

## Gold King Mine Spill Points To EPA Institutional Failure

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On Aug. 5, 2015, U.S. Environmental Protection Agency personnel and a retained contractor caused the breach of a dam holding back wastewater while investigating a leak at a Colorado mine. This breach caused millions of gallons of severely contaminated water to flow into Cement Creek, a tributary of the Animas River in Colorado. The impact of the spill was felt in Colorado, New Mexico, Utah and within the reservations of the Navajo Nation and the Southern Ute tribes. The EPA initially estimated that roughly 1 million gallons had leaked from the mine, but later conceded that the extent of the damage was three times worse.[1]

The EPA continues to downplay the significance of the environmental consequences of this spill. As alluded to in a recent Law360 article, there is no doubt that, if a private party was in the EPA's shoes, the agency would immediately threaten criminal prosecution, draconian penalties and far-reaching and speculative remedial measures to remove all trace of toxic contaminants.



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In contrast, the EPA claimed within eight days after the release of the toxic sludge from the abandoned gold mine that the contaminant levels in the impacted waterways have returned to their original condition. On Aug. 13, EPA Administrator Gina McCarthy announced that the "[Animas] river is restoring itself" and that water quality has returned to "pre-incident conditions." [2] The EPA certainly has not accepted similar claims about BP PLC's oil spill in the Gulf of Mexico.

In fact, the EPA's treatment of itself in Gold King Mine spill is a drastic departure from the agency's standard practice of requiring private operators to implement expensive and long-lasting investigations and cleanup measures for any contamination that exceeds drinking water standards. Most of these cleanups must be conducted under draconian regulations adopted by the EPA almost three decades ago, known as the National Contingency Plan.

Further, the Associated Press has obtained documents indicating that the EPA was warned by its contractor of the risk of a "blowout" of tainted water as a result of the planned investigation at the mine.[3] Despite knowledge of these risks, the EPA opted to proceed with the Gold King Mine operation. This reckless conduct fits within a larger pattern in which the EPA refuses to consider the potential costs, collateral impacts and risks associated with its actions. This June, the U.S. Supreme Court overruled the EPA's proposal to regulate mercury emissions from power plants because the agency refused to consider the potential costs in its determination as to whether mercury emissions from power plants

should be regulated.[4] The Supreme Court held that the EPA acted unreasonably when it determined that the potential financial impacts from its regulations were irrelevant in deciding whether to regulate power plants:

EPA's interpretation precludes the Agency from considering any type of cost — including, for instance, harms that regulation might do to human health or the environment. The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would still deem regulation appropriate.[5]

In refusing to take into account any consideration of potential costs, the EPA betrays a measure of arrogance that cannot even survive the deferential review that the court provides to the agency. Indeed, in its decision, the Supreme Court reminded the EPA that it is never “rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”[6] Whether dealing with the implementation of complicated regulatory regimes or with the decision to use heavy machinery near a waterlogged mine, the EPA's actions can have significant unintended consequences that far exceed any potential benefit that was hoped to be gained. Hopefully, the Supreme Court's ruling in *Michigan v. EPA* and the spill at the Gold King Mine serve as reminders to the EPA that it should take into consideration all potential consequences from its actions. But, under the current administration, it is unlikely that the EPA will heed these warnings.

The Gold King Mine spill may have its most lasting impact in reminding the public and Congress of the EPA's limitations. It underscores the notion that the EPA, like everyone else, is fallible. With its limited resources, the EPA proved woefully incapable of overseeing the actions of its contractor.[7] This is a humiliating failure in one of the EPA's core and original functions — to remediate contaminated sites where no one else is available to take on the work.

Instead of focusing on its primary statutory function and using its resources accordingly, the EPA, as noted above, continues to venture off, asserting broad interpretations of its jurisdiction that go far beyond what has previously been viewed as a federal issue. And, the Gold King Mine spill has done nothing to humble the EPA from its continued overreach. For instance, a federal district judge recently held that EPA's position on the scope of the waters protected under the Clean Water Act was “exceptionally expansive” and unsupported by the statutory authority.[8] In another very recent decision, the EPA was sanctioned for attempting to assert jurisdiction over wetlands that were held to be completely unassociated with any navigable waters.[9] The EPA's continued, self-initiated expansion of its authority is troubling when viewed in conjunction with its failure to conduct a reasonable cleanup of the Gold King Mine.

Although the Gold King Mine spill is undoubtedly newsworthy for the economic and potential health impacts that it will cause to the region, the EPA's culpability here is multiplied when this incident is considered in conjunction with the actions that the agency typically takes toward private operators.

First, the EPA likely would never display the same cavalier attitude toward the spill if a private party was responsible for this incident. A private party would immediately face threats of criminal prosecution, astronomical fines and extensive cleanup obligations. However, the EPA's attitude toward the potential repercussions of its cleanup activities at the Gold King Mine fits perfectly within the agency's general stance against considering the potential costs and risks from its regulatory actions. And its pronouncement that “all is fine down here” three weeks after this disaster speaks volumes about the

lack of candor and consistency that has become a hallmark from our federal environmental watchdog. Finally, the EPA's role in causing this spill is a necessary reminder that the agency's capabilities are limited.

Just because the EPA has the power to order private parties to conduct extensive remedial actions, does not mean that the agency should not seek to exercise appropriate constraint. The EPA's credibility is already damaged based upon its consistent overreach and lack of focus on its core statutory mission; it certainly didn't help itself with the actions that it has taken over the Gold King Mine.

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[1] "EPA: Pollution from mine spill much worse than feared." The (Farmington, N.M.) Daily Times, Aug. 10, 2015, available at <http://www.usatoday.com/story/news/nation/2015/08/09/navajo-nation-epa-spill/31384515/>

[2] "EPA Chief on Toxic Colorado Spill: 'This River Is Restoring Itself.'" NBC News, Aug. 13, 2015, available at <http://www.nbcnews.com/news/us-news/epa-chief-toxic-colorado-spill-river-restoring-itself-n409336>

[3] "EPA Knew of 'Blowout' Risk at Colorado Gold Mine on Animas River: Report." Associated Press, Aug. 22, 2015, available at <http://www.nbcnews.com/news/us-news/epa-knew-blowout-risk-colorado-gold-mine-animas-river-report-n414211>.

[4] *Michigan v. EPA*, — U.S. —, 135 S. Ct. 2699 (2015).

[5] *Id.* at 2707.

[6] *Id.*

[7] "EPA Causes Massive Spill of Mining Waste Water in Colorado, Turns Animas River Bright Orange," Newsweek, Aug. 7, 2015, available at <http://www.newsweek.com/epa-causes-massive-colorado-spill-1-million-gallons-mining-waste-turns-river-361019>. In this article, David Ostrander, EPA's Director of Emergency Preparedness for the region, was reported as saying at a community meeting held in Durango, Colorado on Aug. 7, "We're asking ourselves the same question: What exactly happened[?]"

[8] *North Dakota v. United States EPA*, No. 3:15-cv-59, 2015 U.S. Dist. LEXIS 113831 (D.N.D. Aug. 27, 2015) (granting preliminary injunction against EPA's implementation of proposed rule to change the definition of "Waters of the United States" under the Clean Water Act).

[9] *United States v. Lipar*, No. 4:10-cv-01904, 2015 U.S. Dist. LEXIS 115821 (S.D. Tex. Aug. 30, 2015). In this case, the court dismissed the EPA's claims against a developer after it refused to produce evidence showing that the developed wetlands were within the jurisdictional waters of the United States. In

dismissing the case, the court stated that: “The government has not followed court orders or has done so only after months of recalcitrance. When ordered to produce data, it either did not comply or did so only half-heartedly. It has never followed the spirit of the court's orders, and, at best, it only sometimes complied with the letter. It has withheld papers under claims of privilege either maliciously or because it is grossly incompetent. It has abused its power in an attempt to browbeat the defendants and discourage their colleagues and competitors from developing similar areas. Its behavior is reprehensible.” *Id.*

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