Environmental Justice and Butte Priority Soils

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On February 11, 1994, through Executive Order 12898, President Clinton declared that: "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." According to the EPA, the President's concern was that: "minority and low-income populations bear a disproportionate amount of adverse health and environmental effects." Today, the EPA further defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, ***implementation, and enforcement*** of environmental laws, regulations, and policies. Fair treatment means that no group of people, including a racial, ethnic, or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal and commercial operations ***or the execution of federal, state, local, and tribal programs and policies***." (Emphasis supplied.) EPA administrator Whitman in August 2001 stated that environmental justice would be an integral part of all EPA programs, policies, and activities. According to Whitman, the goal of the EPA's Environmental Justice program is that no segment of the population, including low-income citizens, suffers disproportionately from the EPA's policies, programs and activities. Furthermore, EPA has a mandate to provide for the equitable distribution of the burden of cleaning up sites. (The Office of Solid Waste and Emergency Response [OSWER] in their *Integration of Environmental Justice into OSWER Policy, Guidance, and Regulatory Development* mandates that "Environmental Justice issues should be considered at all stages of policy guidance and regulation development, beginning with preliminary efforts" and that environmental justice should be integrated into all agency actions. (OSWER Directive 9200.3-18FS, EPA540/F-95/023)

This above OSWER Directive also mandates that the economic/regulatory impacts of EPA decisions be considered in terms of environmental justice issues. Part of the EPA's environmental justice strategy is to promote a "sustainable economy" in areas affected by EPA rules, policies and programs. For example, OSWER Directive No. 9200.3-17 entitled *Integration of Environmental Justice into OSWER Policy, Guidance, and Regulatory Development* states: "Where environmental justice concerns or the potential for concerns are identified, staff should conduct an appropriate analysis of the issues(s). To the extent practicable, staff should evaluate the ecological, human health (taking into account subsistence patterns and sensitive populations) and socio-economic impacts of the proposed decision document on minority and low-income communities. Examples include how a policy on future land use would impact minority or low-income

communities versus non-minority, affluent communities. The analysis should be documented and retained for public availability." (**This has not been done by the Montana Office of EPA for Priority Soils**.) The point is that the Montana Office of EPA has a mandate to consider how its enforcement actions will disproportionately and adversely economically affect low-income areas and has a mandate to mitigate disproportionate adverse economic impacts on low-income citizens. (See: *Incorporating Environmental Justice Principles into the CERCLA Process*, May 1998.) Low-income citizens should not bear a disproportionate or undue regulatory burden when it comes to the development of cleanup activities. (EPA, Region 8, *Environmental Justice Action Plan*, April 2003)

The Region 8 of EPA also equates environmental justice with the legal concept of equal protection under the law. In April of 2003, Region 8 issued its *Environmental Justice Action Plan* which mandates that the agency will work with stakeholders to "correct and prevent inequitable environmental and public health impacts to any groups." In short, environmental justice mandates a particular concern with populations, such as low-income populations, that bear a disproportionate burden of environmental degradation and environmental regulations. "Fair treatment means that no group of people, including a racial, ethnic, or social economic group should bear a disproportionate share of the negative . . .consequences resulting from . . .the execution of federal, state, local and tribal programs and policies." (Headquarters Press Release, EPA, *Administrator Whitman Reaffirms Commitment to Environmental Justice*, August 21, 2003)

Presently, Montana Office EPA actions with regard to the RI/FS process for Priority Soils have not followed the policy mandates regarding environmental justice. Presently, Montana Office EPA actions to develop a proposed plan for the Butte Priority Soils Operable Unit violate the EPA mandate to promote Environmental Justice.

This paper makes the following arguments:

1. Butte has a significant number of low-income citizens.
2. Butte's low-income citizens tend to be congregated in the Butte Priority Soils Area.
3. Low-income citizens in Butte bear a disproportionate burden of exposure to heavy metal contamination.
4. Contrary to the EPA mandate to promote Environmental Justice, the current development of the proposed plan for Butte Priority Soils will result in a plan that will continue and exacerbate the disparate, adverse treatment and environmental burden of low-income Priority Soils area citizens.
5. Contrary to the EPA mandate to promote Environmental Justice, the current development of the proposed plan for Butte Priority Soils will result in a disparate, adverse regulatory burden being placing on low-income Priority Soils area citizens.
6. Contrary to the EPA mandate to promote Environmental Justice, the current development of the proposed plan for Butte Priority Soils will exacerbate rather

than ameliorate the disparate economic burden being placed on low-income Priority Soils area Citizens.

Low-Income Citizens in Butte and Heavy Metals Exposure

According to the 2000 Census, 10.7% of Butte families live in poverty, compared to 10.5% across the state. About 15% of the Butte population lives below the poverty line. Also, according to the 2000 Census, close to 25% of Butte families with children under the age of five years have incomes below the official poverty line. Fifty-eight percent of the homes without fathers have incomes below the official poverty line. According to the Montana Department of Public Health and Human Services, in 2002, about 2.4% of Butte's citizens were receiving Temporary Assistance for Needy Families compared to the state average of 1.89%. Over 10% of the Butte population was receiving food-stamps compared to 7.56% statewide.

Studies also indicated that the vast majority of the poor live in the area encompassed by Butte Priority Soils. For example, of the 1200 houses in Butte that have had a high risk of lead, the vast majority are in the Butte Priority Soils site. Compared to Butte as a whole, the low-income citizens living in the area encompassed by the Butte Priority Soils Operable Unit bear a disproportionate burden of exposure to toxics compared to the rest of the community. Comparing income levels to quantity of toxics present clearly demonstrates that low-income citizens in Butte bear a disproportionate toxics burden. The poor in Butte have a greater risk of cancer from exposure to heavy metals than do the non-poor. The poor in Butte are more threatened by the release of toxic, heavy metals associated with mining than the non-poor. (See: Environmental Defense Fund, *Summary Report: Silver Bow County*, 11/24/03) [The EPA's *Revised Community Involvement Plan for Butte Priority Soils Operable Unit,* November 2003 notes the extent of poverty in Butte but makes no attempt to assure that low-income Butte citizens are represented in a meaningful way or have meaningful opportunities to participate in the decision making processes surrounding Priority Soils. The plan makes no accommodation for eliciting the views of low-income citizens for the Priority Soils area. This is directly contrary to stated EPA policy.)

Remedy Selection Process for Butte Priority Soils violates Environmental Justice

RASD (Response Action Summary Document)

A significant portion of the Butte Priority Soils site (422 acres) has been subjected to TCRA/Emergency Response actions. Although citizens of Butte were originally assured by the EPA that these previous actions would be reevaluated using the full Superfund process and in terms of the nine Superfund evaluation criteria, we are now being told that these TCRA/ER actions will not be evaluated using the full Superfund criteria but will, rather, be evaluated using a unique, hybrid document called a Response Action Summary Document (RASD). As stated in the current RASD, most of the previous TCRA/ER actions in Priority Soils will get a "no further action" designation in the proposed plan for

Butte Priority Soils. In short, the TCRA/ER actions will be part of the proposed plan never having been evaluated using the full Superfund process.

What does the RASD have to do with Environmental Justice?

Using the RASD rather than the full Superfund process will assure that the poor in the Butte Priority Soils Operable Unit will continue to receive negative, disparate treatment. Using the RASD as currently planned will perpetuate environmental discrimination and will perpetuate unequal environmental treatment for low-income citizens. Using the RASD rather than the full Superfund process will mean that the low-income citizens of the Priority Soils area will bear a disproportionate economic burden as a result of cleanup. **Why?** The RASD approves, without full and complete review, the using of caps, fences and institutional controls, rather than removal and treatment of toxic materials. This emphasis on caps, fences, and institutional controls rather than treatment and removal will mean that a disproportional burden of living in a contaminated area will still be endured by the poor. Using this RASD will assure that the poor will continue to be more environmentally burdened than the non-poor. As a result of this RASD remedy, the poor in Butte will continue to be at a comparative environmental and economic disadvantage compared to the non-poor in Butte.

Compared to other recent Superfund remedies in Montana at Milltown and Silver Bow Creek, which areas do not have the large numbers of low-income citizens as does the Priority Soils Area but which areas' plans call for extensive removal of toxics, the Priority Soils poor are getting an inferior cleanup under this RASD process. Compared to the cleanups at Milltown and along Silver Bow Creek, the effect of the RASD will be to further discriminate against low-income citizens in the Butte Priority Soils area by giving them what amounts to a "second-class" cleanup. The RASD will mandate leaving vast amounts on contaminants in place perpetually to threaten the citizens of the area.

Furthermore, the RASD, contrary to the EPA mandate that environmental justice issues be a part of all agency actions, does not consider issues of environmental justice. Issues of environmental justice are completely ignored in the RASD.

Priority Soils' Decision Making Process Violates Environmental Justice Mandate

Another problem with the RASD as it relates to environmental justice regards the Montana EPA's decision-making process regarding Priority Soils. The EPA mandate to promote environmental justice states that affected citizens, such as low-income citizens, will have full and meaningful participation and involvement in the remedy selection process. Particular and special concern is to be given to the concerns of low-income citizens. Special effort is supposed to be made by EPA to involve in a meaningful way low-income citizens and minorities. The TCRAs and Emergency Response Actions conducted on Butte Priority Soils failed to consider environmental justice issues. This is contrary to the EPA mandate that environmental justice will be a specific component of program reviews, enforcement initiatives and activities and compliance work. (Statement of EPA Administrator Carol Browner, *The EPA's Environmental Justice Strategy*, April

3, 1995) The EPA document entitled *Partners in Science: Environmental Justice* states that: Environmental justice includes the fair treatment and meaningful involvement of the poor and minorities in "the development, implementation, and enforcement of environmental laws, regulations and policies."

Previous actions on Priority Soils did not provide for meaningful involvement by low-income citizens. According to EPA policy, public involvement in TCRA/Emergency Response Actions is considerably less than that provided during a full Superfund process. Currently, no effort is being made by the EPA to solicit specifically the views of low-income citizens. This lack of low-income citizen participation is also contrary to EPA Administrator Christine Todd Whitman's directive in 2001 that environmental justice concerns permeate all EPA policies, programs and activities. (EPA, *Environmental Justice Fact Sheet, EPA's Commitment to Environmental Justice*, May 2003) The EPA calls for stakeholder participation and for extraordinary efforts to achieve minority and low income participation but the low-income citizens in the Priority Soils area have no effective representation in the decision making process regarding Priority Soils. (See: Region 8, EPA, *Why is Environmental Justice of Concern?-Who cares about EJ?*) In general, the public participation requirements for TCRAs and Emergency Response Actions are significantly less than they are for the full Superfund process. ***By allowing these TCRA and Emergency Response actions to get a "no further action" designation when it comes time to select the final remedy, will mean the low-income citizens were excluded from the final Priority Soils remedy selection process and environmentally disenfranchised.***

Current Montana EPA Priority Soils Community Involvement Activities do not include or represent Low-Income Citizens.

On the current EPA *Citizens Work Group* on Priority Soils, low-income residents of the Priority Soils area are grossly underrepresented, if they are represented at all. There are **no low-income** citizens from the Priority Soils Site on the Citizens Work Group. This lack of direct representation of low-income citizens on the EPA's Citizens Work Group directly contradicts the EPA mandate that the disadvantaged be an integral part of the decision making process regarding cleanup. The interests of low-income citizens who live in the Priority Soils area were not represented in the Revised Community Involvement Plan developed for the Priority Soils Operable Unit in November 2003.

Current RI/FS Process for Priority Soils fails to consider Environmental Justice

It is not just the RASD that is remiss in considering issues of environmental justice, but the whole, current RI/FS process for Priority Soils isn't explicitly considering issues of environmental justice. The data on income levels in the Priority Soils area clearly indicates that this is an area of significant low-income citizens. To ignore the impact of the proposed remedy on these low-income citizens violates the environmental justice mandate of EPA.

Property Values, Economic Revitalization, Priority Soils and Environmental Justice

Also under the current RI/FS process, the low-income citizens of Priority Soils will bear an unequal economic/regulatory burden as the result of cleanup. The EPA itself admits that the presence of hazardous wastes lowers property values. This negative impact affects both residential and commercial property values. The EPA estimates that as a result of the presence of toxic wastes, property values are diminished by 2-8%. (EPA, *Property Values, Stigma, and Superfund*) A study by McClelland found that there was a major correlation between depressed selling price and the presence of hazardous waste. (McClelland, et. al., "The Effect of Risk Beliefs on Property Values, *Risk Analysis*, at press.) Mundy Associates, LLC in "The Impact of Hazardous Material on Property Value" found: "When the public becomes aware that a contaminated property poses a health or financial risk (either real or perceived), the property is transformed into a problem property, which will affect value. When the market perceives a property as a problem, values will be affected in several ways. A disclosure requirement by the sales agent or seller, concern on the part of the lender, and appraiser uncertainty all may have a noticeable effect on the marketability of the property. When a property loses it marketability, it also loses its value. Contaminants affect both income and marketability."

Given that low-income citizens are located disproportionately in the Priority Soils area, any remedy that lessens property values, decreases income from property, and makes it more difficult to sell property would have a disproportionate and discriminatory effect on low-income citizens. The RASD fails to consider economic issues as regards Butte Priority Soils. Currently, the RI/FS process fails to consider economic issues as regards Butte Priority Soils.

Furthermore, the Priority Soils RI/FS process has also failed to consider the mandates of the Superfund Redevelopment Initiative and the Land Revitalization Initiative Action Agenda (April 10, 2003). For example, the EPA states in an article entitled *Land Revitalization Initiative*: "This Land Revitalization Initiative emphasizes that cleanup and reuse are mutually supportive goals, and that proper reuse should be an integral part of the way EPA does business." The article continues: "The days of erecting chain link fences around a property and posting 'Keep Out' signs are over. Cleaning up previously contaminated properties for reuse can help reinvigorate communities. . . ." In its *Action Agenda* to accompany the initiative, the EPA states that the "land revitalization is an integral part of all EPA cleanup programs and ***reuse is considered early*** in the cleanup process. (Emphasis supplied.) A cleanup that is protective of human health, but leaves a property unused because it is surrounded by a chain link fence and 'do not enter' signs, may not fully benefit the people who live around it. The *Agenda* takes important steps to assist both buyers and sellers in transforming once environmentally-impaired properties into community assets."

The point is that presently the RI/FS process is not considering or implementing the mandates of either the Superfund Redevelopment Initiative or the Land Revitalization Initiative. For example, the RASD, by placing previous TCRA/Emergency Response Actions in the "no further action" alternative category, means that caps, fences, "do not enter" signs, and institutional controls **will be** a primary remedy for Priority Soils. Contrary to the mandates of the Superfund Redevelopment Initiative and the Land Revitalization Initiative, large areas of Priority Soils will be unavailable for reuse and for productive future land uses. Leaving contamination in place will retard future productive land uses and would hinder economic redevelopment of the Priority Soils area. Will potential developers find attractive an area with large segments of land declared off limits because of contamination? This failure to incorporate the Redevelopment Initiative's and the Land Revitalization Initiative's mandates into the RI/FS process, which is contrary to OSWER Directive 935.7-04-*Land Use in the CERCLA Remedy Selection Process*, means that Butte's low-income citizens, who live primarily in the Butte Priority Soils Area, will continue to bear a disproportionate handicap and burden as a result of the EPA's actions at the Priority Soils Site. By perpetuating economic stagnation, an unequal economic/regulatory burden would continue to be placed on low-income citizens. The EPA process at Priority Soils will help perpetuate poverty in Butte.

The Butte Priority Soils RASD proposes leaving vast areas of contamination in place with caps, fences, and institutional controls which areas will be a constant and continual drag on economic revitalization and productive future land uses. Leaving significant amounts of contamination in place will have a profound negative and harmful effect on the housing market in uptown Butte as well as the over-all economic health of the Priority Soils area. People will be discouraged from buying an older home in the Priority Soils area if they know that the area continues to contain significant amounts of contamination. People will be reluctant to improve existing housing. The housing stock in the Priority Soils area will continue to deteriorate and will be available or affordable only to the low income. Leaving contaminants in place will perpetuate substandard housing for the poor. It is also important to remember that the housing stock affects the economic vitality of the whole Priority Soils area. A depressed and deteriorating housing stock is a further rag on economic revitalization.

It is the low-income who will bear the disproportionate burden of the EPA proposed remedy. The extensiveness of poverty and the number of low-income citizens in the Priority Soils area should be an impetus for the Montana EPA to include economic revitalization and future productive land uses in the RI/FS process for Priority Soils.

Summary

Although the formal proposed plan for Butte Priority Soils is some time in the future, the current RI/FS process for Butte Priority Soils is adverse to the promotion of environmental justice. The proposed plan for Priority Soils and the eventual remedy for Priority Soils will grow out of the RI/FS process. If the RI/FS process is flawed, the products of that process will be flawed. As far as the issue of promoting environmental justice is concerned, the RI/FS process is fatally flawed. (It should be noted that EPA policy mandates that environmental justice consideration be

a part of all remedy selection processes and that environmental justice consideration takes place ***early*** in the remedy selection process.) Given the parameters for the current Priority Soils RI/FS, which have already been announced by the Montana Office of EPA, given the issues that have been taken off the table such as previous TCRA/Emergency Response Actions, given that some major sources and pathways of contamination will not be addressed such as indoor dust, given that the mandates of the Superfund Redevelopment Initiative and the Land Revitalization Action Agenda have been so far largely ignored in the development of the RI/FS, and given that low-income citizen stakeholders have not been represented in the decision making or community involvement processes related to Priority Soils, one can easily conclude that whatever proposed plan comes out of the RI/FS process will ignore issues of environmental justice. The results of the current RI/FS process will mean that the poor in Butte will continue to bear a disproportion, unequal burden both in terms of the presences of toxic materials and in terms of the drag on economic development and revitalization which these toxic materials occasion. The current flawed RI/FS process will result in a remedy which is neither fully protective of human health nor promotes future productive land uses. The current RI/FS process is directly contrary to the EPA's own policy mandates, cited in detail in the body of this paper, that call for an equitable distribution of environmental risk and an equitable distribution of the regulatory burden of cleaning up toxic sites.

Because the current RI/FS process does not include members of the low income citizens who predominate in the Priority Soils area the current RI/FS process is contrary to the EPA's own mandate that these "stakeholders" be an integral part of the decision making process regarding Priority Soils and that special consideration be given to minorities and low-income citizens. Because low-income citizens are primarily concentrated in the Priority Soils Area, they will bear this disproportionate burden. The poor will be burdened by toxics left in place and not treated. The poor will be burdened by a cleanup that retards rather than promotes economic reuse and redevelopment. The poor will be burdened by not being a part of the decision-making processes on Priority Soils. In fact, low-income citizens will be worse of under the Montana EPA approach then they were before. The Montana EPA plan will actually increase the level of environmental and regulatory discrimination.

I would urge the Montana EPA to correct these environmental justice problems. I would urge that the RASD either be scrapped or, at a minimum, be re-written to include a full consideration of previous TCRA/ER actions using the all nine Superfund criteria. I would urge that environmental justice concerns be specifically, comprehensively, and meaningfully addressed in the whole RI/FS process. I would urge special concrete efforts to see the poor represented in the process. I would urge that issues related to productive future land uses be specifically addressed in the Priority Soils RI/FS. All that I am asking regarding environmental justice is part of EPA policy and procedures. I am asking that these policies and procedures by followed with regards to the Priority Soils RI/FS and remedy development process. I am asking for a remedy that redresses rather than exacerbates the unequal distribution of the environmental, economic and regulatory burden that low-income citizens have suffered in the past.