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**IN THE MATTER OF
 U.S. ENVIRONMENTAL PROTECTION AGENCY
 DOCKET ID: EPA-HQ-OLEM-2016-0152
 PROPOSED BONITA PEAK MINING DISTRICT SITE LISTING
 TO THE NATIONAL PRIORITIES LIST**

COMMENTS OF THE NEW MEXICO ENVIRONMENT DEPARTMENT

June 13, 2016

The New Mexico Environment Department (NMED) supports the U.S. Environmental Protection Agency’s (EPA) placement of the Bonita Peak Mining District (BPMD) Site on the National Priorities List (NPL). However, due to EPA’s responsibility for and response to the August 5, 2015 Gold King Mine (GKM) blowout, NMED has serious concerns about EPA’s role in managing this proposed Superfund site. In its response to the GKM blowout, EPA has failed to monitor and test critical environmental media, selectively “cherry picked” data to downplay the seriousness of the spill, misrepresented facts about the release, and made unsubstantiated conclusions and assertions. In the ten months following the GKM blowout, New Mexico has observed instances of EPA’s questionable data management and use of skewed baselines that brings EPA’s supervision and judgment into question.

NMED therefore makes the following comments and demands to ensure that the Superfund process for the BPMD Site adequately protects public health, safety, welfare, water quality and the environment for downstream communities within the State of New Mexico.

1. EPA must fully fund, through Superfund and other programs as appropriate, state and tribal jurisdictions to conduct independent, comprehensive and holistic watershed-scale investigations, free of any bias and interference from EPA, that examine the migration and fate of contaminants released by the BPMD Site.

Since the fall of 2015, EPA has sought to exert inappropriate control over the methods, scope, and parameters of New Mexico’s long term monitoring program by “offering” grant opportunities with restrictions so numerous and onerous that options for critical monitoring activities are essentially eliminated. EPA has demonstrated a self-serving bias in monitoring and assessing the impacts and risks from the spill that EPA caused. It would be entirely inappropriate and a conflict of interest, therefore, for EPA to

implement, control or conduct monitoring and investigation in New Mexico in conjunction with the proposed BPMD Site. New Mexico must take action in order to protect public health and the environment and demands the requisite level of funding to do so.

Superfund Technical Assistance Grants (<https://www.epa.gov/superfund/technical-assistance-grant-tag-program>) must be made available to stakeholders in New Mexico.

2. EPA must provide stakeholders downstream from Colorado a seat at the table for the duration of the Superfund process for the BPMD Site.

Hazardous materials have migrated downstream from the BPMD Site into the State of New Mexico for years. Residents who live on or near the Animas and San Juan Rivers, farmers and ranchers who use river water, public water supply systems that withdraw water from the rivers or from wells in the alluvial aquifer, and other persons who may be exposed to contaminants from the BPMD Site must be treated by EPA as stakeholders. To date, this has not occurred. EPA has not included downstream groups as stakeholders during discussions about risk-based screening levels. EPA has not provided work plans, permitting information, or data treatment systems to downstream groups for review. EPA did not discuss the proposed BPMD Site with downstream groups before proposing it for the NPL. EPA must ensure that downstream stakeholders must have an active voice and direct involvement in the handling of the BPMD Site.

The BPMD Site is like no other superfund site in existence because a major portion of the contamination at the proposed site was directly caused by Colorado's and EPA's misconduct at the Gold King Mine. If the BPMD Site is ultimately placed on the NPL, EPA's own liability for what happened prior to, during, and after the GKM release will affect EPA's decisions concerning the cleanup of the upper Animas River Basin. Likewise, the State of Colorado bears responsibility for decades of discharges from the Upper Animas Mining District – both inside and outside of the proposed NPL Site – as well as the August 5, 2015 blowout of the Gold King Mine, and it too will have a conflict of interest.

Consequently, as a responsible party, EPA must take additional steps in this case to assure all affected parties that all decisions concerning the cleanup of the BPMD Site are well founded in data and made in an open and collaborative manner without concern for EPA's or Colorado's own liability. To this end, NMED requests that EPA set up an oversight panel comprised of federal, state, tribal, and local authorities to ensure that the concerns of all impacted, downstream communities are represented in the process. NMED would suggest that, at a minimum, New Mexico, Utah, the Navajo Nation, and the Southern Ute be given a seat at the table and integrated into the remedial review board. EPA should be required to communicate with this panel about all decisions related to the potential BPMD Site, and accept direction and guidance from the panel – including all Applicable or Relevant and Appropriate Requirements (ARARs) – before undertaking any actions. NMED is willing to work with EPA and other stakeholders to ensure that oversight of the Superfund process is firmly in place.

3. EPA must communicate with stakeholders and the public in a clear, timely, and truthful manner.

EPA has not done an adequate job of providing New Mexico stakeholders with information about the potential BPMD Site. Initially, EPA did not plan to hold a Superfund meeting in New Mexico, and only agreed to do so when pressed by NMED and others. Once EPA finally agreed to hold a public meeting on June 9, 2016, EPA officials failed to notify NMED, the City of Farmington, San Juan County and others, leaving stakeholders to scour newspapers and send numerous emails to EPA staff in order to discover the location, date, and time. The City of Farmington and San Juan County did not receive notice of the June 9 meeting until a few days before it took place, and only after soliciting the information directly. EPA continues to shut out other stakeholders, such as the Navajo Nation, who also must have a voice in any BPMD Superfund process. No public meeting has been scheduled on Navajo land, sending the message that EPA has no intent to work collaboratively.

Through actions like these, EPA is already demonstrating that it does not feel New Mexico and other downstream stakeholders deserve a seat at the table or a voice in the proposed BPMD Site listing. Rather than considering the people of New Mexico to have equal and dynamic input in both the BPMD Superfund process and the GKM response, EPA downgrades the state and its citizens to the level of any commenter from the public whose concerns are passively received. This must change quickly before it seriously damages the neutrality and objectivity of the Superfund process.

Additionally, EPA needs to ensure that it is presenting consistently honest information to stakeholders and the public. EPA does not always demonstrate a commitment to the truth, as is evidenced by the Frequently Asked Questions (FAQ) website for the GKM blowout. For example, EPA continues to publicize the following assertion.

“What is the impact on agriculture?”

“We are certain that crops are safe for consumption. When the plume came through, irrigation ditches that impacted crops and livestock were shut down. Water quality data we have seen indicate no harmful effects on any agricultural products. Ground water and tap water have both been tested and have returned to pre-event conditions.” <https://www.epa.gov/goldkingmine/frequent-questions-related-gold-king-mine-response>

However, it is common knowledge that some of the irrigation ditches were not capable of closure during the peak spill event in August 2015. Photographs clearly establish that contaminated water flowed into some of the irrigation ditches (Figure 1). EPA must retract or correct the misrepresentation on its FAQ website. NMED demands that all information that EPA puts forth regarding the proposed BPMD Site listing be truthful, accurate, and grounded in good science.



Figure 1. Willett Irrigation Ditch, Farmington, New Mexico, August 8, 2015.

4. EPA must use good science during the Superfund Remedial Investigation/Feasibility Study process.

Based on data and analysis (or lack thereof) that EPA has provided after the GKM blowout, NMED has serious concerns about the quality of scientific work during the BPMD Superfund process and the ensuing effects on New Mexico. During the June 9, 2016 EPA Superfund meeting in Farmington, EPA indicated that lead was not considered in the HRS documentation, based on a purported lack of supporting data. This is very disturbing in that it may indicate an initiative by EPA to disregard lead contamination. Both NMED and concerned citizens raised lead issues during the June 9, 2016 EPA Superfund meeting.

On May 6, 2016, NMED provided EPA with data taken from samples of yellow/GKM sediment collected in La Plata County that demonstrated lead levels of 3,100 milligrams per kilogram (mg/kg) in a residential setting. These levels of lead present imminent risk to human health and the environment. The results from this sample clearly indicate that lead is present throughout the BPMD and must be addressed. Further, EPA's own emergency response sampling in New Mexico, Utah, and Colorado between August and October 2015 indicate the presence of lead greater than 400 milligrams per kilogram. NMED demands that lead be considered as a contaminant of concern and further demands that groundwater pathways also be considered in the HRS score for the proposed BPMD Site. NMED demands that EPA publish all information that explains how it has determined site-specific levels for lead.

EPA has repeatedly asserted that water and sediment in the Animas River have returned to pre-spill conditions. Despite repeated requests by NMED that EPA provide the scientific basis for this assertion, EPA has failed to provide any adequate basis. EPA had an opportunity to present the basis for their "pre-spill" assertion, and subject their assertion to scientific peer review, at the recent Animas and San Juan Watersheds conference held in Farmington, New Mexico in May 2016. EPA failed to submit any

abstracts for the conference. In fact, the information presented by various agencies and stakeholders at the conference strongly suggests that river water and sediment have not returned to pre-spill conditions. Indeed, by EPA's own admission, the GKM Spill released 880,000 pounds of metals into the Animas and San Juan watersheds. This material was not in the watersheds before the spill, and now poses an imminent and substantial threat to public health and safety in New Mexico.

Further, EPA has referenced a fate and transport model developed for the Animas and San Juan Watersheds that has purportedly undergone peer review and that can be used to determine current stream quality and sediment conditions. Despite repeated requests, this model has not been made available to the stakeholders and the EPA has excluded the state agencies from the peer review process. Without insight into the model's assumptions and core dataset, it is impossible for states, tribes and other critical stakeholders to verify the conclusions it produces. Based on these experiences, NMED fears that EPA will employ similarly poor scientific data collection practices and analysis throughout the Superfund process.

Many families live along the Animas and San Juan Rivers in New Mexico. Uses of the river include private domestic water wells, irrigation, livestock watering, water hauling, and recreational applications. EPA must ensure that the screening levels evaluated for use as ARARs at BPMD must be protective of all users downstream of the Site, not just recreational users. EPA's continued reference to substantially less-protective recreational screening levels, rather than residential screening levels, for water and sediment in these residential areas, is contrary to the goal of public health protection and the very essence of EPA's existence. Communities downstream of the proposed BPMD Site must be protected to the same residential standards that EPA uses elsewhere in the nation, including sites in New Mexico and Texas, rather than to EPA's far less protective recreational standards. NMED is particularly concerned about potential exposure of children to lead contaminated soil and sediment along the Animas River. EPA should be equally concerned. Should the BPMD Site be listed, NMED demands that EPA use a lead concentration of 500 mg/kg for sediment/soil, the same concentration that it has used as a screening level and cleanup target at other lead contamination sites in New Mexico and Texas.

Additionally, as part of the Superfund Remedial Investigation, EPA must fund the State of New Mexico to monitor soil and crops for metals in areas where contaminated spill material entered irrigation ditches in New Mexico. This monitoring is necessary to assure farmers, who irrigate with river water, and the consumers who buy agricultural products that were irrigated with river water, that these crops do not contain dangerous concentrations of metals originating from the BPMD Site.

Finally, pursuant to a Superfund Focused Feasibility Study, EPA must immediately investigate hotspots of discolored sediment in the Animas riverbed in Colorado, and take appropriate corrective measures up to and including Superfund emergency removal actions, when necessary. The location for this investigation must include areas in or near the Animas River in Colorado. However, New Mexico is opposed to EPA-led investigations of hotspots in the Animas River in New Mexico. Those investigations should be led by NMED and other New Mexico stakeholders. Any hotspot investigation must include mapping of extent (*e.g.* both surface area and depth) and characterization of

the nature of contamination. Hotspots with lead concentrations greater than 500 mg/kg must be evaluated for a Superfund emergency removal action. Actionable levels for other metals should be used in the same manner.

In conclusion, NMED appreciates that EPA has proposed BPMD as a Superfund site. However, NMED questions whether a focus on fewer than 50 mining areas is sufficient to protect New Mexico's downstream water, soil, and health from dangerous contaminants emanating from thousands of abandoned mines in the Animas watershed. Due to its past interactions with EPA over the GKM blowout and the post-blowout response, NMED has grave concerns about EPA's ability and willingness to administer any Superfund process in an open, objective, and rigorous manner.