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Clearing Up Questions on River Spill

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Clearing up questions on river spill

What are the impacts of mine contamination, and who is responsible for cleaning it up?

BY CLIFFORD J. VILLA
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Like many New Mexicans, my family and I have been made heartsick by the horrendous spill of mine waste into the Animas River. Like many people, we feel deep connections to the places that have now been polluted.

These are places where we learned to swim and fish and enjoy nature. These are also the places that inspired my dedication to protect the environment, serving more than two decades with the U.S. Environmental Protection Agency and now teaching as a professor of environmental law at the University of New Mexico School of Law.

With this perspective, I have noted much confusion concerning the legal and practical implications of this terrible incident. To help shed some light on these issues and answer some questions I have seen raised, I would like to share the following comments.

■ What are the real impacts of this spill to people or the environment?

EPA toxicologists, working together with scientists from many other federal, state and tribal agencies are working to answer that question. At this point, concentrations of acid mine water and metals in the Animas River appear to be falling and presenting little risk to fish and to people who would swim, paddle and otherwise recreate on the river. However, the risk to people through drinking water still must be evaluated, as well as the risks to livestock and crops irrigated with river water. Long-term risks to the environment, will likely require more extensive evaluation.

■ Can EPA be held responsible for causing this spill?

One bedrock principle in the United States is that no person or agency is above the law. However, the liability of federal agencies, as well as state and tribal governments, may be limited by an ancient rule of common law known as "sovereign immunity." Under this rule, as established by Supreme Court precedent, the federal government cannot be sued without its express consent.



Federal Superfund law waives sovereign immunity, and many federal agencies have been subject to suits under Superfund. However, it remains unclear what such a lawsuit would seek to achieve.

For example, should an affected tribe have concerns about the pace of EPA's cleanup efforts, the tribe can raise their concerns directly to EPA through a process known as "unified command." Costs for the participation of local, state and tribal governments in unified command may be reimbursed by EPA directly without the need for lawsuits.

EPA has also established a claims procedure for any individual to seek reimbursement for losses caused by this incident.

■ Where is the money coming from to respond to this incident?

Most is likely to come from the federal Superfund trust fund. The trust fund provides EPA with money to conduct emergency responses, such as this one, and remediation.

■ What would it mean for the Animas River watershed to be declared a "Superfund site"?

Superfund designation is essential for funding long-term cleanup beyond the emergency response phase. One common misconception is that designation as a Superfund site would mean parties could suddenly

become liable for the cost of cleanup. In truth, Superfund liability and Superfund designation are entirely separate. Superfund designation will not make any parties more liable for the cleanup than they are already today.

■ What is the role of FEMA in this incident? Should the president declare a disaster?

The federal Stafford Act allows the president to designate a "major disaster" that would allow access to funds managed by FEMA. However, no disaster declaration is necessary or appropriate where, as here, other sources of funding are already available.

■ Does this incident indicate a need for change in federal law?

Not necessarily. The federal Superfund law in its current form has been used successfully to address many large mine sites and mining districts.

One occasional criticism of current law concerns the alleged need for a "Good Samaritan" amendment that would allow private parties to conduct mine cleanups voluntarily. However, current law already allows interested parties to enter agreements with state and federal agencies to conduct voluntary cleanups.

Views expressed in this article are entirely the author's.