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OPPORTUNITIES FOR GOOD SAMARITAN CLEANUP OF HARD ROCK ABANDONED MINE LANDS

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

OF THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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OVERSIGHT HEARING ON OPPORTUNITIES FOR GOOD SAMARITAN CLEANUP OF HARD ROCK ABANDONED MINE LANDS

Thursday, July 13, 2006
U.S. House of Representatives
Subcommittee on Energy and Mineral Resources
Committee on Resources
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:03 a.m., in Room 1324, Longworth House Office Building, Hon. Jim Gibbons [Chairman of the Subcommittee] presiding.

Present: Representatives Gibbons, Pearce, Drake and Grijalva.

Also Present: Representatives Mark Udall and Inslee.

STATEMENT OF THE HON. JIM GIBBONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEVADA

Mr. GIBBONS. Good morning. The Subcommittee on Energy and Mineral Resources will come to order.

The Subcommittee is meeting today to hear testimony on the opportunity of Good Samaritan cleanup of hard rock abandoned mine lands.

Under Committee Rule 4(g), only the Chairman and Ranking Minority Member can make opening statements; however, if any Members have other statements, I ask unanimous consent that they be included, and without objection, so ordered. And I will now recognize myself for an opening statement.

As I said earlier, the Subcommittee meets today to discuss the opportunities for Good Samaritan cleanup of hard rock abandoned mine lands. Hard rock mining paved the way for the settlement in the American West, and many of our modern Western cities exist because of mining, and were even built on old mine sites. While mining has left many benefits for the people in the land, there are still historic, old, abandoned mine sites that require some form of reclamation for the purposes of public safety.

Throughout the Western United States, abandoned hard rock mines—AML, as they are known—can be found. Many of these mines or workings were operated in the 1800s or the early 1900s prior to the enactment of the Nation's environmental and land management laws. At times the owner or operator of a mine historically did not always have the authority to make decisions regarding the operation of the mines. Specifically, during World

War II, Federal agencies such as the U.S. Geological Survey, U.S. Bureau of Mines, War Production Board, Office of Price Administration and the War Manpower Commission controlled which mines operated, their hours of operation, which strategic metals were produced, and production price levels. All gold mines with one exception were ordered shut down during this time period. In fact, the Federal Government used the threat of seizure to ensure that mines complied with its orders.

The actions by the Federal Government during World War II caused the abandonment of many mines. As a result, the Federal Government in many cases shares responsibility with the mining industry for environmental remediation and reclamation of mine sites operated prior to the enactment of our Federal and State framework of environmental land management laws and regulations.

The definition of AML site differs from State to State. Mining is Nevada's second largest industry, and as such is home to literally thousands of old, historic, abandoned mine sites, most of which pose no threat to public safety, and some of which are even historic sites.

Nevada and many other Western States have partnered with industry to reclaim these abandoned mines, and together have been able to achieve real progress in addressing the AML problem.

As a former exploration geologist, I know that today's modern mining industry has the desire to be good stewards of the environment, and I believe the Federal Government should facilitate their efforts. Unfortunately, the law as it is currently written discourages voluntary efforts of abatement, reclamation and remediation efforts on these old, abandoned mine lands.

While progress has been made in addressing some problem sites, there are legal barriers to creating a more aggressive and substantial program that relies on the expertise and resources of the mining industry and other parties interested in helping clean up hard rock AML sites.

The principal legal challenges include CERCLA and Clean Water Act liability. Under current law, a Good Samaritan could be held responsible for all historic discharges and other environmental problems.

Several different pieces of legislation have been introduced in the House and the Senate designed to address the CERCLA and Clean Water Act liability for existing conditions at AML sites. The concept is to provide limited liability relief to governments, NGO's, individuals and businesses that voluntarily clean up abandoned hard rock mines that have an environmental component; that is, the workings contain water and may have acid rock drainage rather than just present a physical hazard.

The Good Samaritan Act would provide relief from Clean Water Act and CERCLA for historic existing conditions, but the individual would be held responsible for the work that they actually perform. EPA would issue a permit to the Good Samaritan authorizing the activity. And today we are here to learn from our witnesses what tools are necessary in order to encourage industry to be Good Samaritans, and to achieve our mutual goal of remediating

abandoned mine lands. This is particularly important now when Federal budgets are tight and the mining industry is robust.

I would like to thank all of our witnesses today for being here, and I look forward to learning from their experience and expertise on this important subject.

[The prepared statement of Mr. Gibbons follows:]

Statement of The Honorable Jim Gibbons, Chairman, Subcommittee on Energy and Mineral Resources

The Subcommittee meets today to discuss opportunities for Good Samaritan Cleanup of Hard Rock Abandoned Mine Lands.

Hard rock mining paved the way for the settlement of the American West.

Many of our modern Western cities exist because of mining and were even built on old mine sites.

While mining has left many benefits for the people and the land, there are still abandoned mine sites that require reclamation for the purposes of public safety.

Throughout the Western United States abandoned hard-rock mines (AML) can be found.

Many of these mines or workings were operated in the 1800s and early 1900s prior to the enactment of the Nation's environmental and land management laws.

At times the owner or operator of a mine did not always have the authority to make decisions regarding the operation of the mine.

Specifically during World War II federal agencies such as the U.S. Geological Survey (USGS), U.S. Bureau of Mines (USBM), War Production Board, Office of Price Administration, and the War Manpower Commission, controlled which mines operated, their hours of operation, which strategic metals were produced, and production and price levels.

All gold mines, with one exception, were ordered shut down during this time period. In fact, the federal government used the threat of seizure to ensure that mines complied with its orders.

The actions by the federal government during World War II caused the abandonment of many mines.

As a result, the federal government in many cases shares responsibility with the mining industry for environmental remediation and reclamation of mine sites operated prior to the enactment of our Federal and State framework of environmental and land management laws and regulations.

The definition of an AML site differs from state to state.

Mining is Nevada's second largest industry, and as such is home to literally thousands of abandoned mine sites—most of which pose no threat to public safety and some of which are even historic sites.

Nevada, and many other Western states, have partnered with industry to reclaim these abandoned mine lands—and together have been able to achieve real progress in addressing the AML problem.

As a former exploration geologist, I know that the mining industry has the desire to be good stewards of the environment—and I believe the federal government should facilitate their efforts.

Unfortunately, the law as it is currently written discourages voluntary abatement, reclamation and remediation efforts on abandoned mine lands.

While progress has been made in addressing some problem sites there are legal barriers to creating a more aggressive and substantial program that relies on the expertise, and resources of the mining industry and other parties interested in helping to clean up hard-rock AML sites.

The principle legal challenges include CERCLA and CWA liability. Under current law a Good Samaritan could be held liable for historic discharges and other environmental problems.

Several different pieces of legislation have been introduced in the House and Senate designed to address the CERCLA and CWA liability for existing conditions at AML sites.

The concept is to provide limited liability relief to Governments, NGO's, Individuals and Businesses that voluntarily clean up abandoned hard rock mines that have an environmental component (the workings contain water and may have acid rock drainage) rather than just present a physical hazard.

The Good Samaritan would have relief from the CWA and CERCLA for existing conditions but will be held responsible for the work that they perform.

EPA would issue a permit to the Good Samaritan, authorizing the activity.

Today we are here to learn from our witnesses what tools are necessary in order to encourage industry to be "Good Samaritans" and achieve our mutual goal of remediating abandoned mining lands.

This is particularly important now when federal budgets are tight and the mining industry is robust.

I'd like to thank all of our witnesses for being here and I look forward to learning from their experience and expertise on this important subject.

Mr. GIBBONS. And now I'd like to turn and recognize Mr. Grijalva, the Ranking Democratic Member, for any statement he may have. Mr. Grijalva.

STATEMENT OF THE HON. RAUL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. Thank you very much, Mr. Chairman. And also, let me join with you in thanking the witnesses that we'll be hearing from today. And in particular, I'm pleased to welcome one of the witnesses, Ms. Joan Card, representing the Western Governors' Association. Welcome.

I'm very fortunate and privileged to represent the people of the Seventh District of Arizona, a State so steeped in mining that many believe it was named for a huge silver deposit discovered in 1736. It was called the Arizonac mine, and it was southwest of what is present day Nogales, Arizona.

From silver to gold to copper, Arizona has enjoyed—or suffered, depending on a person's point of view—a series of boom-and-bust periods directly attributable to mining. Under the 1872 mining law, miners have staked out over 1 million claims in Arizona. While some of these miners have been fair and responsible, there is no doubt that there have also been some bad actors as well.

There are, according to EPA, more than 500,000 abandoned mines in the United States. And according to government estimates, the State of Arizona is home to approximately 20 percent of that total. The government has found that an estimated 3,000 of the 100,000 abandoned mining sites in Arizona pose a significant environmental risk. Abandoned mines primarily threaten our water supplies. In fact, the Arizona Department of Environmental Qualities has asserted the pollutants that remain from active and former mines are some of the major pollution sources for Arizona's water bodies.

Clearly, Congress owes it to the American people to address the threat to water quality in our drinking water supplies posed by abandoned hard rock mines across the Western United States.

I commend my colleagues, Mark Udall and John Salazar, for introducing legislation to address this staggering problem. I also concur with Ranking Member Rahall that Congress should not enact legislation that exempts hard rock mining companies from the Clean Water Act or Superfund, and I join Mr. Rahall as a cosponsor to his mining law reform legislation.

I also support the premise that hard rock mining companies should pay a royalty on production of hard rock minerals on Federal lands, and that that revenue be dedicated to the cleanup of past hard rock mining operations. It's well past time that Congress took up this very important environmental issue. And I'm glad for the hearing, Mr. Chairman.

[The prepared statement of Mr. Grijalva follows:]

Statement of The Honorable Raul M. Grijalva, a Representative in Congress from the State of Arizona

Thank you, Mr. Chairman. And thank you to the witnesses we will be hearing from today. I am pleased to welcome one of our witnesses in particular: Joan Card, Director, Water Quality Division, Arizona Department of Environmental Quality who is representing the Western Governors Association.

I am fortunate to represent the people of the 7th District of Arizona, a state so steeped in mining that many believe it was named for a huge silver deposit discovered in 1736 at the Arizonac mine southwest of present-day Nogales.

From silver to gold to copper, Arizona has enjoyed——or suffered—depending on your point of view—a series of boom-and-bust periods directly attributable to mining.

Under the 1872 Mining Law, miners have staked over one million claims in Arizona. While some of these miners have been fair and responsible, there is no doubt that there have been many bad actors as well.

There are according to EPA, more than 500,000 abandoned mines in the United States. And, according to government estimates, the State of Arizona is home to approximately 20% of that total. The government has found that an estimated 3,000 of those 100,000 abandoned mining sites in Arizona pose a significant environmental risk.

Abandoned mines primarily threaten our water supplies. In fact, the Arizona Department of Environmental Quality has asserted that, "the pollutants that remain from active and former mines are some of the major pollution sources for Arizona's waterbodies."

Clearly, Congress owes it to the American people to address the threat to water quality and our drinking water supplies posed by abandoned hard rock mines across the Western United States.

And so, I commend my colleagues, Mark Udall and John Salazar, for introducing legislation to address this staggering problem. I also concur with Ranking Member Rahall that Congress should not enact legislation that exempts hard rock mining companies from the Clean Water Act or Superfund. And, as I have joined Mr. Rahall as a co-sponsor to his Mining Law Reform legislation, I also support the premise that hard rock mining companies should pay a royalty on production of hard rock minerals on federal lands and that this revenue should be dedicated to clean-up of past hard rock mining operations.

It is well past time that Congress take up this important environmental issue.

Mr. GRIJALVA. And with that, I'd also like to, as you indicated at the beginning of this hearing, submit Mr. Rahall's comments for the record. Thank you.

[The prepared statement of Mr. Rahall follows:]

Statement of The Honorable Nick J. Rahall, Ranking Democrat, Committee on Resources

Thank you, Mr. Chairman. And thank you to our witnesses who are here to discuss the problems—and there are many—associated with the over half-a-million abandoned hardrock mine sites in the United States.

This issue comes to us under the banner of "Good Samaritan," giving it the Biblical luster of a well-known parable. But as we take up this issue, I am reminded of a verse from Proverbs (16:16), "How much better to get wisdom than gold, to choose understanding rather than silver!"

Today, I urge my colleagues to consider the folly of our hardrock mining policies with renewed wisdom and to understand the mess left by 134 years of mining conducted under a now-badly outdated law.

For multiple generations, hardrock mining companies have been profiting by extracting gold, silver, and other valuable minerals from our lands only to pull up stake and leave behind scarred and battered landscapes. These huge companies have often operated without mercy for the lands or nearby communities. They are able to do so, in large part, because the tarnished, antiquated Mining Law of 1872 that contains no environmental protection provisions. As a result, the headwaters of 40 percent of Western waterways are polluted by mining, and hundreds of thousands of abandoned mine sites litter the West—including 87 sites so toxic they have been designated as Superfund sites.

Under the guise of easing the burden on well-intentioned folks who simply want to clean up someone else's mess, the so-called "Good Samaritan" proposals coming forward would actually make it easier for hardrock mine companies to get away with making the mess in the first place.

Instead of giving hardrock mine companies a free ride, I have, as many of my colleagues know, long advocated reform of the Mining Law of 1872 as a means to achieve both a fair return to the public on the production of hardrock minerals from public lands, and the reclamation of abandoned mined lands using those returns or royalties. In fact, I began my efforts soon after I became Chairman of this Subcommittee in 1987. We came close to enacting a major reform bill in 1994. Unfortunately, since then, the Republican Majority has done nothing to further this cause. In fact, the gears of reform have notably shifted into reverse.

In May, the Bush Administration proposed the "Good Samaritan Clean Watershed Act," a proposal that purports to promote the cleanup of inactive and abandoned hardrock mines by limiting liability from certain environmental laws to innocent parties who volunteer to provide partial cleanup of such sites. Instead, it has the potential to give the owners of hardrock mines a free pass from liability under the Superfund and the Clean Water Act requirements.

Rather than enacting such flawed legislation, I urge my colleagues to look to H.R. 3968, the "Federal Mineral Development and Land Protection Equity Act of 2005" a bill that I introduced along with a bipartisan group of colleagues. Our legislation would prohibit the continued giveaway of public lands. It would require that a fee be paid for the use of the land, and that a royalty be paid on the production of valuable minerals, such as gold and silver, extracted from Western public domain lands. It would, as well, require industry to comply with some basic reclamation standards to ensure long-term protection of the environment both during mining and after it has been completed.

This legislation would not only bring outmoded mining law into the 21st century, it would also set a solid accountable course for the future of a thriving industry. For too long now, the hardrock mining industry has taken advantage of the lax law that allows them to extract valuable minerals from public lands for free—the last thing that industry needs is another free pass.

Clearly, the environmental damage caused by hardrock mining and the dangers posed to nearby citizens are a result of weak and, at times, non-existent mining regulation. The Administration's proposal does nothing to remedy that. Their idea of Good Samaritan is simply bad public policy.

Mr. GIBBONS. Thank you, Mr. Grijalva.

I'd like to call our first panel. It's Brent Fewell, Deputy Assistant Administrator for the Office of Water, United States Environmental Protection Agency; Joseph Pizarchik—I hope I'm pronouncing your name right, Joe. He's the Director of Bureau of Mining Reclamation, Pennsylvania Department of Environmental Protection; and Ms. Joan Card, Director of Arizona's Water Quality, Western Governors' Association.

I also ask unanimous consent that Congressman Mark Udall be allowed to sit with us on the dais for the purposes of this hearing; and without hearing any objection, so ordered.

Before we open the testimony, what we have is a procedure, a policy for the committee to swear in all of the witnesses. So if each of you will stand with me and raise your right hand, we'll swear you in.

[Witnesses sworn.]

Mr. GIBBONS. Let the record reflect that each of the witnesses answered in the affirmative.

And we will turn now to Mr. Brent Fewell. Brent, welcome. The floor is yours; we look forward to your testimony.

STATEMENT OF BRENT FEWELL, DEPUTY ASSISTANT ADMINISTRATOR FOR THE OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. FEWELL. Thank you, Mr. Chairman. Good morning, members of the Subcommittee. I am honored to appear before you today to testify on one of the most important environmental issues and opportunities currently facing the U.S.; that is, legacy impacts from abandoned hard rock mines, and the commonsense approach that we can take to accelerate cleanup of pollution from these mine sites.

President Bush is committed to accelerating environmental progress through collaborative partnerships, and as part of this commitment, in May of this year EPA transmitted to Congress the Good Samaritan Clean Watershed Act. We are grateful to Representative Duncan, a member of your full committee, for introducing the Administration's bill. And we are grateful to you, Mr. Chairman, for holding this hearing today to continue focusing attention on this important issue.

I'd also like to acknowledge the leadership of Representatives Udall, Salazar and Beauprez on this issue, and we applaud the bipartisan efforts in both Houses of Congress to try to fix this problem.

As a Denver Post editorial staff aptly noted last week on this very issue, "It's high time that Congress enable some real progress to be made toward cleaning up what is technically a very fixable mess."

Mr. Chairman, the issue of abandoned mine remediation has been discussed and debated for well over a decade, and a solution is long overdue. As you are well aware, hundreds of thousands of inactive and abandoned hard rock mines continue to impact local economies by threatening drinking and agricultural water supplies, increasing water treatment costs, and limiting fishing and recreational opportunities.

In August of last year, as part of the White House Cooperative Conservation Conference, Administrator Johnson announced the Agency's Good Samaritan Initiative. In the first project under the initiative, the Agency partnered with Trout Unlimited, who volunteered to clean up an abandoned mine in Utah's American Fork Canyon. Trout Unlimited was willing to invest its time and resources to do the work. The property owner, Snowbird Ski Resort, who did not cause the pollution, was willing to provide access and other resources. The results are win-win for the environment and everyone involved. A watershed that has been impacted for over a century is well on its way to being restored, and will once again provide clean water and habitat for a rare trout species.

Over the last 12 months, the Agency has engaged in extensive stakeholder outreach, and we have met and talked with over 100 groups representing industry, NGO's, State and local governments. And while the vast majority of the stakeholders I have met with are supportive of Good Samaritan legislation and its solution, a few still oppose the legislation and remain skeptical. I'd like to take a few moments to address directly some of the arguments made against this legislation.

First, unfortunately, some have characterized our legislation as a free pass for polluters. I say absolutely not. This is not about letting polluters off the hook; rather, it's about accelerating environmental improvements by removing legal roadblocks. Under the Administration's bill, Good Samaritans will be held to a realistic standard that ensures real environmental improvements. Moreover, the legislation does not in any way waive liability for individuals or companies that are responsible for that pollution.

Second, some will argue that Superfund relief is not needed; however, the simple fact is that Superfund liability is a very real threat to volunteers and will continue to stop voluntary cleanups in their tracks.

Third, others point to EPA's existing administrative authorities as a reason why legislation is not needed. Simply stated, administrative authorities alone are woefully inadequate to address the scope and breadth of the challenge we currently face. Using Super Fund authorities, as we did in the case of Trout Unlimited through an administrative order, can involve a time-consuming and complicated process. Moreover, administrative authorities are not the best tool for maximizing public participation or engaging the States, tribes and local stakeholders in the cleanup process. Therefore, we think that legislation is absolutely essential to clearing these legal roadblocks that continue to impede environmental progress.

Thank you, Mr. Chairman, for the opportunity to discuss this with you today. In closing, I would emphasize that action, not continued debate on this issue, is the only way to clean up what has been described as a very fixable mess. We look forward to working with you and your colleagues to get this important environmental legislation to the President's desk this year. Thank you.

Mr. GIBBONS. Thank you, Mr. Fewell. We appreciate your presence here and the content of your testimony. And your written statement will be entered into the record in its full context.

[The prepared statement of Mr. Fewell follows:]

Statement of Brent A. Fewell, Deputy Assistant Administrator, Office of Water, U.S. Environmental Protection Agency

Good morning Mr. Chairman and Members of the Subcommittee. I am honored to appear before you today to testify on one of the most important environmental issues, and opportunities, facing the United States—legacy impacts from abandoned mines and the innovative efforts we can all take to help clean up pollution from abandoned mines.

The President is committed to accelerating environmental progress through collaborative partnerships and as part of this commitment the Environmental Protection Agency transmitted to Congress on May 10, 2006 the Good Samaritan Clean Watershed Act (S. 2780 and H.R. 5404). This bill is one of several cooperative conservation legislative proposals that will be submitted by the Administration this year. We are grateful to Representative Duncan, a member of your full Committee, for introducing the Administration's bill. And we are grateful to you Mr. Chairman for holding this hearing today to continue focusing attention on this important issue.

As the Denver Post editorial staff noted last week on this subject, "[I]t's high time that Congress enables some real progress to be made toward cleaning up what is, technically, a very fixable mess." Mr. Chairman, we look forward to working with you and members of this Committee to advance much needed and meaningful reform to solve this fixable mess.

The Abandoned Mine Problem

Inactive or abandoned mine sites can pose serious public safety and environmental hazards. According to estimates, there are over half a million abandoned

mines nationwide, most of which are former hardrock mines located in the western states, and which are among the largest sources of pollution degrading water quality in the United States. Acid mine drainage from these abandoned mines has polluted thousands of miles of streams and rivers, as well as ground water, posing serious risks to human health, wildlife, and the environment. EPA has estimated that approximately 40 percent of headwaters in the West have been impacted by discharges from abandoned hardrock mines. This problem can affect local economies by threatening drinking and agricultural water supplies, increasing water treatment costs, and limiting fishing and recreational opportunities.

Challenges To Cleaning Up Abandoned Mines

Today's acid mine drainage and runoff problems can be traced to abandoned hardrock mines that date back to the mid- to late-1800s. In many cases, the parties responsible for the pollution are either insolvent or no longer available to participate in the remediation. However, over the years, an increasing number of "Good Samaritans," not responsible for the pollution, have volunteered to cleanup these mines. Through their efforts to remediate these sites, we can help restore watersheds and improve water quality. Unfortunately, as a result of legal obstacles, we have been unable to take full advantage of opportunities to promote cooperative conservation through partnerships that will restore abandoned mine sites throughout the United States.

The threat of liability, whether under the Clean Water Act (CWA) or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), can be an impediment to voluntary remediation. A private party cleaning up a release of hazardous substances may become liable as either an operator of the site, or as an arranger for disposal of the hazardous substances. As well, under the CWA, a party may be obligated to obtain a discharge permit and comply with the permit's effluent limitations, which must be as stringent as necessary to meet water quality standards. The potential assignment of liability occurs even though the party performing the cleanup did not create the conditions causing or contributing to the degradation. Addressing this liability threat will encourage more Good Samaritans to improve the water quality of watersheds impacted by acid mine drainage.

In some cases, remediation of these sites can be complex and extremely resource intensive. Yet even partial cleanups by Good Samaritans will result in meaningful environmental improvements and will help accelerate achieving water quality standards. By holding Good Samaritans accountable to the same cleanup standards as those that caused the pollution or requiring strict compliance with water quality standards, we have created a strong disincentive to voluntary cleanups. Unfortunately, this has resulted in the perfect being the enemy of the good. EPA strongly believes that liability should rest squarely on parties responsible for the environmental damage, not on those who are trying to clean it up. EPA has seen this concept work successfully all across the country to clean up and restore brownfield properties to beneficial reuse. By removing this threat of liability, we will encourage more voluntary and collaborative efforts to restore watersheds impacted by acid mine drainage.

Let me emphasize, however, that encouraging Good Samaritan cleanups is not about lowering environmental standards nor letting polluters off the hook. Instead, this legislation will hold Good Samaritans to a realistic standard that ensures environmental improvement. And those responsible for the pollution, if still in existence, will remain accountable, consistent with the Agency's "polluter pays" policy.

Cooperative Conservation and EPA's Good Samaritan Initiative

President Bush's August 2004 Executive Order on Cooperative Conservation directs federal agencies to ensure—when taking actions that relate to the use, protection, enhancement, and enjoyment of our natural resources—that the agencies will engage in collaborative partnerships with state, local, and tribal governments, private for profit and nonprofit institutions, and other nongovernment entities and individuals. Last August, as part of the President's Cooperative Conservation conference, EPA announced its Good Samaritan Initiative that focuses on developing administrative tools to encourage more voluntary efforts to remediate damage from abandoned mines.

The first project under the Agency's Initiative involves working with the Trout Unlimited (TU) who volunteered to clean up an abandoned mine in Utah's American Fork Canyon. This project will restore a watershed that has been impacted for well over a century, improving the water quality and the habitat of a rare cutthroat trout species. We believe the TU project serves as a model of cooperative conservation—placing a premium on collaboration and cooperation over confrontation and litigation—and is a win-win situation for the environment and all involved. However,

using administrative authorities alone (without legislation) to solve such large and complex water quality challenges posed by abandoned mines is like applying a band-aid to a hemorrhaging wound. It's not enough.

Good Samaritan Clean Watershed Act

The Administration's "Good Samaritan Clean Watershed Act" bill offers a comprehensive solution to restore watersheds and improve water quality by encouraging remediation of inactive or abandoned hardrock mining sites by persons who are not otherwise legally responsible for such remediation. In the spirit of cooperative conservation, this bill recognizes that environmental progress can be accelerated by encouraging citizens and government at all levels to achieve environmental results through cooperation instead of confrontation.

The bill is narrowly targeted to remove the most significant legal obstacles to voluntary cleanups and establishes a streamlined permit program that would be administered at the federal level by EPA, and which can be administered by states or tribes if certain conditions are met. A permit issued under this bill would allow a Good Samaritan to clean up an inactive or abandoned mine site and would offer targeted protection from CWA or CERCLA liability for the actions taken under the permit. As drafted, the bill is a freestanding piece of legislation and not an amendment to any existing federal environmental statute.

The bill also contains specific requirements regarding who is eligible for a Good Samaritan permit, the sites for which permits may be issued, and what must be included in the permit. Importantly, the bill encourages all volunteers, whether a private citizen, municipality, company, watershed group, or non-profit organization, to participate as a "Good Samaritan" provided that they did not contribute to the creation of the pollution, are not responsible under federal, state or tribal law for the cleanup, and do not have an ownership interest in the property.

I want to take a moment to highlight a number of additional safeguards the bill provides to ensure that abandoned mines will be properly remediated:

- It requires a thorough "due diligence" evaluation of a Good Samaritan and proposed project, ensuring that the Good Samaritan is a "good actor" who has a history of good environmental compliance elsewhere and has sufficient financial resources to complete a project;
- It requires a determination that a project will result in improvement to the environment before any permit for the project is issued;
- While it provides that permits shall not authorize the extraction of new mineral resources, it allows the recycling of historic waste piles if directly related to the cleanup, and only after such activities are identified in a permit application and approved;
- It limits liability relief to only those activities undertaken pursuant to a permit issued under the Act;
- It nullifies liability protection under the Act where an applicant engages in fraud or provides materially misleading information;
- It requires robust public participation, including a mandatory public hearing before a permit is issued; and lastly,
- It provides ongoing federal oversight and enforcement of cleanup activities.

Conclusion

Thank you, Mr. Chairman, for the opportunity to discuss with you the Administration's Clean Watershed Good Samaritan Act legislation. The issue of abandoned mine remediation has been discussed and debated for well over a decade. A comprehensive solution is long overdue. We applaud bipartisan efforts in both houses of Congress to fix the problem, and we look forward to working with you and your colleagues to get this important environmental legislation to the President's desk as soon as possible.

[The response to questions submitted for the record by Mr. Fewell follows:]

Response to questions submitted for the record by Brent Fewell, Deputy Assistant Administrator for Water, U.S. Environmental Protection Agency

Question:

The National Mining Association and the Northwest Mining Association testified that the Good Samaritan proposal should be expanded to include other environmental laws, not just Clean Water and Superfund. What is your organization's position on this recommendation?

Answer:

The EPA believes that concerns about potential liability pursuant to the Clean Water Act and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) present the most significant challenge to voluntary cleanups at abandoned hardrock mine sites.

Question:

The National Mining Association and the Northwest Mining Association testified that the Good Samaritan proposal must allow mining companies to remediate abandoned mine sites. What is your organization's position on this recommendation?

Answer:

Under the Administration's bill, a company is eligible as a Good Samaritan if it did not cause or contribute to the pollution and has no current or historical ownership ties to the abandoned or inactive mine site. EPA believes that many mining companies have the resources and technical expertise needed to remediate abandoned mines.

Question:

In her statement on behalf of the Northwest Mining Association, Ms. Skaer has included a list of mine sites in Nevada that she states the industry was initially interested in reclaiming as "Good Samaritans" (middle of page 3). However, she goes on, "In each case, the potential cradle-to-grave liability exposure under federal environmental laws prevented the mining industry from using its experience, expertise, technology, equipment and capital to remediate and reclaim the AML sites."

It has been brought to our attention that a number of those mines are also are on a list of bankruptcies included in the appendix to a state-sponsored report from 2003: "Nevada Mining Bonding Task Force Report."

These mines all went out of business in 1998-1999. They are not, as is so often asserted, old historic mines for which no owner or responsible party can be located.

The mining industry argues that "Good Sam" legislation is needed due to past, not current, mining practices. However, at least in Nevada, this does not appear to be true.

To what degree are abandoned mines old historic mines and how many were created within the last decade?

Answer:

EPA's National Mining Team (NMT) estimates that more than 90% of abandoned mines are historic mines which were created prior to the enactment of the 1976 Federal Land Policy and Management Act (FLPMA). While the number of abandoned sites over the last decade is rather small compared with historical numbers, the environmental liabilities and the costs associated with cleaning up these sites can be significant.

Question:

Please explain why, in regard to modern abandoned mines, the reclamation bonds were not adequate to cover the cost of cleaning up the mines sites when the operator goes into bankruptcy.

List of Nevada Mines

Easy Junior, Alta Gold, bankruptcy 1999
Elder Creek, Alta Gold, bankruptcy 1999
Golden Butte, Alta Gold, bankruptcy 1999
Ward, Alta Gold, bankruptcy 1999
Mt. Hamilton, Rea Gold, bankruptcy 1998
Griffon, Alta Gold, bankruptcy 1999
Aurora Partnership, Aurora Partnership, bankruptcy 1999
Kinsley, Alta Gold, bankruptcy 1999
Gold Bar, Atlas Gold Mining Inc, bankruptcy 1999

Full report and appendix available: http://www.unr.edu/mines/mlc/presentations__pub/NV__bonding.asp

Answer:

There were no bonding requirements from the Bureau of Land Management (BLM) or the State of Nevada before 1980. In 1980, federal regulations were adopted under the Federal Land Policy and Management Act which created the mine permit program for BLM. The program included bonding requirements which could be imposed at the discretion of BLM.

In 1990 the State of Nevada established its own bonding program which initially received 140 reclamation bond submittals. It took the State a number of years to work through the backlog of submittals. Nevada currently has a several million dollar "bond pool" to address emergency response to imminent spills at sites where the operator has abandoned the site.

In general, many State's bonds are largely based on the cost of reclaiming the surface of the land and do not cover the potential costs of addressing the release of hazardous substances from acid forming waste rock piles or tailings ponds. In addition, State bonds often do not address the need for long term treatment of contaminated groundwater.

Question:

Mr. Fewell, you state that President Bush is committed to accelerating environmental progress through collaborative partnerships. Does the Administration support the mining industry's recommendation that mining companies should be allowed to conduct abandoned mine remediation under the proposed Good Sam proposal?

Answer:

Under the Administration's bill, a company is eligible as a Good Samaritan if it did not cause or contribute to the pollution and has no current or historical ownership ties to the abandoned or inactive mine site. EPA believes that many mining companies have the resources and technical expertise needed to remediate abandoned mines. A joint partnership involving a technically proficient mining company and a local government and/or dedicated citizens group would be an ideal cooperative Good Samaritan project

Question:

Mr. Fewell, Mr. Pizarchik, from Pennsylvania, testified that there needs to be a "clear line" between remediation and remining. This seems to make sense. Clearly we do not want to mix true "Good Samaritan" projects with profit-making endeavors. What is the Administration position on this?

Answer:

The primary purpose of the Administration's bill is to accelerate the cleanup of abandoned hardrock mines through collaborative, voluntary efforts. The bill allows the recycling of historic tailings and waste piles but draws a "bright line" between the reclamation of these materials, created from historic mining operations, and the extraction of existing or new reserves. Such recycling activities must be directly related to the remediation and identified in a permit application before they would be authorized pursuant to a Good Samaritan permit. The bill does not preclude or limit profits that may be generated from these activities. Revenues from authorized recycling activities can provide important incentives to encourage more environmentally beneficial cleanups.

Question:

H.R. 5404, the "Good Samaritan Clean Watershed Act," allows for recycling of historic waste piles if directly related to the cleanup of the AML site. The proposed legislation does not allow for the extraction of newly identified mineral resources under a "Good Samaritan permit."

The National Mining Association and the Northwest Mining Association have both stated that the mining industry would not use a "Good Samaritan permit" to access newly identified mineral resources any company interested in exploring for and developing new resources would be required to go through a comprehensive mine permitting process.

They have also both testified that removal and reprocessing of waste material, tailings and mineralized stockpiles could play an important role in addressing the problems associated with acid rock drainage and heavy metal contamination of streams and lakes. In addition a private party or other entity could help defray the costs of remediation with any metals recovered. These statements are not inconsistent with other witness testimony.

However, it seems that there are some Members and others that are still concerned that Industry or others will try and take advantage of a "Good Samaritan permit" to access newly identified mineral resources without going through a comprehensive mine permitting process. It seems that some of the concern is a result of people using different terms to describe the same exercise or concept.

Please define the following terms in the context of a "Good Samaritan permit":

- **"reprocessing of waste, ore or tailings"**
- **"reclamation mining"**
- **"recycling of waste, ore and tailings"**
- **"Incidental reprocessing of tailings or waste rock piles"**
- **"remining"**

Answer:

The Administration's bill would allow for the "recycling or incidental reprocessing of historic mine residue," which by definition may include tailings or mine waste piles, provided such activities are directly related to the remediation. With the exception of the term "remining," all of the above mentioned phrases are related and indistinguishable from a number of onsite actions that generally would be undertaken to conduct cleanup and remediation of abandoned mine sites. In many instances, hauling off the contaminated tailings and waste rock piles is prohibitively expensive and merely transfers the contaminants to another location, where they might ultimately prove to be problematic in the future. Onsite reprocessing and reclamation activities are usually environmentally preferable and more cost effective. As the term implies, "remining" usually means initiating full scale mining of underground and/or surface ore deposits and waste piles at an abandoned mine site where a remediation bond has been forfeited. Remining is a commercial, "for profit" activity that would incur the same permitting and liability conditions required of any new mine site. The Administration's bill seeks to distinguish between the reclamation of materials that have been previously removed by historic operations and the commercial extraction of new materials, e.g., virgin ores and minerals, unrelated to the remediation of the site.

Mr. GIBBONS. I turn now to Mr. Joe Pizarchik. And welcome, Joe; we're happy to have you, and the floor is yours.

STATEMENT OF JOSEPH PIZARCHIK, DIRECTOR, BUREAU OF MINING AND RECLAMATION, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Mr. PIZARCHIK. Thank you, Mr. Chairman, members of the Subcommittee, Congressman Udall.

The challenges of cleaning up abandoned and inactive mines, both coal and noncoal, spans the entire country. I will briefly discuss the efforts of Pennsylvania to clean up these sites, many of which serve as examples of the work being undertaken by all States to address the problem.

During my testimony, you will see on the monitors pictures of some of the challenges we have faced or have actually undertaken in Pennsylvania. There are similar problems, both coal and noncoal, throughout the country. These sites would be addressed but for the potential liabilities facing those who desire to assist with the cleanup. Given that Pennsylvania is the only State with the Good Samaritan law, there are valuable lessons to learn about how national legislation can be structured and implemented.

In my State, over 200 years of mining has left more than 200,000 acres of abandoned, unreclaimed mine lands. These sites include open pits, some of which are water-filled. The pit you see covers 40 acres, is 238 feet deep, and will cost over $20 million to reclaim. These abandoned lands also include spoil piles, waste coal piles, mine openings and subsided surface areas. We also have thousands

of abandoned discharges of polluted water. Some discharges are small seeps, while others are quite large. One such tunnel discharges 40,000 gallons per minute. According to EPA, there were over 3,000 miles of Pennsylvania streams affected by mine drainage. These discharges have a significant impact on Pennsylvania streams and rivers.

Pennsylvania has spent hundreds of millions of dollars on abandoned mine problems. It became clear that without help from other parties, government efforts alone will take many decades and billions of dollars to clean up the problems. Additional options were needed. One option was remining. Operators were remining some abandoned sites, but remining and reclamation was not occurring on sites that contained mine drainage due to the liability under State and Federal laws. For remining the sites with preexisting discharges, we worked to change the law to limit mine operators' liability. We only approve permits that are likely to improve or eliminate the discharge.

While the law limits the liability, it does not provide absolutely immunity. Pennsylvania's remining program has been very successful. Of 112 abandoned surface mines containing 233 preexisting discharges that were remined, 48 discharges were eliminated, 61 were improved, 122 showed no improvement, and 2 were degraded. Thousands of tons of metals were removed, and approximately 140 miles of streams were improved. Treatment would have cost at least $3 million a year every year.

The benefits of remining are not limited to water quality improvement. Significant amounts of Pennsylvania's abandoned lands have been reclaimed at no cost to the government. Over the past 10 years, 465 projects have reclaimed 20,000 acres and eliminated 140 miles of highwall. Abandoned waste coal piles were eliminated—you can see a before and after picture there. In addition, abandoned pits were filled, and lands were restored to a variety of productive uses, including wildlife habitat.

In addition to remining, Pennsylvania implemented a contract reclamation program for waste coal sites to allow for the limited recovery of coal from the waste piles where the coal removal was necessary to complete reclamation. The value of the recovered coal is used to pay for reclamation. This program has financed the reclamation of 800 acres valued at over $4 million. There are 54 other such projects under way.

Where remining or waste coal contracts was not an option, Pennsylvania officials tried to leverage the State's limited resources to accomplish more reclamation by working with citizens' groups. Many such groups would not reclaim sites that had drainage because State and Federal law imposed liability on them to permanently treat the discharge if they reaffected it. In response, Pennsylvania enacted the Environmental Good Samaritan Act to provide protections and immunities to those who were not legally liable, but who voluntarily undertook the reclamation of abandoned lands or abatement of mine drainage.

Only projects approved by the State are eligible. Approval is required to ensure that the project is likely to make things better, and there must be no liable party. Protections are provided to the

people who do the work, for those who provide materials, and for the landowner.

Pennsylvania has undertaken 34 Good Samaritan projects. Some are simple, others are large and complex; however, the number of these projects is less than it could be because of the potential Federal liability.

During the 109th Congress, several bills have been introduced addressing the cleanup of active and abandoned mines. While each bill contains good points, the Administration's bill provides the best starting point on which to structure an effective Good Samaritan program. We have several recommendations for your consideration.

Briefly stated, effective Good Samaritan legislation should be structured to allow implementation by the States, extend protection to abandoned coal as well as hard rock sites, include provisions that allow for the minerals to be recovered from the abandoned waste to offset reclamation costs, include public and private land, and provide flexible environmental standards, but should not include remining.

Mr. Chairman, thank you for the opportunity to be here today, and I have a few documents I'd like to have made part of the record that accompany my statement.

Mr. GIBBONS. Mr. Pizarchik, thank you very much for your testimony and your presence here today. Your documents and your written testimony will be entered into the record, without objection.

[The prepared statement of Mr. Pizarchik follows:]

Statement of Joseph G. Pizarchik, Esq., Director, Bureau of Mining and Reclamation, Pennsylvania Department of Environmental Protection, on behalf of The Interstate Mining Compact Commission

Good morning, Mr. Chairman. My name is Joseph Pizarchik and I am Director of the Bureau of Mining and Reclamation within the Pennsylvania Department of Environmental Protection. I am appearing here today on behalf of the Interstate Mining Compact Commission (IMCC). The IMCC is an organization of 22 states located throughout the country that together produce some 80% of the nation's coal, as well as important noncoal materials. Each IMCC member state has active mining operations as well as numerous abandoned mine lands within its borders and is responsible for regulating those operations and addressing mining-related environmental issues, including the reclamation of abandoned mines. I am pleased to appear before this Subcommittee to discuss what we have accomplished in Pennsylvania through measures that encourage others to clean up abandoned mines and the opportunities for Good Samaritan Cleanup of Abandoned Mines that could be realized through the enactment of federal Good Samaritan legislation. In particular, I will address the views of the Commonwealth of Pennsylvania regarding our experience with the reclamation of abandoned mine lands under Title IV and Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and Pennsylvania's Environmental Good Samaritan Act and the need for federal Good Samaritan Legislation.

EXECUTIVE SUMMARY

Over 200 years of mining in Pennsylvania left over 200,000 acres of abandoned mine lands and thousands of miles of streams affected by mine drainage. Reclamation efforts began 60 years ago. While hundreds of millions of dollars of state and federal funds eliminated many hazards, by the early 1980s it was clear that the limited government funds could not reclaim all of the abandoned mine lands and polluted streams.

In 1984 Pennsylvania instituted a program that provided the opportunity for reclamation through remining of abandoned mine land with preexisting discharges. Under this program remining improved 140 miles of streams by removing, on an annual basis, 2,900 tons of acid, 95 tons of iron, 5.6 tons of manganese, 55 tons of aluminum and 2,400 tons of sulfates saving over $3,000,000 per year of government funds. In 1992 Pennsylvania enacted incentives to encourage reclamation of

abandoned mine lands through remining by providing permit application assistance, remining financial guarantees and reclamation bond credits. The additional remining resulted in the reclamation of 2,387 acres valued at $14,794,010.

In 1999 Pennsylvania enacted the Environmental Good Samaritan Act to encourage volunteers to improve land and water adversely affected by mineral extraction by limiting the Good Samaritan's potential liability. Thirty-four projects, focused mainly on mine drainage but also including coal refuse, have been undertaken. A number of other projects have not been undertaken because of the potential for incurring liability under federal law. The opportunities for reclamation by Good Samaritans would be enhanced by the enactment of federal Good Samaritan legislation that includes coal.

In 1992 Pennsylvania created a contract reclamation program to allow for the limited recovery of coal from waste piles where the coal removal was necessary to complete reclamation. The value of the recovered coal is used to pay for the reclamation. The program was expanded in 1999 to include other abandoned coal mine land. This program has financed the reclamation of 812 acres valued at $4,603,771.

Pennsylvania has demonstrated there are countless opportunities for Good Samaritans to clean up abandoned mine land. We need federal Good Samaritan legislation that protects Good Samaritans from potential liability under the Clean Water Act and under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); that allows for the recovery of minerals from the mining waste; that provides flexible standards; that is not burdensome and can be administered by either the states or the federal government. While abandoned hard rock mines present the most pressing need for Good Samaritan Legislation, coal should also be included. It is time for Congress to act to enable Good Samaritans to help conquer the monumental task of abandoned mine lands.

BACKGROUND

Mr. Chairman, during the past quarter of a century significant and remarkable work has been accomplished pursuant to the abandoned mine lands (AML) program under SMCRA. The Office of Surface Mining Reclamation and Enforcement (OSM) and the states have documented much of this work. (See the 2006 Accomplishments Report recently published by the National Association of Abandoned Mine Land Programs and OSM's twentieth anniversary report.) OSM's Abandoned Mine Land Inventory System (AMLIS) provides a fairly accurate accounting of the work undertaken by most of the states over the life of the AML program and also provides an indication of what is left to be done.

Over the past 25 years, tens of thousands of acres of abandoned mine land have been reclaimed, thousands of mine openings have been closed, and safeguards for people, property and the environment have been put in place. Based on information maintained by OSM in AMLIS, as of June 30, 2005, $2.6 billion worth of high priority coal-related public health and safety problems have been funded and reclaimed. Another $354 million worth of environmental problems have been funded or completed and $398 million worth of noncoal AML problems have been funded and reclaimed. In addition to the aforementioned federally funded projects, Pennsylvania has taken other steps to address the abandoned mine land problem within the Commonwealth.

There are numerous success stories from around the country where the states' AML programs have saved lives and significantly improved the environment. Suffice it to say that the AML Trust Fund, and the work of the states pursuant to the distribution of monies from the Fund, have played an important role in achieving the goals and objectives set forth by Congress when SMCRA was enacted—including protecting public health and safety, enhancing the environment, providing employment, and adding to the economies of communities impacted by past coal mining.

As we work to address the remaining inventory of abandoned coal mine sites, the states are particularly concerned about the escalating cost of addressing these problems as they continue to go unattended due to insufficient appropriations from the AML Trust Fund for state programs. Unaddressed sites tend to get worse over time, thus increasing reclamation costs. Inflation exacerbates these costs. The longer the reclamation is postponed, the less reclamation will be accomplished. In addition, the states are finding new high priority problems each year, especially as we see many of our urban areas grow closer to what were formerly rural abandoned mine sites. New sites also continually manifest themselves due to time and weather. For instance, new mine subsidence events and landslides will develop and threaten homes, highways and the health and safety of coalfield residents. This underscores the need for constant vigilance to protect our citizens. In addition, as states certify that their abandoned coal mine problems have been corrected under SMCRA, they are authorized to address the myriad health and safety problems that attend abandoned

noncoal mines. In the end, the real cost of addressing high priority coal AML problems likely exceeds $6 billion. The cost of cleaning up all coal related AML problems, including acid mine drainage, could be 5 to 10 times this amount and far exceeds available monies. Estimates for cleaning up abandoned noncoal sites are in the billions of dollars.

In my home State of Pennsylvania, Mr. Chairman, over 200 years of mining in Pennsylvania left a legacy of over 200,000 acres of abandoned unreclaimed mine lands (Pennsylvania's Abandoned Mine Reclamation Plan, 1983). These abandoned sites include open pits (Attachment 1), some of which are water filled pits (Attachment 2), spoil piles (Attachment 3), waste coal piles, mine openings and subsided surface areas.

Many of the abandoned sites discharge polluted water (Attachment 4). The mine drainage discharges range from alkaline water containing iron to heavily polluted acid discharges containing iron, aluminum, manganese and sulfates. The volume of pollution discharged varies. Some discharges are small seeps (Attachment 5) while others are large underground mine tunnels. One such tunnel discharges 40,000 gallons per minute (Attachment 6, Jeddo Mine Drainage Tunnel). According to an EPA Region III list from 1995 there were 4,485.55 miles of streams affected by mine drainage in Pennsylvania, Maryland, Virginia and West Virginia (Attachment 7). Three thousand one hundred and fifty eight miles were in Pennsylvania. These discharges have a significant impact on Pennsylvania's streams and rivers (Attachment 8).

Pennsylvania began addressing abandoned mine land problems in the 1940s. A more comprehensive and systematic approach to address these problems began in 1968 with the enactment of the Land and Water Conservation and Reclamation Act. After years of government effort and changes in state and federal law that imposed liability on a mine operator or anyone who remined or affected an abandoned discharge, it became clear that without help from other parties, government efforts would take many decades and billions of dollars to clean up all of the problems. Additional options were needed.

Upon examining the issue, Pennsylvania found that operators were obtaining permits for previously abandoned sites, and, using modern equipment, they were mining the coal that previously had not been economically or technologically feasible to remove. These abandoned mine lands were being remined and reclaimed in accordance with modern standards and laws. However, such remining and reclamation was not occurring on sites that contained mine drainage discharges.

Citizen, watershed, and environmental groups were also working to address some of the problems in their geographical areas. When Pennsylvania officials tried to leverage the state's limited resources to accomplish more reclamation by working with these groups, we met significant resistance regarding sites that had existing pollutional mine drainage.

Mine operators and many citizen groups would not reclaim sites that had pollutional mine drainage discharges because if they reaffected the site they could be held liable under state and federal law to permanently treat the discharge. They could incur this liability even though they had not created the discharge and even if their remining or reclamation improved the quality of the discharge.

With the advances made in science, technology, and our understanding of mine drainage, we in the Pennsylvania mining program knew many abandoned discharges could be eliminated or improved at little or no cost to the Commonwealth if we could address the potential for personal liability.

In Pennsylvania we took two different approaches to limit the potential liability under state law. First, for remining and reclamation of abandoned mine sites with preexisting discharges we worked to change the mining laws to limit a mine operator's potential liability. Federal regulations contain similar remining provisions. Several years later incentives to encourage remining and reclamation were also enacted. Second, Pennsylvania enacted a new law to provide protections and immunities to those people who were not legally liable but who voluntarily undertook the reclamation of abandoned mine lands or abatement of mine drainage. This new law is called the Environmental Good Samaritan Act. Pennsylvania Good Samaritans are still exposed to potential liability under federal law for their good deeds. We also developed a way to make the coal waste pay for reclamation.

REMINING

Under the changes made to the coal mining laws for remining, an operator gathers data on the quality and quantity of the preexisting pollutional discharge to establish a baseline of the pollutants being discharged. The operator must demonstrate in its mining permit application, and the Pennsylvania Department of Environmental Protection must find, that the remining and reclamation of the site is

likely to improve or eliminate the preexisting discharge in order for the permit to be issued. These permitting decisions are made using the Best Professional Judgment Analysis in accordance with the Clean Water Act. If the remining and reclamation is successful, then the mine operator is not held responsible to treat that portion of the preexisting discharge that remains. If the discharge is made worse, then the operator must treat the discharge to the point of the previously established baseline of pollutants.

Pennsylvania's remining program has been very successful. In a 2000/2001 study of 112 abandoned surface mines containing 233 preexisting discharges that were remined and reclaimed, 48 discharges were eliminated, 61 discharges were improved, 122 showed no significant improvement, and 2 were degraded. In terms of pollutant load reductions, the net acid load was reduced by 15,916 pounds per day or 2,900 tons per year. The net iron load was reduced by 518 pounds per day or 95 tons per year. The net manganese load was reduced by 31 pounds per day or 5.6 tons per year. Aluminum was reduced by 303 pounds per day or 55 tons per year. The sulfates being discharged to the streams were reduced by 13,175 pounds per day or 2,400 tons per year. Approximately 140 miles of streams were improved. The pollutant load reductions were due to reductions in the flow and concentrations. (The report can be found at pages 166-170, volume 312 of Transactions 2002 published by the Society for Mining, Metallurgy, and Exploration, Inc.) If these materials were to have been removed through treatment, it is estimated it would have cost the government at least $3,000,000 per year, every year. (This number does not include the costs of constructing the treatment systems.) These cost savings do not include what it would have cost Pennsylvania to reclaim these 112 sites. These environmental improvements occurred at no cost to the government or taxpayers because the operator's potential liability was limited and the operators were able to recover the coal that remained on the site. In addition, the operators paid a reclamation fee of 35 cents per ton of coal mined, reclaimed the land in accordance with modern standards, and made a profit.

The benefits of remining are not limited to water quality improvements. Significant amounts of Pennsylvania's abandoned lands have been reclaimed at a significant savings to the government. For example, from 1995 through 2005, 465 projects reclaimed 20,100 acres and eliminated 139.68 miles of highwall. Abandoned waste coal piles were eliminated (Attachments 9 and 10—before and after), abandoned pits were filled (Attachment 11), and lands were restored to a variety of productive uses, including wildlife habitat (Attachment 12). The estimated value of this reclamation is $1,135,695,950—money the state and federal government did not have to spend to reclaim these abandoned mine lands.

III. ENVIRONMENTAL GOOD SAMARITAN ACT

A second approach undertaken to encourage reclamation of abandoned mine lands and treatment or abatement of abandoned discharges occurred in 1999 when Pennsylvania's General Assembly enacted the Environmental Good Samaritan Act, Title 27 Pennsylvania Consolidated Statutes Annotated Sections 8101-8114. The purpose of the Good Samaritan Act was to encourage volunteers to improve land and water adversely affected by mining or oil and gas extraction by limiting the potential liability. Prior to the Good Samaritan Act, anyone who voluntarily reclaimed abandoned lands or treated water pollution for which they were not liable could be held responsible for treating the residual pollution.

Projects must meet certain criteria to be covered by the Good Samaritan Act. The project must be reviewed and approved by Pennsylvania's Department of Environmental Protection. The proposed project must restore mineral extraction lands that have been abandoned or not completely reclaimed, or it must be a water pollution abatement project that will treat or stop water pollution coming from abandoned mine lands or abandoned oil or gas wells.

The law contains protections for landowners and for the people who do the work.

Pennsylvania's Environmental Good Samaritan Act provides that a landowner who provides access to the land without charge or compensation to allow a reclamation or water pollution abatement project is eligible for protection. The Good Samaritan Act also provides that a person, corporation, nonprofit organization, or government entity that participates in a Good Samaritan project is eligible for protection if they:

- Provide equipment, materials or services for the project at cost or less than cost.
- Are not legally liable for the land or water pollution associated with past mineral extraction.
- Were not ordered by the state or federal government to do the work.
- Are not performing the work under a contract for profit, such as a competitively bid reclamation contract.

- Are not the surety that issued the bond for the site.

Landowners who provide free access to the project area are not responsible for:

- Injury or damage to a person who is restoring the land or treating the water while the person is on the project area.
- Injury or damage to someone else that is caused by the people restoring the land or treating the water.
- Any pollution caused by the project.
- The operation and maintenance of any water pollution treatment facility constructed on the land, unless the landowner damages or destroys the facility or refuses to allow the facility to be operated or repaired.

Landowners are not protected from liability if they:

- Cause injury or damage through the landowner's acts that are reckless, or that constitute gross negligence or willful misconduct.
- Charge a fee or receive compensation for access to the land.
- Violate the law.
- Fail to warn those working on the project of any hidden dangerous conditions of which they are aware within the project area.

Landowners are also not protected if adjacent or downstream landowners are damaged by the project and written or public notice of the project was not provided.

People who participate in a Good Samaritan project are not responsible for:

- Injury or damage that occurs during the work on the project.
- Pollution coming from the water treatment facilities.
- Operation and maintenance of the water treatment facilities.

Good Samaritan project participants are not protected if they:

- Cause increased pollution by activities that are unrelated to work on an approved project.
- Cause injury or damage through acts that are reckless, constitute gross negligence or willful misconduct.
- Violate the law.

Participants are also not protected if adjacent or downstream landowners are damaged by the project and written or public notice of that project was not provided.

In addition to being crafted to address potential legal liabilities that deter Good Samaritans from acting, Pennsylvania's Environmental Good Samaritan Act was also crafted to address potential financial hurdles that could impede a Good Samaritan project. A landowner, contractor, or materialman who desires to profit from the efforts of the volunteers can do so. People who profit from Good Samaritans are not eligible for the immunities and protections available to the Environmental Good Samaritans. This approach was taken to encourage more people to provide their goods and services as economically as possible to allow Good Samaritans to accomplish more with their resources.

Pennsylvanians have undertaken 34 Good Samaritan projects. Participants include local governments, individuals, watershed associations, corporations, municipal authorities and conservancies. The status of the projects range from "very successful at removing metals from the water" to "not yet started." Some projects are simple low maintenance treatment systems. Other projects are large complex projects. A project in Vintondale, Pennsylvania, transformed an abandoned mine into a park that treats acid mine drainage, celebrates the coal mining heritage, provides recreation facilities for Vintondale's residents and serves to heighten public awareness and educate people on treating mine drainage.

MINERAL RECOVERY RECLAMATION CONTRACTS

Pennsylvania has thousands of small abandoned coal waste sites. Remining was not occurring on small abandoned coal waste sites due to the low economic value of the waste coal, the cost of obtaining a mining permit, and the potential liability if a discharge was present. These sites were also a low priority under the SMCRA ranking system and were likely to never be funded for government cleanup.

In 1992 Pennsylvania implemented a program where a reclamation contract is issued to reclaim abandoned waste coal sites. This program became part of Pennsylvania's federally approved SMCRA Title IV Reclamation Plan and includes safeguards to prevent misuse. The contractor is allowed to recover coal from the waste that is necessary to be removed in order to reclaim the site. The value of the recovered coal is used to pay for the cost of the reclamation. As of December 21, 2005, 63 contracts have been completed reclaiming 812.9 acres. This reclamation is valued at $4,603,771; money the government did not spend. There are 54 other reclamation contracts underway.

V. RECENT LEGISLATION

During the 109th Congress, several bills have been introduced addressing the cleanup of inactive and abandoned mines. These include H.R. 5404 (and its companion in the Senate, S. 2780), H.R. 1266, and S. 1848. Each of these bills offers various approaches to "Good Samaritan" voluntary remediation efforts and the current disincentives in the Clean Water Act that inhibit those cleanups. While each of these bills provides a solid framework on which to build an effective Good Samaritan program, we have several recommendations, perspectives and/or concerns that we offer for your consideration:

- There are myriad reasons why Good Samaritan legislation is needed, but perhaps the most important is the potential for incurring liability under the Clean Water Act and CERCLA. These liabilities deter motivated, well-intentioned volunteers from undertaking projects to clean up or improve abandoned sites, thereby prolonging the harm to the environment and to the health and welfare of our citizens. These impacts also have economic impacts that are felt nationwide. In addition, the universe of abandoned mine lands is so large and the existing governmental resources so limited that without the assistance of Good Samaritan volunteers, it will be impossible to clean up all of these lands. In this regard, it makes sense to consider expanding the protection from potential liability beyond the Clean Water Act and CERCLA to include other laws such as the Toxic Substances Control Act, the Safe Drinking Water Act, the National Environmental Policy Act, the Clean Air Act, and the Uranium Mill Tailings Radiation Control Act.
- In accordance with the principles of state primacy contained in laws such as SMCRA and the Clean Water Act, we believe it is essential that Good Samaritan programs be administered by state regulatory authorities (or federal agencies where a state chooses not to administer the law), as the states best understand the complexities associated with abandoned mine lands within their borders, including which sites can be improved and how to accomplish the improvement. States also tend to have a better working relationship and understanding of potential Good Samaritans. Given the current structure of laws like SMCRA and the Clean Water Act, we believe that the states are in the best position to administer Good Samaritan programs with appropriate oversight by federal agencies such as EPA and OSM
- There is merit to extending Good Samaritan protection to abandoned coal, as well as hard rock, sites. The Western Governors Association has taken the position that the proposed definition of "abandoned or inactive mined lands" could be drafted to include coal sites eligible for reclamation or drainage treatment expenditures under SMCRA. We agree with this assessment. Also, to the extent that Good Samaritan permits are not required by states who are certified under Title IV of SMCRA when performing hard rock AML remediation, this same protection should be afforded to states performing coal AML work. Furthermore, from a political support perspective, extending Good Samaritan protections to abandoned coal mines would likely enlist the support of more eastern and mid-continent states for the legislation.
- Some have suggested that provisions addressing remining of abandoned mine sites should be included in the legislation. Our position is that these two matters should not be connected. They have somewhat different goals. As an example, Pennsylvania allows those who are not legally liable for the reclamation to engage in remining. Sites that have a preexisting discharge can only be remined if the applicant demonstrates and the state finds that the remining will improve or eliminate the discharge. If the remining degrades the preexisting discharge, the mine operator is responsible to treat the resulting pollution. Remining of abandoned mine land that does not contain preexisting mine drainage is allowed, provided the operator reclaims the site to modern standards. To the extent that additional incentives are considered as part of Good Samaritan legislation, we suggest including technical assistance and federal funding for these projects.
- Good Samaritan legislation should also include provisions that allow for the minerals contained in the waste on the abandoned mine land to be recovered as part of the reclamation. Allowing recovery of materials from the waste can help offset or totally pay for the reclamation. However, the mineral recovery must be secondary to the purpose of reclaiming the site. Appropriate safeguards must be provided in the legislation to ensure the purpose of the work is to reclaim the site and not to conduct mining. New mining or remining should not be a part of Good Samaritan legislation.
- Good Samaritan protections should be extended to both public and private lands. The pollution problem knows no such boundaries and must be addressed

wherever it occurs. The environment and public health and safety all benefit by cleanup of abandoned mine lands, whether public or private. We also believe the protections should extend beyond federal lands so as to allow nationwide application.

- With respect to applicable environmental standards for Good Samaritan projects, we believe it is absolutely critical that the legislation include flexible standards, based on a determination by the state or federal regulatory authority that the Good Samaritan efforts will result in environmental improvement. Some abandoned mine problems are so intractable that it is not possible with today's technology to achieve "total cleanup". These types of cleanups could also be cost prohibitive. We know that in many circumstances some cleanup can result in significant environmental improvement. Forswearing that improvement because total cleanup cannot be achieved is poor public policy and shortsighted. We also know that, in some circumstances, even where total cleanup is technically possible, at some juncture the cleanup reaches a point of diminishing returns and the money would be better spent on cleaning up other sites. In the end, some cleanup is often better than none at all.
- Finally, it has been Pennsylvania's experience that it is important that innocent landowners be covered for the Good Samaritan project activities. Some landowners will not cooperate if they are not protected.

VI. CONCLUSION

While Pennsylvania's Good Samaritan Act has been successful in helping to engage local residents in restoring and assisting in the restoration of their environment, there are concerns. First, the Federal Clean Water Act citizen suit provision still poses a potential liability to the Good Samaritans. Recent developments portend actions by some who hold a strict, literal view of the National Pollutant Discharge Elimination System (NPDES) permitting requirements and of the Total Maximum Daily Load requirements. Without a Federal Good Samaritan Act or an amendment to the CWA providing that Good Samaritan projects and abandoned mining discharges are not point sources and are not subject to NPDES permitting requirements, the potential good work of volunteers in Pennsylvania and of others throughout the country are at risk. People who undertake projects that benefit the environment and America could be held personally liable for making things better because they did not make them perfect.

Mr. Chairman, our experiences in Pennsylvania with Good Samaritan cleanups and remining cleanups is instructive for others who are struggling to find effective mechanisms for addressing abandoned mine sites, be they coal or noncoal. The opportunities are there. The country needs Congress to enact Good Samaritan legislation to make the opportunities a reality. Through the Interstate Mining Compact Commission, we have worked with other organizations to address this critical matter. We look forward to future opportunities to work together. We also welcome the opportunity to work with this Subcommittee, Mr. Chairman, to address the legal and legislative barriers that stand in the way of meaningful reclamation of abandoned mines throughout the country.

Thank you for the opportunity of appearing before you today. I would be happy to answer questions you may have or to provide follow up answers at a later time.

[The response to questions submitted for the record by Mr. Pizarchik, follows:]

Response to questions submitted for the record by Joseph G. Pizarchik, Director of the Bureau of Mining and Reclamation, Pennsylvania Department of Environmental Protection

Questions from Mr. Gibbons:

H.R. 5404, the "Good Samaritan Clean Watershed Act," allows for recycling of historic waste piles if directly related to the cleanup of the AML site. The proposed legislation does not allow for the extraction of newly identified mineral resources under a "good Samaritan permit."

The National Mining Association and the Northwest Mining Association have both stated that the mining industry would not use a "good Samaritan permit" to access newly identified mineral resources any company interested in exploring for and developing new resources would be required to go through a comprehensive mine permitting process.

They have also both testified that removal and reprocessing of waste material, tailings and mineralized stockpiles could play an important role in

addressing the problems associated with acid rock drainage and heavy metal contamination of streams and lakes. In addition a private party or other entity could help defray the costs of remediation with any metals recovered. These statements are not inconsistent with other witness testimony.

However it seems that there are some Members and others that are still concerned that Industry or others will try and take advantage of a "good Samaritan permit" to access newly identified mineral resources without going through a comprehensive mine permitting process. It seems that some of the concern is a result of people using different terms to describe the same exercise or concept.

Please define the following terms in the context of a "good Samaritan permit":

- **"reprocessing of waste, ore or tailings"**
- **"reclamation mining"**
- **"recycling of waste, ore and tailings"**
- **"incidental reprocessing of tailings or waste rock piles"**
- **"remining"**

Answer: Copies of Pennsylvania's Good Samaritan law and accompanying guidelines were submitted for the record at the July 13, 2006 hearing. While the specific terms identified in this question are not the same as those under Pennsylvania's law, there are some similarities and the definitions that we use are set forth in both the law and the guidelines. What the question seems primarily to be getting at, however, is the potential for remining under Good Samaritan laws. Neither Pennsylvania nor the Interstate Mining Compact Commission advocates including or addressing remining under Good Samaritan laws. These two types of activities should be treated and handled separately to avoid the potential for abuse of the Good Samaritan protections. While there is merit to remining activity that will eliminate or reduce pollution and reclaim the land, especially to the extent it allows us to address AML sites without expense to the taxpayer, there should be a separate and distinct regulatory program for this mining activity, as I lay out in my testimony.

Questions from Mr. Grijalva:

1. **Mr. Pizarchik, as you stated, over 200 years of mining in Pennsylvania left over 200,000 acres of abandoned mine lands and thousands of miles of streams affected by mine drainage. Yet, as Dr. Brown outlined in his written statement, and you also explained, the State of Pennsylvania passed its own Good Sam law in 1999. Under this legislation, as long as you don't make the problem worse, you will be shielded from liability under the Clean Water Act. All work must be conducted with the guidance and approval of the Pennsylvania Department of Environmental Protection.**

   At the same time, then-Pennsylvania Governor Tom Ridge signed the Growing Greener legislation, which provided $650 million from the state's general funds over five years to clean up critical environmental problems, including acid mine drainage from abandoned coal mines.

   As a result, Pennsylvania has answered the question on Clean Water Act liability, provided more than a half-billion dollars of funding for remediation projects, and encouraged community participation in cleanups on a wide scale.

   And yet you are here to today advocating a broader Good Sam program that would exempt coal mines from the Clean Water Act and Superfund. With you record of success, why do States need this extra program?

Answer: The sheer magnitude of the abandoned mine land and acid mine drainage problem in Pennsylvania and Pennsylvania's record of success addressing the problem is the best argument for why states, and the country, need a Good Samaritan program that includes coal.

First, over the past 12 years in Pennsylvania 222 acid mine drainage projects for several hundred abandoned coal mine discharges have been funded with Growing Greener money and other funds. These projects cost in excess of $60 million. The projects that have been completed treat an average of 36 billion gallons per year of mine drainage and remove thousands of tons per year of iron, manganese, aluminum and acidity. Governor Ed Rendell has signed Growing Greener II legislation that is providing $230 million over five years for the remediation of environmental problems and a minimum of $60 million is to be used for abandoned mine lands. Notwithstanding these efforts, there are many more abandoned, acid mine drainage

discharges that need to be addressed. The problems that took over 200 years to create could not be addressed in just the last several years.

Second, Pennsylvania is the only state that has a Good Samaritan law. All of the states with abandoned coal mines and acid mine drainage would be helped by federal Good Samaritan legislation that includes coal. Including coal would eliminate an impediment to voluntary remediation and would protect those Good Samaritans who undertook the clean up of these problems.

Finally, even though Pennsylvania has a Good Samaritan law, Pennsylvania also needs federal Good Samaritan legislation to include coal. Congressional help is needed because under the supremacy clause of the United States Constitution Pennsylvania's Good Samaritan law cannot change the liability provisions of any federal law. Consequently, Pennsylvania's Good Samaritans are exposed to potential liability under the federal Clean Water Act. This potential federal liability has prevented some Good Samaritans from remediating acid mine drainage in Pennsylvania.

The coal abandoned mine land and acid mine drainage problem in Pennsylvania, as in some other states, is so large that there is more than enough work for the government, citizens and the mining industry. Even with the money Pennsylvania would receive under the most comprehensive bill to reauthorize the Title IV reclamation fee of the Surface Mining Control and Reclamation Act, Pennsylvania would only be able to address the most dangerous abandoned coal mines. There would not be adequate funds to address all of the abandoned acid mine discharges. I cannot think of a reason why Congress would not want to empower Americans to help themselves and this country. A federal Good Samaritan law that includes coal would do that and would remove a barrier to American ingenuity.

2. **The National Mining Association and the Northwest Mining Association testified that the Good Samaritan proposal should be expanded to include other environmental laws, not just Clean Water and Superfund. What is your organization's position on this recommendation?**

Answer: While there may be merit in extending Good Samaritan protections beyond the Clean Water Act and CERCLA to include other laws such as the Safe Drinking Water Act, the Toxic Substances Control Act, the National Environmental Policy Act, the Clean Air Act and the Uranium Mill Tailings Radiation Control Act, we understand that there is significant concern from some that to do so would be "painting with too broad of a brush." We therefore support restricting Good Samaritan protections to just the Clean Water Act and CERCLA at this point in time and revisiting the question of further extensions of that protection in the future following several years of experience with the more limited protections.

3. **The National Mining Association and the Northwest Mining Association testified that the Good Samaritan proposal must allow mining companies to remediate abandoned mine sites. What is your organization's position on this recommendation?**

Answer: As long as the mining company seeking to remediate the site is not legally liable for the land reclamation or water pollution associated with past mineral extraction at the site, the mining company should enjoy the Good Samaritan protections. Mining companies can be an important part of the solution. Some mining companies have been important contributors to addressing abandoned mine problems in Pennsylvania. If we do not expand the universe of potential parties who have an interest in remediating these sites, the work will never be completed.

4. **In her statement on behalf of the Northwest Mining Association, Ms. Skaer has included a list of mine sites in Nevada that she states the industry was initially interested in reclaiming as "Good Samaritans" (middle of page 3). However, she goes on, "In each case, the potential cradle-to-grave liability exposure under federal environmental laws prevented the mining industry from using its experience, expertise, technology, equipment and capital to remediate and reclaim the AML sites."**

   It has been brought to our attention that a number of those mines are also are on a list of bankruptcies included in the appendix to a state-sponsored report from 2003: "Nevada Mining Bonding Task Force Report."

   These mines all went out of business in 1998-1999. They are not, as is so often asserted, old historic mines for which no owner or responsible party can be located.

   The mining industry argues that "Good Sam" legislation is needed due to past, not current, mining practices. However, at least in Nevada, this does not appear to be true.

To what degree are abandoned mines old historic mines and how many were created within the last decade?

Please explain why, in regard to modern abandoned mines, the reclamation bonds were not adequate to cover the cost of cleaning up the mines sites when the operator goes into bankruptcy.

List of Nevada Mines

Easy Junior, Alta Gold, bankruptcy 1999
Elder Creek, Alta Gold, bankruptcy 1999
Golden Butte, Alta Gold, bankruptcy 1999
Ward, Alta Gold, bankruptcy 1999
Mt. Hamilton, Rea Gold, bankruptcy 1998
Griffon, Alta Gold, bankruptcy 1999
Aurora Partnership, Aurora Partnership, bankruptcy 1999
Kinsley, Alta Gold, bankruptcy 1999
Gold Bar, Atlas Gold Mining Inc, bankruptcy 1999

Full report and appendix available: http://www.unr.edu/mines/mlc/presentations__pub/NV__bonding.asp

Answer: We do not have access to data or information that would allow us to answer the first part of this question related to when abandoned mines were created. In Pennsylvania, the noncoal mines that would qualify for Good Samaritan protections under the pending bills involve mining that occurred prior to 1972. Under the federal Surface Mining Control and Reclamation Act, abandoned coal mines are defined as those where mining occurred and terminated prior to the enactment of SMCRA (August 3, 1977). While it is our view that coal should be included in the Good Samaritan bill, we are not seeking coverage for coal mines abandoned after August 3, 1977.

We also do not have access to data or information to enable us to answer the question regarding the adequacy of various states' mine reclamation bonds. Like other state regulatory authorities, we do our best to insure that the amount of bond is adequate to complete reclamation. However, unlike coal mining, there is no national law requiring the bond be adequate to complete reclamation of other types of mines. The adequacy of the bond can be affected by statutory limits, unexpected changes in the mining operation, bond calculation guidelines that were established before good data was available, or other factors. In these situations, the state will address the most critical reclamation needs with the forfeited bond moneys, but there may be issues that remain, particularly long-term water treatment issues associated with acid mine drainage or similar challenges. In these cases, where a Good Samaritan comes along at a later time and the mining company causing the damage is clearly out of the picture, the protections offered under Good Samaritan legislation are essential.

Mr. GIBBONS. I also want to thank you for bringing the photographs that you did of the areas that you have talked about. As we all say, a picture is worth 1,000 words. You saved yourself a lot of talking before the committee by providing these photographs.

Mr. PIZARCHIK. Thank you.

Mr. GIBBONS. I turn now to Ms. Joan Card, Director of Arizona Water Quality and a member of the Western Governors' Association. Ms. Card, welcome, the floor is yours.

Ms. Card, is your mike on?

Ms. CARD. My apologies, now it's on.

STATEMENT OF JOAN CARD, DIRECTOR OF ARIZONA'S WATER QUALITY, WESTERN GOVERNORS' ASSOCIATION

Ms. CARD. Mr. Chairman, Members of the committee and Congressman Udall, thank you.

As I said, this issue is of great importance to Western States, abandoned and inactive mines and the barriers that exist to the cleanup of these mines. Abandoned and inactive mines are

responsible for many of the greatest threats and impairments to water quality across the Western United States. Thousands of stream miles are severely impacted by drainage and runoff from these mines.

In view of the impacts on water quality caused by these mines and the difficulty in identifying responsible parties to remediate the sites, Western States are very interested in undertaking and encouraging voluntary Good Samaritan remediation initiatives; that is, cleanup efforts by States or other third parties who are not legally responsible for the existing conditions at the site. However, Good Samaritans currently are dissuaded from taking measures to clean up the mines due to an overwhelming disincentive in the Clean Water Act.

There is currently no provision in the Clean Water Act that protects a Good Samaritan who attempts to improve the conditions at abandoned mine sites from becoming legally responsible for any continuing discharges from the mine land after completion of a cleanup project. The Western States have found that there would be a high degree of interest and willingness on the part of Federal, State and local agencies, volunteer organizations and private parties to work together toward solutions to the problems commonly found on inactive mine lands if an effective Good Samaritan provision were adopted. Consequently, for over a decade Western States have participated in and encouraged efforts to develop appropriate Good Samaritan legislation.

Regarding a few of the hot-button issues that come up in the context of Good Samaritan legislation, first, the scope of the Good Samaritan definition, Western States believe that participation in Good Samaritan cleanup should not be limited solely to governmental entities. Also, the Western States believe the statutory provision should broadly exclude those with prior involvement at the abandoned or inactive mine site, and those with current or prior legal responsibility for discharges at the site. Also, it should assure that any nonremediation-related development or mining at a site is subject to normal Clean Water Act rules. And it should be narrowly enough conducted to minimize concerns over potential abuses of this type of discharge permit.

Second, Western States support including authority to the EPA Administrator to delegate Good Samaritan permitting authority to the States.

Third, the Good Samaritan proposal was developed initially with a focus principally on impacts from abandoned or inactive hard rock mines in the Western United States, and hard rock mine sites remain the priority to the Western States.

Fourth, remining. Western States believe it is appropriate to allow limited incidental reprocessing of tailings or waste rock piles to take place during an approved Good Samaritan cleanup so long as the revenues which result from such reprocessing would go toward offsetting the total cost of cleaning up the site.

The Western Governors commend Administrator Johnson and the EPA for their efforts in developing the Good Samaritan Clean Watershed Act. We strongly support these efforts and believe the bill represents a solid basis for moving forward.

The Western Governors have consistently identified the Good Samaritan program as one of their highest priorities regarding water quality. And the Western States urge Congress to proceed with the enactment of a Good Samaritan program that will allow States and other parties to proceed on Good Samaritan cleanups in accordance with the principles I have just described.

We look forward to working with the appropriate congressional committees and other interested parties to see Good Samaritan legislation enacted this year. As soon as a law is passed allowing Good Samaritan cleanups of abandoned or inactive mines, water quality in the West will begin to improve.

Thank you. We also have some submissions for the record, Mr. Chairman.

Mr. GIBBONS. And without objection, they will be entered into the record, as well as your full and complete written testimony, Ms. Card. Thank you very much for your presence and your testimony here today.

[The prepared statement of Ms. Card follows:]

Statement of Joan Card, Director, Water Quality Division, Arizona Department of Environmental Quality, on behalf of the Western Governors' Association and the Western States Water Council

Mr. Chairman, and members of the Subcommittee, thank you for the opportunity to appear before you today to discuss an issue of great importance to Western states' abandoned or inactive mines and the barriers that exist to the cleanup of these mines. Abandoned or inactive mines are responsible for many of the greatest threats and impairments to water quality across the Western United States. Thousands of stream miles are severely impacted by drainage and runoff from these mines, often for which a responsible party is unidentifiable or not economically viable.

Regulatory approaches to address the environmental impacts of abandoned or inactive mines are often fraught with difficulties, starting with the challenge of identifying legally responsible and financially viable parties for particular impacted sites. Mine operators responsible for conditions at a site may be long gone. The land and mineral ownership patterns in mining districts are extremely complex and highly differentiated. The surface and mineral estates at mine sites are often severed and water rights may exist for mine drainage. It is not uncommon for there to be dozens of parties with partial ownership or operational histories associated with a given site.

In view of the impacts on water quality caused by these abandoned mines and the difficulties in identifying responsible parties to remediate the sites, Western states are very interested in undertaking and encouraging voluntary "Good Samaritan" remediation initiatives, i.e., cleanup efforts by states or other third parties who are not legally responsible for the existing conditions at a site. However, "Good Samaritans" currently are dissuaded from taking measures to clean up the mines due to an overwhelming disincentive in the Clean Water Act.

To date, Environmental Protection Agency (EPA) policy and some case law have viewed abandoned or inactive mined land drainage and runoff as problems that must be addressed under the Clean Water Act Section 402 National Pollutant Discharge Elimination system (NPDES) permit program. However, there is currently no provision in the Clean Water Act that protects a "Good Samaritan" who attempts to improve the conditions at these sites from becoming legally responsible for any continuing discharges from the mined land after completion of a cleanup project. This potential liability is an overwhelming disincentive to voluntary remedial activities to address the serious problems associated with inactive or abandoned mined lands.

The Western states have found that there would be a high degree of interest and willingness on the part of federal, state and local agencies, volunteer organizations and private parties to work together toward solutions to the multi-faceted problems commonly found on inactive mined lands if an effective Good Samaritan provision were adopted. Consequently, for over a decade Western states have participated in and encourage—in cooperation with Congressional Offices, the environmental community, the mining industry, EPA, and other interested parties—efforts to develop appropriate Good Samaritan legislation. The Western Governors' Association and

the Western States Water Council have focused on amending the Clean Water Act in order to eliminate the current disincentives that exist in the Act. However, the Western States believe that there could be benefits to addressing potential liabilities under CERCLA as well.

Responses to Major Issues

Scope of "Good Samaritan" or "Remediating Party" Definition

The Western states believe that participation in Good Samaritan cleanups should not be limited solely to governmental entities, since there are many other persons likely willing to contribute to Good Samaritan cleanup initiatives. The states believe the statutory provisions should do the following:

1) broadly exclude those with prior involvement at the abandoned or inactive mine site;
2) broadly exclude those with current or prior legal responsibility for discharges at a site;
3) assure that any non-remediation-related development at a site is subject to the normal NPDES rules, rather than the Good Samaritan provision; and
4) be narrowly enough constructed to minimize fears over potential abuses of this type of discharge permit.

Delegation Authority

The Western states support including authority to the EPA Administrator to delegate permitting authority to states. At a minimum, the program should be delegable to states where the remediating party is not a state government agency.

If Good Samaritan permits can only be issued by the Administrator, it will be important to clarify the states' and tribal roles in this process when entities other than states act as remediating parties. The Western states believe the proposal should include a requirement that the Administrator only issue a permit with the concurrence of the applicable State or Indian tribe. By "concurrence," the states mean that a permit shall not be issued or modified unless the EPA Administrator and the applicable State, and if appropriate, the applicable Indian Tribe, have agreed to all terms specified in the permit.

Standard for Cleanup

An important issue that any Good Samaritan bill will need to address is the standard to which sites need be cleaned. The Western states believe only those Good Samaritan projects that will result in significant improvements should be approved, but recognize the difficulty in legislatively defining such terms as "significant." A Good Samaritan clean up permit should be approved only if the remediation plan demonstrates with reasonable certainty that the actions will result in an improvement in water quality. Further, we believe Good Samaritans will have no reason to undertake the expense of an abandoned mine cleanup project unless they believe that meaningful water quality improvement will result.

The analysis of a proposed project needs to occur at the front end of a project. Once there is agreement that a project is expected to result in water quality improvement, with no reasonable likelihood of resulting in water quality degradation, the Good Samaritan's responsibility must be defined as implementing the approved project rather than meeting specific numerical effluent limits or standards. The exception to this structure that the states agree upon is that if a Good Samaritan seeks early termination of a permit, meaning they will not fulfill the obligations of the permit, then they have to ensure that the conditions at the site are no worse than before they started the project.

Mining Site Eligibility

The Good Samaritan proposal was developed initially with a focus principally on impacts from abandoned or inactive hardrock mines in the Western United States. However, the Western states recognize that there are also remaining challenges regarding the remediation of abandoned or inactive coal mines. Therefore, the Western states accept that the proposed definition of "abandoned or inactive mined lands" could be drafted to include coal sites eligible for reclamation or drainage abatement expenditures under the Surface Mining Control and Reclamation Act (SMCRA). However, to avoid interference with complex issues regarding the implementation of SMCRA, the definition should not include sites under Title V of SMCRA where mining has occurred subsequent to SMCRA's adoption. The Western Governors' Association would have concerns with efforts to allow Good Samaritan permits for lands regulated under Title V of SMCRA. The Western states advocate that any Good Samaritan bill include a provision exempting state AML programs certified under SMCRA from having to obtain a Clean Water Act—Good Samaritan

permit. SMCRA-certified AML programs already receive liability protections, and the states want to ensure that these SMCRA protections are preserved.

Search for Parties with Existing Liabilities

Western states agree that any Good Samaritan cleanup must include a summary of the results of a reasonable effort to identify parties whose past activities have affected discharges at the site. Additionally, Western states agree that the permitting authority should make a determination that no identifiable, financially viable, owner or operator exists before issuing a permit. Western states further agree that existing liabilities for mined lands should not be affected by the clean up.

Remining

The Western states find that, while providing incentives for remining is an important topic that warrants further public discussion and analysis, the issue brings into play policy considerations and stakeholders that go well beyond those involved in Good Samaritan remediation issues. Aside from the stated opposition a remining provision would bring, it would also necessarily involve other statutes beyond the Clean Water Act and thus trigger other congressional committee jurisdictions, all of which would greatly complicate enactment of a Good Samaritan provision. Western states believe it is appropriate to allow limited incidental reprocessing of tailings or waste rock piles to take place during an approved Good Samaritan cleanup, so long as the revenues which result from such reprocessing would go toward offsetting the total costs of cleaning up the site.

Citizen Suit Enforcement

The citizen suit enforcement tool under the Clean Water Act has proven to be a useful incentive to encourage permit compliance by point source dischargers subject to the NPDES program. From the outset of development of the Good Samaritan proposal, the Western states have believed that a different set of enforcement tools is warranted for Good Samaritan permittees. Other permittees are required to get Clean Water Act Section 402 permits because they are undertaking activities that cause pollution, and a policy decision has been made that a broad array of enforcement tools are appropriate to assure that these polluting activities are adequately controlled. A Good Samaritan is not a "polluter," but rather an entity that voluntarily steps in to remediate pollution caused by others. In this case, sound public policy needs to be focused on creating incentives for the Good Samaritans' actions, not on aggressive enforcement that creates real or perceived risks to those that might otherwise undertake such projects. It is clear that the perceived risk of Clean Water Act citizen suit action is currently a major disincentive for such efforts.

Funding for Remediation

Historically, Clean Water Act Section 319 funds for addressing nonpoint sources of pollution have been utilized for a number of cleanup projects at inactive and abandoned mines. To ensure that Section 319 funds will continue to be available for such cleanup projects, any Good Samaritan legislation should include a provision expressing that Section 319 funds may be used for approved Good Samaritan projects. Such provision would not be intended to change the current Section 319 allocation formula or a state's prioritization of projects under a state nonpoint source management program.

H.R. 5404, "Good Samaritan Clean Watershed Act"

The Western Governors commend Administrator Johnson and the U.S. Environmental Protection Agency for their efforts in developing H.R. 5404, "Good Samaritan Clean Watershed Act" and its companion in the Senate, S. 2780. We strongly support these efforts, and believe the bill represents a solid basis for moving forward. There are a limited set of issues for which we would like clarification, but we are confident that these issues can be easily resolved. A description of the issues follows:

- Scope of Liability Protection—WGA supports allowing liability relief to Good Samaritans for both the Clean Water Act and CERCLA (as contained in the bill under the definition of "Environmental Laws"). However, we would like clarification of how the CERCLA liability relief would function under the bill.
- Federal Lands—WGA would like clarification regarding the extent to which Good Samaritan cleanups would be allowed on federal lands, and the potential role of federal agencies in Good Samaritan projects.
- Early Termination of a Permit—WGA would like clarification regarding the standards for cleanup in the event of early termination, e.g., "no worse than before," and clarification of whether the permitting agency would have the authority to set such standards.

- Implementing Regulations—WGA would like clarification of whether EPA would be required to issue regulations before Good Samaritan permits could be issued.

Conclusion

The Western Governors have consistently identified the Good Samaritan provision as one of their high priorities regarding water quality. The Western states urge Congress to proceed with the enactment of a Good Samaritan program that will allow states to proceed on Good Samaritan cleanups in accordance with the principles I have described. We urge Congress to avoid expanding the Good Samaritan proposal to include issues such as remining or a general fee on mining. The Western states are concerned that efforts to expand the scope of this program are likely to generate significant opposition that may further delay or frustrate the ability to get this needed and widely supported proposal enacted into law.

The Western Governors' Association and the Western States Water Council commend you for this oversight hearing and for your interest in H.R. 5404, "Good Samaritan Clean Watershed Act." We would welcome the opportunity to work with you to clarify a limited set of issues in that bill as outlined in this testimony. We look forward to working with the appropriate Congressional committees, Senator Salazar, Senator Allard—the sponsors of S.1848, Representative Udall and Representative Beauprez—the sponsors of H.R.1266, the EPA, the mining industry, environmental groups and other interested parties to see Good Samaritan legislation enacted this year. As soon as a law is passed allowing Good Samaritan cleanups of abandoned or inactive mines, water quality in the West will begin to improve.

Attachments

- Examples of Abandoned or Inactive Mines which have been Assessed for Remediation in Western States
- WGA Policy Resolution 04-10 "Cleaning Up Abandoned Mines"

Examples of Abandoned or Inactive Mines which have been Assessed for Remediation in Western States

The following cleanups have been postponed due to potential NPDES liability.

California

Walker Mine Copper Mine, Plumas County

Regional Board spent over 30 years unsuccessfully suing the mine owner to cleanup acid mine drainage discharge that sterilized a creek. Finally, the Board plugged mine shaft and accepted settlement from mine owner's estate. The Board remains liable for any point source discharge that may occur from the plug.

Buena Vista/Klau Mine Mercury Mine, San Luis Obispo County

Central Coast Board has unsuccessfully tried to secure cleanup from mine owner for over 20 years. These mines are the source of 80 percent of mercury pollution in Nacimiento Reservoir, which is under a fishing advisory. U.S. EPA is willing to do cleanup on condition California takes over the long-term operation and maintenance. The state is unwilling to accept liability for NPDES discharges at site and so relieve the recalcitrant mine owner of responsibility. Cleanup may be delayed until potential state liability is resolved.

Mt. Diablo Mine Mercury Mine, Contra Costa County

Owner discovered mine after spending entire savings to buy land for a residence. Mine pollution has sterilized a creek and caused a fishing advisory in a nearby reservoir. With liability protection, a government agency could do partial remediation to significantly reduce pollutant discharges from the site. Without liability protection it is likely no remediation will occur.

Stowell Mine, Keystone Mine, and Mammoth Mine, Shasta County

In 1991, the Board secured $1 million from the State Cleanup Account to hire consultants to perform remedial work at those three mines. Although a responsible party eventually came forward to take remedial action, the Board decided to return the funds rather than apply them to mine cleanup because of liability concerns (brought on by the Penn Mine case.)

Balaklala and Shasta King Mines, Shasta County

These mines discharge abandoned mine drainage to West Squaw Creek, a tributary to Shasta Lake. Impacts include elimination of aquatic life in the stream below

the mines, frequent fish kills where the stream enters Shasta Lake and degradation of recreational/aesthetic uses in this part of the National Recreation Area. The owner, Alta Gold Company, has performed some remedial work but final site restoration is probably beyond their capability. There is a unique opportunity here for Alta Gold to sell the property to the public resource agencies for development of an off-road vehicle park with funds from the sale to be used for mine drainage control. This arrangement could provide substantial funds for problem solution but is presently not being actively pursued due to the liability issue.

Mammoth Mine, Shasta County

This large abandoned copper mine discharges abandoned mine drainage to Little Backbone Creek and Shasta Lake. Impacts are similar to those previously described for the West Squaw Creek mines. The owner, Mining Remedial Recovery Company, has implemented a comprehensive mine sealing program but the results to date have been disappointing. Substantial modification of the sealing program or a new control strategy, such as collection and treatment, will be required to address the problem. The issue is further complicated by a lawsuit filed by the California Sport Fishing Protection Alliance. We believe that a cooperative effort at Mammoth Mine between the owners, resource protection groups, and the agencies would be more effective than lawsuits and enforcement orders.

Greenhorn Mine, Shasta County

This acid mine west of Redding discharges abandoned mine drainage to Willow Creek which is a tributary to the Wiskeytown Lake National Recreation Area. The discharge impacts aquatic life and recreational uses in the area. There is no responsible owner capable of implementing a control program. A reclamation feasibility study has been prepared by the Department of Water Resources (under contract to Regional Board), but no work has been done. Water quality and beneficial use improvements could be achieved through a combination of surface drainage control and mine sealing.

Corona Mine and Abbott Mine, Lake County

These two mercury mines would each benefit from actions to contain tailings and solid wastes and to divert surface waters. Staff estimates a cost of $1-2 million per mine.

Afterthought Mine, Shasta County

Proposed actions at this mine include sealing the multiple portals, removing and covering the tailings pond, and rehabilitating the access road.

Bully Hill Mine, Shasta County

Staff proposes solid waste containment and portal scaling at this site.

- S. 1787 would also support watershed cleanups. U.S. EPA is working on regulations to permit publicly owned sewage treatment works (POTWS) to cleanup pollution within a watershed as an alternative to removing pollutants that exist at very low levels in the POTWS' discharge. This will provide much greater removal of pollutants from watersheds and will help California comply with its mandate to implement Total Maximum Daily Load allocations. However, POTWS are not likely to cleanup abandoned mines under a watershed program unless they get some liability protection.

Colorado

St. Kevin Gulch, Lake County

The St. Kevin Gulch project is located northwest of Leadville in the small perennial drainage known as St. Kevin Gulch. Mine drainage from the lower Griffin Tunnel flows as a series of springs from the waste rock pile approximately two miles above the confluence of St. Kevin Gulch and Tennessee Creek. The mine drainage has a pH of 2.6 to 2.9 and has rendered St. Kevin Gulch virtually devoid on any aquatic life below the drainage, and has an adverse effect on trout reproduction in Tennessee Creek. The mine drainage is to be treated using a combination of an anoxic limestone drain and a sulfate reducing bioreactor (wetland). An interceptor trench has been completed to help site the treatment system. The project is in the final design state. Commitments for materials, labor, services, and cash were obtained from local individuals, Lake County, and the USGS. These commitments have at least partially been withdrawn and the project postponed because of concerns about assumption of liability.

McClelland Tunnel, Clear Creek County

The McClelland Tunnel project is located along Interstate 70, one-half mile southeast of the town of Dumont. The McClelland Tunnel drains approximately 15 gallons per minute of metal laden water into Clear Creek. The site also contains mine and mill waste along Clear Creek, a county road, and a State Highway. The Colorado School of Mines, Department of Transportation, Department of Public Health and Environment, Clear Creek County, and Coors have been collaborating with DMG on this project. The DMG's part of the project is to construct a small sulfate reducing bioreactor and a small aerobic wetland to treat the mine drainage. Final designs for the water treatment aspects of the project have been prepared and are ready to be bid. The project portion has been halted because of the concern of the State for incurring perpetual liability for maintaining the treatment system.

Perigo, Gilpin County

The Perigo project is located approximately 6 miles north of Central City in a small perennial steam known as Gamble Gulch. The Perigo mine drains an average of 70 gallons per minute of pH 2.9-3.9 metal laden water. Gamble Gulch below the mine drainage is virtually devoid of aquatic life for six miles before its confluence with South Boulder Creek. In 1989 and 1990, a small project was completed in this drainage to remove mine waste rock and mill tailings from the steam bed in two locations and construct a test treatment system at the Perigo mine. The proposed treatment techniques for this site include an aqueous lime injection system, settling pond and sulfate reducing bioreactor, which will be capable of treating all the mine drainage. The design for the project is completed but will not be bid out for construction because the state is concerned about incurring perpetual liability for maintaining the treatment system.

Pennsylvania Mine, Summit County

The Pennsylvania Mine project is located just east of Keystone ski area on Peru Creek. Acidic metal laden water drains from caved mine workings making the creek biologically dead. Through a 319 grant from EPA, DMG has installed an innovative hydro-powered water treatment mechanism and a settling pond. The drainage water is diverted from the mine adit into a hydropower turbine, thus generating the power to drive a feeder that doses limestone to buffer the water. Once in the pond metal precipitate can settle out, and the effluent progresses through three wetland cells. Here, sulfate reducing bacteria and low oxygen waters remove much of the remaining acid and metal. The project is 80% complete with only a redesigned feeder mechanism necessary. The project is on hold pending resolution of NPDES liability issues.

Animas River Mine Sites, San Juan County

The Division of Minerals and Geology in conjunction with the Animas River Stakeholders Group has investigated hundreds of mine sites in the vicinity of Silverton. The resulting feasibility reports for Mineral Creek, Cement Creek, and the Animas River have identified at least 32 sites having a significant impact on the Animas River water quality. Treatment recommendations have been made but project work cannot proceed until the NPDES issue is resolved.

Frank Hough Mine, Hinsdale County

The Frank Hough Mine is located in Palmetto Gulch near the top of Engineer Pass in Hinsdale County. The water quality of Palmetto Gulch and Henson Creek (the receiving stream) was investigated in 2005. The water quality analysis shows that runoff from the Frank Hough Mine is one of the main sources of heavy metals during spring snowmelt. During low-flow periods, the Frank Hough Mine drainage is a significant source of heavy metals. This site is at an elevation of 12,700 feet, which severely limits access and also limits the available treatment options.

Dinero Tunnel, Lake County

Dinero Tunnel is located in Sugarloaf Gulch approximately 1/4 mile southwest of the Turquoise Lake Dam in Lake County. This is a cooperative project with the Lake Fork Watershed Group and BLM. The Dinero Tunnel drains approximately 40-45 gallons per minute of metal laden water into the Lake Fork of the Arkansas. Previous investigations had shown that there was a collapse damming the water approximately 400 feet from the entrance. The collapse had formed a chimney that extended to the surface approximately 100 feet above. Work to remove the blockage in the adit to facilitate underground investigation of inflows was completed in the fall of 2004. Water behind the collapse was drained slowly and treated, and then the tunnel was rehabilitated. During the summer of 2005, the Dinero Tunnel Underground Phase II project installed compressed airline for oxygen ventilation in the

tunnel and rehabilitated the tunnel up to 2000 feet. At 2000 feet the tunnel contains another cave-in, which extends laterally for at least 150 feet. Treatment and hydrologic control methods are being considered at this site with NPDES issues also needing to be resolved.

Commodore Mine/Nelson Tunnel, Mineral County

The Commodore Mine and Nelson Tunnel are located 1 mile north of Creede in Mineral County. This is a long-term cooperative project with the Willow Creek Reclamation Committee (WCRC) near Creede, Colorado. Nine open connections between the Commodore Mine and the Nelson Tunnel have been identified and rehabilitated. Approximately three miles of mine workings have been rehabilitated. Current work is to install the infrastructure to pump the flooded portion of the Nelson Tunnel. This is the area where historic documents have indicated that the majority of the flow enters the Nelson Tunnel workings. Currently, these workings are completely flooded and are inaccessible. The Nelson Tunnel drainage is the principal source of metals to Willow Creek. The feasibility of constructing hydrologic controls will be investigated. Hydrologic controls may reduce the flow from the Nelson Tunnel, but it is doubtful that all the acid mine drainage can be eliminated by construction of hydrologic controls and other treatment methods have significant liability concerns.

Solomon Mine, Mineral County

The Solomon Mine is located in East Willow Creek approximately 2 miles north of Creede in Mineral County. A sulfate reducing wetland was constructed to treat the mine drainage in 1991. The Solomon Mine drainage is the largest source of zinc and cadmium in East Willow Creek. The sulfate reducing wetland worked well for several years, but without maintenance is currently providing very little treatment. The Willow Creek Reclamation Committee is very interested in resurrecting the wetland system, but has been unable to reconstruct the system because of liability concerns.

Carbonero Mine, San Miguel County

The Carbonero Mine is located in San Miguel County near the small mining town of Ophir. The Carbonero mine drains in excess of 1,000 gallons per minute. Metals concentrations are relatively low, but because of the high flow the metal loading to the Howards Fork is very high. There has been considerable interest in the past to use the mine drainage to generate power because of the high flow rate and over 2,000 feet of relief from the mine to the Howards Fork. Power generation can offset or partially offset the cost for treating the mine drainage should liability concerns be addressed.

Mary Murphy Mine, Chaffee County

The Mary Murphy Mine is located near the small mining town of St. Elmo in Chaffee County. The Mary Murphy Mine drains metal laden water from two different portals. Underground water quality sampling has shown that over 70% of the metals in the mine drainage come from one inflow in the mine at the 1400 level. The purpose of this project is to determine if the main inflow source of water can be diverted inside the mine before it become contaminated. To date, all of the accessible mine workings have been investigated, and the contaminated water flow has been followed up to the 1000 level. Initial water sampling has indicated that the zinc level is as high at the 1000 level as at the 1400 level. Currently, DMG is investigating the potential to freeze the upper mine workings. The first step in this process was to install air-locks on the 2200 level and on the 1400 level. The 1100 level was opened and safeguarded to prevent access while allowing airflow. The temperatures are being monitored to see if the mine cools or warms as a result. If this natural ventilation of the upper levels does not work, consideration will be given to installing and running a fan during the winter months. Other treatment methods would be investigated if liability concerns could be addressed.

Montana

The State of Montana has inventoried its abandoned non-coal mine sites. Thus far, Montana has found 245 abandoned mines which have the potential to impact surface waters because they are within 100 feet of a stream. Of these, 71 sites have discharging adits (mine entrances emitting acid mine drainage into the environment). 89 of 245 sites are already known to be degrading water quality. These 89 sites have caused downstream water quality samples to exceed at least one Clean Water Act parameter—either the Maximum Contaminant Limits or Aquatic Life Standards.

Given recent developments in federal case law, Montana officials are gravely concerned that cleanup projects addressing abandoned mines which are known to be

seriously degrading the state's water quality will be halted due to Clean Water Act liability concerns.

Nevada

Tybo Tailings Site, Nye County, Nevada

The Tybo Tailings Site is located in the Tybo mining district in Nye County, Nevada. It is approximately 58 miles east of Tonopah on U.S. Highway 6 and thence 6.5 miles northwest on the Central Nevada Test Sites Base Camp access road. The site is located in the Hot Creek hydrographic basin. Tybo Creek flows from Tybo Canyon in the Hot Creek Range and then easterly into the Hot Creek Valley. The tailings are the result of mining activity, which began around 1866. Silver, lead, zinc, copper, mercury, and small amounts of gold were recovered. By 1877, Tybo was the second largest lead producing area in the United States after Eureka, Nevada. Production continued on an intermittent basis until around 1940. Some very minor production occurred in the 1950's and early 1960's. Total recorded production from the district is valued at over $9 million.

The tailings impoundment is located just downstream from the mouth of Tybo Canyon. The actual impoundment is located in an ephemeral wash and is about 1,000 feet long and up to 600 feet wide (approximately 12 acres total). The dam has been breached, allowing tailings to migrate down the creek for at least 6 miles. The tailings appear to be about 20 feet thick at the dam. The tailings are highly acidic (surface water on the tailings has a pH of 1-3), have a strong sulfur smell, and are stained brown-orange to purple, red and black. Surface water has eroded channels into the tailings. All vegetation along the migration path from the impoundment is stressed or dead for at least 3 miles downstream.

Preliminary studies have detected arsenic and lead range up to 10,000 ppm, zinc up to 7,500 ppm, and copper up to 233 ppm. At this time, the State of Nevada has recommended evaluating groundwater use and the habitat of threatened and endangered species. Additional recommendations include measures to prevent wildlife from drinking surface water, and restricting site access by fencing and gating. NDOW has expressed concern about the effects on plants and wildlife and groundwater.

Rip Van Winkle Mine, Elko County, Nevada

The Rip Van Winkle Mine site is located in the Merrimac mining district, Elko County, Nevada. The site is located at approximately 7,000 feet above mean sea level on Lone Mountain in the Independence Mountains, and is situated in the Maggie Creek Area hydrographic basin, which flows into the Humboldt River near Elko, Nevada. The Rip Van Winkle Mine recorded first production in 1918. It was the only active producer in the district after 1949 with limited production of lead, zinc and silver through 1966.

The mine site consists of shafts and underground workings, a mill, building foundations and several cabins, waste dumps and tailing impoundments. The tailings impoundments cover approximately 3 acres and contain acid-generating materials. Vegetation on the site is sparse and in the vicinity of the tailings, plants show signs of stress. Impacts to Humboldt River flows are unknown at present, but may be impacting endangered species.

Norse-Windfall Mill Site, Eureka County, Nevada

The Norse-Windfall Mill Site is located 5 miles south of Eureka, Nevada. It is located in the Diamond Valley hydrographic basin in which perennial springs are prolific in the mountainous regions south of Eureka, with many flowing springs existing at the mill site. The Windfall Mine was discovered in 1908, and was operated intermittently for about 30 years as an underground operation with a cyanide vat leach facility. Around 1968, Idaho Mining Corp. acquired the property and mined the same ore body via open pit methods. Between 1975 and 1978 the Windfall Pit, and associated cyanide heap-leach piles, waste dumps, mill process building, office and laboratory were constructed. The last operator of the site was Norse Windfall Mines, Inc. The site has been abandoned since 1989 and little or no reclamation has occurred. In July 1994, the Nevada Division of Environmental Protection conducted a compliance inspection of the site and noted that unmaintained process components and materials left scattered about the property may have the potential to cause environmental damage by degrading the waters of the state.

Springs located within the site exceed the Nevada Water Quality Standards for arsenic, mercury, nickel, and cyanide. Within a 4-mile radius of the site, six municipal springs and one domestic well provide drinking water for Eureka. Water from the nearby springs are blended and pumped into 2 water tanks located just outside of Eureka. This water serves as the main water supply for the entire town.

South Dakota

In the early 1990's, South Dakota completed an inventory of abandoned hardrock mines occurring in the Black Hills of western South Dakota in conjunction with the South Dakota School of Mines and Technology. Approximately 900 mines were identified in a four-county area (about 700 on private land and about 200 on federal land). The inventory purpose was primarily to identify abandoned mine locations, so little or no assessment work was completed for many of the mines identified. Many of these historic mines pose significant safety hazards, and some pose environmental problems, including impacts to water quality. The Good Samaritan bill would certainly be an incentive for getting some of these mines cleaned up.

South Dakota has been working on reclaiming several hardrock mines that occur in the Black Hills with EPA and the federal agencies that administer the land upon which the mines are located. Several mines have been reclaimed, including the Belle Eldridge gold mine (BLM land), the Minnesota Ridge gold mine (Forest Service and private land), and the Blue Lagoon uranium mine (Forest Service land). The state is working with the Forest Service in developing plans to reclaim the following mines:

Riley Pass Mine (Harding County)

The Riley Pass uranium mine (Forest Service land) is located in the northwest corner of the state. The main hazards associated with the mine are eroding waste material high in radioactivity and heavy metals and unstable highwalls. In the 1990s the Forest Service began to take steps to minimize impacts at some of these sites by constructing sediment ponds to capture contaminated sediment, notably at the Riley Pass mine in the North Cave Hills. These ponds were cleaned periodically and the material stored in an on-site repository. The Forest Service is currently working on an environmental evaluation and cost estimate for the site.

The King of the West Mine (Pennington County)

The King of the West gold mine is located approximately 20 mines west of Rapid City. The main hazards associated with the King of the West mine include eroding unvegetated tailings, acid mine drainage, and unfenced mine shafts. These hazards have been documented in a report developed for the Forest Service by the South Dakota School of Mines and Technology. They recommended the King of the West Mine as a priority site for remediation in the Black Hills.

Freezeout Mine (Fall River County)

The Freezeout uranium mine is located approximately 14 miles northwest of Edgemont. The main hazards associated with the Freezeout mine are unstable pit highwalls, erosion, and waste material with high radioactivity. The Forest Service has completed a preliminary assessment and site investigation for the mine.

WGA Policy Resolution 04-10

Cleaning Up Abandoned Mines

June 22, 2004
Santa Fe, New Mexico

A. BACKGROUND

1. Inactive or abandoned mines are responsible for threats and impairments to water quality throughout the western United States. Many also pose safety hazards from open adits and shafts. These historic mines pre-date modern federal and state environmental regulations which were enacted in the 1970s. Often a responsible party for these mines is not identifiable or not economically viable enough to be compelled to clean up the site. Thousands of stream miles are impacted by drainage and runoff from such mines, one of the largest sources of adverse water quality impacts in several western states.
2. Mine drainage and runoff problems are extremely complex and solutions are often highly site-specific. Although cost-effective management practices likely to reduce water quality impacts from such sites can be formulated, the specific improvement attainable through implementation of these practices cannot be predicted in advance. Moreover, such practices generally cannot eliminate all impacts and may not result in the attainment of water quality standards.
3. Cleanup of these abandoned mines and securing of open adits and shafts has not been a high funding priority for most state and federal agencies. Most of these sites are located in remote and rugged terrain and the risks they pose

to human health and safety have been relatively small. That is changing, however, as the West has gained in population and increased tourism. Both of these factors are bringing people into closer contact with abandoned mines and their impacts.

4. Cleanup of abandoned mines is hampered by two issues—lack of funding and concerns about liability. Both of these issues are compounded by the land and mineral ownership patterns in mining districts. It is not uncommon to have private, federal, and state owned land side-by-side or intermingled. Sometimes the minerals under the ground are not owned by the same person or agency that owns the property. As a result, it is not uncommon for there to be dozens of parties with partial ownership or operational histories associated with a given site.
5. Recognizing the potential for economic, environmental and social benefits to downstream users of impaired streams, western states, municipalities, federal agencies, volunteer citizen groups and private parties have come together across the West to try to clean up some of these sites. However, due to questions of liability, many of these Good Samaritan efforts have been stymied.
   a. To date, EPA policy and some case law have viewed inactive or abandoned mine drainage and runoff as problems that must be addressed under the Clean Water Act's (CWA) Section 402 National Pollutant Discharge Elimination System (NPDES) permit program. This, however, has become an overwhelming disincentive for any voluntary cleanup efforts because of the liability that can be inherited for any discharges from an abandoned mine site remaining after cleanup, even though the volunteering remediating party had no previous responsibility or liability for the site, and has reduced the water quality impacts from the site by completing a cleanup project.
   b. The western states have developed a package of legislative language in the form of a proposed amendment to the Clean Water Act. The effect of the proposed amendment would be to eliminate the current disincentives in the Act for Good Samaritan cleanups of abandoned mines. Throughout development of legislation, the states have received extensive input from EPA, environmental groups, and the mining industry.
   c. During the 106th Congress, a bi-partisan Good Samaritan bill was introduced that was largely based on the WGA proposal. WGA supported the bill, S. 1787.
6. Liability concerns also prevent mining companies from going back into historic mining districts and remining old abandoned mine sites or doing volunteer cleanup work. While this could result in an improved environment, companies which are interested are justifiably hesitant to incur liability for cleaning up the entire abandoned mine site.

B. GOVERNORS' POLICY STATEMENT

Good Samaritan

1. The Western Governors believe that there is a need to eliminate disincentives, and establish incentives, to voluntary, cooperative efforts aimed at improving and protecting water quality impacted by abandoned or inactive mines.
2. The Western Governors believe the Clean Water Act should be amended to protect a remediating agency from becoming legally responsible under section 301(a) and section 402 of the CWA for any continuing discharges from the abandoned mine site after completion of a cleanup project, provided that the remediating agency—or "Good Samaritan"—does not otherwise have liability for that abandoned or inactive mine site and attempts to improve the conditions at the site.
3. The Western Governors believe that Congress, as a priority, should amend the Clean Water Act in a manner that accomplishes the goals embodied in the WGA legislative package on Good Samaritan cleanups. S.1787 from the 106th Congress is a good starting point for future congressional deliberations of Good Samaritan legislation.

Cleanup and Funding

4. The Governors encourage federal land management agencies such as the Bureau of Land Management, U.S. Forest Service, and National Park Service, as well as support agencies such as the U.S. Environmental Protection Agency, the U.S. Geological Survey, and the U.S. Army Corps of Engineers to coordinate their abandoned mine efforts with state efforts to avoid redundancy and unnecessary duplication.

5. Reliable sources of funds that do not divert from other important Clean Water programs should be identified and made available for the cleanup of hardrock abandoned mines in the West.
6. The Western Governors continue to urge the Administration and Congress to promptly distribute to states abandoned coal mine land funds in the Abandoned Mine Reclamation Trust Fund, including accumulated interest, collected under Surface Mining Control and Reclamation Act of 1977. In addition, the Western Governors urge the Administration and Congress to continue funding the mitigation of mine scarred lands through dedicated funding under the Small Business Liability Relief and Brownfields Revitalization Act of 2002.
7. The U.S. Army Corps of Engineers can provide valuable services in assisting the states and the federal government to clean up abandoned, inactive, and post-production non-coal mine sites. The Governors support legislation that authorizes the Corps, through their Restoration of Abandoned Mine Sites (RAMS) program, to undertake and fund cleanup activities, including the closure of safety hazards, at such sites. In states where an AML program is authorized under Title IV of the Surface Mining Control and Reclamation Act (SMCRA), funding from the Corps should be administered by the authorized state program. The Corps should consult with state and federal agencies with administrative and programmatic jurisdiction

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. This resolution is to be posted on the Western Governors' Association website and it should be referenced and used as appropriate by Governors and staff.
2. WGA shall work with Congress, the Administration, and affected stakeholder groups to pursue enactment of Good Samaritan legislation consistent with the WGA proposal.
3. WGA shall continue to work cooperatively with the National Mining Association, federal agencies, and other interested stakeholders to examine other mechanisms to accelerate responsible cleanup and securing of abandoned mines.

This resolution was originally adopted as Policy Resolution 98-004 in 1998 and readopted in 2001 as 01-15.

[The response to questions submitted for the record by Ms. Card follows:]

Response to questions submitted for the record by Joan Card, Director of Water Quality Division, Arizona Department of Environmental Quality

Answers to Chairman Gibbons:

H.R. 5404, the "Good Samaritan Clean Watershed Act," allows for recycling of historic waste piles if directly related to the cleanup of the AML site. The proposed legislation does not allow for the extraction of newly identified mineral resources under a "good Samaritan permit."

The National Mining Association and the Northwest Mining Association have both stated that the mining industry would not use a "good Samaritan permit" to access newly identified mineral resources any company interested in exploring for and developing new resources would be required to go through a comprehensive mine permitting process.

They have also both testified that removal and reprocessing of waste material, tailings and mineralized stockpiles could play an important role in addressing the problems associated with acid rock drainage and heavy metal contamination of streams and lakes. In addition a private party or other entity could help defray the costs of remediation with any metals recovered. These statements are not inconsistent with other witness testimony.

However, it seems that there are some Members and others that are still concerned that Industry or others will try and take advantage of a "good Samaritan permit" to access newly identified mineral resources without going through a comprehensive mine permitting process. It seems that some of the concern is a result of people using different terms to describe the same exercise or concept.

Please define the following terms in the context of a "good Samaritan permit":

- **"reprocessing of waste, ore or tailings"**
- **"reclamation mining"**

- **"recycling of waste, ore and tailings"**
- **"incidental reprocessing of tailings or waste rock piles"**
- **"remining"**

The Western Governors' Association has not taken a position relative to specific definitions of these terms.

The following responses describe the WGA positions in general.

Answer #1:

"Reclamation mining" & "remining" would appear to be synonymous.

Although many support the concept of "remining" as a tool and incentive for mining companies to perform cleanups of abandoned mines, past attempts have shown that it is very difficult and controversial to legislatively define what "remining" is—and what it is not—to the satisfaction of the various parties involved. The difficulty in legislating remining seems to come in drawing the line between reclamation and new mining.

Answer #2:

"Reprocessing of waste, ore or tailings," "recycling of waste, ore and tailings," and "incidental reprocessing of tailings or waste rock piles" all appear to be synonymous terms.

Western states believe it is appropriate to allow limited incidental reprocessing of tailings or waste rock piles to take place during an approved Good Samaritan cleanup, so long as the revenues which result from such reprocessing would go toward offsetting the total costs of cleaning up the site.

Answers to Representative Grijalva

1. **Ms. Card, you state that the Western Governors Association is urging Congress to avoid expanding the Good Samaritan proposal to include issues such as remining. Why do you think it is important to keep remining separate from remediation?**

The WGA position on Remining is:

> The Western states find that, while providing incentives for remining is an important topic that warrants further public discussion and analysis, the issue brings into play policy considerations and stakeholders that go well beyond those involved in Good Samaritan remediation issues. Aside from the stated opposition a remining provision would bring, it would also necessarily involve other statutes beyond the Clean Water Act and thus trigger other congressional committee jurisdictions, all of which would greatly complicate enactment of a Good Samaritan provision. Western states believe it is appropriate to allow limited incidental reprocessing of tailings or waste rock piles to take place during an approved Good Samaritan cleanup, so long as the revenues which result from such reprocessing would go toward offsetting the total costs of cleaning up the site.

From the State of Arizona's perspective, including the issue of remining in the Good Samaritan legislation would unnecessarily complicate the issue, likely diminishing the prospects for passing the much-needed Good Samaritan protections. Good Samaritan legislation is different from remining in that it is removing current disincentives for purely voluntary cleanups, not only for mining companies, but also for states, local governments, tribes, non-profits and other entities.

Although many support the concept of "remining" as a tool and incentive for mining companies to perform cleanups of abandoned mines, past attempts have shown that it is very difficult and controversial to legislatively define what "remining" is—and what it is not—to the satisfaction of the various parties involved. Remining would allow mining to take place on historic mines in the hope that overall conditions on the site would improve as a result of the new mining and subsequent reclamation. The difficulty in legislating remining seems to come in drawing the line between reclamation and new mining.

Western States have consistently named Good Samaritan legislation as a top Clean Water Act priority. States have cleanup projects we want to begin implementing, but cannot, due to the overwhelming liability concerns we face under the Clean Water Act and possibly CERCLA. Again, remining, if crafted properly, may be an appropriate tool and incentive for the mining industry to clean up abandoned mines. However, we should not tie the fate of Good Samaritan legislation to it. Since the Penn Mine case in California, very few voluntary cleanups have taken place. We should not risk that another 15 years will go by without voluntary remediation efforts going forward, because Good Samaritan legislation is stalled.

QUESTIONS FOR ALL:

1. **The National Mining Association and the Northwest Mining Association testified that the Good Samaritan proposal should be expanded to include other environmental laws, not just Clean Water and Superfund. What is your organization's position on this recommendation?**

The Western Governors' Association and the Western States Water Council have focused on amending the Clean Water Act in order to eliminate the current disincentives that exist in the Act. However, the Western States believe that there could be benefits to addressing potential liabilities under CERCLA as well.

2. **The National Mining Association and the Northwest Mining Association testified that the Good Samaritan proposal must allow mining companies to remediate abandoned mine sites. What is your organization's position on this recommendation?**

The Western states believe that participation in Good Samaritan cleanups should not be limited solely to governmental entities, since there are many other persons likely willing to contribute to Good Samaritan cleanup initiatives. The states believe the statutory provisions should do the following:

1) broadly exclude those with prior involvement at the abandoned or inactive mine site;
2) broadly exclude those with current or prior legal responsibility for discharges at a site;
3) assure that any non-remediation-related development at a site is subject to the normal NPDES rules, rather than the Good Samaritan provision; and
4) be narrowly enough constructed to minimize fears over potential abuses of this type of discharge permit.

3. **In her statement on behalf of the Northwest Mining Association, Ms. Skaer has included a list of mine sites in Nevada that she states the industry was initially interested in reclaiming as "Good Samaritans" (middle of page 3). However, she goes on, "In each case, the potential cradle-to-grave liability exposure under federal environmental laws prevented the mining industry from using its experience, expertise, technology, equipment and capital to remediate and reclaim the AML sites."**

   It has been brought to our attention that a number of those mines are also on a list of bankruptcies included in the appendix to a state-sponsored report from 2003: "Nevada Mining Bonding Task Force Report."

   These mines all went out of business in 1998-1999. They are not, as is so often asserted, old historic mines for which no owner or responsible party can be located.

   The mining industry argues that "Good Sam" legislation is needed due to past, not current, mining practices. However, at least in Nevada, this does not appear to be true.

   To what degree are abandoned mines old historic mines and how many were created within the last decade?

   Please explain why, in regard to modern abandoned mines, the reclamation bonds were not adequate to cover the cost of cleaning up the mines sites when the operator goes into bankruptcy.

List of Nevada Mines

Easy Junior, Alta Gold, bankruptcy 1999
Elder Creek, Alta Gold, bankruptcy 1999
Golden Butte, Alta Gold, bankruptcy 1999
Ward, Alta Gold, bankruptcy 1999
Mt. Hamilton, Rea Gold, bankruptcy 1998
Griffon, Alta Gold, bankruptcy 1999
Aurora Partnership, Aurora Partnership, bankruptcy 1999
Kinsley, Alta Gold, bankruptcy 1999
Gold Bar, Atlas Gold Mining Inc, bankruptcy 1999

Full report and appendix available: http://www.unr.edu/mines/mlc/presentations__pub/NV__bonding.asp

With regard to limiting the Good Samaritan provision to "abandoned and inactive" mines, the Western states agree that any Good Samaritan cleanup must include a summary of the results of a reasonable effort to identify parties whose past activities have affected discharges at the site. Additionally, Western states agree

that the permitting authority should make a determination that no identifiable, financially viable, owner or operator exists before issuing a permit. Western states further agree that existing liabilities for mined lands should not be affected by the clean up.

Mr. GIBBONS. We'll turn now to individual questions from the committee, and it will be a 5-minute time limit on each of the Members for questioning.

Let me begin by asking Ms. Card, because I listened to your testimony here, I've read your statement, and the question I had is you've asked for State authority delegated from EPA to oversee the permit process. Does that indicate, that delegation of authority that you're talking about—is that equivalent to a State veto of such Federal permits?

Ms. CARD. Well, the delegation we're asking for, Mr. Chairman, members of the Subcommittee, is similar to the delegation to issue section 402 MPDS permits, the ability for the State to permit third parties to do the cleanups.

If the delegation were not part of the Good Samaritan package, we would hope that EPA would not issue permits without the concurrence of the affected State. Veto may be a strong word, but we would certainly want to work in concert with EPA to ensure that the State supported the permit to be issued.

Mr. GIBBONS. In your testimony you state that a Good Samaritan would have no reason to undertake the expense of an abandoned mine cleanup project unless they believe that meaningful water quality improvement will result. Does this mean that you don't believe that the possibility of earning a profit from the reprocessing of and recycling of metals contained in the waste and tailings would not work well in this process, short of an altruistic motive?

Ms. CARD. Mr. Chairman, members of the Subcommittee, we believe that incidental reprocessing and recycling of tailings and waste rock piles would be a common activity in the context of a Good Samaritan cleanup, but because of the controversy and concern, we don't think it should be the primary purpose for recycling or reprocessing. The water quality improvements ought to be the driver.

Mr. GIBBONS. Mr. Fewell, let me turn to you for a minute. In your testimony, in your list of safeguards for ensuring abandoned mines would be properly remediated, you want to ensure that Good Samaritan is a good actor. How do you define "good"? Put good in quotes, because it's obviously an objective standard.

Mr. FEWELL. Mr. Chairman, good active provisions are common with respect to other Federal environmental laws, and the permitting authorities in many cases should have the information regarding the compliance history of the permit applicant. And we believe it's appropriate of even Good Samaritan legislation that a Good Samaritan provide a 5-year history of their compliance at other sites to give the permitting authority additional information to decide whether, in fact, the Good Samaritan is capable and has a good track record. It does not—within the Administration's bill, it does not necessarily preclude a permitting authority from issuing a permit even though there may be some violations of the past; it's just

one more bit of information we believe the authority needs to make its decision.

Mr. GIBBONS. I think what our purpose is, of course, with any legislation is not to see it—reinvent the wheel each and every time it has to go back through a litigation process, so that was the purpose of the question.

Let me also ask that some people may have an ownership interest in an abandoned mine land and may not have been responsible for the disturbance or the mining activity. Why shouldn't they be able to participate in a Good Samaritan cleanup effort?

Mr. FEWELL. Mr. Chairman, you're correct. Under the Administration's legislation, landowners, Good Samaritans who have an ownership interest in the property, would not be eligible to be Good Samaritans under our bill. Having said that, they are very much an important partner in the cleanup process. It does not mean that a passive landowner who did not cause the pollution would not be able to have mines on their property cleaned up; they simply would not be able to have the liability protection provided under the legislation. We did not believe it was appropriate in the context of our legislation to disrupt or change the current liability structure for parties that are liable or potentially liable.

Mr. GIBBONS. Thank you.

Mr. Pizarchik, what are the permit timelines for cleanup efforts under the Good Samaritan provisions there in Pennsylvania?

Mr. PIZARCHIK. The amount of time it takes depends on the complexity of the situation. We will work closely with the Good Samaritan, and we have guidelines that are publically available, and help them to design the project and provide technical support to them. And they could be something as simple as several weeks, or maybe a little longer depending on the complexity of the situation. And we try to make it as timely and as simple as possible in order to facilitate the reclamation rather than be an impediment to it.

Mr. GIBBONS. Thank you. My time is expired, and I turn now to Mr. Grijalva for questions he may have.

Mr. GRIJALVA. Thank you very much.

Let me begin, I guess, with a question for a brief response from all the witnesses today.

The National Mining Association and the Northwest Mining Association will testify later that the Good Samaritan proposal should be expanded to include other environmental laws, not just Clean Water and the Superfund. And I'm curious to know what your position is on this particular recommendation that we'll hear later, from the three of you if you don't mind.

Mr. FEWELL. Congressman Grijalva, we—under the Administration's bill, we have identified the Clean Water Act and Superfund as the primary impediments to voluntary cleanups. We have engaged in extensive stakeholder outreach and talked to lots of municipalities, States, watershed groups and industry groups, and while there is an interest to expand it beyond that, our belief is Clean Water Act and Superfund are the biggest impediments, and that's what we're focusing on.

Mr. GRIJALVA. Thank you.

Sir.

Mr. PIZARCHIK. From Pennsylvania's perspective and that of the Interstate Mining Compact Commission, we believe that the primary focus ought to be on the Clean Water Act and also on the Federal Superfund, or CERCLA. That appears to us to be the biggest impediments to the Good Samaritan cleanups of abandoned mine sites.

Mr. GRIJALVA. Thank you.

Ms. CARD. Mr. Chairman, Congressman Grijalva, the Western Governors' Association, as I stated in my testimony, has focused on Clean Water Act disincentives. We're certainly willing to discuss how a CERCLA exemption might work because we have found that that's also a disincentive to the cleanups.

With regard to other environmental laws, putting on my Arizona hat here, we have concerns that the laundry list of environmental laws, there hasn't been a real stated justification for including exemptions for so many environmental laws. Our primary interest, from an Arizona perspective, is to protect Good Samaritans for future liabilities from historic contamination. Good Samaritans ought to get all the necessary permits to cover the project, but should be protected from future liability for historic contamination.

Mr. GRIJALVA. If I may, also, Mr. Fewell, testimony today indicated that there needs to be a clear line between remediation and remining, and it seems to make sense. We don't—in a Good Samaritan project, we don't want to mix a true Good Samaritan project with profit-making endeavors, and I'd like to know what the—on the clear line question what the position of the Administration is on that.

Mr. FEWELL. The Administration bill actually does allow for limited reprocessing and recycling of tailings and waste piles. In many cases these waste piles are the cause of water quality impacts. Our bill does not exclude Good Samaritans provided that they meet the qualifications under the act. It does not exclude a Good Samaritan, however, from benefitting and profiting from the reprocessing of those waste piles. In fact, we think it's an important tool and an incentive to encourage cleanup.

Mr. GRIJALVA. Ms. Card, on that same question, you state that the Western Governors' Association is urging Congress to avoid expanding the proposal to include issues such as remining. And I just want to have that reemphasized. Why is it important to keep those issues separate?

Ms. CARD. Mr. Chairman, Congressman Grijalva, frankly, because of the concerns and oppositions to remining provisions, we think that's better avoided and separated from this legislation. Because of the importance of the Good Samaritan program to water quality in the West, our main goal is to get a program, an effective program, passed.

Mr. GRIJALVA. No further questions, and I yield back.

Mr. GIBBONS. Thank you.

I turn now to the gentleman from New Mexico Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman.

Mr. Pizarchik, you mention in page 1 of your testimony that the reclamation of 2,387 acres—and there is a rough value at 14 million something. Would you see a problem in the future of offering some sort of participation in the resale of that land that groups

could come in, say, Trout Unlimited can take a percentage of the sale of the land if we were actually to create value; in other words, some incentives down the road for groups that are actually benefitting the public, but they would then develop some incentives? What would you think about that sort of proposal?

Mr. PIZARCHIK. I presume that's in the context of cleaning up Federal lands?

Mr. PEARCE. No. I mean even private lands. What are you—where does the value go? Let's say that somebody owns the private land, and they're not participating in the cleanup at all. Do they get the full value? How do you handle that?

Mr. PIZARCHIK. In Pennsylvania we require the landowner's approval to be part of the project in order for it to go forward. And the added value to the land generally accrues to the property owner, it doesn't go to the Good Samaritan or other folks.

Now, from our experiences in Pennsylvania, we have not seen a significant increase in the value of land. Back in the 1960s, the Pennsylvania General Assembly instituted a program where it provided seed money for the States to reclaim abandoned mine lands, and it was designed to be a revolving fund where that land would then be sold, and the increase in the value would fund additional reclamation. What we found was the cost of reclamation far exceeded the increase in value to the land, and it did not generate enough funds for it to be a revolving fund.

So with that history on that, I'm uncertain whether the value would be that significant of an increase that it would be worth pursuing.

Mr. PEARCE. Ms. Card, tell me a little bit about this resistance for any kind of remining that's going on. If the objective is to clean up the water—and I think that's a pretty close summation of what you said, clean up the air and the water—where do we generate this political opposition? Myself, if the objective is clean water, and we can get closer to that by some remining and then an improvement of the site, where does the political backlash start on that? I just don't follow, I guess, the logic.

Ms. CARD. Mr. Chairman, Congressman, my understanding of the opposition is that remining ought to be permitted under the standard and currently applicable requirements as opposed to the kind of exemption that a Good Samaritan program would offer.

Once again, if it's incidental recycling and reprocessing, Western Governors' Association can be behind that and would hope that the resulting commercial value would offset the cost of the cleanup.

Mr. PEARCE. And you state on page 3 of your written testimony that the Western States believe that only Good Samaritan projects that will result in significant improvement, and in your mind—I know that you go on in your text to describe the difficulty of defining "significant." in your own mind, what is significant, 50 percent or more, or 30 percent or more?

Ms. CARD. Mr. Chairman, Congressman, I hesitate to put a number on that, and that's part of the problem. As you know, under the Clean Water Act it's all about numbers and what can be achieved in the stream.

I think from our perspective significant improvement means it's improvement, it's better than it was before, and it was a worthwhile effort.

Mr. PEARCE. That's the problem that I'm finding with this statement from the Governors. They want to use the term "significant," but they don't want to define it, and you're equally hesitant. And from sitting on this side of the table, that makes it very difficult to evaluate what your position really is, because from my standing, again, the idea is we clean water up. A 10 percent cleanup when it doesn't cost the government, it doesn't cost the taxpayer anything would be significant. But the wording and then the follow-up language is so—do you have another comment? I saw you getting legal advice—go ahead.

Ms. CARD. Mr. Chairman, Congressman, as Mr. McGraph here suggested over my shoulder, and it's true, it would be expected that the permitting authority, EPA or the delegated State, would have the technical expertise and the discretion to know that the project would significantly improve water quality and would only permit such a project.

Mr. PEARCE. Just for my purpose, if you would tell him that one Member really was not too overwhelmed with your suggestion to limit it only to significant, without defining significant themselves in their own minds, find that to be somewhat duplicitous. But thank you, Mr. Chairman.

Mr. GIBBONS. Thank you.

We turn now to the gentleman from Colorado, Mr. Mark Udall.

Mr. MARK UDALL. Thank you, Mr. Chairman, thank you for holding this hearing.

I think this is an important subject. In fact, I've been known to say that the gray hair that I sport is because I have two children, but as I sit here, I realize that part of the gray hair is all the work that I've done on the Good Samaritan legislation over the last 8 years with no real results yet, but I'm still hopeful. And the two bills that I have introduced, one, H.R. 1265, deals with financing abandoned mine cleanups, and it's pending in the Subcommittee, and I would hope perhaps we could have a hearing on that at some point. And the other, H.R. 1266, deals with the concerns about liability that deter would-be Good Samaritans from cleanups. In that way I think it's similar to the legislation proposed by the Administration, introduced by our colleague, Mr. Duncan.

It's very important for Colorado and for the West, as Ms. Card has suggested, and I think that's shown by the fact that 1266, the bill I've introduced on the liability side, is sponsored not just only by two Democrats, Mr. Salazar and Ms. DeGette from Colorado, but also from Mr. Beauprez.

Mr. Chairman, I was tempted to read off 40 pages of speeches and statements I made through the years, but if I could, I'd ask that if we could include those in the hearing record under a unanimous consent request.

Mr. GIBBONS. Without objection.

[NOTE: The information submitted for the record by Mr. Udall has been retained in the Committee's official files.]

Mr. MARK UDALL. And with that behind us, I would like to turn to Mr. Fewell and again say I'm glad the Administration has

recognized the importance of the issue and the need for legislation. I would have to say I think my own bill has perhaps a few advantages over your proposal, but I really don't think we're that far apart. Would you care to comment—I'm not trying to lead the witness here, but I'd be curious about your thoughts.

Mr. FEWELL. Congressman Udall, first of all, I want to take this moment to thank you for your leadership on this important issue. I think we, too, are optimistic that something can be done soon.

With respect to the difference between the Administration's bill and your bill, I think while there are more similarities than not, probably the biggest difference, however, ours is a stand-alone bill, and yours is an amendment to the Clean Water Act. I would think that that's probably the fundamental difference, but I think the goal and many of the provisions are the same.

Mr. MARK UDALL. Thank you for that insight.

Ms. Card, if I might turn to you before I direct a comment and then a question. I want to thank the Western Governors' Association. Without the ongoing interest of the WGA and their willingness to work with me, and hopefully our willingness to work with you, I might have lost hope a few years ago, because the WGA has been on point. And, again, this has been a real bipartisan effort.

In your testimony, and this is a bit of a follow-on of Mr. Gibbons' questions, you urge that the EPA be able to delegate to the States the authority to issue Good Sam permits, and I think that makes sense. But do you think Congress should say that unless there is a State program, there could be no Good Sam permits in that State?

Ms. CARD. Mr. Chairman, Congressman Udall, to clarify, unless there is a State Good Samaritan program, is that the question?

Mr. MARK UDALL. Yes, yes.

Ms. CARD. Mr. Chairman, Congressman Udall, I think from my perspective as a water quality administrator in the State, I can't do anything without my State Legislature telling me it's OK to do it. So it would be my expectation that Arizona—for example, in Arizona, I would have to have authority from the Arizona Legislature to issue those permits.

Mr. MARK UDALL. So, again, I don't want to lead you, but what I think you I hear you saying is that it would be appropriate for Congress to allow EPA to delegate authority to the States, but it wouldn't mandate the States to undertake the job of Good Samaritan oversight, if you will.

Ms. CARD. Mr. Chairman, Congressman Udall, that is correct.

Mr. MARK UDALL. Could I, in the time I have remaining, turn also to your comments about keeping the legislation that we're considering today relatively clean? And you talk about not delving into the issue of general fees. Would you like to expand a little bit more on that point? It led me, as an aside, to break the initial legislation I've introduced a few years ago into two parts because of the discussion about fees and how we might proceed.

Ms. CARD. Mr. Chairman, Congressman Udall, that's correct. Similar to the concerns about—the general concerns in the community about remining, there are similar concerns about the general fees. So as I've already stated, the Western Governors' goal is to clean up these water quality impairments, and without a Good

Samaritan program in place, I have little hope of many cleanups occurring in Arizona, for example.

So in an effort for an effective Good Samaritan program to actually pass, we would hope to separate remining and the general fee from the discussion.

Mr. MARK UDALL. Thank you.

Thank you, Mr. Chairman. Again, this is a very important hearing. And for us westerners, it is just about water, isn't it? Always about water. Thank you.

Mr. GIBBONS. Thank you, Mr. Udall.

We turn now to the gentlelady from Virginia, Mrs. Drake.

Mrs. DRAKE. Thank you, Mr. Chairman. I would like to thank the panel for being here.

I'm one of the very few members of this committee from the east coast, so we sort of have a different way of looking at this committee. But I'm a former member of the Chesapeake Bay Commission, so, Mr. Pizarchik, I have visited Pennsylvania and seen some of the work that you've done, and it truly was remarkable to look at the original pictures and then look at the reclaimed land.

My first question will go to you. And I'm curious, does the industry work with the NGO's and community groups on these Good Samaritan projects, or should we be looking at ways to encourage that more? Because certainly they have the same goal, that landscape be left intact. And they want to do what they do and do it effectively and not have all of us saying, you can't do this anymore because of the impact. So is that working?

Mr. PIZARCHIK. Congresswoman, it's been our experience that industry does help and does cooperate on these. They oftentimes have the equipment in the area that they could provide at a very reasonable cost, or they provide it at no cost because they're in the neighborhood. Sometimes they provide materials. So the industry does work. We've got a lot of good responsible operators in Pennsylvania who see the value of helping to clean up the problems of the past.

Mrs. DRAKE. That's been my experience in talking with them is they want to be part of the answer.

Mr. Fewell——

Mr. FEWELL. Fewell, just like gasoline.

Mrs. DRAKE. Well, that's very appropriate; for my question that's very appropriate.

One of the things this committee has been talking about a lot is liquified coal, and certainly what I've learned in Virginia is our coal is too good, and we need a lesser grade of coal. And you have stated that these permits should not authorize the extraction of new mineral resources. So I guess part of my question is how would that work with the whole issue of us looking more at alternatives? I think liquified coal has such great potential, to think you could run it in your car today without any changes or have it in our supply system. So I'm just wondering is that, in your opinion, good, sound policy; or is it something we should look at as part of a total package to reclaim these lands?

Mr. FEWELL. Congresswoman, first of all, the Administration's bill applies to hard rock mines, not coal mines, so it would not apply in the case that you're mentioning. However, we are mindful of the fact that if this legislation is successful, we would like to see

it used as a model to expand into the arena of coal, because we believe some of the—obviously the environmental issues and water quality impacts from abandoned coal mines are as great in many Eastern States. But, again, we do have a provision that provides incentives for recycling of waste piles and tailings.

And let me just state that the Agency—with respect to coal, the Agency has been supportive in the past of coal remining, and certainly we would encourage those options and those ideas that you mentioned.

Mrs. DRAKE. Thank you.

And, Ms. Card, would it be appropriate for us to exempt Good Samaritan actions from civil suit provisions and simply leave enforcement to both the State and Federal agencies?

Ms. CARD. Mr. Chairman, Congresswoman, from the Western Governors' Association perspective, we believe the Good Samaritan permitting ought to be enforceable; in other words, the conditions of the permit ought to be enforceable by the permitting authority. However, we have had concerns expressed that a citizen's provision would be a disincentive to Good Samaritans moving forward with cleanups.

So while we certainly support enforcement of the Good Samaritan permit by the permitting authority, we have concerns that a citizen's provision like the one under the Clean Water Act would remain a disincentive to cleanups.

Mrs. DRAKE. Thank you, Mr. Chairman. I'll yield back. I see my time is up.

Mr. GIBBONS. Thank you very much.

I think what we may do, if those Members here have any follow-on questions, is ask that they submit those questions in writing to the witnesses. And we would ask that the witnesses do return those questions and answers to us within 10 days as such. There are a number of additional follow-on questions, I know, that I had that I'd like to ask, but I know that our time is quite limited in a committee hearing, and we do want to make room for those panelists that are following.

Mr. GIBBONS. So with that, I want to thank these witnesses for their presence here and testimony today, and also excuse them from the panel and call up the second panel of witnesses, which will include Mr. Tim Brown, Center for the America West, University of Colorado; Mr. Hal Quinn, senior vice president, National Mining Association; Ms. Laura Skaer, Executive Director, Northwest Mining Association; and Ms. Velma M. Smith, Senior Policy Associate, National Environmental Trust.

If you could come forward and take your seats, please.

First of all, I want to welcome each and every one of you to the committee hearing. And as you saw with the first panel, we have a procedure whereby we swear you in and have you take an oath for testimony before this committee. So if each one of you will rise and raise your right hand.

[Witnesses sworn.]

Mr. GIBBONS. Let the record reflect that each of the witnesses answered in the affirmative.

We want to welcome you here. We appreciate the time and distance many of you have traveled to come before this committee, and we're anxious to hear your testimony.

We'll turn now to Mr. Tim Brown, Center of the American West, University of Colorado, for your remarks. And, Mr. Brown, your full and complete written testimony will be entered into the record, and you will have 5 minutes to summarize your testimony.

STATEMENT OF TIM BROWN, CENTER OF THE AMERICAN WEST, UNIVERSITY OF COLORADO

Mr. BROWN. Thank you.

Good morning, Mr. Chairman, members of the Subcommittee, and Congressman Udall. It is a privilege to speak to you on the Good Samaritan bill under consideration today.

I'd like to start by commending Mr. Fewell and his colleagues at the EPA for producing a very fine draft. This bill would deliver liability relief to the many volunteer organizations who are now poised to clean up abandoned hard rock mines across the West. This bill appropriately concerns itself with just two problematic environmental laws, the Clean Water Act and CERCLA, and wisely leaves aside the question of remining for another day.

Effectively amending a landmark environmental law such as the Clean Water Act should not be undertaken lightly. In this deliberation, however, it is helpful to recall that hard rock acid mine drainage was far from the minds of the authors of the 1972 Water Pollution Control Act.

John Whitaker, Environmental Advisor to President Nixon and later Under Secretary of the Interior, recently acknowledged that he and his congressional collaborators designed the law for very different purposes. Mr. Whitaker wrote just last year, quote, "When I and other White House staffers recommended to the President new water pollution control strategies for congressional consideration, our focus was primarily on sewage treatment and industrial fluids, not the acid mine drainage problems from abandoned mines. We should have had more foresight," unquote.

Well, I think we would all want to rush to absolve Mr. Whitaker and his collaborators of any lack of foresight and instead thank them and the other Clean Water Act authors for statutes that have done immense good for our environment and our quality of life in this country. But the Clean Water Act, like the other environmental laws of the 1960s and 1970s, are not infallible texts. They will not provide perfect remedies in all circumstances, and they should not be immune to amendment where experience shows that they impede rather than facilitate environmental improvement.

The second point that I would make is that the growing consensus for Good Samaritan legislation reflects a trend in environmental management toward the restoration of the diverse values found in healthy, natural environments.

In the case of those watersheds impaired by acid mine drainage, there are compelling reasons for restoration, economic benefits not the least among them. The prosperity of the Rocky Mountain community, to say nothing of a downstream municipality such as Denver, depends on the ability of their watersheds to support recreation, tourism and population growth. More and more westerners

are coming around to the idea that an intact natural environment is a large part of their future economic well-being.

Anglers alone spend $500 million in Wyoming and $800 million in Colorado every year. This recreation sustains fishing guides, outfitters, shopkeepers, motel owners, and tens of thousands of other business people in the tourism sector. However, 40 percent of Colorado's watersheds are impaired by abandoned mine pollutants, and each of these areas is therefore economically handicapped.

And my final point, I wish to assure you that there are Good Samaritans out there waiting for your action. This point was brought home to many of us who attended an EPA press conference held at the McClelland abandoned mine site in Idaho Springs, Colorado, on July 6th.

A local Good Samaritan group, the Clear Creek Watershed Foundation, has made great progress in cleaning up the dried portions of the mine; that is, the piles of tailings that lead to polluting into the adjacent river. But out of fear of the Clean Water Act liability, they could not, "work in the wet"—that is, they could not treat the acid mine drainage flowing from the mine entrance.

I can soon wear out my welcome here by relating other cases of watershed groups and State agencies who also cannot work in the wet, who can only conduct partial cleanups, or who must even abandon existing acid mine drainage treatment systems.

Liability relief for environmental Good Samaritans has brought support from State and Federal agencies, conservation groups, the mining industry, and, happily, from both Republicans and Democrats, as seen in the sponsorship of the different bills introduced in both the House and Senate.

I thank the Chairman and the committee members for their attention and for expediting action on this legislation. The people of the West look forward to beginning work on abandoned mines in the next construction season. I shall be happy to answer any questions.

[The prepared statement of Mr. Brown follows:]

Statement of Timothy Brown, Ph.D., Research Associate, Center of the American West, University of Colorado, Boulder

Mr. Chairman and Members of the Subcommittee:

Thank you for this invitation to speak to you on the subject of abandoned mines and acid mine drainage. It is an honor and privilege to come before you.

The mining booms of the nineteenth and early twentieth centuries left behind a mixed heritage: families supported by wages, wealth acquired by some, national prosperity and high standard of living, a folklore of color and adventure, and, regrettably, thousands of hardrock mines that discharge highly toxic water pollution. We now face the necessity of reckoning with this unfortunate environmental legacy of our mining past.

These abandoned hardrock mines and their discharge of pollutants (acid mine drainage) exact a high cost on the environment and society. They kill aquatic life in tens of thousands of rivers and streams, some potential fisheries; they deprive communities of the economic benefits brought by anglers and other recreational visitors. They taint water supplies, requiring municipalities to spend significant monies on water purification. Some mountain communities find their chances of economic development constrained by the toxic discharge of local mining sites.

The cleanup of these mines presents a formidable technical challenge. However, the greatest impediment to the remediation of abandoned mines is, ironically, the potential to incur liabilities and penalties prescribed by the Clean Water Act. Government agencies, the mining industry, and environmental groups agree that Good Samaritan remediating parties must have relief from Clean Water Act liability in order to make substantial progress in addressing this problem.

While there is broad consensus on the need for liability relief, other issues remain unresolved. I believe that an understanding of the history of mining in the West can help show us not only how we find ourselves in this predicament today, but also how to proceed toward agreement on those remaining points of discord.

The Historical Significance of Mining

No other industry changed the West as rapidly and as profoundly as did the gold and silver rushes of the nineteenth century. Mining, more than any other white American enterprise, accelerated the colonization of the West. It brought with it systems of law, governance, commerce, transportation, communications, and finance. Only with these institutions of civil society in place could miners proceed in relative security with the harvest of the mineral wealth that lay in the western territories.

Mining, as a labor intensive industry, also populated the West. The California Gold Rush of 1849 inspired thousands of Easterners, Southerners, and Midwesterners to make the difficult passage across the American interior. The quest for precious metals then drew prospectors into the interior itself, with major rushes in 1859 to the areas that would become Colorado and Nevada. Gold and silver brought Americans to places they otherwise would have avoided or even fled. To those men intent on harvesting the mineral bounty of the American West, the territorial constraints imposed by treaties and Indian country boundaries carried little meaning. Thus mining had the effect of pushing American political sovereignty into many areas of the Northwest, the Rockies, the Great Basin, and the Southwest.

Scope of Environmental Degradation from Abandoned Mines

Although the old-timers knew not to drink water downstream from their stake, they had little notion of the environmental legacy that they were bequeathing to later generations of Americans. The extent of this degradation is daunting. The U.S. Bureau of Mines estimated that 12,000 miles of waterways in the Western United States, or about 40 percent, are contaminated by metals from acid mine drainage, mostly from abandoned mines, while 180,000 acres of lakes and reservoirs are tainted by abandoned mine runoff.[1] The Mineral Policy Center (now Earthworks), put the number of abandoned hardrock mines at about 500,000 a few years ago, and it estimated cleanup costs from 30 to 70 billion dollars. Such figures may well be inflated, and we must remember that all rivers contain some amount of minerals from natural sources. But these figures correctly convey the fact that a great deal of wilderness, much of it located in National Forests and other public lands, is partially or wholly spoiled for fishing, hunting, and hiking. That means great deal of lost revenue for communities whose economies depend on these outdoor pursuits. Anglers especially are affected by acid mine drainage and have become a strong voice in calling for the cleanup of abandoned mines. Their main organization, Trout Unlimited, now devotes significant resources to AMD cleanups.[2] Some municipalities must also spend hundreds of thousands of dollars to purify their water supply. The City of Golden, Colorado, was at one point spending $250,000 annually to remove heavy metals and acid from Clear Creek.

How Can a Mine Be "Abandoned"?

Who is responsible today for the acid mine drainage coming from these historic mines? Technically, some entity or individual owns every square mile of U.S. land and the mines on them, whether it is a federal agency, a former mine operator, or someone who inherited the claim from the operator and who may not even know about the mining that once took place on the land. It may be someone who bought the land from the former operator and now plans to reactivate the mine. In many cases, claims were made on federal land, and some mining was done, but the claim was never transferred into private ownership and therefore ownership of the land reverted to a federal agency.

Theoretically, these owners are responsible for the water discharged from their mines. But regulatory agencies find it impractical to take legal action against the vast majority of private owners. Most unwittingly inherited the problem, and could not begin to pay for remediation. They are, by virtue of having little or no financial means, "judgment-proof" should someone sue them for environmental violations. Old

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[1] Cited in Carlos D. Da Rosa and James S. Lyon, Golden Dreams, Poisoned Streams (Washington, D. C.: Mineral Policy Center, 1997), p. 4. See also Robert L. P. Kleinmann, "Acid Mine Drainage" Engineering and Mining Journal (July 1989), p. 161.

[2] See Trout Unlimited's recent publication by Russ Schnitzer and Rob Roberts, Settled, Mined & Left Behind: The Legacy of Abandoned Hardrock Mines for the Rivers and Fish of the American West, and Solutions for Cleaning Them Up (2004), also online at http://www.centerwest.org/acid—mine/reading-tu.pdf.

mines belonging to such private individuals are simply waiting for a third party, an environmental Good Samaritan, to clean them up.

Clean Water Act Impediments to Mine Remediation

The Clean Water Act creates both a mandate and an obstacle for cleaning up acid mine drainage. The Clean Water Act prohibits "the discharge of any pollutant by any person" without a permit, into "navigable waters from any point source." The law delegates to the EPA or the states the responsibility of identifying streams that are impaired in terms of their designated uses. For many alpine streams affected by acid mine drainage, that designation is "Class 1 Cold Water Aquatic"—this means that the stream should support aquatic life, including species that may be sensitive to trace amounts of metal contamination. If the concentrations of metals exceed the standards for sustaining aquatic life, then the stream is impaired, and some kind of remedial action is required by the Clean Water Act.

Remediating parties are required in normal circumstances to obtain a Clean Water Act discharge permit (a National Pollutant Discharge Elimination System permit or NPDES). The permit requires that the treatment will result in Clean Water Act water quality standards, which are very stringent, and that the remediator will remain responsible for the source of pollution in perpetuity. These two provisions have deterred many interested parties from cleaning up polluting mines. When a third party—a nonprofit organization, community group, government agency, or corporation—attempts to clean up acid mine drainage coming from an abandoned mine, that party legally assumes liability for the mine's discharge. A Good Samaritan remediator might wish to decrease the acid mine drainage at a particular site, but could not undertake a comprehensive remediation project that would satisfy Clean Water Act water quality standards. Current federal law allows for no such partial cleanup. A Good Samaritan has the choice of achieving the highest water quality standards or of not undertaking the project at all.

An additional deterrent is the financial penalty that such an operator might incur under Clean Water Act provisions. Although it is up to the discretion of individual judges, an operator of a mine is liable to incur penalties of up to $32,500 for every day that the mine discharges pollution. Would-be environmental Good Samaritans abandon their good mission because they cannot possibly risk these fines, assume the long-term financial liability, or meet the water quality standards dictated by the Clean Water Act.

Some jurists argue that abandoned mines should not be covered by the Clean Water Act. John Whitaker, environmental advisor and Undersecretary of the Interior during President Richard M. Nixon's last administration, and a principle author of the Clean Water Act, here looks back on the unintended consequence of CWA liability for would-be environmental Good Samaritans:

> When I and other White House staffers responsible for environmental initiatives during the Nixon administration recommended to the President new water pollution control strategies for congressional consideration, our focus was primarily on sewage treatment and industrial effluent, not the acid mine drainage problems from abandoned mines. We should have had more foresight.
>
> Before we decided on a regulatory enforcement strategy, our initial inclination was to propose to President Nixon an effluent fee system, i.e., a market-oriented alternative to regulation by enforcement that relied on financial, not regulatory, incentives to clean the nation's waters.
>
> The effluent fee concept was appealingly simple. The more an enterprise polluted, the more it paid. This way, the free market could set the cost of cleaner water, not a regulatory system, which often turned out to be based on unscientific assumptions with politically motivated goals that were impossible to meet.
>
> However, the effluent fee concept died because there were serious political disadvantages. Congress had only given consideration over the years to a "tough cop" regulatory approach. "Sue the bastards" had a nice ring to it.
>
> Also, effluent fees are a form of taxation, and the House Ways and Means Committee and the Senate Finance Committee would have claimed jurisdiction. Under those conditions, it was highly unlikely that Nixon's proposals would have ever seen the light of day because members of these committees saw taxation only as a means for increasing or decreasing revenue, not as a means of curing social ills such as water pollution.
>
> In retrospect, one wonders what might have been. Later, in 1972, an EPA paper, "Alternative Strategies in Water Quality Management," concluded that an "effluent fee is the most effective alternative for national water

quality objectives. It promises to be the most effective and simultaneously requires the least cost."

Eventually, bowing to political realities, we decided to go down the traditional regulatory path, which indeed turned out to be the proverbial slippery slope.

Impatient that Congress had sat on Nixon's proposed water quality legislation for almost a year (Congress held a few water pollution hearings, then spent most of its time on air pollution, solid waste, and ocean pollution legislation), we decided to revive the permit authority in the old 1899 Refuse Act that required a federal permit to discharge effluents into navigable waters. Later Congress incorporated this permitting authority into the Water Pollution Control Act of 1971.

However, Congress required that the water pollution control standard be "zero discharge." At the time, the Nixon Administration witnesses testified before Congress that the zero discharge provision was an impossible goal to achieve, and also an unreasonable financial impediment to clean water because of the very high cost of removing the last few percentages of effluents in relation to the benefit of the result. The stated goal reflected a lack of understanding of the scientific and technical aspects of water pollution control.

For example, a zero discharge provision ignores the nature of the river, lake, or ocean into which the discharge is flowing, and this oversight can lead to absurd results: water distilled to the zero discharge standard at great cost might be dumped into naturally saline or mineralized streams, altering them for the worse.

We did not envision at the time that the day would come when the zero discharge provision would prevent Good Samaritans from cleaning up acid mine drainage or when the onerous and costly federal permit requirements would snuff out any economic incentive to curb the acid mine drainage problem associated with abandoned mines.

So perhaps the time has come to take another look at the basic water quality laws and reconsider a market-based effluent fee approach.[3]

Such testimony underlines the need to adjust the Clean Water Act so that it might facilitate rather than inhibit environmental improvement.

Some legal experts argue potential Good Samaritans could plausibly defend themselves against a Clean Water Act liability suit and against the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), whose liability provisions Good Samaritans also fear.[4] This is a matter of legal opinion, however, and few Good Samaritans would care to test it in court.

What Is an Environmental Good Samaritan?

All parties agree that disinterested, altruistic parties—environmental Good Samaritans—should be able to undertake mine cleanups without incurring Clean Water Act liability. But who qualifies for such a designation? Such an entity—whether an individual, a group, a government agency, or a complex coalition of groups—would be moved first and foremost by the desire to clean up an environmental mess; that to do so, it would bring its resources to bear, not just once, but until the problem was resolved; and finally, that it would understand this act as a moral obligation of environmental stewardship.

A trickier issue, arises with the introduction of a commercial aspect into the question. In terms of healing the environment, the issues of self-interest and a profit motive are points of contention when trying to define who counts as a Good Samaritan. Some argue that an environmental Good Samaritan can only work on behalf of public welfare broadly defined. This means, in practical terms, that the redemptive actions must be governmental because government, unlike most commercial or philanthropic enterprises, endeavors to balance the needs and desires of society's many competing interests. Government agencies are also accountable to elected politicians and ultimately to the public. Others also worry that if environmental Good Samaritans are allowed to profit in some fashion from a clean up—as some mining companies now propose—the purpose of environmental cleanup will be lost in the pursuit of economic gain. On the other hand, some kind of profit incentive could

[3] Patricia Limerick, et. al. Cleaning Up Abandoned Hardrock Mines in the West: Prospecting for a Better Future (Boulder: Center of the American West, University of Colorado, 2005), p. 23.

[4] Sean McAllister, "Unnecessarily Hesitant Good Samaritans: Conducting Voluntary Cleanup of Inactive and Abandoned Mines Without Incurring Liability," Environmental Law Reporter 33 (2003): 10245-10264.

dramatically accelerate the process of cleaning up abandoned mines. Private enterprise has an energy and drive that could have a very positive effect. Mining companies, after all, know how to work the sites. Government processes, on the other hand, do not enjoy a reputation for efficiency. Some argue that the government is good at conducting studies and writing reports, but the real technological know-how, the scientific brain power, and the right equipment are all found in the mining industry. We favor a broad definition of who might qualify as a Good Samaritan even though some bad actors using this status may be tempted to conduct new mining activities without a proper permits. This seems to us a marginal risk given the potential for environmental improvement.

State Good Samaritan Initiatives

Rather than waiting for federal Good Samaritan legislation, the State of Pennsylvania passed its own in 1999—the Environmental Good Samaritan Act.[5] This act presumably provides protection against liability for land owners and third parties (individuals, nonprofit organizations, corporations, and government agencies) that take on abandoned mine reclamation and water-pollution abatement projects. By this legislation, as long as you don't make the problem worse, you will be shielded from liability under the Clean Water Act. All work must be conducted with the guidance and approval of the Pennsylvania Department of Environmental Protection.

At the same time, then-Pennsylvania Governor Tom Ridge signed the Growing Greener legislation, which provided $650 million from the state's general funds over five years to clean up critical environmental problems, including acid mine drainage from abandoned coal mines. State legislators recognized acid mine drainage as Pennsylvania's most pressing water quality problem, and they sought to provide both liability relief and the money to do the work of remediation.

Removing the obstacles of liability and insufficient funding has resulted in a proliferation of active watershed groups in Pennsylvania—the Pennsylvania Organization for Watersheds & Rivers lists about three hundred watershed alliances, associations, and friends—Friends of the Mingo Creek, of the Poquessing Watershed, of the Sinking Valley, of the Nescopeck Creek, of the Wissahickon Creek—just to name a few. The most notable is the community organization headed by T. Allan Comp, a historian with the Office of Surface Mining. Comp's AMD&ART in Vintondale, Pennsylvania, has won awards for its innovative efforts to transform an abandoned colliery into a public park and to raise public awareness of the need for cleaning up abandoned mines.

Pennsylvania has managed to relieve Clean Water Act liability, provide more than a half-billion dollars of funding for remediation projects, and encourage community participation in cleanups on a wide scale. Should Western states follow Pennsylvania's example by passing their own Good Samaritan legislation?

The Pennsylvania model is not perfect. Its Environmental Good Samaritan law cannot legally supersede the requirements and provisions of federal law. Pennsylvania Good Samaritan groups such as AMD&ART, Inc. presume that they are protected from Clean Water Act penalties and liability as they work under the auspices of their state's Good Samaritan law. However, they cannot know for certain if a state or federal environmental standards enforcement agency, particularly the EPA, will not step in and hold them to the stricter federal standards. In fact, EPA officials know that good work is being done in Pennsylvania; they want to see mines cleaned up and so are probably not going to interfere with the progress. The bigger risk to Pennsylvania Good Samaritans comes in the form of citizen groups, especially environmentalists, who oppose any laws which allow an exception to or variance from the standards and provisions of the Clean Water Act. There might be broad agreement on a reasonable approach to cleaning up a site, but it would take only one dissatisfied holdout to scuttle a project.

Funding Sources for Mine Remediation

Despite the threat of liability, mine cleanups do happen, either through a consent decree that establishes alternative cleanup standards for a particular project, or by not directly treating the polluted water.

How are these projects funded? Depending on the severity of a mine's pollution, its threat to public health, its environmental impact, and its location on public or private land, there are a variety of public funding sources and strategies available for cleanups. The obvious places are the established federal programs, without

[5] Environmental Good Samaritan Legislation, Act 1999-68, http://www.centerwest.org/acid—mine/reading-pa1999-68.pdf

which virtually all acid mine cleanups would be impossible. Here is a very brief description of some of those programs:

CERCLA. If the pollution is a "hazardous substance" and poses an immediate threat to human health, the Environmental Protection Agency may designate a mine as a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Signed into law in 1980, Superfund law initially provided funding through a tax on the chemical industry. Congress, however, failed to reauthorize this tax in 1995, terminating this source of cleanup funding. Now projects done under CERCLA authority depend in part on general congressional appropriations to various federal agencies such as the EPA.[6]

Brownfields Revitalization Act. Acid mine remediators have been innovative in tapping other cleanup and redevelopment initiatives that were not originally intended for acid mine remediation. The Brownfields program, begun in 1995 under the administration of the EPA and as a part of CERCLA, seeks to assist states, communities, and other stakeholders in the reclamation and redevelopment of "brown fields"—those areas, usually located in industrialized cities, that were compromised by the presence of hazardous materials and other forms of industrial pollution. While initially conceived as a means of revitalizing economies in urban, formerly industrial, neighborhoods, the Brownfields program now also makes grants to acid mine remediation projects where restoration of the natural landscape is the primary concern. Brownfields grants emphasize the reclamation of disturbed land in contrast to those Clean Water Act Section 319 grants mentioned below, which are designed specifically for the remediation of water. Where both acreage and water need attention, Brownfields and Section 319 grants might be used in complementary fashion.

Brownfields, however, has limitations. Its funds are not currently applicable to superfund sites, and loosening this restriction would allow many mitigators access to this funding source.

Clean Water Act Section 319 Non-Point Source grants. These grants from the EPA are administered by the states for use by non-profit organizations engaged in the design and implementation of watershed restoration projects. "Non-point" means those polluting sites where it is difficult to identify a single point, like a drainage pipe, from which the pollution flows. Mines often discharge pollution from tunnel openings, but polluted water can also emanate from the site through more diffuse seepages.

SMCRA. Some states like Montana utilize industry tax funds collected under the Surface Mining Control and Reclamation Act. Enacted in l977, SMCRA was designed to regulate every aspect of coal mining operations and to establish standards for the restoration of areas disturbed by coal extraction. It has had a profound effect on areas where coal was or is now being mined. SMCRA has also been stretched to assist in the cleanup of hardrock mining in certain areas. If a state can show that it has completed the remediation of its coal mine sites, then it becomes eligible to receive SMCRA funds for hardrock abandoned-mine remediation (but not usually the acid drainage itself).

Bureau of Land Management. In the 1990s, BLM, in cooperation with various states, inventoried and assessed nearly 8,000 abandoned hardrock mines on its lands. The BLM now is working to treat those sites that cause the most environmental damage to watersheds or pose the greatest risks to public health. Like other government entities, the BLM works cooperatively with other agencies and private owners to secure funds and undertake cleanups in those watersheds most in need of remediation. Besides receiving an annual congressional appropriation of around $10 million for this work, the BLM also procures funds from other AMD-related federal programs. Through these efforts, about a dozen BLM abandoned mines are cleaned up each year.

U.S. Forest Service. National Forest watersheds are the single largest provider of municipal water for 66 million people in 33 western states,[7] but some 7,600 abandoned mines threaten the quality of their water.[8] The Forest Service receives about $20 million annually from congress and federal programs for the assessment and

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[6] Abandoned Mine Site Characterization and Cleanup Handbook, August 2000, http://www.centerwest.org/acid—mine/reading-epa910b00001.pdf.

[7] U.S. Forest Service's Abandoned Mine Land Program (August 2004) http://www.fs.fed.us/geology/fs—aml—program.pdf

[8] U.S. Department of Agriculture, Forest Service, FY 2005 Budget Justification, available at http://www.fs.fed.us/publications/budget-2005/fy-2005-budget-justication-pdf.pdf.

cleanup of abandoned mines, and usually manages to treat between ten and forty projects each year.[9]

These federal programs mesh with the many state programs[10] in the effort to undertake voluntary cleanups of abandoned mines, and Western states establish their own programs and funding. Colorado's Inactive Mine Reclamation Program, established in 1980 spent more than $18 million on abandoned mine remediation in 2002.[11]

Who Should Pay for Mine Remediation?

Federal and state funding programs must be carefully designed in order to place the financial burden of remediation on the right parties. SMCRA, for example, depends on taxation of the coal mining industry, and this draws our attention to a contentious issue. The coal industry has paid more than $7.2 billion in fees to the SMCRA abandoned mine lands fund to date.[12] Coal companies located in Wyoming, for example, pay into taxes that are then partially redistributed to other states. Why should a Wyoming coal company help pay for mine remediation in Colorado or West Virginia? Even more puzzling, should this company help pay to clean up a hardrock mine that closed down in the late 1800s? The placement of tax burdens on the mining industry through programs like SMCRA requires careful consideration and committed diplomacy.

Consumers, we believe, have both an opportunity and obligation to acknowledge the extent to which they have driven mining enterprises, and accept responsibility for the environmental consequences for their consumption. Consumers have not seen the true cost of the mineral and metal commodities because the price of their goods has not included the environmental costs. That cost has been passed on to the future, and now the future has arrived. Part of an honest reckoning with the legacy of mining must be a willingness on the part of consumers to pay for abandoned mine remediation.

Hardrock miners also fear that any movement to tax their industry would have the effect of pricing their commodities out of the international marketplace. Such taxation might have the unintended and unfortunate effect of increasing the importation of minerals and metals from countries with few or no environmental controls. In this case, the environmental problems associated with extractive industry would simply be exported to another country, as is already beginning to happen in the timber industry.

Western states should also be prepared to assume at least some of the financial and legislative responsibility themselves. In these times of tight budgets, creative sources of funding will have to be tapped. A state tourism tax might be considered because abandoned mine remediation restores aquatic habitat, and fishing is a major attraction for visitors in most Western states. In general, the financial responsibility of acid mine remediation must fall more broadly on those who have enjoyed mining's benefits, and that means average American consumers. How best to achieve that fairer distribution of financial responsibility is open to discussion, but it is time that we consumers take responsibility for our part in the environmental legacy of mining.

Congressional Action

No fewer than five Western Members of Congress—Max Baucus, Mark Udall, Scott McInnis, Ben Nighthorse Campbell, Ken Salazar, and James Inhofe— and their cosponsors have introduced environmental Good Samaritan bills since 1999. The focus of all of the bills was relief from Clean Water Act liability for third parties taking on cleanup of abandoned mines. Some of the bills also proposed that royalties on hardrock mining be used to fund cleanups. But designing legislation with a double mission—providing for Clean Water Act liability exemption and setting up a funding mechanism—has thus far proven too difficult, and none of these bills succeeded. There is increasing sentiment that these two aspects of the problem should be tackled separately.

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[9] U.S. Department of Agriculture, Forest Service, FY 2005 Budget Justification, at 15-30, available at http://www.fs.fed.us/publications/budget-2005/fy-2005-budget-justication-pdf.pdf.

[10] McElfish, J.M., Jr., Bernstein, T., Bass, S.P., and Sheldon, E., Hard Rock Mining: State Approaches to Environmental Protection. Washington, DC: Environmental Law Institute, 1996.

[11] U.S. Department of Interior, Colorado Inactive Mine Reclamation Program, Annual Summary Evaluation Report of the Colorado-Utah Abandoned Mine Land Team (Evaluation Year 2002), available at http://www.osmire.gov/../oversight/coloradoaml02.pdf. [check URL]

[12] Office of Surface Mining, Abandoned Mine Land Program, Completed Reclamation of Problems Created by Mining Other Than Coal Mining, available at http://www.osmre.gov.aml.accomp/znoncoal.htm.

A partial solution to crafting a Good Samaritan bill is to separate the protection from liability from the funding issues. A bill designed to allow Good Samaritans to proceed with their work without incurring Clean Water Act liability could encounter much less opposition if it did not attempt to address the question of who will pay. Such a bill could allow individuals or organizations the ability to obtain a permit to undertake cleanups of hardrock mines according to adjusted environmental standards. Having gotten a Good Samaritan provision in place, Congress could then work on the right formula for funding such cleanups.

If Congress amends the Clean Water Act, it should be careful not to impair the general integrity of this environmental law. The Clean Water Act is generally very useful in protecting the environment from industrial polluters. This principal purpose should not be compromised in an revision of the Clean Water Act.

On the other, there is good reason to fight for a stand-alone Good Samaritan bill. Good Samaritans working under the shelter of this kind of legislation would still be executing a cleanup plan and meeting water quality standards, albeit lowered, approved by the EPA. Some improvement is better than no improvement. But if we use adjusted standards, we must ask ourselves exactly what the goals of cleanup are and what constitutes a success. The recalibration of standards to allow Good Samaritan actions would need to consider, for example, whether the intention of the cleanup would be to return fish to a stream. Is a partial cleanup good enough for the fish? Failing this goal, what would other cleanup benchmarks be? Would those cleanup goals be too expensive to achieve in some areas? Such questions require us to think about the precise purposes of a cleanup and where it is feasible to achieve them.

Conclusion

The environmental laws of the 1960s and 1970s created a new world for the operations of extractive industries, and we are all beneficiaries of that transformation. And yet those laws were not written under divine inspiration. They are not sacred, infallible texts that will impart perfect wisdom for all needs or for all time. Legislation designed to protect the environment can inadvertently harm it.

I urge you to work toward the passage of a simple, restricted bill to allow Good Samaritans the ability to conduct mine cleanups without fear of Clean Water Act liability. We need to remain vigilant in ensuring that current mining operations would not conduct new mining activity under relaxed regulatory standards, but we feel that such a risk is acceptable next to the potential environmental benefits produced by such a law.

An Analysis of Abandoned Mine Good Samaritan Policy

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In October of 2004, The Center of the American West hosted a workshop on the problem of acid mine drainage produced by abandoned hardrock mines throughout the West. This workshop included state and federal officials, environmental advocates, scientists, watershed associations, and representatives from the mining industry. The Center subsequently published a report in January 2005 that reflected the workshop participants' consensus that volunteer, financially disinterested parties seeking to clean up abandoned mines and their pollutants needed relief from the threat of legal and financial liability posed by federal environmental laws, notably the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Since the publication of the Center's report, Republican and Democratic Members of Congress have joined the effort to remove the legal obstacles to mine cleanups. Congress is now contemplating three Good Samaritan bills. While there is broad agreement in them on the need for the abatement of mine pollution and on the principle of liability protection, there remain points of difference.

As a supplement to its earlier report, this Center of the American West paper weighs these differences and offers specific recommendations. We hope that our perspective might bring clarity to those issues still under deliberation.

This paper will refer to the bills by their principal sponsors' names, thus "Udall," "Inhofe," and "Salazar."

Eligibility for Good Samaritan Designation

Summary: Salazar and Inhofe allow any federal, state, or private entity to act as a Good Samaritan so long as it had no causal role in the creation of or ownership interest in the mine site in question or otherwise carries no liability for the site. Salazar makes an exception for those who hold an ownership interest by virtue of a succession to title. Udall takes a different approach by designating a federal agency to serve as the Good Samaritan except where the mine site is located on federal land, in which case a state agency assumes that role. Udall thereby retains for a federal or state governmental agency relief of liability, and envisions that it would work with one or more "cooperating parties" such as a watershed group or mining company.

CAW Position: While we understand that Udall attempts to disarm concerns that come with extending exceptions to environmental quality standards to private entities such as mining companies, we favor the more inclusive definition set out in Inhofe and Salazar, and agree with Salazar's succession to title provision. The permitting and enforcement provisions in these bills are adequate to ensure that Good Samaritan entities will be held to the objective of environmental improvement. In the interest of removing obstacles to mine cleanups, the Inhofe/Salazar definition allows the private sector to seize the initiative and guide the process from a more local set of interests.

As a matter of practicality, Good Samaritan entities are by necessity consortiums of local, state, and government agencies, and nonprofit organizations and for-profit businesses. This reality will render any of the proposed statutory definitions of a Good Samaritan largely moot, and require the permitting authority to rule on exactly what entity is being granted the cleanup permit. For example, The Snake River Watershed Task Force, a coalition working to improve the water quality in Peru Creek and the Snake River in Summit County, Colorado, lists as members consultants, the Colorado Division of Minerals and Geology, the EPA, the U.S. Forest Service, Keystone Resort, private citizens, the U.S. Geological Survey, water utilities, the Colorado Department of Public Health and Environment, Summit County Open Space and Trails, the University of Colorado, Trout Unlimited, the Colorado School of Mines, the Trust for Land Restoration, and the Northwest Colorado Council of Governments. All these groups must participate for a successful outcome, but this association remains informally constituted and unincorporated. How would it appear as a Good Samaritan applicant? The permitting authority will have to decide how it will designate as the Good Samaritan one or another member of such consortiums, or if it will give the consortium an individual corporate identity. At a minimum, the liability protection must cover that business which does the physical work at the mine site, but the operator of any passive or active treatment system must also have protection. There may be in some cases a need to cover multiple entities under the same permit.

Funding of Projects

Summary: All three bills require that applicants demonstrate the financial capability to complete the proposed work. While this does not probably mean that the Good Samaritan must have the money on hand at the time of application, it does mean that the permitting authority would have to be satisfied that the project is financially viable.

CAW Position: While all of the bills want assurances that the project has adequate funding, it is likely that a Good Samaritan would have greater success in securing grants and raising corporate money after the cleanup permit has been secured. The language in Udall and Inhofe should be softened by requiring in the application a project budget and proposed funding strategy, rather than a demonstration of sufficient financial resources.

The funding language in all three bills could also recognize that the issue of funding pertains not just to the completion of the initial cleanup, but also to the maintenance of acid mine drainage treatment systems into the indefinite future. A Good Samaritan permit should require that the applicant make, as far as is reasonable and practicable, arrangements for the maintenance and operation of treatment systems in perpetuity.

While it seems not politically feasible at this time for a Good Samaritan bill to contemplate funding programs, the scope and longevity of the problem posed by acid mine drainage will sooner or later require Congress to raise and appropriate more funds for hardrock mine remediation. Upon seeing a period of successful Good Samaritan projects, Congress may wish to guarantee the appropriation of maintenance funds for those projects that have made significant environmental improvements.

Future landowners

Summary: The Udall bill is unique in obligating the owner of a site to establish a covenant whereby any future owners are required to operate and maintain whatever treatment systems are in place. Any future owner may not degrade, neglect, or disturb mine remediation work. However, future owners need not show their financial capability to do so.

CAW Position: This provision goes some way in addressing the issue of perpetual maintenance, and the potential for remediation systems to fail or loose efficacy through neglect or mismanagement. However, none of the bills gives the issue of perpetual maintenance adequate emphasis.

Remining (distinct from recycling or reprocessing)

Summary: Udall requires that any development of a historic mine site be conducted under normal permitting provisions of the Clean Water Act and any other applicable regulatory regime. Moreover, Udall excludes any site with economic mineral value from its Good Samaritan provisions. In other words, an eligible site must not have obvious remining potential. Likewise, Inhofe and Salazar do not allow for new mining activity to be conducted under the Good Samaritan remediation permit.

CAW Position: The role of the mining industry in Good Samaritan actions has been one of the more difficult points of negotiation in crafting legislation. The Center's report broached the issue of remining, giving a brief outline of the advantages and potential drawbacks in allowing mining companies to conduct new mining activities at a historic site while remediating polluting residues. Mining companies should be given the opportunity to participate in Good Samaritan actions; they have the equipment and expertise. These three bills, however, are correct in disallowing any new mining activities under a Good Samaritan permit. Should a mining company wish to engage in the mining of virgin ground, it should undertake that activity under the purview of normal leasing and permitting processes.

It is necessary to differentiate clearly environmental Good Samaritan projects from commercial activities; although these actions may be physically compatible at some sites, their combination may create a conflict of priorities and interests in the execution of the remediation activities.

There remains, however, compelling commercial reasons why a mining company would spend its resources on Good Samaritan cleanups. For these companies, the greatest value in such projects lies not in the minerals that they might take away from the site, but in the good will and improvement in public image accruing to them from cleaning up the environment. Mining companies should be full partners in watershed improvement associations, and they should enjoy the full commercial value that is earned through responsible corporate citizenship.

The question of remining should, in any case, be framed in terms of its real economic potential. Of those historic mines in greatest need of remediation, it remains unclear how many offer real remining possibilities. Until this number is given some definition, the question of remining remains abstract; in fact, it may be a moot point if few mines are remining candidates.

Recycling

Summary: Each bill allows for the recovery of minerals from the historic mine residues such as tailings and ore, but on different terms. Udall allows a Good Samaritan cleanup to use or sell minerals recovered in the course of the implementation of the cleanup, but the consequent earnings must be used to defray costs at some Good Samaritan remediation project. Inhofe and Salazar put no such conditions on the use of the recovered minerals, however, Inhofe's language may be interpreted as being more restrictive than Salazar's.

CAW Position: Remediation projects are costly, and any opportunity to subsidize the expenses through the recycling of residual minerals makes good sense. Udall's stipulation that such funds directly go toward cleanups is probably redundant, but it raises the larger issue of the ownership of such materials. Given the membership of Good Samaritan organizations such as the Snake River Watershed Task Force, the permitting authority will not only have to decide what entity is designated as Good Samaritan but also who owns the rights to the residual minerals. Presumably, the value of minerals would be used to reimburse an association's members for the resources spent on their project.

The mining industry believes that the Inhofe bill, with its reference to "incidental" reprocessing of mine residue, is more restrictive than Salazar. Given Salazar's prohibition on remining, its definition of recycling or reprocessing is adequate.

Standards

Summary: Udall and Salazar similarly prescribe that a Good Samaritan action achieve CWA quality standards to the maximum extent circumstantially, reasonably, and practicably possible. That is, the CWA standard remains the objective, but need not be met. Udall requires that applicants show with "reasonable certainty" that their project will achieve some improvement. Inhofe departs from the CWA framework by requiring the project to result in some degree of improvement to the larger watershed.

CAW Position: Inhofe appropriately recognizes that many watersheds are dotted with mines that individually contribute to an overall degradation of the environment, and that the treatment of any one mine is only an incremental improvement in a larger hydrological system. The standard of success should therefore not be measured at any one mine, but in the overall improvement of the ecosystem within a watershed. Individual mines within a watershed may not achieve CWA standards after treatment, but their incremental improvement should cumulatively allow the main watercourses to support aquatic life. The permitting authority may have to determine what is a meaningful level of improvement at a specific mine in context of the larger watershed, and grant or deny applications on the likelihood that a Good Samaritan action would achieve that level of improvement.

Scope of Liability Relief

Summary: As an amendment to the CWA, Udall explicitly extends liability relief only for CWA Sec. 402. Udall presumes that a Good Samaritan permit would also provide protection from CERCLA liability, and that CERCLA contains its own Good Samaritan accommodations. Inhofe would shelter Good Samaritans from CWA and CERCLA, while Salazar extends relief for CWA, CERCLA, the Toxic Substances Control Act, Safe Drinking Water Act, National Environmental Policy Act, Solid Waste Disposal Act, Clean Air Act, Uranium Mill Tailings Radiation Control Act, and applicable state and local environmental laws.

CAW Position: In identifying CWA and CERCLA for liability protection, Inhofe correctly gauges the needs of Good Samaritan to proceed with their work. Udall falls short in assuming that CERCLA liability is otherwise neutralized, and Salazar needlessly extends relief to laws that have not been impediments to Good Samaritan actions, and will thereby arouse opposition from environmentalists. Salazar's inclusion of additional laws will only create unforeseen problems and consequences. It is best to begin with the most minimal necessary fix possible, and make adjustments as the need arises.

Conclusion:

While all three bills offer certain advantages, Inhofe, if passed into law, would best test the premise that the CWA and CERCLA currently stands between would-be Good Samaritans and environmental restoration without undue weakening of these environmental laws. Inhofe strikes the best balance between environmental and industry concerns on the question of remining and recycling, and correctly delineates the scope of liability relief. So too is its emphasis on watershed improvement well conceived. Finally, Inhofe proposes a very rigorous permitting process and potentially responsible party search process, both strengths. However, Inhofe could adopt the succession to title provision of Salazar, and as well as soften its language on recycling. Inhofe would be improved also by addressing the issue of perpetual maintenance with a future landowners' covenant as is found in Udall.

Table: Bill Comparison

	Udall/Beauprez H.R. 1266	Inhofe/Duncan S.2780/H.R. 5404	Salazar/Allard S. 1848
Definition of G.S.	"Remediating Party" is a fed. governmental entity except where mine is on public land. "Cooperating Party" is gov't with respect to mines on public land, or any person or entity. State gov't entities or tribes may act as G.S. for federal land sites.	G.S. has no prior role in creation of residue; has or had no ownership interest or liability at site. A G.S. person is inclusive: fed, state gov't, or for- or nonprofit entity.	Person unrelated in operation or ownership (except solely through succession to title) to site; had no role in creation of residue or its pollutants; and is not liable. "Person" is inclusive: Fed, state, corporation, or any association, or entity.
Funding	Application "provides a budget for the plan and identifies the funding sources that will support the implementation of the plan." EPA presumably would issue rule that establishes that G.S. is financially capable.	Application must show that "permittee has sufficient financial resources to ensure that the permitted work . . . will be completed." Permitted projects eligible for 319 funds.	Application must include a description of financial assurances, if any, to ensure that the work will be completed.
Future Landowners	Application "demonstrates that there is a covenant obligating future landowners to operate and maintain the property so that all environmental benefits of the project authorized by the permit will be fully realized." This is a requirement that future landowners don't disturb existing remediation work. But it does not require future landowners to show their financial capability to maintain treatment.		
Remining	"Any development (exploration, processing, beneficiation, or mining)...not specifically described in a permit...shall be subject to this Act" (CWA). Permits shall be issued only for sites "for which no evidence exists that the lands contain minerals which could economically be extracted through the mining, reprocessing, or remining of such lands." That is, a site may not have obvious remining value.	Any activities not described in permit application and those activities not directly relating to the remediation of historic mine residue at or from the site shall not be authorized under a permit... No new mining shall be authorized under this section.	Purposes of Act are to avoid permitting for ongoing, for profit businesses that specialize in multiple Good Samaritian projects that are designed to be permitted outside otherwise applicable Federal, State, and local environmental laws. The permit shall authorize only those activities that are directly required for the remediation of historic mine residue at the mine site. Any other activity including mining or processing in addition to that required for the remediation of historic mine residue is not authorized.
Recycling	G. S. "may sell or use materials recovered during implementation plan, but the proceeds ... must be used to defray the cost of remediation" at that site or another remediation site.	Application must describe any proposed recycling or incidental reprocessing of historic mine residue at the site and how it relates to the remediation.	G. S. activities may include the use or reprocessing of, or removal of material from, mine residue.
Standards	"applicable water quality standards to the maximum extent practicable,	"to restore watersheds and improve water quality impacted	To meet, to the maximum extent reasonable and

	but in no circumstances worse than the baseline water quality." Permits will be issued only if they show that improvement can be obtained with "reasonable certainty." Permittee shall not be held liable if complete plan is implemented even if no improvement is achieved.	by historic mine sites" "to mitigate the effects of historic mine residue to improve the environment." "the project will result in improvement to the environment, including water quality, in the area of, or downstream from, the mine site"	practicable under the circumstances water quality standards.
Permitting	EPA or delegated state or tribal authority issues permit as part of existing NPDES program	EPA or state/tribal authority	State shall have in place a remediation program that is able to issue permits. State or a substate political entity concurs with issuance of permit, and any relief from enviro law.
Scope of Relief	Covers CWA Sec. 402 Remark: So this relief does not extend to CERCLA liability? CERCLA allows for G. S. provision. Some liability does exist under	CWA and CERCLA Permittee who performs terms of application shall be deemed in compliance with CWA and CERCLA, and is immune from costs or damages under CWA and CERCLA	Toxic Substances Control Act Federal Water Pollution Control Act Safe Drinking Water Act NEPA Solid Waste Disposal Act Clean Air Act Uranium Mill Tailings Radiation Control Act CERCLA State and substate environmental laws.
Site Eligibility	No coverage for sites designated for remediation under CERCLA	No sites on CERCLA NPL	No NPL sites, except where deemed acceptable by Administrator
Comments	Bill is an amendment to CWA because this permitting process could piggyback onto an existing reg. system which is in place in all states, rather than having a whole new systems set up. A mandate to set up a G. S. permitting system may be an unfunded mandate.	NEPA exemption: "No action of the Administrator taken pursuant to this section shall be required to comply with section 102 of NEPA.	NEPA: No action of Administrator shall trigger NEPA.

[The response to questions submitted for the record by Mr. Brown follows:]

Response to questions submitted for the record by Timothy Brown, Ph.D., Center of the American West, University of Colorado

Question: You also advocate, and I quote from your statement, "a broad definition of who might qualify as a Good Samaritan even through some bad actors using this status may be tempted to conduct new mining activities without proper permits. This seems to us a marginal risk given the potential for environmental improvement."

How did you reach this conclusion? What do you mean by "marginal risk" and do you also think mining companies should profit from "Good Samaritan" projects?

Response: Environmental advocates have long expressed the concern that some mining companies might surreptitiously conduct new mining activity while remediating a site under the protection of a Good Samaritan permit. I conclude, however, that this risk is negligible and should not undermine the more real potential benefits that would come from the participation of mining companies in Good Samaritan actions. I therefore believe that mining companies, with their capacity to conduct the physical work of remediation and thereby function as the "operator" of an abandoned mine, must be eligible for Good Samaritan protection.

The question of Good Samaritan eligibility, in any case, is not adequately addressed in any of the proposed bills. As a matter of practicality, Good Samaritan entities are by necessity consortiums of local, state, and government agencies, and nonprofit organizations and for-profit businesses. This reality is not contemplated by any of the proposed statutory definitions of a Good Samaritan, and will require the permitting authority to decide what entity is being granted the cleanup permit. For example, The Snake River Watershed Task Force, a coalition working to improve the water quality in Peru Creek and the Snake River in Summit County, Colorado, lists as members consultants, the Colorado Division of Minerals and Geology,

the EPA, the U.S. Forest Service, Keystone Resort, private citizens, the U.S. Geological Survey, water utilities, the Colorado Department of Public Health and Environment, Summit County Open Space and Trails, the University of Colorado, Trout Unlimited, the Colorado School of Mines, the Trust for Land Restoration, and the Northwest Colorado Council of Governments. All these groups must participate for a successful outcome, but this association remains informally constituted and unincorporated. How would it appear as a Good Samaritan applicant? The permitting authority will have to decide how it will designate one or another member as the Good Samaritan, or if it will give the consortium a unified corporate identity. At a minimum, the liability protection must cover that entity that does the physical work at the mine site, but the operator of any passive or active treatment system must also have protection. There may be in some cases a need to cover multiple entities under the same permit.

Having said that mining companies should be eligible for Good Samaritan protection, I also believe that the Good Samaritan entity should be able to recover its costs so far as is possible from the reprocessing or recycling of historic mineral residues. The residual ore, tailings and waste rock that must otherwise be removed or capped may as well be processed, probably off-site, for their mineral value. However, the question of whether or not a mining company should profit from a Good Samaritan action is based on a faulty premise. Good Samaritan organizations, like the Snake River Watershed Task Force, may include mining companies as participating members, but it is improbable that a mining company could be the sole entity in a Good Samaritan action, and even less likely that a mining company would initiate a remediation project for its dollar-profit potential.

The three Good Samaritan bills, however, are correct in disallowing any remining (extraction of minerals from previously undisturbed ground at a historic mine site) under a Good Samaritan permit. Should a mining company wish to engage in the mining of virgin ground, it should undertake that activity under the purview of normal leasing and permitting processes. There remains, however, compelling commercial reasons why a mining company would spend its resources on Good Samaritan cleanups. For these companies, the greatest value in such projects lies not in the minerals that they might take away from the site, but in the good will and improvement in public image accruing to them from cleaning up the environment. Mining companies should be full partners in watershed improvement associations, and they should enjoy the full commercial benefit that is earned through responsible corporate citizenship. The question of remining should, in any case, be framed in terms of its real economic potential. Of those historic mines in greatest need of remediation, it remains unclear how many offer real remining possibilities. Until this number is given some definition, the question of remining remains abstract; in fact, it may be a moot point if few mines are remining candidates.

Question: Please define "reprocessing of waste, ore or tailings," "reclamation mining," "recycling of waste, ore and tailings," "incidental reprocessing or waste rock piles," and "remining."

Response: With the Subcommittee's permission, I will defer the definitions of those terms to those panelists with technical expertise in mining practices.

Question: You've stated that the consumer is ultimately responsible for the environmental legacy of AML sites. That's a refreshing notion. Just how would get the consumer to pay for that legacy?

Would you do so through a consumption tax on end products? Assuming that the consumer will resist or oppose that tax, doesn't it seem to lead you to the equally compelling notion that a "self-interested person" might well be the vehicle for undertaking Good Samaritan operations by making a profit either as a miner or as a reprocessor of wastes, as both Mr. Quinn and Ms. Skaer seem to favor?

Response: Consumers have an obligation to acknowledge that historic mining greatly contributed to the building of American society, but that legacy also comes with an environmental cost. However, consumers have not seen the true cost of mineral commodities because the historic pricing of mineral commodities has not factored in abandoned mine cleanups. Those costs have been passed on to future generations of Americans. In truth, we have turned out to be that generation, as our need for ample supplies of clean water and for a healthy environment becomes more acute. Part of an honest reckoning with the legacy of mining must be a willingness on the part of consumers to pay for abandoned mine remediation. Fiscal policy is not any area of my expertise, but I would suggest that the proper place to raise revenue for acid mine remediation at historic sites is a tax, not on mining production, but on mineral consumer products. Such a tax would place the financial burden of AML remediation more directly on the consumers who continue to enjoy a quality of life and standard of living largely derived from the historic abundance of mineral commodities.

All participants in a Good Samaritan action are self-interested; they all want to realize some benefit from a mine cleanup. It is not correct to think of a Good Samaritan action as altruistic. However, Good Samaritans may be motivated by many different values. Some want to restore an impaired river so that it once again supports aquatic life. For them, there may be great value in simply reintroducing a rare native trout species. Some others would see in a revived fishery the tourist and recreational dollars brought by anglers. Others might see in a mine cleanup a solution to a municipal water shortage. Mining companies, therefore, would not be unique in expecting to derive some benefit from contributing to a Good Samaritan action.

I have argued above that, in the absence of better estimates on the remining and recycling potential of abandoned mines sites, the greatest value of Good Samaritan participation for mining companies is in the accrual of good will and improvement in their pubic image. Again, the question of for-profit cleanups rests on faulty premises. That a dollar-profit motive would spur Good Samaritan cleanups presumes that a mining company could initiate and conduct such cleanups as a kind of for-profit business. However, such cleanups require extensive cooperation between many different federal, state, and local stakeholders. A mining company could not go it alone. H.R. 5404 acknowledges this reality emphasizing the language of cooperative conservation.

Mrs. DRAKE. Thank you, Mr. Brown, and next we'll recognize Mr. Hal Quinn with the National Mining Association for 5 minutes. Thank you, Mr. Quinn, for being here.

STATEMENT OF HAL QUINN, SENIOR VICE PRESIDENT, NATIONAL MINING ASSOCIATION

Mr. QUINN. Morning, Madam Chairwoman and members of the Subcommittee. Thank you for the opportunity to share with you the National Mining Association's views on promoting the voluntary cleanup of abandoned mines.

Many parties who have participated in this discussion over the years, including the Western Governors Association, the National Academy of Sciences, The Center for the American West, and the Environmental Protection Agency, to name a few, have all recognized that various regulatory and legal impediments deter public and private parties from engaging in voluntary efforts to clean up abandoned mine sites. There seems to be a general consensus that legislation is necessary to remove these barriers and provide a framework of greater regulatory legal certainty in order to promote these public and private efforts.

Today I would like to briefly present five core principles the National Mining Association believes are essential for an effective Good Samaritan legislation.

First, mining companies that did not create the environmental problems at abandoned mine sites should qualify as Good Samaritans. Mining companies have the resources, expertise, experience and technology to efficiently and appropriately assess and address the public safety environmental problems at such sites often in conjunction with their nearby mining operations, where necessary equipment and manpower is already mobilized.

Second, a Good Samaritan project should be subject to review and authorized through a Good Samaritan permit after an opportunity for public participation in the form of notice and comment and, if necessary, a hearing or conference.

Third, a Good Samaritan project should be authorized so long as they result in improvement to the environment, if they will not result in the cleanup of all contaminants or address every

environmental condition. Improvement, not perfection, should be the standard of performance.

Fourth, a Good Samaritan program must provide the flexibility to adjust environmental requirements and standards and address liability exposures arising under Federal and State laws, particularly liability under CERCLA, the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, and the Resource Conservation and Recovery Act, which all deter Good Samaritans from undertaking beneficial remedial actions.

Finally, the types of remedial activities that could be authorized as Good Samaritan activities must also include the reprocessing and reuse of ores, minerals, waste and materials existing at the site. Such processing and reuse of historic mining materials may often be the most efficient and least costly means of cleaning up the AML site.

The fact a Good Samaritan can recover its costs and even make a profit on such activities would provide just an additional incentive for engaging in such AML cleanup efforts. Legislation which embodies these core principles would remove the most significant barriers and provide appropriate incentives for private and public efforts to move forward with voluntary cleanup efforts while protecting the environment and the interests of the public.

We would commend to the Subcommittee's attention S. 1848, the Cleanup of Active and Abandoned Mines Act, introduced by Senators Allard and Salazar of Colorado. We believe that bill contains many of the core elements necessary to remove the existing impediments that deter mining companies and others from undertaking voluntary investigations and remediations of abandoned mines.

Again, I thank the members of the Subcommittee and the Chair for the opportunity to appear today and share with you our views about legislation designed to remove barriers to the voluntary cleanup of abandoned mine sites.

[The prepared statement of Mr. Quinn follows:]

Statement of Harold P. Quinn, Jr., Senior Vice President and General Counsel, National Mining Association

Introduction:

My name is Hal Quinn. I am the Senior Vice President and General Counsel of the National Mining Association (NMA). NMA is the national trade association whose members include the producers of most of the nation's coal, metals, industrial and agricultural minerals, the manufacturers of mining and mineral processing machinery, equipment and supplies, and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

The mining industry has long been interested in promoting the voluntary cleanup of abandoned mine lands (AML's). NMA, in cooperation with the Western Governors' Association, started the Abandoned Mine Lands Initiative (AMLI). The AMLI was the first cooperative effort between industry and government to address AML issues, and focuses on disseminating data on the scope of the AML problem, technologies that can be used to address AML sites, and legal impediments to voluntary cleanup of AML's. NMA, along with the Office of Surface Mining (OSM) and the Interstate Mining Compact Commission (representing the States), also co-founded the Acid Drainage Technology Initiative (ADTI). The purpose of the ADTI is to develop and disseminate information about cost-effective and practical methods and technologies to manage drainage from active and abandoned mining and processing operations. A report published in 1998 by the National Mining Association entitled "Reclaiming

Inactive and Abandoned Mine Lands—What is Really Happening"[1] describes how, given the right opportunity, the mining industry can play a significant role in improving environmental conditions at abandoned and inactive mines.

I am here on behalf of the National Mining Association and its member companies to urge this committee to develop Good Samaritan legislation that will create a framework for private parties and government agencies to voluntarily remediate the environmental problems at abandoned hardrock mine lands. The Western Governors' Association, the National Academy of Sciences, and the Center of the American West have all recognized the legal impediments to voluntary clean-ups of AMLs deriving from federal and State environmental laws, and have urged that these impediments be removed.[2]

I would like to summarize five key concepts that must be included for effective Good Samaritan legislation:

1. Mining companies that did not create the environmental problems caused by the AML in question should qualify as "Good Samaritans." Mining companies have the resources, expertise, experience and technology to efficiently and appropriately assess the problems, often in conjunction with undertaking reclamation measures at nearby active mines which the company operates.
2. Individual Good Samaritan projects should be subject to review and authorization by EPA, after adequate opportunity for public notice and comment. Such authorization, which can be granted in the form of a Good Samaritan permit, would specify the scope and details for the Good Samaritan project that will be undertaken. Governmental authorization of such projects will ensure that a Good Samaritan permit is not used to engage in other activities that are not necessary to remediate the site.
3. Perfection or significant improvement should not be the clean-up standard in every case, particularly where persons will be voluntarily remediating problems for which they have no legal or factual responsibility. Good Samaritan projects should be allowed so long as they result in an improvement to the environment, even if they will not result in the clean-up of all contaminants at an AML or the attainment of all otherwise applicable environmental standards, such as stringent water quality standards.
4. There must be discretion under any Good Samaritan program to adjust environmental requirements, standards and liabilities arising under State and federal environmental laws (particularly liability under CERCLA, the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act and others) that deter Good Samaritans from undertaking beneficial remedial actions.
5. The types of remedial activities that can be authorized as Good Samaritan activities must include the reprocessing and reuse of ores, minerals, wastes, and materials existing at an AML—even if this may result in the mining company recovering metals from such wastes and making some cost recovery and profit. Such processing and reuse of historic mining materials may often be the most efficient and least costly means of cleaning up an AML, with the wastes from any reprocessing or reuse activities being disposed of in accord with current environmental standards. The fact that a Good Samaritan could potentially make a profit on such activities would provide an added free market incentive for companies to clean up AML's, although it should be kept in mind that, given the costs involved and the volatility of commodity prices, it is just as likely that a company could lose money as make a profit. Considering the level of downside risk involved, there must be the possibility for at least some upside potential. The goal should be on remediating the AML's and if the potential to realize a profit from an AML provides an incentive to achieve that goal then it should be allowed.

BACKGROUND

By way of background, mining activities have taken place in the Western States (including on public lands) for the past century and a half. Most of this mining occurred before the advent of modern environmental regulation at the State or federal level. As a result, many historic mining operations were abandoned without being

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[1] Reclaiming Inactive and Abandoned Mine Lands—What Really is Happening, Struhsacker, D.W., and Todd, J.W., prepared for the National Mining Association, 1998.

[2] See Western Governors' See Western Governors' Association & National Mining Association, Cleaning Up Abandoned Mines: A Western Partnership at 8, available at www.westqov.org/wqa/publicat/mininqre.pdf; National Research Counsel, Hardrock Mining on Federal Lands (1999)at 72, reproduced at http://www.nap.edu/html/hardrockfedland/index.html; Center of American West, Cleaning Up Abandoned hard rock Mines in the West (2005) at 20-24, available at www.centerwest.org/cawabandonedmines.pdf.

adequately reclaimed to ensure against potential future environmental damage. Although there are thousands of AML's located in the western States, no one really knows how many pose significant dangers to our nation's waterways, soils, groundwater or air. The Western Governors' Association has estimated that more than 80 percent of AML's do not pose any environmental or safety problems.[3] The Center of the American West recently concluded that "only a small fraction" of the abandoned mines are causing significant problems for water quality.[4] Nonetheless, the federal land management agencies and the States are generally agreed that at least some percentage of these AML's are causing or contributing to the impairment of rivers, streams, and potential contamination of air and groundwater resources.

At the vast majority of AML's, there are no financially viable owners, operators, or other responsible persons whom the federal government or the States can pursue in order to fund clean-up of these sites. While the federal land management agencies can use monies within their budgets to investigate or remediate AML's located on the public lands, the fact is that those budgets are limited. So are grant monies that can be provided under environmental programs aimed at investigating or remediating pollution, such as Clean Water Act §319 grants or grants under the Brownfields Revitalization Act. Effective Good Samaritan legislation can, we believe, provide incentives for a diverse array of persons, ranging from local, state, and federal agencies to citizen's groups, non-Governmental Organizations, private landowners, and companies, to partially fill this gap and help remediate some AML's posing environmental dangers.

ELEMENTS OF EFFECTIVE GOOD SAMARITAN LEGISLATION

Efforts to enact Good Samaritan legislation have been ongoing in the Congress for the past decade. It has become clear to NMA and its members that, in order to be effective, Good Samaritan legislation must include a number of elements.

1. Mining Companies must be allowed to qualify as Good Samaritans. The NMA supports the concept that to be a Good Samaritan, an entity must not have caused the environmental pollution at issue. That does not mean, however, that all mining companies should automatically be excluded from the universe of persons who can qualify as Good Samaritans. The majority of AMLs were created decades before modern environmental laws were enacted. There is simply no reason to preclude an existing company that is not responsible for creating the orphaned site from being a Good Samaritan.

   To the contrary, there are good reasons why mining companies should be allowed to qualify as Good Samaritan. Mining companies have the resources, know-how and technology to properly assess environmental dangers posed by an AML, and to efficiently remediate such sites. Indeed, to the extent that AML's are located near active mining operations, a mining company would in the best position to efficiently use equipment and personnel from its current operations, including its current reclamation operations, to remediate or reclaim a nearby AML.
2. The EPA Must Authorize Good Samaritan Projects. Good Samaritan projects should be approved by EPA, or by a state implementing a delegated program, after prior notice to and comment from the public. Such approval should be given if the project will result in environmental improvement. Appropriate conditions (such as monitoring requirements and financial assurance requirements) should be included in a Good Samaritan permit.
3. EPA must be given discretion, on a case by case basis, to revise the regulatory and/or liability provisions of federal and State environmental law that might otherwise apply to the Good Samaritan. The main obstacles to mining companies and others to conduct voluntary clean-ups at AML's are the potential liabilities and requirements deriving from federal and state environmental laws. A Good Samaritan that begins to clean up, or even investigate, an AML runs the risk of being an "operator" under CERCLA, and could become liable for cleaning-up all pollution at the site to strict Superfund standards. A Good Samaritan also runs the risk of having to comply in perpetuity with all Clean Water Act requirements for any discharges from the site, including stringent effluent limitations and water quality standards. These are liabilities and regulatory responsibilities that mining companies and others are unlikely to voluntarily accept, particularly with respect to AML's that are posing significant environmental problems. NMA members have, for instance, in the past

[3] Western Governors' Association & National Mining Association, Cleaning Up Abandoned Mines: A Western Partnership at 5, available at www.westgov.org/wga/publicat/miningre.pdf.

[4] Center of the American West, Cleaning Up Abandoned Hardrock Mines in the West (2005) at 31.

considered taking actions to voluntarily address pollution at a certain inactive site near active operations throughout the West, but ultimately declined to do so because of the potential liability concerns under CERCLA, the Clean Water Act, the Clean Air Act, and possibly other environmental laws.

Some have argued that the EPA's discretion to revise regulatory requirements should be limited to the Clean Water Act and CERCLA. A Good Samaritan could easily find itself incurring liability under other environmental acts as well. While NGOs may not be particularly worried about being sued under these other laws out of professional courtesy to each other, a mining company has no such expectation. In order for the mining industry to participate in Good Samaritan efforts, there needs to be assurance that the mining company will not be subject to suits after the fact for having done exactly what was permitted by the EPA.

Good Samaritan legislation should not be so narrowly drafted as to adopt a one-size-fits all approach. Since the environmental characterization of each site will vary drastically, the permit-writer must be given the discretion to tailor the permit to the specifics of the site. This should be done on a site-by-site basis. The legislation must allow the permit issuer, on a case-by-case basis, to relax the liability provisions and regulatory standards that might otherwise apply to the Good Samaritan project so long as: (1) the project would result in some environmental benefit; and (2) the project would not go forward absent the waiver of such provisions and standards. As discussed previously, the Western Governors' Association, the National Academy of Sciences and the Center for American West have all urged that certain environmental standards and liabilities otherwise applicable to a Good Samaritan be waived or relaxed, in order to encourage Good Samaritan clean-ups.

4. Good Samaritan legislation must not unduly narrow the types of activities that constitute legitimate remediation. Abandoned hardrock mines pose a variety of environmental and safety problems throughout the West. They also call for a variety of clean-up measures. At some sites, the physical removal of wastes and their disposal off-site may be the appropriate solution. At other sites, it may be a matter of diverting stormwater or drainage away from wastes and materials that are highly mineralized. And yet, at other sites, the best, most efficient, and least costly way to partially or wholly remediate the environment may be to collect the various wastes and materials located at the site, to then process those wastes and materials to remove any valuable minerals contained in them, and then to dispose of the wastes from the reprocessing operation in an environmentally-sound manner.

AML's are located in highly mineralized areas—that is why mining occurred at those sites in the first place. Often, materials and wastes abandoned by historic mining operations have quantities of a desired metal (such as gold, silver, zinc, or copper) that can be recovered with modern mining technology. Allowing the mining company—particularly a company with operations nearby to an AML "to process such materials and wastes as part of the Good Samaritan project would provide a financial incentive for mining companies to remediate such sites.

We recognize that some groups are opposed to allowing mining companies to ever make a profit through Good Samaritan activities. Some groups have even argued that a mining company might seek to misuse Good Samaritan legislation as a way to engage in new mining, beneficiation and mineral processing operations without complying with the environmental laws that apply to such operations.

Such concerns are misplaced. NMA member companies have no plans to utilize Good Samaritan legislation to undermine application of all legitimate mining projects. Nor could they. Under our proposal, a Good Samaritan could not proceed without a permit. Prior to issuing a permit, the regulatory agency will certainly be aware—and if they are not, the public would make them aware—if a given project is in fact a stand-alone economically viable project that the mining company would undertake without Good Samaritan protections. The permit-writer will also know whether what is being authorized is focused on remediating existing pollution, or whether the project is a for-profit operation operating under the guise of cleanup.

We also disagree with the notion that a mining company should never be in a position to make a potential profit from clean-up activities. Unlike governmental entities and some NGOs who might undertake Good Samaritan activities, a mining company will be spending its own funds (not grants obtained

from EPA or States) to undertake remediation activities. If it turns out that the price of a metal recovered through remediation activities is such that the mining company has made a profit, this does not detract from the fact that, without spending public funds, the mining company has in fact remediated an environmental danger. Moreover, the price of any given metal could just as likely go down as go up, leaving the mining company with no profit. In fact, a number of potential complications or unexpected conditions could arise during clean-up and rapidly change the economics. Considering the level of downside risk involved, there must be the possibility for at least some upside potential.

CONCLUSION

Legislation that embodies the concepts discussed above will provide incentives to mining companies and other entities to go forward and voluntarily remediate AML's, while fully protecting the environment and the interests of the public. We would commend to the Committee's attention S. 1848, the Cleanup of Inactive and Abandoned Mines Act, introduced by Senators Wayne Allard (R-Col.) and Ken Salazar (D-Col.) as well as H.R. 5404, the Good Samaritan Clean Watershed Act, introduced by Chairman John Duncan (R-TN.) on behalf of the Administration. We believe that these bills represent a good starting point for those elements necessary to remove existing legal impediments that deter companies and others from undertaking investigations and remediation of AML's. We also believe that these bills fully protect the public interest by requiring EPA to sign off on any Good Samaritan permit, and by only allowing such permits in situations where the environment will be significantly benefited.

I will be happy to answer any questions that members of this Committee may have.

[The response to questions submitted for the record by Mr. Quinn follows:]

NATIONAL MINING ASSOCIATION
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SUITE 500 EAST
WASHINGTON, D.C. 20001

SEPTEMBER 1, 2006

Congressman James Gibbons
Chairman, Subcommittee on Energy and Minerals
House Resources Committee
1626 Longworth HOB
Washington, DC 20515

Dear Chairman Gibbons:

Thank you for inviting the National Mining Association (NMA) to testify before the Committee on Resources Subcommittee on Energy and Mineral Resources at the July 13, 2006 hearing regarding "Opportunities for Good Samaritan Cleanup of Hardrock Abandoned Mine Lands." This letter provides NMA's responses to follow-up questions posed by members of the subcommittee.

1. **Mr. Quinn and Ms. Skaer, while the EPA seems to be advocating a Good Sam program that is a parallel to the Brownfields program, you do not seem to be taking the same approach. Your testimony suggests that what you are after is an alternative to the permitting programs that exist for environmental control of mine operations. Please explain.**

NMA is not advocating an alternative to the permitting programs that exist for environmental control of mining operations. In fact, NMA does not anticipate that enactment of Good Samaritan legislation would in any way affect the current regulatory scheme that governs current active mining operations. What NMA does advocate is legislation that would provide the regulatory agencies with the authority to exempt a "Good Samaritan" from some or all liability under certain environmental laws that deter voluntary cleanup of abandoned mined lands (AML). Furthermore, NMA believes the mining industry is best equipped to provide the necessary expertise, experience and technology to assess and design appropriate solutions, often in

conjunction with the completion of reclamation activities at nearby active mines operated by a mining company.

2. Please define the following terms in the context of a "Good Samaritan" permit:

- Reprocessing of waste, ore or tailings:
  - Activities associated with the beneficiation or re-processing of previously mined and/or processed material (such as low-grade ore stock piles, leached heaps, waste rock, and tailings) found at an AML site for the purpose of extracting metals. As indicated in our testimony before the Committee on July 13, such previously mined and/or processed materials found at AMLs often contain concentrations of desired metals (such as gold, copper, lead, etc.) or minerals that can be recovered through processing these materials. The waste streams from reprocessing operations can be managed in an environmentally-sound manner. The result is the amelioration of pollution caused by such previously mined and/or processed material.
- Reclamation mining or Remining:
  - Recovering metals or minerals from mined and unmined mineral resources in conjunction with reclaiming an AML for the purpose of contaminant removal. This can be accomplished at sites in and near active mining operations through synergism between the active mine/mill and the AML site, although it can also be accomplished at stand-alone AML sites. Reclamation mining capitalizes upon industry expertise, equipment, personnel, existing mine waste disposal and mineral processing facilities and infrastructure to close, reclaim, or remediate an AML site. The term remining may include: the processing of waste rock and low grade stock piles and/or reprocessing of tailings and previously leached materials to recover desired metals; removing and relocating old mine wastes to existing (permitted) facilities such as tailings, or waste rock facilities; removing and relocating old mine wastes to new waste repositories; stabilizing old in-situ mine wastes using appropriate liners, caps, and covers; moving or removing ores or materials from a mine that are a source of acid mine drainage; and remediating groundwater by taking advantage of de-watering activities to support pump and treat opportunities.
- Recycling of waste, ore and tailings:
  - Reuse of waste, ore or tailings from an AML for purposes of metal extraction and for other uses such as construction of tailings dams.
- Incidental reprocessing of tailings or waste rock piles:
  - Recovery of metals or other valuable constituent's incidental to AML cleanup activities.
- Remining:
  - See Reclamation Mining.

Again, NMA appreciates the opportunity to present our views on "Good Samaritan" legislation.

SINCERELY YOURS,

HAROLD P. QUINN, JR.

Mrs. DRAKE. Thank you, Mr. Quinn.

Next Ms. Laura Skaer, with Northwest Mining Association. Thank you for being here.

STATEMENT OF LAURA SKAER, EXECUTIVE DIRECTOR, NORTHWEST MINING ASSOCIATION

Ms. SKAER. Thank you, Madam Chairwoman and members of the committee. I am here today to testify on behalf of the more than 1,300 members of our association that work in the mining industry and reside or work in more than 31 States. Our members are the experts at reclaiming and remediating mine sites. It is a significant part of what our membership does on a daily basis, and we are here to tell you that we are ready, willing and able to come to the

table and help address the abandoned mine land issues in the West.

We are ready to take on this problem of abandoned mines, but as several other witnesses have indicated, there are significant impediments from potential liability under various Federal and State environmental laws, and we are here to ask Congress to help us come to the table by removing those impediments.

We also believe that Good Samaritan legislation should include significant encouragement and incentives to promote the cleanup of these lands through Good Samaritan actions. If I was sitting on your side of the dais and I looked out and saw an industry that had the expertise and the knowledge and the experience and the equipment and the personnel and the resources and the desire to tackle this issue, I would want to try to find a way to bring them to the table. This is an industry that has more experience cleaning up mine sites and reclaiming mine sites than everybody else put together. I would want to try to find a way to bring them to the table.

One way to do that is to allow reprocessing and reuse and remining of ores at the mine site. In many cases, the only way you are going to achieve an improvement in water quality at the mine site and downstream is to allow the removal of the mineralized material that is at that site because it is the mineralized material that is causing the pollution in the first place, and if you just allow the removal of just the waste rock and just the waste materials and the tailings piles at the site, you may not truly get to the heart of the problem, and so removing that mineralized material is a way to improve water quality, and may be the only way to improve water quality at the site.

We have to ask ourselves, what's the goal here? And if the goal is to improve water quality and clean up the environment, then we should not, you know, impede our ability to do that by putting restrictions on the mining industry to participate as a Good Samaritan or put restrictions on their ability to use remining and even if they make a little profit, you know, this is a free market system and that incentive should carry forward.

There's a couple of examples that I have given in my written testimony where from the Northwest that kind of shows the need for Good Samaritan action. There is one mine site that is now closed in Idaho where the mining company had historical mine deposits and waste rock on their mine property in Napias Creek that was former salmon habitat, and by having the equipment nearby, they were able to remove those materials, take them to their mine, run them through the mill, generate some cash out of it, and in the process restored Napias Creek to salmon habitat. Everybody wins.

In the Northwest—northeast Washington, at the Ponderay Mine, State and Federal officials have approached the mining company there to tackle legacy issues in the vicinity of the mine, but in each and every case the potential of liability under the Clean Water Act and other State and Federal environmental laws has, you know, prohibited the company from doing essentially what was done in Idaho.

So the industry is there. They have proven that they can do this, and can take, you know, can help make important strides to

cleaning up the environment. Of the legislation that has been introduced, we believe that the Allard-Salazar bill is the best starting point, but we have some suggestions that we put forth in our written testimony that could improve that bill so that it actually works for on-the-ground cleanup. Unfortunately, the Administration's bill as drafted in our members' opinion is not going to generate on-the-ground cleanup of a significant extent.

Thank you.

[The prepared statement of Ms. Skaer follows:]

Statement of Laura Skaer, Executive Director, Northwest Mining Association

INTRODUCTION:

My name is Laura Skaer. I am the Executive Director of the Northwest Mining Association, a 112 year old non-profit mining industry trade association. Our offices are located in Spokane, Washington. NWMA has more than 1,300 members residing in 31 states and 6 Canadian provinces. Our members are actively involved in exploration, mining and reclamation operations on BLM and USFS administered land in every western state, in addition to private land. Our membership represents every facet of the mining industry, including geology, exploration, mining, reclamation, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. Our broad-based membership includes many small miners and exploration geologists, as well as junior and large mining companies. More than 90% of our members are small businesses or work for small businesses. Our members have extensive first-hand experience with reclaiming active and inactive mine sites and remediating a variety of environmental conditions and safety issues at these sites.

Our members also have extensive knowledge of Abandoned Mine Lands (AMLs) in the U.S. Two of our members, Debra W. Struhsacker and Jeff W. Todd, researched and authored a study published in 1998 by the National Mining Association entitled "Reclaiming Inactive and Abandoned Mine Lands—What Really is Happening." (A copy of this study is being included in the record). This study documents that the mining industry has spent tens of millions of dollars to cleanup numerous AMLs throughout the west. As evidenced by this report, the mining industry is ready, willing and able to play a significant role in cleaning up abandoned and inactive mines. We are here today to ask Congress to do its part and enact Good Samaritan legislation that will remove the legal liability hurdles and provide incentives for a variety of persons and entities to remediate and reclaim AMLs throughout the West.

Unfortunately, the number one impediment to voluntarily Good Samaritan cleanup of abandoned mine lands is the potential liability imposed by existing federal and state environmental laws, in particular the Clean Water Act (CWA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (commonly known as Superfund), the Resource Conservation & Recovery Act (RCRA), and the Federal Toxic Substances Act. Under these laws and others, a mining company, individuals, or other entities that begin to voluntarily remediate an abandoned mine site could potentially incur "cradle-to-grave" liability under the CWA, CERCLA, and other environmental laws, even though it did not cause or contribute to the environmental condition at the abandoned mine land site.

Furthermore, they could be required under the CWA to prevent discharges to surface waters from the AML in perpetuity, unless those discharges meet strict effluent limitations and do not result in exceedences of stringent water quality standards, something that may not be possible; and in any event, may be so expensive that no company, individual, or other entity would undertake a voluntary cleanup.

Virtually everyone who has looked at the AML issue in the west has recognized and documented the legal impediments to voluntary cleanup of AMLs and have urged that those impediments be eliminated. These groups include the Western Governors Association, the National Academy of Sciences, and the Center for the American West.

The time has come for Congress to pass effective Good Samaritan legislation that will create a framework, with incentives and liability protection for numerous entities, including mining companies, local, state and federal agencies, NGO's, and tribes to voluntarily remediate of environmental problems caused by others at abandoned hardrock mine sites in the U.S.

Elements of Effective Good Samaritan Legislation:

To be effective, Good Samaritan legislation must embody the following key provisions:

1. Mining companies that did not create environmental problems at an AML must qualify as Good Samaritans. No one knows more about reclaiming and remediating mine sites than the mining industry. The mining industry has the desire, the resources, expertise, experience, and technology to effectively and efficiently assess the environmental and safety issues present at an AML and to properly remediate, reclaim and secure those sites. This often can be done in conjunction with reclamation activities at nearby active mines which the company operates, resulting in an efficient use of resources to improve the environment and enhance public safety.

   For example, Teck Cominco American Incorporated purchased the Pend Oreille Mine in Pend Oreille County, Washington in 1996 and brought it back into production in 2004. It is located in a setting where a substantial amount of historical mining took place before there were environmental laws and regulations and modern mining practices. There are many abandoned mine sites in the area of the Pend Oreille Mine. In working with the local community, Teck Cominco determined that many of the old mine openings presented a potential hazard to public safety. Those that did not involve environmental issues were voluntarily closed through the installation of bulkheads in several of the openings.

   Teck Cominco has been approached by state and federal agencies to see if it could process some of the historic waste rock piles, ore piles and concentrate accumulations in the area. In each and every case, the company chose not to undertake this cleanup effort due to the strict nature of its Clean Water Act authorization that prohibits any tailings other than those generated from the Pend Oreille Mine to be placed in the lined and approved tailings disposal facility. Furthermore, the company is reluctant to undertake cleanup efforts at any of these old sites for fear of being deemed an operator and incurring cradle-to-grave liability for the site under a variety of federal and state environmental laws.

   All mines run out of ore and towards the end of production may look for additional sources of mineralized material to process. Having the ability to augment or extend the productive life of the mine benefits the mining company, the community and the nation. It also benefits the environment through metal source reduction as more metal will ultimately be recovered from the AML sites and the resulting tailings are placed in a regulated, engineered and permitted containment structure. This promotes conservation of the resource and sustainable development with a net improvement in the environment.

   This is but one of many, many examples of sites throughout North America where existing mines are located adjacent to abandoned historical mines. Another example from the Northwest is Meridian Gold Company's Beartrack Mine near Salmon, Idaho. Deposits from historic mining were included on the mine property. As a result, Napias Creek no longer supported salmon habitat. Meridian used the equipment and personnel that were on-site at Beartrack to remove the tailings and waste rock piles from Napias Creek and fully remediate the site and restore the streambed to salmon habitat. The company won several environmental awards for their work. The mine was able to process tailings and waste rock materials from historic mining located on the mine property (emphasis added), at the Beartrack Mine, increase the ultimate recovery of metals from the mine and improve the environment. A scenario where everyone wins.

   I have emphasized located on the mine property to highlight the important distinction between the Pend Oreille mine example and the Beartrack example. The Napias Creek tailings and waste rock piles were located on the mine property and covered by Beartrack's operating permits. The lack of effective Good Samaritan legislation has prevented, to date, the same win-win-win result at Pend Oreille.

   In Nevada, the mining industry initially expressed interest, as Good Samaritans, in remediating and reclaiming several AMLs. The AML sites included Easy Junior, Elder Creek, Golden Butte, Ward, Mt. Hamilton, Griffon, Aurora Partnership, Kinsley, Norse-Windfall, Arimetco and Gold Bar.

   In each case, the potential cradle-to-grave liability exposure under federal environmental laws prevented the mining industry from using its experience, expertise, technology, equipment and capital to remediate and reclaim the AML sites.

Four of the sites (Easy Junior, Golden Butte, Elder Creek and Ward) have been and/or are being remediated under the Army Corps of Engineers Restoration of Abandoned Mine Sites (RAMS) program. Sadly, as good as the RAMS program is, it is not adequately funded to perform complete reclamation to current mining industry standards. If there was effective Good Samaritan legislation in place, then these sites would have been closed by the mining industry, and the final result would have been more than the minimum needed to ensure basic environmental protection.

Some of the other sites have been closed and reclaimed in part using a combination of bond money and federal agency funding. Again, the lack of Good Samaritan legislation prevented industry from participating in the remediation, reclamation and closure of these sites.

2. A potential Good Samaritan must be able to gather the needed site characterization data to develop a technically sound remediation proposal without having to conduct a Potentially Responsible Party (PRP) search or go through a long, complicated and involved permitting process. A Good Samaritan must be able to conduct a site survey without the potential for becoming liable for the site solely by virtue of gathering data.
3. Individual Good Samaritan projects should be subject to review and authorization by the federal government or by an individual state's abandoned mine land program (and/or the environmental permitting authority for those states where EPA has delegated Clean Water Act authority). In addition to providing for review and authorization by EPA, the bill should authorize the Army Corps of Engineers' RAMS program to issue Good Samaritan permits. The chairman will recall that he authored the legislation that created the RAMS program in 1999 as part of that year's Water Resources Development Act (WRDA). Although the RAMS program has not been adequately funded, its stakeholder approach to remediating and restoring abandoned mine sites is a model that is well-suited for Good Samaritan cleanups.

   Unfortunately, the RAMS program will sunset at the end of the next fiscal year if it is not reauthorized. The only reason the RAMS program has not been reauthorized is Congress has not passed a WRDA in six years. We urge the Chairman to communicate his support for RAMS to both the House and Senate authorizing committees for WRDA, or find a way to insert reauthorizing language in a bill that will move this year.
4. The Good Samaritan permitting process should include meaningful public input. The permit process also must be simple, straight-forward and understandable. The environmental requirements for a Good Samaritan project should be wrapped into a single permit. The permit should be approved only if the project is technically sound and promises overall improvement to the environment and/or securing of safety hazards.
5. The Good Samaritan must have full legal protection under the permit. That is, a Good Samaritan permit-holder must be able to obtain a specific, concrete list of the federal, state and local environmental laws that would be deemed satisfied by completion of the work authorized under the permit. One of the Good Samaritan bills introduced in the Senate, S. 1848, contains a list of federal environmental laws that is a good starting point.
6. Good Samaritan projects should be allowed as long as they result in an improvement to the environment, even if they will not result in the complete cleanup of all contaminants at an abandoned mine land site or the attainment of all otherwise applicable environmental standards, such as stringent water quality standards. To quote an oft-repeated phrase, "don't let pursuit of the perfect be the enemy of the good." An 85 percent improvement in water quality downstream from an AML site is a far better result than no cleanup due to a Good Samaritan's concerns that their cleanup activities may not be able to achieve water quality standards that would be applicable at a modern mine.
7. The permitting authority must be given discretion under any Good Samaritan legislation to make site-specific adjustments to environmental requirements, standards and liabilities arising under state and federal environmental laws that could otherwise be applicable and prevent Good Samaritans from undertaking remedial actions. This is not a new concept. The Applicable or Relevant and Appropriate (ARAR) approach under CERCLA might be a reasonable starting point.

   The permitting authority also should have the discretion to waive the PRP search requirement. A Good Samaritan that is willing to spend private monies to remediate and reclaim an AML site should not have to spend time and resources conducting and certifying a PRP search. It should not matter whether

there might be a PRP. The goal should be environmental improvement, not finding someone to blame.

8. Any Good Samaritan legislation, to be effective and result in actual, on-the-ground cleanup, must allow the reprocessing, remining, and reuse of ores, minerals, waste rock piles and other materials existing at an AML, even if this results in the mining company or other Good Samaritan recovering metals from such materials and making some cost recovery and perhaps a little profit on its Good Samaritan operations. Given the volatility and cyclical nature of metal prices, it is just as likely that the costs of any Good Samaritan project would exceed the revenue generated by removal and reprocessing. In any event, these activities should be allowed as part of a Good Samaritan project only if the overall result would be an improvement in environmental conditions at the site.

   In many cases, processing tailings, waste rock piles and other historic mining materials at AML sites may be the most efficient and least costly means of cleaning up a site. The waste from any reprocessing or remining activities would then be disposed in compliance with current environmental standards and practices. The net result would be an efficient use of resources to increase the ultimate recovery of metals the U.S. needs for strategic and economic purposes while improving the environment.

   AMLs are generally located in highly mineralized areas. Not only are these highly mineralized areas the location of historic mining, they are likely to be the location for future mines as prices and technology allow. A Good Samaritan project could lead to the discovery of a new mine, which would require the full NEPA and mine permitting process, and would be allowed only if the proposed new mine complied with all current standards of environmental protection. The mining industry has no desire to use Good Samaritan legislation to avoid the mine permitting process or the application of current environmental laws and regulations that apply to today's modern mines. The Good Samaritan permitting authority, through permit conditions, can easily prevent the misuse of a Good Samaritan permit.

   The Mining and Minerals Policy Act of 1970 (30 U.S.C. § 21(a)), specifically establishes the Congressional intent "to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals, metal, and mineral reclamation industries." Including remining and reprocessing authority in Good Samaritan legislation is consistent with and promotes this Congressional intent.

   We must ask ourselves what are the goals of Good Samaritan legislation? If a goal is to improve water quality, the environment and public safety by remediating and reclaiming Abandoned Mine Sites, which by definition have no current owner or financially responsible party, then Good Samaritan legislation must encourage and incentivize Good Samaritan cleanups. One way to do this is to allow the Good Samaritan to reprocess and remine.

9. Good Samaritan legislation should allow Good Samaritan actions at AMLs to qualify as off-site mitigation under the CWA for mining companies permitting new mines or expansion of existing mines. This would provide an additional incentive for a mining company to undertake a Good Samaritan cleanup while meeting the permitting requirements at new or expanded.

Superfund is Not the Answer:

Some Members of Congress and anti-mining groups argue that instead of focusing on Good Samaritan legislation, Congress should fund the Superfund program and EPA, under the Superfund program, should address all Abandoned Mine Lands. In our opinion, this is a wrong-headed approach to remediating and reclaiming historic abandoned mine lands.

Superfund does not have a very good track record at mine sites. Superfund was not designed to address natural processes that result in contaminated watersheds at AMLs. The historic mining communities of Aspen and Leadville in Colorado, Butte, Montana, Triumph, Idaho and the Bunker Hill site in northern Idaho's Silver Valley all have experienced first hand the failures of Superfund and the costly results of misguided policies and millions of dollars wasted on legal delays and repetitive studies. Of the billions of dollars spent of Superfund efforts, only 12% of those moneys have actually gone into cleaning up the environment while the balance went to legal and consulting fees.

In each of the Superfund sites cited above, the cleanup costs have exceeded reasonable estimates by a magnitude of three to five times. Bunker Hill is a prime example of the waste that occurs when an EPA-led Superfund effort is undertaken

at mine sites. This can be demonstrated by comparing Bunker Hill with another example from the Silver Valley in northern Idaho.

Just outside the Bunker Hill Superfund site are many historic mining sites on Nine Mile and Canyon Creeks. Two mining companies working together with the State of Idaho were able to cleanup and remove historic mine wastes, tailings and waste rock piles from Nine Mile and Canyon Creeks, and restore fish habitat on the two creeks at cleanup costs one-fourth to one-fifth the cleanup costs incurred by EPA under Superfund on a per-cubic-yard of material removed basis.

I have visited these sites on at least three occasions and can personally testify to the outstanding remediation and reclamation on Canyon and Nine Mile Creeks, and that there has been substantial improvement in water quality as a result of these efforts. And, the work is done, unlike the work at Superfund sites which seems to never end.

There may be some sites for which Superfund is the appropriate remedy, but let's not limit the tools we have in the toolbox. Thoughtful and effective Good Samaritan legislation that encourages and incentivizes Good Samaritans is an important tool to add to the Abandoned Mine Land remediation and reclamation toolbox.

Current Good Samaritan Proposals:

Our members are familiar with all Good Samaritan legislation that has been drafted and introduced over the past ten years. While we applaud any and all efforts to advance the Good Samaritan concept, our analysis of most Good Samaritan legislation introduced is that it is not intended for use by the mining industry. This is especially true of the Administration's bill. This not only disappoints our members, it would be a huge opportunity lost for the nation and for the environment if mining companies were not allowed to utilize Good Samaritan legislation.

With respect to the two bills that have been introduced in the Senate, the Administration's bill introduced by Chairman Inhofe, and S. 1848 introduced by Senators Salazar and Allard from Colorado, we believe S. 1848 is clearly the better bill and is a good starting point. We also believe that S. 1848 can and should be improved to ensure that it results in on-the-ground Good Samaritan projects at AML sites. S. 1848 already incorporates many of the nine (9) concepts listed above, and could be improved by: 1) providing a mechanism for conducting site investigations without incurring environmental liability and without having to go through the full permitting process; 2) the PRP search should be significantly streamlined and eliminated when only private monies are funding the cleanup; and 3) any restrictions on the ability of a mining company or other Good Samaritan to remine, remove and reprocess ores and other waste materials from a mine site should be eliminated.

The Administration's bill, as currently drafted, is pretty much a non-starter for our members. The major problems our members have with this bill are: 1) the liability relief provision is too restrictive; 2) the PRP search requirements are too cumbersome and costly; 3) the permitting process is too complex and rigid; 4) a full PRP search and certification is required for privately funded cleanups; 5) the definition of a Good Samaritan is too limiting—merely appearing in the chain of title should not disqualify someone; and 6) there are too many restrictions on remining and reprocessing. Significant on-the-ground Good Samaritan activities at AMLs are not going to take place under the Administration's bill without significant changes.

CONCLUSION:

Industry wants to see abandoned mines cleaned up. After all, they are our dirty pictures, our Achilles Heel. Mining opponents use pictures of historic, unreclaimed abandoned mines to foment public opposition to new mine proposals. Industry wants to see AMLs remediated and reclaimed as much as anyone, but we need your help. The mining industry has the desire, the experience, the technology, the expertise and the capital to remediate and reclaim AMLs. In fact, the mining industry has more experience and expertise than all other potential Good Samaritans put together. Effective Good Samaritan legislation makes sense and can be a win-win-win-win for the environment, for the Good Samaritan, for the community, and for society. We applaud the Chairman for holding this hearing and look forward to working with him to produce Good Samaritan legislation that will actually result in on-the-ground Good Samaritan cleanups at Abandoned Mine sites.

I will be happy to answer any questions.

[NOTE: A report submitted with Ms. Skaer's testimony entitled "Abandoned Mine Land Initiative" prepared by Debra W. Struhsacker and Jeffrey W. Todd for the National Mining

Association, dated July 1998, has been retained in the Committee's official files.]

[The response to questions submitted for the record by Ms. Skaer follows:]

NORTHWEST MINING ASSOCIATION
10 N. POST STREET, SUITE 220
SPOKANE, WA 99201

AUGUST 23, 2006

Jim Gibbons
Chairman, Subcommittee on Energy and Minerals
House Resources Committee
1626 Longworth HOB
Washington, DC 20515

Dear Chairman Gibbons:

I want to thank you again for inviting me to testify before the Subcommittee on Energy and Mineral Resources on July 13, 2006 to present testimony concerning opportunities for Good Samaritan cleanup of hardrock abandoned mine lands. Northwest Mining Association appreciates the opportunity to present the views of its members on this important issue. This letter is in response to yours dated July 20, 2006 concerning a number of follow-up questions from members of the Subcommittee.

The Subcommittee has asked all witnesses to define the following terms:

- Reprocessing of waste, ore or tailings
- Reclamation mining
- Recycling of waste, ore and tailings
- Incidental reprocessing of tailings or waste rock piles
- Remining

The Subcommittee has asked the witnesses to define these five terms in the context that some members of the Subcommittee and others are concerned that the mining industry or other Good Samaritans will try to use a Good Samaritan permit to access newly identified mineral resources without going through a comprehensive mine permitting process. We would like to put these concerns to rest, once and for all.

In our written testimony we clearly stated: "The mining industry has no desire to use Good Samaritan legislation to avoid the mine permitting process or the application of current environmental laws and regulations that apply to today's modern mines."

We believe it is important that any Good Samaritan legislation allow and encourage remining and/or reprocessing operations as a viable option for remediating and reclaiming an abandoned mine site to improve water quality by removing and processing metal-bearing source contaminants. The processing/reprocessing of the source contaminant material most likely would occur at an existing, fully permitted off-site facility.

An existing off-site processing facility would have been permitted pursuant to design, operating, monitoring, and closure requirements of relevant and comprehensive state and federal mining regulatory programs. In the unlikely event an on-site facility would be used, the Good Samaritan permit could incorporate current design and operation requirements on a site-specific basis.

The permitting authority under Good Samaritan legislation would be able to condition the permit to ensure that the Good Samaritan permit is not used to access newly identified mineral resources or to bypass the comprehensive NEPA and mine permitting processes for new mining sites on public land or the applicable state permitting process for new mining on other sites.

In addition to the ability of the Good Samaritan permitting authority to condition Good Samaritan permits to prevent unauthorized mining of newly identified mineral resources, it would be highly unlikely (or at least very risky) for a mining company to make the investment in mining and processing newly identified mineral resources at an abandoned mine land site subject to a Good Samaritan permit without locating claims to prevent interference from rival claimants. Once a mining company located claims at the abandoned mine site, the site would no longer be abandoned and, by definition, the site would become ineligible for a Good Samaritan permit. Any mining of newly identified mineral resources would require a NEPA analysis and mine permitting process under either the Bureau of Land Management's 43

CFR 3809 regulations or the United States Forest Service's 36 CFR 228A regulations in the case of public land, or a comprehensive state permitting process in the case of other lands.

Even without a mining claim, either the 43 CFR 3809 or the 36 CFR 228A regulations would apply to any mining-related activities on public land outside of the conditions of the Good Samaritan permit. On non-public land, ownership—or at least permission from an insolvent owner, would be necessary to recover and sell metals from old mine wastes/ore. Otherwise, the Good Samaritan would be stealing the metals from the owner. Thus, there would be no regulatory gaps and no ability for a Good Samaritan to use Good Samaritan legislation to avoid the mine permitting process or the application of current environmental laws and regulations that apply to today's modern mines.

Set forth below are our definitions of the five terms listed in the Subcommittee's questions for all witnesses:

- **Reprocessing of waste, ore or tailings**—Any activity associated with treating previously mined and/or processed material found at an AML site with the purpose of extracting metals to achieve contaminant source reduction.
- **Reclamation mining**—The activity of reopening a mining operation with the intent of mining additional mineral resources and reprocessing existing waste or tailings or previously mined ore in conjunction with reclaiming a mine site or part of a mine site in order to achieve contaminant source reduction or removal. In this scenario, the Good Samaritan portion of the project would be permitted under the Good Samaritan legislation. Any new mining activity to extract new ore and all associated activities including reclamation thereof would be permitted in accordance with current applicable laws and regulations for a new mining operation.
- **Recycling of waste, ore and tailings**—Reuse of waste, ore or tailings for purposes other than metal extraction (road building, underground-mine back filling, construction materials, fill material, construction of permitted mine facilities, etc.).
- **Incidental reprocessing of tailings or waste rock piles**—Recovery of metals or other valuable constituents incidental to other AML cleanup activities. For example, some water treatment technologies may include incidental recovery of metals in the waste streams.
- **Remining**—This term is synonymous with reclamation mining.

Our written testimony cited and included a 1998 study by NWMA members Debra W. Struhsacker and Jeffrey W. Todd entitled, "Reclaiming Inactive and Abandoned Mine Lands—What Really is Happening." This study contains an extensive discussion of remining in the context of abandoned mine land remediation and reclamation. Appendix A to this study included numerous examples of remining projects in which the mining industry reclaimed and remediated AML sites in and near active mining operations through synergism between the active mine/mill and the AML sites. These examples capitalized upon industry expertise, equipment, personnel, and existing mine waste disposal and mineral processing facilities and infrastructure to close, reclaim or remediate nearby AML sites.

The study identifies a number of sites where remining constituted a broad range of activities that produced numerous and varied environmental benefits. Examples of remining activities identified in this study are:

- Processing of waste rock in low-grade stockpiles and/or reprocessing of tailings of previously leached materials;
- Removing and relocating old mine waste to existing project components (i.e., active, permitted tailings, heap leach, or waste rock facilities);
- Removing and relocating old mine wastes to new waste repositories;
- Stabilizing old mine waste in-situ using appropriate liners, caps and covers; and
- Remediating ground water by taking advantage of dewatering activities to support pump and treat opportunities.

The study identified the following environmental and public safety benefits and improvements that occurred at these sites as a result of the remining activities mentioned above:

- Surface water quality improvement;
- Landscape improvement;
- Wildlife habitat restoration, preservation and enhancement;
- Historical preservation; and
- Safety closures

As stated in the study:

> Reprocessing of metal-bearing mine waste achieves source reduction and therefore has proved to be an effective environmental cleanup method for AML sites. Other cleanup methods such as water treatment or waste

> containment do not reduce or eliminate the source of the contaminants, and may create long-term operational and monitoring requirements. In contrast, recovering metals by reprocessing removes some or all of the contaminant source, thereby minimizing the volume of problematic material and reducing the residual metals content in the resulting waste product. Additionally, the newly generated mineral processing wastes are disposed of in a modern, permitted mine waste disposal facility with appropriate containment, monitoring and financial guarantees.

Struhsacker/Todd Study at p. 29

Remining/reprocessing is an environmental remedy that contributes to ultimate resource recovery (conservation) and source reduction (environmental improvement), and therefore should be allowed and encouraged under any Good Samaritan legislation.

Ranking Member Grijalva proposed the following question:

> **Mr. Quinn and Ms. Skaer, while the EPA seems to be advocating a Good Sam program that is parallel to the Brownfields program, you do not seem to be taking the same approach. Your testimony suggests that what you are after is an alternative to the permitting programs that exist for environmental control of mine operations. Please explain.**

We have partly addressed this question and the Ranking Member's concerns in our response to the questions from the Subcommittee Chairman to all witnesses and would incorporate those responses in response to this question as though fully set out herein.

While there are some similar aspects between the provisions we believe effective Good Samaritan legislation must contain and the EPA Brownfields program, there are a number of key differences. The most important difference is that under a Brownfields program, the specific intent of the entity doing the cleanup is to redevelop the site for alternative uses with the goal of realizing a financial benefit from the project. To do that, one must have protection from pre-existing liability (a similarity with Good Samaritan legislation) and be allowed to redevelop the property for commercial or industrial uses with the expectation of generating a profit.

Under Good Samaritan legislation, there would be no guarantee of a financial benefit, nor any reasonable expectation of one. Furthermore, given the location and condition of most AML sites, redevelopment for other commercial or industrial uses is unlikely. Good Samaritan is simply a program that would remove liability impediments to allow and encourage a Good Samaritan to clean up a site voluntarily without expectation of financial benefit. There is nothing in it for the Good Samaritan except to know that they have done a service to the citizens of this country.

The reason the Brownfields program won't work for most AML sites is that we are not dealing with an urban or rural industrial site that is contaminated and if cleaned, could be reused. Most AML sites are remotely located without access, infrastructure, or a workforce that would allow successful re-development. Although there are a few mine sites that have been successfully closed with alternative land uses (landfills, wind farms, etc.), those are the rare exceptions, and, each of those were modern facilities which were closed when the infrastructure was still in place.

To try and perform that type of redevelopment at the vast majority of AML sites would be infeasible and unprofitable. We need a Good Samaritan law that removes the liability impediments so that the mining industry (and others) can do what our members are prepared to do: clean up abandoned mine sites for the good of the citizens of this country.

Some might ask, "Why would the mining industry be willing to do this? What's in it for them?" The answer is simple: Because it is the right thing to do. That is the essence of being a Good Samaritan.

If the purpose of the remining/reprocessing is to reduce the source of metal contaminants at the site and in the resulting waste, it should be allowed by the Good Samaritan permit. Otherwise, a Good Samaritan would be required to engage in an inefficient and unnecessary duplicative permitting process that would only discourage Good Samaritan efforts.

If the Chairman, Ranking Member or other members of the Committee have additional questions, we would be pleased to answer them.

Thank you for the opportunity to provide additional information to the Committee. We stand ready, willing and able to work with the Subcommittee to advance and enact effective Good Samaritan legislation that results in on-the-ground cleanup of AML sites.

RESPECTFULLY SUBMITTED,

LAURA SKAER
EXECUTIVE DIRECTOR

Mrs. DRAKE. Thank you, and next is Ms. Velma Smith. She is a Senior Policy Associate with the National Environmental Trust. Thank you for being here.

STATEMENT OF VELMA M. SMITH, SENIOR POLICY ASSOCIATE, NATIONAL ENVIRONMENTAL TRUST

Ms. SMITH. Thank you. Thank you, Madam Chair. On behalf of the National Environmental Trust I thank you for this opportunity to testify and for shining a light on the long-festering and still growing problem of abandoned hard rock mines.

As I said in my written testimony, we are coming to you this morning with dual messages, optimism along with caution. Caution so that Congress recognizes not only the enormity of the problem, which we agree with, but also its continuing nature and its complexity. And my pictures aren't as large and they are certainly not as technically sophisticated, but I have asked if the staff would share these pictures. You will see that mine sites vary in terms of abandoned mine sites, the challenges vary, and I would point out, Madam Chair, that actually there is an East Coast picture on there. There could have been more because indeed there are quite a number of abandoned mines in the East and, indeed, South Carolina had one that made the Superfund list, I believe it was last year, may have been the year before. But the abandoned PCB transformers there are in a site in Tennessee.

But what I am trying to illustrate with that is that some mine cleanups indeed may be easy. Some of the very, very old small mine tailings disposal may be easy to solve, but many others—and as the Chairman knows, as Mr. Gibbons knows, from the sprawling Yerington site in Nevada, they are anything but simple.

So we urge caution, lest good intentions actually take us backwards, lowering the floor even further of environmental management in the mining industry. It is not a matter of letting the perfect become the enemy of the good. It is an appeal not to simplify what should not be simplified, not to promote the creation of more Yeringtons.

But I also bring optimism and I urge the committee to look at the truly significant amount of work that is going on. I can commend my friends and colleagues at Trout Unlimited, and they are doing good work. They may have had the most stubborn lawyers around in terms of protecting their liability, but there is a lot of work similar and even tougher projects going on all around the U.S. today.

Collaborative efforts, engaging Federal and State agencies, tribal organizations, nonprofits, businesses. What these efforts need, first and foremost, is funding. Now, some have pointed out that there are current rates of spending. The best we can do is address 8 to 20 percent of cleanup problems in the next 30 years. Surely we all agree that is unacceptable. We believe that Congress needs to appropriate more funds for cleanup and that the mining industry

should follow the approach of their coal mining brethren, picking up a share of the cost of cleaning up legacy mining problems, and to that I think we should look toward Mr. Udall's bill.

We also underscore that many of the messes that exist today have failed because mining regulation has failed and problems continue today. The old Anaconda copper mine that vexed state regulators in Nevada for years is going to continue as a long and expensive cleanup project. It is a site where remining and reprocessing were undertaken, but without significant remediation benefits. To the contrary, what occurred on this site appears to have only added to the problems. It is a harsh illustration of why you should be wary of weakening environmental controls and accountability. Arimetco, the company that did extensive copper recovery on this site, walked away in 2000 leaving nearly 92 million gallons of acidic metal-laden waste water and a radioactive nightmare and a financial bond that won't begin to cover what will undoubtedly begin to be a cleanup reaching into the hundreds of millions.

So with Yerington in mind we would ask you not to weaken environmental law, but to take action to strengthen current protections and there we ask you to look at the bill that has set here for quite some time in this committee and Mr. Rahall's legislation. We think you should—and I would also appeal to the industry to begin a serious dialogue on Mr. Rahall's legislation.

Again, I thank you for this opportunity, and I look forward to your questions. Thank you.

[The prepared statement of Ms. Smith follows:]

Statement of Velma M. Smith, Senior Policy Associate, National Environmental Trust

On behalf of the National Environmental Trust, I thank the Committee for this opportunity to testify on the important issue of cleaning up abandoned mine sites.

Our hope this morning is to bring several messages before the Committee. First, a message of appreciation for recognizing the long-festering and still-growing problem of abandoned hardrock mines. In addition, a sense of optimism to what can clearly seem like a daunting task—noting the important cleanup work that is going on already, under current law and involving diverse parties.

At the same time, we would hope to dispel what appear to be critical misperceptions about this problem, including the idea that nearly all abandoned mines date from the turn-of-the-20th-century or that liability is always a barrier to cleanup. We also offer cautions about the complexity of cleanup at many sites, the potential for remediation failures—regardless of good intentions, the need for solid information and analyses, and the absolutely inescapable need for resources.

In fact, we would argue that the pressing need today is not for new legislation but for an infusion of funds: Mining sites are not being cleaned up fast enough because neither the industry nor the government is contributing sufficient money to the task. The federal budget is tight, but to really address this problem, you must find a way to bring more resources to a serious cleanup effort.

We would also underscore the fact that while fear of liability may, in some cases, give pause to non-mining parties who would otherwise venture into mine cleanup, that pause, in and of itself, may not be a bad thing when it comes to cleaning up these difficult messes. Mining sites can be not only difficult to diagnose but also enormously difficult to cure. Entered upon without solid information, with poor design or with faulty execution, cleanups can and have gone terribly wrong.

Finally, we urge you to recognize that liability for both previous operators and land owners is an important factor that has been driving many cleanups—cleanups that are happening at listed Superfund sites like the Iron Mountain Mine in California, Clark Fork in Montana, and the Captain Jack Mill in Colorado and at non-listed sites like Yerington, Nevada, Bingham Canyon, Utah and the Copper Basin Mining District of Tennessee. If Congress reaches too broadly to encourage the cleanup of the most easily remedied mine sites, it will put at risk the current liability leverage that leads to cleanup of enormously difficult and expensive mining

messes. And if a Congressional response brings remining and reprocessing operations into the definition of "Good Samaritan" actions, you may end up creating the exception to swallow the rule, removing normal, for-profit operations, which nearly always take place in old mining districts, from existing regulatory requirements.

So please, don't look simply through the narrow prism of regulatory hurdles for cleaning up a few of the many mining problems. Look broadly at the full scope of the problem and recast your topic as "Solutions to Mining Contamination." In that context, figure out not only how to drive more of the easier cleanups but also how to stop adding to the problem and how to address the large and seemingly intractable mining messes. In that context, we believe you should look, with new openness, to the mining reform legislation sponsored by Congressman Rahall, which includes dedicated funding that can be used for mine cleanups and also sets a new standard of environmental scrutiny and performance for hardrock mines. The Rahall bill addresses only operations that take place on federal lands, but we would argue that it should be applied to all hardrock mining, regardless of location.

Hardrock mining is enjoying a boom. Metals prices are breaking records; exploration fever has once again hit the West; and even old operations that seemed like economic losers are attracting new attention. So now, while hardrock mining is flush, is the time to engage the industry in cleaning up its past and current operations. Now, we would hope, is the time for the mining industry to act cooperatively in the true spirit of the Good Samaritan who gave aid to the injured man and paid his expenses with no thought of compensation. Our plea to the industry is to step forward willingly to pay a modest fee on mining profits in order to create a trust fund that can remedy a long legacy of pollution problems.

A Big Problem

In 1993 the Mineral Policy Center, now known as Earthworks, assembled data on hardrock abandoned mines from state and federal agencies, private contractors and associations.[1] From this effort, they estimated nearly 557,000 abandoned hardrock mines in 32 states. Their numbers, though perhaps considered high at the time, are generally in line with other best judgments—including estimates from the Western Governors' Association, the Bureau of Land Management and the Environmental Protection Agency.

A compilation of abandoned mine land data assembled by the Western Governors Association, for example, shows counts ranging from 150 abandoned mines in North Dakota to 100,000 in Arizona.[2] The WGA report cautions that different states use different definitions of abandoned mines and count mines and mine sites in different ways. It also clearly acknowledges that existing inventories are incomplete. The report's numbers for 13 states total more than a quarter of a million.

Estimates from Federal agencies are high as well. BLM, for example, places the number of abandoned mines on lands that it administers at a low of 100,000 or a high topping half a million.[3] About 5 percent of those sites—possibly more than 25,000 mines—have caused or could cause environmental damage, according to the Bureau. The Forest Service estimates that about 5 percent of an estimated 25,000 to 35,000 abandoned mines on its lands will require cleanup under Superfund authorities; another 12 percent of those sites are expected to require water-related cleanup using authorities other than Superfund. Excluding lands in Alaska and California, the National Park Service estimates the number of abandoned sites on its lands at more than 3,200—with abandoned mines inventoried in 134 of the 387 National Park System units

A Varied Universe, in the West and Beyond

What types of sites are these and what types of remediation is called for? The answers run the gamut from small problems to large complexes. And though much of the focus in this discussion is on the West, where the number of sites is huge, there are mine messes in other parts of the country as well.

In some instances, the highest priority problems may be open shafts and adits that pose physical hazards to people and wildlife. These must be plugged, filled, secured or closed off.

- A motorcyclist was killed in 2003, for example, when he rode his bike over a tailings pile directly into an open mine shaft in the Red Mountain area of California.

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[1] Mineral Policy Center, Burden of Gilt, June 1993.

[2] Western Governors' Association, Abandoned Hardrock & Noncoal Mines in the West: A Partnership Report, 1998 available online at http://www.westgov.org/wga/publicat/miningre.pdf.

[3] US EPA, Office of Solid Waste and Emergency Response, Cleaning Up the Nation's Waste Sites: Markets and Technology Trends, September 2004.

- In Nevada, the state reports that people have died swimming in open pit lakes and suffocated after entering open mine shafts.
- Wyoming has reports of mine subsidence affecting an interstate highway, a public water line and a housing development.
- In Alaska, 500 feet of dangerous high wall was reported in a heavily used area near Juneau, and open portals and shafts found within a few hundred feet of a public use cabin in a state park
- In Oklahoma, the community has learned that a third of the small town's 400 houses sit atop or near a huge mining cavern with a probability of collapse.[4]
- In California alone, the Office of Mine Reclamation has stated that 84 percent of the state's abandoned mines "that's nearly 33,000 mines—present physical hazards.[5]

In other cases, the threats are from elevated levels of pollutants in mine wastes, contaminated soils, blowing tailings and abandoned ponds of cyanide solutions or other wastewaters. Abandoned mines, as the U.S. Geological Survey reports, may degrade water quality and aquatic resources with releases of acid drainage, seepage from tailings piles, streambank erosion and storm runoff.

Overall, the government estimates that old mines have contaminated about 40 percent of all Western river headwaters, and scientists have reported loss of fish populations and deterioration of fish health as well as groundwater contamination, including contamination of drinking water wells, all associated with continuing pollution from abandoned or inactive mines.

- In Arkansas, for example, a 1996 report attributed problems in nearly 200 miles of streams to the impacts of old lead, zinc and coal mines.
- In Oklahoma, a report from that same year identified 23 lakes and streams adversely impacted from past and then present mining operations.
- In Utah an estimated 300 uranium mines have moderate to high levels of radiation.
- A 1999 Nevada report on abandoned mines notes problems with breached tailings dams spreading heavy metals and acidic wastewaters, elevated levels of contaminants including mercury, lead, cyanide and arsenic from abandoned mines, and mining-related threats to local agricultural activities and the habitat of the endangered Desert Tortoise and the Northwest Valley Fly Catcher.
- In March of 2005, a "flash report" by the Department of Interior's Office of Inspector General reported dangerous levels of arsenic and contaminated groundwater in a growing area of Pima County, Arizona.

Solutions to these problems will run the gamut as well, ranging from removing small piles of waste rock or tailings from a floodplain or reseeding a disturbed area, to removing transformers, machinery and buildings, stabilizing large waste piles, rerouting water flows, building new retention ponds, reinforcing old dams, managing toxic lagoons, removing or covering contaminated soils.

Old and New Contributions to the Problem

Much of the discussion of abandoned mines brings to mind the grizzled prospector with mule and pick axe, faded sepia-tone images and thoughts of the Wild West. But before you assume that the nation's abandoned mine messes all date from the 19th century, well before modern environmental regulation, consider this.

Modern-day mines are often located in historic mining areas, where mining wastes have been deposited in stream beds and other fragile areas, and where acid drainage still flows from old mine workings. In some cases, this makes it difficult to say with certainty just how much of a pollution problem is linked solely to recent activity.

In many instances, however, it is clear that modern operations not only worsen existing problems but also create new problems. Modern mine operations can cover large acreages and employ enormous earth-moving equipment. Their scale, complexity and waste production can dwarf that of historic mines. Frequently modern mines use large amounts of toxic chemicals, and collectively they release more toxics into the environment than any other industry. Their impact on the environment is enormous—and not always according to plan.

- Perhaps the most notorious example of a modern mine gone wrong is from Colorado. The Summitville gold mine opened in 1986 and was abandoned in 1992. It became one of the nation's most expensive Superfund cleanup sites, while the

[4] Omer Gilham, "Calls for Tar Creek buyouts intensify: A Corps of Engineers report brings home to residents the dangers of possible cave-ins," Tulsa World, February 2, 2006.

[5] California Department Of Conservation, Office of Mine Reclamation, Abandoned Mine Lands Unit, California's Abandoned Mines: A Report on the Magnitude and Scope of the Issue in the State, June 2000.

Canadian business tycoon behind the venture moved his schemes and his assets overseas. The Summitville area had a long history of mining, but the acid and cyanide drainage that killed miles of the Alamosa River were clearly connected to this faulty heap leach mine operation.

- In 1996, Canyon Resources boasted that reclamation of the northern section of its Montana Kendall heap-leach operation was 90 percent complete, and they predicted that they would rinse out the "last traces of cyanide" through the next year. Reclamation of the mine that opened in the late 1980s is still incomplete today, and according to news reports, the mining company is resisting State calls for more extensive cleanup. Canyon extracted gold and silver from the ground from 1989 until 1995. Treating the mine-contaminated water, says the State, will have to continue indefinitely.
- Near Riddle, Oregon, a now-defunct Canadian company ran the Formosa copper and zinc mine between 1990 and 1993. The company abandoned the 100-acre property in 1994, and by 1997 the system they had installed to handle acid mine drainage was no longer working. As is the case with many other mines—some reclamation was accomplished by the company before its departure, but those efforts did not stop copper, cadmium, lead and zinc from polluting some 18 miles of a nearby stream. According to the state, the contamination has "...severely harmed the ecosystem of these streams, including protected Coho and Steelhead salmon populations."
- In South Dakota, the Gilt Edge Mine was a 260-acre open pit and cyanide heap leach facility. Granted a permit in 1986, the operation was reportedly mined out by 1992. The mine's initial bond of $1.2 million was based on a prediction that the mine would encounter only non-acid generating rock. The prediction, however, turned out to be wrong. When the mine closed, 150 million gallons of acidic, metal-laden wastes remained along with millions of cubic yards of acid-generating waste rock.
- Idaho's Grouse Creek mine began production in 1994, and its tailings impoundment, declared "state-of-the-art" when it was built, included clay and plastic liners and, according to a company spokesperson, exceeded permit requirements. But Hecla's gold find wasn't as rich as anticipated, and the company ran into processing problems. In July of 1995, EPA cited this mine near the Frank Church Wilderness for violations of cyanide, mercury and total suspended solids water quality standards. The problem: leakage from the impoundment liner. A month later, it was the pipeline carrying slurried mill wastes that caused more violations. In 1996, according to the U.S. Forest Service, another 19,000 gallon spill occurred in the mill area. The mine closed in 1997 and by 1999 "pervasive levels" of cyanide were found in Jordan Creek.

I could go on. But suffice it to say that mining's mistakes have and will always be characterized by the mining industry as its misguided past. In the 1970's, history included the turn-of-the-century gold rush mines as well as mine operations from the 1940s and 50s. Now, it appears, that mines from the 1960s, 70s and 80s have taken their place in "history" as well. By 2020, will the mines of today be lumped in with those "turn-of-the-century" mines that bear all the responsibility for pressing pollution problems?

From Brewer Gold in South Carolina to the Battle Mountain mine in Nevada, from Zortman Landusky in Montana to Red Dog in Alaska, modern mines have given us ample evidence of continuing pollution problems. The facts on the ground suggest that regulation—even today—is sorely lacking in substance or enforcement, or perhaps both. And in too many instances mining companies seek the shelter of bankruptcy courts before they meet their reclamation and cleanup obligations.

We agree with the National Center for Manufacturing Sciences: "[T]he mining sector is, from an environmental standpoint, the least regulated of any comparable industry sector." (Emphasis in original.) The Center goes on to state that the lack of regulation for mining "is no chance oversight," but actually the result of a specific legislative loophole. Their reference is to the so-called Bevill amendment that shields the mining and mineral processing industry from federal hazardous waste rules. This hard-fought and carefully protected special deal for mine-related wastes keeps EPA from regulating wastes derived from extraction and beneficiation of minerals, even if they met established criteria for designating wastes as "hazardous."

These wastes are frequently the crux of the problem at abandoned mine sites.

EPA issued a National Hardrock Mining Framework in September of 1997, with the specific aim of improving environmental protection with coordination and collaboration across programs and agencies, but in August of 2003, the EPA Inspector General declared that it "...found no evidence that the Framework contributed to environmental improvements or protections at specific hardrock mining sites." The IG

noted that the Framework's goal of protecting human health and the environment at hardrock mining sites was hampered by EPA's lack of direct regulatory authority.

In addition, as the Government Accountability Office made so clear in its August 2005 report,[6] the federal government's cleanup burden grows as businesses reorganize and restructure to limit their future expenditures for environmental cleanups. GAO points out that "EPA has not yet implemented a 1980 statutory mandate under Superfund to require businesses handling hazardous substances to maintain financial assurances" for environmental cleanups.

Only two months earlier, the GAO also concluded that BLM's failure to obtain proper financial assurances from mining operations on federal lands has left a gap of some $56.4 million in unfunded reclamation costs.[7] That number, by the way, covers only 48 hardrock mines that had ceased operations by the time the study was undertaken. It doesn't cover mines that are still operating.

A Matter of Money, Lots and Lots of Money

Because abandoned mine inventories have not been completed—and indeed may never be—it is difficult, if not impossible, to offer any certainty about the likely costs of addressing these problems. Some sobering numbers have been put forward, however.

Earthworks, working with experienced mining engineers, has predicted that approximately 15,000 mines would require cleanup of water-related problems. The cleanup tab for the full universe of abandoned mine sites, according to the group, may run as high as $72 billion.

In January 2003, the EPA Inspector General reported that 87 sites classified as abandoned hardrock mines or mine-related sites had been placed on the Superfund National Priorities List (NPL).[8] At the time of the IG's report, EPA's rough estimate of cleanup costs for these specific sites was about $2 billion. Since then, more mine-related sites have been added to the list—and many more are possible candidates.

Looking beyond these few sites, EPA's Superfund office has predicted that somewhere between 7,700 and 31,000 mines will require cleanup—either under Superfund or under another program.[9] An EPA report on the cleanup technologies, notes that the need for cleanup grows as the public looks increasingly toward rural areas for recreation and as some old mining areas are developed for primary housing or second homes. Certainly in your own thirsty state, Mr. Chairman, you understand that mining's impact on water resources grows more relevant to the entire state as downstate populations grow and look beyond existing water allocations for new water sources. Data from several sources cited in this EPA report indicate a range of cleanup cost running from $20 to $54 billion, with about $3.5 billion of that related to Superfund designated sites.

The Bureau of Land Management estimates that cleanup of abandoned mine sites in its jurisdiction may cost as much as $35 billion.[10] Damage on U.S. Forest Service land alone would cost $4.7 billion to fix.[11]

How do expenditures match up against these figures? According to EPA[12], the total federal, state and private party outlays for mining site remediation have been averaging about $100 million to $150 million per year.

At this rate of expenditure, notes the report, only 8 to 20 percent of all the cleanup work will be completed over the next 3 decades.

No Easy Solutions

And now for the bad news. Cleaning up mining problems can be, not only expensive, but also technically challenging.

The case of the Penn Mine in California—the case that initially prompted the call to loosen Clean Water Act requirements for mining cleanups—makes the point.

The abandoned old copper mine in the Sierra Nevada Mountains was producing acid mine drainage flowing into the watershed that provides drinking water to the East Bay Municipal Utility District. The water utility, with the best of intentions,

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[6] US Government Accountability Office, "Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations," August 2005.

[7] US Government Accountability Office, "Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs", June 2005.

[8] Office of the Inspector General, U.S. EPA, Nationwide Identification of Hardrock Mining Sites, March 31, 2004, Report 2004-P-00005.

[9] US EPA, Office of Solid Waste and Emergency Response, Cleaning Up the Nation's Waste Sites: Markets and Technology Trends, September 2004.

[10] Ibid.

[11] Robert McClure and Andrew Schneider, "More than a century of mining has left the West deeply scarred," The Seattle Post-Intelligencer, June 12, 2001.

[12] US EPA, Office of Solid Waste and Emergency Response, Cleaning Up the Nation's Waste Sites: Markets and Technology Trends, September 2004.

took on what it apparently thought would be a modest project to protect its water source. The Utility constructed a small dam, diversion facilities and retention ponds. Unfortunately, however, the results fell short of what was desired.

The ponds were not sized properly and maintenance of the structures was reportedly minimal. So the facilities—though they solved some problems—actually created additional problems at certain times of year. People in the community were upset and took legal action to compel more cleanup. The Utility found itself with a long-term cleanup job that it had not initially anticipated.

Was this particular party particularly inept or sloppy? Probably not.

- In 1997, a mining company in Arizona was attempting to cover a tailings impoundment with waste rock. The impoundment failed and tailings and debris moved into Pinto Creek. [13]
- In Montana, a mining company reconstructed a tailings dam that had failed. Today, the State, the Forest Service, the EPA and the community are searching for answers and money to fix this previous "fix" that is now leaking and considered unstable. The company involved in this case and dozens of others is in bankruptcy.
- Initial cleanup efforts at the Sulphur Bank mine—an old mercury mine in California—used monitoring data from what turned out to be an unusual dry spell. When precipitation levels changed, the conceptual model of the mine's release of mercury into the environment was proven wrong and adjustments to the remedy were required.
- A host of engineers tried to address the problems of acid drainage running through the Oklahoma lead mining district some 20 years ago. They apparently managed to keep acidic waters from returning to the surface through unplugged boreholes, and they thought they got it right with water diversions and "rerouting." But just recently monitoring has shown high levels of lead and arsenic headed toward Oklahoma's Grand Lake.
- Sadly, another lesson in unintended consequences comes from the same Tar Creek area, where the sensible course of action at one point seemed to be to encourage "remining" of abandoned ore bodies. In this case, "gougers" leased mines that had been abandoned in order to recover lower grade ores, and their modest operations provided some modest economic benefits as the mines were closing in the late 60s and early 70s. Since that time, however, there have been numerous and sometimes tragic cases of subsidence. [14] Homes and businesses in the small town have been declared unsafe, and the community is now seeking federal support for relocation.

The Lessons of Yerington

But perhaps, Mr. Chairman, the most relevant case-in-point comes from your own Silver State. The old Anaconda Copper Mine is a sprawling site that has vexed State regulators for years and will, no doubt, continue as an expensive, long-term cleanup project. It is a site where remining and reprocessing were undertaken—but without significant remediation benefits. To the contrary, the reprocessing that occurred on this site appears only to have added to underlying problems. Yerington, as it is known, stands as a harsh illustration of why policymakers should be extremely wary of weakening environmental controls and accountability, waiving liability or allowing projects to proceed with less than thorough knowledge and understanding of baseline conditions and possible outcomes.

As I am sure you know, Mr. Chairman, Anaconda mined copper and produced sulfuric acid at this 3,400-acre site near the small City of Yerington from 1953 through the late 70s. At some point in the 70s, as regulators and the public later learned, the company recognized the presence of radioactive elements in the mine waste and considered options for uranium reprocessing. The property was purchased by Atlantic Richfield Company in 1977 as the mines were closing down. Shortly thereafter the property was purchased by another owner, who worked to demonstrate the potential for additional copper recovery from the tailings.

At this point, the site was used for copper recovery and for metal salvage operations. Arimetco then purchased the property and constructed five heap leach pads and other facilities. The company filed for bankruptcy in 1997 but continued to recover copper from tailings until late in 1999. In 2000, they walked away from the site leaving nearly 92 million gallons of acidic, metal-laden wastewater. Using standard BLM costing methods, engineers estimate that the closure of just the five

[13] US EPA, Region 9, "Total Maximum Daily Load for Copper in Pinto Creek, Arizona," April 2001.

[14] Subsidence Subcommittee, "Report to Governor Keating's Tar Creek Superfund Task Force," July 21, 2000.

leach pads could cost somewhere in the range of $12 million to $15 million—a fraction, unfortunately, of what the entire site cleanup may cost.

The site is difficult, not just because of the size and the range of activities that took place, but also because of the co-occurrence of the uranium in the copper ores and the fact that that information was not shared early on with regulators, the public and, perhaps, with some users of the property. And problems with groundwater contamination have worsened, it seems, because the picture of what was happening with seepage and groundwater flows was sketchy at best for far too long. In fact, disputes over needed testing at this site are a strong argument against the language in H.R. 5404, which seems to discount the need for solid baseline data and careful site characterization.

So with Yerington in mind, we would ask you to recognize that mining problems can be a bear to solve. Remediation—whether it involves sealing adits, reconstructing tailings ponds, diverting waters or recovering valuable minerals left as waste "can and often does go wrong. An adit may be plugged, only to blow out as water pressure increases. New seeps from a closed tunnel may open up, not at the original point of discharge, but in other unexpected areas.[15] Constructed wetlands may function for a time but cease their cleaning function when they reach a point of saturation. Acid-generating rock may be encountered where none was anticipated; a season of drought, can pull groundwater into a pit lake faster than expected; storms or heavy snowmelt overwhelm the capacity of detention ponds. And reprocessing or remining, as Yerington so clearly illustrates, can create its own significant problems.

These examples are offered, not to suggest that nothing can be done to abate the problems of mining, but only to caution against a "solution" that tries to fast-track decisions that should not be fast-tracked, that skims over the need for critical baseline data, that imposes unreasonable deadlines on those reviewing cleanup plans, that skimps on oversight, or that absolves operators of responsibility from the outset. All of these are problems we seen in H.R. 5404

No Quick Fixes for Acid Mine Drainage

These real world lessons also remind us that time is an element to be reckoned with in mine cleanup efforts. In many cases, mining cleanups will have to be viewed as holding actions, and responsibility for long-term management must fall to someone, if not to the party that initiates cleanup. According to EPA, nearly 60 percent of the mining sites listed on the Superfund NPL are expected to require from 40 years to "perpetuity" for cleanup operations.[16] Many other mine sites will require long-term maintenance and vigilance in similar time frames.

This is a critically important point that any "Good Samaritan" legislation must face up to. It is understandable that small non-profit organizations or even large corporations have little interest in assuming responsibility for a discharge that may well outlast the life of their organizations. But the reality is that acid mine drainage will, in many instances, go on for decades or longer, and that someone, some entity must retain responsibility for operating active treatment systems or maintaining wetlands or other more passive systems. If the Committee does not wish to consider leaving this obligation with private entities, then it must determine how to enable state governments or federal agencies to take on the long-term maintenance that many sites will require.

These examples also make it clear that a general directive to "do no harm" or "improve the environment," much like that in the legislation before you, may be difficult to follow or to assess. We do not believe that vague language and lofty but unclear goals should sweep away the fundamental underpinnings of the Clean Water Act, including water quality standards. The communities surrounding these mines—or downstream, downgradient or downwind from these mines—deserve more assurances than these vague goals can provide.

And, because things can go wrong, despite the best of intentions, we think it would be more than reasonable for any provisions that encourage "Good Samaritan" actions to also ensure against the unforeseen. H.R. 5404 allows for but does not require financial assurance, but financial assurance would be essential for any complex cleanup project. We recognize that financial assurance would add an up-front cost to cleanup projects, but that cost would be a small fraction of a project's overall cost. It could be subsidized by a trust fund, and its existence would help to ensure that the cleanup projects undertaken today do not become tomorrow's emergency removals, that what are anticipated to be small projects do not end up draining the

[15] See, for example, "The Earth's Open Wounds: Abandoned and Orphaned Mines," Environmental Health Perspectives, Volume 111, Number 3, March 2003.

[16] Ibid.

government's resources for response and remediation. That a poorly crafted "cooperative conservation" program doesn't create more Yeringtons.

Existing Law Allows for Cleanups

It is, no doubt, frustrating to hear of cases in which a willing Samaritan hesitates to act because he doesn't want to become embroiled in Clean Water Act permitting, is wary of a citizen suit or fears the reach of Superfund liability. But consider that there is another side to that coin. Liability and obligations under environmental laws is, in many instances, is driving cleanups, not impeding them.

Yerington, for example, is being cleaned up today because the threat of Superfund liability offers strong motivation to potentially responsible parties.

In Utah, the Kennecott case is also instructive. It has been heralded as a "voluntary" effort to clean up massive amounts of groundwater, but the more than 20-year cleanup was "voluntary" only in the sense that Kennecott negotiated out and agreed to a cleanup plan—after complaints were filed by regulatory agencies. In 1986, the State Health Department, acting as Trustee of Natural Resources as provided for under the Superfund law, filed a complaint against Kennecott Utah Copper Corporation for groundwater contamination. Superfund liability, again, drove cleanup.

In the Copper Basin of Tennessee, at the Rio Tinto mine in Nevada, along the Canadian border in Washington State and in dozens of other cases, investigation, cleanup and stabilization is happening, not in spite of liability and regulation, but because of it.

Mine cleanups are taking place not only within the context of the Superfund program—as National Priority List sites, under orders and authorities for response actions and time-critical removals, as part of the Natural Resource Damage Assessment provisions and as Brownfields site. Mine sites are being cleaned up as part of community watershed initiatives, non-point pollution control programs and basin-wide programs to restore impaired waters. They happen under the authorities of the federal surface mining law and federal hazardous waste rules. And they involve not only the parties who created or worsened problems but also those who own the properties or want to own or use the properties. They engage volunteers, government agencies, non-profits and corporations. They are happening today—under current law.

- In Colorado, for example, EPA reports that casino developers have capped and removed mine waste piles contributing to cleanup.
- In an area near the Birch Creek National Wild River Corridor, the Bureau of Land Management, the Alaska Department of Fish and Game, the Alaska Department of Transportation and the Alaska Department of Natural Resources worked together to restore portions of a reclaimed channel breach on land that had been used for placer gold mining from 1984 to 1990.
- In an area along the Hammond River, also in Alaska, BLM worked cooperatively with the State and Alyeska to clean up mine waste from an old 1930s to 1950s mine.
- The Martin Mine restoration project in Idaho was undertaken by the National Park Service in cooperation with the Craters of the Moon Natural History Association, the BLM and a local Boy Scout troop. This modest but useful project helped to eliminate a water quality threat to Little Cottonwood Creek.
- Not too far from here, over the river in Virginia, the Park Service worked with the State of Virginia and local volunteers to clean up the old Cabin Branch pyrite mine in the Prince William Forest Park.
- In Nevada and elsewhere, Bat Conservation International has worked cooperatively with U.S. Borax and others to address hazards in old mines in ways that help conserve bat habitat. Their work includes closure at the abandoned Murphy Gold Mine in Nevada designed to protect a large colony of pallid bats—again accomplished within the context of current law.
- And in January of this year, the Deltakeeper Chapter of Baykeeper and the California Department of Parks & Recreation signed a consent decree aimed at preventing a hundred year-old toxic waste at Empire Mine State Historic Park from continuing to degrade local waterways. The agreement—which actually grew out of challenge to the polluting discharges coming from the mine, was hammered out—not in spite of the Clean Water Act, but because of it.

Projects such as these and, of course, the much-talked about Trout Unlimited efforts, suggest to us that those who are determined can find room to work within the context of current law. Current law allows for creative and effective mine cleanup partnerships. The lesson from these examples is not, in our view, that the law should be changed, but that the experiences of mine cleanups should be shared widely; that more funds should be made available to allow for more projects.

H.R. 5404 is Not the Answer

In sum, Mr. Chairman, we repeat: The problems of abandoned mines are large and difficult, and Congress should be wary of simple solutions. Any effort to "encourage" cleanups with broad exemptions from Clean Water Act obligations, or worse still, from Superfund liability and other environmental requirements, is fraught with difficulty and unnecessary.

If a "Good Samaritan" is relieved of achieving Clean Water Act standards, what standards must they achieve? The legislation before you doesn't answer that question. Over what time frame? What data should prospective Samaritans have in hand to assure that they understand critical aspects of water flow and geochemistry? Again, the legislation holds no answers. If a remedy fails, who bears responsibility? Who can be called upon for additional work or for maintaining treatment systems and reclamation work? On these points, the legislation tells us that the Samaritan is not responsible. It says that if the land is owned by the federal government, that the federal government is not responsible. But it doesn't suggest just who it is that will take responsibility.

So what to do instead? We have a few recommendations.

1. Endorse EPA's efforts to use model consent agreements, prospective purchaser agreements and other existing regulatory tools to promote "Good Samaritan" projects. Enable this work with adequate appropriations to support and enlarge the Mine-Scarred Land team of mining reclamation experts from federal agencies. Assure that this team has the resources and the support to act in an advisory capacity for new cleanup projects, providing technical critiques and disseminating information about the best practices and most likely problems.
2. Look to the mining industry to help fund cleanup of abandoned mines, following the model set out for coal mine restoration under the Surface Mining Reclamation and Control Act (SMCRA). Congress should impose a tonnage fee on all metals mined from private and public land to fund a serious, long-term remediation program. Use the resulting trust fund to pay for cleanup at old sites where responsible, solvent entities cannot be found. Congressman Mark Udall's H.R. 1265 would be an excellent mark up vehicle.
3. Boost federal funding for cleanups and provide for coordination and sharing of funds among states, BLM, Forest Service, EPA and other appropriate agencies. Do this with more funding for Superfund, for brownfields, for Clean Water Act Section 319 grants and more. By encouraging federal agencies and the states to do joint planning and to pool resources, the best expertise and capacities of many parties can be leveraged for the maximum results.
4. Engage states and federal agencies in developing adequate inventories of sites and, perhaps more importantly, selecting priority areas for voluntary cleanups and for re-invigorated enforcement-driven cleanups.
5. Direct EPA to get off the dime and issue rules for financial assurance for the mining sector, which makes such an enormous contribution to the country's Superfund burden. This duty already exists in law, so you don't have to pass new legislation. Make things happen with directions and appropriations. Senator Maria Cantwell has introduced legislation on this matter—S. 3515. No similar legislation exists in the House at this point.
6. Stop the continued creation of additional mine problems by first clearly defining "abandoned," as recommended by the National Academy of Sciences and as done under SMCRA. And begin work on legislation to set out minimum performance standards, strong financial assurance requirements and clear permitting guidelines. Have the agencies create clear requirements for operators to notify regulators of changing conditions at operating mines, and be certain that mine permits—as well as bonding amounts—are updated as conditions change. Set out monitoring and reporting requirements as well fair and firm enforcement mechanisms. Build regulatory capacity and expertise in the field with grants to support state programs. Again, Congressman Rahall's legislation, H.R. 3968, offers the most thorough and useful model.
7. Weed out irresponsible investors and operators with solid "bad actor" provisions to deny future permits or government contracts to companies that violate environmental rules or walk away from reclamation obligations. Make sure bad actors cannot hide behind corporate reshuffling and creation of new subsidiaries. Such provisions are included in H.R. 3968.
8. Deal with the most dramatic regulatory loophole for mine operations by directing EPA to establish waste regulations specifically crafted for the management of mine waste rock, tailings or other mineral-processing wastes, including wastes currently covered by the Bevill amendment.

9. Invest in research that will allow for more reliable predictions about mining's impacts on water resources, looking closely at the potential for creating acid mine drainage but also focusing on other difficult issues, such as disruption of aquifers from dewatering, mechanisms for groundwater contamination and impacts of pit lakes that refill with acids, metals and other pollutants after mine operations cease. Make sure that the best available predictive tools are used to plan cleanups and to permit mines in the first instance.
10. Learn from past mistakes with failure analyses conducted in conjunction with mine cleanups. Whenever federal dollars or enforcement authorities are used for cleanup of a mine site that operated during the mid-1980s or forward, regulators should analyze those aspects of the operation that led to a need for cleanup. As these analyses identify problem management areas—be they heap leach pads, faulty liners, pipeline breaks, unstable waste piles, poorly characterized geology or something else—regulators should act to disseminate new information on "best practices" and, as necessary, adopt new regulations to prevent repeat failures.
11. Commit to carrying out your oversight duties. This is a thorny issue, but there is much activity in the field. Congress should keep a close eye on developments, positive and negative, regarding mining and water quality.
12. And, to the extent that you decide to take legislative action on Good Samaritan cleanups, look to language introduced by Congressman John Salazar. Work from his carefully crafted legislation, H.R. 5071, that builds upon long efforts of many parties to address significant problems in the Upper Animas watershed of Colorado. It is based on solid background work to characterize and understand threats in the watershed and it authorizes a demonstration project that will be carried out as part of a watershed Total Maximum Daily Load program. This legislation could be expanded beyond the single watershed in Colorado, incorporating other TMDL restoration work in other watersheds. A watershed context for cleanups can provide valuable context, assuring that individual projects do not unintentionally improve water quality for one parameter or in one location only to undermine it elsewhere. In addition, several projects within a single watershed may be able to share important baseline data and technical information. Assure that all projects have appropriate oversight, and require a report—say on a two-to-three-year timeframe—about successes and problems with the projects chosen.
13. As part of this effort, set up a trust fund—like that established under the Surface Mining Control and Reclamation Act—that can be used not just to fund individual cleanup projects but also to underwrite financial assurances for this work. Even well-planned projects can meet with difficulty, and a shared trust fund could be used to insure against creating new problems at any mine site.

Again, Mr. Chairman, I appreciate this opportunity to testify, and I hope that Committee members find this information and these recommendations of assistance. I look forward to your questions and to working with your staff on these important issues.

Mrs. DRAKE. Thank you. We will move to questions. We will work with a 5-minute limit on questions. I will begin, and first of all, Ms. Skaer, thank you for bringing to our attention what industry has done voluntarily when you talked about a company that—Idaho I think you said, who had stepped in, but for both you and Mr. Quinn, if Good Samaritan provisions were available in the past, would the industry have stepped in and helped address environmental and water management problems at some of the modern mine properties listed on the AML sites? Would they have stepped in and done that sooner or have been able to do more?

Ms. SKAER. Well, I believe the industry would have done that. As I indicated in the closing part of my written testimony, these historic abandoned mines, they are dirty pictures. They are our Achilles' heel. It is what mining opponents use to foment public opposition to modern, environmentally responsible mining projects under current regulations. They drag in pictures of the past. It is an—it not only is in our—it not only helps clean up the

environment, it is in industry's best interest to clean these sites up and get them off the radar screen as quickly as possible. If we would have had good sound legislation that would have allowed reprocessing and remining and provided appropriate liability relief—and we are not asking for a liability relief if we caused problems in the Good Samaritan work, but from liability relief from the actions of others in the past, I definitely believe we would have addressed many of those sites.

Mrs. DRAKE. And Mr. Quinn, did you want to add to that?

Mr. QUINN. Yes. Clearly if the incentives provided under legislation being offered today, particularly the legislation introduced by Senators Allard and Salazar, had been available a while back, there are opportunities lost because of the lack of those protections and those incentives, and the industry, there are many instances—I know WGA can testify to this as well there are instances—of their member States and our members trying to partner together on projects, but oftentimes the final barrier is some of these legal and regulatory impediments.

Mrs. DRAKE. Can you also answer, either or both of you, to what extent did litigation by groups opposed to mining contribute to some of the modern mining sites listed as AML sites? Did that have an impact as well?

Mr. QUINN. Madam Chairman, I cannot speak to that point, but in terms of citizens suit exposure as being a deterrent to undertake these types of projects, that is clearly an issue.

Ms. SKAER. Madam Chairwoman, I know a site in the State of South Dakota, known as the Anchor Hill deposit, in which a company was proposing to bring in a new mine and the proposal was to use the revenue generated by that mine to not only provide for the reclamation of the new mine, but to clean up historic waste and acid rock drainage on the mine site that the company proposing the new mine did not create, and yet mining opponent opposition to this mine delayed the permitting. The litigation resulted during a period of time when the price of gold dropped from $400 an ounce to $240 an ounce and the project became no longer feasible, and that site is now—you know, the revenue is not generated to clean that site up and it ended up being an AML site that the public is going to have to pay for.

Mrs. DRAKE. Well, in the same vain as that, to what extent, if at all, could the Good Samaritan program eliminate or at least reduce the need for a Superfund outlay? We always talk about more money from the Federal Government, but do we have any estimates of what we could either reduce or eliminate that need of funding through these Good Samaritan programs?

Ms. SKAER. Well, I think that clearly Superfund is not the answer here. Experience has shown that the costs under Superfund run three to five times higher. It is much more expensive. They spend—about 12 percent of the money that Superfund collects actually goes into the ground. The rest of the money goes into studies and consultants. I think it is much more efficient to encourage the mining industry to step forward and other Good Samaritans with their own money and put it into the ground rather than collecting money from the industry, sending it back to Washington, D.C., and then sending it back to the ground, where you lose 90 percent of

the money in the transition. It seems like a much more efficient process to allow the free market to work.

Mrs. DRAKE. Thank you. And I will now recognize Mr. Mark Udall for 5 minutes.

Mr. MARK UDALL. Thank you, Madam Chairman, and again welcome to the panel. Your testimony has been very enlightening. If I might, I would like to start with Dr. Brown. Dr. Brown, welcome.

It is always terrific to have somebody from Colorado to join us. We appreciate you making the trip back here. You suggested that separating the protection from liability from funding issues would help make it easier to craft legislation. I came to that same conclusion over the last year or so, and that is why I decided to introduce two separate bills, one that deals with the funding, one that deals with the liability side. But I take it that you think a complete solution needs to address both issues at some point.

Mr. BROWN. Indeed. I am sorry.

Mr. UDALL. If you would like to continue.

Mr. BROWN. Madam Chairman and Congressman Udall certainly funding is also an impediment to the cleanup of these mines. We have seen, however, in Colorado and across the West various different ways how different sites have been funded.

Mrs. DRAKE. Could you turn your mike on for us?

Mr. BROWN. I am sorry. It is on. I am not sitting close enough.

Mrs. DRAKE. Thank you.

Mr. BROWN. Sometimes there are communities who will be able to exploit the commercial value of reclaimed land to a fund site. Sometimes a community, such as they did in Breckenridge, will pass a local sales tax to help pay for cleanups. There are as many funding solutions as there are mines needing to be cleaned up.

I think that the Administration's bill is strong because it focuses on the liability aspect and leaves aside for another day the possibility of considering a kind of fee on the industry. What we need, the strategy of taking on this problem bit by bit I think is the most practical one in terms of seeing action as soon as possible on the liability question.

Mr. MARK UDALL. Thank you. Yeah. With this disclaimer, I am biased. My bill does as well focus, as you know, on the liability side.

Page 10 of your statement, you talked about some of the things we should do, some of the things we should avoid when we craft such legislation. Have you had a chance to review all the various bills introduced in the House and the Senate? And if so, could you rate them in terms of the criteria you have described and perhaps we ought to give you a chance to respond to the committee in more detail in that regard. Based on the look on your face, I would make that offer.

Mr. BROWN. Madam Chairwoman and Congressman, I have to admit that I am not a policy technician nor a lawyer. I am a historian by training and it is a historical perspective that I take on these issues. I would be happy to generate a memo that more in detail weighs the different strengths and weaknesses of the various bills as a homework assignment.

Mr. MARK UDALL. We appreciate your willingness to undertake such an assignment. If I might, Mr. Quinn, on page 8 of your

statement you say Good Samaritan doing a cleanup under permit could find itself incurring liability under other laws besides the Clean Water Act. Could you give us some examples of what you have in mind?

Mr. QUINN. Certainly, Congressman. For instance, RCRA is another issue that needs to be dealt with in terms of permitting and corrective actions, and so forth, if we incur particularly materials that are considered generated by the Good Samaritan activity and has to be regulated either as a subtitle C hazardous waste prospectively. So there are issues associated with RCRA that deal with how we are going to apply RCRA. Is it appropriate to be applied as is or tailored in a Good Samaritan project? That is just one example, one additional law.

TSCA could potentially be a problem, as Ms. Smith just testified, in terms of the Tennessee site with PCBs. That would be another issue that we would be confronted with. Good Samaritan confronted an abandoned mine with transformers or PCB with materials that have been somehow spread in part of the site and have to do with TSCA.

What we are speaking about in that testimony is the framework we see for Good Sam providing up front the flexibility to address those issues by naming those laws as eligible to be addressed in a Good Sam permit and then in the permit process, the regulators and the parties come together to decide what is necessary to adjust those existing standards to allow the Good Samaritan projects to go forward, at the same time result in some improvement.

Mr. MARK UDALL. I see my time is about to expire, Madam Chair. I don't know if we are going to have time for another round of questions. I would hope we might.

Mrs. DRAKE. I think we would have time for that.

Mr. MARK UDALL. For another round. I will yield the time I do not have remaining, and we will come back around to Ms. Smith and Ms. Skaer.

Mrs. DRAKE. The Chair will recognize Mr. Pearce.

Mr. PEARCE. Thank you, Madam Chair. Ms. Smith, you said you are not in favor of weakening environmental laws and you consider this Good Samaritan law to be a weakening of environmental laws.

Ms. SMITH. I consider the Administration bill to do that because I feel like what we see is they don't set a standard. I know that Mr. Fewell said they set realistic standards, but I say it is—basically it is a real mushy standard. There is no standard in the alternative. The analogy I would think of is, I have good intentions, I want to drive safely. You wouldn't tell me, OK, now you don't have to obey the traffic lights, you don't have to stop at stop signs, you don't have to obey the speed limit. There are no clear standards, and there is no way of getting to clear standards within the Administration bill. It absolves people of liability and responsibility, and it takes the public in many ways out of the game in terms of being able to have access to information and access to the courts if things go wrong.

Mr. PEARCE. You would be opposed if we did pass some sort of legislation for—let's say that we could get those objections resolved and we did have some form of Good Samaritan legislation where we could begin to clean up some of these sites that exist, you would

be opposed to having, like Ms. Skaer suggested, mines that did not contribute to the problem be a part of the solution; you would think that would be offensive?

Ms. SMITH. I am not opposed at all to remining or reprocessing.

Mr. PEARCE. No. I was asking to right on exactly the point. She said that it makes sense to allow mines who know the process, which makes sense to me, if you know the process, those would be the people that we would—and you would find that to be somewhat problematic?

Ms. SMITH. Well, I don't see any reason to absolve the people who if they know what they are doing, they have a good plan——

Mr. PEARCE. No, no, no. The problem is we are going into the back. We are saying if a problem existed a hundred years ago, that if you ever touch it you are now part of the problem for a hundred years ago, and that is why we don't get anywhere on asbestos, it is why we don't get anywhere on this issue, and I am asking as a person that comes from industry, in the oil and gas industry, if you want somebody to clean up an old orphaned well you probably ought to get somebody from the oil and gas industry to clean it up. And if you make them responsible for what happened in the past, nobody is going to touch it. And that is simply what he is saying and you would find that objectionable it seems.

Ms. SMITH. The reason I would find it objectionable is that much of the mess today—there are many arguments that many of these sites with companies who are operating in the 70s in the 80s and the 90s and today and creating pollution problems and saying that those pollution problems are from the turn of the 20th century, and many of those pollution problems are not from the turn of the 20th century. They are from the last few——

Mr. PEARCE. OK. Ms. Skaer, you hear the conversation. Is that true? You have people in the industry who are really ducking responsibility, claiming under their watch that the things they see belong back there. Do you have people that will admit to problems that they see that have been created under their watch and go about solving them? Tell me a little about your industry.

Ms. SKAER. Well, you know today's industry is a highly environmentally responsible industry. They have—the industries figured out that being environmentally responsible is not only the right thing to do, it is good for the bottom line. You know, it would be very easy on a site-by-site basis to determine whether or not there is a responsible party, a mining industry in existence today who worked at the site and caused or contributed to the problem. That is going to be easily determined. We start from the standpoint that by definition an abandoned mine is a mine that has no identifiable owner today or party that was responsible for the problem. And what we are suggesting is that—like you said, Congressman, if you want an abandoned mine cleaned up, then you ought to bring in the experts in cleaning it up, and that is the industry, just like in the oil and gas industry. You know, we are not looking to absolve liability for problems that we contributed to. We are looking at saying we want to be part of the solution to this problem that we didn't cause.

Mr. PEARCE. And that is typically what I see in industry today. I see in the oil and gas industry when my—in my dad's generation

significant problems, but I just don't see random acts today in the oil industry, and I suspect that they are not there.

I have another round of questions also, Madam Chair.

Mrs. DRAKE. Mr. Quinn, your written testimony calls for permit writers to have flexibility and to tailor the permit to the need of the site. Don't the permit writers already have that ability today?

Mr. QUINN. Apparently not in terms of applying current environmental statutes to the situation. They do not appear to think they have that authority. Arguably, there might be a situation where EPA or other regulators may think they can tailor the Clean Water Act, and so forth, but that has obviously not been forthcoming and as I indicated in my testimony, it seems to be the consensus of many of the organizations which have had a dialogue on this for well over a decade that to break the logjam we need to have a legislative solution that clearly signals to the State agencies and Federal agencies that they have that discretion to tailor in a single permit how different environmental measures will be applied to that situation for a voluntary cleanup.

Mrs. DRAKE. Thank you. I am going to go ahead and go—the Chair is going to recognize Mr. Udall for the second round.

Mr. MARK UDALL. Thank you, Madam Chair. Ms. Skaer, is that how you pronounce your last name?

Ms. SKAER. Correct.

Mr. UDALL. OK. Thank you for your testimony. In particular, I could make an editorial comment. I think we all have a real opportunity here, as you point out, for a win-win-win across a lot of spheres, and I appreciate the mining industry's acknowledgment that if we could move in this direction. It is quite a statement, and so I hope we can seize the moment, frankly. As I mentioned earlier, I have been working on this since I arrived in the Congress in 1999. I know Senator Baucus has been working on this since the 1980s and at one point he threw his hands up and said enough, people just don't seem to want to move ahead. So I think there is a real opportunity here for the mining industry to provide great leadership on this, and it would be a great success before we even cleaned up some of these mines to have the possibility of doing so.

In one of your criticisms of the bill, if I could become a little more specific here, you focus on the fact that the definition of a Good Samaritan is too limiting and you suggest the company shouldn't be disqualified just because it appears in the chain of a title for a mine. But wouldn't a company that appears in the chain of title be liable at least to some extent for cleaning it up? And if so, why should Congress relieve them of that liability?

Ms. SKAER. Well, there is a lot of times in the course of mergers and acquisitions a company may end up, you know, a modern mining company may end up in the chain of title of a legacy site but they didn't work on the site. They didn't cause the problem, and what we are suggesting is that merely appearing in the chain of titles should not be enough in and of itself to disqualify a company from being a Good Samaritan if they are willing to come forward with their own money and their own equipment and clean up the site. It seems to me that if our goal is to improve water quality and clean up these sites, let's not limit the people that can participate.

Mr. MARK UDALL. A devil's advocate would say they should have undertaken due diligence when they were involved in that transaction and that they have that legal responsibility. I know that has been part of the discussion between Mr. Pearce and Ms. Smith in the committee in general.

Ms. Smith, would you want to respond here, present your point of view on this as well? Because I think this is an important discussion here.

Ms. SMITH. I think it is, and I am fearful that that kind of exemption feeds into how the mining industry operates. It is not a criticism of how they operate, but there is a lot of transfer of properties and interest in particular mining operations. So it is very common, and you will find in many cases, you know, there is whole numbers of bankruptcies that go on and then their portfolio of mines, the mines that have uncleaned up messes go one place and the mines that have, you know, messes that maybe have a little money attached to them, you know, get spun off to someone else, and I think by doing that we pretty much basically tell the industry that is all right, you can trade your mining messes, and no one will have to clean up after themselves.

Mr. MARK UDALL. My sense, again editorially, is that there are arguments on both side of this that make some sense and we ought to continue to have this discussion to see if there isn't a sweet spot that we could embrace because I think there are a number of companies that would like to do the right thing, as Ms. Skaer suggested, and in other cases maybe somebody has been playing fast and loose and gaming the system. But would you like to respond, Ms. Smith?

Ms. SMITH. I would say—I would propose to the mining folks, wonder if they would—I would challenge them that if they had Good Samaritan legislation, that no mining company who has outstanding cleanup obligations of their own has unreclaimed land that they have not—that is closed and not cleaned up could participate at any site as a Good Samaritan until they clean up their existing obligations.

Mr. MARK UDALL. It might be interesting to embrace the American principle that we all get second or third chances, and perhaps it is opportunity for some companies—if in fact they exist, and let Ms. Skaer speak to this—get a second start, prove that in this day and age, as Mr. Pearce has suggested, that we know what we need to do and the technology is available and perhaps those companies will want to put that legacy behind them and start a new legacy.

Ms. Skaer, would you care to comment further?

Ms. SKAER. Well, I think that is true, Congressman. You know, like most industries in America, you know, we operated at a time when society did not have the same environmental ethic that we have today. We lacked the practices and the technology and the processes. I mean, we used to put—as a society, we used to put our sewage in the river because the river took the sewage away. We don't do that anymore. The industry has changed. When presented with problems, the mining industry has time and time again looked at it and found a solution. They have developed the technology, the practices to address these issues. It is a much different industry today than it was 30 years ago, 40, 50 years ago.

I do think that, you know, that if they have obligations somewhere else that should not prohibit a company who is willing to step forward and spend their own money and use their own equipment and apply their own expertise to clean up an abandoned mine site if the goal is to improve water quality and clean up these sites, then we should allow the people—you know, companies that are willing to do that to step forward to do that as long as they didn't cause the problem at the site they are cleaning up.

Mr. MARK UDALL. Thank you again, both of you. Madam Chair, thanks for your indulgence. Made very good points here. I am not sure where the answer lies, but it is the discussion we ought to continue to have. When you speak about the old days and sending sewage downstream, I am not sure that Mr. Pearce agrees that Colorado doesn't still do that today.

Ms. SKAER. Well, Congressman, we look forward to continuing the dialogue and working with you. Our members are very supportive, and we support any and all efforts to advance the Good Samaritan concept. We just want to make it clear that we want to participate and in order for the industry to participate, there is certain elements that the legislation needs to contain to ensure that we are at the table and bringing our expertise to the table.

Thank you.

Mrs. DRAKE. The Chair recognizes Mr. Pearce.

Mr. PEARCE. Thank you. And I have several questions, so if you would go to the shorter version of your answer rather than the longer version.

Mr. Quinn, you have heard Ms. Smith's concern and Mr. Udall's question that you might have some companies that play right and some play fast and loose. What would the association's position be if you have some company out there playing fast and loose with the rules? Would you tolerate it?

Mr. QUINN. No, and they shouldn't be eligible for a Good Samaritan.

Mr. PEARCE. Ms. Smith, the deal is that I think you have an industry that is willing to differentiate and yet people with the viewpoint somewhat similar to yours are continuing to block almost all improvement in this, and it just gets very frustrating because I think we all could move not all the way to the goal but somewhat closer to the goal. I see if you do address it, very shortly, Ms. Quinn—I mean Ms. Smith.

Ms. SMITH. I would say that colleagues of mine indeed have been trying to advance this discussion and have been actually supportive of Mr. Udall's legislation on—not just the finance part.

Mr. PEARCE. OK. Mr. Quinn, you have heard Ms. Smith talk about some of the ongoing current problems that we are—the statement is that we are continuing even today under regulatory practices. Are the regulatory practices that allow, and are there mines that are just starting today that are creating the same problems that we have seen created in the past? Is that a true statement?

Mr. QUINN. No. I mean if the premise is that there is a number of instances where mines that began in 1970s or 80s have ended up causing some environmental concern but that should now—that should make the entire industry ineligible for cleaning up sites that were at the turn of the century, in the early part of the

century and in the last century in the 50s, I don't really accept that premise. I think what we are talking about here is a predominant amount of the problems are problems when the ethic and the technology and the know-how and the expectation is entirely different. Now we are saying we have a different ethic. We have a different expectation and we have the technology and know how to fix those problems if the cloud of liability and regulatory impediments are——

Mr. PEARCE. If we were to look at the more current problems, and I don't doubt that there are some, but I suspect that they are completely on a different scale than previously, if, again, my background in oil and gas is any correct viewpoint. How much effect does litigation have, coming from the outside, on the difficulty of mines to continue or mining companies to continue or to clean up? Tell me a little bit about that.

Mr. QUINN. Well, Congressman, a lot of the litigation is a huge problem in terms of planning and receiving the authorizations you need to start mining. This prolongs the process. Expanding cases in the West and for large operations, it is taking 7 to 10 years to get permits you need to start up, and if they can get permits within 18 months, using—meeting similar environmental standards in another country, all things considered, I am going to be going offshore because as an investor I will get a quicker return on my same investment. So I really can't, again, speak to how much litigation has been a cause of——

Mr. PEARCE. That is fine. Let me ease on ahead here then.

Ms. Smith, you had suggested we need to do more funding. That would be the solution. You have heard Ms. Skaer testify I think 12 percent in one of her answers of the Superfund actually goes to the ground. The rest goes to studies and consultants. Who would you—I mean, you obviously do not want the mining companies to participate in the rehabilitation of the mine. Who would you direct that funding toward? Who would actually do the work since we are not going to use the people with the know-how?

Ms. SMITH. No. I didn't say I would exclude mining companies across the board. I was saying bad actor mining companies shouldn't be allowed to be Good Samaritans. And the 12 percent figure for Superfund was—I believe that is like a 15 or so year old study about——

Mr. PEARCE. How much is that today then?

Ms. SMITH. I don't know that there is a figure today. I think that it is probably a much higher percentage of it that goes——

Mr. PEARCE. See, I doubt it. And the reason I am not willing just to pour money into it, because I see the same thing Ms. Skaer sees. I will give you an instance. We have Blue Hole, just an aqua spring in the district that I represent out in the middle of the desert. There is a hole about the size of this room that flows with water all the time, and the city thought they would do something really good and make it where you could drop big rocks so the scuba divers could see something. Well, it disrupted the flow. So now the water is eating away. So we wanted the big rocks out. If I were doing that as an industry guy, I could do that for $5,000. But we got the Corps of Engineers, what was it, $75,000? We got them $75,000. Well, they should have been able to study it, to draw a

picture, to go down there and look at it, to go down there upside down to look at it, and instead they only got the $75,000 to study it. So then we said, OK, next year we wanted absolute. So they requested another $250,000 to study it again, and that is the problem with these things wherein the government is involved and where any agency, they are self-protecting, they want to pay the consultants, they want to pay all this stuff, and I don't think—I would be worried that it would be even lower than that. And so that is the reason that I am not sitting here chomping at the bit to pour money into this. If I saw that we were cleaning—even 80 percent of the money went to the cleanup, I would begin to vote for funding, but when 12 percent—when 80 percent goes to the bureaucracy, I am not interested.

Thank you, Madam Chair, and I probably have 8 or 10 more rounds of questions.

Mrs. DRAKE. Well, I thank the witnesses for their valuable testimony and the members for their questions. Members of the committee may have additional questions for the witnesses, and we will ask you to respond to these in writing. So thank you for being here.

If there is no further business to come before the Subcommittee, the Chairman again thanks the members of the committee and our witnesses. Without objection, the committee stands adjourned.

[Whereupon, at 11:45 a.m., the Subcommittee was adjourned.]

[A statement submitted for the record by Mr. Udall follows:]

REPRESENTATIVE MARK UDALL

BILLS TO ASSIST ABANDONED HARDROCK MINES RECLAMATION

MARCH 10, 2005

Mr. Speaker, today I am again introducing legislation designed to help promote the cleanup of abandoned and inactive hardrock mines that are a menace to the environment and public health throughout the country, but especially in the west. I introduced a bill aimed at that result in the 107th Congress, and in the 108th introduced a revised version that incorporated a number of changes developed in consultation with interested parties, including representatives of the Western Governors' Association, the hardrock mining industry, and environmental groups.

Today, I am introducing two separate but complementary bills that together include the provisions of the bill I introduced in the 108th Congress. This two-bill approach reflects the fact that while the Resources Committee has jurisdiction over the proposed funding legislation, the provisions dealing with liability fall within the responsibility of the Transportation and Infrastructure Committee. In other words, while the one-bill approach had the virtue of being comprehensive, the two-bill approach may facilitate Congressional action. But it remains the fact that both bills are equally necessary for a complete response to the problem.

THE BACKGROUND

For over one hundred years, miners and prospectors have searched for and developed valuable "hardrock" minerals—gold, silver, copper, molybdenum, and others. Hardrock mining has played a key role in the history of Colorado and other states, and the resulting mineral wealth has been an important aspect of our economy and the development of essential products. However, as all westerners know, this history has too often been marked by a series of "boom" times followed by a "bust" when mines were no longer profitable. When these busts came, too often the miners would abandon their workings and move on, seeking riches over the next mountain. The resulting legacy of unsafe open mine shafts and acid mine drainages can be seen throughout the country and especially on the western public lands where mineral development was encouraged to help settle our region.

THE PROBLEMS

The problems caused by abandoned and inactive mines are very real and very large—including acidic water draining from old tunnels, heavy metals leaching into streams killing fish and tainting water supplies, open vertical mine shafts, dangerous highwalls, large open pits, waste rock piles that are unsightly and dangerous, and hazardous dilapidated structures.

And, unfortunately, many of our current environmental laws, designed to mitigate the impact from operating hardrock mines, are of limited effectiveness when applied to abandoned and inactive mines. As a result, many of these old mines go on polluting streams and rivers and potentially risking the health of people who live nearby or downstream.

OBSTACLES TO CLEANUPS

Right now there are two serious obstacles to progress. One is a serious lack of funds for cleaning up sites for which no private person or entity can be held liable. The other obstacle is legal. While the Clean Water Act is one of the most effective and important of our environmental laws, as applied it can mean that someone undertaking to clean up an abandoned or inactive mine will be exposed to the same liability that would apply to a party responsible for creating the site's problems in the first place. As a result, would-be "good Samaritans" understandably have been unwilling to volunteer their services to clean up abandoned and inactive mines.

Unless these fiscal and legal obstacles are overcome, often the only route to clean up abandoned mines will be to place them on the nation's Superfund list. Colorado has experience with that approach, so Coloradans know that while it can be effective it also has shortcomings. For one thing, just being placed on the Superfund list does not guarantee prompt cleanup. The site will have to get in line behind other listed sites and await the availability of financial resources. In addition, as many communities within or near Superfund sites know, listing an area on the Superfund list can create concerns about stigmatizing an area and potentially harming nearby property values.

We need to develop an alternative approach that will mean we are not left only with the options of doing nothing or creating additional Superfund sites—because while in some cases the Superfund approach may make the most sense, in many others there could be a more direct and effective way to remedy the problem.

WESTERN GOVERNORS WANT ACTION

The Governors of our western States have recognized the need for action to address this serious problem. The Western Governors' Association has several times adopted resolutions on the subject, such as the one of June, 2004 entitled "Cleaning Up Abandoned Mines" sponsored by Governor Bill Owens of Colorado along with Governor Bill Richardson of New Mexico and Governor Kenny Guinn of Nevada.

OUTLINE OF THE TWO BILLS

My two bills are based directly on those recommendations by the Western Governors. One addresses the lack of resources, while the other deals with the liability risks to those doing cleanups.

BILL TO PROVIDE FUNDS FOR CLEANUPS

To help fund cleanup projects, one bill—entitled the "Abandoned Hardrock Mines Reclamation Funding Act"—would create a reclamation fund paid for by a modest fee applied to existing hardrock mining operations. The fund would be used by the Secretary of the Interior to assist projects to reclaim and restore lands and waters adversely affected by abandoned or inactive hardrock mines.

A similar method already exists to fund clean up of abandoned coal mines. The Surface Mining Control and Reclamation Act of 1977 (SMCRA) provides for fees on coal production. Those fees are deposited into the Abandoned Mine Reclamation Fund and used to fund reclamation of sites that had been mined for coal and then abandoned before enactment of SMCRA. Similarly, my bill provides for fees on mineral production from producing hardrock mines.

In developing this bill, I have followed the lead of a 1999 resolution of the Western Governors Association. That resolution notes that "While society has benefited broadly from the metal mining industry, problems created by some abandoned mine lands [are] a significant national concern..... [and] industry can play an important role in the resolution of these problems through funding mechanisms" as well as in other ways.

In accord with that suggestion, the bill provides for fees on producing hardrock mines on federal lands or lands that were federal before issuance of a mining-law patent. Fees would be paid to the Secretary of the Interior and would be deposited in a new Abandoned Minerals Mine Reclamation Fund in the U.S. Treasury. Money in that fund would earn interest and would be available for reclamation of abandoned hardrock mines and associated sites.

In developing the bill, I decided that a one-fee-fits-all approach would not be fair. Instead, the bill provides for only modest fees and a sliding scale based on the ability of mines to pay.

Mines Exempt from Fees—To begin with, the bill would entirely exempt mines with gross proceeds of less than $500,000 per year. That means many—probably most—small operations, such as Alaskan prospectors working individual placer claims, will not be liable for any fees.

Calculation of Fees—For more lucrative mines, fees would be based on the ratio of net proceeds to gross proceeds. If a mine's net proceeds were under 10% of gross proceeds, the fee would be 2% of the net proceeds. For mines with net proceeds of at least 10% but less than 18% of gross proceeds, the fee would be 2.5% of net proceeds. Mines where the net proceeds were at least 18% but less than 26% of gross proceeds would pay a fee of 3% of net proceeds. If the net proceeds were at least 26% but less than 34% of gross proceeds, the fee would be 3.5% of net proceeds. Where the net proceeds were at least 34% but less than 42% of gross proceeds the fee would be 4% of net proceeds. Mines with net proceeds equal to at least 42% but less than 50% of gross proceeds would pay a fee of 4.5% of net proceeds. And mines whose net proceeds were 50% or more of the gross proceeds would pay a fee of 5% of the net proceeds.

For the purpose of calculating these fees, the bill defines gross proceeds as the value of any extracted hardrock minerals that are sold, exchanged for good or services, exported ready for use or sale, or initially used in manufacture or service. Net proceeds are defined as how much of the gross proceeds remain after deducting the costs of mine development; mineral extraction; transporting minerals for smelting or similar processing; mineral processing; marketing and delivery to customers; maintenance and repairs of machinery and facilities; depreciation; insurance on mine facilities and equipment; insurance for employees; and royalties and taxes.

Based on Nevada Model—This way of calculating fees resembles one used by Nevada, which collects similar production-based fees from mines in that state. However, the fees in my bill are more moderate than those set by the Nevada law in one important respect—Nevada imposes its maximum fee rate on all mines with net proceeds of $5 million or more, regardless of the ratio between those net proceeds and the gross proceeds. My bill does not do that—instead, all of its fees are based on the ratio. In other words, under my bill a mine with earnings (i.e., net proceeds) of more than $5 million per year still might pay the minimum fee if those earnings were less than 10% of the gross proceeds.

Offset Provision—Under current law, the United States does not receive royalties from production of hardrock minerals from federal lands. Over the years, there have been frequent proposals to establish royalties for hardrock production, in order to provide a greater return to the American people. I think there are strong arguments in favor of such an approach. Accordingly, this bill would require the Secretary of the Interior to reduce payments under this title so as to offset any royalties hardrock producers may pay in the future pursuant to changes in current law. This is intended to avoid the chance that implementation of a royalty would result in inequitable treatment of a producer covered by both the royalty and Title I of this bill.

Estimated Proceeds from Fees and Use of Fund—There are not sufficient data available to say exactly how much money the fees would bring into the new reclamation fund each year. However, the United States Geological Survey does have information about the number of operating copper and gold mines and the State of Nevada has data about the money raised by their similar fee system. By extrapolating from those data, it is possible to estimate that the fees provided for in my bill would generate about $40 million annually for the Abandoned Minerals Mine Reclamation Fund.

Funds in the new reclamation fund would be available for appropriation for grants to States to complete inventories of abandoned hardrock mine sites, as mentioned above. A state with sites covered by the bill could receive a grant of up to $2 million annually for this purpose. In addition, money from the fund would be available for cleanup work at eligible sites.

To be eligible, a site would have to be within a state subject to operation of the general mining laws that has completed its statewide inventory. Within those states, eligible sites would be those—(1) where former hardrock-mining activities had permanently ceased as of the date of the bill's enactment; (2) that are not on

the National Priorities List under the Superfund law; (3) for which there are no identifiable owners or operators; and (4) that lack sufficient minerals to make further mining, remining, or reprocessing of minerals economically feasible. Sites designated for remedial action under the Uranium Mill Tailings Radiation Control Act of 1978 or subject to planned or ongoing response or natural resource damage action under the Superfund law would not be eligible for cleanup funding from the new reclamation fund.

The Interior Department could use money from the fund to do cleanup work itself or could authorize use of the money for cleanup work by a holder of one of the new "good Samaritan" permits provided for in the other bill I am introducing today. Among eligible sites, priorities for funding would be based on the presence and severity of threats to public health, safety, general welfare, or property from the effects of past mining and the improvement that cleanup work could make in restoration of degraded water and other resources. The first priority would be for sites where effects of past mining pose an extreme danger. After that, priorities would be sites where past mining has resulted in adverse effects (but not extreme danger) and then those where past mining has not led to equally serious consequences but where cleanup work would have a beneficial effect.

Further, the bill recognizes that in Colorado and other states there are often concentrations of abandoned mining sites that vary in the severity of their threat to the public health and the environment but that can and should be dealt with in a comprehensive manner. Therefore, it provides that sites of varying priority should be dealt with at the same time when feasible and appropriate.

BILL TO PROVIDE PROTECTION FOR "GOOD SAMARITANS"

To help encourage the efforts of "good Samaritans," the second bill—entitled the "Abandoned Hardrock Mines Reclamation Facilitation Act—would create a new program under the Clean Water Act under which qualifying individuals and entities could obtain permits to conduct cleanups of abandoned or inactive hardrock mines.

These permits would give some liability protection to those volunteering to clean up these sites, while also requiring the permit holders to meet certain requirements.

The bill specifies who can secure these permits, what would be required by way of a cleanup plan, and the extent of liability exposure. Notably, unlike regular Clean Water Act point-source ("NPDES") permits, these new permits would not require meeting specific standards for specific pollutants and would not impose liabilities for monitoring or long-term maintenance and operations. These permits would terminate upon completion of cleanup, if a regular Clean Water Act permit is issued for the same site, or if a permit holder encounters unforeseen conditions beyond the holder's control. I think this would encourage efforts to fix problems like those at the Pennsylvania Mine.

Together, these two bills can help address problems that have frustrated federal and state agencies throughout the country. As population growth continues near these old mines, more and more risks to public health and safety are likely to occur. We simply must begin to address this issue—not only to improve the environment, but also to ensure that our water supplies are safe and usable.