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CRIMINAL INTENT — EPA HAD KNOWLEDGE OF RISK OF MINE BLOWOUT

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The Environmental Protection Agency said today it had underestimated the amount of water built up in an abandoned Colorado mine, resulting in a catastrophic release of toxic substances into the Animas River. EPA admitted in a report released following its investigation of the incident on August 5, that it could have foreseen the rupture and release and yet it did not have measures in place in preparation for that inevitability. -Under the criminal and civil enforcement provisions of the Clean Water Act, EPA and its contractors should be held accountable. -Clearly, a "knowing" or intentional violation of the CWA occurred, triggering felony liability.

Internal documents released by EPA last week indicate that EPA and its contractors had knowledge that a catastrophic release of hazardous materials could result from its remediation activities at an abandoned mine. -The agency's contractor predicted that water had been impounded behind the collapsed entrance to the Gold King Mine and other collapsed areas within the mine and surrounding mines. -The prediction included the possibility of a "blowout of the blockages" and a "release of large volumes of contaminated mine waters and sediment from inside the mine, which contain concentrated heavy metals." -These predictions were made in a June 2014 work order and a May 2015 action plan. -In fact, the predictions came true on August 5, 2015, releasing 3 million gallons of contaminated water into the Animas River in Colorado.

Importantly, if EPA were a corporation or individual that owned or operated the mine creating the release of toxic water into the Animas River, it is likely that the US Attorney's office would criminally prosecute it for multiple felony violations of the Clean Water Act (see blog dated August 20, 2015 http://bicklawgroup.com/animas-river-is-a-clean-water-act-crime-scene/). -It is still possible that the state attorneys general for Colorado, New Mexico, and/or Utah, as well as the Navaho Nation and the Ute Nation may bring criminal and/or civil action against EPA and its contractors for the releases in violation to the Clean Water Act.

Pressure will be on EPA going forward to prevent blowouts like the one in the Gold King mine.

There are over 55,000 abandoned hard-rock mines across the West. -The federal government has been under pressure to investigate, remediate, and close these old mines to prevent the kind of release that occurred in the Animas River.

EPA has a project in place to facilitate the cleanup of areas affected by runoff from orphan mine sites. It encourages cleanups by non-liable parties ("Good Samaritans") willing to voluntarily clean up these sites. -The Good Samaritan administrative CERCLA tools were issued on June 6, 2007. The tools are a model comfort letter and a model settlement agreement (an administrative order on consent or "AOC"). -EPA issued a memorandum intended to reassure Good Samaritans that they would not be subject to Clean Water Act prosecution. -Many community organizations have been looking at opportunities to clean up these sites and EPA's memorandum clarifies that these "Good Samaritans," or non-liable parties, who volunteer to clean up these abandoned sites are generally not responsible for obtaining a permit under the Clean Water Act (CWA) both during and following a successful cleanup.

Before EPA's actions caused the release from the Gold King mine, EPA had considered designating it a Superfund site. -It is likely that it will designate it a Superfund site now in order to access government funding for the remediation. -This will be precedent setting for the

remaining mines in the West, which could be addressed through Superfund by EPA in the future. -Former and current mine owners and operators would be subject to CERCLA's strict joint and several liability. -For the most part, however, these mines are a hundred years old, or older, and the companies that owned and operated them are no longer in existence. -Remediating them will fall to the federal government using the Superfund monies for orphan mines.

Superfund was created to pay for the cleanup of the country's worst waste disposal and hazardous substances spill sites that endangered human health and/or the environment. -There are two programs that implement Superfund activities, the emergency response program and the remedial program. Emergency response and removal actions address emergencies, such as fires, train derailments, and floods, involving the release of hazardous substances. Remedial cleanup activities address long-term cleanup of the most complex contaminated sites listed on the National Priorities List. EPA's Office of Solid Waste and Emergency Response (OSWER) in Washington, D.C. oversees the Superfund program.

EPA has a program for abandoned mine lands (AMLs). -AMLs are waters and surrounding watersheds where extraction, beneficiation or processing of ores and minerals has occurred. EPA notes on its website that "AMLs can pose serious threats to human health and the environment."

EPA recently issued a report that evaluates mining-influenced water (MIW) treatment technologies. MIW is defined as any water whose chemical composition has been affected by mining or mineral processing and includes acid rock drainage (ARD), neutral and alkaline waters, mineral processing waters and residual waters. MIW can contain metals, metalloids and other constituents in concentrations above regulatory standards. MIW affects over 10,000 miles of receiving waters in the United States. -In its report, EPA evaluates lower-maintenance treatment systems to decrease the costs and improve the efficiency of mine site cleanups. In recent years, development and implementation of passive systems has increased. However, EPA is still evaluating the effectiveness of passive treatment. The goal is to shift away from high-energy-use, high-maintenance systems to low-energy-use, low-maintenance systems, most of which are passive technologies.

Passive treatment refers to processes that do not require frequent human intervention, operation or maintenance, and typically employ natural construction materials (soils, clays, broken rock), natural treatment media (plant residues such as straw, wood chips, manure, compost), and promote growth of natural vegetation. Passive treatment systems use gravity flow for water movement, and passive energy sources such as solar or wind power, thus reducing energy use. In arid climates, passive systems also include the use of evaporation or infiltration. Such methods combine physical, biological and chemical approaches to treat MIW. The main purpose of both classes of technologies is to raise pH, lower dissolved metal concentrations, and lower sulfate. However, passive treatment of MIW requires long-term maintenance, oversight, and funding.

It is unknown at this time whether EPA intends to use passive treatment systems in the Animas River.