

# SGC

"Successful in improving Animas River water quality"

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April 05, 2021

Katherine Jenkins  
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1595 Wynkoop Street  
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Via Email

**Re: SGC Comments on EPA's 5-Year Strategic Plan and 2021 Task List and  
SGC Response to EPA's Reply on SGC's Public Interest Questionnaire**

Dear. Ms. Jenkins:

EPA has requested stakeholder and community comment on EPA's Draft Final 5-Year Strategic Plan for the Bonita Peak Mining District (BPMD) and on EPA's BPMD 2021 Annual Task List. SGC's comments on the Strategic Plan and Task List follow, as well as SGC's follow up to EPA's reply on SGC's Public Interest Questionnaire.

Both the Strategic Plan and the Task List reflect a focus on actions having no discernable impact on Animas River water quality. EPA remains fixated on study for study's sake. EPA intends to drill at the Gold Prince, despite universal understanding that there is no purpose to that work. EPA intends to drill behind the outbye Terry Tunnel bulkhead and muck out the Terry Tunnel portal, despite undisputed evidence that the Terry Tunnel bulkheads are operating as intended, and despite the fact that water quality below the Terry Tunnel is better than that above it. EPA intends its 2021 study to focus on the Upper Animas area, despite universal recognition that, to achieve water quality improvements, actions must address the draining adits of Cement Creek. With respect to Cement Creek, EPA plans little work at all. There is no indication that the Red & Bonita bulkhead will be closed or that the Gladstone Water Treatment Plant will be operated to its capacity. EPA's failure to take these simple, sensible steps is allowing thousands of pounds of metals to enter Cement Creek, and is indeterminately delaying Animas River water quality improvement. At the end of EPA's 5-Year Strategic Plan, which will be approximately 10 years after the August 5, 2015 Gold King Blowout and subsequent listing of the BPMD Superfund Site, it is difficult to discern any action that EPA will have taken that will have actually materially improved Animas River water quality.

Improving Animas River water quality is not complicated. It necessitates addressing the draining adits in Cement Creek, operation of EPA's Gladstone Water Treatment Plant at its capacity, installation

and closure of bulkheads where appropriate, and residual stabilization and closure activities. 30 plus years of study at the BPMD is enough. It has more than informed everyone of what needs to be done. Resources must be devoted to actions actually materially improving Animas River quality, and not to actions which have thus far, and despite the expenditure of approximately \$75 million, had “no discernible improvement in the water quality of the Animas River.”<sup>1</sup>

Additionally, SGC is in receipt of EPA’s October 26, 2020 reply to SGC’s September 25, 2020 Bonita Peak Mining District Site Management Plan Public Interest Questionnaire (Public Interest Questionnaire). In its reply, EPA again shuns transparency and stymies efforts by stakeholders and the community to meaningfully participate in Bonita Peak Mining District (BPMD) decision-making. EPA’s actions compromise environmental outcomes, provide no means of assessing the basis or appropriateness of EPA’s actions or contemplated actions at the BPMD, and are contrary to law.

**I. EPA’s 5-Year Strategic Plan and 2021 Task List**

**a. EPA Did Not Involve Stakeholders or the Community in Strategic Plan or Task List Decision-Making, Nor Does the Strategic Plan or Task List Provide for Stakeholder or Community Involvement in Site Decision-Making.**

EPA’s Draft Final 5-Year Strategic Plan was created without any community or stakeholder involvement. As reflected in the Strategic Plan:

The BPMD five-year strategic planning process was initiated in 2020 in parallel with the development of the [Site Management Plan]. As part of this process, the six internal EPA workgroups involved with the Site met individually during planning board meetings to identify near-term and out-year milestones to achieve the site principles (i.e., goals, objectives, and strategies). The milestones were planned and arranged to facilitate the CERCLA process and accommodate anticipated funding and resource allocations on an annual basis. Other BPMD agencies that provided input to this plan include the Bureau of Land Management (BLM), State of Colorado, and USFS.

Conspicuously absent is any community or stakeholder involvement in the Strategic Plan. Despite a request for involvement in the workgroups, EPA did not place any community member or stakeholder on any of EPA’s six internal workgroups. EPA, moreover, sought input only from other BPMD governmental agencies.

The Strategic Plan itself, moreover, is completely silent on stakeholder or community involvement in site decision-making or strategic planning. As provided in the Strategic Plan:

During the annual fall interagency planning meeting, EPA and the other agencies will conduct a review of this plan to assist with planning activities for the following year. Project workgroups will establish a list of tasks to meet established milestones and present them in the annual task list.

...

As part of the adaptive management process, EPA and other agencies will evaluate progress toward meeting milestones and priority actions discussed in the strategic plan on a five-year basis.

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<sup>1</sup> The Durango Herald, Five environmental issues to watch in 2021 (Dec. 31, 2020), available at: <https://durangoherald.com/articles/358888>

Milestones were developed during EPA workgroup planning board meetings in 2020.

The Strategic Plan makes no provision for stakeholder or community involvement in strategic planning or site decision-making. Nor is any stakeholder or community member involved in project workgroups or the annual fall interagency planning meeting. The Strategic Plan, in short, fails to involve stakeholders or the community in strategic planning, task list planning, or site decision-making.

So too was EPA's 2021 Task List developed without any stakeholder or community involvement. The Task List was simply created by EPA and then presented to stakeholders and the community. Emblematic of EPA's failure to involve stakeholders and the community in site decision-making is the repeated references in the Task List to "Update SPG/CAG at monthly meetings" or to "Present at CAG/SPG" meetings. "Updating" or "presenting" is not involving stakeholders or the community in site decision-making. It is simply dictating what is going to be done and presuming acquiescence.

**b. EPA Must Involve Stakeholders and the Community in Site Decision-Making, and its Failure to Do So Renders its Actions Inconsistent with the NCP.**

A core component of the CERCLA Superfund program is stakeholder and community involvement and participation in the Superfund decision-making process. The NCP requires EPA to provide stakeholders and the community 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>2</sup> As reflected in the Community Involvement Plan (CIP), community involvement goals include to:

- Provide community members with *accurate, timely and understandable information* about Site activities *that reflects their communication preferences* and culture.
- *Ensure* community members have appropriate *opportunities for involvement in a wide variety of Site-related activities.*<sup>3</sup>

Similarly, as recognized in the Superfund Community Involvement Handbook, community involvement objectives include to:

- Conduct early, frequent and *meaningful community involvement.*
- *Keep the public well-informed of ongoing and planned activities.*
- Encourage and *enable the public to get involved.*
- *Explain* to community members *how EPA considered their comments, what the Agency plans to do, and why this decision was made.*<sup>4</sup>

During the Senate Committee on the Environment and Public Works, Subcommittee on Superfund, Waste Management, and regulatory Oversight Hearing in August 2017, the U.S. Senator from the State of South Dakota succinctly stated "*EPA should strive to work in a transparent, cooperative fashion with State and local governments and stakeholders* to make certain these sites are effectively cleaned up and can be safely redeveloped for the benefit of the communities in which they are located."<sup>5</sup>

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

<sup>3</sup> EPA, Bonita Peak Mining District Superfund Site Community Involvement Plan (Sept. 2019) (emphasis added).

<sup>4</sup> EPA, Superfund Community Involvement Handbook (March 2020) (emphasis added).

<sup>5</sup> Senate Committee on the Environment and Public Works, Subcommittee on Superfund, Waste Management, and Regulatory Oversight Hearing (August 1, 2017) (emphasis added).

Adaptive management, too, compels EPA to involve stakeholders and the community early and iteratively in the site decision-making process. A fundamental component of adaptive management is a greater level of stakeholder participation in management decisions. EPA is ostensibly using adaptive management at the BPMD as an iterative decision-making process wherein the decision makers plan, implement, evaluate, and adjust, improving project management over time.<sup>6</sup> At the site level, adaptive management “captures stakeholder priorities to inform a transparent and structured decision-making process.”<sup>7</sup> Adaptive management “focuses limited resources on making informed decisions throughout the remedial process.”<sup>8</sup> EPA “has long recognized the importance of early and meaningful stakeholder participation and will continue to enhance community and stakeholder engagement to promote transparency, community support, and more timely cleanup decisions.”<sup>9</sup>

Simply affording stakeholders and the community notice and comment opportunities (or updates and presentations) on isolated actions is **not sufficient**. It is **not** involving stakeholders and the community in a wide variety of site related decisions. It is telling stakeholders and the community what EPA is going to do, feigning interest in the public’s reaction, and then EPA doing what it wants, how it wants, when it wants.

The deficiency of EPA’s involvement of stakeholders and the community in site decision-making is starkly displayed in EPA’s response to comments on the Interim Record of Decision (IROD). EPA determined in its IROD to spend millions of dollars on a plethora of temporary, interim remedial actions with no demonstrated improvement to water quality. EPA determined to do so despite public opposition to the interim actions,<sup>10</sup> and EPA determined to do so while dismissing stakeholder and community input:

EPA has not made any significant changes to the original proposal but has provided clarifying information in this IROD based on the comments.<sup>11</sup>

Similarly, EPA’s finalized Adaptive Management Site Management Plan (SMP) failed to involve stakeholders and the community in site decision-making, and actually rolled back what was already insignificant stakeholder and community involvement in the BPMD decision-making process. Comments on early iterations of the SMP largely focused on the absence of stakeholder and community involvement in decision-making. For example:

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.<sup>12</sup>

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<sup>6</sup> See EPA, Community Outreach Meeting Bonita Peak Mining District Adaptive Management Pilot Program (July 2019).

<sup>7</sup> See EPA, Community Outreach Meeting Bonita Peak Mining District Adaptive Management Pilot Program (July 2019).

<sup>8</sup> EPA, Superfund Task Force Final Report (Sept. 2019).

<sup>9</sup> EPA, Superfund Task Force Final Report (Sept. 2019).

<sup>10</sup> See e.g. Published Comments on Multi Source Proposed Plan for 2018 Interim Record of Decision (Released September 10, 2018); Durango Herald, EPA won’t release public comments about Superfund cleanup until after decision on plan (Aug. 29, 2018); Durango Herald, EPA’s quick-action Superfund plan receives flak from commenters (Sept. 14, 2018); Silverton Standard, EPA interim remedial plan draws criticism (June 28, 2018); Standard, Comments on EPA interim plan (Sept. 13, 2018).

<sup>11</sup> IROD, RS-23.

<sup>12</sup> Myers Letter to Jenkins (Oct. 21, 2020).

[W]hile 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.<sup>13</sup>

[T]he 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 “implementing” site actions. No stakeholders or community members (or even the [SPG] 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.<sup>14</sup>

As described in the plan, the Site Principles are developed by the different agencies, and local interests can then comment. We do not believe that this arrangement can be construed as a “seat at the table”, a concept that San Juan County, Silverton and others have insisted on since this site was first considered for inclusion on the National Priorities List. We are the ones who live with the landscape once the site work is complete and should have more input as to what that landscape should look like and how our tax dollars are spent.<sup>15</sup>

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. This is our main concern with these chapters.<sup>16</sup>

EPA’s finalized SMP provided no more clarity, nor concrete opportunities (*e.g.* participation on workgroups), for stakeholder and community involvement in site decision-making.<sup>17</sup> In fact, EPA removed language found in a draft chapter of the SMP that provided for the barest of stakeholder involvement. Specifically, EPA deleted a sentence in the draft that stated “[t]he CAG will attend planning meetings or ad-hoc meetings, as determined necessary, with the Federal and State Agencies to discuss progress and status of response actions at the site,”<sup>18</sup> taking even that minimal seat at a table away from the Bonita Peak Community Advisory Group (CAG).

No changes based on community comments. Regression in stakeholder and community involvement in the SMP. This is the opposite of stakeholder and community involvement in site decisions. It is being repeated in the Strategic Plan and Task List where no stakeholder or community involvement was afforded in their formulation or reflected in their provisions. This failure to involve stakeholders and the community in site decisions violates the NCP. It does not allow stakeholders and the community a

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<sup>13</sup> Myers Letter to Jenkins (Oct. 21, 2020).

<sup>14</sup> Myers Letter to Jenkins (Oct. 21, 2020).

<sup>15</sup> Bonita Peak CAG Letter to Jenkins (Oct. 26, 2020).

<sup>16</sup> Bonita Peak CAG Letter to Progress (June 22, 2020).

<sup>17</sup> See U.S. EPA, Adaptive Management Site Management Plan for the Bonita Peak Mining District Final (Nov. 2020).

<sup>18</sup> Draft SMP Section 2.4.2, Stakeholders, Roles, Responsibilities and Communications, Community Advisory Group.

necessary role in ensuring that “sites are effectively cleaned up and can be safely redeveloped for the benefit of the communities in which they are located.”<sup>19</sup>

It also compromises environmental outcomes. Stakeholder and community involvement in site decision-making improves environmental outcomes. “Giving the public an opportunity to communicate their concerns, problems, and alternatives can improve the Agency’s decisions and environmental outcomes.”<sup>20</sup> Local stakeholders, including SGC and the Animas River Stakeholder’s Group (ARSG),<sup>21</sup> have a long history of taking actions that have demonstrably improved Animas River water quality. SGC’s activities, including major reclamation and remediation work, have been a significant positive for the environment, demonstrably improving Animas River water quality.<sup>22</sup> With respect to the Bonita Peak CAG:

Some members of the CAG and [Silverton Planning Group] have twenty-five years of experience with water quality and mine remediation in the Animas Basin. As far as we can tell, currently only one EPA person who is heavily involved with the site has more than four years of direct experience in the Animas Basin. EPA should welcome the use of long-term, local experience.<sup>23</sup>

EPA’s failure to involve stakeholders and the community in the Strategic Plan and Task List compromises environmental outcomes.

**c. EPA’s Planned Actions Have No Discernable Impact on Improving Animas River Water Quality.**

EPA’s actions at the BPMD have been seriously flawed. \$75 million spent should not translate into no meaningful improvements to water quality and aquatic life. But EPA’s planned actions, dictated to rather than decided in concert with stakeholders and the community, do nothing to suggest environmental outcomes will improve.

EPA’s planned actions generally consist of additional study, including such actions as “OU3 well drilling,” which presumably means the “[i]nstall[ation] [of a] groundwater well at the Gold Prince Mine,” and, at the Terry Tunnel, opening its portal, inspecting the outbye bulkhead, and addressing adit conveyance. The apparent goal of EPA’s continued study is to understand “[h]ow groundwater moves through mine workings” and “impacts surface water.”<sup>24</sup>

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<sup>19</sup> Senate Committee on the Environment and Public Works, Subcommittee on Superfund, Waste Management, and Regulatory Oversight Hearing (August 1, 2017) (emphasis added).

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

<sup>21</sup> See e.g. Animas River Stakeholder Group, December 2015, Background Summary Metal Loading in Upper Animas River Basin.

<sup>22</sup> See e.g. Steven Lange, Knight Piesold, Animas River Water Quality 1985 – Present Quantification of the Positive Effects of SGC’s Mining and Reclamation (June 20, 2019), available at: [http://www.sgcreclamation.com/reports/HistoricZincEval\\_10.16.19.pdf](http://www.sgcreclamation.com/reports/HistoricZincEval_10.16.19.pdf); Steven Lange, Knight Piesold, *Evaluating the Effectiveness of Sunnyside Gold Corporation’s Reclamation* (Presented at the 13<sup>th</sup> International Conference on Mine Closure, Perth, Australia (Sept. 2019)), available at: [http://www.sgcreclamation.com/reports/S\\_Lange\\_Evaluating\\_the\\_effectiveness\\_of\\_Sunnyside\\_Gold\\_Corporations\\_reclamation.pdf](http://www.sgcreclamation.com/reports/S_Lange_Evaluating_the_effectiveness_of_Sunnyside_Gold_Corporations_reclamation.pdf).

<sup>23</sup> Bonita Peak CAG Letter to Progress (June 22, 2020).

<sup>24</sup> U.S. EPA, 2020 Year in Review and Plan for 2021 (Dec. 2020) (presented at the December 3, 2020, Bonita Peak CAG meeting), available at: <https://semspub.epa.gov/work/08/100009164.pdf>

EPA's Strategic Plan and Task List reflect this preoccupation with unnecessary study. The Strategic Plan identifies a plethora of remedial investigations (RI), and these RI's are only further expanded in the Task List. In fact, the Task List identifies *twenty* separate RI undertakings.

EPA's planned actions come without any satisfactory explanation of their need, for which there is often none, and without any examination of the comprehensive study and analysis that has already occurred at the BPMD, which already shows a clear path to improved Animas river water quality. An action is arbitrary and capricious if EPA fails to examine the relevant data and articulate a satisfactory explanation for its action.<sup>25</sup>

**i. EPA Must Recognize that Further Study is Unnecessary and not Cost Effective, that Improving Animas River Water Quality is Not Complicated, and That it Can be Accomplished Now.**

The thrust of EPA's planned actions is study. As dictated by EPA, its "Planned Remedial Investigations" include "long-term sampling," finalizing a "sitewide RI [Remedial Investigation] work plan," "RI data collection," [p]otential treatability study," an addendum to the Human Health Risk Assessment, and "infiltration and seepage studies." An ostensible goal of these studies is to understand "[h]ow groundwater moves through the mine workings."<sup>26</sup>

The Bonita Peak area has already been studied exhaustively. Decades of extensive study and analysis has comprehensively covered the area's geology, geochemistry, hydrology, natural and anthropogenic sources of metals loading, historic and modern mining, flora and fauna, and treatment methodologies.<sup>27</sup>

EPA cannot close its eyes to this already existing comprehensive analysis of the Bonita Peak area. EPA is to "consider all existing data," from appropriate and relevant sources, "including state and tribal partners, other federal agencies, local entities and facility records." EPA must recognize "that there are significant opportunities to leverage existing data to develop more robust and realistic [Conceptual Site Models] and to achieve remedial investigation cost savings." Data from previous investigations and "every site related document, regardless of its intended audience or purpose of creation should be assessed for information that contributes."<sup>28</sup>

EPA, however, fails to provide any indication that it has considered this existing comprehensive study and analysis in arriving at its planned actions, and EPA fails to provide any rationale or any objective, scientific evidence supporting any need for further study.

The existing comprehensive study and analysis of the Bonita Peak area demonstrates that improving Animas River water quality can be done now. It requires addressing the draining adits in Cement Creek, operation of EPA's Gladstone Water Treatment Plant at its capacity, closure and installation of bulkheads where appropriate, and residual stabilization and closure activities.

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<sup>25</sup> See e.g. *Emhart Indus., Inc. v. New England Container Co., Inc.*, 274 F. Supp. 3d 30, 49 (D. R.I. 2017).

<sup>26</sup> U.S. EPA, 2020 Year in Review and Plan for 2021 (Dec. 2020) (presented at the December 3, 2020, Bonita Peak CAG meeting), available at: <https://semspub.epa.gov/work/08/100009164.pdf>

<sup>27</sup> 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/bonita.pdf>.

<sup>28</sup> Smart Scoping for Environmental Investigations Technical Guide (Nov. 2018).

But more, it requires a recognition that water quality can be fixed now. 30 plus years of study is enough. Additional study, as even EPA recognizes, will just result in it “tak[ing] longer to address Upper Cement Creek, which is the primary source of metals in the watershed.”<sup>29</sup>

EPA’s contemplated study would, at great cost and indeterminate delay, achieve nothing.<sup>30</sup> Focusing on areas of insignificant metals loading (e.g. the Upper Animas) achieves nothing. Water quality solutions should not be sacrificed to satisfying idle intellectual curiosity. The internal wanderings of water, moreover, are irrelevant to a solution.

Understanding how water arrives at Cement Creek, or elsewhere, will not change the fact that it does arrive – nor will the purported enhanced understanding improve water quality.<sup>31</sup>

Where the water comes out, what its quality and quantity is, and how to remediate any concerns that water might present are what need to be known, *and they are well known*.

There is, moreover, “no time frame for when the agency will present its final work plan for a comprehensive cleanup in the Animas River basin,”<sup>32</sup> but EPA has suggested it could be decades. For instance, EPA Region 8 representatives have stated that “this mining district will be the source of many forthcoming papers and a lot of research,”<sup>33</sup> that Bonita Peak will be a “very long term project”<sup>34</sup> or a “20 year project.”<sup>35</sup> As recognized by the Bonita Peak CAG, EPA may be more concerned with following the process than focusing on the “big picture, and the best and most efficient ways to improve environmental conditions” at the site, and “[we] do not believe that this site needs to be a thirty-year project...”<sup>36</sup>

Even EPA recognizes its failings, noting that “[i]t is a valid criticism of the EPA—taking far too long in the studies before we start to take response actions[.]”<sup>37</sup> EPA’s perpetuation of study is becoming a multi-decade leviathan. It must be brought back to reality.

An overriding goal of CERCLA is to provide the government with efficient and effective tools to effectuate the prompt cleanup of contaminated properties. The ultimate goal of the NCP in the remedial investigation context is to cost-effectively gather only that data necessary to identify remedial alternatives tailored to the site, and then to implement remedial actions as soon as possible.<sup>38</sup> As clearly stated in the Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA:

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<sup>29</sup> EPA, *Bonita Peak Mining District Adaptive Management Site Strategy Workshop 12* (Nov. 2019).

<sup>30</sup> See e.g. SGC Record of Position and Written Comments on UAO Modified Statement of Work, Work Plan, and Field Sampling Plan (July 9, 2019).

<sup>31</sup> Enviromin, *Expert Report in Response to Statement of Work, Unilateral Administrative Order of Remedial Investigation, Bonita Peak Mining District Superfund Site* (April 2018).

<sup>32</sup> 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>.

<sup>33</sup> Silverton Standard, *EPA seeks new tech for mine cleanup* (July 27, 2017) (quoting the Project Manager).

<sup>34</sup> Indian Country Today, *Navajo Nation seeks \$160 million in damages for Gold King Mine Spill* (Dec. 19, 2016) (quoting the Project Manager).

<sup>35</sup> Silverton Standard, *EPA: 35 mining sites pose a risk* (Oct. 19, 2017) (quoting the Project Manager); Silverton Standard, *EPA plots early response, seeks sludge site* (March 2, 2017) (quoting the Project Manager).

<sup>36</sup> Bonita Peak CAG Letter to Jenkins (Oct. 26, 2020).

<sup>37</sup> Denver Post, *EPA crews working on Gold King cleanup find elevated lead threatening birds, animals and, potentially, people* (October 19, 2017).

<sup>38</sup> 40 C.F.R. § 300.430(b), (d)(1).

The objective of the RI/FS process is not the unobtainable goal of removing *all* uncertainty, but rather to gather information sufficient to support an informed risk management decision regarding which remedy appears to be most appropriate for a given site.<sup>39</sup>

More than enough data exists to adequately characterize the BPMD. Site problems are more than capable of being addressed now.

EPA recognizes the importance of expediting cleanup, of reassessing its investigative objectives, and of transitioning from study to remedial action. It must capitalize on this recognition. The Superfund Task Force Final Report lists expediting cleanup and remediation as its number one goal. The first strategy discussed is to evaluate and accelerate bringing National Priority List (NPL) sites to completion, by reprioritizing resources to focus on getting to the remedial action phase, completion of construction, and deletion from the NPL. The second strategy is to promote adaptive management at complex sites. Under an adaptive management strategy, which is ostensibly employed at the BPMD, regions are encouraged to consider greater use of early action, and the characterization of data in support of early action can be used to “reduce the remedial investigation and feasibility study duration and cost.”<sup>40</sup> EPA plainly states, moreover, that the scope of all planned remedial investigations should be reviewed to ensure that they are critical to inform remedy selection:

Systematic project planning is a process that requires the core project team to convene during key milestones in the [remedial investigation and feasibility study] RI/FS schedule in order to update the CSM and project risk register, and to review the sequence and scope of upcoming RI/FS tasks to determine if they are still appropriate or need modification.<sup>41</sup>

There is simply no utility in additional study. Sufficient knowledge exists now to implement a remedial action that will demonstrably and immediately further improve Animas River water quality. Continued study indeterminately delays or denies Animas River water quality improvement, renders cost-effective remediation an impossibility, and allocates resources away from known fixes to known problems to the unnecessary pursuit of answers to irrelevant questions.

**ii. EPA’s Planned Action at the Gold Prince is Unjustified and Unnecessary, Risks Impacting a Site of National Historic and Cultural Significance, and Diverts Resources From Actions Actually Improving Water Quality.**

With respect to the Gold Prince, there is no justification for EPA’s planned action, and EPA provides none. A reasonable search of the administrative record yields only one sentence’s worth of information on placing a monitoring well at the Gold Prince, in the form of a 2017 scoping letter by EPA’s contractor, CDM Federal Programs (CDM Smith).<sup>42</sup> Based on this sentence, a monitoring well is allegedly needed to

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<sup>39</sup> Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA (Oct. 1988).

<sup>40</sup> Superfund Task Force Final Report (Sept. 2019).

<sup>41</sup> Smart Scoping of an EPA-Lead Remedial Investigation / Feasibility Study Fact Sheet (Oct. 2020).

<sup>42</sup> CDM Smith, Bonita Peak Mining District Remedial Investigation: 2017 groundwater scope for Sunnyside Mine Pool Study Area (March 3, 2017).

evaluate heads and water in this area and behind the innermost bulkhead. What EPA ignores, however, is the considerable existing study and analysis demonstrating no need for any action at the Gold Prince.<sup>43</sup>

As demonstrated in that analysis, accessing the Gold Prince bulkhead “would serve little to no purpose” and “no evaluation” is needed.<sup>44</sup> The bulkheads are performing as intended and are structurally sound. They are reducing the oxidation rate for sulfide minerals in the water, the outbye bulkhead is preventing near surface water from freely exiting the portal, and the inbye bulkhead was designed to prevent any flow path back from the Sunnyside Mine in the event of any blockage by any future fall of ground.<sup>45</sup> Any water interior to this inbye bulkhead, moreover, would be negligible, and would have no impact, and certainly no calculable or discernable impact, on groundwater movement through the interior workings or to surface water. The Gold Prince, moreover, was never scored pursuant to the Hazard Ranking System (HRS), meaning it has never been demonstrated to be a source of any hazardous substance. As perhaps best summed up by a Colorado Division of Reclamation, Mining and Safety (CDRMS) representative, a data point at the Gold Prince would be “inconsequential.”<sup>46</sup>

The Gold Prince Mine, Mill, and Aerial Tramway, moreover, are on the National Register of Historic Places. The Gold Prince is a “representative large-scale industrial mining and milling complex from the principal period of hard-rock mining in Colorado.”<sup>47</sup> The Cultural Resource Survey recommendation associated with the Gold Prince shows that the site has high historic and cultural value, but low potential remedial environmental benefit, and the recommendation emphasized that the need to protect the historical and cultural values was more significant than any minimal benefit to the environment from remediation.<sup>48</sup> As noted by the National Trust for Historic Preservation, moreover, “the San Juan Mountains are now home to a trove of intact, nationally significant historic sites, including boarding houses, mills, trams, and former residences. Together they make a wild chapter in American history come alive for hundreds of thousands of visitors every year.”<sup>49</sup> This situation resulted from a “strategy to rely on historic preservation as an economic development engine.”<sup>50</sup>

EPA has not shown that it has conducted any historical and cultural review, or otherwise shown that its work would comply with Applicable or Relevant and Appropriate Requirements (ARARs), including the National Historic Preservation Act (NHPA), with respect to its planned action at the Gold Prince. This failure includes making no showing of what adverse effects its action would have, and what alternatives to the action, or mitigation measures, might avoid those adverse effects. EPA has not made this showing despite the fact that the State of Colorado Historical Preservation Officer has noted that “we are not aware that CERCLA exempts the EPA from completing application requirements of Section 106 of the NHPA,”

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<sup>43</sup> See e.g. SRK, Assessment of Integrity of Outbye Terry Tunnel and Gold Prince Bulkheads (Feb. 4, 2019); SGC, Record of Position Memorandum (July 9, 2019).

<sup>44</sup> SRK, Assessment of Integrity of Outbye Terry Tunnel and Gold Prince Bulkheads (Feb. 4, 2019).

<sup>45</sup> SRK, Assessment of Integrity of Outbye Terry Tunnel and Gold Prince Bulkheads (Feb. 4, 2019).

<sup>46</sup> Kirstin Brown, CDRMS, Speaking at January 28, 2021, Bonita Peak CAG Meeting.

<sup>47</sup> History Colorado, Gold Prince Mine, Mill, and Aerial Tramway, available at: <https://www.historycolorado.org/location/gold-prince-mine-mill-and-aerial-tramway>; see also SGC, Record of Position Memorandum (July 9, 2019).

<sup>48</sup> Durango Archaeological Consultants, *A Cultural Resources Assessment of the Gold Prince Mine, San Juan County, Colorado* (August 2, 1996).

<sup>49</sup> Kate Siber, *Ghost of a Chance: Animas Forks, Colorado: Learn how the residents of Silverton, Colorado beat the odds to rescue a long-abandoned mining town*, Preservation Magazine (Spring 2015).

<sup>50</sup> Clarion Associates of Colorado, LLC, *The Economic Power of Heritage and Place: How Historic Preservation is Building a Sustainable Future in Colorado*, prepared for the Colorado Historical Foundation (Oct. 2011).

and has requested that EPA “immediately consult with [the State Historic Preservation Office] and the Advisory Council on Historic Preservation to ensure compliance with Section 106 of the NHPA.”<sup>51</sup>

EPA’s planned action at the Gold Prince is unjustified, unnecessary, and risks impacting a site of national historic and cultural significance. It is an action not consistent with the NCP, and makes no sense.

While EPA is planning to take this “inconsequential” action at the Gold Prince, it is failing to take any further action at the Red & Bonita, where actions could be taken that would actually improve water quality. As recognized by the Bonita Peak CAG:

Given that the Red & Bonita is easily the biggest untreated source of metals in the basin, when will you further test/shut valve on the Red & Bonita? Shouldn’t this be a top priority?<sup>52</sup>

EPA has no concrete next step planned at the Red & Bonita, except to complete the documentation of its 2020 study.<sup>53</sup> In 2020, EPA conducted a study of the Red & Bonita bulkhead. That study confirmed that the bulkhead was functioning as intended. During that study, EPA also treated the Red & Bonita discharge in EPA’s Gladstone Water Treatment Plant, confirming the ease by which this additional metals source could be treated in the Treatment Plant. The bulkhead valve, installed back in 2014, remains open. The Red & Bonita’s discharge remains untreated. Easy steps to address “easily the biggest untreated source of metals in the basin” are being ignored as resources are allotted to “inconsequential” actions.

**iii. EPA’s Planned Action at the Terry Tunnel is Unjustified and Unnecessary, and Risks Negatively Impacting Water Quality.**

EPA’s planned action at the Terry Tunnel makes no more sense than that at the Gold Prince. EPA has again provided no justification for the planned action,<sup>54</sup> and EPA has ignored significant information demonstrating no need for any action at the Terry Tunnel.

Independent expert analysis has demonstrated that the Terry Tunnel bulkhead is “stable and there is no appreciable risk of catastrophic failure.” The bulkhead is “currently performing in accordance with [its] design purpose of impounding water with minimal leakage.” In fact, the Terry Tunnel bulkheads “have been successfully performing in accordance with the design...[for] 22 years.”<sup>55</sup> With respect to the potential excavation of the bulkhead, moreover, “physical access to the bulkhead[] is not necessary. The

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<sup>51</sup> Letter from Steve Turner, Colorado State Historic Preservation Officer to Gregory Sopkin, EPA Region 8 Regional Administrator; *see also* Durango Herald, *Is EPA protecting mining history around Superfund site?* (June 9, 2019).

<sup>52</sup> BPMD CAG, Questions for EPA from the Bonita Peak CAG (Jan. 11, 2021).

<sup>53</sup> That EPA is still documenting its study of the Red & Bonita is particularly frustrating. SGC offered to conduct the sampling related to the Red & Bonita bulkhead test, including “a full suite of water quality parameter analyses.” SGC committed to making its “sampling data available to all as soon as reasonably practicable,” and anticipated “turning this data around approximately 3 to 6 weeks after the respective sampling [was] conducted.” As recognized by SGC, “[t]his sampling data may be useful in characterizing various environmental aspects of Cement Creek and in improving Animas River water quality.” EPA effectively refused to allow SGC to conduct the sampling. *See e.g.* Maley Letter to Progress and Hou (July 7, 2020); Maley Letter to Progress and Hou (Aug. 28, 2020).

<sup>54</sup> The Terry Tunnel is included in the list of 18 sites to be addressed for mine portal, mining influenced water (MIW), discharges in the 2019 IROD. The “Detailed Description of Selected Remedy” does not address any of the sites individually whatsoever. It provides a little over one page of general possible actions that may or may not be performed at any given site, stating that for the 18 sites of MIW discharges, “components implemented at each mining related source will be chosen on a location by location basis.” Interim Record of Decision for Bonita Peak Mining District Superfund Site, Operable Unit 1 (2019).

<sup>55</sup> SRK, Assessment of Integrity of Outbye Terry Tunnel and Gold Prince Bulkheads (Feb. 4, 2019).

risk of disturbing the tunnel and bulkhead (by removing backfill from portal areas back to the bulkhead) outweighs the benefit of observing the outbye face of the Terry Tunnel bulkhead.”<sup>56</sup>

EPA’s own experts similarly concluded that engineered concrete bulkheads strategically placed and well-constructed pose no risk of failure.<sup>57</sup> As recognized in a Deere & Ault report commissioned by EPA:

Water impounding concrete bulkheads installed at strategic locations in draining and discharging underground mine workings have the potential to flood the workings and create a mine pool that will eventually establish a ground water system with water table and flow paths similar to the pre-mining system. Saturation of sulfide minerals in the flooded workings and country rock will create relatively anoxic conditions and limit the generation of ARD. Bulkhead installation eliminates rapid and continuous collection and discharge of ground water through open mine workings and minimizes direct discharge of ARD from mine portals.... Bulkhead installation in mines that are determined to be good candidates has the potential to significantly reduce metal loading to receiving streams.<sup>58</sup>

In targeting the Terry Tunnel, moreover, EPA is targeting a site that, by EPA’s own estimation, does not require any remediation. The Final Focussed Feasibility Study Report (May 2018) (FFS) describes available water quality data upstream (station A39) and downstream (station EG6) of the Terry Tunnel discharge.<sup>59</sup> Metals concentrations in surface water downstream of the Terry Tunnel are less than those upstream of the Terry Tunnel, with the exception of zinc on September 30, 2015, and arsenic, which is below detection limits for all measurements. Based on these data, the FFS concludes:

These results indicate that the Terry Tunnel did not meaningfully contribute to the metals concentrations in Eureka Gulch at these points in time.

EPA itself recognizes that “[t]he Terry Tunnel does not currently discharge a significant amount of water,”<sup>60</sup> and EPA does not identify the Terry Tunnel as a “principal discharging adit[.]”<sup>61</sup>

EPA’s planned action at the Terry Tunnel, moreover, instead of showing any discernable environmental benefit, actually raises the spectre of negatively impacting water quality. Excavation of the portal increases exposure of mine waste or mineralized rock to oxygen and water, which could result in acid rock drainage.<sup>62</sup> EPA has not shown that it has considered these environmental consequences, or any unnecessary or undue degradation, caused by its planned action at the Terry Tunnel, or that its planned action otherwise complies with ARARs. EPA’s excavation of the portal, moreover, or installation of a

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<sup>56</sup> SRK, Assessment of Integrity of Outbye Terry Tunnel and Gold Prince Bulkheads (Feb. 4, 2019); see also Stephen Phillips, Mining Geotechnical & Grouting Inc., *The American Tunnel Bulkhead Stability Analysis Report* (Feb. 2018); *The Engineered Concrete Bulkheads Installed by SGC* (Feb. 2018); Letter from Steven Lange, Knight Piésold, to Marcie Bidwell, Mountain Studies Institute, *Sunnyside Gold Corporation Evaluation of the Success of Its Bulkheading and Remedial Activities* (August 24, 2018); SGC, Record of Position Memorandum (July 9, 2019).

<sup>57</sup> Deere & Ault, *Red and Bonita Mine Bulkhead Closure Evaluation*, at 5; D&A Job No. CG-0628.001.00 (March 24, 2016).

<sup>58</sup> Deere & Ault, *Red and Bonita Mine Bulkhead Closure Evaluation*, at 5; D&A Job No. CG-0628.001.00 (March 24, 2016).

<sup>59</sup> See also SGC Comments on EPA’s Interim Record of Decision (June 25, 2019).

<sup>60</sup> Modified Work Plan (May 2019).

<sup>61</sup> Modified Work Plan (May 2019).

<sup>62</sup> SGC Comments on EPA’s Interim Record of Decision (June 25, 2019).

monitoring well, could destabilize the hillside, potentially impacting an access route, wetland area, and historic tram tower.

## **II. EPA Must Provide Stakeholders and the Community the Information Necessary for them to Meaningfully Participate in Site Decision-Making, and the Information that is Necessary to Justify EPA's Planned Actions.**

In its Public Interest Questionnaire, SGC asked EPA several questions and requested information fundamental to meaningful stakeholder and community involvement in site decision-making.<sup>63</sup> This information is necessary for stakeholders and the community to analyze the basis and appropriateness of EPA's actions and contemplated actions at the BPMD, and to improving environmental outcomes. For instance, SGC asked for information on how EPA has spent money at the BPMD; how EPA allocates money, and in what amount, to various actions, projects, tasks, or items at the BPMD; how stakeholders and the community can participate in that allocation process; what studies or investigations EPA has conducted at the BPMD; what sites within the BPMD EPA anticipates delisting in the near term, and how EPA goes about the delisting process; how EPA will clarify the boundaries of the 48 listed mine sites in the BPMD; and what actions, items, or categories of costs EPA is at least tentatively considering spending money on as it moves forward at the BPMD.

This effort by SGC to acquire information necessary to meaningfully participate in site decision-making was precipitated in part by reports, confirmed by EPA, that EPA has spent approximately \$75 million at the BPMD, but there "has yet to be meaningful improvements to water quality and aquatic life."<sup>64</sup>

EPA effectively provided no response to SGC's Public Interest Questionnaire. Referencing pending litigation, EPA said it "does not intend to respond to SGC's questionnaire on a question-by-question basis."<sup>65</sup> EPA cites absolutely no basis for using litigation as a means to preclude stakeholders and the community from meaningfully involving themselves in remedial decision-making or for denying stakeholders and the community the information necessary to do so. Similarly, when SGC sought information relevant to EPA's construction and operation of an interim sludge management facility at the BPMD, EPA provided none of the requested information, calling it "not necessary."<sup>66</sup>

There is no justification for EPA's actions. EPA's actions are inconsistent with the NCP's community involvement and public participation directives, provide no basis, rationale, or means of evaluating the sense or cost-effectiveness of EPA's actions or contemplated actions at the BPMD, and delay or deny improvement to Animas River water quality. Stakeholder and community involvement in the Superfund decision-making process is required by law. Information transparency and stakeholder and community engagement are not hollow bromides, but imperatives necessary to improving Animas River water quality.

CERCLA, moreover, is clear that EPA "shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the [EPA] will base the selection of remedial actions and on which judicial review of remedial actions will be based."<sup>67</sup>

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<sup>63</sup> See Myers Letter to Jenkins, Bonita Peak Mining District Site Management Plan Public Interest Questionnaire (Sept. 25, 2020).

<sup>64</sup> 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-waterqualityremains-a-concern>; see also The Durango Herald, Five environmental issues to watch in 2021 (Dec. 31, 2020), available at: <https://durangoherald.com/articles/358888>

<sup>65</sup> Jenkins Letter to Myers (Oct. 26, 2020).

<sup>66</sup> Jenkins Letter to Roach (Nov. 20, 2019).

<sup>67</sup> 42 U.S.C. § 9613(k)(2).

An important function of the administrative record is to facilitate public involvement, and administrative record procedures are closely related to procedures for public participation.<sup>68</sup>

The NCP directs that “documents containing factual information, data and analysis of the factual information, and data that may form a basis for the selection of a response action”<sup>69</sup> go into the administrative record. This includes information justifying remedial investigations. Since EPA is adamant that remedial investigations must be performed to inform the analysis of the viability of alternative remedial actions leading to the selection of a preferred remedial action,<sup>70</sup> EPA must provide documentation of the reasons for performing specific investigations, and allow stakeholders and the community an ability to weigh in on the investigations EPA professes the desire to perform at the BPMD.

The NCP, moreover, directs that each remedial action selected must be cost-effective, and a remedy will be cost-effective if its costs are proportional to its overall effectiveness.<sup>71</sup> Costs appear over the lifecycle of the project and accurately accounting for the costs and providing that information to stakeholders and the community is a primary objective of project management, without which informed decision-making cannot occur.<sup>72</sup> Financial data regarding what has been spent at any given juncture of a project is key to forming a basis for the analysis of the next steps towards completing a project, as well as to understanding and estimating future costs, and to evaluating cost-effectiveness. The U.S. Government Accountability Office (GAO) defines cost estimation as “the summation of individual cost elements, using established methods and valid data, to estimate the future costs of a program, based on what is known today.”<sup>73</sup> It is the Remedial Project Manager’s responsibility, moreover, to be “aware of, in control of, and responsible for site charges.”<sup>74</sup>

EPA has in its possession cost information. At a January 28, 2021 BPMD CAG meeting, EPA confirmed that it has spent approximately \$75 million at the BPMD, and that approximately \$44.5 million of that was spent in response (including treatment) to the release at the Gold King Mine that EPA caused. EPA further confirmed that it has spent approximately \$115,000 at the Natalie/Occidental. In each case, this disclosure shows EPA can demonstrate what it has spent at particular sites within the BPMD. EPA further noted that it tracks costs by contract at the BPMD, and indicated that it could track costs by site or other means moving forward. EPA must track costs by particular site or potential source area. Each site or potential source area is unique, and each site or source area may require its own type or scope of response action.

EPA, however, refused to provide any cost information for its past or contemplated actions in response to SGC’s request for such information. In fact, while EPA’s October 2020 Response claimed that “[a] number of publicly available documents provide information responsive to SGC’s questions,” only one publicly available document specifically linked by EPA in its Response included actual cost data.<sup>75</sup>

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<sup>68</sup> See 55 Fed. Reg. 8799-8800 (1990).

<sup>69</sup> 40 C.F.R § 300.810(a)(1).

<sup>70</sup> See Smart Scoping for Environmental Investigations Technical Guide (Nov. 2018).

<sup>71</sup> 40 C.F.R § 300.430(f)(1)(ii)(D); 40 C.F.R § 300.430(f)(1)(i)(B).

<sup>72</sup> See Superfund Program Implementation Program Manual Fiscal Year 2021 (Oct. 1, 2020).

<sup>73</sup> GAO, GAO Cost Estimating and Assessment Guide (March 2009) (emphasis added).

<sup>74</sup> Superfund Program Implementation Program Manual Fiscal Year 2021, III.B.2.b Regional Staff Financial Roles and Responsibilities (Oct. 1, 2020).

<sup>75</sup> See EPA Region 8 Action Memorandum Request for approval of a Non-Time-Critical Removal Action at the Bonita Peak Mining District (Oct. 15, 2019) (showing that the cost for EPA’s Gladstone Water Treatment Plant operations under EPA’s emergency removal action was \$2,672,152). Further, no publicly available documents explain EPA’s reasoning regarding two additional topics on which SGC requested information. These

If stakeholders and the community are provided no information about the scope and details of response actions or contemplated actions, including remedial investigations, why they are being conducted, and how much is being, or is expected to be, spent on them, there is no way for stakeholders and the community to meaningfully participate in the site decision-making process. But more, there is no way to know if EPA has any basis or justification for its actions or contemplated actions, including whether its actions or contemplated actions are necessary or cost-effective. There is no way to know if EPA's actions or contemplated actions are necessary to the containment or cleanup of any hazardous release, or if there is any nexus between the action or contemplated action and improvement to Animas River water quality. Absent such basis, there is no consistency with the NCP.

### III. Conclusion

EPA must involve stakeholders and the community in site decision-making, including in a reformulation of the Strategic Plan, Task List, and SMP. EPA must move from study to action. Planned actions should not consist of additional study, but should focus on actions actually materially improving Animas River water quality. More than enough information exists to do so. The law requires this approach. Animas River water quality demands it.

To this end, it is requested that EPA:

- (1) In concert with stakeholders and the community, and after involving stakeholders and the community in strategic planning and tasking:
  - a. Reformulate the Strategic Plan to include stakeholder and community input;
  - b. Reformulate the Task List to cut unnecessary and cost-ineffective tasks, and to identify those actions that are justified and necessary and that will actually materially improve Animas River water quality;
  - c. Reformulate the Strategic Plan, Task List, and SMP to provide clarity regarding and concrete opportunities for stakeholder and community involvement in site decision-making, including those points in the adaptive management process where stakeholder and community involvement in decision-making can be impactful;
- (2) Respond in full to SGC's September 25, 2020 Bonita Peak Mining District Site Management Plan Public Interest Questionnaire and to SGC's October 17, 2019 Kittimac Tailings Public Interest Questionnaire; and
- (3) Track costs at the BPMD by particular site or potential source area, and regularly disclose that information to interested stakeholders and the community.<sup>76</sup>

Improving Animas River water quality is not complicated. It requires a focus on the Cement Creek adits, running the Gladstone Water Treatment Plant at capacity, closure of the Red & Bonita Bulkhead, and the stopping of wasteful investigations and projects. It is time for actions that will result in actual improvements to Animas River water quality, and the Strategic Plan and Task list should reflect this.

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are the possibility of near-term partial delisting of specific sites at the BPMD and clarification about how EPA will decide the boundaries of the 48 separate sites at the BPMD.

<sup>76</sup> At the January 28, 2021, Bonita Peak CAG meeting, EPA indicated that it can be asked ahead of time to have costs tracked in a specific way, including to have costs tracked by site/source (e.g. at a particular mining site).

Sincerely,

A handwritten signature in black ink, appearing to read 'Gina Myers', with a stylized flourish at the end.

Gina Myers  
Director, Reclamation Operations

cc: Christina Progross  
Joy Jenkins  
BPMD Community Advisory Group