

S. HRG. 114–188

# OVERSIGHT OF THE CAUSE, RESPONSE, AND IMPACTS OF EPA'S GOLD KING MINE SPILL

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## HEARING BEFORE THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE ONE HUNDRED FOURTEENTH CONGRESS FIRST SESSION

SEPTEMBER 16, 2015

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FOURTEENTH CONGRESS  
FIRST SESSION

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## **OVERSIGHT OF THE CAUSE, RESPONSE, AND IMPACTS OF EPA'S GOLD KING MINE SPILL**

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**WEDNESDAY, SEPTEMBER 16, 2015**

U.S. SENATE,  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,  
*Washington, DC.*

The committee met, pursuant to notice, at 10:01 a.m. in room 406, Dirksen Senate Building, Hon. James M. Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Boxer, Sullivan, Rounds, Barrasso, Capito, Crapo, Boozman, Fischer, Markey, and Cardin.

Senator INHOFE. We will come to order. We have, Senator Boxer and I, if it is all right with her, are going to withhold until we hear from four Senators who have made a request to be here. Senator Gardner first called this to my attention.

So what we are going to do is start with you, Senator Gardner, and go across and hear from those who have a special concern and interest. You are recognized.

### **OPENING STATEMENT OF HON. CORY GARDNER, U.S. SENATOR FROM THE STATE OF COLORADO**

Senator GARDNER. Thank you, Mr. Chairman, Ranking Member Boxer, and other members of the Environment and Public Works Committee, for holding this hearing today to examine the August 5th, 2015, spill that took place at the Gold King Mine in Southwest Colorado.

I also appreciate the committee for providing Senators Bennet, Heinrich, Udall and me with the opportunity to make statements about the impact that this spill has had in our States and obviously the representatives here who will also testify. Also, remember the spill had an impact on the Southern Ute Indian tribe, Ute Mountain Ute and the Navajo Nation.

From the outset of the spill, it was crucial that the EPA's full focus be on mitigation and slowing the flow of contaminants in the Animas River. Water testing shows that the surface water of the river has returned to pre-incident levels. But many uncertainties remain regarding long-term remediation and future monitoring for heightened contamination in the river during spring runoff. If anybody has seen the pictures of recent days when you can go in and disturb and disrupt the river bed bottom, the bottom, the sediment, you can see material still being kicked up.

Once the national press disappears from the area, there are still serious concerns that exist for Coloradans and communities downstream that the EPA must address.

Although the EPA has acknowledged the magnitude of this crisis, its initial lack of communication and coordination in events leading up to and following the spill are suitable for congressional oversight. Affected communities and stakeholders deserve transparency and accountability in the events surrounding the spill, particularly in understanding where EPA was during the first hours and days following the spill.

For example, the Colorado Department of Public Health and the Environment was the first to notify the city of Durango of the Gold King release on August 5th. The Colorado Department of Natural Resources was the first to notify the Southern Ute Indian Tribe of the release on August 5th. The LaPlata County sheriff's office closed public access to the Animas River on August 6th.

The questions that we must ask today: where was the EPA during this initial notification and closure of the river? Did the agency follow the National Contingency Plan for notification and implementation of its response on this disaster? Did they follow the same requirements that would have been in effect for a private sector actor? Was there anyone within the EPA with crisis management experience for a spill of this nature dispatched to the area or made aware of the spill? These are but a few of the questions I hope Administrator McCarthy will address today.

In the first few days following the spill, it was largely State, local and tribal officials responding. It was not until August 10th that the EPA established a unified command center in Durango. Along with the confusion over EPA's lack of notification, frustration began regarding the need for timely release of a simple, straightforward interpretation of the water quality monitoring data from the EPA.

From my personal experience, the EPA's response mirrors that of local communities. No one from the EPA attempted to contact me until days after the spill. Upon first learning of the spill, I attempted to speak with the Administrator but was told she was unavailable. After pushing back on the EPA and requesting answers, I was told the regional director would contact me. That call came several hours later.

I visited the spill site on August 9th with Senator Bennet. This is 4 days after the 3 million gallons of contaminated water were released, and yet the EPA did not yet have an appropriate crisis response plan or team in place. In fact, it was that Sunday morning briefing where we were sitting with the EPA officials who could not answer basic questions including how much water at that point was still leaking into the river.

From the outset, I have said that the EPA should be held to the same standards as EPA would hold a private company for the spill, which means investigations must be conducted, people must be held accountable and tough questions must be asked. When those questions get asked, there must be answers.

Among the tough questions that must be asked, the few I have are: whether the EPA knew that it was likely that water was impounded behind the Gold King Mine portal and a blowout was possible. Whether the health and safety plan for the Gold King Mine work was adequate. Why did it take several days for the EPA to revise the amount of contaminated water?

The agency initially said the amount was, I believe 1 million gallons and several days later said the search consisted of 3 million gallons. What data does the EPA have on the total amount of acid mine drainage within the upper Animas basin? How long has the agency been tracking the drainage and publicly measuring it?

Mr. Chairman, before concluding, I request the statement of Mr. Mike Olguin, Southern Ute Tribal Council member, be included as part of my testimony for today's hearing.

Senator INHOFE. Without objection.

[The referenced information follows:]

**Prepared Statement of  
James M. “Mike” Olguin  
Southern Ute Indian Tribal Council Member  
Southern Ute Indian Tribe  
Before the Committee on Indian Affairs  
United States Senate**

**Oversight Hearing  
*EPA’s Gold King Mine Disaster: Examining the Harmful Impacts to Indian Country*  
September 16, 2015**

Good afternoon Chairman Barrasso, Vice Chairman Tester, and Committee members. Thank you for the opportunity to appear before you today on behalf of the Southern Ute Indian Tribe to discuss the Gold King Mine Spill and its impacts on the Tribe and our community.

My name is Mike Olguin. I am an elected member of the Southern Ute Indian Tribal Council, which is the governing body of the Southern Ute Indian Tribe. The Southern Ute Indian Reservation encompasses approximately 710,000 acres in southwestern Colorado. The Tribe is blessed by eight rivers traversing its Reservation in five main drainage basins. One of those rivers is the Animas River, which bisects the western half of the Tribe’s Reservation, downstream of Durango, Colorado, and upstream of New Mexico.

Since the Gold King Mine blowout on August 5, the Tribe has been actively and extensively engaged in responding to the spill. Because of this experience, the Tribe has learned some lessons and is prepared to share our observations with the Committee.

**Tribal and Local Governments were Particularly Responsive and EPA was Cooperative in Responding to the Spill.**

The Tribe first learned of the Gold King Mine release when the Deputy Director of the Colorado Department of Natural Resources notified the Tribe’s Wildlife Resources Division on Wednesday afternoon, August 5, 2015. Our Tribe immediately responded by implementing its emergency management plan, contacting the La Plata County Office of Emergency Management, estimating when the contaminant plume would reach the Reservation, contacting EPA to determine the appropriate analyte list for water quality sampling, and commencing baseline water quality monitoring activities before the spill reached the Reservation. On Thursday and Friday, August 6th and 7th, tribal staff coordinated with EPA and La Plata County personnel, attended meetings, gathered information, and continued daily sampling on the Animas River. In the first days of the spill, however, it was largely the local jurisdictions who were responding to the incident. As of Friday, August 7th, EPA still did not have a coordinated effort in Durango. In the absence of a federal presence, local jurisdictions, including the Tribe, worked together as members of the Southwest Incident Management Team in coordinating a response.

In accordance with the Tribe’s Incident Management Plan, Tribal Chairman Clement Frost issued a disaster declaration on Saturday, August 8th. Other jurisdictions followed suit. In the days that



followed the release, the Tribe attended to the needs of the tribal membership. The Tribe posted signs closing access to the Animas River on the Reservation, commenced bottled water delivery to affected tribal members, provided water tanks for affected livestock owners, commenced delivery of water for livestock (the Tribe commenced delivering water to the tribal membership when the EPA contractor delivered water that was not suitable for livestock consumption), held informational meetings with tribal members, and offered temporary housing for affected tribal member families. The Tribe also coordinated and supported EPA testing of tribal member domestic water wells and irrigation ditches in the impacted area within the Reservation. Subsequently, the Tribe purchased and installed 14 reverse osmosis systems on the kitchen taps of tribal member homes.

For the duration of the response, tribal staff communicated, coordinated, and actively participated with personnel from other affected governments in the Unified Incident Command. The Tribe's Incident Management Team was fully engaged in the Incident Command effort, which was headquartered in Durango, and worked closely with local, state and federal agencies throughout the response effort. Tribal Incident Management Team members staffed the center virtually around the clock to ensure that the Tribe was contributing its expertise to the response effort, as well as to ensure that the Tribe was treated as an affected jurisdiction. The Tribe has since received acknowledgement and thanks for its participation, expertise, efficacy, and professionalism in responding to the incident, and remains engaged in the Incident Command to this day.

The spill response highlighted the importance of relationships between state, tribal, and local governments. The State of New Mexico first learned of the spill on August 6<sup>th</sup> when the Southern Ute Indian Tribe's Water Quality Program called New Mexico's Spill Reporting Hotline. New Mexico had not received notification from either EPA or Colorado at that point. The County and City attorneys reached out to tribal attorneys to share information and meeting notifications that they knew had not been shared with tribal attorneys. The Southern Ute Indian Tribe coordinated with its sister tribe, the Ute Mountain Ute Tribe, which draws water from the San Juan River. Other downstream tribes in the lower Colorado River Basin, including Chemehuevi, Fort Mohave, Quechan, and Cocopah reached out to the Southern Ute Indian Tribe for information about the spill and the Tribe's water quality sampling, which the Southern Ute Indian Tribe shared.

Today, water quality monitoring results show the water of the Animas River on the Reservation has returned to pre-spill conditions and the River has been re-opened for all activities. Our primary concern remains the potential long-term impact on human health and the environment caused by the deposition of heavy metals on the Animas Riverbed.

**The Tribe Incurred Significant Costs from Responding to the Spill but Expects Full Reimbursement from EPA.**

For the period from August 5<sup>th</sup> through September 8th, the Tribe incurred approximately \$170,000 in costs responding to the spill, mostly in staff time. We understand neighboring community businesspersons suffered losses and our neighboring local governments, La Plata County and the City of Durango, with whom the Tribe shares many interests, likewise incurred costs. Long-term, we expect to incur costs for continued water quality and sediment monitoring. The Tribe is working with EPA to enter into a Cooperative Agreement whereby the EPA will reimburse the Tribe for

costs already expended, as well as future costs that will be incurred, including the costs of continued water quality monitoring.

**The Tribe's Water Quality Data Provided Important Information for Assessing the Spill's Short-term Impacts and Continued Monitoring Should Provide Important Information on Long-term Impacts.**

The Tribe has long had an active water sampling and monitoring program, and for over fifteen years has been monitoring water quality in the rivers that cross the Reservation, including the Animas. Before the Gold King Spill, the Tribe's Water Quality Program had been maintaining three stations in the River with equipment that continuously collects pH, oxygen, temperature, and conductivity data. EPA funds this monitoring through a Clean Water Act tribal assistance grant. In response to the spill, the Tribe's Water Quality Program established additional monitoring stations and expanded the list of substances for which the Tribe tests. The Tribe tested before the plume hit the Reservation, and for two weeks after the spill, the Tribe was testing daily for over 25 substances, including aluminum, iron, silver, magnesium, arsenic, cadmium, selenium, zinc, lead, mercury, barium, and molybdenum. The Tribe has since resumed its routine monthly sampling of water quality, quarterly sampling of macroinvertebrates, and taking pH, oxygen, temperature, and conductivity readings every 30 minutes.

On Thursday, August 13, 2015, the Tribe shared the water quality data it had collected on the Animas River since the spill. The data from the lab was encouraging. The Tribe assessed the results against tribal and state water quality standards, as well as historical data. Initial pH data showed no dip below pH 7.4 on the Reservation. Aquatic life prefers waters in the 6.5 – 8.0 range. The Tribe shared data with EPA, the State of Colorado, La Plata County, local officials, and community stakeholder groups. The Tribe also prepared and shared historical water quality data to provide information on pre-release—or normal—river conditions.

The Tribe also has historical data regarding aquatic life in the River. Coincidentally, just two weeks before the Gold King spill, the Tribe had collected tissue samples from fish in the Animas River to conduct metals analysis on those samples. While the purpose of the testing was initially to assess potential human consumption concerns, the Tribe will continue to conduct these fish tissue studies to determine any toxicity impacts from the spill. This will allow the Tribe to assess the extent of bioaccumulation of toxins in the aquatic life in the River.

The Tribe has been able to develop a highly successful water quality program, which has provided valuable support to the community in this response, due principally to EPA Tribal Assistance Program grant funding. We hope Congress and the EPA will see the benefits that the Tribal Assistance Program grants have provided to Indian Country and its surrounding communities and continue to appropriately fund these tribal grant programs.

**The Problem of Abandoned Mine Drainage Predates the Gold King Incident, and Addressing the Problem is Complex and Expensive.**

Like others, the Tribe favors a full evaluation of events leading to the spill and the EPA's performance responding to the spill. We can all learn from mistakes made and, based on a thorough evaluation of the incident and response, hopefully, EPA, the Tribe, and other responders can improve emergency response preparedness.

It is important to keep this incident in perspective and understand it points to a much larger problem, one that has been 100 years in the making. In the late 19th century, the discovery of valuable minerals in the San Juan Mountains led to widespread trespass on lands set apart for the Utes under an 1868 treaty. As a result, the United States negotiated another agreement with the Utes in 1873 that carved 3.7 million acres out of the middle of the Ute Reservation. That agreement, along with the 1872 mining law, paved the way for hard rock mining in the San Juan Mountains, one legacy of which is mining-related pollution of the Animas River.

The Gold King is not the only abandoned mine polluting the Animas River basin. There are many others, and reportedly many thousands of abandoned mines that similarly degrade water quality in rivers across the West. There are an estimated 23,000 abandoned mines in Colorado alone. We hope that the new light being shined on the long-standing problem of acid mine drainage in the Animas River basin will cause interested parties to develop a permanent solution.

**Federal Leadership and Assistance, and Communication, Collaboration, and Cooperation among Downstream Community Stakeholders and Federal, State, and Tribal Governments, is Key to Avoiding another Blowout and Addressing the Problem of Abandoned Mine Drainage Polluting the Upper Animas River Watershed.**

Without Congressional support and federal leadership, the problem of acid mine drainage polluting the Animas River and other rivers will not be solved. The Tribe, State of Colorado, local governments, and stakeholders need federal assistance in exploring options for cleaning up the acid mine drainage problem, including possible Superfund designation for the San Juan Mountain area surrounding the Gold King Mine. The Tribe urges the Committee to support continued dialogue and collaboration and to provide direction in how the Tribe and other interested parties can help EPA respond to contamination threats, in order that EPA may fulfill its mission to protect, preserve and, where necessary, proactively remediate contamination sites that continue to threaten the Animas and other rivers.

**Conclusion**

The Tribe, through its Incident Management Team and Water Quality Program has made a significant contribution to the response effort on the Gold King incident. Based on ongoing discussions, we anticipate EPA will reimburse the Tribe for its direct costs incurred responding to the spill. The Tribe hopes Congress will fund, and EPA will assist in providing support for, long-term monitoring for impacts caused by the Gold King Mine spill. We also hope Congress will support EPA continuing to work cooperatively with Colorado and affected tribes, local

governments, and community stakeholders to develop a permanent solution to the acid mine drainage problem in southwestern Colorado.

Thank you for the opportunity to appear before you today. I am glad to answer questions the Committee may have.

Senator GARDNER. Councilman Olguin will be testifying this afternoon in front of the Senate Indian Affairs Committee on the Gold King Mine spill.

Last, I thank you, Mr. Chairman, and your staff, for being responsive during this time. While this hearing is to examine this incident and the EPA's response, this bill shows a greater need for legislation that would allow Good Samaritans the opportunity to assist with cleaning up these abandoned mines across the West. I hope we can continue to work together on this effort, and I know the four of us have done that so far.

I thank you again for the opportunity to be here, and I look forward to hearing the EPA's answers as we continue to work together to address this very serious situation.

[The prepared statement of Senator Gardner follows:]

STATEMENT OF HON. CORY GARDNER,  
U.S. SENATOR FROM THE STATE OF COLORADO

Thank you, Chairman Inhofe, Ranking Member Boxer, and other members of the Environment and Public Works Committee for holding this oversight hearing to examine the August 5th, 2015, spill that took place at the Gold King Mine in southwest Colorado. I also appreciate the committee for providing Senators Bennet, Heinrich, Udall and me with the opportunity to make statements about the impact this spill has in our States. We must also remember this spill had an impact on the Southern Ute Indian Tribe, Ute Mountain Ute, and the Navajo Nation.

From the outset of the spill, it was crucial that the Environmental Protection Agency's (EPA's) full focus be on mitigation and slowing the flow of contaminants in the Animas River. Water testing shows that the surface water of the River has returned to pre-incident levels, but many uncertainties remain regarding long-term remediation and future monitoring for heightened contamination in the River during spring runoff.

Once the national press disappears from the area, there are still serious concerns that exist for Coloradans and communities downstream that the EPA must address. Although the EPA has acknowledged the magnitude of the crisis, its initial lack of communication and coordination in events leading up to and following the spill are suitable for congressional oversight.

Affected communities and stakeholders deserve transparency and accountability in the events surrounding this spill, particularly in understanding where EPA was during the first hours following the spill. For example, the Colorado Department of Public Health & the Environment was the first to notify the city of Durango of the Gold King release on August 5th. The Colorado Department of Natural Resources was the first to notify the Southern Ute Indian Tribe of the release on August 5th. The La Plata County Sheriff closed public access to the Animas River on August 6th.

Where was the EPA during this initial notification and closure of the River? Did the agency follow the national contingency plan for notification and implementation of its response on this disaster? Was there anyone within the EPA with crisis management experience for a spill of this nature dispatched to the area or made aware of the spill? These are but a few of the questions I hope Administrator McCarthy will address.

In the first few days following the spill, it was largely State, local and tribal officials responding. It was not until August 10th that the EPA established a unified command center in Durango. Along with the confusion over EPA's lack of notification, frustration began regarding the need for a timely release of a simple, straightforward interpretation of the water quality monitoring data from the EPA.

My personal experience with EPA's response mirrors that of local communities. No one from EPA attempted to contact me until days after the spill. Upon first learning of the spill I attempted to speak with the Administrator but was told she was unavailable. After pushing back on the EPA and requesting answers I was told the regional director would contact me. That call came several hours later.

I visited the spill site on August 9th with Senator Bennet. This was 4 days after the 3 million gallons of contaminated water was released, and yet EPA did not yet have an appropriate crisis response plan or team in place.

From the outset I've said that EPA should be held to the same standard as EPA would hold a private company for said spill. Which means investigations must be

conducted, people must be held accountable, and tough questions must be asked. Among the tough questions that must be asked, a few I have are:

- Whether the EPA knew that it was likely that water was impounded behind the Gold King Mine portal and a blowout was possible,
- Whether the Health and Safety Plan for the Gold King Mine work was adequate. It appears the plan was wholly inadequate because it fails to address safety risks associated with mines, and it even lists the site by the wrong name at one point, and
- Why did it take several days for the EPA to revise the amount of contaminated water? The agency initially said the amount was 1 million gallons, and several days later said the surge consisted of 3 million gallons.

Mr. Chairman, before concluding I request that the statement of Mike Olguin, a Southern Ute Indian Tribal Council Member, be included as part of my testimony for today's hearing. Councilman Olguin will be testifying this afternoon in front of the Senate Indian Affairs Committee on the Gold King Mine spill.

Last, I thank you and your staff for being responsive during this time, and while this hearing is to examine this incident and EPA's response, this spill shows a greater need for legislation that would allow Good Samaritans the opportunity to assist with cleaning up these abandoned mines across the West. I hope we can continue to work together on this effort.

Thank you again for the opportunity to be here, and I look forward to hearing the EPA's answers as we continue to work together to address this very serious situation.

Senator INHOFE. Thank you, Senator Gardner.  
Senator Bennet.

#### **OPENING STATEMENT OF HON. MICHAEL BENNET, U.S. SENATOR FROM THE STATE OF COLORADO**

Senator BENNET. Thank you, Mr. Chairman, and thank you also, Ranking Member Boxer, for allowing us all to speak this morning. It is a privilege to be here with my colleagues from New Mexico and Senator Gardner from Colorado.

Mr. Chairman, the blowout at the Gold King Mine was a disaster that affected many communities in Colorado and New Mexico. Although the EPA was trying to remediate the mine, there is no denying that they caused this spill, and that is entirely unacceptable. It is also clear that the agency was slow to communicate, as Senator Gardner said, with local governments and did not obtain water quality results or bring water to farmers who needed it quickly enough.

When Senator Gardner and I traveled to Durango 4 days after the blowout, the river was still bright orange and closed to the public. The Animas River really is the lifeblood of Durango. Rafting companies have lost business, farmers could not water crops and moms are still keeping their kids out of the water. These families deserve to have the full attention and dedicated resources of the Administration committed to the clean up.

In the week after the spill, we spoke with Administrator McCarthy and wrote to the EPA and the President. We appreciate that Administrator McCarthy listened to our call and came to Colorado to view the area and address the community. Following a crisis like this, it is tempting to point fingers, and we must hold people and agencies responsible for any egregious mistakes or negligence they committed in the days and hours after this spill.

But as the communities recover, it is also critical to look at the bigger picture. Let's identify what went wrong to make sure it does not happen again.

We also need to put this in context: the blowout released 3 million gallons of acid mine drainage. This same amount of polluted water was already being released from the Gold King Mine about every week. And the four mines in the area released more than 300 million gallons of acid mine drainage into the river every year. This has been going on for more than 130 years.

In 1902, the water quality was so bad that Durango permanently switched to the Florida River for its main drinking water supply. That decision largely protected the town's drinking water from the most recent disaster.

There are more than 23,000 abandoned mines in Colorado, Mr. Chairman, including 400 in the San Juan Mountains. We need solutions to address the acid mine drainage coming from all of these old abandoned mines. And in the upper Animas watershed we need an immediate solution. That is why we have asked Administrator McCarthy and the President to prioritize funding for a water treatment plant.

We also, as my colleague, from Colorado said, need to pass Good Samaritan legislation to encourage counties, non-profits and companies to clean up abandoned mines throughout the West. We worked with Senator Boxer, Senator Mark Udall and the EPA to establish guidance for Good Samaritans to allow them to do clean up work without being liable under the Clean Water Act.

Unfortunately, that did not provide enough certainty and has not encouraged action. Last Congress, Mark Udall, Scott Tipton and I introduced a bill to give Good Samaritans that certainty while holding them to appropriate standards. Senator Gardner and I are working to reintroduce a bill this Congress. Finally, we need to reform the 1872 mining law to make sure that companies pay royalties to taxpayers.

Thank you, again, Mr. Chairman, for allowing me to speak briefly, and thank you for holding this hearing.

[The prepared statement of Senator Bennet follows:]

STATEMENT OF HON. MICHAEL BENNET,  
U.S. SENATOR FROM THE STATE OF COLORADO

Thank you, Chairman Inhofe and Senator Boxer, for allowing me to speak this morning.

The blowout at the Gold King Mine was a disaster that affected many communities in Colorado and New Mexico. And although the EPA was working to clean up the mine, there's no denying that they caused the spill. That's entirely unacceptable.

It's also clear that the agency was slow to communicate with local governments and didn't obtain water quality results or bring water to farmers who needed it quickly enough. When Senator Gardner and I traveled to Durango 4 days after the blowout, the River was still bright orange and closed to the public.

The Animas River really is the lifeblood of Durango. Rafting companies have lost business, farmers couldn't water crops, and moms are still keeping their kids out of the river. These families deserve to have the full attention and the dedicated resources of the Administration committed to the clean up.

In the week after the spill, we spoke with Administrator McCarthy and wrote to the EPA and the President. We appreciate that Administrator McCarthy listened to our call and came to Colorado to view the area and address the community. Following a crisis like this, it's tempting to point fingers—and we must hold people and agencies responsible for any egregious mistakes or negligence they committed in the days and hours after the spill. But as the communities recover, it's also critical we look at the bigger picture. Let's identify exactly what went wrong to make sure this doesn't happen again.

We also need to put it in context. The blowout released 3 million gallons of acid mine drainage. This same amount of polluted water was already being released from the Gold King Mine about every week. And the four mines in the area release more than 300 million gallons of acid mine drainage into the River every year. This has been going on for more than 130 years.

In 1902, the water quality was so bad that Durango permanently switched to the Florida River for its main drinking water supply. That decision largely protected the town's drinking water from the most recent disaster. There are more than 23,000 abandoned mines in Colorado, including 400 in the San Juan Mountains. We need solutions to address the acid mine drainage coming from all of these old abandoned mines.

And in the Upper Animas watershed, we need an immediate solution. That's why we've asked Administrator McCarthy and the President to prioritize funding for a water treatment plant.

We also need to pass Good Samaritan legislation to encourage counties, non-profits, and companies to clean up abandoned mines. We worked with Senator Boxer, Senator Mark Udall, and the EPA to establish guidance for Good Samaritans to allow them to do clean up work without being liable under the Clean Water Act. Unfortunately, this didn't provide enough certainty and hasn't encouraged action. Last Congress Mark Udall, Scott Tipton, and I introduced a bill to give Good Samaritans that certainty while still holding them to appropriate standards. Senator Gardner and I are working to reintroduce a bill this Congress.

And finally, we need to reform the 1872 Mining Law to make sure that companies pay royalties to taxpayers.

Thank you again for allowing me to speak briefly, and thank you for holding this hearing.

Senator INHOFE. Thank you, Senator Bennet.  
Senator Udall.

#### **OPENING STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM THE STATE OF NEW MEXICO**

Senator UDALL. Chairman Inhofe and Ranking Member Boxer, thank you very much for focusing on this issue. It is a very important issue, not only for our States but it is also an important issue for the Nation and for the West.

I first of all would like to, because this impacted in New Mexico the Navajo Nation, I would like to recognize the President of the Navajo Nation who is here, Russell Begaye. He is seated in the row right behind the two Colorado Senators. They in particular have been very concerned and on top of this. He is going to testify this afternoon in the Indian Affairs Committee.

Sitting back and looking at this and trying to give all of you the big picture, as I listened to the two Colorado Senators who we are working closely with, here you have big mining companies who have been extracting minerals we use in everyday life. Many of us believe some of these are very valuable and we need them.

But who says that they are entitled to pollute the sacred waters of two Native American Tribes, the Navajo Nation and the Ute Tribe? Who says they should be able to pollute drinking water that our two States use on a daily basis? And that really I think in the big picture sense is why we are here to fix this, to make sure that it never happens again.

That is a big task because this has been going on for a long time. This mining and the pollution from it, people have been working on it for decades. But we have not, we have not been able to solve this problem or really come to grips with it.

In the West, rivers are our lifeblood, our drinking water, our irrigation support for agriculture. The Animas River, which was the one that was mainly polluted here, and the San Juan. Animas



means, in Spanish, the River of Souls. The San Juan River is another important part of the Navajo tradition. When I talked about President Begaye and the Navajos, they have a saying, water is life. Our Hispanic community in New Mexico says the same thing, *agua es la vida*.

So we all know how important water is to the West and to all of us. This is a disaster on many levels, to our water, to our economy, to our culture. I just very much appreciate working with this committee and with these Senators to try to get to the root of what we need to do.

I appreciate very much, as the two Colorado Senators have said, EPA taking responsibility for the spill. We all know mistakes were made. There were delays in notification, confusion across three different EPA regions. There were also delays in testing, in providing much-needed water for irrigation and other supplies. EPA has accepted responsibility here also.

At the same time, EPA is not the only responsible party. What happened at the Gold King Mine is part of a much, much bigger problem. Abandoned mines in the West are a ticking time bomb, slowly leaking hazardous waste into our streams and rivers. The mine owners that left this mess are no longer around. EPA is not in the mining business. It is in the clean up business.

Just to show you the wake up call that all of us are facing, there are 10 mining projects very similar to this that EPA analyzed that said they believe there are similar conditions. There are 10 of these mines that have—the work has been suspended, so we could see something similar to this happen. Three of those are in California, Senator Boxer, four in Colorado that the Colorado Senators know very well, two in Montana and one in Missouri. So this is a big national issue, and it needs to be addressed.

Let me just finally say that one of the key parts of this which we all, I think, have been battling for a long time, is the 1872 mining law. That law continues to allow mining corporations to take hard rock minerals like gold, silver, copper and uranium from public lands without paying any royalties, zero royalty. Meanwhile coal, oil and gas companies have paid royalties for many decades.

That is the crux of what we need to do here. Senator Heinrich has been working on this issue for a long time. I am going to be working very closely with him to make sure we put in legislation very soon on that. I very much appreciate, once again, your holding this hearing.

Senator INHOFE. Thank you, Senator Udall.

Senator Heinrich.

**OPENING STATEMENT OF HON. MARTIN HEINRICH,  
U.S. SENATOR FROM THE STATE OF NEW MEXICO**

Senator HEINRICH. I want to thank you, Chairman Inhofe and Ranking Member Boxer, for holding this important hearing today.

I want to thank all of my colleagues up here, as well as the President of the Navajo Nation, who has joined us, for the work they have done to shine a light on this and to begin dealing with the policy issues that require legislation around this. We have had a good team effort from the Colorado and New Mexico delegations,

including some of our colleagues in the House of Representatives as well.

Last month, a large plume of bright orange mine waste, and I will give credit to President Begaye for sharing this photo with us, you can see him in the foreground, spilled into Cement Creek and then into the Animas River and then into the San Juan and polluted the entire Four Corners region. I share the enormous anger and frustration over this terrible incident.

When I toured the affected areas following the spill, I visited with impacted residents, including farmers in places like Aztec as well as San Juan County leaders in New Mexico and Navajo Nation President Russell Begaye.

In the Southwest, as my colleague said, water is our most precious resource. So you can imagine the kind of impact that this disaster has had on our communities in Colorado, New Mexico, the Navajo Nation, and Arizona.

Take a look at this photo. I have demanded that the EPA react with urgency to protect our health and safety and to repair the damage inflicted on this watershed. This must be our first and our top priority. An oversight of the EPA's response is completely warranted and appropriate.

But we must also look over the horizon and take action to address the hundreds of thousands of other similarly contaminated mines that literally litter the West and are leaking toxins into our watersheds. There are estimates that 40 percent of western watersheds have been polluted by toxic mining waste and that reclaiming and cleaning up abandoned mines across the West could cost upwards of 32 billion to 72 billion—with a b—dollars.

I want to share with you a couple of maps. These are our two impacted States here, Colorado and New Mexico. As you can see from these maps, they show all of the abandoned hard rock mines and the waters impacted by hard rock metals. You can see that in Southwestern Colorado, for example, where the Gold King Mine is, there are literally thousands of unreclaimed hard rock mines. You can see them scattered through the mountainous portions of Southwestern Colorado.

If you look at New Mexico, you will see a similar State. If you look across the West, the maps would not be dissimilar.

In 1975 in an even a larger accident than the Gold King blowout, a large tailings pile near Silverton spilled 50,000 tons of tailings laden with toxic-heavy metals into the Animas River watershed. In 1979, a breached dam at a uranium mill tailings disposal pond near Church Rock, New Mexico, on the Navajo Nation sent more than 1,000 tons of solid radioactive waste and 93 million gallons of acidic liquid into the Rio Puerco.

For decades before the spill last month, the Gold King Mine leached water laced with heavy metals and sulfuric acid into Cement Creek. Over the last 10 years, an average of 200 gallons of highly polluted water per minute, or more than 100 million gallons a year, have flowed out of this mine and into the Animas River via Cement Creek.

Beyond the immediate clean up of this spill, it is high time that we overhaul our abandoned mine clean up policies to make future disasters like this less likely. While developers of resources like oil,

natural gas and coal all pay royalties to return a fair value to taxpayers for our public resources, hard rock mining companies can still mine valuable minerals for free.

A comprehensive approach to mining reform should include the establishment of a hard rock reclamation fund, funded by a fair royalty on public minerals, Good Samaritan authority to allow third parties to clean up mine sites they had no role in creating, and comprehensive surveys of abandoned mines and a plan to clean them up.

I appreciate the value of hard rock mining and what it means for families. My father and my mother's father both made a living in this industry. This industry continues to provide good paying jobs throughout the West. But passing long overdue reforms to our Federal mining law which has not been updated since 1872 is critical if we want to address the root cause of this disaster.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,  
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. Thank you, Senator Heinrich, and all four of you, who have come and expressed your feelings.

We are all very much concerned about this. You are free to leave but are certainly invited to stay if you are able to do that.

At the time of the spill, the EPA's contractor was investigating the amount of water that had pooled behind the collapsed entrance of the Gold King Mine. EPA authorized this investigation as part of a clean up action under the Superfund Law to address acid mine drainage from the nearby abandoned Red and Bonita mine.

Based on the committee's oversight to date, it is clear that EPA knew that there was likely to be a significant amount of water behind the collapsed Gold King Mine entrance and that there was a risk of a blowout. Given these facts, it is unclear why EPA and the contractor did not exercise more care when working at the Gold King site. EPA has said that it has already spent \$8 million responding to the spill.

Well, thankfully no one was killed or injured by the blowout. But a number of important questions remain unanswered about what led to the spill and how EPA responded. Since the spill, EPA has conducted a preliminary evaluation of the causes and has asked the Department of Interior to conduct an independent investigation and report its findings later next month.

But I question whether the Interior Department has the independence and the expertise necessary to conduct this review. The EPA Office of Inspector General is also conducting a review of the spill.

I would also like to thank Administrator McCarthy for agreeing to testify today. It is important that we hear directly from the EPA's top official about what caused this spill. I think particularly since some of the comments were made by some of the Senators who are here today, she may want to respond to some of those accusations. I think that would be appropriate.

Finally, I would like to note that the area where the blowout occurred is in a historic mining district near Silverton, Colorado, where local groups have been working with the State of Colorado

and the EPA to address the impacts of acid mine drainage from this and other abandoned mine sites for a number of years.

When I was chairman of this committee in 2006, we passed a bipartisan bill that would have promoted the clean up of these sites by Good Samaritans. In the years since, this issue has received very little attention from Congress or this committee. But as chairman for the second time, I again look forward to working with my colleagues from Colorado and New Mexico. I think we will this time do what should have been done 10 years ago.

Senator Boxer.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE,  
U.S. SENATOR FROM THE STATE OF OKLAHOMA

Today's oversight hearing is on the cause, response, and impacts of last month's blowout at the Gold King mine in Colorado. The spill, which occurred when an EPA contractor poked a hole through the collapsed mine entrance, released more than 3 million gallons of contaminated mine water into the Cement Creek and Animus River. A yellow plume of contaminated water traveled as far as the San Juan River in New Mexico and southern Utah and affected drinking water supplies, recreation, agriculture, and wildlife along the way.

At the time of the spill, EPA's contractor was investigating the amount of water that had pooled behind the collapsed entrance to the Gold King mine. EPA authorized this investigation as part of a clean up action under the Superfund law to address acid mine drainage from the nearby abandoned Red and Bonita mine.

Based on the committee's oversight to date, it is clear EPA knew that there was likely to be a significant amount of water behind the collapsed Gold King mine entrance and that there was a risk of a blowout. Given these facts, it is unclear why EPA and the contractor did not exercise more care when working at the Gold King site. EPA has said that it has already spent \$8 million responding to the spill.

Thankfully, no one was killed or injured by the blowout, but a number of important questions remain unanswered about what led to the spill and how EPA responded.

Since the spill, EPA has conducted a preliminary evaluation of the causes and has asked the Department of the Interior to conduct an independent investigation and report its findings later next month. But I question whether the Interior Department has the independence and expertise necessary to conduct this review. The EPA Office of Inspector General is also conducting a review of the spill.

Before we begin, I would like to welcome Senators Gardner, Bennet, Heinrich, and Udall and thank them for requesting this important hearing. I look forward to hearing their statements on how this spill has affected their States and constituents.

I would also like to thank Administrator McCarthy for agreeing to testify today. It is important that we hear directly from EPA's top official about what caused this spill and what EPA has learned from this tragedy.

Finally, I would like to note that the area where the blowout occurred is in a historic mining district near Silverton, Colorado, where local groups have been working with the State of Colorado and EPA to address the impacts of acid mine drainage from this and other abandoned mine sites for a number of years.

When I was chairman of this committee in 2006, we passed a bipartisan bill that would have promoted the clean up of these sites by Good Samaritans. In the years since, this issue has received little attention from Congress or this committee, but as Chairman for a second time I again look forward to working with my colleagues from Colorado and New Mexico as they contemplate new legislative proposals.

**OPENING STATEMENT OF HON. BARBARA BOXER,  
U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. Thank you. I want to thank my colleagues so much for coming here today, and just of course express my strong feelings for this issue. I know we have a problem in California, potential problem, and you have experienced it firsthand.

First, I would like to note that the mayor of the city of Durango, Mayor Dean Brookie, said the following in front of the House com-

mittee: "It is tempting in times of crisis to point fingers and place blame. Attempts to blame single agencies or individuals are pointless and ignore the scale and complexity of the problem that needs to be addressed."

So I want to point out that the Mayor of Durango said that, because I hope this doesn't turn into a finger pointing deal, because it doesn't make any sense. It is important for us, as was explained by all of our colleagues really to understand the root causes of the blowout at the Gold King Mine so that future accidents can be prevented. I hope that that is the point of this important hearing.

EPA has already begun the process of improving its mine clean up activities. They have conducted already a quick internal review. They have issued new guidance based on lessons learned so far. But they are not stopping, and there are other investigations. There are two ongoing independent investigations, one by Department of Interior and one by the EPA's Inspector General. I think those reviews are important, and I look forward to reading both of them and implementing a lot of what they say.

It is important to understand that acid mine drainage is not a new problem, as was stated by our very, I think, intelligent colleagues. It has plagued this watershed in Colorado for nearly a century. In fact, EPA was at the site at Colorado's request to help find solutions to the longstanding problem of acid mine contamination. The mines in this area leak more than 330 million gallons of acid mine drainage into the Animas River each year. Each year. That is 100 times more than the spill that we are looking at today. So this is a serious ongoing problem.

Instead of scoring political points by blaming EPA, Congress could use this and should use this as an opportunity to focus on the longstanding issue of abandoned hard rock mines that pollute our rivers and streams. We should ensure that polluters pay the cost of clean up so that the American taxpayers are not stuck with the bill.

Some argue that waiving liability for clean ups is needed to address abandoned mine pollution. These so-called Good Samaritan waivers, unless they are very carefully crafted, are not the solution. They need to be carefully crafted. Otherwise, what happens is there are no rules, and there can be unintended consequences, such as we have seen and cost taxpayers even more.

So some of the solutions that are available to us include using existing authority to facilitate clean ups, providing sufficient resources to EPA. I think Senator Heinrich pointed out to us, this is a big problem, and it is a big price tag. But we need to address this with serious resources and that will require oversight of clean ups and work to pass reforms that ensure polluters pay, not the taxpayers. These steps are necessary because these mines pose a serious threat to waterways that people use for recreation. It has been laid out by our colleagues.

Mine wastes frequently contain high levels of dangerous heavy metals including mercury, lead, arsenic, cyanide and other hazardous chemicals that are also used in mine operations. In California, we have 47,000 abandoned mines. Nationwide, there are over 500,000 abandoned hard rock mines. And again, clean up costs are in the range of \$50 billion. Yet the Federal Government is

barely making a dent. So I can pontificate, colleagues on both sides can pontificate about how bad this is. But unless we spend some dough on this we are going to face more of these terrible disasters.

EPA spends an average of \$220 million per year, the Bureau of Land Management and Forest Service \$5 million to \$20 million respectively, although Congress has appropriated even less in recent years. In President Obama's budget his Administration proposed reinstituting the Superfund tax so that polluters pay for clean up. They have also proposed creating a fee on hard rock mining that would be paid into a fund for clean ups.

Unfortunately we failed to act, Congress has failed to act. Yes, we are holding this hearing, I am for it, I thank my chairman, and I think it is totally and completely appropriate.

I would ask that the rest of my statement be included in the record. Let's really step up to the plate. Let's not just point fingers. Let's get something done and stop these disasters from happening in the future.

Thank you Mr. Chairman.

[The prepared statement of Senator Boxer was not received at time of print.]

Senator INHOFE. Without objection that will happen. Thank you.

Thank you very much, Senators. We will now welcome to the table the Administrator. While she is coming in, let me share on the basis of the arrivals. On the Republican side it will be Rounds, Sullivan, Barrasso, Capito and Crapo. On the Democrat side, Boxer, Merkley, and Carper, and Markey, too.

Senator BOXER. It should be Boxer, Cardin and Markey, is my understanding. Boxer, Cardin and Markey.

Senator INHOFE. OK. Good.

Administrator McCarthy, why don't you give us your opening statement. You have heard a lot of comments being made by others, and we want to give you a chance to respond.

**STATEMENT OF HON. GINA MCCARTHY, ADMINISTRATOR,  
U.S. ENVIRONMENTAL PROTECTION AGENCY**

Ms. MCCARTHY. Thank you. Good morning, Mr. Chairman Inhofe, Ranking Member Boxer and members of the committee. I am Gina McCarthy, I am the Administrator of the United States Environmental Protection Agency. Again, I thank you for the opportunity to appear today and to discuss the August 5th Gold King Mine release and EPA's subsequent response.

This was a tragic and an unfortunate incident, and EPA has taken responsibility to ensure that we clean it up appropriately. EPA's core mission is to ensure a clean environment and to protect public health, and we are dedicated to continuing to do so. Our job is to protect the environment, and we will hold ourselves and continue to hold ourselves to the same high standards that we demand of others.

EPA was at the Gold King Mine on August 5th conducting an investigation to assess mine conditions and ongoing water discharges so that we could dewater the mine pool and assess the feasibility of further mine remediation.

While excavating above the mine opening, the lower portion of the bedrock crumbled, and approximately 3 million gallons of pres-

surized water discharged from the mine into Cement Creek, which is a tributary of the Animas River. EPA and Colorado officials informed downstream jurisdictions in Colorado within hours of the release, before the plume reached drinking water intakes and irrigation diversions. Notification to other downstream jurisdictions continued the following day, allowing for all of those intakes and diversions to be closed prior to the plume's arrival.

In the aftermath of the release we initiated an internal review of the incident, and we released an internal review summary report, which includes an assessment of the events and potential factors that contributed to the Gold King Mine incident. The report provides observations, conclusions as well as recommendations that our regions should consider applying when conducting ongoing and planned site assessments, investigations, constructions and removal projects at similar types of sites across the country.

EPA will implement all of the recommendations from the report and has shared its findings with external reviewers. As you know, in addition to the internal review, the Department of the Interior is leading an independent assessment of the facts that lead to the Gold King Mine incident. The goal of DOI's independent review is to provide EPA with an analysis of the incident that took place at the Gold King Mine, including the contributing causes. Both internal and external reviews will help inform EPA for ongoing and planned site assessments, investigations, constructions and removals.

One of our foremost priorities is to keep the public informed about the impacts from the Gold King Mine release and our response activities. EPA has closely coordinated with our Federal partners and with officials with Colorado, New Mexico, Utah, the Southern Ute and Ute Mountain Ute Tribes and the Navajo Nation to keep them apprised of water and sediment sampling results which are routinely posted on our Web site. These results indicate that water and sediment have returned to pre-event conditions and supported local and State decisionmakers as they made the decision to lift water restrictions along the Animas and the San Juan River.

Finally, I want to clarify that EPA was working with the State of Colorado to take action at the Gold King Mine to address both the potential for a catastrophic release and the ongoing adverse water quality impacts caused by the significant mine discharges in the upper Animas watershed. Based upon 2009 to 2014 flow data, approximately 330 million gallons of contaminated water was being discharged from those mines in the watershed each year to Cement Creek and the Animas River. That is 100 times more than the estimated release from the Gold King Mine on August 5th.

EPA was and continues to work with the State of Colorado as well as the Animas River stakeholder group to address these significant discharges from mines in the upper Animas watershed that are impacting these waters.

I think that it is important to note that all across the country our Superfund program has successfully cleaned up more than 1,150 hazardous waste sites and successfully responded to or provided oversight for thousands of removal actions to protect human

health and the environment. That reflects our longstanding commitment to protect human health and the environment.

All of the affected residents of Colorado and New Mexico and the tribes can be assured that EPA has and we will continue to take responsibility to ensure that the Gold King Mine release is cleaned up.

Thank you, Mr. Chairman. That concludes my statement, and I am happy to answer any questions that you or the committee may have.

[The prepared statement of Ms. McCarthy follows:]



STATEMENT OF  
GINA MCCARTHY, ADMINISTRATOR  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE  
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS  
U.S. SENATE

September 16, 2015

Good morning Chairman Inhofe, Ranking Member Boxer, and Members of the Committee. I am Gina McCarthy, Administrator for the U.S. Environmental Protection Agency. Thank you for the opportunity to appear today to discuss the August 5 Gold King Mine release and subsequent EPA response.

This was a tragic and unfortunate incident, and the EPA has taken responsibility to ensure that it is cleaned up appropriately. The EPA's core mission is to ensure a clean environment and protect public health, and we are dedicated to continuing to do our job to protect the environment and to hold ourselves to the same high standard we demand from others.

The EPA was at the Gold King Mine on August 5 conducting an investigation to assess mine conditions and ongoing water discharges, dewater the mine pool, and assess the feasibility of further mine remediation. While excavating above a mine opening, the lower portion of the bedrock crumbled and approximately three million gallons of pressurized water discharged from the mine into Cement Creek, a tributary of the Animas River. EPA and Colorado officials informed downstream

jurisdictions in Colorado within hours of the release before the plume reached drinking water intakes and irrigation diversions, and notifications to other downstream jurisdictions continued the following day, allowing for those intakes to be closed prior to the plume's arrival.

In the aftermath of the release, we initiated an internal review of the incident and released an Internal Review Summary Report on August, 26, which includes an assessment of the events and potential factors contributing to the Gold King Mine incident. The report provides observations, conclusions, and recommendations that regions should consider applying when conducting ongoing and planned site assessments, investigations, and construction or removal projects at similar types of sites across the country. The EPA will implement all the recommendations from the report and has shared its findings with external reviewers.

In addition to the internal review, the U.S. Department of the Interior is leading an independent assessment of the factors that led to the Gold King Mine incident. The goal of DOI's independent review is to provide the EPA with an analysis of the incident that took place at Gold King Mine, including the contributing causes. Both internal and external reviews will help inform the EPA for ongoing and planned site assessments, investigations, and construction or removal projects.

One of our foremost priorities is to keep the public informed about the impacts from the Gold King Mine release and our response activities. The EPA has closely coordinated with our federal partners and with officials in Colorado, New Mexico, Utah, the Southern Ute and Ute Mountain Ute tribes and the Navajo Nation to keep them apprised of water and sediment sampling results, which are routinely posted on our website. These results indicate that water and sediment have returned to pre-event conditions and supported local and state decision-makers as they made the decision to lift water restrictions along the Animas and San Juan Rivers on August 14 and August 15.

Finally, I want to clarify that the EPA was working with the state of Colorado to take action at the Gold King Mine to address both the potential for a catastrophic release and the ongoing adverse water quality impacts caused by the significant mine discharges into the Upper Animas Watershed.

Based upon 2009 – 2014 flow data, approximately 330 million gallons of contaminated water was being discharged from mines in the Watershed each year to Cement Creek and the Animas River – 100 times more than the estimated release from the Gold King Mine on August 5.

The EPA was and continues to work with the State of Colorado and the Animas River Stakeholder Group to address these significant discharges from mines in the Upper Animas Watershed that are impacting these waterways.

I think it is important to note, that all across the country, our Superfund program has successfully cleaned up more than 1,150 hazardous waste sites and successfully responded to or provided oversight for thousands of removal actions to protect human health and the environment. That reflects our long-standing commitment to protect human health and the environment that we will continue to pursue and continue to support the Administration's request for an Abandoned Mine Lands fee to help cover the costs of cleanups at these sites. .

All of the affected residents of Colorado and New Mexico and members of the Southern Ute, Ute Mountain Ute, and Navajo Nation Tribes can be assured that the EPA has and will continue to take responsibility to help ensure that the Gold King Mine release is cleaned up.

Thank you Mr. Chairman that concludes my statement. I will be happy to answer any questions that you or the committee members may have.

**U.S. Environmental Protection Agency  
Responses to Questions for the Record  
Senate Committee on Environment and Public Works  
September 16, 2015, Hearing on  
“Oversight of the Cause, Response, and Impacts of EPA’s Gold King Mine Spill”**

**Chairman Inhofe:**

**Question 1:** Please provide a list of all inactive or abandoned mine sites across the country where EPA has led or overseen non-EPA lead removal or remedial actions between January 2009 and the present date. For each site, please identify: (a) whether the cleanup action was designated as an (i) emergency removal, (ii) time-critical removal, (iii) non-time critical removal; or (iv) remedial action; (b) the date when the contractor mobilized to carry out the removal or remedial action; (c) the lead agency or entity overseeing the cleanup; (d) a summary of the current status of cleanup work at the site including; (e) whether (i) the site has been included on the National Priorities List or (ii) is under consideration for inclusion; (f) whether the site included a collapsed mine portal or adit and, if so, (ii) whether hydrological pressure was tested to determine the risk of a potential blowout and, if so, (iii) how pressure was tested; (g) (i) an estimate of the flow of mine water or acid mine drainage from the site, (ii) whether such water or drainage is or will be treated, and (iii) whether the flow or drainage is subject to a federal or state discharge permit; (h) EPA’s costs to date for cleanup; and (i) (i) the name of any contractor performing or assisting with the removal, (ii) the contract number, and (iii) and the amount paid to the contractor to date.

**Response:** Abandoned mine lands are located across private, federal and/or state lands. Multiple federal agencies address environmental contamination issues associated with abandoned mine lands through various statutory authorities. The Department of the Interior's Bureau of Land Management, Office of Surface Mining Reclamation and Enforcement, National Park Service, the Department of Agriculture's Forest Service, and the EPA all provide funding for the cleanup of environmental contamination at some of these hardrock mine sites.

EPA’s Superfund website contains information about those mining and mineral processing sites that are on the National Priorities List (NPL)<sup>1</sup>. The EPA is currently compiling a list of hardrock mining and mineral processing sites from January 2009 to present that are either EPA or PRP-lead, remedial or removal sites that are tracked in the Superfund Enterprise Management System. For non-EPA performed lead removal or remedial actions with EPA oversight, the EPA does not maintain records in the detail described above. However, the abandoned mine lands portal contains additional information regarding state inventories.<sup>2</sup>

**Question 2:** On August 12, 2015, EPA announced that Regions had been directed to suspend field investigative work at mine sites and to identify sites with similarities to the Gold King Mine site and to identify any immediate threats at such sites. Please summarize the results of this

<sup>1</sup> <http://www2.epa.gov/superfund/abandoned-mine-lands-site-information-1>

<sup>2</sup> <http://www.abandonedmines.gov/mapdata.html>

review and include the names and location of all such mine sites that were identified as having similarities with the Gold King Mine site and where immediate threats were identified. Please include a summary of the status of any removal actions these sites.

**Response:** In the aftermath of the Gold King Mine release and pursuant to a directive from the EPA Administrator, office directors in EPA's Office of Land and Emergency Management sent an August 14, 2015, memo to EPA regions to stop remedial and removal assessment/investigative work at Superfund hardrock mining/tailing sites.

Pursuant to that memo, EPA regions identified 15 mining-related sites of potential concern. Ultimately, EPA stopped ongoing or planned work at 10 of the 15 sites. At the five remaining sites, work continued based on site-specific conditions and discussions between EPA regional offices and EPA's Office of Site Remediation and Technology Innovation (OSRTI).

On September 4, 2015, OSRTI transmitted a memo to Superfund regional division directors describing a process to resume or start work at the 10 sites where the EPA had stopped field investigation work. The September 4 memo included categories of mine site conditions that could apply to the 15 sites, the 10 for which work stopped and the five for which work had continued.

The first three sites where work resumed are Standard Mine in Region 8, and Leviathan and Argonaut mines in Region 9 (work at Standard Mine subsequently stopped again after a small mine water release in October, 2015). Based on written summaries and subsequent technical discussions on site-specific circumstances between OSRTI managers and mining technical experts with regional counterparts, OSRTI and regional management determined it was appropriate to resume work at these three sites. In particular, those site-specific discussions verified that the procedures to be resumed were low risk and that there were appropriate emergency and notification procedures in place prior to re-starting work.

Two other sites that have had work stopped pending further investigation are SW Jefferson County in EPA Region 7 and Iron Mountain Mine in Region 9. The regions may plan to initiate work at those sites in 2016, and will coordinate with EPA headquarters using the process outlined above prior to beginning any site work.

EPA regions stopped work at five additional sites pending further assessment. Those sites were the Flat Creek/Iron Mountain Mine, Upper Tenmile Creek, Camp Bird Mine, James Creek, and Eagle River, all in Region 8. Removal actions had been conducted at several of these sites in prior years, and some sites have ongoing planning activities but no imminent field work. For each of these, the region will consult with EPA headquarters using the process outlined above, if and when field work is planned.

After initial discussions with EPA headquarters, regions continued work at five mines immediately after the Gold King Mine spill and the August 14, 2015, work cessation directive, and prior to issuance of a September 4, 2015, "restart process" memorandum. Those five sites are Callahan Mine in Region 1; Bullion and Captain Jack Mines in Region 3; and the Red and Bonita Mine in Region 8.

**Question 3:** According to the March 20, 2013, Removal Site Evaluation for the Red and Bonita Mine, a well was drilled from above the collapsed entrance to test for water pressure. (a) How much did it cost to drill the test well and perform the water pressure test at the Red and Bonita Mine? (b) The September 24, 2014, action memorandum approving funding for a removal action at the Red and Bonita Mine estimates that the removal work at the Red and Bonita Mine site would cost about \$1.7 million. Does that figure include the costs for performing any work at the Gold King Mine site?

**Response:** The cost was \$24,272.50 for subcontracting costs and materials, which did not include road preparation or the geologist logging the well. The removal action at the Red and Bonita did not include any costs for investigatory work at the Gold King Mine.

**Question 4:** The August 8, 2015 Summary Report of EPA's Internal Review of the Gold King Mine Blowout states that EPA and its contractors were unable to drill a well at the Gold King Mine site to test water pressure at the collapsed mine entrance because of the time, cost, and site conditions. Please explain how similar site conditions, timing, and cost considerations did not prevent drilling a test well at the Red and Bonita Mine site.

**Response:** Conditions at the Gold King Mine are very different from those at the Red and Bonita Mine. The road accessing the Red and Bonita Mine ends at an elevation just above the top of the adit portal (ie, the entrance to the adit, which is the opening to the mine). The EPA was able to build a short access road immediately above the adit and to place the well pad a short distance from the Red and Bonita Mine adit portal, allowing the EPA to drill a relatively shallow well (approximately 30 feet deep) to determine the water pressure in the adit. These factors should have made the ability to penetrate the adit a relatively easy task. However, there were significant challenges: the adit was extremely narrow and the team was working from inaccurate historical maps, which provided incorrect information on how the mine was constructed. As a result, the first two drilling attempts did not penetrate the adit. Ground slope and stability were an additional complicating factor. Even with this relatively straightforward drilling effort, the ground conditions above the Red and Bonita Mine adit portal were only minimally stable, and the ground substantially deteriorated during the drilling process, ultimately resulting in a slope collapse.

The site conditions at the Gold King Mine are very different in terms of terrain and geologic conditions. As part of the Gold King Mine assessment, the option of drilling a well similar to the one that was installed at the Red and Bonita Mine was part of the evaluation process, but was determined not to be feasible. Due to the steep slope and site conditions, as well as the collapsed bedrock fully closing an adjacent, former adit portal, the EPA On-Scene Coordinator (OSC) determined that locating a drill rig above the adit near the adit portal, as was done at the Red and Bonita Mine, would be unsafe. The nearest location that might have been suitable to locate a drill rig is approximately two miles up the mountain road, a mile of which is not a maintained road, and an estimated 400 feet of which would require road reconstruction. The estimated drilling depth at this location would be more than 700 feet at approximately a 53-degree angle into the Level 7 adit, and approximately 1,000 feet back from the adit portal.

Additionally, like the inaccurate historical maps of the Red and Bonita Mine, the historical maps for the Gold King Mine may not accurately reflect present conditions, and the exact location of the underground workings relative to surface benchmarks could be off by several tens of feet, if not more, based on Colorado mapping and modeling. This issue would have further complicated potential drilling operations.

**Question 5:** The removal action at the Red and Bonita Mine (including the action at the Gold King Mine site) was designated as time-critical. However, investigative work at the site began around 2010, the collapsed mine portal was rebuilt in 2013, and work to install a bulkhead was approved in 2014. Please explain why the Red and Bonita Mine site was designated as “time-critical” when work at the site has been conducted over several years and is ongoing. In your response, please identify applicable statutory requirements, regulations, policies, and guidance documents concerning the factors used to designate a removal as time-critical as opposed to non-time-critical

**Response:** The EPA has conducted the work to reopen mine portals and evaluate the technical feasibility of installing a bulkhead as investigative work under section 104(b) of the Comprehensive Emergency Response, Compensation and Liability Act (CERCLA). Once the evaluation is completed, a decision to conduct a time critical removal action is documented in an action memo. Although classified as time critical, removal actions may take longer to complete than six months. The time critical nature is related to the decision to initiate an action, not how long it takes to complete.

The removal evaluation work at the Red and Bonita Mine and several other adits including the Gold King Mine was started in 2010 to generally assess contaminated releases from waste rock and discharging adits. In 2011, it was agreed that opening the Red and Bonita Mine was appropriate to evaluate the possibility to perform source control work in the adit. The assessment of the workings at the Red and Bonita Mine continued through 2014 when it was determined that suitable conditions existed to construct a concrete bulkhead in 2015. EPA’s work at the Gold King Mine site up to and including August 5, 2015, was investigative work under CERCLA section 104(b).

When there is a determination that a removal action is appropriate and that a planning period of at least six months exists prior to the initiation of on-site removal activities, additional requirements for an Engineering Evaluation/Cost Analysis (EE/CA) and community involvement activities become applicable. The Guidance on Conducting Non-Time Critical Removal Actions, August, 1993, provides an outline of the process. After the EE/CA is complete, the action memorandum selects the removal action<sup>3</sup>. When based on the site evaluation, there is a determination that a removal action is appropriate and that less than six months exists before on-site removal activity must begin, the removal is considered time-critical. That determination is documented in the action memorandum.

**Question 6:** In early 2011, the owner of the Gold King Mine, the Mogul Mine, and Part of the Red and Bonita Mine (Todd Hennis, doing business as the San Juan Corp.) apparently withdrew

<sup>3</sup> <http://www.epa.gov/sites/production/files/2013-10/documents/non-time-crit-remov-1993.pdf>



permission for EPA to access the mine sites. In May 2011, EPA issued an order under CERCLA to obtain access to the Red and Bonita, Gold King, and Mogul mines to conduct field investigation, drill holes and install monitoring wells, and take soil and water samples. Please describe what, if any holes were drilled and monitoring wells installed, and water samples taken at the Gold King Mine site pursuant to this order.

**Response:** The access order was issued but did not become effective because Mr. Hennis provided access by consent. The terms of the access order were broad so that the EPA could conduct anticipated or unanticipated actions on properties owned by either San Juan Corp., Salem Minerals Inc., or Todd Hennis, individually. Under the consent for access given by Mr. Hennis, the EPA collected samples from the Gold King Mine discharge and conducted preliminary access and grading work at the Gold King Mine. No wells were drilled and no monitoring wells were installed at the Gold King Mine site pursuant to this order.

**Question 7:** An Engineering Evaluation/Cost Analysis (EE/CA) is required for non-time-critical removal actions. As the removal action at the Red and Bonita Mine (and the Gold King Mine) was designated as "time-critical," no such EE/CA was required to be conducted. Please describe whether any engineering assessment was performed at the Red and Bonita Mine (and the Gold King Mine) to assess the safety of the work site.

**Response:** Following the opening of the blocked adit portal, the underground workings at the Red and Bonita Mine were evaluated by qualified, experienced underground mine contractors, professional engineers, including engineers from Colorado Division of Reclamation Mining and Safety (DRMS) staff. EPA contractors were advised by engineers in the development of the Gold King Mine Action/Work Plan and Site Health and Safety Plan.

**Question 8:** In May 2015, Environmental Restoration, LLC (EPA's contractor) developed a work plan for the Gold King mine that stated, in part, "[c]onditions may exist that could result in a blow-out of the blockages and cause a release of large volumes of contaminated mine waters and sediment from inside the mine, which contain concentrated heavy metals." To address the water volume, Environmental Restoration planned to install a pipe (called a "stinger") through the collapsed mine entrance so water could be pumped and treated. Please describe the process used by EPA to evaluate the technical merits and safety of this work plan, including whether any of the EPA personnel who participated in this review (a) were mining engineers and (b) personnel from the Office of Emergency Management participated in reviewing and/or approving the work plan.

**Response:** The EPA had developed a preliminary plan for removing the mine water and was in the process of evaluating the technical merits and safety of this preliminary workplan. The EPA had scheduled a meeting for August 14, 2015, to include an additional expert from Bureau of Reclamation (BOR) to assist with this evaluation, consider the conditions at the mine, and to decide whether to go forward with the preliminary plan.

The objective of the work conducted at the Gold King Mine up until the release on August 5, 2015, was to expose bedrock below the eroded and unconsolidated soil and gravels on the hillside above the adit portal and adit. This work was implemented so that conditions above the

adit at the portal could be better observed, to support discussions on a path forward with the full technical team, including the scheduled consult with BOR on August 14, 2015, to determine whether the preliminary plan was viable.

EPA Region 8's mining coordinator has a Mining Engineering degree from Colorado School of Mines. The EPA On Scene Coordinator (OSC) on-site during the incident has a Geological Engineering degree from Colorado School of Mines. Additionally, EPA contractors include staff with science and engineering backgrounds, and Region 8 consults with state partners at the Colorado Department of Public Health and the Environment and Division of Reclamation and Mine Safety who have many years of experience in mine site remediation. In conducting mining-related operations, the EPA uses private companies with mining engineers to conduct mine remediation work. Following general practice, the EPA Office of Emergency Management did not participate in the review or development of the work plan for the site.

**Question 9:** The health and safety plan developed for this cleanup was boilerplate and was not tailored to the risks of a mine site. It did not even contain a worst-case scenario like the blowout that occurred. Please describe what if any requirements there are concerning the development of health and safety/emergency response plans at removal actions at abandoned and inactive mine sites.

**Response:** A Site Safety Plan establishes policies and procedures to protect workers and the public from the potential hazards posed by a hazardous waste site. The Site Safety Plan provides measures to minimize accidents and injuries that may occur during daily activities. Development of a written Site Safety Plan helps ensure that all safety aspects of site operations are thoroughly examined prior to commencing field work. In general, a Safety Plan will:

- Name key personnel and alternates responsible for site safety;
- Describe the risks associated with site operations;
- Confirm that personnel are adequately trained to perform their job responsibilities and to handle the specific hazardous situations they may encounter;
- Describe the protective clothing and equipment to be worn by personnel during site operations;
- Describe any site-specific medical surveillance requirements;
- Describe the program for periodic air monitoring, personnel monitoring, and environmental sampling if needed;
- Describe the actions to be taken to mitigate existing hazards;
- Define site control measures and include a site map;
- Establish decontamination procedures for personnel and equipment;
- Set forth the site's Standard Operating Procedures (SOPs);
- Set forth a Contingency Plan for safe and effective response to emergencies.

**Question 10:** Please explain why the Health and Safety Plan at page 22 refers to the "Concord Chemical Site" instead of the Red and Bonita Mine or Gold King Mine sites.

**Response:** The reference to the Concord Chemical Site was an oversight by the contractor in preparing the plan.

**Question 11:** Although the health and safety plan for the Red and Bonita Mine site stated that a satellite phone would be available for emergency communication purposes, no such device was present at the Gold King Mine site, and workers there were unable to notify the National Response Center or emergency personnel from the blowout location. What are the requirements, policies, and procedures concerning the deployment and use of communication equipment, including satellite phones, for emergency notification purposes by on-scene coordinators and other EPA or contractor staff performing removal actions?

**Response:** At the Gold King Mine site, there was no breakdown in the communications links. Colorado DRMS has a detailed log of communications with local county officials on the ground. The Colorado Office of Emergency Management verified that notifications occurred in a timely manner to downstream agencies and water users.

While there was no satellite phone at the Gold King Mine site on August 5, 2015, there was a satellite phone available at the Red and Bonita site, less than 500 feet below the Gold King Mine. There were personnel at the Red and Bonita site on "toplander" or "mine rescue" mode because personnel were working underground at the Red and Bonita Mine and the satellite phone was available for communications for both. Personnel working at the Gold King Mine site were in constant radio communication with personnel at the Red and Bonita Mine and others working down below the site. Radio communications have proven to be most reliable in the area. Reporting to the National Response Center was accomplished in a timely manner via radio communications to personnel who were able to quickly move to cell phone range to report the incident.

**Question 12:** On August 18, 2015, EPA announced the Department of the Interior (DOI) had been selected to conduct an "independent" review of the Gold King mine events. Please answer: (a) why was DOI selected to lead this review; (b) what involvement, if any, did the White House (including the Office of Management and Budget or the Council on Environmental Quality) have on this process; (c) when was DOI first contacted to lead this review and by whom; (d) were any other (i) federal agencies, (ii) states, or (iii) non-governmental entities contacted about leading and/or participating in this review; (e) why did EPA not ask the Office of Inspector General to conduct this review; (f) does DOI's responsibility for cleaning up contaminated mine sites on federal land and its natural resource and Native American trust responsibilities compromise its ability to conduct an independent assessment of causes of and response to the Gold King Mine spill; and (g) will EPA be reimbursing DOI for the cost of this review?

**Response:** In addition to conducting an internal review of the Gold King Mine release, the EPA wanted an independent review conducted by a respected entity with long-standing engineering and technical mine site experience. In August, 2015, the EPA requested technical assistance from the U.S. Department of the Interior (DOI) and U.S. Army Corp of Engineers (USACE) to perform an independent review of the cause of the Gold King Mine release and steps that could be taken to preclude similar incidents at other mine sites in the future. DOI asked the Bureau of Reclamation (BOR) to lead the technical evaluation and coordinated with USACE and U.S. Geological Survey (USGS) for peer review of the work performed by BOR. The work performed by DOI will be reimbursed under an Interagency Agreement, as is customary when a federal

department or agency conducts work for another department or agency.

**Question 13:** The installation of a bulkhead at the nearby Sunnyside Mine-American Tunnel appears to have caused the water level to rise inside the mine works at the Red and Bonita Mine and the Gold King Mine. The portal for the Sunnyside Mine is located on unpatented Bureau of Land Management land. As such, what responsibility, if any, may the Department of the Interior have for the cleanup of the Red and Bonita Mine and Gold King Mine?

**Response:** The EPA defers to the Department of the Interior regarding land ownership and the 1872 Mining Act, particularly regarding unpatented mining claims.

**Question 14:** In 2008, the United States and the State of Colorado reached an agreement with Standard Metals, memorialized in a consent decree, resolving claims for reimbursement of response costs incurred (or expected to be incurred) in connection with several sites, including the Sunnyside Mine in Silverton, Colorado. Please summarize the status of this consent decree, including compliance with the terms by Standard Metals regarding payment of any judgment, recovery from any insurance claims, and conveyance of real property. Please also discuss whether the consent decree would prevent the United States from seeking recovery of any response costs from Standard Metals associated with the removal action at the Red and Bonita Mine and Gold King Mine sites.

**Response:** The Standard Metals consent decree, entered by the United States District Court for the District of Colorado on February 2, 2009, (Consent Decree) resolves the liability of the Standard Metals Corporation arising under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et. seq. (CERCLA), for the following nine sites:

- American Tunnel, San Juan County, Colorado
- Antler Site, Mohave County, Arizona
- Arrastra Gulch Disposal Site, San Juan County, Colorado
- Grand Mogul Mine, San Juan County, Colorado
- Mayflower Mill and Tailings Site, San Juan County, Colorado
- Mogul Mine, San Juan County, Colorado
- Ross Adams, Site, Prince of Wales Island, Alaska
- Standard Mine Site, Gunnison County, Colorado
- Sunnyside Mine, San Juan County, Colorado

The parties to the Consent Decree include the EPA, the U.S. Department of Agriculture Forest Service (Forest Service), the U.S. Department of the Interior Bureau of Land Management (BLM), the Colorado Department of Public Health and Environment, the Colorado Department of Natural Resources and the Attorney General of the State of Colorado, in addition to Standard Metals Corporation.

In 2004, the EPA commenced an investigation to identify potentially responsible parties for the Standard Mine site in Gunnison County, Colorado. During the course of this investigation, the EPA uncovered secondary evidence of insurance coverage that covered environmental damages.

The EPA also conducted an evaluation of Standard Metals' financial condition. The EPA concluded that the only assets of the company were the insurance claims and approximately 125 patented mining claims consisting of at least 800 acres with a tax assessed value of \$1.4 million. The EPA also discovered that Standard Metals was responsible for contamination at least eight other sites. The EPA invited other federal and state agencies to join the EPA in a collaborative enforcement approach.

The EPA, together with the State of Colorado, BLM and the Forest Service, negotiated a settlement with Standard Metals that allowed the agencies to pursue claims against the insurance companies. Standard Metals agreed to assist the government in pursuing recovery from insurers and to pay to the United States fifty percent (50%) of the first \$180,000 recovered and ninety percent (90%) of all insurance recovery thereafter. Standard Metals also agreed to transfer any real property to which it held title to the United States upon request. The Forest Service and BLM reviewed the company's holdings and expressed interest in possibly acquiring much of the land for the public. The government agencies also agreed to allocate future insurance recoveries among the various sites and entered into a Memorandum of Understanding for this allocation.

Ultimately, Standard Metals, with assistance from the DOJ and the EPA, entered into five settlement agreements with insurers. More than \$900,000 was recovered to address contamination at the six "Silverton" sites in San Juan County, Colorado, and evenly distributed to EPA and BLM. More than \$1.3 million was recovered to address contamination and natural resource damages at the Standard Mine site in Gunnison County, Colorado and was distributed to the EPA and the state of Colorado. In 2012, pursuant to the Consent Decree, Standard Metals transferred title to the United States to approximately 980 acres of land in San Juan and Ouray counties consisting of 100 mining claims. The Forest Service is now managing 83 of these claims and BLM is managing the remaining claims.

Pursuant to the Consent Decree, the United States provided to Standard Metals a covenant not to sue for liability arising under CERCLA relating to the American Tunnel, the Grand Mogul, the Mogul and the Mayflower Mill and Tailings sites which could prevent recovery for response costs from Standard Metals for the Red and Bonita Mine and Gold King Mine sites. Further, because Standard Metals is a defunct, insolvent company, such action would likely not result in any meaningful cost recovery.

**Question 15:** DOI announced on August 20, 2015, that the Bureau of Reclamation would lead its review of the Gold King Mine spill. According to EPA documents and press reports, the Bureau of Reclamation has not cooperated with EPA's efforts to address contaminated mine water and to clean up the California Gulch Superfund Site in Leadville, Colorado. For example, in 2008 Lake County, Colorado, commissioners declared a state of emergency over concerns about the buildup of contaminated mine water at the Bureau of Reclamation's Leadville Mine Drainage Tunnel (See, [http://www.nytimes.com/2008/02/28/us/28leadville.html?\\_r=0](http://www.nytimes.com/2008/02/28/us/28leadville.html?_r=0).) In another example, EPA was forced to revise its remedy to clean up Operable Unit 6 for the California Gulch Superfund Site because Reclamation would not cooperate. (See, [http://ftp.epa.gov/r8/calgulch/OU6/RODFeasibilityStudiesRIFS/CG\\_OU6RODAmendmentSep2010.pdf](http://ftp.epa.gov/r8/calgulch/OU6/RODFeasibilityStudiesRIFS/CG_OU6RODAmendmentSep2010.pdf).) Please describe the basis for Reclamation's objections and efforts to resolve the

disagreements about Reclamation's cleanup responsibility for the California Gulch Superfund Site, including any involvement by the White House.

**Response:** The EPA defers to the Bureau of Reclamation (BOR) to describe the basis for any objections they may have had to EPA's remedy at Operable Unit 6 (OU6) of the California Gulch Superfund Site. The EPA is not aware of any involvement of the White House in this matter. Generally, the EPA and the BOR have had a cooperative relationship during cleanup activities at the California Gulch Superfund Site. For instance, after Lake County declared a state of emergency in 2008, the EPA and BOR entered into a memorandum of understanding to cooperate in implementing EPA's emergency removal action to drill into the Leadville Mine Drainage Tunnel (LMDT) and construct a pipeline to direct the water from the well drilled into the LMDT to the BOR's water treatment plant. In 2010, the EPA and the BOR entered into an interagency agreement to treat OU6 surface water, to provide technical support for pond and ditch design, and consultation on design of drainage systems within OU6.

**Question 16:** According to EPA's ECHO database, the Bureau of Reclamation's Leadville Mine Drainage Tunnel has received a notice of significant violation for its Clean Water Act permit. (See, <https://echo.epa.gov/detailed-facility-report?fid=110063915429>.) Please describe the basis for the violation notice and any efforts that have been undertaken to resolve the issue and bring the Reclamation facility into compliance with the Clean Water Act.

**Response:** The EPA did not send a notice of violation to the BOR/Leadville Tunnel permittee on this potential violation. The facility's Discharge Monitoring Reports (DMRs) for the first three quarters of 2015 were not received by the correct EPA Region 8 office. The ECHO database noted the missing reports for the first two quarters, and the third missing report triggered a SNC (significant non-compliance) violation. The permittee had been using an incorrect mailing contact, and the issue has since been resolved. The ECHO database has been updated to accurately reflect that the Leadville Mine Drainage Tunnel is in compliance with its NPDES permit.

**Question 17:** Were you (Administrator McCarthy) aware of the issues involving the Bureau of Reclamation's Leadville Mine Drainage Tunnel when you decided to request the Department of the Interior to conduct the independent review of the Gold King Mine spill?

**Response:** Issues associated with the Leadville Mine Drainage Tunnel had no impact on the decision to select the Department of the Interior to conduct an independent review of the Gold King Mine release.

**Question 18:** A recent internal EPA review found numerous management and communication problems within the Office of Emergency Management, which is the office that oversees emergency and time-critical removal actions such as the one being performed at the Gold King Mine site. At the September 16, 2015, hearing you (Administrator McCarthy) were asked, "Have the recent problems with the EPA Office of Emergency Management contributed to the Gold King Mine spill or affected EPA's response?" You (Administrator McCarthy) responded, "I am not aware of recent problems with our Office of Environmental Management." Please clarify for

the record whether you are aware of the review conducted by Region 2 Deputy Administrator of the Office of Emergency Management and, if so, how you became aware of the review.

**Response:** The Office of Land and Emergency Management (OLEM) requested a senior EPA regional official to conduct a review of the Office of Emergency Management (OEM) to identify ways to enhance and better support the organization in its prevention, preparedness, and response roles. OEM serves an important role in EPA's efforts to help prevent, prepare for, and respond to spills and releases that threaten public health and the environment and plays an important role with our federal, state, and local partners in the federal chemical facility safety effort. OEM has a dedicated workforce who are committed to the mission of prevention, preparedness and response. In 2014, the Administrator was notified by OLEM management regarding the internal review of OEM conducted that year.

**Question 19:** Please describe what steps, if any, EPA has taken to respond to the internal management review of the Office of Emergency Management.

**Response:** The Office of Land and Emergency Management selected a new permanent Office Director for the Office of Emergency Management in the summer of 2015. With the new Office Director in place, a revised office strategic plan is being developed which will include:

- short and long term priorities;
- an annual implementation plan;
- addressing items mentioned in the internal review report along with additional items to be determined in collaboration between OEM and the OLEM Immediate Office;
- Report items to be addressed include but are not limited to: communications issues, regional issues, training, collaboration with external federal partners, and the National Response Team.

**Question 20:** Please describe what involvement, if any, the Office of Emergency Management (OEM) had in overseeing the time-critical removal of the Red and Bonita Mina and Gold King Mine sites, including the number of OEM staff who were involved and the dates of any site visits that occurred as part of any such OEM oversight, prior to the August 5, 2015 blowout.

**Response:** EPA regions provide personnel to oversee removal actions, and regions typically provide OEM periodic updates on their removal actions. OEM regional coordinators monitor removal program activity for their respective regions, including monitoring situation report web postings for removal sites and through general coordination activities with their assigned region. For the Red and Bonita Mine site, Region 8 followed procedures in the National Contingency Plan (NCP) and in the Action Memo Guidance for initiating the time-critical removal action which, in this case, did not require review and concurrence from OEM. OEM did not conduct any site visits to the Silverton/ Durango area prior to the Gold King Mine release.

**Question 21:** Please describe whether EPA followed all of the notice requirements of section 103 of CERCLA and section 304 of the Emergency Planning and Community Right to Know Act after the Gold King Mine blowout occurred.

**Response:** Notifications were made in accordance with CERCLA section 103. Although the EPA was not an “operator” of the Gold King Mine as defined under EPCRA section 304, the notifications associated with the release satisfied the requirements of EPCRA 304. Notifications included:

- EPA personnel radioed an off-site EPA contractor to secure public access below the site and communicate with the Colorado State Department of Reclamation Mine Safety (DRMS) to make appropriate notification of the release. This was completed within minutes of the discharge;
- Colorado DRMS personnel notified the Colorado Department of Public Health and Environment (DPHE) Spill Hotline and the National Response Center;
- Colorado DPHE notified downstream water municipal and agricultural water users including local governments, the Colorado Parks and Wildlife, and Southern Ute Tribe.

**Question 22:** Concerns have been raised by downstream water users that they were not given timely notice of the blowout and the potential risks associated with the flow of contaminated water. What steps, if any, did EPA take to ensure that downstream entities, including state, county, local and Tribal governments, water and irrigation districts, and agricultural users, were properly notified of the blowout? In your response, please specify when and how EPA provided notice to the Navajo Nation and the Southern Ute Nation.

**Response:** On August 5, 2015, the EPA was able to alert state workers in the area by radio communications. The workers then alerted local officials in San Juan County while on their way into cell phone range. They contacted the National Response Center and the Colorado spill hotline, and notifications to local jurisdictions and water users downstream were completed within a few hours. Local officials assisted in notifying irrigation districts and water users in their jurisdiction. The Southern Ute Tribe was notified on August 5, 2015, by Colorado Parks and Wildlife. EPA Region 8 notified EPA Region 6 and Region 9 on August 6, 2015. Once EPA Region 9 learned that the release was heading toward the San Juan River, they notified Navajo Nation. In addition, EPA Region 9 notified Navajo Nation in writing on August 6 of the closure of the Animas River by the La Plata County Sheriff’s order and offered updates and assistance.

**Question 23:** Please identify what lessons EPA has learned and what steps EPA is taking to improve communication and the process for providing timely notification of downstream users who may be affected by a release such as the one that occurred at the Gold King Mine blowout.

**Response:** As part of EPA’s initial lessons learned, we identified notification as an area to address. The Assistant Administrator for the Office of Land and Emergency Management has issued a guidance memo to EPA regions on strengthening our notification process.

**Question 24:** Under CERCLA section 119, EPA may indemnify contractors for damages caused by negligence of a contractor working on a removal action. Did EPA indemnify any of the contractors working at the Gold King Mine site?

**Response:** The relevant contracts do not contain CERCLA section 119 indemnity provisions.



**Question 25:** In your testimony, you state that “EPA has and will continue to take responsibility to help ensure that the Gold King Mine release is cleaned up.” Will EPA take financial responsibility for financial loss experienced by any local business or farmers as the result of the blowout?

**Response:** EPA completed its own internal review of the events leading up to the Gold King Mine incident, including the actions undertaken by agency and other officials following the release. We also sought an independent evaluation of the events surrounding the Gold King Mine release from various experts at the U.S. Department of the Interior, and we have received the results of that investigation.

The findings and conclusions of these reports are being carefully reviewed by EPA's Claims Officer in order to assess the applicability of the Federal Tort Claims Act (FTCA) for purposes of paying legitimate claims against the United States for money damages arising from the Gold King Mine incident. In addition, EPA regulations provide that no award, compromise, or settlement in excess of \$25,000 may be effected without the prior approval of the Attorney General or designee. Further, under these regulations, the EPA cannot settle any claims, even those under \$25,000, that have the potential to set precedent, involve policy, or control disposition of related claims without consultation of the Department of Justice (see 40 C.F.R. § 10.10). This process, involving EPA's Claims Officer and relevant officials from the U.S. Department of Justice, is required by law and regulation, for the receipt and processing of any claims under the FTCA. Upon reviewing the relevant facts, the EPA Claims Officer together with officials in the Department of Justice, will determine whether the FTCA provides a means of compensating claims for money damages arising from the Gold King Mine incident.

**Question 26:** How many claims has EPA received to date for damages associated with the Gold King Mine blowout, and what is the status of any such claims?

**Response:** To date, the agency has received 45 FTCA administrative claims.

**Question 27:** Will EPA seek to avoid liability under the Federal Tort Claims Act by arguing that EPA was not negligent, EPA's actions were discretionary, or that the harm was caused by an independent contractor?

**Response:** The EPA completed its own internal review of the events leading up to the Gold King Mine incident, including the actions undertaken by agency and other officials following the release. We also sought an independent evaluation of the events surrounding the Gold King Mine release from various experts at the U.S. Department of the Interior, and we have received the results of that investigation.

The findings and conclusions of these reports are being carefully reviewed by EPA's Claims Officer in order to assess the applicability of the FTCA for purposes of paying legitimate claims against the United States for money damages arising from the Gold King Mine incident. In addition, EPA regulations provide that no award, compromise, or settlement in excess of \$25,000 may be effected without the prior approval of the Attorney General or designee. Further, under these regulations, the EPA cannot settle any claims, even those under \$25,000, that have the

potential to set precedent, involve policy, or control disposition of related claims without consultation of the Department of Justice. See 40 C.F.R. § 10.10. This process, involving EPA's Claims Officer and relevant officials from the U.S. Department of Justice, is required by law and regulation, for the receipt and processing of any claims under the FTCA. Upon reviewing the relevant facts, the EPA Claims Officer together with officials in the Department of Justice, will determine whether the FTCA provides a means of compensating claims for money damages arising from the Gold King Mine incident.

**Question 28:** What are EPA's current activities related to possible listing of the Red and Bonita Mine and Gold King Mine sites on the National Priorities List (NPL)?

**Response:** In addition to meeting with local stakeholders and state and tribal officials, the EPA has been carefully evaluating the relevant data and information related to contamination sources and hazardous substance releases in the Upper Animas Mining District, which includes both the Red and Bonita and Gold King mines. To date, no final determination has been made regarding NPL listing.

**Question 29:** Would EPA move forward with an NPL listing over the objections of the State of Colorado and local governments?

**Response:** EPA has not proposed to add the Gold King Mine site to the NPL. At this time, we have not received a request from the Governor to propose the site to the NPL. In general, the EPA seeks state concurrence before proposing to list a site on the NPL.

**Question 30:** If EPA includes these mine sites and the Animas River watershed on the NPL list, would EPA have the authority to include any downstream locations where contamination from these sites may be present, including areas as far away as the state of New Mexico, as part of the NPL site? If so, what factors would EPA consider in determining the geographic scope of the NPL site?

**Response:** The Superfund Hazard Ranking System scoring process focuses on an evaluation of the threat posed by the contaminant sources and releases. The listing process itself is not intended to define site boundaries. Once a site is listed, a remedial investigation is performed that describes in greater detail the nature and extent of contamination, which may impact the scope of remedial actions. Under the Comprehensive Environmental Response, Compensation and Liability Act, the term "facility" is defined as "...any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located..." (Section 101 (9)(B)). Only sites added to the NPL are eligible to receive federal funding for long-term remedial cleanup.

**Question 31:** Would inclusion of these mine sites and the Animas River watershed on the NPL list guarantee funding for cleanup by EPA?

**Response:** Only sites added to the NPL are eligible to receive federal funding for long-term remedial cleanup. The Superfund program operates on the principle that polluters should pay for cleanups, rather than passing these costs on to taxpayers. The EPA searches for parties legally

responsible for the contamination at sites, and holds those parties accountable for cleanup costs. For sites that do not have viable potentially responsible parties (PRPs), the EPA uses Congressional appropriations to investigate the full extent of the contamination, select a remedy and conduct remedial construction.

Sites are generally funded when they are ready to begin construction. In FY 2014, 66 new remedial construction projects were started, including 38 government-performed projects and 28 PRP-performed projects. Due to funding constraints, the EPA was unable to proceed with new construction work at five NPL sites with projects ready to start construction in FY 2014. Data on new remedial construction activities are not yet available for FY 2015.

**Question 32:** According to the Government Accountability Office, DOI's Bureau of Land Management has identified over 7,000 abandoned mines on BLM lands. Would listing the Animas River watershed on the NPL result in EPA forcing the DOI or other federal land management agencies to address abandoned mines on public lands?

**Response:** The EPA would work with the Department of the Interior and other federal land management agencies to implement their responsibilities to address abandoned mines within the Animas River watershed on public lands. BLM and U.S. Forest Service representatives have been active participants in stakeholder and community meetings, and we expect this participation to continue. Discussions of a potential NPL site necessarily would include these federal land managers. Both agencies have been conducting independent assessment work to understand potential environmental concerns associated with lands they manage and they have undertaken this work cooperatively with the EPA.

**Question 33:** Has EPA ever ordered DOI to conduct a cleanup of a contaminated abandoned or inactive mine site on federal land? If, yes, please identify the site and the status of the cleanup.

**Response:** No.

**Question 34:** How many CERCLA section 107(b) comfort/status letters and settlement agreements/orders on consent has EPA issued to "Good Samaritans" in connection with a voluntary cleanup of an abandoned or inactive mine site?

**Response:** The EPA has entered into three Good Samaritan settlement agreements: two at the American Fork Site in Utah, and the third at Kerber Creek in Colorado. The EPA is not aware of any Good Samaritan comfort/status letters having been issued.

**Question 35:** Please describe the role that an On-Scene Coordinator would have in a voluntary "Good Samaritan" cleanup pursuant to the CERCLA administrative tools. In your response, please discuss whether the On-Scene Coordinator would be involved all such cleanups or only certain ones that posed significant risks, involved a certain cost threshold, or involved significant technical or engineering challenges.

**Response:** EPA's Good Samaritan guidance defines a Good Samaritan as "a Person (as defined in CERCLA § 101(21)) who is rendering care, assistance, or advice in accordance with the NCP

or at the direction of an on-scene coordinator (“OSC”). This definition suggests that there may not always be an OSC assigned to oversee the work being performed by a Good Samaritan. The EPA determines whether an OSC should be involved after evaluating the complexity of the work to be performed. Because the EPA’s Good Samaritan comfort/status letter does not typically require oversight reimbursement from a Good Samaritan, the EPA will also analyze whether its Superfund budget can absorb the extra cost if involvement by an OSC is determined to be necessary. The EPA will factor these costs into its analysis when deciding whether to provide a Good Samaritan with a Section 107(d) comfort/status letter.

As stated in EPA’s Good Samaritan guidance, Good Samaritan Settlement Agreements, as opposed to comfort/status letters, may be particularly appropriate where the proposed cleanup work is technically complicated and/or where there is a significant possibility of third party litigation. EPA’s model Good Samaritan Settlement Agreement and Order on Consent for Removal Actions (Agreement) therefore anticipates having an OSC involved at such sites in a role similar to that of any other removal action being performed by private parties.

The specific role of an OSC will be determined based on the nature of the work proposed, and will therefore vary from site to site. The model Agreement states: “The OSC shall be responsible for overseeing Good Samaritan’s implementation of this Settlement Agreement. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct the Work, or to direct any other removal action undertaken at the Site.” As described by the model Agreement, an OSC typically will: review submissions from the Good Samaritan, including weekly reports and the final report; make minor modifications to plans or schedules if necessary, and; be the first point of contact in the event of an emergency.

**Senator Fischer:**

**Question 1:** Does the EPA’s proposed RFS rule for 2014, 2015, and 2016 trigger a reset of the entire RFS program? If yes, how does EPA plan to rewrite the remainder of the Congressionally-approved volumes? And how would this impact the renewable fuels industry and farmers?

**Question 2:** Is the justification to lower the RFS volumes for 2014, 2015, and 2016 being used as a reason to trigger a reset of the entire RFS program?

**Responses 1-2:** The final rule setting the standards under the RFS program for 2014, 2015, and 2016 was published on December 14, 2015. Based on a comprehensive analysis of the volumes of renewable fuel that can be supplied in 2015 and 2016 or was supplied in 2014, and a consideration of the more than 670,000 comments we received, we determined that the statutory volume requirements for these three years cannot be met. While we reduced volumes for cellulosic biofuel, advanced biofuel and total renewable fuel for all three years, only the standards for advanced biofuel and cellulosic biofuel met the statutory triggers for a reset; the standards for total renewable fuel did not. The EPA exercised our waiver authority for the reasons set forth in the final rule (80 FR 77420, December 14, 2015), not on the basis of whether the volumes would trigger a reset. The EPA has not yet determined how the statutory volumes

will be reset for cellulosic and advanced biofuel or the associated impact that the new volumes would have on the renewable fuels industry and farmers.

**Question 3:** I'm concerned that the EPA's treatment of E15 and Reid Vapor Pressure limits are driving fuel retailers away from carrying the fuel. Do you have a plan to equalize the regulatory treatment of E10 and E15 so E15 is not disadvantaged in the marketplace?

**Response:** As the EPA noted in the E15 waiver decision, sections 211(f)(4) and 211(h)(4) of the Clean Air Act preclude us from extending the 1-psi waiver for E10 to E15. Disparate RVP treatment occurs only in the summertime and only in area that sell conventional gasoline. In RFG (Reformulated Gasoline) areas, including Chicago, and in conventional gasoline areas during the winter months there is already no disparate treatment of E10 and E15. We have recently received letters from the Renewable Fuels Association and the Alliance of Automobile Manufacturers requesting that we take action to equalize the RVP requirements for E10 with those for E15. We have not yet determined what action if any might be appropriate in response to these letters.

**Question 4:** What methodology is the EPA using to estimate the supply of renewable natural Gas (RNG)?

**Response:** Under the RFS program, qualifying renewable fuel must be used to replace or reduce the quantity of fossil fuel that is present in transportation fuel. Given the multiple possible uses of natural gas, the RFS regulations specify requirements for parties seeking to claim natural gas as a renewable fuel to document that it is used as transportation fuel. Thus, the "supply" of renewable natural gas in the context of the RFS program is the volume expected to be produced for which documentation exists to verify its intended use as fuel in compressed natural gas (CNG) or liquified natural gas (LNG) vehicles. As described in the final rule establishing the 2014, 2015, and 2016 volume standards (80 FR 77420, December 14, 2015), our methodology for estimating this supply includes interacting with the specific production companies to ensure that they are accurately tracking both production of renewable natural gas and its supply through existing natural gas pipelines to vehicle refueling stations.

**Question 5:** Why is RCNG and RLNG limited to a D3 RIN when they are often used as a diesel substitute in heavy duty engines?

**Response:** Renewable compressed natural gas (RCNG) and renewable liquefied natural gas (RLNG) do not meet the statutory definition of biomass-based diesel (See §80.1401), and therefore cannot qualify for the biomass-based diesel (D4) or the cellulosic diesel (D7) renewable identification numbers (RINs). To qualify as biomass-based diesel or cellulosic diesel, a fuel must meet the definition of either biodiesel or non-ester renewable diesel. As RCNG and RLNG are not a mono-alkyl ester (as required by the biodiesel definition) and cannot be used in an (unmodified) engine designed to operate on conventional diesel fuel (as required by the non-ester renewable diesel definition), they cannot qualify for D4 or D7 RINs. Nevertheless, while the biomass-based diesel and cellulosic standards are separate standards within the advanced biofuel category, the cellulosic (D3) RIN and the biomass-based diesel (D4) RIN both count toward meeting both the advanced biofuel and total renewable fuel standards. Thus, we would

not expect there to be a distinct advantage for biofuel producers in qualifying RCNG and RLNG for D4 RINs as opposed to D3 RINs.

**Question 6:** Is EPA aware that a gallon-equivalent of renewable electricity (22.6 kilowatt hours) can propel a vehicle four times as far, and replace four times as much gasoline, as a gallon of ethanol can? If so, why has EPA assigned an equivalence value of 1.0 to both of those renewable fuels?

**Response:** In the 2010 RFS2 rulemaking (75 FR 14670, March 26, 2010), the EPA took comment on various approaches to valuing RINs and ultimately finalized an energy content approach, basing the value on their energy content relative to ethanol. Because vehicles have differing efficiencies operating on the same fuel and these efficiencies change over time, attempting to reflect vehicle efficiency in the value of RINs would significantly complicate the program and introduce another level of uncertainty. Rather, vehicle efficiency impacts on greenhouse gas (GHG) emissions are reflected in our vehicle GHG standards where credits are provided.

**Question 7:** The EPA has forecasted that the CPP will increase both the price of electricity and natural gas. Increased costs directly impact the competitiveness of energy-intensive trade-exposed manufacturers, such as chemicals, steel, aluminum, paper, glass and countless other industries. My concern is that middle class manufacturing jobs and GHG emissions will move offshore when energy costs rise. This is called GHG leakage. The EU ETS and California's cap and trade systems recognize this problem and give allowances to manufacturers. Has the EPA studied the impact of GHG leakage and the loss of middle class jobs due to the CPP? If so, what are the results? If not, why not?

**Response:** Along with the final CPP, the EPA included a Regulatory Impact Analysis that estimated the illustrative costs and benefits of compliance, including the effects on emissions and employment. That document can be found at <http://www2.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf>. The EPA does not expect the Clean Power Plan to cause a significant increase in costs for manufacturers. While we estimate that electricity prices may rise by a small amount, we also estimate that overall electricity bills will go down as facilities improve their energy efficiency. Independent economists have also found that the decrease in pollution from U.S. manufacturers over time – while GDP continued to rise dramatically – is overwhelmingly due to manufacturers cleaning up their domestic processes. The reduction in pollution was NOT due to manufacturers moving operations.<sup>[1]</sup> In addition, economists have studied the effects of environmental regulations on manufacturers and consistently concluded that there is very little evidence that environmental regulations harm American competitiveness. The Census Bureau's survey of manufacturers suggest that environmental regulations have a negligible effect on industry competitiveness.<sup>[2]</sup> Independent economists who have looked at this question have drawn the same conclusion.<sup>[3]</sup> Finally a survey of offshoring companies by

<sup>[1]</sup> <http://www.econ.yale.edu/~js2755/ShapiroWalkerPollutionDecomposition.pdf> and [http://www.jstor.org/stable/10.1086/680039?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/10.1086/680039?seq=1#page_scan_tab_contents).

<sup>[2]</sup> <http://yosemite.epa.gov/ee/epa/eed.nsf/webpages/pace2005.html#whatare>.

<sup>[3]</sup> M. Scott Taylor, 2005. "Unbundling the Pollution Haven Hypothesis," *The B.E. Journal of Economic Analysis & Policy*, Berkeley Electronic Press, vol. 0(2), and

Duke University found that the main causal factor cited by those companies is NOT costs; it is a shortage of skilled domestic workers.<sup>[4]</sup>

**Question 8:** Manufacturers are concerned about the precedent setting nature of the CPP. The CPP requires existing electric generators to reduce more GHG emissions than can be reduced from inside-the-fence line. If manufacturers are required to reduce more GHG emissions than can be reduced from inside-the-fence line, they will not be able to compete with foreign competition.

What is to prevent an environmental group from suing the EPA, forcing the EPA to regulate the manufacturing sector in the same manner as the electric generators?

**Response:** The final Clean Power Plan is consistent with the law and aligns with the approach that Congress and the EPA have always taken to regulate emissions from this and all other industrial sectors – setting source-level, source category-wide standards that sources can meet through a variety of technologies and measures. Power plants, unlike most manufacturing facilities, operate through broad interconnected regional grids that determine the generation and distribution of power, and thus the EPA based our best system of emission reduction (BSER) analysis on the three established regional electricity interconnects. There is not a comparable system for other potential 111d source categories. While it is possible that the EPA will be sued to take similar action in other sectors, the EPA will continue to act within the authority Congress gave it and make decisions based on the transparent factual record before it.

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A.B. Jaffe, S.R. Peterson, P.R. Portney, and R. Stavins, "Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?" *Journal of Economic Literature* 33(1995):132-163.

<sup>[4]</sup> [http://www.fuqua.duke.edu/news\\_events/news-releases/offshoring\\_jan\\_2011/#.VjEVe1WrTcs](http://www.fuqua.duke.edu/news_events/news-releases/offshoring_jan_2011/#.VjEVe1WrTcs)

Senator INHOFE. Thank you, Madam Administrator.

Let me just go ahead and try to stake out where I think your position is, and what your position is, so that others can address that position.

Both the EPA and the contractor knew that there was a risk of a blowout at the Gold King Mine. In hindsight, do you agree that the EPA should have spent the time and money to do the necessary engineering and water pressure tests before work began there? Yes or no, we do not need a long answer.

Ms. MCCARTHY. Sir, my position is that the State of Colorado and the Animas River stakeholder group knew it, it was in the work plan. We were actually there, sir, because of the danger of a blowout.

Senator INHOFE. So your answer is no. Did EPA designate the clean up here as time critical to cut corners and avoid having to do a detailed engineering study?

Ms. MCCARTHY. No, sir, we did not.

Senator INHOFE. Why didn't the EPA ask the Inspector General or another Federal agency or group like the National Academies that does not have a conflict of interest? There has been a lot of concern about a conflict of interest that would have been there with the DOI. So I am asking the question, why didn't you address one of them as opposed to the DOI?

Ms. MCCARTHY. Sir, it is important for us to remember that we have also put on hold other similar mining responses, that many of which are time critical. We went to DOI because they had the expertise, they are bringing the Army Corps in, we believe that they are independent, they will give us an independent assessment, and that is the most appropriate thing to do. And as you know the OIG is investigating this incident as well.

Senator INHOFE. Do you are saying then that those who are saying DOI would have a conflict of interest are not accurate?

Ms. MCCARTHY. I do not believe they have a conflict of interest. They are independent. They should do a good job.

Senator INHOFE. Have the recent problems with the EPA Office of Emergency Management contributed to the Gold King Mine spill or affected EPA's response?

Ms. MCCARTHY. I am not aware of recent problems with our Office of Environmental Management.

Senator INHOFE. Then last, Senator Bennet made the statement that there is no denying that the EPA caused this disaster. Senator Gardner in his statement complained that you were not available for some period of time, your schedule did not permit, to discuss this with Senator Gardner. Is that incorrect?

Ms. MCCARTHY. Well, sir, we have taken full responsibility without question.

Senator INHOFE. I understand that.

Ms. MCCARTHY. I was there on the 12th and 13th. The original response was quite hectic and ongoing. I certainly did not want my presence there to confuse the situation. But I am not aware that the Senator reached out to me in any way prior to that, that I did not respond to right away.

Senator INHOFE. Did you hear his statement that he made?

Ms. MCCARTHY. I did not hear his statement, sir, no.



Senator INHOFE. You might look at that.

Now, on another topic, because I have just a short while here, and it is very important. While you are here the Department of Justice recently told a Federal court that EPA would submit the final carbon rules to the Federal Register by September 4th and that publication would occur by late October. Did the EPA submit the rules to the Federal Register by September 4th?

Ms. MCCARTHY. I am sorry, sir, I don't have those numbers in my head. I did not expect this question.

Senator INHOFE. I know that, but this is significant, though, and we need to know. That was the deadline given and whether or not you complied with that deadline.

Ms. MCCARTHY. I do not have the exact date.

Senator INHOFE. Do you have staff here that can tell you that?

Ms. MCCARTHY. I am sorry?

Senator INHOFE. Do you have staff sitting here who might be able to answer that question?

Ms. MCCARTHY. We can certainly get you the answer as quickly as possible. I do not have my Office of Air and Radiation staff here, given the subject matter of the hearing.

Senator INHOFE. Are you aware that delaying publication until the end of October interferes with the ability of Congress and the public to legally challenge the rules before the big show in Paris?

Ms. MCCARTHY. Sir, I am aware that both you and I want this to get into the Federal Register as soon as possible.

Senator INHOFE. Senator Boxer.

Senator BOXER. Thank you, Senator, thank you, Mr. Chairman.

Administrator McCarthy, I want to point out that Senator Bennett did praise you for being available, so there is confusion. One said you weren't, the other one said you were. So I think—anyway I am moving on.

Ms. MCCARTHY. I certainly had a conversation with Senator Gardner. I am unaware of being available.

Senator BOXER. Good. We will clear it up.

Administrator McCarthy, the Superfund law called for EPA to issue rules requiring certain industries to provide financial assurances for clean ups so that taxpayers are not on the hook. In 2009, EPA identified the hard rock mining industry as the first class of facilities requiring financial assurance rules. In other words, that they would be there, should their action cause a problem. EPA is undertaking this rulemaking, but now you are under court order to finish that rule by December 2017.

Can you describe the steps EPA is taking to ensure that these critical rules are promulgated according to the court's schedule?

Ms. MCCARTHY. We have also committed, Senator, to an August 2016 draft. Prior to that draft, we intend to work with our sister Federal agencies so that we can be assured that the financial responsibility rule will be as accurate as it can be in terms of how much responsibility those parties should take for CERCLA clean up and how best to assure that that financial responsibility will be solid and appropriate.

Senator BOXER. Administrator, how will these rules help assure taxpayers they are not on the hook for future clean ups?

Ms. MCCARTHY. My understanding, Senator, is that we do have an ability to require financial responsibility for our existing and new active sites. The challenge for us are these legacy sites talking about like Gold King Mine, where we do not have a responsible party that we can lean to, that we will not be able to address those issues with this particular rulemaking.

Senator BOXER. Administrator McCarthy, in response to the Gold King Mine spill, you issued a stop work order at all hard rock mine sites. You requested a review of whether those sites pose a potential for a blowout similar to what happened at the Gold King Mine. I want to thank you for that, because clearly, we do not want to play Russian roulette with these mines.

I understand that the review has resulted in the suspension of clean ups at 10 sites, including three in California and four in Colorado. Again, I appreciate your quick action to identify other sites that could present a concern. Can you describe what actions EPA is taking to assess the potential risk at these sites?

Ms. MCCARTHY. I can, Senator. You are absolutely right, we were very concerned that any similar situation learn from the independent review that is being done by DOI before they proceeded. So we have identified as best we can all of the sites that EPA is engaged in, which is a small fraction of the sites you want to look at. But it is over a couple of hundred.

We are looking at the similarities between this and the Gold King Mine incident, and we are allowing sites to proceed where there is an imminent hazard. But if there is not, we are waiting for the review to be done so that we can make sure that similar sites learn the lessons that we are going to learn on the basis of what happened at the Gold King Mine and what the investigation by DOI and other independent entities indicate.

Senator BOXER. Thank you. I think that is very common-sense and wise.

Administrator McCarthy, one concern raised about clean ups of abandoned mines by Good Samaritans is who will be responsible if something goes wrong during the clean up. This is my concern. I love the fact that people can come forward and clean up, but who pays if things go wrong? And something could easily go wrong.

So if Good Samaritans are not responsible, who would be on the hook for those costs? Would it not be taxpayers in those situations?

Ms. MCCARTHY. Yes, it would be.

Senator BOXER. OK, that is why I think it is critical that we can work together to come up with some rules that make some sense, so we can include Good Samaritans but not have a situation where they just go in there.

Look, if EPA made this kind of mistake, and I know it weighs heavy on your heart, that EPA is in there and look what happened, now a Good Samaritan comes forward without any of the expertise, it could happen again. So we have to be very, very careful about it.

I just want to say, the Obama administration has proposed reinstating the Superfund tax and establishing a fee on hard rock mining. I just think it makes all the sense in the world to get ahead of this. Everything costs something. You can't just wish it away and wish that it would be cleaned up.

So I hope as a result of this hearing and your openness to reform that we can make some good reforms within EPA, but also that we can have a new era where we can work across party lines to truly clean up these sites. Thank you.

Senator INHOFE. Thank you, Senator Boxer.

Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

Administrator McCarthy, I would like to follow up a little bit on what the chairman had started visiting with you about. On August 18th the EPA announced that the Department of the Interior would conduct an independent investigation into the causes of the spill and issue a report by late October. Subsequently, DOI announced that the Bureau of Reclamation would lead the review.

However, it appears that there are several conflicts of interest that you have spoken about and that you don't believe were involved. You are disagreeing with there being conflicts. What I am curious about is, if this is an independent review and we are assuming that is the way you set it up to be, most certainly there would have been a contract or documentation as to what the expectations were from DOI.

Is there a memorandum of agreement or other documentation concerning what the DOI would review? And if there is, why haven't we received copies as requested by this committee? EPW staff has requested the documents, including the charge questions or the scope of the DOI's work. But we have not received any of the information, this is as of last evening.

Why has your agency not publicly released the documents? Will you commit to sending these documents to us following the conclusion of this hearing?

Ms. MCCARTHY. Senator, we were as, I think, sensitive as you were to making sure that this review was truly independent. One of the decisions we made to ensure that was for EPA not to actually ourselves control the scope of the investigation. We thought it was important for the independence of DOI that they actually articulated that scope themselves so that EPA wouldn't be accused of narrowing that inappropriately.

So we are leaving that up to DOI. I am happy to follow up to see if I can be helpful in getting any information on how they have defined that. But as far as I know, EPA has not seen that documentation either.

Senator ROUNDS. I am sorry, but you said that you have an independent, you are anticipating an independent review, but you don't know if the EPA has seen the document which lays out the scope of the investigation by an independent firm?

Ms. MCCARTHY. EPA did not dictate the scope of that investigation.

Senator ROUNDS. But certainly you would have seen a copy of what would be expected of the independent agency?

Ms. MCCARTHY. The independent agency is going to dictate that themselves, and we are going to actually live with whatever scope DOI is appropriate as an independent investigator.

Senator ROUNDS. But by now that document should exist, shouldn't it? The reason why I am asking is because you have indicated that you have already stopped work at other locations.

Ms. MCCARTHY. I have.

Senator ROUNDS. Based upon the preliminary report. But it must be based upon some sort of understanding of the review in the first place.

Ms. MCCARTHY. My understanding is that DOI indicated that they would do the review, they understood that they were going to be establishing the scope, and it is my understanding that they are intending to complete this review in October.

Senator ROUNDS. So either the documents exist and your agency has not seen them, or second of all, the documents are still being developed. At which time my question would be, because if not, we should be able to see a copy of them, and it shouldn't be very tough to get them.

Ms. MCCARTHY. Well, sir, I am continuing to try to make sure that EPA is not perceived as interfering in this investigation in any way that would question the independence of DOI's review. And that is what we are going to continue to do.

Senator ROUNDS. If it is an independent review, though, it seems to me that the independent review agency would have at least provided you with a copy of what they are going to be reviewing and how they would do it.

Ms. MCCARTHY. In this case, I do not believe that we have seen that type of documentation.

Senator ROUNDS. You have not?

Ms. MCCARTHY. Yes, we have seen the press release, that is what we have seen. And I know that their review is going to be looking at the incident itself and the contributing factors. Beyond that I haven't seen a limitation on how they are going to conduct that.

Senator ROUNDS. Has there been a preliminary report issued to your agency from the independent DOI?

Ms. MCCARTHY. No, sir, the only communication we have had was to look at the press release that was issued. We are hands-off on this to address the very issue that you are concerned about, which is our independence.

Senator ROUNDS. But the reason why I am asking the question is, just a moment ago you indicated that you have already shut down work, I believe you have shut down work at other locations based upon the information already received and learned.

Ms. MCCARTHY. A number of locations. Yes.

Senator ROUNDS. Did that not come from DOI?

Ms. MCCARTHY. Oh, no, no, that was our look from our own national mining subgroup or team, I guess, our National Mining Team, and EPA has done review of all of the NPL, the mines that are on our NPL list, and have taken a look at what might be even closely similar to this effort. They are consistently looking at those to see what should continue or not. But if there is any similarity or chance that we need to learn lessons here, those reviews and assessments and work is on hold pending the result of this investigation.

Senator ROUNDS. Would that report which created the need to suspend the existing operations, would that be available for this committee to review at this time?

Ms. MCCARTHY. That is available, sir, and that was just a memo that I sent, it was a directive to the agency which I thought was appropriate to do, to be very cautious that there was no way in which the Gold Mine release would happen again at another site. Because we were—I was unclear, and I will remain unclear until the independent review is done about what was the real contributing factor, what happened that we need to make sure will never happen again.

Senator ROUNDS. Thank you for your testimony.

Ms. MCCARTHY. Thank you, sir.

Senator INHOFE. Thank you, Senator Rounds.

Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman.

Administrator McCarthy, one thing I would hope all of would agree upon is that we do want the independent review, and we want it done with the integrity of an independent review.

Ms. MCCARTHY. Yes, sir.

Senator CARDIN. To understand what happened, as you said, to prevent this from happening in the future. So I think we all support that, and we appreciate your commitment to that independent review.

I just want to ask a broader question, because I was listening to my colleagues' testimony. Hard rock mining, of course, took place in many parts of our country. But clearly the States that were directly impacted the most are the ones we heard from today, and there are thousands of abandoned mines. All look like they create some environmental challenges, some have been under control and have been pretty well understood. Others are much more problematic, and we are still evaluating the risk factors as to whether action is needed. And that was part of the process of this particular episode.

I was impressed by Senator Heinrich's comment that we have not reviewed the laws for a long period of time. I understand the political environment we are operating under, where it is difficult to pass new environmental laws or to pass funding laws.

But I would hope that we would get your evaluation as to whether the current laws, either the Clean Water Act or the BLM rules for inactive mines, are adequate. Do we really hold the right person accountable for the reclamation? Do we need to have a dedicated funding source to deal with these types of urgent needs in order to protect the environment and water for the communities involved?

It seems to me that considering the challenge, if Senator Heinrich is correct, we are talking multi-tens of billions of dollars in outstanding needs, we need to at least understand this and have more transparent awareness that there are ongoing problems every day and yet, are we taking appropriate actions to make sure our communities are safe as they need to be? How do we go about doing that?

Ms. MCCARTHY. Well, Senator, just to put this problem in perspective, we are talking about 23,000 abandoned mines in Colorado alone and more than 161,000 in the West and Alaska. So clearly this is a very large challenge.

I think I would point to the fact that the Administration, in its fiscal year 2016 budget, actually proposed a fee that would be

charged on hard rock mining to actually support a fund that would allow us to do a better job at tackling these abandoned mines and the continual impact that they are having on water quality.

I think it is important to remember that many Federal agencies have jobs to do in this. But there is no leadership position that actually is the one that is accountable for the entire issue, and it makes it very difficult. From EPA's perspective, we really track the mines, which are only—a small percentage of what is out there on the abandoned mines actually make it into the NPL list, which is our responsibility to track and monitor and to take action if there is an imminent hazard or short term action.

But in this case, it was a mine that is not on that list, that the local community did not want on that list. But the State was unable on their own wherewithal to address this challenge. We have been working for 17 to 20 years to try and figure out how to address the 400 mines in the upper Animas River. It is an incredible challenge.

But when EPA responded when the State wanted us to look at this issue, the pressurization behind the Gold King Mine, which had been going on unattenuated for quite some time, and we went with them on the site, we developed a work plan with them, that work plan went to public meetings, to the stakeholder group in the Animas River, it was completely open, completely transparent. Everybody agreed our next steps, and those are the next steps we took.

Senator CARDIN. I thank you for that. I just ask that you keep us—advise as to whether you have adequate tools, where we talked about your budget with a dedicated funding source, whether the laws are strong enough. Because the bottom line is we want to protect the communities, and we want to hold those that are responsible accountable for the reclamation. It seems to me that the tools could be stronger from what you testified.

Ms. MCCARTHY. Yes, sir, thank you.

Senator INHOFE. Thank you, Senator Cardin.

Senator Sullivan.

Senator SULLIVAN. Administrator McCarthy, good morning. I want to echo kind of what our panel mentioned at the outset Senator Udall talked about water is life out West, I think that is something we all agree with, certainly we want clean water. I agree with Senator Boxer that we all want to make sure that polluters are accountable to help make sure we keep our water clean.

But I also want to emphasize what Senator Gardner talked about, where we also believe that the Government should be held to the same standards as it requires of the public and the private sector. Do you believe that?

Ms. MCCARTHY. Absolutely. Actually a higher standard would be quite appropriate.

Senator SULLIVAN. Do you believe that agencies like the EPA should be subject to the same transparency in reporting requirements that the public is?

Ms. MCCARTHY. I believe that is the reason why the NPL sites are on the NPL list.

Senator SULLIVAN. What do you think would happen to a private company if they did what the EPA had done in this episode with

the Animas River, accidentally causing a blowout, very significant pollution, some arguments saying it took too long to notify? What do you think would happen to a private sector company that that happened to?

Ms. MCCARTHY. In my estimation, and again, the facts will be borne out or not by the independent review, but the way in which you do an action like this, which is difficult to do, is you first make sure that if there is an accident——

Senator ROUNDS. Let's assume that——

Ms. MCCARTHY. I am trying to explain. My answer is——

Senator SULLIVAN. I don't have a lot of time. What would you think would happen if you guys hired a contractor that accidentally caused the eruption, what do you think would happen to a private sector company?

Ms. MCCARTHY. Exactly the same thing that EPA did if they take the same steps that EPA did.

Senator SULLIVAN. What kind of penalties would happen to——

Ms. MCCARTHY. There would be no penalties unless it was against a settlement or an order.

Senator SULLIVAN. Mr. Chairman, I would like to submit for the record a Wall Street Journal article from September 9th, 2015, that lays out several examples of even smaller than this private sector companies where there was an accident, there was pollution, and there were officials that were criminally charged, some went to jail.

Senator INHOFE. Without objection.

[The referenced article follows:]

**THE WALL STREET JOURNAL.**

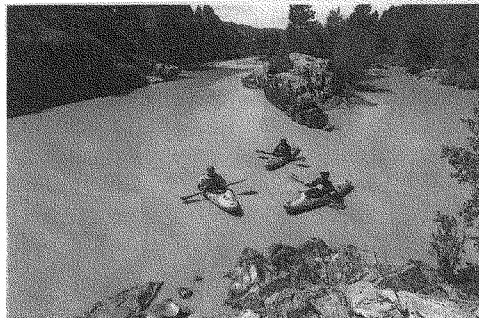
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OPINION | COMMENTARY

## Salvaging a Lesson From the Animas River Spill

The EPA employees at fault won't face criminal charges. Neither should companies that make similar mistakes.



The Animas River near Durango, Colo., in August after an EPA crew accidentally released more than three million gallons of mine waste into a nearby creek. PHOTO: JERRY MCBRIDE/ASSOCIATED PRESS

By **BILL WEHRUM**

Sept. 9, 2015 7:33 p.m. ET

The Animas River disaster in Colorado is looking worse and worse for the Environmental Protection Agency. On Wednesday, EPA officials faced grilling from a

<http://www.wsj.com/articles/salvaging-a-lesson-from-the-animas-river-spill-1441841582>



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congressional committee for the agency's Aug. 5 spill of three million gallons of toxic wastewater into a tributary of the Animas during the cleanup of an abandoned mine near Silverton, Colo. On Aug. 24, the agency released the findings of an internal investigation that found its staff had failed to accurately gauge the water pressure within the mine, thus increasing the chances for a "blowout" like the one that occurred.

All this came after reports that the EPA had known for more than a year that cleaning up the mine was highly risky. As Rep. Lamar Smith (R., Texas), chairman of the House Committee on Science, Space and Technology, asked in Wednesday's hearing: "Why did the EPA ignore these obvious warnings?"

Such revelations have intensified criticism of the EPA's handling of the spill. High-profile politicians, including former Speaker of the House Newt Gingrich, have even called for criminal charges against the agency and the employees at fault. Yet federal law protects them from any such action. America will have to settle for EPA Administrator Gina McCarthy's statement that she is "absolutely, deeply sorry this ever happened."

As a former EPA official, I believe the agency and the individuals responsible shouldn't be prosecuted for the accident. But I also believe this episode brings needed attention to a serious problem with how the EPA conducts business: The agency often criminalizes actions that are nothing more than accidents, many far less damaging to the environment than the Animas River disaster. Such treatment is unjust.

There are many examples. Consider last year's Elk River chemical spill. In January 2014, a Freedom Industries Inc. facility in Charleston, W. Va., accidentally spilled roughly 7,500 gallons of toxic chemicals into the local waterway. The EPA's recent discharge of toxic water in Colorado was many times larger. Yet the agency went after the company with everything it had.

The EPA quickly dispatched an agent from its Criminal Investigation Division to West Virginia. Working with the FBI and a local U.S. attorney, the EPA built a case that resulted in criminal indictments for Freedom Industries and six of its employees. All pleaded guilty in connection with negligent discharge under the Clean Water Act and currently await sentencing, which could involve varying prison sentences.

Companies and employees who willfully commit a crime should be prosecuted. But criminal liability for negligence isn't appropriate because, by definition, a negligent act isn't done with intent. That doesn't mean that negligent acts should go unpunished. There is ample authority for fines and other appropriate relief to be imposed under civil law. Criminal liability should be reserved for those who intend to break the law.

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Yet under the Clean Water Act and numerous other laws enforced by the EPA, accidents like the Elk River chemical spill are criminally punishable. In that sense many environmental laws and regulations with criminal penalties suffer from a problem common in the rest of criminal code—a lack of intent requirement.

There is no indication that any of Freedom Industries' employees intended to cause the spill. The company declared bankruptcy within days of the accident, 11 months before the federal government announced its criminal prosecution. (One employee is being criminally prosecuted for bankruptcy fraud, which isn't related to the spill.) The company also suffered from civil lawsuits from area residents, the costs associated with the post-spill cleanup, and the inevitable public-relations disaster that accompanies such debacles.

In other words, the criminal charges related to the spill added insult to an already debilitating injury. They satisfied calls for vengeance but failed to serve the cause of justice.

Criminal prosecutions aren't restricted to major, headline-grabbing disasters. Take the 1999 prosecution of Edward Hanousek. He oversaw a quarrying project for Pacific & Arctic Railway and Navigation Company in Alaska where a backhoe accidentally struck a pipeline, sending up to 1,500 gallons of oil gushing into nearby Skagway River. Though Hanousek was off-duty and wasn't operating the backhoe, he was criminally charged and sentenced to six months in prison because his contract said he was responsible for safety at the site.

There is also the 2011 prosecution of Lawrence Lewis. Upon finding sewage flooding a military retirement home in the Washington, D.C., metro area, he diverted the flow into a storm drain that—unknown to him—discharged into the Potomac River. He was charged and pleaded guilty to a crime under the Clean Water Act.

The list goes on. The lesson is clear: People can have their lives ruined for something that, in Gina McCarthy's words, they are "absolutely, deeply sorry" for and never meant to do.

The EPA accidentally released three million gallons of toxic water into one of America's most scenic river systems. Thanks to federal law, the employees at fault will never face criminal prosecution or jail time for their mistake—nor should they. But neither should the companies and individuals who make similar mistakes during their work. What's just for the EPA surely is just for those it regulates.

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*Mr. Wehrum, a former acting assistant administrator for air and radiation at the Environmental Protection Agency, is a partner at Hunton & Williams LLP.*

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Senator SULLIVAN. If you think that the EPA should be held to the same standards as private sector companies or a higher standard, do you think anyone from the EPA should be held criminally liable or go to jail for what happened?

Ms. MCCARTHY. I have not received the independent review that is going to fully tell me what happened at that site using an independent voice and eye. I am looking forward to that. But, Senator, the sequence of events when you have a spill is to keep your people safe at the site. It is then to stop the spill as quickly as possible, and it is then to ensure the clean up. That is exactly what EPA is—

Senator SULLIVAN. All I am saying, Administrator, is your agency has, on a number of occasions, according to this article, criminally charged people for accidental spills, and some have gone to jail on spills smaller than what you just described. So if you are going to hold your agency to a higher standard than the private sector, you need to be aware of what you have done as an agency in the past.

And I do want to mention, this is a frustration, I think it is a frustration throughout the country, I think it is a frustration of why people have focused on this. We have, like the other States, abandoned mines in Alaska. We also have abandoned legacy wells. I know it is not EPA's responsibility, but on BLM land, we have wells that are still leaking oil right now. Right now. If you were a private sector CEO in charge of a company like that, you would be in jail. Right now BLM allows abandoned wells to leak all over the State of Alaska, they don't clean these up.

Let me talk more broadly. I am assuming you also believe the EPA should be following the law like the private sector and U.S. citizens have to do, correct?

Ms. MCCARTHY. Of course, sir. Yes.

Senator SULLIVAN. So are you familiar with the Michigan v. EPA case, Supreme Court case from the last session that the Supreme Court had, Utility Air Regulators v. EPA, and just a recent case, North Dakota, Alaska sued the EPA? Are you familiar with those cases? Just came out as a preliminary injunction.

Ms. MCCARTHY. Are you talking about the Clean Water Rule, sir?

Senator SULLIVAN. These are just three instances in the last year and a half, two Supreme Court cases where the EPA has either violated the Constitution, the Clean Water Act or the Clean Air Act.

Ms. MCCARTHY. Sir, I wouldn't characterize it that way, but I understand the point that you are trying to make.

Senator SULLIVAN. That is exactly the way to characterize it; read the opinions. What would happen to a private sector company if it was continually violating the law the way the EPA does?

Ms. MCCARTHY. I don't believe we are violating the law, sir.

Senator SULLIVAN. Have you read the Michigan v. EPA case?

Ms. MCCARTHY. I am familiar with that.

Senator SULLIVAN. Have you read the Utility Air Regulators v. EPA?

Ms. MCCARTHY. I understand that there is a preliminary injunction.

Senator SULLIVAN. No, these are two U.S. Supreme Court cases that said the EPA violated the Clean Water Act and the Clean Air Act. The North Dakota Federal Court just recently said, the Waters of the U.S. Rule, which we have debated here, a lot of us think it violates the law, we had a Federal Court saying that it is very likely that it did violate the law.

Do you think a private sector company could serially violate the law and not pay consequences?

Ms. MCCARTHY. So this is the way the process works when you do rules. EPA interprets the law as best it can, it develops the rules. The vast majority of them do go to court and the vast majority, EPA wins. The times we don't we listen to that court decision and we take appropriate action. That does not mean we have violated the law or the Constitution.

Senator SULLIVAN. I think you need to reread these cases, because that is exactly what the Supreme Court said.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you Senator, Sullivan.

Senator MARKEY.

Senator MARKEY. Thank you, Mr. Chairman, very much, and thank you, Administrator McCarthy, for being here today.

So we have a big mess on our hands. We are dealing here with a law that was passed in 1872. Ulysses S. Grant was the President of the United States, and it hasn't been amended since then. And he did a great job, by the way, on winning the Civil War, just a great job. I just want to compliment him on that.

This law may have been appropriate for 1872. We were trying to get people to go out West. Colorado isn't even a State yet for 4 more years. We have to get people out there, we are trying to get people to populate these States.

In 1872 the law passes, in 1876, Colorado becomes a State. So the law says, you get out there, kind of like the Homestead Act, we will give you access to these mines for free.

Now it is 2015, some people say there are 160,000 abandoned mines, some other groups say there are 500,000 abandoned mines. What is the revenue stream to put in place in order to ensure that we don't see more accidents like this happening? We don't have a revenue stream.

What we did in the end of the 1970s, beginning of the 1980s, we created a Superfund Program, a program that was intended to deal with the worst sites across the country, Love Canal in New York State, Woburn, which was the subject of the movie A Civil Action, in Massachusetts, in my congressional district. And we put that program in place.

But the mining industry, even today, doesn't want to pay for the minerals that are on Federal lands. These are taxpayers' minerals that the companies believe that they should get for free. For free.

Now, over in the House of Representatives I was the ranking member on the National Resources Committee, and I introduced a bill saying that they should have to pay. You can't have this bargain basement giveaway sale any longer. We need a revenue stream so that we can put programs in place that ensure that we begin to work on the worst of these sites in a much more aggressive fashion.

That is something that you would think we could agree that is necessary 147 years later, after the law was passed to deal with the mess, the obvious mess that has been created.

So do you agree, Madam Administrator, that the revenue stream is just completely insufficient in order to deal with the magnitude of the problem which this incident demonstrates is just looming out there as a continuing threat to the environment of our country?

Ms. MCCARTHY. I think the President's fiscal year 2016 budget and earlier that suggested that we need a fee revenue that is based on the polluter pays principle, that is exactly the same way that coal mines are treated and those abandoned coal mines are cleaned up. It is the same kind of source that we need to be looking for here to be instituted by Congress to begin to tackle this issue more effectively.

Senator MARKEY. I would hope my Republican friends could agree that it is time for us to put a fee on this. Giving it away, letting them mine, letting them abandon, and then not having a revenue source to deal with the mess that is created makes no sense at all. I would hope that we could work together on this. Although I found in the House of Representatives it was impossible to find Republican supporters for something like this.

It does leave kind of a regulatory black hole. And the alternative, of course, that some Republicans continue to propound, is that we should have a kind of a Good Samaritan law where we just kind of waive the rules. Waive them. I think that whatever minimal set of laws we have on the books just can't be cavalierly waived, that is kind of the last wall of environmental protections which we have. So you have to be very careful when you go down that route.

But it would just seem to me that, I know that people don't like to hear it, but you need money. When you have 160,000 or 500,000 abandoned mines, all potentially leaching into now a much more populated Colorado, a much more populated New Mexico, because of those policies, that you now have a danger with regard to the health, the air, the water, of people who live near them. It is time for us to do something about it.

Thank you, Madam Administrator, for your great work.

Senator INHOFE. Thank you, Senator Markey.

Senator Barrasso.

Senator BARRASSO. Thank you, Mr. Chairman.

And thank you, Madam Administrator. It is good to see you. Later today I will be chairing the Indian Affairs Committee to better understand how the EPA's actions are impacting the Indian tribes downstream from the Gold King site. I thank you for agreeing to appear, and I anticipate we will again have a similar robust discussion.

Senator Bennet, who was on the panel before you came in, said, there is no denying that EPA caused this disaster. He is very thoughtful. This has happened in his home State. He has a bipartisan concern about what happened.

And my question to you is, isn't it true that when a private company is accused of violating the Clean Water Act that the EPA, under your specific leadership, has aggressively pursued civil fines against the company and individuals within the company? Isn't it true that if there was a 3 million gallon toxic spill caused by ac-

tions of private citizens that the EPA would act aggressively against that company, against those citizens? How large of a fine would the EPA be pursuing under those cases?

Ms. MCCARTHY. Senator, we were there to correct what we know to be a significant problem. There is no question that the actions of EPA contributed to this spill.

But that does not mean that we or another private sector person would be accused of violating intentionally the Clean Water Act. They would be told to do exactly what we are doing, which is to aggressively get their people to safety, aggressively stop the spill, make sure it didn't happen again.

Senator BARRASSO. The EPA caused this disaster. That is what Senator Bennet says and I agree with him. I just think the EPA ought to be held to even a higher standard.

But the aggressive nature of this EPA under your direction I think says that there is clearly a double standard between the way that EPA treats itself and looks to itself and how it treats private companies.

On a second but related EPA water management issue, I would like to discuss the EPA's Waters of the United States Rule. Over and over again, the preamble to the Waters of the United States rule says that it is based on "the science and the expertise and experience of the agencies." Doesn't appear to have any support for these statements in any of the rulemaking record.

In an attempt to understand the basis for the final rule, this committee, through the leadership of our chairman, sent letters to EPA and the Army Corps of Engineers asking for documents that support the final rule. Asking EPA for copies of the scientific studies, asking the Army Corps of Engineers for examples of field experience, because you say you use both.

In a letter dated August 17, Deputy Assistant Administrator Ken Kopocis did not identify any scientific studies to support the decisions made in the final ruling. Instead, he offered the staff a briefing. At that briefing, the EPA took the position that the "science" just supports the idea that all water is connected. He said all water is connected.

That is not the law of the land, is it? The law talks about navigable waters and the Federal Government. That is the best that your Administration could do for the EPA about waters. It is all connected. That is their science.

Separately, in a letter dated August 28, Assistant Secretary of the Army Jo-Ellen Darcy told the committee that the Army didn't rely on any field observations to support the rule. None. But that is what you say they did. So this statement is consistent with memos that General Peabody of the Corps sent to the Secretary when the final rule was under review.

So if the final rule isn't based on any science and the final rule isn't based on the Corps' experience in the field, what did you base it on?

Ms. MCCARTHY. Senator, we did base it on the science and experience of both the EPA and the Army.

Senator BARRASSO. That is not what your staff and the Army Corps of Engineers is saying. It sounds to me that you are making it up as you go, and you are in charge of everything.

Ms. MCCARTHY. But I would point the committee to the record on our work we have done on the water connectivity study which does look at more than, I think, close to 2,000 studies that is available, that went through the normal science advisory board subcommittee process. In fact, we also have the technical support document that is in the record that is the basis for many of the decisions in the Clean Water Rule.

So those are already available. Perhaps we could sit down with your staff again.

Senator BARRASSO. We would like to do that because it is still based on the idea that all water is connected, period. And we would disagree with you on that.

Ms. MCCARTHY. OK.

Senator BARRASSO. Finally, in August the EPA released the Federal Clean Power Plant Final Rule. The economies in many States, including my home State of Wyoming, are going to be devastated by this. According to a study issued August 4th through the University of Wyoming, our public policy energy economics, we could face the loss of 7,000 to 11,000 jobs in just the coal mining, coal generation, coal transport sectors. That doesn't account for all the local businesses that are going to lose revenue as a result of these job losses.

The study also found that my State could lose up to 60 percent of its State coal revenue, which is money that goes to fund schools, roads, water treatment facilities, emergency medical services, all things that makes people's lives better, keeps them safer.

So your plan is taking that away from people in my State and other States, States that have strong energy sectors. The costs of your regulations are real, they are immediate, and they are destructive. The benefits of your regulations are theoretical and unproven. My question is, how does your Clean Power Plan mitigate those impacts and the direct damage that your new regulations do to Wyoming people, people from other States? And how do you make those lives whole?

Ms. MCCARTHY. We actually believe we have done this rule in a way that is flexible, that looked at States' concerns, that provided significant time, that is going to achieve significant reductions, that will allow us to provide leadership we need to address what is essentially the greatest environmental challenge of our time, which is the challenge of climate change.

Senator BARRASSO. Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Senator Barrasso.

Senator Capito.

Ms. MCCARTHY. I apologize, Mr. Chairman, I just wanted to let you know that I did get the information you were seeking on the Clean Power Plan and when the rule was submitted. So I can provide that.

Senator INHOFE. The September 4th deadline, is that what you are talking about?

Ms. MCCARTHY. Yes, it was sent to the Register on September 4th, and we still expect it to be published in October. So I just wanted to let you know.

Senator INHOFE. So it was submitted on September 4th.

Ms. MCCARTHY. That's correct.



Senator INHOFE. Thank you very much.

Senator Capito.

Senator CAPITO. Thank you, Madam Administrator. Thank you for being here.

Just a quick question on the contractor issue. It has been mentioned that EPA had contracted a private contractor to do the work. Does the private contractor have a liability issue here, or is that something that they are released from when they contract with EPA?

Ms. MCCARTHY. The contractor has to follow the work plan and the task order that they have been given. It is a contractor that has been working with the agency for a number of years and has worked on 15 mine sites before. But they were working under the direction of our on-scene coordinator.

Senator CAPITO. So they were taking direction from EPA, so those were EPA's direct orders that actually caused the damage?

Ms. MCCARTHY. The work plan that we developed was being followed as far as I know. But that is one of the things that we would expect an independent review to look at.

Senator CAPITO. Yes, I am looking for accountability here, as I think we all are, and you are as well.

Because as you know, I live in a community that has had our waters, we had the chemical spill causing a lot of disruption and a lot of health concerns and other concerns. Those executives have just recently been sentenced and will be serving time.

But one of the issues that came out of this is business interruption. Senator Gardner brought this up about rafters, I think Senator Bennet as well, other people who have lost their revenues for the year because of this. Then they are going to have the stigma attached to it which is going to be even more difficult for them to regain this.

Is this part of your restitution, that you could possibly go back to a community, is that within the bounds of the EPA to be able to do things like this?

Ms. MCCARTHY. Senator, first of all, EPA is not arguing that we are responsible for the clean up here.

Senator CAPITO. Right.

Ms. MCCARTHY. So whatever happens with the contractor happens, but we are taking full responsibility. There is a claim process, in fact we received a number of claims from small businesses exactly related to the issues that you identified. The Federal law that allows those claims to be processed appropriately and we will do that. Those are well within the boundaries of what a Federal Claims Tort Act is supposed to be compensating.

Senator CAPITO. OK, so I would love to have follow up on that to know how successful that has been. I see the president of the Navajo Nation there, and it is very important for them as well.

Another issue that was on the crisis response plan, Senator Gardner mentioned when he was onsite 4 days later, there was still not an adequate appropriate crisis response plan or team in place. Would you have a response to that?

Ms. MCCARTHY. I apologize that I was not here, I wasn't realizing that the Senator was testifying. So we actually had a response team in place, we had on-scene coordinators, we had more

than a couple of hundred EPA staff. We immediately put them in motion, how to set up incident command centers. We had an area command center that we have since set up. We moved as quickly as we could.

But we will always be able to look back and see whether we could have done it better, could we have done it quicker, what are the lessons we need to learn from this.

Senator CAPITO. Do you anticipate that will be part of the report, that they'll be looking at the crisis report, the crisis response?

Ms. MCCARTHY. If they don't, I know the Office of Inspector General will certainly be looking at that, and EPA independently will be looking at that as well.

Senator CAPITO. Because that was a huge issue in the spill that we had. And also in the timing, I think there was some, the National Response Center was not notified until an hour and half later. You were lucky because you were able to get the downwater folks who had water intakes to be able, you had enough mileage there.

Ms. MCCARTHY. Yes, we did.

Senator CAPITO. But if at the source, which happened in our community, you wouldn't have had that time. And it was blamed on lack of cell service in the area. Living in a rural community I can identify with that. But certainly there would be some kind of satellite phone, or some other way to get an immediate response.

Ms. MCCARTHY. That is one of the things we are looking at, Senator. We agree that we could have done better on notifications. It is a process we work on with the States. And in this case we were in a remote area, we know we got hold of our State partners immediately. Those partners went down and notified the National Response Center and it triggered all of the appropriate notifications.

As you said, the good news is we got there before the plume did and any of the areas in which it could have caused a problem in terms of irrigation diversions or other water infrastructure diversion.

Senator CAPITO. Then I think the controversy of the 1 million as opposed to the 3 million is something we need to examine as well. Other issues that come to my mind are the health issues, medical monitoring and such. You don't really know with the combination of the metals that are in this water, has that been sufficiently tested? Do we know what the serious effects are? I am just raising questions that I think need to be raised.

I would like to say, just in final, because I just have a couple of seconds remaining, on the Clean Power Plan. You know this is going to impact my State a great deal. We have the highest unemployment in our State right now, and it is directly attributable to a lot of things, natural gas, yes. But also to the regulatory environment, everything you see. We have thousands of West Virginians who have lost their jobs. It is a concern to me every day.

It is a sad affair. I wish you would come and talk with the folks that these regulations are very deeply affecting. It is difficult for our county commissioners, who are laying off people, their school systems can no longer function because of lack of tax revenue, our unemployment fund in our State is now under serious attack.

We are hurting here. And when this regulation goes into effect, it is going to have an even more devastating effect on us directly, probably our State most directly affected. Thank you.

Senator INHOFE. Thank you, Senator Capito.

Senator BOOZMAN.

Senator BOOZMAN. Thank you, Mr. Chairman.

Thank you very much for being here today. I think the issue of the double standard really is important. People have lost faith in government. Your agency has a reputation of being aggressive, sometimes heavy handed, in dealing with individuals that have had problems in this regard. It seems like the initial reaction, and you did the right things early on.

The initial reaction of the agency really did seem to downplay the extent of the damage. That went on until literally the river turned orange and then everybody could figure out this was a big deal. Statements like "the water is healing itself," if an oil executive would have said things like that people would have gone ballistic.

So again we will have to wait and see what comes out of the IG report; we will have to wait until the Department of Interior, things like that. But I do think it is fair to say that the initial reaction downplaying or appearing to downplay in regard to the public, I think we have enough information to say that was done very, very poorly.

Mr. MCCARTHY. Senator, I appreciate your concern. There is no way in which EPA should have downplayed this spill. I certainly did not. We have taken full responsibility, and I will work hard to show you that we are following the same standards of excellence that we demand of others. This was a devastating thing not just for those communities but for EPA as well.

And we will learn from this, but it has been a very, very hard lesson for all of us, and it will continue. We have long term obligations here, and I have made it very clear that EPA is not going away, and it is going to meet those long term responsibilities.

Senator BOOZMAN. Thank you. You mentioned earlier that you have an old mine, and again I don't understand all that is going on in there, but pressure built up and all of those kinds of things.

I guess with all of that happening, why, I believe on September 9th, in the House Science Committee a witness testified that an engineer wasn't consulted. Why is that the case? Why would an engineer not be involved in the planning? One of the witnesses testified the work at the Gold King Mine was not developed by a professional engineer. Why would that be the case?

Ms. MCCARTHY. I do not know why that was stated. My understanding is that the actual work plan, EPA was called in to assist for the very reason a problem happened, which is that a blowout was seen as likely inevitable and we wanted to get in and help the State take care of that, at their request. Our OSC was a mining engineer, our on-scene coordinator. We developed this plan with the State. We both developed this plan.

Then we worked with the Animas River stakeholder group which is filled with mining experts and local constituencies, and we did public hearings on this work plan before we actually initiated the work.

So we had a lot of engineering expertise and eyes on this work plan. The way this happened was as sad for us as it was for anybody. We did not certainly anticipate that the work we were doing would have aggravated the situation. We were there to actually relieve the situation that we knew was building up.

Senator BOOZMAN. We will look and see about the discrepancy. My understanding is that the removal actions are classified into three categories: emergency, time critical, non-time critical. Can you tell us what the difference is in the sense of which category to use for a particular action?

Ms. MCCARTHY. Senator, if it is possible I am happy to respond in writing afterwards. I am not sure I will get the nuances correct.

Senator BOOZMAN. I can identify with that. Thank you very much.

Ms. MCCARTHY. Thank you.

Senator INHOFE. Thank you, Senator Boozman.

Senator FISCHER.

Senator FISCHER. Thank you, Mr. Chairman.

Welcome, Administrator. I like to kind of drill down on some items that Senator Capito brought up about cell phone coverage. In the Omaha World Herald there was an article on September 12th that stated there was no cell phone coverage at the gold mine the day of the spill. That was confirmed in an August 16th e-mail that was posted on your agency's Web site which also said, "No satellite phone was at the local."

So just to clarify, there wasn't a cell phone, there was no satellite phone, there was no way to immediately communicate to those downstream when the toxic water began rushing out. So my question is, was the EPA really properly prepared to inform local communities if there was a spill that happened, and which did happen?

Ms. MCCARTHY. Senator, I cannot at this point confirm to you about the cell coverage. I apologize, I will get back to you on that.

But clearly, better notification would have been beneficial to all of us. That is one of the reasons why we have actually asked for a review of all of this internally and a beefing up of our notification process. It is a very secluded and difficult place to reach. But we did get in touch with our colleagues in Colorado very quickly. We were able to get to those downstream areas and make sure that those diversions were protected before the plume arrived there. Because it is quite a distance away from any populated area.

Senator FISCHER. And I would imagine that you will be looking at how plans are developed in the future too, not just with the subcontractors but also EPA itself.

Ms. MCCARTHY. Absolutely, our internal review indicated that that is one of our first orders of business.

Senator FISCHER. And to follow up with Senator Boozman, he said the plan was not developed by professional engineers with the subcontractor, and they were the ones that were performing the work onsite when the blowout occurred. Is that correct?

Ms. MCCARTHY. Under the direction of the on-scene coordinator.

Senator FISCHER. Did the EPA have an emergency action plan? Any kind of contingency plan on your own?

Ms. MCCARTHY. The EPA required it from the contractor. The contractor developed their own, and that is something our internal

review looked at. But there may be broader emergency plans that are also appropriate that I can't speak to at this point.

Senator FISCHER. Did I understand you correctly when you said the EPA was very active in developing the plan with the subcontractor, is that correct? The health and safety plan?

Ms. MCCARTHY. The work plan for the actual actions and work at the site was developed with the State of Colorado and EPA.

Senator FISCHER. The health and safety plan, were you involved in that development?

Ms. MCCARTHY. I do not know whether there was back and forth with the contractor. The contractor did develop a plan, but that plan was seen by the internal review team when they looked at it, at EPA as being inadequate to address a blowout situation.

Senator FISCHER. Do you have copies of correspondence you could provide us with that would outline the involvement of EPA?

Ms. MCCARTHY. Well, on the Web already there is both the request for proposal, there is the work plan, there is the task order. All of those issues have been posted. I do not know whether there is additional communication that we can provide.

Senator FISCHER. I would really like to see the health and safety plan and be able to understand in more detail the involvement of EPA in that.

Ms. MCCARTHY. We are happy to point that out to you, Senator.

Senator FISCHER. I hear a lot of confusion on the plan and how important it could have been in this spill we are dealing with here.

I would like to question you, I have a few seconds left here, about notifications to the jurisdictions within the State of Colorado. It is my understanding that in fact the EPA did not notify irrigation districts, and they did not know about this until the yellow plume reached their irrigation waters. Have you been made aware of any information concerning that?

Ms. MCCARTHY. Well, I am aware, Senator, that the way in which we develop contingency plans is for us to very much rely on the State to know where those diversions are, and to be able to work with us to appropriately identify and notify all of the key stakeholders here. I do not know of anything in particular but I am happy to follow up if you have names that are concerned.

Senator FISCHER. Would you say the EPA has followed all the notice requirements of section 103 of the Comprehensive Environmental Response Compensation and Liability Act, as well as section 304 of the Emergency Planning and Community Right to Know Act? There is some discrepancy out there on if the EPA really did follow the requirements that you are supposed to do.

Ms. MCCARTHY. I am happy to get back to you on it. Obviously, I don't have those at my fingertips. But I think we have very much said that the notification could have been better. One of things we identified that we followed up is that we have to continually update these lists as does the State working hand in hand with us. Because clearly, we don't want EPA wanting to know the business of every river and stream. But we need to make sure we constantly do that and test to make sure we have done it right. So we will get to those issues, and we are not suggesting that there isn't room for improvement here.

Senator FISCHER. If you could get back to me in a timely manner I would appreciate it. I always thank you for offering to get back, but sometimes it is months and months and months. So if you could try to get me some information, why don't we say by Thanksgiving, that would be helpful.

Ms. MCCARTHY. Well, I think we will try to do better than that.

Senator FISCHER. I would appreciate that. Thank you, Administrator.

Senator INHOFE. Thank you, Senator Fischer, and thank you, Madam Administrator. We are adjourned.

[Whereupon, at 11:36 a.m., the hearing was adjourned.]

[An additional statement submitted for the record follows:]

STATEMENT OF HON. SHELDON WHITEHOUSE,  
U.S. SENATOR FROM THE STATE OF RHODE ISLAND

The Gold King Mine Spill is and will continue to be an environmental nightmare for Colorado and other western States. So I thank Chairman Inhofe for drawing attention to this important issue.

I share the frustration of my colleagues on both sides of the aisle with this situation. I think we can agree that 3 million gallons of contaminated wastewater flowing into a tributary of the Animas River is a serious problem. Consequences will likely be long-lived and are already widespread across Colorado, New Mexico, and Utah. Rivers in these regions provide water to homes, farms, and recreational areas. Thankfully, EPA is taking action, and progress is being made to aid in the clean up effort.

Today we are likely to hear from my Republican colleagues lots of talk about negligence, but this finger pointing I believe is misguided and lacks understanding of the original problem—the polluters. It also won't take away the fact that clean up at the Colorado site, which includes operation of a temporary water treatment facility, will cost around \$3 million. And because the Gold King mine was not designated a Superfund site, the region is not privy to larger pots of the Superfund Remedial Program funding.

What we will not hear from our Republican colleagues is that, according to the GAO, there are 161,000 abandoned hard rock mine sites in 12 western States and Alaska. Of those, 33,000 have degraded environmental conditions. These abandoned sites don't clean themselves up. Some have been festering for decades upon decades. Cleaning up these sites isn't free. So one would think that the both parties would be interested in actually making sure we can clean up these mines responsibly and with adequate resources. Especially because in the U.S. close to 50 million people live within 3 miles of Superfund sites.

The Superfund account has been shrinking each year since fiscal year 2010, from \$1.3 billion down to \$1.08 billion in 2014. This year, the President's budget asked for \$1.15 billion. The House came back with \$1.09 billion, while the Senate reported out \$1.1 billion. The trend was similar last year, where the President requested \$1.16 billion and enacted level was at \$1.09 billion. It's our job to make sure the programs which protect our communities and environment are working.

EPA also administers other important clean up programs like the brownfields program and the Leaking Underground Storage Tank Trust Fund.

The brownfields program helps underwrite the clean up of sites not covered under the Superfund program. According to the EPA, every dollar invested in brownfield clean up has been shown to yield nearly \$18 in economic development benefits—from new jobs to development of remediated sites to increased property values in surrounding areas. Rhode Island has benefited from the program, and this year we received five clean up grants totaling \$1.32 million.

As we look for a way forward on the Gold King Mine clean up, I urge my colleagues to consider the environmental and economic consequences of consistently shortchanging environmental tools like the Superfund account. The Environmental Protection Agency's mission—to protect human health and the environment—is one of the most fundamental responsibilities of the Federal Government. EPA is developing and implementing some of the most important health protections ever needed, and they need continued support from Congress to do so.