Precautionary Principle, Pollution Prevention and the Parrott Tailings

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CERCLA's purpose is to ameliorate 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 steams 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. **These principles are state ARARS that must be applied to the issue of removing the Parrott Tailings.**

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 total removal of the Parrott Tailings as part of the Priority Soils Remedy.

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 Federal 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.

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 Parrott Tailings site, the pollution prevention principle would warrant the total removal of the Parrott Tailings **now** rather than waiting for these contaminants to be released and then trying to treat them later. Given the serious nature of the pollutants found at the Parrott Tailings site, the pollution prevention principle would warrant removing as much of the contaminants as possible so as not to threaten future generations. Leaving the Parrott Tailings waste-in-place is a serious threat-in-place.

<u>The Precautionary Principle/Standard warrants removing the Parrot Tailings now as part of the Priority Soils remedy</u>.

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 its 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 it's occurring. The precautionary principle is really grounded in old common sense sayings: "An once 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 are ARARS for Parrott Tailings

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. Akzo 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 Akzo 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 sate 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 it conclusion.

What are ARARS for Purposes of the Parrott 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 which must be applied to the Parrott Tailings. As we know, CERCLA does not contain its own cleanup standards but relies heavily on state ARARs. "Regulation codified in the NCP govern 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 the Parrott 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 the Parrott Tailings.

There is ample proof that the contaminants found at the Parrott Tailings area pose a threat to human health and the environment. The EPA argues that, as a result of their waste-in-place remedy, people will not be exposed to these toxic contaminants. Instead of removing the toxics from the people, EPA wants to remove the people from the toxics. (Given the vagaries of human behavior this approach is problematic at best.) All agree that if exposure to these toxic wastes was present, human health and the environment would be negatively affected. There is no guarantee that changing patterns of citizen behavior or inherent problems with caps and institutional controls will not in the future expose citizens to these wastes left in place.

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 at the Parrott Tailings. Leaving waste in place really is leaving an unacceptable and unwarranted threat in place.