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Committee on Environment and
Public Works Washington, D. C.

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

Wednesday, September 16, 2015

U. S. SENATE

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 10:01 a.m. in room 406, Dirksen Senate Building, the Honorable James Inhofe [chairman of the committee] presiding.

Present: Senators Inhofe, Boxer, Sullivan, Rounds, Barrasso, Capito, Crapo, Boozman, Fischer, Markey, 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 who have a special concern and interest. You are recognized.

STATEMENT OF THE HONORABLE CORY GARDNER, A UNITED STATES 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 four days after the 3 million gallons of contaminated water was 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:]

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

Lastly, 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 has 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:]

Senator Inhofe. Thank you, Senator Gardner.

Senator Bennet?

STATEMENT OF THE HONORABLE MICHAEL BENNET, A UNITED STATES
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 four 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 cleanup.

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 cleanup 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:]

Senator Inhofe. Thank you Senator Bennet.

Senator Udall?

STATEMENT OF THE HONORABLE TOM UDALL, A UNITED STATES 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 cleanup business.

Just to show you the wakeup call that all of us are facing, there are ten mining projects very similar to this that EPA analyzed that said they believe there are similar conditions. There are ten 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.

[The prepared statement of Senator Udall follows:]

Senator Inhofe. Thank you, Senator Udall.

Senator Heinrich?

STATEMENT OF THE HONORABLE MARTIN HEINRICH, A UNITED STATES
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 ten 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 cleanup of this spill, it is high time that we overhaul our abandoned mine cleanup 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.

[The prepared statement of Senator Heinrich follows:]

STATEMENT OF THE HONORABLE JAMES INHOFE, A UNITED STATES 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 cleanup 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 cleanup 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 ten years ago.

Senator Boxer?

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF THE HONORABLE BARBARA BOXER, A UNITED STATES
SENATOR FROM 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 committee: "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 cleanup 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 cleanup so that the American taxpayers are not stuck with the bill.

Some argue that waiving liability for cleanups 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 cleanups, 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 we require oversight of cleanups 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, arsenics, 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, cleanup 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 reinstating the Superfund tax so that polluters pay for cleanup. They have also proposed creating a fee on hard rock mining that would be paid into a fund for cleanups.

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 follows:]

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. Okay. 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 THE HONORABLE GINA MCCARTHY, ADMINISTRATOR,
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 pressurized 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 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 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:]

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 cleanup 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 lastly, 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 Bennet 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 cleanups 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 cleanup 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 cleanups?

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 cleanups at ten 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 cleanups of abandoned mines by Good Samaritans is who will be responsible if something goes wrong during the cleanup. 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. Okay, 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 information follows:]

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 cleanup. 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 four 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 actions 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. Okay.

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.

Ms. McCarthy. Yes. 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 cleanup 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. Okay, 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 four 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.

But 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 email 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 probably prepared to inform local communities if there was a spill that would happen, 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. Well 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 just 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. I guess, 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? Because 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 as well as 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.]