

STATE OF MONTANA, NATURAL RESOURCE DAMAGE PROGRAM



MEMORANDUM

TO: Kristie Beal, Chair, UCFRB Advisory Council
Elizabeth Erickson, Chair, Butte Natural Resource Damage Restoration Council

FROM: Katherine Hausrath, Legal Counsel, NRDP

DATE: November 27, 2023

SUBJECT: 2020 Butte Priority Soils Operable Unit Consent Decree (2020 Butte CD),
Summary of BP-Atlantic Richfield's Reservation of Ability to Sue State of
Montana in Paragraph 96

This memo outlines the basis for BP-Atlantic Richfield's (BP-AR's) reserved right to sue the State for the State's allocable share of any such costs, fees, or damages caused by restoration actions, along with the restrictions on this ability to sue.

Under Paragraph 96.f. of the 2020 Butte CD, BP-AR reserved the ability to sue the State under CERCLA, CECRA, and any other federal or state law for any State actions "that cause (in whole or in part) EPA to require additional remedial action and/or AR to perform remedial action that is approved by EPA to satisfy any AR obligation under this Consent Decree or to ensure the protectiveness of the Remedy, thereby causing AR to incur the additional response costs, fees, or damages listed below."

This memo is organized by the type of restoration action for which BP-AR reserved the right to sue—Parrot Tailings Waste Removal Project or other Butte Area One restoration action—followed by any relevant restrictions. [Explanatory comments that are not directly relaying Paragraph 96.f. requirements are provided in blue.](#)

Under Paragraph 96.f., BP-AR may sue the State (includes NRDP and DEQ):

If the Parrot Tailings Waste Removal Project causes:

- Damage to the Subdrain.¹
 - Restrictions:
 - BP-AR can only sue following implementation of Subdrain optimization. The June 2022 Subdrain Draft Final BPSOU Subdrain Pump Station Remedial Design Work Plan (RDWP), which states that it is a portion of the broader Subdrain optimization work, has a proposed schedule for completing this portion in 2025. NRDP has not seen a revised RDWP in response to EPA comments nor has NRDP seen a broader Subdrain optimization work plan. Accordingly, the Subdrain optimization appears that it will not occur for several years, leaving a limited (or no) window for this portion of the liability reservation to be triggered by BP-AR.
 - BP-AR may only seek costs for repair or maintenance, not for any capital expenditures on the Subdrain.
- At the Butte Treatment Lagoons (BTL)²:
 - (A) an increase in any contaminant in groundwater that was treated at the BTL as of the Effective Date of the CD;
 - (B) a new contaminant in groundwater treated at the BTL that was not treated at the BTL as of the Effective Date of the CD; and/or
 - (C) an increase in the quantity of water captured for treatment at BTL.
- **Restrictions—the 2020 Butte CD recognized the following:**
 - **Contaminants exceedances at Butte Treatment Lagoons:** BP-AR agreed in the 2020 Butte CD that cadmium, copper, lead, and zinc were already exceeding performance standards. NRDP's robust groundwater monitoring has shown a statistically significant reduction in these contaminants in the downgradient groundwater following the implementation of the Parrot Tailings Waste Removal Project. Therefore, all data currently available indicates that this liability reservation does not apply.
 - **Other contaminants treated at Butte Treatment Lagoons:** BP-AR agreed that aluminum, arsenic, barium, (total) boron, fluoride, iron, mercury, nitrogen compounds, silver, sulfate and uranium-238 have already been detected in the Butte Treatment Lagoons. NRDP has not detected any other contaminants in its monitoring of alluvial wells in Butte Area One, so this portion of the liability reservation is not likely to be triggered.
 - **Water Quantity:** "As of the Effective Date, the State is pumping 100 gallons per minute from the groundwater system at the Parrot Tailings Waste Removal Project area; the Parties agree that the State's cessation of groundwater pumping and withdrawal of groundwater from the Parrot

¹ The Subdrain is a groundwater collection system operated by BP-AR, with a primary objective of collecting groundwater and separating it from the surface water flow in the lined Silver Bow Creek above the confluence. Water flows on the surface during storm events.

² The BTL is where BP-AR treats the groundwater collected from the Subdrain and releases it to Silver Bow Creek.

Tailings Waste Removal Project area will not be an “increase in the quantity of water captured for treatment at the BTL” under Paragraph 96.f.(ii)(C).”
NRDP has found no evidence in its monitoring of an increase in water quantity, so this portion of the liability reservation is not likely to be triggered.

- **BP-AR must bring a claim, defense, or cause of action:** within five years after the later of the following occurrences: (1) the State’s issuance of a final project completion report for the Parrot Tailings Waste Removal Project; or (2) the State’s completion of all Parrot Tailings Waste Removal Project-related activities, including any interim groundwater pumping, other than Project-area monitoring. This five-year period will begin soon; the completion report is due to NRDP February 1, 2024.

If Non-Parrot Tailings Restoration Funded with Leftover of \$20.5M Blacktail Creek Work³ causes:

- Any adverse impacts to the Remedy.
- **Restrictions:**
 - Only applies to a restoration project in the Butte Area One Restoration Plan or any subsequent amendments funded by the Blacktail Creek leftovers. NRDP has not received any leftover funds from the 2020 Butte CD \$20.5M, so there are currently no projects that fit within this category of liability. (DEQ’s Blacktail Creek work has not yet been implemented for various scheduling reasons, including the lack of an EPA-approved repository and BP-AR having not yet installed the Blacktail Creek groundwater control.)
 - Does not apply to the Parrot Tailings Waste Removal Project.
- **BP-AR must bring a claim, defense, or cause of action:** within five years after the later of the following occurrences: (1) the State’s issuance of a final project completion report for the State Restoration project that is the subject of AR’s claim; or (2) the State’s completion of all project-related activities other than monitoring for the State Restoration project that is the subject of AR’s claim.

Other Requirements for Both Liability Reservations:

- BP-AR must incur more than \$1 million in costs before bringing a claim against the State;
- BP-AR has the burden of proof; and
- Reduced concentrations of contaminants in groundwater entering the Subdrain cannot be used as a basis for a claim.

³ The 2020 Butte CD included a combined cleanup and restoration funding arrangement where BP-AR paid \$20.5M to DEQ to perform a portion of the remedy (the Blacktail Creek project). The \$20.5M is a significant overpayment for the remedial work DEQ will do, with the remainder of the \$20.5M to go to repay the restoration funds used to pay for the Parrot Tailings Waste Removal Project. This portion of BP-AR’s liability reservation addresses any future damage (to the Subdrain, BTL, or other remedial structure) caused by future restoration actions implemented with these leftover restoration funds.

- **Data Sharing:** “AR and the State will each timely provide the other with all data and other information received or generated at the BPSOU after the Effective Date that may be relevant to any claim, defense, or cause of action under Paragraph 96.f.” [BP-AR has not provided the State data indicating that the Parrot Tailings Waste Removal Project has caused any damage to the Subdrain or the Butte Treatment Lagoons, as outlined above.](#)