interest in, and concern about, the closing phases of cleanup activities leading toward the consent decree, he recommends that the plan include a section dedicated to formal public involvement strategies (beyond the formal design comment periods mentioned here). Such interactive strategies should emphasize the community's stake in determining the best end- uses of the entire corridor.

**Response:** NRDP plans to keep the public informed on the design. During the design process, NRDP will develop a post-removal grading plan in coordination with landowner BSB. BSB's will ultimately determine the end land use for its Parrot Project-related property. Areas that are not immediately developed will be revegetated to minimize erosion and stormwater runoff.

## Attachment A – Categorical Breakdown of Comments

PH = Public Meeting comments

Category Number	Category Title	Letter Number
1	General Support of the Draft Restoration Plan Amendment	3, 6,9,12-14; PH7, PH8
2	General Opposition to the Draft Restoration Plan Amendment	1, 11, 15; PH6
3	Use of Remedy versus Restoration Funds	3, 4, 6, 7, 10, 12, 13; PH1, PH3, PH8
4	Disposal in the Berkeley Pit	1, 2, 3, 6, 9, 11, 12, 13, 14; PH5, PH6
5	ET Cover Systems	8, 13;PH2, PH3
6	Groundwater	13, 14; PH2
7	Waste Removal Comments	3,5,11, PH3,
8	Miscellaneous	1, 3, 5, 9, 11, 12, 13, 14, 14; PH3, PH3, PH4

## Attachment B – Individual List of Public Comments Received

<b>BAO Public Comments Received by NRDP</b>	
1	Larry Winstel
2	Jim and Pat Scown
3	Fritz Daly
4	John Ray
5	John Ray
6	Colleen Elliott
7	John Ray
8	John Ray
9	Chris Gammons
10	John Ray
11	Tyler Pullman
12	Trout Unlimited/Bruce Farling
13	Richard Tretheway
14	Mary Kay Craig for Citizens for Labor and Environmental Justice
15	William Duffy for Patricia Gallery, Atlantic Richfield Company
<b>January 14, 2016 Public Meeting Comments</b>	
1	John Ray
2	Doug Coe
3	Dan O’Neill
4	Kellee Anderson
5	Cindy Perdue-Dolan
6	Larry Winstel
7	Carl Hafer
8	Chris Brick



**Coleman, Kathleen**

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**From:** Larry Winstel <mtpilot@live.com>  
**Sent:** Tuesday, January 05, 2016 9:44 AM  
**To:** Natural Resource Damage Program  
**Subject:** Parrot Tailings

There is a lot of deception and lies surrounding the Parrot tailings Proposal. The EPA says it's unnecessary, you barely mention the trap Pipe and completely omit their efforts in your proposal. I spoke with The EPA in person. I see no clear reason for removing the tailings other Than greed. You failed to show the existing plume or how to deal with It. It is a lie to call a man made storm ditch a creek also a lie to report To the papers you will move the county shops when demolition is clearly Intended. There are more intelligent ways to deal with the ground water. The bigger concern is the rising pit water.

Larry Winstel

Sent from [Mail](#) for Windows 10

**Coleman, Kathleen**

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**From:** pscown@bmi.net  
**Sent:** Monday, January 11, 2016 4:45 PM  
**To:** Natural Resource Damage Program  
**Subject:** parrot tailings

Please do not dump the tailings into the Pit!

I know it will only make a difference of a month before it overflows, but we live right in the path! So unless you clean up and release the Pit water into the Clark fork where it wants to go, not into the city, I am concerned!! It's unnerving to be "collateral damage"!!

Thank you,

Jim and Pat Scown

**Coleman, Kathleen**

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**From:** Fritz Daily <buttedaily@bresnan.net>  
**Sent:** Tuesday, January 19, 2016 8:30 AM  
**To:** Brendan McDonough; bwalker@bsb.mt.gov; Cindy Dolan; Cindy Dolan; cshaw@bsb.mt.gov; dfoley@bsb.mt.gov; dhenderson@bsb.mt.gov; dpalmer@bsb.mt.gov; jfisher@bsb.mt.gov; John Sorich; jpmorgan@bsb.mt.gov; sralph@bsb.mt.gov; Natural Resource Damage Program; Cunneen, Padraig  
**Cc:** Bob Olson; Bob Worley; COkrusch@mtech.edu; Dave Isakson; Dave Schultz BSB; David McCumber; Don Peoples; Doug Coe; Dr. Dan Harrington; Ed Simonich; emmett.riordan@northwestern.com; eric.whitney@mso.umt.edu; Erik Nylund; fiskcm@butte.k12.mt.us; JD Lynch; Jerry Sullivan; Jim Dick; Jim Kambich; Jim Keane; Joe Lee; John Ray; John McKee; johnfwalshjr337@msn.com; ksullivan@bsb.mt.gov; Mark Gollinger; Mary Jo McDonald; Matt Vincent; Mick Ringsak; mike.smith@mtstandard.com; ntrettheway59701@yahoo.com; PMunday@mtech.edu; quivik@usfamily.net; Rick L; Robin Jordan; Ron Davis; Ryan Lynch; SJudd@Maryknoll.org; Steve McCarthur; tmalloy@bsb.mt.gov; Elizabeth Erickson; evanbutte@bresnan.net; helen.joyce@mse-ta.com; Ray Robins; Susan Dunlap; ochenski@mt.net; pdudley@mtech.edu  
**Subject:** Draft Butte Area One Restoration Plan Amendment: Parrot Tailings Waste Removal Plan  
**Attachments:** Pat Cunneen and Fritz Daily Emails.docx; Thoughts on the Draft Butte Area One Restoration Plan Amendment.docx

I would like to address the **Draft Butte Area One Restoration Plan Amendment: Parrot Tailings Waste Removal Plan** and request that my comments become part of the official record.



***Fritz Daily***  
***1901 Roosevelt Ave.***  
***Butte, MT 59701***

To whom it may concern;

**Several years ago my great friend and community leader Don Peoples recommended that the tailings in and around the Civic Center be removed and work with the Atlantic Richfield Company to construct a new “state of the art” Civic Center and Convention Center in the area. He was right then and he is right now! Too bad we missed the opportunity! I’m concerned now we may again be missing another opportunity in creating a clean and restored meandering Silver Bow Creek flowing through Butte.**

I have debated in my mind for considerable time now as to how I wanted to respond to this proposed plan. I **keep finding myself asking the old proverbial question “is something better than nothing or is nothing better than something?” To tell the truth I don’t know the answer! I do know however, I am not the enemy!** I am sad to say this proposal only addresses the removal of the Parrot Tailings and does not address the complete cleanup and restoration of the Creek that the residents of Butte and the entire Clark Fork basin deserves. Nothing less should ever be accepted.

**I find it unbelievable and unconscionable that the State of Montana and the Environmental Protection Agency have determined that it is environmentally practical and achievable to require the Atlantic**

**Richfield/British Petroleum Company to spend \$100+ million dollars to remove the Milltown Dam, negotiated a \$82 million “buy out” to clean Silver Bow Creek from below Interstate 90 to the Warm Springs Ponds, and negotiated a \$100+ million “buy out” to clean the Clark Fork River. Yet they find it unachievable and acceptable to not responsibly clean and restore Silver Bow Creek flowing through Butte, where the contaminants came from at the Headwaters and source of the entire problem.**

**In response to the Draft Butte Area One Restoration Plan Amendment: Parrot Tailings Waste Removal Plan I strongly believe the State of Montana and the Butte Silver Bow Local Government must “step to the plate” and demand through Court Action or in Consent Decree Negotiations that the Environmental Protection Agency reopen the Record of Decision on Butte Priority Soils and demand that a comprehensive detailed cleanup and restoration plan be developed and implemented for the area.**

**The plan must include a solid financial commitment and addresses the responsible cleanup and restoration of the Creek. It must include total removal of the Parrot, Diggings East, Northside Tailings and the Blacktail Berm and reestablishes a quality meandering Creek flowing through the center of our town. It must be protective of human health and the environment as required under Superfund Law and restores the Creek and the area to a useful purpose as is also required in State law and the Montana Constitution.**

**If the State and the Local Government refuse to challenge the incompetence of the Environmental Protection Agency to responsibly clean and restore the creek then I support the State using Natural Resource dollars to complete the task. The States plan however, must also include a solid financial commitment and responsibly cleaning and restoring the Creek. Including total removal of all tailings, creating a quality meandering Creek flowing through the town and responsibly addressing the inefficient French Drain and Storm Sewer issue.**

**I believe sufficient Restoration dollars are available to accomplish this task. Including; \$70 million from the original 118 million Settlement, \$45 million remains from the Silver Bow Creek Cleanup fund, \$32 million from the Montana Pole Settlement Cleanup funds and \$20 million remaining in the Butte Priority Soils Settlement.**

**As a life-long resident of Butte and former seven-term Montana Legislature my goal has always been for the past several years to promote creating a quality meandering Silver Bow Creek flowing through Butte where the children can play and fish and the adults of the community could enjoy the amenities of the cleanup and restoration as well. I joined with Sister Mary Jo McDonald and Ron Davis to file a lawsuit against the state of Montana over the name of the Creek to create a goal of hopefully promoting a responsible cleanup and restoration of the Creek**

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The cleanup and restoration must include removing the tailings, addressing the French Drain issue that the State publically claims is not collecting all of the contaminated groundwater as the EPA and Arco/BP claims that it is, and responsibly addressing the storm water issue.

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I regret I have not been more effective in promoting my efforts and I believe I have failed in trying to achieve my goal of a clean and restored meandering Creek flowing through town.

**I now believe my goal has become unachievable because of the incompetence of the agencies and a secret agreement negotiated between Butte Silver Bow and the Atlantic Richfield Corporation/British Petroleum Company known as the Allocation Agreement.**

**I now believe that in reading this Draft, some email correspondence between me and Pat Cunneen that I am attaching, and recent articles in the Montana Standard that the State of Montana and others now believe, without merit, that it is impractical to provide a quality meandering Creek flowing through Butte. Instead it will be addressed by using a series of what I call "mosquito ponds" to address the issue. I believe this is wrong, without merit, and is not in the best interest of Butte and the entire Clark Fork River Basin.**

**I also want to emphasis that I have the greatest respect for my friend Pat Cunneen and my friends on the Butte Natural Resource Council including Elizabeth Erickson, John McKee, Chad Okrusch, Mark Gollinger, Emmett Riordan and the others. Without the efforts of this group, Judge Newman, the Restore the Creek Group, Jim Kambich and Mick Ringsac of the Butte Clark Fork Advisory Committee, Ron Davis, Sister Mary Jo McDonald, Don Peoples, Bob Olson, and Joe Shoemaker, we would not be where we are today. "Youse Guys" deserve a great big shout out! Hopefully our successful lawsuit will add to the credibility of a successful cleanup and restoration as well. My concern however, is that the decisions are**

**being made by the “anti Butte” State bureaucrats and former State bureaucrats that have got us in the mess we are in today.**

I sincerely hope that my involvement and thoughts are viewed as a worthy contribution to this issue and will eventually contribute to making Butte Montana a better and more environmentally safe place to live. **While I still do have some Fire in my belly,” I have said many times in the past the flame is flickering. I now believe because of the fact there will not be a quality meandering Creek flowing through the town, and that the Butte Silver Bow Council of Commissioners and the Montana Standard have allowed a quality Resolution to be “torpedoed” and drastically changed by members of the current administration, who negotiated a flawed Allocation Agreement and are protecting their “tails”, the flame has just about been put out. I wish you well in your endeavor.**

**I only offer my thoughts because I strongly believe that we can and definitely must do better!**

I am attaching an email discussion between me and Pat Cunneen we wrote last week in support of my thoughts, expressed in my comments, and Pat’s email expressing his believe that we cannot establish a quality meandering Silver Bow Creek in which I totally disagree! Please make these attachments part of the official record as well.

Sincerely,  
*Fritz Daily*

Pat Cunneen and Fritz Daily Emails;

Pat, I can't help but starting this email without thinking of the courageous Butte men who accomplished placing the 90' tall Lady of the Rockies on the Continental Divide overlooking Silver Bow Creek, the Headwaters of the Columbia and Clark Fork Rivers! Men like Bob O'Bill, Al Beavis, Leroy Lee, Mike Cerise, Joe Roberts, Scrapper Daily, Jim Keane and hundreds of other men and women who accomplished what many thought could never be accomplished, this incredible unbelievable goal.

Thank for the note. I have debated in my mind all weekend as to how to respond to your email. I kept finding myself asking the old proverbial question "is something better than nothing or is nothing better than something?" To tell the truth I don't know the answer! I do know I am not the enemy!

As I have said and written many times, you truly are a "breath of fresh of fresh air" in the process and I definitely respect your thoughts. Thanks for doing what you, Nick Tucci, Elizabeth, John, Chad, Mark, Emmett and the others on the Butte Natural Resource Damage Council have accomplished. You are true Butte Guys and gals and I know you have the best interests of the community at heart. Please don't find my response offensive, but I find it compelling, as I always do, to express my thoughts.

**While we may in the end be forced to accept the lower quality cleanup and restoration of Silver Bow Creek flowing through Butte as is now being proposed by the agencies, I strongly believe we must continue to strive to achieve the quality cleanup and restoration the community of Butte deserves. The same quality cleanup as the folks in Missoula received at the Milltown Dam that only a few thought could be accomplished, and they are now receiving on the Clark Fork River!**

I would not be much of a person, knowing what I know from my 30+ years of involvement, if I did not continue to express my frustration and disappointment of the quality of cleanup and restoration the community of Butte has received. FYI---**My positive Facebook post supporting dumping the Parrott Tailings in the Berkeley Pit last week as of this morning reached 9166 Facebook folks! The last time I posted my Annual Berkeley Pit Statistics, believe it or not, it reached 44,592 Facebook folks. Obviously some folks are listening.**

**In response to your email, I find it unbelievable and unconscionable that the State of Montana and the Environmental Protection Agency have determined that it is environmentally practical and achievable to require the Atlantic Richfield/British Petroleum Company to spend \$100+ million dollars to remove the Milltown Dam, negotiated a \$82 million "buy out" to clean Silver Bow Creek from below Interstate 90 to the Warm Springs Ponds, and \$100+ million "buy out" to clean and restore the Clark Fork River. Yet they find it unachievable and acceptable to not responsibly clean and restore Silver Bow Creek flowing through Butte, where the contaminants that have been and are being removed came from at the Headwaters and source of the entire problem.**

Whoever changed the initial decision to begin the cleanup of Silver Bow Creek below Interstate 90 and not at the Headwaters at Texas Avenue where I believe it was classified in the 1983 Superfund decision, to place Silver Bow Creek #20 on the Superfund List of Cleanup Sites, definitely did not have the best interest of Butte and the entire Clark Fork Basin in their thoughts. **The fact of the matter is---the entire future of the cleaned Creek, where cutthroat**

trout are now appearing in the lower reaches of the Creek, is forever threatened without a responsible clean and restored Silver Bow Creek at the Headwaters of the Creek and building a quality treatment plant for Berkeley Pit water that must be eventually pumped/treated and discharged to Silver Bow Creek in perpetuity!.

A recent quote by Harley Harris the Legal Counsel for the Department of Environmental Quality in the Montana Standard best sums up my thoughts---***“no reasonable person believes this {underground} water isn’t moving towards the Creek”-- a pointed reference to the EPA, which has precisely made that assertion. In addition, Rob Collins the former Counsel of the Department of Environmental Quality has publicly stated the Reverse French Drain designed to treat the underground water in perpetuity is not collecting all of the contaminated water as stated by the EPA and the Atlantic Richfield/British Petroleum Company. Yet we still head down this failed path in making the critical decisions to clean and restore the Creek and ignore Judge Newman’s decision that Silver Bow Creek flowing through Butte is a watercourse. Unbelievable!***

Judge Brad Newman wrote in our recent successful Lawsuit against the State of Montana; **“This litigation seeks to ensure that the State of Montana and its agencies follow the law.”**

It’s too bad the State didn’t spend the last four years and the several hundred thousand dollars fighting the EPA instead of us and demanding a quality cleanup and restoration for Butte that the residents deserve!

Pat, as you know I have spent countless hours over the past 30+ years trying to make Butte a better and more environmentally safe place to live. Believe me it has been a challenge! While I am definitely not an expert, I have worked hard at staying informed and trying my best to learn what is best for the future of our town. Most importantly I have tried to keep the community informed and I believe, from the numerous daily comments I receive, I have strong credibility in the community. **As I say often, “I know just enough of the details that I am Dangerous!”**

I respond in a positive manner when I believe things are being done right. Things like dumping the Parrot Tailings in the Pit and using Natural Resource Dollars to construct the Basin Creek Water Treatment plant, and I respond negatively when appropriate.

In the process I have learned many things, some negative and some positive. **The most disturbing is the “anti Butte attitude” that is still so prevalent and predominant in the State and Federal agencies in Government in general and in their representatives. The greatest tragedy in this entire process is that all of the major decisions have been made behind closed doors in secret meetings by these same “anti Butte agency folks” with basically no public input.**

I have also discovered that it is very difficult to determine who your friends and who your enemies are. I have absolutely no doubt that I include you in my friend’s category as I do the other members of the Butte Natural Resource Damage Council.

As I look back on where we have been and where we are going with Superfund Cleanup and Restoration in Butte I have numerous thoughts in response to your email. Again some positive and some negative. I will send those to you in a separate email. I will also submit my thoughts for the Public Record on the Draft Butte Area One Amendment.

**I have absolutely no doubt, as I have expressed for these 30+ years that the entire economic, environmental and social future of our town depends on a successful Superfund cleanup and restoration of the community.**

That includes; Building a quality Berkeley Pit Treatment Plant that includes cleaning and mining the water. Creating a quality Silver Bow Creek flowing through Butte that includes a meandering Creek where kids can play and fish and the adults enjoy the amenities as well. In addition, a responsible cleanup and restoration of the Butte Hill that adequately addresses the storm sewer issue and responsibly addressing the Montana Pole Area and Lower Area One. I strongly believe all of these things can be achieved with proper planning and addressing Superfund and State law and most importantly the Montana Constitution.

As always, I am going to share my thoughts with some others. Hope you don't mind.

Please share this email with the folks in the Consent Decree negotiations and Governor Bullock, Harley Harris, Tracy Stone Manning and the DEQ Director. I do not have email addresses. **We are not the enemy!**

Anyway, good luck in your endeavor. It appears, since we are not going to have a quality meandering creek flowing through Butte, that in our lawsuit we won the battle, but lost the war. **I now understand how Chief Joseph felt after the Battle of the Big Hole when he said---"I will fight no more forever!"**

Fritz

Let me share those thoughts;

- **The Record of Decision to clean Silver Bow Creek flowing through Butte in 2006 was made with false, inaccurate and incomplete data. We now know the true facts.**
- The State continues to deal with the cleanup and restoration of Silver Bow Creek flowing through Butte as a sewer.
- Judge Newman in our recent successful lawsuit over the name of Silver Bow Creek flowing through Butte states differently. Judge Newman writes in his opinion--- **“This litigation seeks to ensure that the State of Montana and its agencies follow the law.”** He wrote; **“In this case the Plaintiffs stand in the shoes of government. They are seeking as a private attorney general to force the State to act appropriately with respect to the State’s waters held in trust for the public.”**
- **Judge Newman also confirmed in his decision that the Creek is a watercourse and not a sewer. He wrote; The issue raised in the complaint is not what would happen to the restoration of the creek should the State improperly change the name of the watercourse, but rather what damage already has occurred and will occur in the future as the result of the State's actions concerning the name of the creek without observing the statutory requirements to change its name.”**
- **It’s too bad the State did not spend the several hundred thousands of dollars in trying to defeat us in our lawsuit and not in demanding the Environmental Protection Agency to develop and propose the quality cleanup and treatment of the Creek as should have been the case.**
- While I have mixed feeling about the current effort I do believe---We need a **comprehensive detailed plan** that includes a solid financial commitment and addresses the responsible cleanup and restoration of the Creek. **It must include total removal of all of the contaminated tailings that is protective of human health and the environment as required under Superfund Law and restoring the Creek and the area to a useful purpose as is required in State law and the Montana Constitution.** Including, removing the tailings, addressing the French Drain issue that the State publically claims is not collecting all of the contaminated groundwater as the EPA and Arco/BP claims that it is, and addressing the storm water issue.
- **This is a “one time opportunity” and if we don’t take advantage of the situation right now we will never have a clean and restored Silver Bow Creek flowing through Butte Montana.** We need to continue the fight and demand the cleanup we deserve as the folks in Missoula did when they demanded that the Milltown Dam be removed. Remember the same agency folks who stated it was impossible to remove the Dam are the same agency folks who are now stating it is impossible to create a quality Silver Bow Creek flowing through Butte.
- Finally--- **Without the efforts of you and the Butte Natural Resource Council, Judge Newman, the Restore the Creek Group, Jim Kambich and Mick Ringsac of the Butte Clark Fork Advisory Committee, we would not be where we are today. “Youse Guys” deserve a great big shout out! Hopefully our successful lawsuit will add to the credibility of a successful cleanup and restoration as well.**

**Coleman, Kathleen**

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**From:** John Ray <bodinman2003@yahoo.com>  
**Sent:** Wednesday, January 20, 2016 5:50 AM  
**To:** Brendan McDonough; bwalker@bsb.mt.gov; Cindy Dolan; Cindy Dolan; cshaw@bsb.mt.gov; dfoley@bsb.mt.gov; dhenderson@bsb.mt.gov; dpalmer@bsb.mt.gov; jfisher@bsb.mt.gov; John Sorich; jpmorgan@bsb.mt.gov; sralph@bsb.mt.gov; Natural Resource Damage Program; Cunneen, Padraig  
**Cc:** Bob Olson; Fritz Daily; Bob Worley; COkrusch@mtech.edu; Dave Isakson; Dave Schultz BSB; David McCumber; Don Peoples; Doug Coe; Dr. Dan Harrington; Ed Simonich; emmett.riordan@northwestern.com; eric.whitney@mso.umt.edu; Erik Nylund; fiskcm@butte.k12.mt.us; JD Lynch; Jerry Sullivan; Jim Dick; Jim Kambich; Jim Keane; Joe Lee; John McKee; johnfwalshjr337@msn.com; ksullivan@bsb.mt.gov; Mark Gollinger; Mary Jo McDonald; Matt Vincent; Mick Ringsak; mike.smith@mtstandard.com; ntarethway59701@yahoo.com; PMunday@mtech.edu; quivik@usfamily.net; Rick L; Ron Davis; Ryan Lynch; SJudd@Maryknoll.org; Steve McCarthur; tmalloy@bsb.mt.gov; Elizabeth Erickson; evanbutte@bresnan.net; helen.joyce@mse-ta.com; Ray Robins; Susan Dunlap; ochenski@mt.net; pdudley@mtech.edu; Joe Vranka; Nikia Greene; Livers, Tom; Cunneen, Padraig; Ford, Jim; John Ray; Chambers, Jenny; Joe Griffin  
**Subject:** Re: Draft Butte Area One Restoration Plan Amendment: Parrot Tailings Waste Removal Plan

First, I want to thank Fritz for his presentation last evening and the others that spoke. I think that everyone was impressed with the turnout and, very importantly, there were many new faces at the event. The energy displayed at the event was huge. It was inspiring to be in attendance.

If the EPA is to be true to its commitment to the efficacy of public involvement in the Superfund process, such an outpouring of public involvement should "move" the agency to give Butte a real "cleanup."

Second, only unrelenting public pressure will get Butte a real cleanup. By sponsoring and publicizing the event, the *Montana Standard* did a great public service. The Standard's focus on and the quality of reporting about environmental issues in Butte has been excellent and is much needed. The efficacy of their efforts was seen last evening. The Restore Our Creek folks are a true grass roots effort to be commended for their effort, enthusiasm and effectiveness.

Third, it was apparent to me that as far as the EPA is concerned it will be business as usual. For reasons that I will not go into here, the agency is committed to preserving the status quo even in the face of overwhelming, reasoned public input that the remedies for Butte are not working to remediate our community. The EPA's responses were either obdurate defenses of what they are doing or dismissive, condescending responses to sincere public concern. Even after more than twenty years, how often did we hear the EPA response: "We are looking into that." Our only hope is to keep up unrelenting pressure on the agency. Hopefully, Senator Tester will get some positive movement when he meets with the EPA director.

We need to keep demanding:

1. Full agency accountability to the public. This is hard to achieve when the EPA constantly retreats behind a "veil of secrecy" when it comes to decision making during the consent decree negotiations. The bottom line is that I don't think EPA in Montana really values public input.
2. Removal of the Parrot Tailings under remediation not restoration. If we do the removal under restoration not remediation their will be tremendous opportunity costs. Think of the twenty million dollars that will be spent to remove the Tailings that could be spent on truly restoring Silver Bow

Creek. Removal should be a remediation activity. EPA should reopen the Record of Decision and provide for removal of the Parrot Tailings.

3. Attention to environmental justice issues. Butte has a higher than average number of poor people and higher than state or national rate of poverty. Most low-income citizens live in uptown Butte and have to endure a disparate toxics burden. EPA ignores them.

4. Attention to the Montana Pole cleanup that will leave vast amounts of dioxin in place.

5. Enforcement of storm water runoff controls. Storm water runoff is the major threat to Silver Bow Creek but the EPA refuses to enforce storm water runoff controls.

6. Addressing in a comprehensive manner the ticking time bomb of the Berkeley Pit. The EPA has left little margin of error.

Again, last evening was impressive and something to build on. We can't give up. The issue is too important. The task will be hard in the face of an unresponsive EPA but we will win in the end.

Thanks to all. It was truly inspiring.

Dr. John W. Ray.

On Tuesday, January 19, 2016 8:30 AM, Fritz Daily <buttedaily@bresnan.net> wrote:

I would like to address the **Draft Butte Area One Restoration Plan Amendment: Parrot Tailings Waste Removal Plan** and request that my comments become part of the official record.



***Fritz Daily***  
***1901 Roosevelt Ave.***  
***Butte, MT 59701***

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Sincerely,  
*Fritz Daily*



**Coleman, Kathleen**

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**From:** John Ray <bodinman2003@yahoo.com>  
**Sent:** Wednesday, January 20, 2016 6:53 AM  
**To:** Natural Resource Damage Program; Ford, Jim; Cunneen, Padraig; Martin, Douglas (DOJ); Capdeville, Mary; Nikia Greene; Reed, Daryl; Livers, Tom; Chambers, Jenny; Joe Vranka; Libby Faulk; Shaun McGrath  
**Cc:** John Ray; Erik Nylund; Dylan (Tester) Laslovich; W. Robert Ward; Mathy Stanislaus; Northey Tretheway; Gina Mccarthy; Barry Breen; Joe Griffin; Ron Davis  
**Subject:** Institutional Controls are not Reliable--Remove the Waste

Last evening at the Restore Our Creek meeting, the EPA spoke glowingly about the efficacy of institutional controls on the Butte Hill. **This praise is misplaced. Institutional controls are very problematic. Whenever waste is left in place, i.e. whenever a threat is left in place, institutional controls are in the mix. Institutional controls do not work. For example, all of the waste associated with the Parrot Tailings, Diggings East, etc. should be removed not managed by institutional controls. Any waste left in place remains a perpetual threat left in place. True remediation calls for toxic waste removal. True restoration is not possible as long as toxic waste remains in place.**

**Consider the following comments about the EPA's use of institutional controls as well as the use of institutional controls in the *Butte Area One Draft Restoration Plan Amendment: Parrot Tailings Waste Removal*:**

**Submitted by:**  
**Dr. John W. Ray**  
**Butte, Montana 59701**

**The Public should be concerned about too great a Reliance on Institutional Controls.**

Institutional controls per se do nothing to reduce the mobility, toxicity, or volume of contaminants. Institutional controls do nothing to clean up a site. The institutional controls being considered in the EPA's RI/FS for Priority Soils would seriously limit productive land uses and greatly compromise the property rights of owners to use their land as they determine. The extensive reliance on institutional controls is also contrary to the Superfund mandate of preference for treatment over restricted land use. Institutional controls do nothing to treat a site. The EPA's own document "Rules of Thumb for Superfund Remedy Selection" states that the law mandates a clear preference for treatment over all other approaches. "EPA expects to use treatment to address the principal threats posed by a site. . . ." [40 CFR 300.430(a)(1)(iii)(A)]. The above document also notes: "Institutional controls. . .generally shall not substitute for more active measures. . . ." (pp. 12-13)

***The EPA itself has found significant problems with institutional controls at its other sites.*** In an article entitled "EPA, Think Tank Studies Show Superfund Land-use Controls Flawed, December

10, 2001” which summarizes “Superfund Report via Inside EPA.com” by Resources for the Future, we find these conclusions, ***reached by the EPA itself***, which due to their significance, I will quote at length:

“EPA and environmental think tank studies have shown that the federal and state governments’ land-use restrictions at Superfund sites, known as institutional controls (IC), are seriously flawed, with an agency study showing the controls are not reliably implemented and the think tank report finding the controls are dramatically under-funded.”

“During a November 27 land use control summit, sponsored by the International City/County Management Association (ICMA), EPA officials and the Environmental Law Institute (ELI), outlined numerous shortcomings they have found with EPA’s IC monitoring and enforcement efforts nationwide. While EPA released the results of a study showing EPA has failed to ensure Superfund ICs are reliably implemented, and ELI study indicates that EPA’s ICs are dramatically under-funded.”

“Bruce Means, of EPA’s Federal Facilities Restoration and Reuse Office, told attendees that preliminary studies show that half of the ICs implemented under Superfund records of decisions (ROD) were mischaracterized. During a study of RODs conducted during 1999 and 2000, the agency found that half of the ICs established under RODs were not implemented as the agency had planned.”

“And Jay Pendergrass of ELI outlined the preliminary findings of ELI’s study of state’s IC programs, which showed that the programs are severely under-funded.”

“In a draft version of the report, Pendergrass found that state environmental programs are underfunded and as a result the sites allocate very little time on IC implementation. The funding and staffing shortfall ‘raises concerns about whether [ICs] are implemented as intended and [are] as protective as intended.’”

“An ICMA source agrees that EPA has serious problems with its IC program, saying that the agency has many RODs with vague or inconsistent references to such controls.”  
(pages 1-2)

The greater the cleanup of the Butte Priority Soils Operable Unit, the more the site can be used productively. The less cleanup of the BPSOU, the less the site can be used for residences and recreational uses. Given the EPA’s admission that institutional controls have failed it in the past, it is amazing that the remedies listed in the RI/FS for Priority Soils call for such extensive use of institutional controls.

#### Other Problems with Institutional Controls:

- a. There is a tendency not to implement institutional controls as time passes. Frequently institutional control mandates are not carried to completion.
- b. The effectiveness of institutional controls usually depends upon the ability, personnel and resources of the local government to implement. Often local governments do not have the personnel or resources to devote to the implementation and monitoring of institutional controls. Given the national administration’s proposed cutbacks in Superfund allocations, resources will be increasingly unavailable on the national level to monitor implementation and effectiveness of institutional controls. Certainly the financial capacity of Butte’s local government to implement and monitor institutional controls is greatly limited. Nowhere does the EPA’s comprehensively address the above issue.

- c. “Institutional controls rely heavily on humans to implement, oversee, and administer them. It is human nature to ignore tasks that no one else seems to care about or where the purpose is not readily apparent. Residual hazardous substances are a classic example of a problem that is not readily apparent.” (“Protecting Public Health at Superfund Sites: Can Institutional Controls Meet the Challenge?” Environmental Law Institute, p. 2)
- d. Although EPA must review the remedy every five years, the frequency of this review process may be insufficient to detect the failure of institutional controls.
- e. The use of education as part of the institutional controls strategy is a substantial part of the EPA’s approach to implementing institutional controls. Research of previous remedies under Superfund indicates that education programs fail to materialize.
- f. “In addition to the direct costs of implementing institutional controls, their use can impose substantial indirect costs on communities, property owners, prospective purchasers and developers by limiting the ways a site may be used. The burden of the restrictions on use of the site falls on the property owner and the community, with the owner reaping potentially lower profits from use of the property and the community receiving lower social benefits from the allowed uses than would have been possible if no restrictions existed.” (ELI, *Ibid.*)
- g. Because the sites where institutional controls will be implemented will not be cleaned up and will present a continuing potential threat to human health, these sites will be off limits to development in perpetuity. It is difficult to see how the use of institutional controls meshes with the goals of the EPA’s Superfund Redevelopment Initiative.
- h. It is impossible to determine future possible land uses for the site nor is it possible to predict unanticipated land uses. (See: “Linking Land Use and Superfund Cleanups: Uncharted Territory,” by Probst, Hersh, Wernstedy and Mazurek, *Summary of Findings*, RFF, p. 1)
- i. “Institutional controls have more problems than just risk miscalculation. Breaches in the site because of future construction, or even animals may cause the control to fail. The lack of a required contingency plan, would not account for new remedies, new information, or failed institutional controls negatively impacts the effectiveness of the treatment. Institutional memory loss was well is an important factor. This memory loss occurs when a party decides to breach the original institutional control without its own knowledge. In fact, in the ICMA (International City/County Management Association) study, the majority of respondents (63%) said that breaches in the institutional controls on a site were highly or somewhat likely. Following up on that question, 30% of the respondents reported that no formal inspection schedule was set up to evaluate the site as require by law.” (Erwin Tam, Environmental Science and Economics, UC Berkeley, “Analysis of Institutional Controls at California Superfund Sites.”)
- j. “Concern has been expressed about the long-term viability of institutional controls as a remediation tool. For example, they may be forgotten; enforcement agencies may not effectively review properties or land users’ actions; or land users simply may take their chances. Decision makers should weigh the full costs of such options, including capital costs, costs of long-term sampling and analysis, and costs of replacing equipment, as well as concerns about potential long-term risks associated with contaminants left in place, against the cost options that would remove the contaminants completely. Many local governments do not yet have the capacity and resources necessary to meet the challenges of long-term stewardship.” (“Understanding the Role of Institutional Controls at Brownfields Sites: Major Concepts and Issues.”)
- k. Because institutional controls leave large amounts of contaminants in place, institutional controls will have to be perpetual. Who is to say what anticipated land uses come up for an institutionally controlled area? For example, fifty years after the record of decision for Butte Priority Soils is implemented, the contaminants will still be there threatening human health and the environment, but will the will be there to restrict land uses in order to prevent the release of contaminants. “Institutional controls ‘work’ only if they are complied with. And while this is true

of any site remedy, institutional controls require monitoring and enforcement over long time periods.” (“Linking Land Use and Superfund Cleanups: Uncharted Territory, Probst, et al., Resources for the Future Center for Risk Management.) Will the will to enforce institutional controls exist fifty to a hundred years in the future?

- l. Legal, social and political pressures limit the effectiveness of institutional controls. (*Ibid.*)
- m. The long-term effectiveness of institutional controls is unknown. “There has, however, been little investigation of what happens at sites on the National Priorities List (NPL) when land use plays a prominent role in the remedy selection process. There also has been little analysis of what institutions are involved in making land use decisions and maintaining land use restrictions over time. It is unclear what legal mechanisms are most effective, what institutions will be responsible for enforcing institutional controls, and who’s going to pay for these additional responsibilities. We need to be able to answer these questions if land use-based remedies are to be protective over the long term.” (*Ibid.*)

“Planners of long-term disposal systems have long recognized the difficulty of maintaining institutional control over property. . . .” (Jack A. Caldwell and Charles C. Reith, *Principles and Practice of Waste Encapsulation*, 1993, p. 35)

**Coleman, Kathleen**

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**From:** Elliott, Colleen <CElliott@mtech.edu>  
**Sent:** Thursday, January 21, 2016 12:26 PM  
**To:** Natural Resource Damage Program  
**Subject:** Comment on Butte Area One Draft Restoration Plan Amendment of Dec 31, 2015

I have read the draft restoration plan regarding removal of the Parrot Tailings and I attended the BNRC meeting at which the plan was presented. I think the plan is a very good one and fully support the idea of putting the excavated tailings in the Berkeley Pit.

I would like to echo the committee's desire that Butte Area One funds go to restoration of the excavated Parrot Tailings site and that remediation funds come from other sources. In fact, I hope the State demands it. The EPA contends that waste removal is not necessary and that the science is unclear. This makes no sense. If the science is unclear, and there are unresolved 'scientific differences' between BP (the PRP) and the State of Montana, remedy should err on the side of caution – not on the side of inaction.

I am grateful for the opportunity to comment on this plan while it is still a draft, as opposed to being presented with a *fait accompli*.

Sincerely,

Colleen Elliott, PhD  
1231 West Quartz Street  
Butte MT 59701  
(406)782-3179



**Coleman, Kathleen**

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**From:** John Ray <bodinman2003@yahoo.com>  
**Sent:** Monday, January 25, 2016 5:23 AM  
**To:** Natural Resource Damage Program; Cunneen, Pdraig; Ford, Jim; Martin, Douglas (DOJ)  
**Cc:** Joe Griffin; John Ray; Capdeville, Mary; Elizabeth Erickson; David Williams; David Williams  
**Subject:** Comments---Butte Area One Draft Restoration Plan Amendment  
**Attachments:** Precautionary Principle and the Parrot Tailings.docx

January 25, 2016

I would like to submit the **attached** as comments on the *Butte Area One Draft Restoration Plan Amendment--Parrot Tailings Waste Removal*.

Dr. John W. Ray  
915 West Galena St.  
Butte, Montana 59701

## **Precautionary Principle and the Removal of the Parrot Tailings—The Precautionary Principle and the Principle of Pollution Prevention mandate that the Parrott Tailings should be Removed under Remediation not Restoration**

Submitted by:

Dr. John W. Ray  
915 West Galena St.  
Butte, Montana 59701

The EPA argues that one of the reasons for not removing the Parrot Tailings under Superfund remediation is that there is a lack of absolute scientific certainty as to whether or not the Tailings are a threat to the environment. Although the preponderance of scientific/ technical evidence from sources other than the EPA strongly points to the Tailings being a threat, even if we were to take EPA's claim at face value, the precautionary principle and the principle of pollution prevention, both part of federal as well as Montana state law, would mandate that the ROD for Priority Soils be reopened and that the Parrot Tailings be removed, totally, under remedy. Recent independent scientific evidence clearly points to the fact that the groundwater modelling upon which the EPA based its decision to leave the Parrott Tailings in place was flawed. Superfund is supposed to remediate THREATS to the environment. Clearly, by any definition of threat, the Parrot Tailings pose a threat to Butte's aquatic environment. As a threat, removal must occur under remediation not restoration. The Parrott and associated tailing clearly represent a remediation not a restoration issue. To use restoration dollars to remediate the Parrott and associated tailings would be a misuse of restoration dollars.

CERCLA's purpose is to ameliorate, remediate or prevent actual or potential threats to human health and the environment emanating from toxic material or hazardous materials. Article II, section 3 of the *Montana Constitution* provides that "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment..." and Article IX of the Montana State Constitution holds: "The State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." MDEQ's Mission is: "to protect, sustain, and improve a clean and healthful environment to benefit present and future generations."

In interpreting the meaning of Articles II and IX of the Montana Constitution, the Montana State Supreme Court in *Montana Environmental Information Center v. Department of Environmental Quality and Seven-Up Pete Joint Venture* (No. 97-455, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236) found that **Pollution Prevention** and the **Precautionary Principle** were part of the Montana Constitution's guarantee to citizens of a clean and healthy natural environment, i.e. these principles are part of Montana law. The Court found that "the right to a clean and healthful environment is a fundamental right. . . ." In analyzing the discussion and debate at the 1972 Montana Constitutional Convention, the Court determined that it was the clear intent of the participants that the environmental rights guaranteed in Articles II and IX were interrelated and that these two

Articles espoused the principles of pollution prevention and the precautionary principle. For example, the Court cites Delegate McNeil who said in discussing how Articles IX's subsections (1) and (3) were related: "It goes further than that and directs the Legislature to provide remedies to prevent degradation. **This is anticipatory.**" (*Emphasis supplied.*) It was also clear during the discussion and debate during the Montana Constitutional Convention that the delegates intended the environmental provisions of the Constitution to mandate an "improvement" of the natural environment. The Court stated: "In doing so, we conclude that the delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation that can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked..." The Montana Supreme Court's decision is an unambiguous and binding statement that the **Principles of Pollution Prevention and the Precautionary Principle/Rule** must direct the administration and implementation of **ALL** state laws, rules, and regulations. Pollution Prevention and the Precautionary Principle must guide the state's actions under Superfund.

*Black's Law Dictionary* also provides guidance as to the meanings of the concepts articulated in the Montana Supreme Court case above quoted. *Black's* defines **potential** as "Existing in possibility but not in act." **Threat** is defined as a "menace." **Imminent** is defined as: "Near at hand; mediate rather than immediate, close rather than touching, perilous." **Substantial** is defined as of "Importance." Certainly, toxics left in place at the Priority Soils site would present a potential threat and a substantial, imminent threat as defined in *Black's Law Dictionary*.

### **The Pollution Prevention Principle/Standard warrants Remediating the Parrott Tailings by Removal.**

The goal of Montana's pollution prevention program is to "prevent pollution before it occurs. Pollution prevention is the highest step of the waste reduction hierarchy and occurs prior to the other steps of recycling, treatment, or disposal." (MDEQ, *What is Pollution Prevention?*) **See also:** MCA 2003, 75-10-601; 75-1-602, 8 (b) (iii) and 75-1-103 (1) and (2) (a)

The Pollution Prevention Act of 1990 established as national policy the mandate that: "Pollution should be prevented or reduced at the source wherever feasible." According to the EPA, pollution prevention means "source reduction" which is defined in the Pollution Prevention Act as any type of action which: "reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment or disposal" and "reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants." Pollution Prevention and the Precautionary Principle are also a part of several other federal laws: CERCLA, Clean Water Act, Toxic Substances Control Act, NEPA, RCRA, EPCRA, and the Clean Air Act. For a more detailed discussion of the role of pollution prevention and the

precautionary principle in federal environmental law see: *Advancing Environmental Justice through Pollution Prevention: A Report developed from the National Environmental Justice Advisory Council-A Federal Advisory Committee to the U.S. Environmental Protection Agency*, June 2003. As this report makes clear, there is an intimate relationship between environmental justice, pollution prevention, and the use of the precautionary principle, all of which are EPA policy mandates.

**Environmental Justice cannot be fully achieved at Priority Soils unless the Precautionary Principle is applied as part of the remedy and unless the principle of Pollution Prevention is applied to the remedy. Applying these two principles to the Parrott and associated tailings mandates removal under remediation not restoration.**

The point of Montana law and federal law is that it is better to prevent pollution before it harms public health and the environment rather than treat or mitigate the effect of pollutants after they are released. The medical motto: *Primum non nocere* (First, do no harm.) would apply to pollution prevention. Given the serious nature of the pollutants found at the Parrot Tailings site, the pollution prevention principle would warrant consideration and remediation of the Parrot Tailings **now** rather than waiting for these contaminants to be released to threaten our waters and then trying to treat them later. Given the serious nature of the pollutants found at the Parrot Tailings site, the pollution prevention principle would warrant removing as much of the contaminants as possible so as not to threaten future generations. Waste-in-place is a serious threat-in-place.

**The Precautionary Principle/Standard warrants remediating contaminated Parrot Tailings now and removing waste-in-place as part of the Priority Soils remedy.** The ROD must be reopened.

The essence of the precautionary principle is that government should act before harm to human health and the environment occurs from the releases of toxic substances. The precautionary principle “dictates that indication of harm, rather than proof of harm, should be the trigger for action.” (Sandra Steingraber, *Living Down Stream: An Ecologist Looks at Cancer and the Environment*, p. 270.) If there is a reasonable suspicion that harm to human health and the environment could occur from the release of a toxic substance, government should step in and fix the problem before it hurts people and the environment. The 1998 Wingspread Statement on the Precautionary Principle states: “When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.” Former EPA director Christine Todd Whitman stated: “policymakers need to take a precautionary approach to environmental protection. . . We must acknowledge that uncertainty is inherent in managing natural resources, recognize it is usually easier to prevent environmental damage than to repair it later, and shift the burden of proof away from those advocating protection toward those proposing an action that may be harmful.” If there is a strong suspicion that something bad is going to happen, government has an obligation to stop it prior to its occurring. The

precautionary principle is really grounded in old common sense sayings: “An ounce of prevention is worth a pound of cure.” “Better safe than sorry.” “A stitch in time saves nine.” “Look before you leap.”

The President’s Council on Sustainable Development supports the precautionary principle. The Council declared: “Even in the face of scientific uncertainty, society should take reasonable actions to avert risks where the potential harm to human health or the environment is thought to be serious or irreparable.” The American Public Health Association has passed a similar resolution concerning chemical exposure. (Resolution 9606)

The U.S. Court of Appeals for the District of Columbia Circuit upheld the EPA’s use of the precautionary principle in *Ethyl Corp. v. U.S. Environmental Protection Agency* (541 F. 2d 1, 6 ELR 20267 (D.C. Cir.), cert denied, 426 U.S. 941 (1967)) This was the case which supported the banning of leaded gasoline by the EPA. The banning of lead additives to gasoline was an example of the precautionary principle in action. “The U. S. Court of Appeals for the D.C. Circuit upheld the U.S. Environmental Protection Agency’s decision to take a precautionary approach and ban lead anyway, even in the absence of scientific evidence adequate to demonstrate exactly what the risks from the lead were or what the benefits of removing it would be. As it turned out, banning leaded gasoline was the single most important contributor to the virtual elimination of lead from air and from most children’s blood.” (Charnley and Elliott, *Risk Versus Precaution: Environmental Law and Public Health Protection*, Environmental Law Institute, March 2002)

There is ample support for the precautionary principle from international organizations and treaties, to many of which the United States is a signatory. For example, the Rio Declaration from the 1992 United Nations Conference on Environment and Development, also known as Agenda 21, stated: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” The United States signed and ratified the Rio Declaration. The precautionary principle is also part of the following: Ozone Layer Protocol, Second North Sea Declaration, United Nations Environment Programme, Nordic Council’s Conference Declaration of October 18, 1989, PARCOM Recommendation 89/1, Third North Sea Conference, Bergen Declaration on Sustainable Development, Second World Climate Conference, Bamako Convention on Transboundary Hazardous Waste into Africa, OECD Council Recommendation of January 1991, Maastricht Treaty on the European Union, Climate Change Conference, UNCED Text on Ocean Protection, and the Energy Charter Treaty.

**The Pollution Prevention Standard and the Precautionary Principle/Standard do apply to the Parrot Tailings removal.**

## **The Pollution Prevention Standard and the Precautionary Principle mandate reopening the ROD for priority soils and providing that the Tailings be removed under remediation.**

In effect, the provisions of the Montana Supreme Court decision *Montana Environmental Information Center v. Department of Environmental Quality and Seven-Up Pete Joint Venture* (No. 97-455, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 as well as the other citations listed above become ARARs which must be met for the Priority Soils Operable Unit. This point is clearly articulated in: *United States v. Kazoo Coating of America, Inc.* No. 88-CV-73784-DT (719 F. Supp. 571, 30 ERC 1361) (E.D. Mich. August 9, 1989) ARARs do not have to be numerical standards but can be found in the law of the state. The Kazoo court found: “CERCLA envisions a substantial and meaningful role for the individual states in the development and selection of remedial actions to be taken within their jurisdictions. CERCLA also accommodates the environmental standards and requirements of the state in which a site is located.” “Congress has not . . . displaced state regulation. . . .” “CERCLA does not expressly preempt state law. . . .” With specific regard to numerical standards that court found: “Although the state law does not contain specific numerical standards, it is, as the State contends, legally enforceable and of general applicability. The EPA’s own publication (EPA, *Superfund Program; Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements; Notice of Guidance*, 52 Fed. Reg 32495, 32498 (Aug. 27, 1987) recognizes that general requirements having no specific numerical standards to be enforceable ARARs. General State goals that are duly promulgated (such as a non-degradation law) have the same weight as explicit numerical standards. . . .” The Court cites numerous other cases to support its conclusion.

### **What are ARARs for Purposes of Priority Soils and, in particular the Parrot Tailings?**

According to the *CERCLA/Superfund Orientation Manual* (EPA/542/R-92/005, October 1992), ARARs are defined as “Any standard, requirement, criterion, or limitation under a State environmental or facility-siting law. . . .” Certainly, a decision of the Montana State Supreme Court, given the doctrine of judicial review, would qualify as a requirement, standard, criterion or limitation.” This Montana Supreme Court decision is more stringent than any other federal court decision. So given that it is enforceable, has been promulgated and is more stringent than federal case law (See: *CERCLA/Superfund Orientation Manual*, p. XII-2 and XII-6), this decision is an ARAR. “CERCLA, Section 121(d)(2) requires compliance with applicable or relevant and appropriate state requirements when they are more stringent than federal rules and have been ‘promulgated’ at the state level. To be viewed as promulgated and serve as an ARAR at a Superfund site, a state requirement must be legally enforceable, based on specific enforcement provisions or the state’s general legal authority, and must be generally applicable, meaning that it applies to a broader universe than Superfund site.” (*RCRA, Superfund and EPCRA Hotline Training Module: Introduction to Applicable or Relevant and Appropriate Requirements*, (EPA540-R-020, OSWER9205.5-10A, June 1998, p. 19)

Clearly the Precautionary Principal and the Principle of Pollution Prevention, as mandated by the Montana Supreme Court Decision *Montana Environmental Information Center v. Department of Environmental Quality and Seven-Up Pete Joint Venture* (No. 97-455, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236), as well as Montana state environmental policy as articulated in the MCA, are clearly ARARs for the Priority Soils site. As we know, CERCLA does not contain its own cleanup standards but relies heavily on state ARARs. “Regulation codified in the NCP governs the identification of ARARs and require compliance with ARARs throughout the Superfund response process, including. . .removal actions.” (*RCRA, Superfund and EPCRA Hotline Training Module: Introduction to Applicable or Relevant and Appropriate Requirements*, (EPA540-R-020, OSWER9205.5-10A, June 1998, p. 1) Of course, as previously cited, ARARs do not have to be numerical or quantitative.

The point is that both Court precedents as well as EPA policy mandate the use of the precautionary principle as it applies to Priority Soils and in particular the Parrot Tailings. The Precautionary Principle/Standard and the Principle/Standard of Pollution Prevention, as mandated by the Montana Supreme Court decision *Montana Environmental Information Center v. Department of Environmental Quality and Seven-Up Pete Joint Venture* (No. 97-455, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236) are in effect ARARs for Priority Soils and, more specifically, for the Parrot Tailings.

There is ample proof that the contaminated Tailings do pose a threat to human health and the environment. The EPA argues that, as a result of their waste-in-place remedy, Butte’s water will not be exposed to these toxic contaminants. Instead of removing the toxics from the water, EPA wants to remove the water from the toxics, which is problematic at best. All would agree that if exposure to these toxic wastes was present, the environment would be negatively

**The Precautionary Principal and the Principal of Pollution Prevention, which are both part of Montana law and federal law and which are, in effect, ARARs, demand that the waste-in-place remedy be rejected in favor of the maximum removal of contaminants, including the Parrot Tailings under Remedy. Leaving waste in place really is leaving an unacceptable and unwarranted threat in place.**

**Moreover, the Precautionary Principal and the Principal of Pollution Prevention, which are both part of Montana law and federal law and which are, in effect, ARARs, demand that contaminated Tailings be specifically addressed and removed and remediated as part of the Priority Soils remedy.**

**Reopen the ROD, remove the Tailings.**



**Coleman, Kathleen**

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**From:** John Ray <bodinman2003@yahoo.com>  
**Sent:** Tuesday, January 26, 2016 5:31 AM  
**To:** Natural Resource Damage Program; Ford, Jim; Martin, Douglas (DOJ); Cunneen, Padraig  
**Cc:** John Ray; Elizabeth Erickson; David Williams; David Williams  
**Subject:** Comment--Butte Area One Draft Plan Amendment: Parrot Tailings Waste Removal.  
**Attachments:** ET Covers and the Parrot Tailings.docx

I would like to submit the **attached** as additional comments on the *Butte Area One Draft Plan Amendment: Parrot Tailings Waste Removal*.

Submitted by:  
Dr. John W. Ray  
915 West Galena St.  
Butte, Montana 59701

Comments—*Butte Area One: Draft Restoration Plan Amendment—Parrott Tailings Waste Removal*

Submitted by:

Dr. John W. Ray

915 West Galena St.

Butte, Montana 59701

*The object of our profession is to destroy hazardous waste, whenever possible, and to permanently dispose that which cannot be destroyed. Our obligation is to free subsequent generations of the responsibility for caretaking our hazardous residues, not to saddle them with housekeeping chores which, if neglected, will result in the re-pollution of the environment that we worked so hard to clean. (Jack A Caldwell and Charles C. Reith, *Principles and Practice of Waste Encapsulation.*)*

**All of the tailings** associated with the Parrot Tailings should be removed—Diggings East, Northside Tailings, and other areas of mine waste in and around Blacktail and Silver Bow Creek. It makes no environmental sense to just remove the tailings behind the Civic Center. Caped waste in place remains a permanent threat in place. One cannot say that a site has been remediated and/or restored if a threat to the environment remains in place. Having a partial, incomplete removal of toxic tailings makes no scientific or environmental sense. Butte has had enough of partial, incomplete, insufficient and deficient remedies. Let us do the Tailings removal correctly—remove all of the toxic tailings.

Even ET caps are not perfect. Even ET caps have numerous problems that compromise the efficacy of the proposed remedy. Better than leaving a significant amount of tailings in place as a perpetual threat in place is to remove all of the tailings associated with the Parrot Tailings.

## **ET Caps are not Permanently Protective of Human Health and the Environment. ET Caps do not permanently restore a site.**

### **Problems with ET caps:**

1. Metals can be remobilized through bio-irrigation. (Dueri, Sibylle, et. al., University of Laval, Quebec, “Modeling the Transport of Heavy Metals through a Capping-Layer: The case Study of the Flood Sediments Deposited in the Saguenay Fjord, Quebec.”)
2. The long term efficacy of caps can be compromised by advection “related to consolidation, diffusion, chemical reactions, and the effect of . . . burrowing activity.” (*Ibid.*)
3. Desiccation can cause cracking of the cap cover. (David Daniel, Professor of Civil Engineering, University of Texas, *Geotechnical Practice for Waste Disposal*)
4. The freeze-thaw cycle can produce changes in the structure and fabric of the cover and a way that increases hydraulic conductivity. (*Ibid.*)

5. Caps are difficult to construct correctly. (*Ibid.*)
6. Caps are difficult to maintain and repair. (*Ibid.*)
7. Erosion is a serious problem. (Jack Caldwell, U.S. Department of Energy, *Principles and Practice of Waste Encapsulation.*)
8. Biointrusion can compromise the effectiveness of the cap. (*Ibid.*)
9. Differential settlement of the cap can cause cracking. (Oweis and Khera, New Jersey Institute of Technology, *Geotechnology of Waste Management.*)
10. Caps require regular and often expensive repair. (*Ibid.*)
11. Stabilization of the cap is a problem. (*Ibid.*)
12. Caps present long-term subsidence and settlement issues. (*Ibid.*)
13. Because of their susceptibility to “weathering, cracking and subsidence” caps have limited long term utility. “Wind, rain, and generalized erosion over time can severely damage even a well-designed . . . cover.” (U.S. Department of Energy, Office of Environmental Management, “Remediation Technology Descriptions: Containment.”) See also: Merritt, Frederick (ed.) *Standard Handbook for Civil Engineers*, McGraw-Hill, New York.

The extensive use of ET caps as a restoration method for the tailings associated with the Parrot Tailings would do nothing to reduce the toxicity and volume and mobility of contaminants. ET caps do nothing to clean up the site. The extensive use of caps as a cleanup method for the tailings associated with the Parrot Tailings would not provide a permanent remedy. The extensive use of ET caps as a cleanup method for the tailings associated with the Parrot Tailings would not provide permanent containment. In short, the extensive use of caps for the tailings associated with the Parrot complex would not be protective of human health and the environment. For true restoration to occur, remediation must be complete and effective. Trying to restore a resource that remains contaminated is a hopeless pursuit. At site with extensive waste left in place can never be said to be permanently restored.

As the following report from the EPA indicates, as well as others I have read, ET caps are susceptible to the problems listed above in this report. The toxic tailings should be removed not covered up with a problematic cap that will have to be maintained in perpetuity. I would reference my earlier submittal to you that clearly details the problems with institutional controls. The use of ET caps would mandate perpetual institutional controls The use of ET caps would mean permanent dependence on institutional controls.

Little is understood about the long term efficacy of ET caps. Just as the EPA based its original decision to leave the Parrot Tailings in place on a model that has proved faulty, now NRDP wants to leave large amounts of toxic waste in place based on the hope that the ET caps will have long term efficacy. Too much of the EPA approach to Butte has been to cover up the toxic waste and not to remediate it. Let us not once again go for problematic waste in place solution to our toxic waste problem.

**While focused to a certain extent on landfill covers, the points made below about ET caps need to be addressed in terms of the use of ET covers at the Parrot**

**Tailings site. The concerns raised here in this EPA publication need to be addressed in terms of the Parrot Tailings removal issue.**

# Evapotranspiration Landfill Cover Systems Fact Sheet

## EPA

*Limited data are available to describe the performance of ET cover systems in terms of minimizing percolation, as well as the covers' ability to minimize erosion, resist biointrusion, and remain effective for an extended period of time. While the principles of ET covers have been understood for many years, their application as final cover systems . . . has emerged only within the past 10 years. Limited performance data are available on which to base applicability or equivalency decisions (Dwyer 2003; Dwyer, Stormont, and Anderson 1999; Hauser and Weand 1998).* and reduces erosion. For ET covers, the topsoil layer is generally a minimum of six inches thick (McGuire, England, and Andraski 2001).

**Control layer types** – Control layers, such as those used to minimize animal intrusion, promote drainage, and control and collect landfill gas, are often included for conventional cover systems and may also be incorporated in ET cover system designs. For example, a proposed monolithic ET cover at Sandia National Laboratories in New Mexico will have a biointrusion fence with 1/4-inch squares between the topsoil layer and the native soil layer to prevent animals from creating preferential pathways, potentially resulting in percolation. The biointrusion layer, however, will not inhibit root growth to allow for transpiration. At another site, Monticello Uranium Mill Tailings Site in Utah, a capillary barrier ET design has a 12-inch soil/rock admixture as an animal intrusion layer located 44 inches below the surface, directly above the capillary barrier layer.

In addition, a capillary barrier cover demonstration at Sandia National Laboratories has a drainage layer located above the capillary break. A drainage layer consisting of an upper layer of sand and a lower layer of gravel is located directly below the topsoil layer.

The sand serves as a filter to prevent topsoil from clogging the drainage layer, while the gravel allows for lateral drainage of water that has infiltrated through the topsoil (Bolen and others 2001, Dwyer 2003).

In more recent applications, several types of ET cover designs also have incorporated synthetic materials, such as geomembranes, which are used to enhance the function of minimizing water into the waste. For example, the Operating Industries Inc. Landfill in California has incorporated a soil layer with a geosynthetic clay liner in the design. The cover

system for this site will reduce surface gas emissions, prevent oxygen intrusion and percolation, and provide for erosion control (EPA 2000b).

### **PERFORMANCE AND MONITORING**

Protection of groundwater quality is a primary performance goal for all waste containment systems, including final cover systems. The potential adverse impact to groundwater quality results from the release of leachate generated in landfills or other waste disposal units such as surface impoundments. The rate of leachate generation (and potential impact on groundwater) can be minimized by keeping liquids out of a landfill or contaminated source area of a remediation site. As a result, the function of minimizing percolation becomes a key performance criterion for a final cover system (EPA 1991).

Monitoring the performance of ET cover systems has generally focused on evaluating the ability of these designs to minimize water drainage into the waste. Percolation performance typically is reported as a flux rate (inches or millimeters of water that have migrated downward through the base of the cover in a period of time, generally considered as 1 year). Percolation monitoring for ET cover systems is measured directly using monitoring systems such as lysimeters or estimated indirectly using soil moisture measurements and calculating a flux rate. A more detailed summary on the advantages and disadvantages of both approaches can be found in Benson and others 2001 (EPA 1991, Benson and others 2001).

Percolation monitoring can also be evaluated indirectly by using leachate collection and removal systems. For landfills underlain with these systems, the amount and composition of leachate generated can be used as an indicator of the performance of a cover system (the higher the percolation, the more leachate that will be generated) (EPA 1991).

Although the ability to minimize percolation is a performance criterion for final cover systems, *limited data are available about percolation performance for final cover systems for both conventional and alternative designs*. Most of the recent data on flux rates have been generated by two federal research programs, the Alternative Landfill Cover Demonstration (ALCD) and the Alternative Cover Assessment Program (ACAP); see Exhibits 3 and 4, respectively, for further information on these programs. From these programs, flux rate performance data are available for 14 sites with demonstration-scale ET cover systems (Dwyer 2003, Benson and others 2002).

In addition, previous studies have been conducted that monitored the performance of ET covers. Selected studies include the following: integrated test plot experiment in Los Alamos, NM, which monitored both types of ET covers from 1984 to 1987 (Nyhan, Hakonson, and Drennon 1990); Hill Air Force Base

alternative cover study in Utah, which evaluated three different covers (RCRA Subtitle D, monolithic ET, and capillary barrier ET) over a 4-year period (Hakonson and others 1994); and Hanford field lysimeter test facility in Richland, WA, which monitored ET covers for 6 years (Gee and others 1993).

Additional demonstration projects of ET covers conducted in the 1980's and early 1990's are discussed in the ACAP Phase I Report,

(Emphasis supplied.)

I would also call to your attention the following article that details problems with the ET caps. (Please consider it as part of my comments):

**The Protective Cap/Biobarrier Experiment  
A study of Alternative Evapotranspiration Caps  
for the Idaho National Engineering and Environmental Laboratory**

**Jay E. Anderson**

**Center for Ecological Research and Education**

**Department of Biological Sciences**

**Idaho State University**

**Pocatello, ID 83209**

**and**

**Amy D. Forman**

**S. M. Stoller Corporation**

**Idaho Falls, ID 83401**

**STOLLER-ESER-46**

**Coleman, Kathleen**

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**From:** Gammons, Chris <CGammons@mtech.edu>  
**Sent:** Wednesday, January 27, 2016 9:35 AM  
**To:** Natural Resource Damage Program  
**Subject:** Public comment on Parrot Tailings draft amendment

January 26, 2016

I am strongly in favor of the plan to remove the Parrot tailings from the headwaters of Silver Bow Creek, and also to dispose of the tailings in the Berkeley Pit. I have one comment, explained below.

In the past 10-20 years, there have been hundreds of piezometers, wells, and auger holes drilled into the greater Parrot tailings site in an attempt to fully characterize the chemistry, mineralogy, and hydrogeology of the sediment, slag, and groundwater. There is some nasty water on site, including the famous GS-41 well, which produces the blue, "million parts per billion" copper sulfate water. This could be the most highly Cu-contaminated groundwater within a city limits in the world. I am fascinated to think what minerals must be present in the aquifer in the vicinity of GS-41 to produce this type of water. Beginning this summer, the State will be excavating the site. This cleanup activity will provide an opportunity to collect samples of the contaminated soil and waste as it is unearthed, and to see how well our (ARCO's, EPA's, MBMG's) predictions about the mineralogy and chemistry of the subsurface of the Parrot site match reality. It would be desirable to get representative samples of material that is both highly contaminated (e.g., visible Cu-staining or other obvious indicators) and relatively uncontaminated. The samples could then be archived (e.g., frozen) and analyzed at a later date.

I realize that there are many safety issues associated with any construction site, but these are surmountable. The opportunity to learn more about the science of the Parrot site as it is being excavated is too great to overlook. If nobody else is available, I would be willing to visit the site periodically (possibly with a student) to collect samples as the excavations progress. Our Department at Montana Tech owns two field instruments for rapid characterization of soil and rock: a Niton portable XRF (for chemical analysis of metals) and a Terraspec Halo spectral analyzer (for identification of clays and other secondary minerals forming in the weathering environment). These could be used to guide the sampling process. Additional characterization work (e.g., chemistry or mineralogy) could be done at a later date.

There is no present need for a budget for the work I am proposing. The main thing is not to throw away all of the metal-loaded waste as it is excavated without first allowing a scientist to sample the waste. We might find something that was missed by the decades of previous "top-down" work. Or, we might find that the previous characterization was spot-on. Either way, I feel it is important to collect the samples as the cleanup project progresses, because there will never be a chance to do this once the waste is thrown in the pit.

Christopher Gammons  
1231 West Quartz Street  
Butte, MT 59701



**Coleman, Kathleen**

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**From:** John Ray <bodinman2003@yahoo.com>  
**Sent:** Thursday, January 28, 2016 5:35 AM  
**To:** Natural Resource Damage Program; Cunneen, Padraig; Ford, Jim; Martin, Douglas (DOJ); Nikia Greene; Joe Vranka; Chambers, Jenny; Reed, Daryl; Shaun McGrath; Gina Mccarthy; Libby Faulk; Paula Smith; Henry Elsen; W. Robert Ward; Mathy Stanislaus; Barry Breen; Bill Murray; Livers, Tom; Matt Vincent; Northey Tretheway; Capdeville, Mary; Ron Davis; Karen Sullivan; Eddie Sierra  
**Cc:** John Ray; Dylan ( Tester) Laslovich; Erik Nylund; Susan Dunlap; Mike Smith; Elizabeth Erickson; Joe Griffin; Tom Malloy; Dave Palmer; Cindy Dolan; Jim Keane; CTEC-Janice Hogan; David Williams; Cindi Shaw; Amanda Curtis; Flatow, Jeni; Bill Andersen; Edie McClafferty; Sister Mary Jo; Sesso, Jon; Dan Foley; Ian Magruder; Chris Brick; Mary Kay Craig; David Hutchins; Dan Powers; Eric Hassler; Jim Fisher; Mary Jo McDonald; Stone-Manning, Tracy; Rayelynn Connole; DeWitt, Lisa  
**Subject:** Additional Comment--Butte Area One Draft Restoration Plan Amendment: Parrot Tailings Waste Removal--LEGAL (case and statutory) PROBLEMS AND ENVIRONMENTAL JUSTICE ISSUES WARRANT REMOVAL UNDER REMEDIATION  
**Attachments:** Comments--Butte Area One--Draft Restoration Plan Amendment.docx

I would like to submit the **attached** document as **additional comment on *Butte Area One Draft Restoration Plan Amendment: Parrot Tailings Waste Removal***.

I have looked at CERCLA law, both statutory and case law, and come to the following conclusions:

1. Removal of the tailings associated with the Parrot Tailings should be done under remediation not restoration. The case made in the *Draft* is a remediation case not a restoration case.
2. It is questionable whether or not using restoration dollars to remove the tailings associated with the Parrot Tailings is legally permissible.
3. Environmental justice demands removal **all of the tailings** associated with the Parrot Tailings, i.e. Diggings East, etc.. Leaving tailings in place along Silver Bow Creek means the Creek will never be fully restored. Leaving tailings in place will mean that low income citizens in the Butte Priority Soils area will continue to have to endure a disparate toxics burden in violation of EPA's environmental justice mandate as well as equal protection of the laws.

***I have copied folks other than the NRDP folks because this issue is at the heart of answering the question of whether or not we will fully restore Silver Bow Creek.***

What ought to be done is for EPA to step up, admit it made a mistake, reopen the ROD for Butte Priority Soils and provide for removal of the Parrot Tailings and associated tailings under remediation not restoration.

EPA also ought to start vigorously enforcing storm water runoff controls in Butte as well as constructing the necessary infrastructure such as catch basins, etc. Until storm water runoff is controlled, Silver Bow Creek will never be really restored.

The lack of real cleanup at the Montana Pole Plant needs to be investigated. How can we say that Silver Bow Creek is restored if we do not adequately address the issue of dioxin remaining on site as a perpetual threat at the Pole Plant? How can we say that Silver Bow Creek is restored when the issue of storm water runoff through the Pole Plant washing dioxin into Silver Bow Creek is not being addressed? In the rush to move the county shops, we are neglecting the fact that the Pole Plant is not really being cleaned up.

Dr. John W. Ray  
Butte, Montana

Comments—*Butte Area One: Draft Restoration Plan Amendment—Parrot Tailings Waste Removal*

Submitted by:

Dr. John W. Ray

915 West Galena St.

Butte, Montana 59701

Comment

The removal of the Parrot Tailings should occur under the rubric of Superfund remediation NOT restoration. The Draft Amendment proposes removal using restoration dollars. This is a fundamental flaw in that this is not a restoration activity but a remediation activity and should be funded with remediation dollars not restoration dollars. The ROD for Priority Soils should be reopened and changed to provide for removal of the Parrot and associated tailings (Diggings East, etc.)

Remediation means preventing, stopping or reversing environmental harm. Restoration means returning something to its original state, a make whole remedy to the extent possible; or providing an equivalent resource. It is clear that the current EPA remedy for the Parrot and associated tailings is not working to protect us from environmental harm. Numerous independent, scientifically based studies by experts outside of the EPA convincingly prove that the remedy is not working to protect the environment. The environmental threat from the Parrott and associated tailings (Diggings East, etc.) remains. Only the EPA believes in the continued efficacy of its current cleanup approach for the Parrot and associated tailings.

As I said, the ROD for BPSOU should be reopened and removal of the Parrot and associated tailings should occur under remedy not restoration. Restoration should not be made to do the work that should be done under remediation. By paying with restoration dollars what should be accomplished by remediation dollars, will occasion significant opportunity costs. Money that could have been spent on

needed restoration projects will have to be spent doing the job of remediation. Because the Butte Area One: Draft Restoration Plan Amendment calls for spending restoration dollars for doing what should be done under remediation, the approach is fatally flawed. The whole premise is wrong.

In reading *Butte Area One Draft Restoration Plan Amendment: Parrot Tailings Waste Removal, December 31, 2015*, it is clear to me that the justification for NRDP removing the Parrot Tailings is **not** a restoration justification but a remediation justification. The plan does not talk about restoring a damaged resource or coming up with an equivalent resource but clearly speaks of preventing further harm to Butte's aquatic resources and cleaning up Butte's aquatic resources. NRDP, in its own document, wants to remove the Parrot Tailings because leaving these tailings in place poses a threat to the environment—a clear remediation justification. According to the contentions of the NRDP's own document removal should be done under remediation. For example, Section 1, Introduction, clearly articulates a remediation purpose for the removal. It speaks of addressing "contamination associated with the Parrot Tailings." Most of the summary actions listed are clearly remediation not restoration activities. Section 3.3 of the Plan Amendment clearly states a remediation objective. Actually pages 1-24 of the Plan Amendment document articulate a remediation not a restoration activity. The goal of the Parrot Tailings removal as articulated under the Plan Amendment document is to remove a threat to the environment caused by mine wastes left behind from past mining activity in Butte. This is the exact same goal that Superfund remediation has articulated for numerous areas in Butte. This IS a remediation not a restoration activity.

Having restoration dollars pay for removal of the Parrot Tailings would also set a bad precedent. If restoration dollars can be used in this instance to remediate a threat to the environment, the difference between restoration and remediation would collapse and become meaningless.

The EPA makes a clear distinction between remediation and restoration:

*CERCLA directs two types of activities – cleanup and natural resource damage assessment and restoration – at sites contaminated by hazardous substances. EPA is the lead agency, in cooperation with individual states and tribal governments, to investigate and clean up hazardous waste sites, as part of its response authority. EPA's goal is to prevent further contamination and cleanup sites to levels protective of human health and the environment [CERCLA §104; Executive Order 12580 §2(g) (January 23, 1987)]. Natural Resource Trustees have delegated authority to perform NRDA's and recover costs beyond cleanup to restore or replace natural resources to the conditions that would have existed without the hazardous substance release [CERCLA §107(f)(1); 40 CFR §300.615(c)(3), (4)].*

I would make the further argument that it may well be legally impermissible, given the above distinction between restoration and remediation, to use restoration dollars to do the work of remediation. It is clear that the restoration work, i.e. removal of the Parrot Tailings, contemplated under NRDP is in reality remediation and should, therefore, be paid for under the rubric of remediation. To use restoration dollars to pay for remediation could well be a violation of CERCLA. **I would ask that this legal issue be addressed.**

Why is EPA so reticent to admit that it made a mistake and that the ROD for Priority Soils is flawed when it comes to the Parrot Tailings? Is EPA afraid of ARCO? Has bureaucratic lethargy set in? Has EPA been captured by ARCO? Admittedly, information when the ROD was issued for Priority Soils was incomplete. Much new information has been generated which information clearly shows that the data underlying the ROD remedy was flawed, incomplete and inadequate. The new data clearly warrants a reopening of the ROD and the removal of the Tailings under remediation.

EPA Montana is displaying the same obdurate and ossified approach to Butte that it has shown in Colorado and Michigan. Why should Butte have to settle for an incomplete, inadequate, ineffective and insufficient cleanup? The EPA is happy to spend restoration dollars on removal. That gets them off the hook and they don't have to do the right thing by Butte. Why can't EPA boldly reopen the ROD and do

what should be done—remove the Parrot and associated tailing under remediation not restoration.

### Consider the Purpose of Superfund Remediation

*The object of our profession is to destroy hazardous waste, whenever possible, and to permanently dispose that which cannot be destroyed. Our obligation is to free subsequent generations of the responsibility for caretaking our hazardous residues, not to saddle them with housekeeping chores which, if neglected, will result in the re-pollution of the environment that we worked so hard to clean.*  
(Jack A Caldwell and Charles C. Reith, *Principles and Practice of Waste Encapsulation.*)

Superfund’s purpose is to clean up hazardous waste sites that pose a **threat** to human health and the environment. Remedies under Superfund should provide a permanent cleanup remedy not temporary containment. Simply, cleanup is the “act of cleaning up” and the term clean means “pure, free from dirt, contamination, impurities.” According to the EPA, Superfund’s mission is to “make sites safe, make sites clean, and bring new technology to bear on the problem.”

If one carefully examines the major laws and regulations pertaining to Superfund, one finds that they all emphasize the following:

1. **Cleanup as the primary goal** of any Superfund activity.
2. **The reduction of toxicity, volume and mobility of hazardous substances, pollutants, and contaminants at a site.** For example, the NCP mandates that the overriding goal of the Superfund remedy selection process is: “to select remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste.” [40 CFR 300.430(a)(1)(i)] Treatment is the preferred approach to dealing with contaminants.
3. **Permanent cleanup remedies.** Section 121(b) of CERCLA mandates that: “Treatment which ‘permanently and significantly reduces’ the hazardous substances involved is to be ‘preferred’ over other remedies and EPA must select remedies that utilize ‘permanent solutions’ . . .” (Quoted in *Environmental Law Handbook*, Arbuckle, et. al, 10<sup>th</sup> Edition, p. 88) During the Senate debate on SARA, Senator George Mitchell (D-Maine) argued that permanent treatment means that EPA cleanup plans must result in the permanent and major reduction in the toxicity, volume, and mobility of hazardous substances, pollutants, and contaminants at a site and that this reduction must be to the “lowest level achievable.” Senator Mitchell stated: “In addition to the quantitative reduction implied, significant reduction in this context means the minimization of volume, toxicity and mobility of such substances to the lowest levels achievable with available technologies.” (132 *Congressional Record*, S. 14914 (daily edition, October 3, 1986) It is clear that the legislative intent was permanent, real cleanups of Superfund sites.
4. **Cost is not the major factor in selecting a cleanup remedy under Superfund.** Cost is secondary to protecting human health and the environment. Under Superfund, human health and the environment must be protected from potential threats regardless of cost. During Senate debate on SARA, Senator John H. Chafee (R-RI) noted: “the extent to

which a particular technology or solution is feasible or practicable is not a function of cost. A determination that a particular solution is not practicable because it is too expensive would be unlawful.” (132 *Congressional Record*, S. 14925 (daily edition, October 3, 1986) The way in which cost is supposed to figure into Superfund decisions is that a determination is first made as to what is the level of protection for human health and the environment which the remedy should achieve and then selecting the most cost effective means of achieving that level of protection. Cost as a balancing criterion does not mean selecting the cheapest remedy. It is clear that the law mandates that the EPA designs a remedy which will be permanently protective of human health and the environment and then finds the most cost effective method of implementing that remedy. “The EPA is never justified in selecting a short-term, impermanent remedy (like landfilling or capping) simply because it is cheaper than a permanent alternative. The law could hardly be clearer.” (Environmental Research Foundation, “More Lessons from Superfund.”)

5. The use of **institutional controls** is not a substitute for cleanup of a site. “Institutional controls. . . generally shall not substitute for more active measures (e.g. treatment and/or containment of source material) as the sole remedy. . . . (40 CFR 300.430(a)(1)(iii)(D). See: OSWER Directive 9355.0-69, EPA 540-R-97-013-“Rules of Thumb for Superfund Remedy Selection.”

Superfund was designed not only to deal with actual harms to human health and the environment but also with threatened harms and potential threats. CERCLA specifically deals not only with release of hazardous substances but also with the “threat of” release “into the environment of a hazardous substance or pollutant or contaminant. CERCLA defines each of these terms quite broadly.” (*Environmental Law Handbook*, p. 76.) Also, Superfund places an emphasis on treatment rather than containment for hazardous waste. [EPA, “Rules of Thumb for Superfund Remedy Selection,” 40 CFR 300.430 (a)(1).

Considering the above would clearly lead to the conclusion that the proposed removal should be part of remediation not restoration. NRDP is not in the remediation business. NRDP is not in the business of doing what should be done under remediation.

Also consider that the proposed lime treatment rubric does not work. Only removal works:

### **Lime Treatment does not Work.**

The use of lime abatement will be ineffective as a treatment technology for the Parrot and associated tailings.. A study conducted by Bethel Inc. showed that treatment of heavy metals with lime still allowed the release of 20% of the heavy metals into the environment. (Shimoda, Masao 1994. “Fixation Mechanisms of Toxic Heavy Metals with Cements. Proceedings of 15h U.S./Japan Experts Meeting,” U.S. Army Corps of Engineers.) Lime treatment also increases the volume of contaminated material 50 to 100%. (“In-Situ Remediation Technologies for Contaminated Sites,” Environment Canada, 11/19/02) The EPA itself in “Wastewater Technology Fact Sheet: Chemical Precipitation (Office of Water, EPA 832-F-00-018) lists numerous disadvantages of lime addition.

Please consider the following from the EPA which clearly shows what is covered as a proper expenditure of restoration dollars. It is clear, considering the justification for the proposed removal of the Parrott Tailings under restoration that a mistake has been made. This is not a restoration activity as defined below but a remediation activity. After reading this material it should be clearer that the proposed removal of the Parrott Tailings does not fall under the rubric of restoration.

CERCLA	OPA
Definition of Damages	<p data-bbox="883 705 1419 810"><b>§1001(5)</b> - Defines damages as those specified in Section 1002(b)(2), including "the cost of assessing these damages."</p> <p data-bbox="883 852 1403 1100"><b>§1002(b)(2)</b> - Outlines six categories of damages for which a responsible party is liable under Section 1002(a). These are: natural resources; real or personal property; subsistence use; revenues; profits and earning capacity; and public services.</p> <p data-bbox="883 1142 1435 1394">Damages to natural resources are defined as "injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage." These damages are recoverable by Federal, State, Indian Tribe, and foreign government Trustees.</p> <p data-bbox="883 1436 1403 1646">Damages to real or personal property are defined as "injury to, or economic losses resulting from destruction of, real or personal property." These damages are recoverable by the person who owns or leases that property.</p> <p data-bbox="883 1688 1419 1869">Damages to loss of subsistence use of natural resources "shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the</p>

		<p>ownership or management of the resources."</p> <p>Damages for revenues are "equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources. These damages are recoverable by the Federal government, a State, or a political subdivision of a State.</p> <p>Damages for profits and earning capacity are "equal to the loss of profits or impairment of earning capacity due to injury, destruction, or loss of real property, personal property, or natural resources." These damages are recoverable by any claimant.</p> <p>Damages for public services are the "net costs of providing increased or additional public services during or after removal activities." These damages are recoverable by a State or political subdivision of a State.</p>
Definition of Natural Resources	<p><b>§101(16)</b> - Defines "natural resources" as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States ... any State or local government, any foreign government, [or] any Indian [T]ribe." Any member of an Indian Tribe can be a Trustee if the resources are subject to a trust restriction on alienation.</p>	<p><b>§1001(20)</b> - Defines natural resources as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States ... any State or local government or Indian [T]ribe, or any foreign government." Federal natural resources include the "resources of the exclusive economic zone."</p>
<b>Trustee Roles and Responsibilities</b>	<b>CERCLA</b>	<b>OPA</b>
Requirement of Trustee Notification	<p><b>§104(b)(2)-Requirement of Trustee Notification-</b> Directs the President to notify the appropriate Federal and State Natural Resource Trustees of "potential damages to natural resources resulting from releases under investigation ... and ... to coordinate the assessments,</p>	<p><b>§1011- Consultation on Removal Actions-</b> Requires the President to consult with the affected Trustees, designated under Section 1006, on the appropriate removal action to be taken in connection with any discharge of oil.</p>

	investigations, and planning" with such Trustees.	
Designation of Trustees	<p><b>§107(f)(1)</b> - Requires the President, or authorized representative of any State, to act on behalf of the public as Trustee to recover damages.</p> <p><b>§107(f)(2)(A)</b> - Requires the President to designate in the National Contingency Plan (NCP) the Federal officials who shall act on behalf of the public as Trustees for natural resources. [This designation can be found at 40 CFR Part 300, Subpart G.]</p> <p><b>§107(f)(2)(B)</b> - Requires the State Governor to designate State officials who may act on behalf of the public as Trustees for natural resources. The Governor shall notify the President of these designations.</p>	<p><b>§1006(b)</b>- States that the President or the authorized representative of any State, Indian Tribe, or foreign government, shall act on behalf of the public, Indian Tribe, or foreign country as Trustee of natural resources "to present a claim for and to recover damages to the natural resources."</p> <p>Requires that the following parties designate Trustees: the President designate Federal Trustees to act on behalf of the public; the Governor of each State designate State and local officials to act on behalf of the public (and notify the President of such designation); the governing body of any Indian Tribe designate Tribal officials to act on behalf of the Tribe or its members (and notify the President of such designation); and the head of any foreign government designate the Trustee to act on behalf of that government as Trustee (and notify the President of such designation)</p>
Responsibilities of Trustees	<p><b>§107(f)(2)(A)</b>- Requires Federal Trustees to "assess damages for injury to, destruction of, or loss of natural resources ... under their trusteeship." Federal Trustees may assess damages for State natural resources "upon request of and reimbursement from a State and at the Federal officials' discretion."</p> <p><b>§107(f)(2)(B)</b>- - Requires State Trustees to "assess damages for injury to, destruction of, or loss of natural resources ... under their trusteeship."</p> <p><b>§111(i)Restoration of Natural Resources</b> - Prohibits Superfund monies to be used for "the restoration,</p>	<p><b>§1006(c)(1)-(5)</b>- Sets up the functions of Federal, State, Indian Tribe, and foreign Trustees. All Trustees shall perform the following duties: assess NRD; and develop and implement plans for "the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship." These plans shall be developed and implemented only after adequate public notice, an opportunity for a hearing, and consideration of all public comment.</p>

	<p>rehabilitation, or replacement or acquisition of the equivalent of any natural resources until a plan for the use of such funds has been developed and adopted" by the affected Trustee, and "after adequate public notice and opportunity for hearing and consideration of all public comment."</p> <p>There is one exception to this requirement: in situations that require action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources, funds may used without the Section 111(i) plan.</p> <p>Affected Trustees are: (1) Federal agencies; (2) the Governor or Governors of any State having sustained damages to natural resources within its borders, belonging to, managed by or appertaining to such State, and (3) the governing body of any Indian Tribe having sustained damage to natural resources belonging to, managed by, controlled by, or appertaining to such Tribe, or belonging to a member of such Tribe if such resources are subject to a trust restriction on alienation. Superfund monies cannot be used to pay for natural resource claims.</p>	<p>The Federal government may, "upon request of and reimbursement from a State or Indian [T]ribe ... assess damages for the natural resources under the State's or Tribe's trusteeship."</p>
Coordination Between Federal Government and Trustees for NRD	<p><b>§122(j)(1)</b>- Directs the President to "notify the Federal [N]atural [R]esource [T]rustees of the negotiations" and to "encourage the participation of such [T]rustee in the negotiations" when involved in negotiations concerning a release that may have resulted in damages to natural resources under the trusteeship of the United States.</p>	<p><b>§1011</b>-Requires the President to consult with the affected Trustees, designated under Section 1006, on the appropriate removal action to be taken in connection with any discharge of oil.</p>
Regulations Pertaining to NRDA's	<p><b>§301(c)</b>- Directs the President to promulgate regulations pertaining to NRD assessment. The regulations shall specify (1) "standard procedures for simplified assessments requiring</p>	<p><b>§1006(e)(1)</b>- Directs the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere, to promulgate regulations for the assessment of</p>

	<p>minimal field observation" and (2) "alternative protocols for conducting assessments in individual cases." The regulations are to be reviewed and revised as appropriate every two years.</p> <p>The "simplified assessments" shall include methods of establishing measures of damages based on units of discharge or release or units of affected areas. The assessments for individual cases shall include methods of determining "the type and extent of short- and long-term injury, destruction, or loss."</p> <p>The regulations are to provide the "best available procedures to determine such damages, both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover."</p>	<p>NRD from discharge of oil no later than two years after the date of enactment of OPA.</p>
<p><b>Liability for NRD and Judicial Review</b></p>	<p><b>CERCLA</b></p>	<p><b>OPA</b></p>
<p>Liability for NRD</p>	<p><b>§107(a)(4)(C)</b>- Defines the scope of natural resource liability as "damages for, injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from" a release of hazardous substances or a threatened release that causes the incurrence of response costs.</p> <p><b>§107(f)(1)</b>- States that, if NRD is proved under Section 107(a)(4)(C), liability shall be to the following parties: the United States Government, any State, or an Indian Tribe.</p> <p>For liability to extend to a State, the</p>	<p><b>§1002(a)</b>- Specifies that "each responsible party for a vessel or a facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, is liable for . . . damages specified in Section 1002(b)(2) that result from such an incident." The discharge or threat of discharge of oil must be into or upon navigable waters, adjoining shorelines, or the exclusive economic zone.</p> <p><b>§1006(a)</b>- Specifies that responsible parties shall be liable to the United States Government, States, Indian Tribes, or foreign government bodies for damages to natural resources</p>

	natural resources must be "within the State or belonging to, managed by, controlled by, or appertaining to such State." For liability to extend to an Indian Tribe, the natural resources must be "belonging to, managed by, controlled by, or appertaining to such [T]ribe, or belong to a member of such [T]ribe if such resources are subject to a trust restriction on alienation."	"belonging to, managed by, controlled by, or appertaining to" each entity.
Limitation on Natural Resource Liability	<p><b>§107(f)(1)</b>- States the following conditions for not finding a party liable for NRD: (1) if the party has demonstrated that the NRD was specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement or comparable analysis; (2) the decision to grant the permit or license authorizes the commitment of natural resources; and (3) the facility or project was operating within the terms of the permit or license. [In the case of Indian Tribes, the issuance of the permit or license must not be inconsistent with the fiduciary duty of the United States.]</p>	<p><b>§1004</b>- Provides liability limits for responsible parties and any removal costs incurred by, or on behalf of, the responsible party. The limits do not apply if the incident was proximately caused by gross negligence or willful misconduct of, or the violation of any applicable Federal safety, construction, or operating regulation by, the responsible party. In addition, the limits do not apply if the responsible party fails or refuses to report the incident as required by law or to provide all reasonable cooperation and assistance requested by responsible officials in connection with removal activities.</p>
Use of Recovered Funds	<p><b>§107(f)(1)</b>- Stipulates that sums recovered by Federal and State Trustees for NRD shall be retained by the Trustee "only to restore, replace, or acquire the equivalent of" the subject natural resources. When the United States Government is the Trustee, the award can be used "without further appropriation."</p>	<p><b>§1006(f)</b>- Specifies that sums recovered by Trustees "shall be retained ... in a revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred" by the Trustee under Section 1006(c) with respect to the damaged natural resources. Any amounts in excess of those required for reimbursement and costs shall be deposited in this fund.</p>
Measurement of Damages	<p><b>§107(f)(1)</b>- States that measurement of NRD shall "not be limited by the sums which can be used to restore or replace" the subject natural resources.</p>	<p><b>§1006(d)(1)-(2)</b>- Specifies that the measure of NRD is the following: (1) "the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources"; (2) "the diminution in value of those natural resources pending restoration"; and (3) "the reasonable cost of assessing those damages." These costs shall be determined using the plans</p>

		discussed under Section 1006(c).
Prohibition of Double Recovery	<b>§107(f)(1)</b> - Prohibits double recovery for NRD, including recovering the costs of assessment, restoration, rehabilitation, or acquisition for the same release and same natural resource.	<b>§1006(d)(3)</b> - Prohibits double recovery for NRD for the same incident and natural resource.
Limitation on Retroactivity	<b>§107(f)(1)</b> - Prohibits NRD recovery, where the damages and the release of hazardous substances occurred wholly before the date of enactment of CERCLA ( <i>i.e.</i> , December 11, 1980).	-----
Rebuttable Presumption and Judicial Review	<b>§107(f)(2)(C)</b> - Requires that a determination or assessment of NRD made by a Trustee in accordance with regulations promulgated under CERCLA Section 301 shall have "the force and effect of a rebuttable presumption" in any administrative or judicial proceeding.	<b>§1006(e)(2)</b> - Requires that any determination and assessment of damages made in accordance with the regulations promulgated under Section 1006(e)(1) shall have "the force and effect of a rebuttable presumption" in any administrative or judicial proceeding.
Period in Which NRD Action May be Brought	<p><b>§113(g)(1)</b>- States a number of conditions for bringing an NRD action:</p> <p>No action may be commenced for NRD unless the action is commenced within three years after the later of: the date of discovery of the loss; or the date on which regulations pertaining to NRD assessment are promulgated under Section 301(c).</p> <p>An action for recovery of NRD must be commenced within three years after completion of a remedial action (excluding operation and maintenance). This condition is applicable for NPL sites, Federal facilities, and any vessel or facility where a CERCLA remedial action is scheduled.</p> <p>Actions may also not be brought (1) prior to 60 days after the Federal or State Trustee provides to the President and the potentially responsible party a notice of intent to file suit or (2) before the selection of the remedial action if the President is diligently proceeding</p>	<p><b>§1017(f)(1)</b>- An action for NRD shall be barred unless the action is brought within three years after: (1) "the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care" or (2) in the case of NRD under Section 1002(b)(2)(A), the date of completion of the NRD assessment authorized in Section 1006(e).</p> <p>Section 1017(f)(3)-(4) provides exceptions for the Section 1017(f)(1) limitation period in actions involving contribution and subrogation. Section 1017(f)(3) provides that no action for contribution of NRD may be commenced more than three years after: (1) the date of judgment for recovery of NRD; or (2) the date of a judicially approved settlement for NRD. Section 1017(f)(4) requires that, when a party is subrogated to a claim because that party has paid the claim, an action for recovery of those monies must be made within three years of the payment.</p>

	<p>with the remedial investigation and feasibility study (RI/FS). This limitation does not apply to actions filed on or before October 17, 1986.</p> <p>Sections 113(g)(3)-(4) provide exceptions for the Section 113(g)(1) limitation period on actions involving contribution and subrogation. Section 113(g)(3) provides that no action for contribution of NRD may be commenced more than three years after: (1) the date of judgment for recovery of NRD; or (2) the date of an administrative or court order for a <i>de minimis</i> or cost recovery settlement. Section 113(g)(4) requires that, when a party is subrogated to a claim because that party has paid the claim, an action for recovery of those monies must be made within three years of the payment. [Section 126(d) describes the period in which an NRD action may be brought for Tribal claims.]</p> <p><b>§126(d)</b>- Provides that for Tribal Trustees, the deadline for filing NRD claims is the later of: (1) expiration of the otherwise applicable period of limitations; or (2) two years after the United States, acting in its capacity as Trustee for the Tribe, gives written notice to the Tribe that it will not present a claim on behalf of the Tribe or fails to present a claim within the time limitations specified elsewhere in the statute.</p>	
Covenant Not To Sue	<p><b>§122(j)(2)</b>- States that covenants not to sue for NRD under Federal trusteeship may be entered into "only if the Federal [N]atural [R]esource [T]rustee has agreed in writing to such covenant." The Federal Trustee may agree to a covenant not to sue if the potentially responsible party agrees to undertake appropriate actions to protect and</p>	-----

	restore the injured natural resources.	
Court Review of Non-Discretionary Duty	-----	<b>§1006(g)</b> - States that any person may have a Federal court review of actions by any Federal official where there is "alleged to be a failure of that official to perform a duty under Section 1006 that is not discretionary with that official." The court may award costs of litigation to any prevailing party.
<b><i>Trust Fund Payment for NRD</i></b>	<b>CERCLA</b>	<b>OPA</b>
Use of Trust Fund for NRD	<p><b>§111(a)(3)</b>- Authorizes the Hazardous Substance Superfund (Superfund) to pay claims for NRD. [Superfund monies cannot be used to pay for natural resource claims.]</p> <p><b>§111(b)</b>- Authorizes the Superfund to pay "any claim for injury to, or destruction or loss of, natural resources, including the cost of damage assessment." [Superfund monies cannot be used to pay for natural resource claims.]</p> <p>The President can assert a natural resource claim for 1) natural resources over which the United States has sovereign rights, or 2) natural resources within the territory of the fishery conservation zone of the United States to the extent they are managed by the United States. States may assert claims for natural resources "within the State or belonging to, managed by, controlled by, or appertaining to such State." Indian Tribes, or the United States acting on behalf of Indian Tribes, can file claims for natural resources "belonging to, managed by, controlled by, or appertaining to such [T]ribe, or belong to a member of such [T]ribe if such resources are subject to a trust restriction on alienation."</p>	<p><b>§1012(a)(2)</b>- The Oil Spill Liability Trust Fund (Oil Spill Fund) is available for the payment of costs incurred by certain Trustees in "assessing natural resource damages and for developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of damaged resources" that are determined by the President to be consistent with the NCP. Only Federal, State, and Indian Tribe Trustees can receive payment of NRD costs from the Oil Spill Fund.</p>

<p>Limitation on Use of Trust Fund for NRD</p>	<p>-----</p>	<p><b>§1012(h)(2)</b>- No claim may be presented to the Oil Spill Fund for recovery of NRD unless: (1) "the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care" or (2) for NRD as defined by Section 1002(b)(2)(A), the date of completion of the natural resource damage assessment stipulated in Section 1006(e).</p> <p><b>§1012(i)</b>- Prohibits the President from paying NRD from the Oil Spill Fund when an earlier claim for the same damages was paid by the Oil Spill Fund.</p> <p><b>§1012(j)</b>- Requires that Oil Spill Fund monies be paid for the restoration, rehabilitation, replacement, or acquisition of natural resources only in accordance with a Section 1006(c) plan. However, such a plan is not required in situations "requiring action to avoid irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action."</p>
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**Environmental Justice demands removing all of the Tailings associated with the Parrot Tailings complex under remediation not restoration.**

I would also maintain that there is an environmental justice issue here. The Butte Priority Soils area has a disparately high number of low-income citizens compared to the rest of Butte, the rest of the state of Montana and the nation as a whole. Clearly, the citizens of the Butte Priority Soils area would qualify as an environmental justice area. These citizens have had to endure a disparate, negative toxics burden. Leaving the Parrot and associated tailings in place would perpetuate this disparate, negative toxics burden. NRDP is conducted under the auspices of a federal Superfund program and so the EPA's mandate to promote environmental justice in all of its activities would apply. Even though the state of

Montana does not have a specific environmental justice mandate, the equal protection of the laws would apply and would mandate, that since the residents of uptown Butte have had to endure a disparate toxics burden compared to the rest of Butte, Montana and United States and since the only sure way to remove this disparate, negative toxics burden is to remove the tailings, the tailings should be removed. I have already made the argument that they should be removed under remediation not restoration. Also, I have made the argument in a separate submittal that leaving waste in place perpetuates a threat in place and since this toxic threat is disparately born by the low income citizens who disproportionately live in uptown (BPSOU) Butte, ALL of the tailings associated with the Parrot Tailings, i.e. Diggings East, etc., should be removed.

**Coleman, Kathleen**

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**From:** Tyler Pullman <mercuryman824@gmail.com>  
**Sent:** Friday, January 29, 2016 2:34 PM  
**To:** Natural Resource Damage Program; jsorich@bsb.mt.gov  
**Subject:** 2nd submission of my comment for the Parrot Tailings Waste removal Project, please reply to this email

My name is Tyler Pullman and I am a lifelong resident of Butte. I graduated from Tech with a BS in Biological Sciences and I have my Master's certificate in Healthcare Informatics. I live within half a mile of the proposed reclamation area.

As a biologist, I can assure you that this is a horrible idea. While the removal of mine tailings in general is always a good thing, I don't believe it is in this case. Look at the millions of dollars that have been spent to restore the Silver Bow Creek drainage. If the Parrot Mine tailings were dug up and disturbed, there would be a substantial washout that would pollute the area that was already reclaimed. To mitigate that, settling ponds could be built but it would undo all of the work that was already performed. The state should be required to prove via water samples taken from the Clark Fork drainage that the Parrot Tailings are contributing to the pollution of the watershed to statistically significant amount before any action is taken. It is absolutely mind boggling that the EPA and the State are so naïve that they don't see the giant problem staring them in the face. Say that the tailing project goes through. Millions of dollars are spent. Then the water table that is just East of the tailings finally fills the Berkley Pit and begins to back up. Where is that going to flow? Directly down the Clark Fork drainage, if it hasn't already. Testing at proper depths has not happened to prove that the Pit water is not seeping down mine shafts and polluting the aquifers west of the Continental Divide. The money that is being considered to be used for this should go towards treating the water that is in the Berkley Pit and coming up with a solution to what is going to be the worst man-made environmental disaster known to mankind. It is understandable that no agency wants to spend money on the pit until the last second, but it seriously irresponsible and just plain wrong. Those who are responsible for the decision to not fix the Berkley Pit disaster now should be ashamed of themselves.

A question that needs to also be answered is will the Parrot Tailing Waste Removal project result in the county facilities behind the Civic Center being removed/demolished. It would be highly convenient if the county were to get brand new facilities out of this deal. If this is the case, they better have some serious data to back up removing this waste.

Can a source be sent out to the public to show the data that this project design is based off?

Lastly, the traffic congestion that will occur will be maddening if Continental has to be shut down. There is a period of time around 8am during the week where it is a solid stream of cars for a few minutes that would back up for a mile or two if traffic was diverted to Grand Ave, which is a school zone and already congested with buses and parents dropping off their kids.

Sincerely,

Tyler Pullman



**Coleman, Kathleen**

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**From:** Bruce Farling <bruce@montanatu.org>  
**Sent:** Monday, February 01, 2016 2:45 PM  
**To:** Natural Resource Damage Program  
**Subject:** MTU comments on Parrot removal  
**Attachments:** MTUcommentsParrotRemoval1-16.pdf

Folks,

Please accept the attached comments from Montana Trout Unlimited regarding the draft amendment to the Butte Area One Restoration Plan.

Thank you.

Bruce Farling  
Executive Director  
406-543-0054



PO Box 7186 Missoula, MT 59807 (406) 543-0054

31 January 2016

Montana Natural Resource Damage Claim Program  
1720 9<sup>th</sup> Avenue  
Box 201425  
Helena, MT 59620

Re: BAO restoration plan amendment: Parrot Tailings removal

Folks,

Montana Trout Unlimited generally supports the plan detailed in NRDP's draft Butte Area One Restoration Plan Amendment for removal of the Parrot Tailings. We are fairly convinced removal of as much of this material as is practical will reduce existing and future contamination of Blacktail Creek and Silverbow Creek from metals-enriched groundwater, surface runoff and sediment. We have long believed, as demonstrated by more than 25 years of advocacy for Superfund remedies at the Mill-Willow bypass, Lower Area One, Milltown Reservoir, the Clark Fork River and elsewhere, that source removal is often the first best option for reducing metals contamination in the upper Clark Fork basin.

We support disposal of contaminated materials in the Berkeley Pit because it costs much less (an estimated \$2 million less) than the alternative site, the Butte Mine Waste Repository. It also requires much less traffic disturbance, and, the amount of material that will be disposed of will probably not result in a measurable change in geochemistry in the Pit water, nor significantly affect the timing of when the water level reaches the critical elevation of 5410 feet.

Because this project could be partially funded, it appears, from two sources of restoration funding, \$10 million from the Butte restoration fund, as well as "leftover" funding from the Streamsides Tailings Operable Unit restoration and remediation, we urge NRD and its partners to approach this project with a very sharp pencil. The draft amendment does not include a detailed estimate of costs for most items, such as excavation, transportation, the ET cover systems, replacement of the BSB shop complex, regarding, etc. We recommend that the final decision provide more detail on the ET cover system, including its efficacy and what it will be required for long-term maintenance. We recommend NRD evaluate whether institutional controls will be necessary to ensure this system works in the long term.

At this time it is our hope that additional critical removals in the BAO operable unit, such as the Diggings East, northside tailings and Blacktail berm will be addressed by the remedy now being negotiated for a final consent decree.

Thanks for the opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Bruce Farling". The signature is written in a cursive, flowing style.

Bruce Farling  
Executive Director



**Coleman, Kathleen**

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**From:** Richard Tretheway <ntretheway59701@yahoo.com>  
**Sent:** Monday, February 01, 2016 4:49 PM  
**To:** Natural Resource Damage Program  
**Cc:** Jocelyn Dodge; Bill Macgregor; Joe Griffin  
**Subject:** Restore Our Creek Coalition written comments to Draft Butte Area One Restoration Plan Amendment: Parrot Tailings Waste Removal  
**Attachments:** ROCC.pdf

Dear NRDP:

Attached to this email, please find the written comments from Restore Our Creek Coalition regarding: Draft Butte Area One Restoration Plan Amendment: Parrot Tailings Waste Removal.

If you have questions or comments regarding our comments, please do not hesitate to contact us.

Thank you.

Northey Tretheway

Spokesperson,, Restore Our Creek Coalition

406-285-8667

Natural Resource Damage Program  
P.O. Box 201425  
Helena, MT 59620

RE: Draft Butte Area One Restoration Plan Amendment: Parrot Tailings Waste Removal

The following are comments submitted by Restore Our Creek Coalition:

#### Funding

1. We agree with use of SSTOU/SBC Remediation Funds for Upper Silver Bow Creek remediation work. If use of UCFRB opens to public comment how long would this delay the project and would there any potential concerns should there be significant opposition by the EPA and/or the public. What would be the funding mechanism should EPA or the public disagree with the proposed use of funds.
2. We concur that remedy funds are the correct use for the proposed cleanup. We further applaud the conscious intent of this plan to make remedial and restoration activities coordinate with one another.

#### Waste removal vs. ET Cover

1. We are concerned that the plan deems waste in the park between Texas Avenue and the county shops impractical to remove. Not removing the waste and installing an ET cover will raise the elevation of the area and potentially have a greater negative effect and/or challenge to ensure neighboring homes are protected.
2. ET cover should only be used as a last resort. Although there may be limitations to removal of waste near the railroad and structures; however, we are not convinced that an ET cover should be used at the park area between Texas Avenue and the county shops. We believe this area should be considered for removal of waste. If not, then the design of ET cover and end use of this area should include opportunities for the removal of waste in areas that allows for trees to be planted. If an ET cover is used the site should be restored to the current site plan under this project since it is separated from the main areas of waste removal.
3. What passive recreation activities would be allowed in the park area if an ET Cover is used – and what are the constraints? End use of this area will affect the plant species to be used. Native trees, shrubs, and grasses should be used from the local area and incorporated into the final end use design and ET cover system. The public must be involved with the end use and design throughout the project.

Final end use of the park area, with public comment, should be completed concurrently with this project and considered as part of the final ET cover design. If public comment indicates that the parking area and trail connection are a priority, they should be incorporated into the final ET cover design and completed as part of this process; otherwise the trail cannot be used by the public for the foreseeable future.

#### Design Features

1. The final design for the Parrot Removal should anticipate subsequent removal of toxic wastes (e.g., Northside Tailings and Diggings East) downstream to the confluence of Blacktail Creek once the Consent Decree is finalized, and incorporate a corridor-wide consistent approach to

controlling stormwater runoff, dewatering, and similar strategies that will inevitably become part of the final CD.

2. We agree with waste removal to Berkeley Pit as it safer to public. Hauling waste to the Berkeley Pit will be visible to the public at the viewing stand; therefore, the project should include interpretation to inform the public of the activity at the Berkeley Pit viewing stand.
3. Final grading and road elevation plan should include the end use design of the parking area for the Civic Center to the north and east (ballfields area) and be ready for use at the end of this project. Other aspects of the end use for the area of the county shops should not be left in a way that detracts from the esthetics of the area.
4. Easements being sought from the railroad should consider permanent access for pedestrians and/or continued access for future removal of Northside Tailings and Diggings East waste or other waste deemed as such in the future in order to minimize use of public streets. Consideration should provide for the potential of additional waste into the Berkeley Pit as necessary should the need arise.
5. Depending on final grading plans and ET covers where will additional cover material come from – if required - and how will it be transported to the site? Need to consider impacts to public streets, safety, and dust. Where will topsoil material come from and is it certified weed free or will weed control be required?

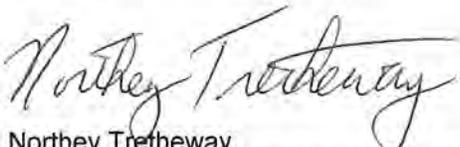
#### Groundwater

1. How will groundwater be treated from the completion of waste removal and end use construction? A plan for mid and long-term groundwater management should be developed and paid for as part of this proposal. End use of area needs to be determined by BSB and other agencies in conjunction with public input and be consistent in order to not adversely affect or restrict future removal of waste downstream of Silver Bow Creek to the confluence of Blacktail Creek.
2. Based on the massive removals already performed on lower reaches of Silver Bow Creek and the Clark Fork, we recommend that the plan include predictions about temporary exceedances of total recoverable metals that might occur in either groundwater or SBC surface waters as a result of removal actions. Placing this information in context will reduce the likelihood that it will be perceived as a disaster if/when it occurs.

Because of the unprecedented levels of public interest in, and concern about, the closing phases of cleanup activities leading toward the Consent Decree, we recommend that the plan include a section dedicated to formal public involvement strategies (beyond the formal design comment periods mentioned here). Such interactive strategies should emphasize the community's stake in determining the best end-uses of the entire corridor.

Thank you for the opportunity to comment on the Draft Butte Area One Restoration Plan Amendment. We are eager for this project to begin and pleased that the State of Montana agrees this is an important step to complete remediation and restoration of the Upper Silver Bow Creek areas. We look forward to future public meetings on this project and the continued waste removal through the Consent Decree that includes the Northside Tailings and Diggings East to the confluence of Blacktail Creek.

Sincerely,



Northey Tretheway  
Spokesperson, Restore Our Creek Coalition



**Coleman, Kathleen**

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**From:** Mary Kay Craig <marykathleencraig@gmail.com>  
**Sent:** Monday, February 01, 2016 7:47 PM  
**To:** Cunneen, Pdraig; Natural Resource Damage Program  
**Subject:** Parrot Tailings Removal Comments - rev.  
**Attachments:** CLEJ Parrot Tailings Removal comments 2-1-16 Rev.docx

Dear Pat and all,

I made an error in the comments sent to you at 5 pm today. Please substitute the attached version as the comments from Citizens for Labor and Environmental Justice. The error is in item #4 where it obviously should have read, "County Shops," not Parrot Tailings going to the Montana Pole Treatment Plant.

Thanks for your consideration.  
Mary Kay

--

Mary Kay Craig  
518 W. Granite St.  
Butte, MT 59701  
406 723-3851  
[marykathleencraig@gmail.com](mailto:marykathleencraig@gmail.com)

# CITIZENS FOR LABOR AND ENVIRONMENTAL JUSTICE

518 WEST GRANITE STREET, BUTTE, MT 59701



2/1/2016

Natural Resources Damages Program  
Helena, Montana

## Re: Parrot Tailings Waste Removal Amendment

Dear Folks,

Citizens for Labor and Environmental Justice exists for two reasons – trying to assure jobs related to Superfund go to Butte people and, especially, that they are union jobs; secondly, that the most protective cleanup possible is done so that Butte children in perpetuity are as safe from toxins as children elsewhere and, especially, the low-income Butte people who tend to live around Superfund Operable Units.

Here are some points of importance to us:

1. We agree the Parrot Tailings should go into the Berkeley Pit because it is the safest transport distance, and it removes the threat to Silver Bow Creek In perpetuity.
2. Reference is made to “standard state terms and conditions” for bid documents. We understand that very large trucks will be utilized. If that might mean the bidders are companies that do not normally utilize union labor, we remind and want assurances that State law regarding unions and prevailing wages are complied with.
3. Please explain what “adverse pit water impacts” might occur. Positive impact is likely for the existing mine, as it precipitates copper from the pit water.
4. We do not believe that the State DEQ will allow the County Shops be placed at the Montana Pole Treatment Plant Superfund site, and want to discourage that from happening if they should agree to it. We are aware that EPA has stated no exposure to Dioxin is safe. To restore our Silver Bow Creek, CLEJ is hopeful that Dioxin contaminated soils will be transported to permanent incineration facility. Onsite incineration was found unacceptable to the community many years ago because of drawbacks in portable incinerators.
5. Referencing comments made by Dr. Doug Coe at your public hearing regarding dewatering and the caps proposed on the downstream side, CLEJ also asks, what is to prevent water from moving into the area of Silver Bow Creek?
6. As overburden is tested before being reutilized for caps, we ask that tests include Lead regulation standards, as there is no acceptable amount of Lead exposure for humans according to EPA, despite their setting standards that allow Butte children more exposure than children anywhere else in the nation.

7. Cadmium in its solid form is regulated by Montana, not federally. We ask that you also test for Cadmium and act to prevent Butte children from its exposure.

Thank you for this opportunity to comment.

Sincerely,

S/Mary Kay Craig and Steven F. McGrath for CLEJ

cc: Citizens Technical Environmental Committee, Butte  
Daryl Reed, Project Officer, Montana Department of Environmental Quality, Helena  
Erik Nyland, Director, Butte Office, Senator Jon Tester  
CTEC Butte Office  
Restore Our Creek Coalition  
Nikia Greene, U.S. Environmental Protection Agency



**Coleman, Kathleen**

---

**From:** Harris, Harley  
**Sent:** Monday, February 01, 2016 3:19 PM  
**To:** Coleman, Kathleen; Martin, Douglas (DOJ); Cunneen, Padraig; Ford, Jim; Mullen, Gregory  
**Subject:** FW: Atlantic Richfield's Comments on the BAO Draft Restoration Plan Amendment  
**Attachments:** Atlantic Richfield comments NRD Parrot Plan 2016.pdf

Kathy: Can you make sure this gets made part of the public comment record?

Thanks.

Harley R. Harris  
 Lawyer/Program Manager  
 Montana Natural Resource Damage Program  
 1720 Ninth Avenue  
 Helena, MT 59601  
 (406) 444-0226

---

**From:** Duffy, William [<mailto:William.Duffy@dgsllaw.com>]  
**Sent:** Monday, February 01, 2016 2:58 PM  
**To:** Harris, Harley  
**Cc:** 'Hestmark, Martin ([Hestmark.Martin@epa.gov](mailto:Hestmark.Martin@epa.gov))'; 'Vranka, Joe ([vranka.joe@epa.gov](mailto:vranka.joe@epa.gov))'; 'Elsen, Henry'; Livers, Tom; Stoops, Thomas; Chambers, Jenny; Kirley, Bill; Capdeville, Mary; 'Cord Harris'; 'Loren Burmeister ([Loren.Burmeister@bp.com](mailto:Loren.Burmeister@bp.com))'; 'Birkenbuel, Lorri A'; 'Martin, Jean A'; 'jpd@prllaw.com'; 'Patricia Gallery - BP - Atlantic Richfield Company ([patricia.gallery@bp.com](mailto:patricia.gallery@bp.com))'; 'Matt Vincent ([mvincent@bsb.mt.gov](mailto:mvincent@bsb.mt.gov))'; Sesso, Jon; 'Mollie Maffei'  
**Subject:** Atlantic Richfield's Comments on the BAO Draft Restoration Plan Amendment

Harley -

On behalf of Patricia Gallery, I am submitting Atlantic Richfield's written comments that have been prepared in review of the Draft Plan Amendment and the NRDP's presentation at the Butte public meeting on January 14<sup>th</sup>. The original letter has been sent to you by mail today from Ms. Gallery's Houston office. For those shown as cc's on the letter, this electronic copy is your copy.

On behalf of Atlantic Richfield, thank you for the opportunity to comment.

Bill

**WILLIAM DUFFY PARTNER**

P: 303.892.7372 ▪ F: 303.893.1379 ▪ M: 720.234.5971 ▪ [vcard](#)

**Davis Graham & Stubbs LLP**

1550 17th Street, Suite 500 ▪ Denver, CO 80202

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# Atlantic Richfield Company

Patricia Gallery  
Vice President

201 Helios, 6.374A  
Houston, TX 77079  
Mobile: (630) 333-6388  
E-Mail: patricia.gallery@bp.com

February 1, 2016

## **VIA EMAIL AND U.S. MAIL**

Natural Resource Damage Program  
Montana Department of Justice  
Attn: Harley Harris, Supervising Attorney  
P.O. Box 201425  
Helena, MT 59620-1425

Re: Butte Area One Draft Restoration Plan Amendment  
Parrot Tailings Waste Removal  
Atlantic Richfield Company Comments

Dear Mr. Harris and Natural Resource Damage Program:

Thank you for providing the public with an opportunity to comment on the Natural Resource Damage Program's (the "Program") Butte Area One Draft Restoration Plan Amendment ("Draft Plan"). The Amendment describes in general terms the Program's plans for restoration-funded activities in the former Parrot Smelter area (the "Project"). The engineering designs described in the Draft Plan are conceptual only, and not sufficiently developed to support a technical evaluation and comment at this time.

The Program also held a public meeting in Butte on January 14, 2016, where Program representatives discussed the Draft Plan. Atlantic Richfield Company ("Atlantic Richfield") representatives attended that meeting, and Atlantic Richfield believes the Program's presentations at that public meeting did not accurately describe important aspects of the remedy work at the Butte Priority Soils Operable Unit ("BPSOU").

Consequently, we submit these comments to address the presentations at the public meeting, and to reserve the right to provide further technical comment on certain elements of the Draft Plan when the engineering design is further developed. Atlantic Richfield is committed to building upon the success of the Butte area remedy work completed to date, and we believe it is important for all parties to coordinate work on the BPSOU remedy with the Program's restoration plans, as further explained below. Effective coordination depends on an accurate understanding of the remedy in place, especially in the vicinity of the proposed Project. We appreciate your consideration of our comments.

## **I. The Metro Storm Drain Sub-drain System Protects Silver Bow Creek**

The Draft Plan describes a draft Project to excavate some of the buried wastes associated with the former Parrot Mining Complex operations. The Parrot Smelter was one of five historic mills and/or smelters that were located in the historic Silver Bow Creek drainage. Historic records show that the Parrot was the first commercial smelter to operate in Butte, starting in the 1860's. By the time it closed in 1899, the Parrot Complex had generated approximately 20% of the waste sources found within what was, at that time, the portion of the Silver Bow Creek drainage located above Blacktail Creek.<sup>1</sup> Shortly thereafter, in the early twentieth century, the Metro Storm Drain was constructed as a public works project through a portion of this area.

Program representatives at the January 14<sup>th</sup> public meeting suggested that it is necessary to excavate and remove a portion of the buried wastes associated with the former Parrot Mining Complex to protect aquatic resources in Blacktail Creek and Silver Bow Creek, and to improve the creeks' fishery and benthic macroinvertebrate communities. Atlantic Richfield disagrees, and notes that the Project is not needed to achieve any of the remedial goals for surface water or groundwater in US EPA's Record of Decision for the BPSOU remedy (Sept. 2006 (the "ROD")).

The Draft Plan proposes the partial excavation of buried mining wastes from the Parrot Mining Complex that are located within the project area under the Butte Silver Bow County Shops. Other buried waste materials, located beneath other developed property and infrastructure in the immediate project area, will not be excavated. Residual contaminants will remain in the alluvial aquifer and groundwater in this area, including dispersed metals that accumulated over more than a century of mining operations, at a time when waste and other effluent from mining, milling, and smelting operations were released into Silver Bow Creek initially, and later into the Metro Storm Drain.

The BPSOU ROD adopted US EPA's findings from the Focused Feasibility Study of the Metro Storm Drain (2004) that regardless of the scale and extent of any potential removal of mining wastes buried in this area, it will still be necessary to capture and treat groundwater in this area, on a long term basis, to control the release of residual contaminants to Silver Bow Creek. (BPSOU ROD at pp.12-13). Thus, the BPSOU ROD remedy required a groundwater collection system, rather than excavation of buried waste, in the Metro Storm Drain corridor to meet remedial objectives and protect creek water quality. Excavation of additional buried wastes from the Project area will not eliminate the requirement for effective remedial systems to capture and remove contaminants from shallow groundwater in this area that could otherwise reach the creek.

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<sup>1</sup> This statement and others describing the Metro Storm Drain Sub-drain portion of the BPSOU remedy and ROD are documented in Atlantic Richfield Company's *2015 Metro Storm Drain Groundwater Management Report (Draft Final Revised, December 10, 2015)*.

To implement this portion of the BPSOU ROD groundwater remedy, Atlantic Richfield upgraded the underground drainage and groundwater collection system that was located in the Metro Storm Drain area at the time when the ROD was issued. Subsequent investigation and monitoring data show that the upgraded system is effectively capturing groundwater within the alluvial aquifer, and conveying it to the Butte Treatment Lagoons, where it is treated to meet surface water quality standards. The treated water is then released to Silver Bow Creek. Ongoing monitoring and other empirical data support Atlantic Richfield's conclusion that this system captures nearly all of the metals load in the affected alluvial aquifer from groundwater that is in contact with buried wastes from the former Parrot Mining Complex (wastes which the Draft Plan proposes to remove). See Atlantic Richfield Company's 2015 Metro Storm Drain Groundwater Management Report (Draft Final Revised, December 10, 2015) ("MSD Report").

Operation of the upgraded collection and treatment system described above, along with other remedy work, has substantially improved compliance with surface water quality performance standards for Silver Bow Creek during base flow conditions. We have moved from 0% compliance in 2005, to 97% compliance in 2014 (e.g., the creek meets water quality standards 97% of the time during base flow). See MSD Report. This monitoring and other data show the existing drainage and groundwater collection system is effectively capturing impacted groundwater and, with other remedy work elements conducted to date, protecting surface water in the creek during base flow, to meet BPSOU ROD objectives for groundwater and surface water.

Given the well-documented effectiveness of the remedy, there is no support in the record for the Program's expectation of "a remedy funding contribution" for the Parrot excavation Project. Excavation is not needed to meet BPSOU ROD remedy goals. Excavation will not eliminate the need to operate or maintain the current groundwater drainage and collection system, or the Butte Treatment Lagoons treatment system. There is no evidence that excavation will reduce the cost of operating or maintaining the remedy. However, excavation may result in a short term increase in remedy costs.

## **II. Coordination of Restoration actions with BPSOU Remedy**

Consistent with the BPSOU ROD, Atlantic Richfield currently operates and maintains the above drainage, collection and treatment system to protect both groundwater and surface water. If the parties enter a consent decree for the BPSOU remedy, we expect it to require Atlantic Richfield to continue to operate and maintain this system, at Atlantic Richfield's expense, for the foreseeable future. EPA has a five year review process that will provide assurance that the effectiveness of the remedy is maintained, and these reviews will take place regardless of whether the parties have reached a consent decree, or whether they are operating under a series of administrative orders.

The State must similarly commit that the Parrot Project and other restoration actions the Program may fund and perform will not interfere with or impede the effectiveness of the BPSOU ROD remedy.

Natural Resource Damage Program  
Montana Department of Justice  
Attn: Harley Harris, Supervising Attorney  
February 1, 2016  
Page 4

The Parrot project was first proposed as part of the Program's Preliminary Conceptual Restoration Plan for Butte Area One, issued in draft form in November 2014, and republished in February 2015 following receipt of comments. Since November 2014, Atlantic Richfield, State and federal representatives have met to discuss and share their views and concerns related to coordination of the Program's restoration plans with the BPSOU remedy. Atlantic Richfield appreciates that some comments provided on the November 2014 draft plan have been considered and addressed in developing the Draft Plan for the Parrot Project.

Other questions and concerns raised by EPA and Atlantic Richfield in review of the Draft Plan have not been addressed, largely because engineering designs to implement the conceptual plans are not yet available. Further discussion of how to coordinate the restoration Project with both the BPSOU and Butte Mine Flooding Operable Unit remedies is needed, including but not limited to coordination of work to manage contaminated water associated with the excavation and disposal of the Parrot Project wastes. This is needed to ensure that State restoration actions will not interfere with or diminish the effectiveness and performance of the existing remedies, nor increase the cost of remedy operation and maintenance.

We believe it is in the best interests of the parties and the Butte community to reach agreement on coordination issues, if possible. We look forward to further discussions with the State on these topics as Parrot Removal plans are further developed.

Thank you for consideration of Atlantic Richfield's comments.

Sincerely,



Patricia Gallery  
Portfolio Manager - Mining  
Remediation Management

cc: Martin Hestmark  
Joe Vranka  
D. Henry Elsen, Esq.  
Tom Livers  
Tom Stoops  
Jenny Chambers  
Bill Kirley, Esq.,  
Mary Capdeville, Esq.  
Cord Harris  
Loren Burmeister  
Lorri Birkenbuel  
Jean Martin, Esq  
William Duffy, Esq.  
John P. Davis, Esq.

NATURAL RESOURCE DAMAGE PROGRAM

PUBLIC COMMENT PERIOD

ON THE DRAFT RESTORATION PLAN AMENDMENT

PARROT TAILINGS WASTE REMOVAL

Held at:

Butte-Silver Bow Public Archives Building  
17 West Quartz Street  
2nd Floor Conference Room  
Butte, Montana

Thursday, January 14, 2016

6:00 p.m.

REPORTED BY:

Kimberly C. Carpenter  
Butte-Silver Bow County Courthouse  
155 West Granite Street  
District Court, Department 2  
Butte, MT 59701  
(406) 497-6422

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DOUG MARTIN, FACILITATOR

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1 Thursday, January 14, 2016

2 \* \* \* \* \*

3 P R O C E E D I N G S

4 -oOo-

5 THE FACILITATOR: John, did you have a  
6 comment? We will start right now. I am done speaking.  
7 I know you wanted to go first.

8 PAT CUNNEEN: And I see John does have a  
9 written -- if you want to hand that in.

10 JOHN RAY: Oh, no. Not with the notes I  
11 have on it.

12 I don't feel like speaking to a screen.

13 My name is John Ray, 915 West Galena. The  
14 removal of the Parrot tailings, to me, should occur under  
15 the rubric of Superfund remediation not restoration.  
16 Remediation simply means preventing, stopping or  
17 reversing environmental harm. Restoration means  
18 returning something to its natural state. It's sometimes  
19 referred to in terms of a make whole remedy to the extent  
20 possible or providing equivalent resources.

21 To me, it is clear that the EPA remediation  
22 remedy for the Parrot and associated tailings is not  
23 working. It is not working to protect the environment as  
24 it was designed to do so. Numerous independent studies  
25 by experts on a local and state level outside of EPA

1 convincingly proved that that remedy is not working to  
2 protect the environment. In fact, about the only entity  
3 that supports the protectiveness of the current remedy is  
4 the EPA.

5 I would argue that the Record of Decision  
6 for the Butte Priority Soils Unit should be reopened and  
7 removal of the Parrot and associated tailings should  
8 occur under remedy not restoration. Restoration should  
9 not be made to do the work that remediation should do.

10 And I would call to your attention the  
11 cost, whether it's 17 million, 18 million, \$19 million,  
12 that that money, if spent for true restoration work,  
13 would be much better spent than spending it on  
14 remediation to do the job that EPA should have mandated  
15 in the first place.

16 I would also say that there is a legal  
17 issue, that if you read the CERCLA law -- and I'm not  
18 going to go into it in great detail here -- it is clear,  
19 and the EPA makes clear, that remediation dollars cannot  
20 be used for restoration and restoration dollars cannot be  
21 used for remediation.

22 If you read the plan, it is clear that the  
23 reason behind the removal of the Parrot tailings is a  
24 remediation reason, to protect the environment.  
25 Therefore, I would ask, as part of the responsiveness

1 summary, the people, the legal people, associated with  
2 NRDP whether it's, quote, legal to use restoration  
3 dollars for what, by any commonsense definition, is a  
4 remediation project. I think that needs to be addressed  
5 because I think that it is improper under CERCLA's  
6 Superfund law to do what is being proposed here.

7 Thank you.

8 DOUG COE: So I'll try to get my question  
9 out now, which is on the --

10 PAT CUNNEEN: Name and address.

11 DOUG COE: Oh, yeah. My name is Doug Coe,  
12 and 1031 Caledonia here in Butte.

13 My question has to do with the proposed  
14 caps and the fact that they're on the downstream side of  
15 the groundwater divide where that groundwater flows  
16 toward Silver Bow Creek. And the question, I guess, I  
17 would like to see answered by the folks who are proposing  
18 the plan, at some point, is what's to prevent that  
19 groundwater from mobilizing the waste under those caps and  
20 moving it somewhere elsewhere where it's no longer  
21 protected by the caps or washes into the stream or washes  
22 into the area that they've remediated or --

23 And that's all.

24 THE FACILITATOR: Thank you.

25 Any other public comment?

1                   And you have your choice; you can speak to  
2 us or you can speak to them.

3                   DAN O'NEILL: I'll just speak and whoever  
4 wants to listen.

5                   My name's Dan O'Neill. And do we need an  
6 address? 305 West Mercury, Butte. I didn't wear a suit  
7 and tie like some of the others, so, hopefully, you take  
8 me as serious as you took these past two.

9                   I'm just as concerned as probably most  
10 people in here with the proposal. And just like all the  
11 citizens in Butte, or most of us -- I can't speak for  
12 everyone -- I think that we should use the -- not to  
13 fault if it's illegal or not -- the restoration money to  
14 restore the damage caused by mining activities to the  
15 best natural pre-mining conditions that we can as men.  
16 However, I have a couple of concerns.

17                   Last week, or two weeks ago, Pat said  
18 what's going on could be done with haul trucks and  
19 shovels that MR uses in, what, two to three weeks you  
20 thought that we could move this material?

21                   So I'm concerned with the methods of this  
22 being done. If the -- if the equipment's out there to do  
23 it in two or three weeks, I think that should be  
24 investigated. If there's other means -- I had mentioned  
25 at the last meeting about using conveyers and maybe

1 putting something in place so that they're either  
2 underground for the future areas that need to be  
3 remediated or restored in the future. The tunnel's  
4 already under Harrison Avenue. It would be nothing to  
5 have a conveyer system in place so that if that area gets  
6 restored in four or five years that system might be ready  
7 to go. And if there's a cost benefit analysis between  
8 those two options, either shovels or conveyers.

9           The other thing that concerns me is how  
10 it's basically divided up into five different areas, the  
11 Civic Center parking lot, the corral, the exposed open  
12 space, the railroad bed. The reason they're not removing  
13 the contaminants under the Civic Center is because  
14 there's a cap of asphalt. And it seems to be that most  
15 of the corral is capped by either asphalt or buildings.  
16 So why is the reasoning there not to remove the Civic  
17 Center and rebuild that, as well, other than the fact  
18 that there's 20 feet versus two feet? But it just seems  
19 a little bit hypocritical or contradictory.

20           The other thing is the amount of exposed  
21 surface area of the railroad bed if you count the flat  
22 surface and both sides. With all the -- with all of the  
23 talk between all the sides involved, I'm curious to know  
24 why someone hasn't discussed using -- or adding a spur up  
25 right around the entrance to the mine for that railroad

1 bed and maybe remove that material.

2 The other thing is this ET cap seems new.  
3 I'm wondering if there's any long-term studies been done  
4 on the liability and maintenance.

5 And then, to speed it up, to me it seems  
6 like this is a kind of a collegiate and manufacturing  
7 test with this ET cap.

8 The fuel costs since this study was done  
9 probably dropped 33 percent, so, hopefully, the cost has  
10 gone down.

11 And then, finally, how it's going to be  
12 seeded. They call what's been done on these Greenway  
13 projects green. They're using Eurasian grasses, nothing  
14 native. The only thing green I can see when these  
15 projects are all done is the contractor's back pockets.  
16 But nothing looks native, so --

17 THE FACILITATOR: All right. Thank you.

18 KELLEEE ANDERSON: I have a statement rather  
19 than a question. My name's Kellee Anderson. I'm the MSU  
20 extension agent for Butte Silver Bow.

21 And I would just like to make the Butte  
22 Natural Resource Damage Restoration Council aware that --  
23 of the dedication the MSU Extension Office has for the  
24 greening of Butte. And through the process concerning  
25 the Parrot tailings, I would like to offer services as a

1 horticulturist to -- as we -- and to participate as we  
2 reestablish new vegetation in the area.

3 CINDY PERDUE-DOLAN: My name is Cindy  
4 Perdue-Dolan. I'm a commissioner in District 1 here in  
5 Butte-Silver Bow. I just have a quick comment.

6 It was said tonight that the tailings  
7 dumping will raise the level about one month earlier than  
8 is currently on the timeline. It will certainly  
9 change -- actually, let me back up. It will change the  
10 critical water level and, number two, it will change the  
11 chemistry of the, quote, unquote, water in the pit.

12 And it was said tonight that the tailings  
13 dumping will raise the water level about one month  
14 earlier than on the current timeline. And it will also  
15 certainly change the contents of the current toxicity of  
16 the pit and what the pit currently is. And I've heard  
17 that the Parrot tailings are about ten times as toxic as  
18 what the, quote, unquote, water of the Berkeley Pit is.

19 But the bottom line is and what concerns me  
20 is what was talked about earlier tonight, in that those  
21 two issues will be studied this spring. And what  
22 concerns me is that they're not going to be studied  
23 before the issues that are on the fast track, and the  
24 public opinion is not going to be taken -- or is going to  
25 be done and taken and finished by February 1.

1 I've had people come up to me, and they're  
2 nervous. They don't really know the full story yet. And  
3 I keep asking them, "What do you feel about the dumping  
4 of the tailings into the Berkley Pit?" And they -- they  
5 don't know the full issue. So I'm concerned that your --  
6 you're cutting off public opinion by February 1. And if  
7 this is the plan and we're on the fast track, I'm just  
8 really concerned that you're not going to get the full  
9 story from folks that are going to be affected by this  
10 for years and years to come. And the people who are  
11 making the decisions, for the most part, may or may not  
12 be the ones who are going to be living out the decisions.

13 Thank you.

14 LARRY WINSTEL: I'm Larry Winstel. I live  
15 on Pine Street in the vicinity of this project, the  
16 public utility buildings. And I have to question the  
17 reason for doing this. I remain unconvinced. I've read  
18 two conflicting reports and I've talked to two people,  
19 and I'm unconvinced there's a benefit to this. You're  
20 going to have -- it looks to me like you'll still have  
21 contaminated water. It will be less concentrated. And  
22 this is a lot of money.

23 My bigger concern is the Berkeley Pit and  
24 how that's going to be dealt with. It's coming up in a  
25 few years, and I believe we're going to need money to

1 deal with that.

2 Also I'm very concerned about how the  
3 public is engaged in this process. This opinion session  
4 here is late and it's limited. We've repeatedly  
5 petitioned the Council of Commissioners for community  
6 councils to address these type of issues, and I believe  
7 the public is being short-changed.

8 Thank you.

9 CARL HAFER: I'll be over here so I can look  
10 you all in the eye. My name is -- can you hear me good?

11 My name is Carl Hafer. I live at 6050  
12 Porter. I've been a resident -- I'm not from here but  
13 I've been around here a long time. I've been to a lot of  
14 these meetings. I've worked on construction pretty much.  
15 I'm kind of a little long of tooth, and I have been  
16 around a little bit.

17 I think this is nice. And I'd like to  
18 start out by saying that the way they put this together  
19 was great. You know, it really was great about the  
20 comment period and how they did this and had this portion  
21 for the citizens and the input. Sometimes that is  
22 lacking. Sometimes that is lacking. But it's done in a  
23 great manner.

24 But one thing -- secondly, you know, it's  
25 like on a road job. Now, I've worked -- I've worked as

1 an ironworker. I've worked every day they built the  
2 concentrator. I was in Nevada for a couple of years  
3 working on that Tonopah Highway deal for there. And I  
4 think these people wouldn't be here presenting this to us  
5 if they weren't talented and well trained and believe in  
6 what they're doing.

7 I think we have to -- when we have jobs  
8 like this, we have to accept the fact that there has been  
9 a lot of study gone into it. It's good to question  
10 anything. I don't mind anybody questioning that. But we  
11 have to have faith in them. And none of us are going to  
12 live long enough to see this thing down the road. That's  
13 just not how it's going to work. You know, time goes on.

14 But I think we just have to appreciate and  
15 respect and have faith in these people who have done all  
16 this work and let it go forward, and let it go forward,  
17 and consider it going to be well done. During the period  
18 of time that it's being done, of course there will be  
19 questions that arise. And at that time, it's like any  
20 job. I don't care if you're building a highway, if  
21 you're pouring concrete, whatever you might be doing.  
22 Sometimes you have to have a little pause and you don't  
23 change the whole picture but you might have to address a  
24 problem. I think we just have to realize that and  
25 appreciate the fact that it's going forward.

1           Because it's taken a long time to get to  
2 here. And I just -- I just think that it -- we have to  
3 have faith in it. I don't know if faith's a good word,  
4 but that's how I look at it. And when it's done, if down  
5 the road if there's some little thing -- like I can stand  
6 up here and tell you a lot of things that I might think  
7 that has gone on in the last ten years that I might  
8 question a little bit, but I am not an authority on much.  
9 But, anyway, I just think we have to have a lot of faith  
10 and we have to kind of join together and let these people  
11 who are talented and they're getting paid well, they're  
12 trained well, and we put our faith in them.

13           THE FACILITATOR: Thank you.

14           CARL HAFER: Thanks, Doug. Thanks, Pat.

15           THE FACILITATOR: Any more public comment?

16           UNIDENTIFIED SPEAKER: Doug, I don't want to  
17 address it unless I can get an answer. I just have a  
18 couple of questions on it.

19           THE FACILITATOR: Okay. We're just -- we're  
20 just -- talk to us afterwards.

21           CHRIS BRICK: Well, my name is Chris Brick,  
22 and I'm with the Clark Fork Coalition in Missoula, 140  
23 South 4th West.

24           So I'd like to, I think, second what Carl  
25 just said. As someone who was part of the EPA working

1 group back in 2004 that sent a letter to EPA asking that  
2 the Parrot tailings be removed and as a signer onto a  
3 scientist letter in 2005 that essentially asked the same  
4 thing of the proposed plan back in those days, I'm  
5 actually pretty excited to see a plan now for Parrot  
6 tailings coming out.

7 I am somewhat disappointed that remedy  
8 isn't paying for it. I'm hoping that remedy will at  
9 least pay for part of it if not all of it. And I do  
10 commend the Natural Resource Damage Program and the Butte  
11 Natural Resource Council for making this a priority.

12 And I think it -- I think that, clearly,  
13 there is still some things that I'm going to be  
14 interested in, the studies on the pit filling and on the  
15 geochemistry. And I'd like to see a little more detail  
16 on the ET caps. But I've heard Jim say that they are  
17 going to bring those studies to the public. I'm glad to  
18 hear that. We'll certainly be paying attention.

19 And in the long-term I think that our  
20 great-grandkids are going to look at this and say -- you  
21 know, they're not going to say, "I can't believe those  
22 guys took those tailings out. What a dumb idea." You  
23 know, it's going to be the right thing to do in the long  
24 term.

25 So, clearly, sometimes the devil's in the

1 details. But I think that this project can go forward.  
2 It's not rocket science to dig up tailings and put them  
3 someplace. Certainly there's been a lot of that in the  
4 Clark Fork Basin. And this is, I think, going to be the  
5 right thing for the creek in the future.

6 Thank you.

7 THE FACILITATOR: Any more public comment?  
8 Going once.

9 Well, I guess, I guess you know from our --  
10 from the NRD's standpoint, we'd like to thank you for,  
11 you know, providing your comment. And we will be getting  
12 back to you with a response in this summary in late  
13 February, March sometime. We will show you how we've  
14 incorporated or responded to these comments. At this  
15 point I'd turn it back to Elizabeth, the chairman of the  
16 BNRC.

17 (Whereupon, the comment period concluded.)

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REPORTER'S CERTIFICATE

STATE OF MONTANA            )  
                                  ) ss.  
County of Silver Bow        )

I, KIMBERLY CARPENTER, an Official Court Reporter and Notary Public in and for the State of Montana, do hereby certify:

That said proceedings were taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction and control.

I further certify that the foregoing, consisting of Pages 1 through 16, contains a full, true, and correct transcript of the proceedings had, transcribed by me to the best of my knowledge and ability.

DATED this the 2nd Day of February 2016.

(Signature)

(Seal)

\_\_\_\_\_  
Kimberly C. Carpenter  
Notary Public for the State  
of Montana, residing at  
Butte. My commission  
expires: July 17, 2018.