

SGC

“Successful in improving Animas River water quality”

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October 21, 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 Final Site Management Plan

Dear Ms. Jenkins:

SGC submits these comments on EPA’s Final Adaptive Management Site Management Plan [(SMP)] for the Bonita Peak Mining District (Sept. 2020).¹ SGC is uniquely positioned to provide constructive input on EPA’s SMP. SGC has demonstrably improved Animas River water quality during its brief five years of mining and concurrent and subsequent reclamation and remediation work. SGC is a long-time member of the community and the Animas River Stakeholders Group, and SGC has an interest in seeing Animas River water quality further improved.

For EPA’s SMP to be successful, however, EPA must 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 in site related decisions and actions, not only does EPA run afoul of the National Contingency Plan (NCP) and other guidance, but EPA impedes Animas River water quality improvement. EPA’s SMP, moreover, must recognize that Animas River water quality can be improved now. Further study is unnecessary and counterproductive. And EPA must recognize the federal governments’ own responsibility for BPMD contamination. EPA’s failure to do so exacerbates EPA’s conflict of interest and confounds efforts to improve Animas River water quality.

¹ SGC’s comments supplement those made on Chapters 2 and 4 of the SMP. See Myers Letter to Jenkins (June 22, 2020) (incorporated herein by reference).

I. EPA's SMP Continues to Exclude Stakeholders and the Community from Meaningful Participation in Site Related Actions and Decisions

EPA's SMP ostensibly recognizes the importance of stakeholder involvement in site related actions and decisions. The SMP provides a "framework for decision-making," and the goal of adaptive management, an integral component of the SMP, "is to coordinate among stakeholders to make decisions." Moreover, a "structured and continuous planning, implementation, and assessment process allows EPA, states, other federal agencies, or potentially responsible parties (PRPs) to make management and resource decisions." And the SMP is designed to ensure "transparent and inclusive decision-making."

But these are just words. The SMP provides no mechanism translating the recognized importance of stakeholder, community, and PRP involvement in decision-making into actual involvement in the decision-making process.

The SMP artificially identifies the BPMD Silverton Planning Group (SPG) as the entity for providing project-related input and feedback for the local community. While SGC respects the SPG and anticipates it will provide valuable input, the SPG's membership is restricted and its meetings are not always public. EPA cannot limit stakeholder involvement by affording the input role to an entity that excludes most community stakeholders.

EPA's SMP further identifies the Bonita Peak Community Advisory Group (CAG) as an "informational conduit between diverse community interests, EPA, and state and other federal partners." Again, not all stakeholders are members of the CAG, so artificially limiting to the CAG a role as information conduit portends a limited dissemination of information. Even with respect to the CAG, however, and emblematic of the SMP's reluctance to actually afford a decision-making role to stakeholders, is the SMP's emphasis that the CAG is "strictly an advisory group." This assessment nullifies any meaningful role in decision-making. As recognized by the CAG:

When the San Juan County Commissioners first asked Governor Hickenlooper to formally request the listing of the BPMD on the National Priority List, one of their stated conditions was for local interests to have a "seat at the table." The CAG and SPG represent many of those interests, and remain continually vigilant that the chair isn't pushed back into the second row.²

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

For instance, the SMP provides that "[t]o manage the workload and implement the Site Strategy," EPA uses "six workgroups." These workgroups are variously responsible for "managing," "planning," and

² Bonita Peak CAG Letter to Progress (June 22, 2020).

“implementing” site actions. No stakeholders or community members (or even the SMP or CAG) are involved in these workgroups. Excluding stakeholders and the community from the management, planning, and implementation process precludes meaningful public involvement in site related actions and decisions.

As made clear by the Community Involvement Plan (CIP), EPA must:

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

This the SMP does not do.

Critically, moreover, while the SMP makes several opaque references to encouraging stakeholder input, it provides no explanation of how that input will be used or incorporated into the decision-making process. Solicitation of input is useless if that input is not truly considered and incorporated into ultimate decision-making.³ Stakeholders must be involved in and their input incorporated into final decision-making. 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.⁴

This the SMP does not do.

Involving stakeholders and the community in the remedial decision-making process is required. The CIP recognizes this fact, and in particular it expressly recognizes the need for active community engagement 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.⁵

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.”⁶

The SMP, however, fails to meaningfully involve stakeholders in the decision-making process.

³ 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,

⁴ Superfund Community Involvement Handbook (Jan. 2016).

⁵ BPDM Superfund Site Community Involvement Plan (Sept. 2019) (emphasis added).

⁶ 40 C.F.R. § 300.430(c)(2)(ii).

II. EPA's SMP Fails to Recognize the Best Option to Further Improve Animas River Water Quality, and Instead Diverts "Considerable Time and Resources" to Pursuing Goals and Objectives Having No Demonstrable Impact on Improving Animas River Water Quality

EPA's SMP resuscitates EPA's fundamentally flawed Site Strategy. That Site Strategy diverts "considerable time and resources" to pursuing goals and objectives having no demonstrable impact on improving Animas River water quality, while at the same time ignoring the best option to further improve Animas River water quality.

It has been abundantly clear for years that the focus of any plan to further improve Animas River water quality must be on the major draining adits in the Cement Creek Basin. EPA's Gladstone Water Treatment Plant should immediately be run at its capacity. It is unconscionable that EPA is only treating "mine discharge from the Gold King Mine," a flawed course of action reinforced in the SMP. Running the Plant at capacity would address the primary polluters, the draining Cement Creek adits, without further delay. Treatment is also the option preferred by the NCP.⁷

No other Site Strategy would provide any comparably demonstrable immediate further improvement to Animas River water quality. As recognized by the CAG, "Treating More Mine Drainages at the Gladstone Treatment Plant [] will lead to immediate water quality improvements."⁸ As recognized by the BPMD Local Planning Group, "[i]n considering the site strategy options presented, the BPMD Local Planning Group now advises EPA to focus on reducing metal contributions in the Gladstone area, and to prioritize mitigating the impacts of the Gold King, Red & Bonita, American Tunnel, and Mogul drainages."⁹

No other Site Strategy would be as cost-effective. Its implementation, predicated on a simple proven solution, would eliminate the unnecessary study, wasteful projects, and unacceptable delay that characterizes EPA's Site Strategy and that is emblematic of EPA's SMP.

Running the Gladstone Plant at capacity would provide an immediate solution to water quality problems in the area and would further the SMP's focus on "early and/or interim actions to address immediate risks." It would also further EPA's adaptive management objectives by providing a baseline against which to measure other potential remedial actions in the Animas River Basin.¹⁰

III. EPA's SMP Perpetuates Unnecessary Study and is Inconsistent with the NCP

EPA's SMP is largely a plan to perpetuate study of the BPMD. It speaks of multiple comprehensive RI/FS's, and of considerable further characterization, studies, analyses, and development of principles. In fact, the SMP itself "was developed as part of a pilot study conducted by [EPA] to demonstrate how [Adaptive Management] can be implemented at a large complex mining site." The SMP completely ignores the fact

⁷ See 42 U.S.C. § 9621(b)(1); 40 C.F.R. § 300.430(f)(1)(ii)(E).

⁸ Bonita Peak CAG Letter to Sopkin (Sept. 21, 2020).

⁹ BPMD Local Planning Group Letter to Progress (Dec. 17, 2019).

¹⁰ See *also* Stoneback Letter to Progress (Dec. 30, 2019) (incorporating exhibits) (incorporated herein by reference).

that the BPMD has already been comprehensively and exhaustively studied,¹¹ and it completely ignores articulating a means of transforming that exhaustive study into concrete measures to further improve Animas River water quality. As recognized by the CAG:

Unlike many other Superfund sites, the BPMD received significant study and remediation over twenty years before its designation. Over the past few years, EPA has committed enormous resources to further study. While that recent work has resulted in better defining current water quality conditions, in assessing risks to aquatic and terrestrial life, and in further characterizing the multiple sources of metals, little has been discovered that wasn't already known in a general sense. The areas of poor water quality and those that could potentially be improved were previously known. The particular metals whose concentrations are problematic were already identified, as were the main mining-related source areas of those metals. We feel that twenty-five years of study has produced enough information to better define water-quality goals, develop a plan to meet those goals, and take immediate steps to significantly improve water quality.¹²

The NCP provides that the “purpose of the remedial investigation (RI) is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives,”¹³ and “[t]he investigative and analytical studies should be tailored to site circumstances so that the scope and detail of the analysis is appropriate to the complexity of site problems being addressed.”¹⁴ More than enough data exists to adequately characterize the BPMD. Site problems are more than capable of being addressed now.

Improving Animas River water quality is not complicated. It requires focus on the Cement Creek adits, operation of EPA's Gladstone Water Treatment Plant at capacity, installation and closure of bulkheads where appropriate, and residual stabilization and closure activities. But more, it requires a recognition that water quality can be fixed now. EPA's SMP misses this fundamental truth.

EPA has allegedly spent in excess of \$75 million at the BPMD, but there “has yet to be meaningful improvements to water quality and aquatic life.”¹⁵ EPA, moreover, is still studying the watershed, and “there's no time frame for when the agency will present its final work plan for a comprehensive cleanup in the Animas River basin.”¹⁶ EPA's SMP, which itself has taken EPA an incomprehensible four years from

¹¹ See e.g. There is More than Sufficient Knowledge to Tackle Bonita Peak Today and Improve Water Quality in the Animas River (Feb. 2018) (available at: <http://www.sgcreclamation.com/reports.html>) (incorporated herein by reference).

¹² Bonita Peak CAG Letter to Sopkin (Sept. 21, 2020).

¹³ 40 C.F.R. § 300.430(d)(1).

¹⁴ 40 C.F.R. § 300.430(b).

¹⁵ The Durango Herald, Five years after Gold King Mine spill, water quality remains a concern (Aug. 5, 2020), available at: <https://durangoherald.com/articles/334236-five-years-after-gold-king-mine-spill-water-qualityremains-a-concern>.

¹⁶ The Durango Herald, Five years after Gold King Mine spill, water quality remains a concern (Aug. 5, 2020), available at: <https://durangoherald.com/articles/334236-five-years-after-gold-king-mine-spill-water-qualityremains->

the designation of the BPMD as a Superfund Site to develop, does nothing to rectify this failure, perpetuating study and delaying indefinitely any further improvement to Animas River water quality.

IV. EPA Has Failed to be Transparent with Information Necessary for Stakeholders to Meaningfully Participate in Site Related Actions and Decisions, Including the SMP

It is indicative of EPA's feigned interest in stakeholder involvement that its SMP, ostensibly out for public comment, is already demarcated as "Final." Stakeholder involvement is without effect if EPA has predetermined its SMP.

EPA's SMP, moreover, was released for public comment without any notice to the public. To SGC's knowledge,¹⁷ nothing on EPA's BPMD website, nor any BPMD press release, nor any BPMD update indicated the SMP had been released for public comment. Nothing, moreover, has been communicated about the time frame for public comment, or how EPA will, if at all, modify the SMP pursuant to public comment. Surreptitious actions do not permit meaningful stakeholder involvement.

EPA, moreover, has failed to provide stakeholders information necessary to meaningfully participate in site related decisions, including the SMP. SGC requested that EPA answer various questions prior to, or contemporaneous with, putting the SMP out for public comment.¹⁸ The information was necessary to meaningfully participate in the SMP process, and it would also aid in ensuring that EPA's SMP implemented actions to actually improve Animas River water quality.¹⁹

Not only did EPA not provide the necessary information, EPA did not respond at all.²⁰ As EPA's SMP recognizes, EPA "is responsible for...sharing information and receiving feedback from the stakeholders." The CIP's goals include "[p]rovid[ing] community members with accurate, timely and understandable information about Site activities that reflects their communication preferences." Stakeholders cannot meaningfully participate in site related actions and decisions, nor are the SMP's provisions for providing information of any use, if EPA fails to provide necessary information, or fails even to respond.

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

The SMP does not implement any measures to control or mitigate the negative impact EPA's conflict of interest and PRP status is having on its actions at the BPMD. 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

a-concern.

¹⁷ SGC understands the Final SMP was provided to the CAG, but SGC is unaware of any effort by EPA to provide the SMP to stakeholders or the public more generally.

¹⁸ See Myers Letter to Jenkins (Sept. 25, 2020).

¹⁹ See *id.*

²⁰ See *also* Myers Email to Jenkins (Oct. 14, 2020).

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.²¹

EPA's conflict of interest is clear, present, and palpable.²² EPA is a 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.²³ 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, and it also ignores the PRP status of the federal government, which is the primary PRP in the BPMD.²⁴ The SMP also fails to

²¹ Comments of the N.M. Env't Dep't. to EPA's proposed BPMD site listing (Jun. 13, 2016).

²² 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).

²³ 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).

²⁴ "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 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

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, moreover, allows EPA to manage the BPMD in whatever manner EPA sees fit. 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.

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, is illusory. As EPA asserts in the SMP, EPA policy "promotes the polluter pays principle, in which those that cause contamination at a site are responsible for investigation and cleanup." Where the primary polluter cannot acknowledge its own PRP status or its own conflict of interest, 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.

VI. EPA's SMP Failed to Address Stakeholder Concerns, Including Alleviating EPA's Conflict of Interest, Recognizing EPA's and the Federal Government's PRP Status, and Implementing Measures to Ensure Meaningful Stakeholder Involvement in Site Related Actions and Decisions

In its comments on EPA's draft Chapters 2 and 4 of the SMP,²⁵ SGC requested that EPA:

- (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;

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).

²⁵ See Myers Letter to Jenkins (June 22, 2020) (incorporated herein by reference).

- (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. timely²⁶ available to the public on EPA's BPMD website, or some other publicly accessible database.

EPA's Final SMP did not address any of these comments. Adopting and implementing an SMP that incorporates these concepts will result in an SMP consistent with the NCP, and an SMP capable of furthering improvements to Animas River water quality. To ignore these issues renders the SMP arbitrary, capricious, and not in compliance with law.

Sincerely,



Gina Myers

Director Reclamation

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

²⁶ *i.e.*, before decisions are taken that are dependent on the data, reports, or analyses.