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U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

September 14, 2016

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DAVID WATKINS
DEMOCRATIC STAFF DIRECTOR

The Honorable Dan Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street NW
Washington, D.C. 20240

Dear Director Ashe:

On August 5, 2015, an Environmental Protection Agency-led crew (“EPA”) discharged 3 million gallons of contaminated water from the Gold King Mine, located in San Juan County, Colorado into the Animas and the San Juan River systems. The plume contained high metal concentrations and reached Arizona, Colorado, New Mexico, and Utah and lands of the Navajo Nation, the Southern Ute, and the Ute Mountain Ute Indian tribes.¹ The Committee on Natural Resources (“Committee”) continues to conduct oversight of the circumstances that gave rise to the discharge, the impact of the discharge on the region, and remediation efforts on the part of EPA.

After much review, the Committee is concerned that EPA’s actions violated the adverse modification prohibitions of Section 7 of the Endangered Species Act of 1973 (“ESA”).² Among other requirements, pursuant to Section 7 of the ESA, federal agencies are required to ensure that agency actions and federally supported activities are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”³ Furthermore, the ESA provides for the imposition of civil and criminal penalties on individuals who knowingly violate any of its provisions.⁴

¹ U.S. ENVTL PROTECTION AGENCY, ONE YEAR AFTER THE GOLD KING MINE INCIDENT A RETROSPECTIVE OF EPA’S EFFORTS TO RESTORE AND PROTECT IMPACTED COMMUNITIES (2016).

<https://www.epa.gov/sites/production/files/2016-08/documents/mstanislausgkml1yrreportwhole8-1-16.pdf>

² The Committee has raised concerns that the EPA violated Section 7 of the ESA by failing to consult with the U.S. Fish and Wildlife Service with regard to its actions associated with the Gold King Mine, *See*, MAJORITY STAFF REP. OF H. COMM. ON NATURAL RESOURCES, 114th CONG., REP., “EPA, THE DEPARTMENT OF THE INTERIOR, AND THE GOLD KING MINE DISASTER,” 71 (2016).

http://naturalresources.house.gov/uploadedfiles/house_committee_on_natural_resources_gold_king_mine_report_fe_b_11_2016.pdf.

³ Endangered Species Act of 1973, 16 U.S.C §1536 (2000).

⁴ *Id.* at 1540.

In the days immediately following the mine discharge through October 2015, the Utah Department of Environmental Quality (“UDEQ”) performed analyses of sediment samples. These samples were collected at various locations along the San Juan River, and compared with samples collected at the same sites prior to the plume’s arrival into Utah. The UDEQ’s data indicates an increase in metals in San Juan River sediments following the plume’s arrival at two sampling sites. In its report summarizing the sediment analyses, UDEQ noted:

[t]he concentrations in sediment at Montezuma Creek and Bluff of aluminum, arsenic, beryllium, cobalt, copper, cadmium, chromium, iron, lead, manganese, vanadium, and zinc all increase by approximately a factor of two after the pollutant plume was predicted to arrive in Utah. The sediment concentrations then consistently decreased for the next sampling round about a month later.⁵

The Committee is particularly concerned that these increases in metals were measured in the critical habitats of the endangered Colorado pikeminnow and the endangered razorback sucker.⁶ The recovery plans for both species make specific note that exposure to heavy metals is a factor that could negatively affect the species’ continued existence.⁷

In order to assist the Committee in its oversight of the effects of EPA’s Gold King Mine blowout, please provide written responses to the following questions no later than September 28, 2016:

1. Has the U.S. Fish and Wildlife Service (FWS) determined whether the Gold King Mine release resulted in the deposition of metals at any point between where State Route 301 crosses the San Juan River in Farmington, New Mexico and the western terminus of critical habitat in Lake Powell in Utah?
2. Is FWS reviewing whether the Gold King Mine release adversely modified the designated critical habitats for the Colorado pikeminnow and razorback sucker by contributing metals to river sediments in the San Juan River? Has FWS ever or is FWS currently relying on EPA data to make a determination as to whether the Gold King Mine release, triggered by EPA, adversely modified the designated critical

⁵ UTAH DEPT OF ENVTL QUALITY, EVALUATION OF UDEQ SEDIMENT DATA COLLECTED IN RESPONSE TO THE GOLD KING MINE RELEASE (Feb. 10, 2016).

<http://www.deq.utah.gov/Topics/Water/goldkingmine/docs/2016/02Feb/UDEQ-Sediment-Analysis-Sediment.pdf>

⁶Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Colorado River Endangered Fishes: Razorback Sucker, Colorado Squawfish, Humpback Chub, and Bonytail Chub, 59 Fed. Reg. 13374, 13398-99 (March 21, 1994) (amending 50 C.F.R. pt. 17).

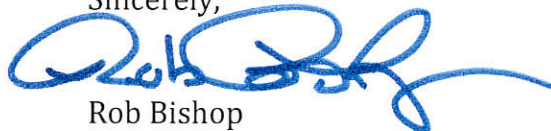
⁷ U.S. FISH AND WILDLIFE SERV., COLORADO PIKEMINNOW (*PTYCHOCEILUS LUCIUS*) RECOVERY GOALS: AMENDMENT AND SUPPLEMENT TO THE COLORADO SQUAWFISH RECOVERY PLAN (2002). *See also*, U.S. FISH AND WILDLIFE SERV., RAZORBACK SUCKER (*Xyrauchen texanus*) RECOVERY GOALS: AMENDMENT AND SUPPLEMENT TO THE RAZORBACK SUCKER RECOVERY PLAN (2002).

habitat for the Colorado pikeminnow and/or razorback sucker? If FWS is relying on EPA data to determine the release's effects on river sediments in designated critical habitat, please describe to what degree is FWS relying on EPA data.

3. Did FWS conduct its own sediment sampling following the Gold King Mine release? If so, was any of the sampling done in advance of the plume? If no, why not?
4. The UDEQ's sampling results indicate approximately a doubling of metal detected in sediments at two different San Juan River sites following the Gold King Mine release. Does FWS consider an action that increases the concentration of metals in river bottom sediment within the designated critical habitat for the Colorado pikeminnow and/or razorback sucker to constitute adverse modification under the ESA?
5. Does FWS consider an action that increases the concentration of metals in river bottom sediment within the designated critical habitat for the Colorado pikeminnow and/or razorback sucker to be harmful to these fish?
6. Does FWS consider an action that increases the concentration of metal in river bottom sediment upstream of the designated critical habitat for the Colorado pikeminnow and/or razorback sucker and that contributes contaminants in the surface water and/or river bottom sediments in critical habitat of these fish to constitute adverse modification under the ESA?
7. Does FWS consider an action that causes an exceedance of state chronic or acute water quality criteria for aquatic life within the designated critical habitat for the Colorado pikeminnow and/or razorback sucker to constitute adverse modification under the ESA?
8. Has FWS initiated any formal or informal consultation relating to EPA's or the U.S. Bureau of Reclamation's actions before, during or after the August 2015 Gold King Mine spill regarding the potential species impacts under section 7 of the ESA? If so, please describe the status of any such consultation currently pending with FWS.

Should you have any questions, please contact Rob Gordon or Christopher Santini of the Committee staff at 202-226-5727.

Sincerely,



Rob Bishop
Chairman
Committee on Natural Resources