

STATE OF UTAH  
OFFICE OF THE ATTORNEY GENERAL



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OAG-017-16

Friday, February 26, 2016

Gina McCarthy, Administrator  
United States Environmental Protection Agency  
Mail Code: 1101A  
1200 Pennsylvania Avenue, Northwest  
Washington, D.C. 20460

Avi S. Garbow, General Counsel  
United States Environmental Protection Agency  
Mail Code: 2310A  
1200 Pennsylvania Avenue, Northwest  
Washington, D.C. 20460

Neil Kornze, Director  
United States Department of the Interior  
Bureau of Land Management  
1849 C Street, Northwest, Room 5665  
Washington, D.C. 20240

Sally Jewell, Secretary  
United States Department of the Interior  
1849 C Street, Northwest  
Washington, D.C. 20240

Dennis Greaney, President and Managing Partner  
Environmental Restoration, L.L.C.  
1666 Fabick Drive  
St. Louis, Missouri 63026

The Honorable John Hickenlooper  
Governor of the State of Colorado  
State Capital Building  
200 East Colfax Avenue, Suite 136  
Denver, Colorado 80203

J. Paul Rollinson, President and CEO  
Kinross Gold Corporation  
25 York Street, 17<sup>th</sup> Floor  
Toronto, Ontario M5J 2V5  
Canada

Sunnyside Gold Corporation  
1 Gladstone  
Silverton, Colorado 81433

San Juan Corporation  
15100 Foothill Road  
Golden, Colorado 80401

Todd C. Hennis, President  
San Juan Corporation  
15100 Foothill Road  
Golden, Colorado 80401

Re: **Notice of Endangerment and Intent to Sue under Section 7002(a)(1)(A) and (1)(B) of the Resource Conservation and Recovery Act, and Section 301 of the Clean Water Act**

Dear Sirs and/or Madams:

By and through counsel, the State of Utah hereby gives notice of its intent to sue the United States Environmental Protection Agency (“EPA”), the United States Bureau of Land Management (“BLM”), the State of Colorado (“Colorado”), Environmental Restoration, L.L.C., (“Environmental Restoration”), San Juan Corporation, Todd Hennis, Sunnyside Gold, Inc., (“Sunnyside”), and Kinross Gold Corporation (“Kinross) (collectively, “Defendants”) for violating 42 U.S.C. § 6972(a)(1)(A) of the federal Resource Conservation and Recovery Act (“RCRA”) for noncompliance with any permit, standard, regulation, condition, requirement, prohibition, or order under RCRA, and for violating 42 U.S.C. § 6972(a)(1)(B) of the RCRA by creating an imminent and substantial endangerment to the health of Utah’s citizens and the environment of the San Juan River in Utah. The State intends to file a citizen suit on or after the 90<sup>th</sup> day from the date of this Notice, in accordance with the notice provisions of 42 U.S.C. § 6972(b)(2)(A).

Furthermore, the Defendants have violated and continue to violate 33 U.S.C. § 1311(a) and 1342 of the Clean Water Act (“CWA”) by having discharged pollutants to the San Juan River and Lake Powell in violation of applicable State effluent limits and water quality standards. For these reasons, the State also intends to file a citizen suit under 33 U.S.C. § 1365(a)(1). Although the CWA includes a sixty (60) day notice provision for the commencement of a citizens suite, § 33 U.S.C. § 1365(h) provides that the governor of a state may commence a civil action against the Administrator at any time where a violation occurring in another state is causing an adverse effect on the public health or welfare in their state.

## **Background**

On August 5, 2015, the EPA and its contractor, apparently with the participation of representatives of the State of Colorado, breached a pile of rock and debris that were blocking an entrance to the Gold King Mine in San Juan County, Colorado. The pile was impounding millions of gallons of toxic mine sludge and wastewater. When the EPA breached the retaining pile, it released over three million gallons of this material into the Animas River. The contamination flowed from the Animas River into the San Juan River, which runs in part through Utah and empties into Lake Powell. This contamination created an imminent and substantial endangerment to Utah’s people, environment, and natural resources.

For much of its course through Utah, the San Juan River runs through native Ute and Navajo lands, passing near numerous Native American ruins. The river drains an arid region and along its length, is often the only significant source of fresh water. The Utah section of the San Juan serves white water rafters, fishermen, hikers, and campers. Navajo and non-Navajo Utah farmers and ranchers make use of the river for their crops and livestock. The San Juan runs through the modern communities of Aneth, Montezuma Creek, Bluff, and Mexican Hat, Utah. It created, and passes through, the famous Goosenecks Utah State Park.

The San Juan River is classified by Utah Admin. Code R317 as a class 1C (domestic purposes), 2A (contact recreation), 3B (game fish and necessary aquatic organisms), and 4 (agricultural) waterway. This classification is intended to protect the river against pollution for domestic, recreation, aquatic, and agricultural uses. While the full nature and extent of the contamination the EPA released into the San Juan and the impacts it has had on the ecosystem of the river remain to be determined, Utah understands that the contamination was highly acidic at the point of release and that it included large volumes of heavy metals, including, but not limited to, arsenic, lead, cadmium, copper, mercury, and zinc in concentrations exceeding

Utah's water quality standards. As these metals flowed downstream, they mixed with surface water and have in part settled into the sediments of the San Juan River, where they may harm the plants and animals that live in and near the river. The heavy metals may contaminate the groundwater near the river. They may harm humans who use surface water from the river or who come in contact with animals that live in, pass through, or drink water from the river. They present a risk to humans who may excavate or otherwise come in contact with the river sediments.

Based on available information disclosed after the blowout, Utah understands that there remain huge quantities of similar contamination in the mines of southwestern Colorado which are now, and will in the future, unless they are corrected, drain into waterways, and eventually make their way into the waters of the State of Utah, causing similar, possibly worse, problems in the future. Utah has incurred and continues to incur sampling, analytical, and response costs together with damage to property, natural resources, fish, wildlife, and other damages, including loss of use, revenues, and taxes.

### **The State of Utah's Intention to File Suit**

The State of Utah files this Notice and will commence legal action in order to achieve the complete remediation of damage to the San Juan River, the abatement and cessation of further releases of contamination from the Sunnyside and Gold King Mines, and adjacent areas into the waters of Utah, and the prevention of future releases like the August 5, 2015, Gold King Mine blowout.

#### **I. RCRA Claim**

In its RCRA claim, the State will pursue injunctive relief, future costs as allowed, and legal fees.

Each Defendant identified in this Notice has either owned, operated, or controlled the Gold King or Sunnyside mines and their associated facilities, and has contributed or is contributing to the contamination of the San Juan River in Utah. Each bears responsibility for creating conditions that pose an imminent and substantial endangerment to the public health and the environment in Utah, all in violation of RCRA.

Utah will bring claims under 42 U.S.C. § 6972(a)(1)(A) and (1)(B) against the owners/operators of the Gold King Mine – San Juan Corporation and its Chief Executive Officer Todd Hennis – and the owners/operators of the Sunnyside Mine – Sunnyside Gold Corporation and Kinross Gold Corporation – because they owned and/or controlled the mines at the time of the contamination and continue to own or control them now. In addition, Utah will bring claims against the BLM because the Gold King Mine portal may be located on BLM land.

Utah will bring claims under 42 U.S.C. § 6972(a)(1)(A) and (1)(B) against Colorado and the EPA because they were in charge of, determining, and directing the activities at the Gold King Mine site on and before August 5, 2015, and were physically present and managing the work performed by Environmental Restoration at the time of the August 5, 2015, blowout. In addition, Utah will bring claims against Environmental Restoration because of its extensive management and direction of operations at the site and its direct role in causing the August 5, 2015, blowout.

Based upon the foregoing, Utah intends to sue the Defendants identified herein under the RCRA citizen suit provision, 42 U.S.C. § 6972(a)(1)(A) and (1)(B), for “contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”

At the close of the 90-day notice period, Utah intends to file a citizen suit against the identified Defendants, in accordance with 42 U.S.C. § 6972(a)(1). Utah will seek all available injunctive relief, future costs, damages, and attorneys’ fees for the Defendants’ creation of an imminent and substantial endangerment in violation of the RCRA.

## II. CWA Claim

Section 303 of the CWA requires states to adopt water quality standards and effluent limitations in accordance with 33 U.S.C. § 1313 and 33 U.S.C. § 1315. Surface waters of the State are grouped into classes to protect the beneficial uses (domestic purposes, recreation, fish and aquatic organisms, and agricultural uses) designated within each class as provided for in Utah Admin. Code R317-2-6. Numeric criteria apply to each of the classes assigned to waters of the State. Utah Admin. Code R317-2-14. Specific numeric criteria apply to listed dissolved metals, including the metals (arsenic, barium, beryllium, cadmium, chromium, copper, lead, mercury, selenium, nickel, and zinc) contained in the contamination released from the Gold King Mine into the San Juan River.

Surface water and sediment samples were collected by the State and the EPA after the release. The Utah Department of Environmental Quality (“UDEQ”) recently evaluated samples collected by the EPA in August and September 2015 at several locations along the San Juan River. The UDEQ compared the metal concentrations from these samples against Utah’s water quality criteria (R317-2-14) for domestic source water, warm-water aquatic life, and agricultural uses. These data reveal several peaks in metal concentrations that exceed the highest concentrations previously observed by the UDEQ in the San Juan River, including samples collected immediately following the mine release and long-term monitoring records. The EPA data discloses high concentrations of several metals that exceed Utah’s water quality criteria for all uses in the Fall of 2015.

The State is concerned about the legacy impacts of contaminated sediment that has been accumulating due to historical releases from the mines. The UDEQ is also concerned about future releases of metals from mines in the watershed, as well as the remobilization of metals deposited in the Animas River. The UDEQ expects to see elevated metal loads in the San Juan River during the annual Spring runoff.

The exceedance of State water quality standards endangers the public health and environment in Utah in violation of the CWA. Utah will seek all available injunctive relief, restitution for costs, future costs, damages, and attorneys’ fees incurred as a result of the Defendants’ actions in violation of the CWA.

## III. Utah Water Quality Act

The Utah Water Quality Act (“WQA”) integrates the requirements of the CWA in State statutes (UCA §§ 19-5-101 *et seq.*) and administrative rules (Utah Admin. Code R317). In addition to regulating surface water quality, the WQA includes underground water (groundwater) in the definition of “waters of the State”

UCA, § 19-5-102(23)(a). Based on the circumstances described in the “Background” hereinabove, as the contamination flowed downstream, it mixed with surface water and settled into the sediments of the San Juan River bed. The heavy metals deposited in the sediment may contaminate the groundwater near the San Juan River and Lake Powell in violation of the WQA.

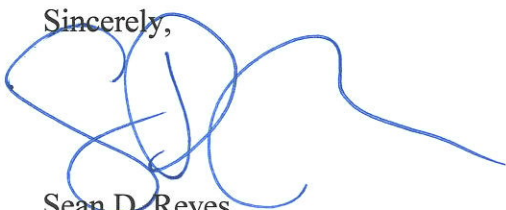
The contamination of groundwater in concentrations that exceed State water quality standards endangers the public health and environment in Utah in violation of the WQA. Utah will seek all available injunctive relief, restitution for costs, future costs, damages, and attorneys’ fees incurred as a result of the Defendants’ actions in violation of the WQA.

IV. Other Claims

These claims are not exclusive. Utah sends this Notice without waiving or prejudicing its right to advance other and additional legal or factual claims, including any claim for relief pursuant to federal, state, or common law causes of action based upon information or facts that are now known or may become known in the future.

During the applicable notice periods, Utah will be willing to discuss effective remedies for the violations identified in this letter. If any or all Defendants seek to avoid litigation, please contact this office to begin discussions within 20 days of receiving this Notice so that a meeting can be arranged and settlement negotiations may be completed before the end of the notice periods.

Sincerely,



Sean D. Reyes  
Utah Attorney General

SDR/CWA/srb