

# SGC

“Successful in improving Animas River water quality”

Sunnyside Gold Corporation  
5075 S. Syracuse Street, Suite 800  
Denver, Colorado 80237  
[www.sgcreclamation.com](http://www.sgcreclamation.com)

June 22, 2020

Katherine Jenkins  
Community Involvement Coordinator  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop Street  
Denver, CO 802002-1129

Via Email

**Re: Bonita Peak Mining District Site Management Plan**

Dear Ms. Jenkins:

Nearly five years after EPA’s Gold King Spill, EPA has finally circulated two chapters<sup>1</sup> of a proposed Bonita Peak Mining District (BPMD) Site Management Plan (SMP) for community stakeholder input. SGC appreciates the opportunity to comment on portions of this long overdue SMP. Having demonstrably improved water quality in the Animas River during its brief five years of mining and concurrent and subsequent reclamation and remediation work, and as a long-time member of the community and the Animas River Stakeholders Group, SGC is uniquely positioned to provide constructive input. For EPA’s SMP to be successful, however, EPA must recognize its own responsibility for BPMD contamination, as EPA’s failure to do so exacerbates EPA’s conflict of interest and continues to confound successful Animas River water quality improvement. EPA must also recognize a degree of stakeholder involvement in remedial decision-making and transparency of data not currently evidenced by the SMP. Without incorporating stakeholders into the remedial decision-making process and affording them the data necessary to meaningfully participate, not only does EPA run afoul of the National Contingency Plan (NCP) and other guidance, but EPA impedes further improvement to Animas River water quality.

---

<sup>1</sup> SGC is aware of EPA’s circulation of only two chapters, chapters 2 and 4, of the draft SMP. For simplicity, SMP will refer to the two chapters as the SMP herein. SGC looks forward to an opportunity to comment on the remaining chapters of the SMP and requests EPA provide all community stakeholders, including SGC, a copy of the complete SMP, or additional chapters, as drafted. These additional chapters, moreover, should include “key steps in the remedial action process, set milestones, specify the documents to be produced for EPA review during the cleanup, and prioritize cleanup activities.” Superfund Community Involvement Handbook (Jan. 2016).

**I. The SMP Fails to Address or Alleviate, but Instead Exacerbates, the Negative Impacts Caused by EPA’s Conflict of Interest and EPA’s Status as a Potentially Responsible Party**

EPA’s conflict of interest at the BPMD has long been recognized. Early on, the State of New Mexico stated:

The BPMD Site is like no other superfund site in existence because a major portion of the contamination at the proposed site was directly caused by...EPA’s misconduct at the Gold King Mine. If the BPMD site is ultimately placed on the NPL, EPA’s own liability for what happened prior to, during, and after the GKM release will affect EPA’s decisions concerning the cleanup of the upper Animas River Basin.<sup>2</sup>

EPA’s conflict of interest is clear, present, and palpable.<sup>3</sup> EPA is a potentially responsible party (PRP) at the BPMD. EPA caused the Gold King Spill and EPA is a defendant in litigation arising out of the Spill. EPA will directly gain or lose financially depending on how the Superfund Site EPA created is administered, and EPA has an incentive to administer the Site in a manner that diffuses its own responsibility and shifts that responsibility elsewhere.<sup>4</sup> Animas River water quality improvement is impeded in such a situation, as is the fair and equitable allocation of responsibility for Site cleanup.

Rather than acknowledging its conflict of interest and implementing measures to ensure that its conflict of interest does not further confound efforts to improve Animas River water quality, EPA does exactly the opposite. EPA’s SMP affirmatively ignores EPA’s conflict of interest and PRP status. The SMP also fails to implement any measures to address the negative impacts EPA’s conflict of interest and PRP status are having on efforts to improve Animas River water quality

EPA’s SMP chapter addressing Stakeholders, Roles, Responsibilities, and Communications has a section addressing PRPs. Conspicuously absent from this section is any mention of EPA. In fact, nowhere is EPA’s PRP status recognized. This is true too with respect to the federal government, which is the primary PRP in the BPMD.<sup>5</sup> EPA’s SMP, moreover, allows EPA to manage the BPMD in whatever manner EPA sees fit.

---

<sup>2</sup> Comments of the N.M. Env’t Dep’t. to EPA’s proposed BPMD site listing (Jun. 13, 2016).

<sup>3</sup> See Letter from Mountain States Legal Foundation to Charles Sheehan, Acting Inspector General for the EPA, Re: Impactful EPA Conflict of Interest at the Bonita Peak Mining District (March 7, 2019); Letter to Charles Sheehan, EPA Office of the Inspector General, from Kevin Roach, SGC, Re: EPA Conflict of Interest – Gold King Spill – Bonita Peak Superfund Site (Feb. 25, 2019); Christian Corrigan, MSLF, *The Complete Colorado, EPA Gold King mine Superfund designation triggers conflict of interest complaint* (March 19, 2019).

<sup>4</sup> As examples of EPA’s conflict of interest confounding Animas River water quality improvement, EPA has failed to run its Gladstone Water Treatment Plant at capacity, EPA has undertaken lengthy and costly studies unnecessary to addressing the BPMD’s environmental condition or cleanup, EPA has engaged in remedial actions having no utility and that are not cost effective, and EPA has failed to conduct necessary environmental, historical, and cultural review of its actions, including compliance with applicable or relevant and appropriate requirements (ARARs). See e.g. SGC Record of Position Memorandum (July 9, 2019).

<sup>5</sup> “Approximately 85% of the land in the Upper Animas Basin is under public ownership. A large number of abandoned orphan mine sites are located on U.S. Forest Service (FS) or U.S. Bureau of Land Management (BLM) property.” Sabrina Forest, U.S. EPA, Upper Animas Mining District Site Background and Activities (Updated May 21, 2011). More than 200 small mines or prospects are on BLM land, including at least 11 warranting remediation. Thomas Nash & David L. Fey, Mine Adits, Mine-Waste Dumps, and Mill Tailings as Sources of Contamination, Chapter E6, in *Integrated Investigations of Environmental Effects of Historical Mining in the Animas River Watershed*, San Juan County, Colorado; U.S. Geological Survey Professional Paper 1651 (Church, S.E., von Guerard, Paul, and Finger, S.E., eds. 2007); see also Sabrina Forest, U.S. EPA, Upper Animas Mining District Site Background and Activities (Updated May 21, 2011); U.S. EPA and BLM, Upper Animas Mining District Mixed Ownership Site Memorandum of

It reiterates EPA's status as lead agency, and repeatedly emphasizes EPA's role in conducting and implementing sitewide activities, overseeing response actions, ensuring consistency with CERCLA, regulations, and guidance, and making long-term remedial action decisions.<sup>6</sup>

EPA's failure to recognize its, and the federal government's, status as a PRP, and to account for its role in contaminating the BPMD, is inexplicable. It evidences EPA's conflict of interest, and ensures that a fair and equitable administration of the BPMD, and further improvement to Animas River water quality, will remain illusory. As EPA asserts, EPA policy ostensibly "promotes the polluter pays principle in which those that cause contamination at a site are responsible for investigation and cleanup."<sup>7</sup> Where the primary polluter cannot acknowledge its own PRP status, investigation and cleanup efforts are skewed toward evasion of the polluter's responsibility rather than improvement of water quality.

A SMP that does not recognize EPA's, and the federal government's, role in BPMD contamination and status as a PRP is fatally flawed. It ignores a fundamental truth. And more, it puts the agency primarily responsible for BPMD contamination in unilateral charge of the BPMD's cleanup.<sup>8</sup>

---

Understanding (Feb. 2013) (recognizing "[t]he Site is a mixed ownership site...at which releases and threatened releases of hazardous substances, pollutants, or contaminants are located partially on, or the source of the release is partially from, both private lands and BLM lands"). Roughly "one thousand mining sites" are on Forest Service land, including "twenty five sites [that] have been considered by others to have significant size and potential for significant environmental degradation." Nash, J.T., *Geochemical Investigations and Interim Recommendations for Priority Abandoned Mine Sites on U.S.D.A. Forest Service Lands, Mineral Creek Watershed* (USGS 1999; Open-File Report 99-170). More than half of the sites/sources listed within the BPMD are owned fully or partially by the federal government. Where the underlying title is federally owned, the government is liable. *See Chevron Mining Inc. v. U.S.*, 863 F.3d 1261, 1274 (10th Cir. 2017). Not only does the federal government own considerable property in OU3, it has exercised considerable decision making regarding hazardous substances, including their disposal, in the area. "The Upper Animas Mining District...includes public lands under the jurisdiction and control of BLM and the USDA-Forest Service." "It is the BLM's responsibility to protect the public lands from undue and unnecessary degradation." BLM, Removal Action Decision, Non-Time Critical Removal Action, Lark Mine and Joe & John Mine (April 2006) (with EPA concurrence). In fact, "BLM has an important role to play as manager/owner of the American Tunnel discharge and a portion of the Grand Mogul mine waste dump." Sabrina Forrest, U.S. EPA, Upper Animas Mining District Site Background and Activities (Updated May 21, 2011). The "American Tunnel is public land managed by BLM." Email from Rob Robinson, BLM Environmental Engineer, Sabrina Forrest, EPA Site Assessment Manager (Oct. 5, 2007). "The Upper Animas Mining District...includes public lands under the jurisdiction and control of BLM and the USDA-Forest Service." BLM, Removal Action Decision, Non-Time Critical Removal Action, Lark Mine and Joe & John Mine (April 2006) (with EPA concurrence). In particular, "the majority of public land in [the Mineral Creek Basin] is administered by the USDA Forest Service." Thomas Nash & David L. Fey, *Mine Adits, Mine-Waste Dumps, and Mill Tailings as Sources of Contamination*, Chapter E6, in *Integrated Investigations of Environmental Effects of Historical Mining in the Animas River Watershed, San Juan County, Colorado*; U.S. Geological Survey Professional Paper 1651 (Church, S.E., von Guerard, Paul, and Finger, S.E., eds. 2007). The Forest Service recognizes its obligation to clean up hazardous waste sites as a "steward [] of the land." *See Notes from the US Forest Service/EPA Region 8 Meeting* (Nov. 9, 1994).

<sup>6</sup> See SMP Draft, Chapter 2, Stakeholders, Roles, Responsibilities, and Communications.

<sup>7</sup> SMP Draft, Chapter 2, Stakeholders, Roles, Responsibilities, and Communications.

<sup>8</sup> See generally SMP Draft, Chapter 2, Stakeholders, Roles, Responsibilities, and Communications.

## II. The SMP Fails to Adopt and Implement Measures Ensuring Stakeholder Involvement in BPMD Decision Making and Data Transparency

### A. Stakeholder Involvement in Decision Making

Involving stakeholders in the remedial decision-making process and ensuring data transparency are required and facilitate Animas River water quality improvement. The Community Involvement Plan (CIP) recognizes this fact, and in particular it expressly addresses planned actions and the need for community involvement in the decision-making process:

Planned actions consist of individual activities that the Agencies intend to implement or continue implementing, as needed, to inform the community of project progress and to *engage the community members so they can actively participate during the cleanup decision-making process.*<sup>9</sup>

The NCP, moreover, requires EPA to provide the public with “appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy.”<sup>10</sup> “Giving the public an opportunity to communicate their concerns, problems, and alternatives can improve the Agency’s decisions and environmental outcomes.”<sup>11</sup>

The SMP, however, fails to meaningfully involve stakeholders in the decision-making process and fails to ensure data transparency. The SMP artificially identifies the BPMD Silverton Planning Group (SPG) as the mechanism for providing project-related input and feedback for the local community. While SGC respects the SPG and anticipates it will provide valuable input into the decision-making process, the SPG’s membership is restricted and its meetings are not always public. EPA cannot limit stakeholder involvement by affording a decision-making role to an entity that excludes most community stakeholders.

EPA’s SMP further identifies the Community Advisory Group (CAG) as an “informational conduit between diverse community interests and U.S. EPA and State and other Federal partners.”<sup>12</sup> The SMP reiterates, however, that the CAG is “the focal point for information exchange,” and is “strictly an advisory group.”<sup>13</sup> Again, not all stakeholders are members of the CAG, so artificially limiting to the CAG a role as information conduit or exchange portends a limited dissemination of information, and its strict advisory capacity suggests no role in decision-making.

With respect to community stakeholders generally, EPA’s SMP notes only that they “may obtain information about the remediation via the EPA updates and reports, quarterly SPG/CAG meetings, or related sources by reviewing the EPA website for these documents.”<sup>14</sup> Although the SMP notes that “[c]ommunity input is welcome and encouraged,” this is a hollow bromide. The SMP provides no mechanism for community stakeholders to provide this input, nor does it address at all how community stakeholders can take part in the decision-making process.<sup>15</sup>

---

<sup>9</sup> BPDM Superfund Site Community Involvement Plan (Sept. 2019) (emphasis added).

<sup>10</sup> 40 C.F.R. § 300.430(c)(2)(ii).

<sup>11</sup> Superfund Community Involvement Handbook (Jan. 2016).

<sup>12</sup> SMP Draft, Chapter 2, Stakeholders, Roles, Responsibilities, and Communications.

<sup>13</sup> SMP Draft, Chapter 2, Stakeholders, Roles, Responsibilities, and Communications.

<sup>14</sup> SMP Draft, Chapter 2, Stakeholders, Roles, Responsibilities, and Communications.

<sup>15</sup> See SMP Draft, Chapter 2, Stakeholders, Roles, Responsibilities, and Communications.

Even with respect to the SPG and CAG, moreover, any decision-making role is illusory. EPA's SMP's Adaptive Management Decision Making contemplates SPG and CAG involvement, whatever that may be, only in the Site Principles Management and Strategic Decision Making stages.<sup>16</sup> No stakeholder involvement appears to be contemplated in the Project Decision Making or Activity Execution stages. With respect to monitoring and assessment, moreover, which EPA's SMP notes is a "key element of Adaptive Management," no community stakeholder involvement, aside from "routine updates on monitoring and assessment activities," is contemplated.<sup>17</sup> With respect to Knowledge Integration, community stakeholder involvement appears to be even more attenuated. EPA will ostensibly "review feedback from the CAG and SPG" (but apparently not other community stakeholders), but there is no explanation how this feedback will be solicited.<sup>18</sup>

Critically, moreover, while the SMP makes several opaque references to encouraging community input or feedback, it provides no explanation how that input will be used or incorporated into the decision-making process. Solicitation of input is useless if that input is given lip service but not truly considered and incorporated into the decision-making process.<sup>19</sup> Community stakeholder input must be used and incorporated into the decision-making process. As stated in the Superfund Community Involvement Handbook, Superfund's community involvement objectives are to:

Explain to community members how EPA considered their comments, what the Agency plans to do, and why a particular decision was made.<sup>20</sup>

EPA's SMP, moreover, notes that to "implement the site strategy," EPA uses "Work Groups."<sup>21</sup> No community stakeholders are involved in these Work Groups.<sup>22</sup> Excluding community stakeholders from the implementation process precludes meaningful public involvement in the remedial decision-making process. As made clear by the CIP, EPA must:

Ensure community members have appropriate opportunities for involvement in a wide variety of site-related activities.

---

<sup>16</sup> See SMP Draft, Chapter 4, Adaptive Management Decision Making.

<sup>17</sup> See SMP Draft, Chapter 4, Adaptive Management Decision Making.

<sup>18</sup> See SMP Draft, Chapter 4, Adaptive Management Decision Making.

<sup>19</sup> As indicative of the necessity to formalize in the SMP public stakeholder involvement in decision-making, in response to predominantly adverse comments regarding EPA's contemplated actions in its Interim Record of Decision (IROD), EPA merely responded that "EPA has not made any significant changes to the original proposal but has provided clarifying information in this IROD based on comments." See Roach Letter to Progress (June 25, 2019); IROD, DS-89,

<sup>20</sup> Superfund Community Involvement Handbook (Jan. 2016).

<sup>21</sup> SMP Draft, Chapter 2, Stakeholders, Roles, Responsibilities, and Communications.

<sup>22</sup> See SMP Draft, Chapter 2, Stakeholders, Roles, Responsibilities, and Communications.

## B. Data Transparency

Data transparency is elemental to meaningful community involvement in decision-making. Without affording the public data, reports, and analyses pertinent to the BPMD, meaningful stakeholder involvement in the remedial decision-making process cannot occur.<sup>23</sup> Accordingly, a stated goal of the CIP is to “[p]rovide community members with accurate, timely and understandable information about site activities....,” and an objective of the Superfund Community Involvement Handbook is to “[k]eep the public well-informed of ongoing and planned activities.”<sup>24</sup>

EPA’s SMP fails to provide a mechanism to accurately, timely, and understandably provide community stakeholders BPMD data or information. In fact, the SMP appears to limit the provision of data to “all Agencies,” as it notes only that “all Agencies have access to the data collected for the year,” and that “EPA, in consultation with CDPHE, USFS, and BLM will review data collected and documents generated during the year.”<sup>25</sup> This arbitrary limitation on the provision of BPMD data and documents is neither appropriate nor countenanced by the NCP, the CIP, or the Superfund Community Involvement Handbook. It does not allow the public opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy, and it impedes Animas River water quality improvement.

### III. Necessary SMP Chapters Two and Four Revisions

Based on the foregoing comments, SGC respectfully requests that EPA revise the SMP to:

- (1) Identify an alternative lead agency and/or implement controlling or mitigating measures in the SMP to eliminate the negative impacts EPA’s conflict of interest and PRP status are having on the BPMD remedial process;
- (2) Identify EPA and the federal government as PRPs;
- (3) Identify a process by which all community stakeholders can be involved in the remedial decision-making process, including the express means by which all community members can be involved;
- (4) Identify a process by which community stakeholders may participate in EPA’s identified Work Groups;
- (5) Identify a process by which community stakeholder input or feedback is used and incorporated into the decision-making process, including a process by which EPA responds to stakeholder comments, input, or feedback; and
- (6) Identify a process that makes all BPMD data, reports, analyses, documents, etc. timely<sup>26</sup> available to the public on EPA’s BPMD website, or some other publicly accessible database.

---

<sup>23</sup> As indicative of the necessity to formalize in the SMP data transparency, EPA has failed to make considerable amounts of BPMD data timely and publicly available, *see* Stoneback Letter to Naftz (March 20, 2020), and EPA has dismissed requests to make all BPMD data publicly available as “editorial in nature,” *See* Stoneback Email to Naftz (April 9, 2020); Naftz Email to Stoneback (April 8, 2020).

<sup>24</sup> Superfund Community Involvement Handbook (Jan. 2016).

<sup>25</sup> *See* SMP Draft, Chapter 4, Adaptive Management Decision Making.

<sup>26</sup> *I.e.*, before decisions are taken that are dependent on the data, reports, or analyses.

Adopting and implementing an SMP that incorporates these concepts will result in further improvements to Animas River water quality. Additionally, consistent with the foregoing comments, SGC requests EPA inform community stakeholders, including SGC, how it used and incorporated these comments into addressing and revising the SMP.

Sincerely,

A handwritten signature in black ink, appearing to read "Gina Myers", is positioned above the printed name.

Gina Myers

Director, Reclamation Operations

cc: Christina Prograss  
Robert Parker  
Doug Naftz  
Will Lindsey  
BPMD Community Advisory Group