



EARTHWORKS

**Testimony of Jennifer Krill, Executive Director, Earthworks, before the U.S. Senate
Committee on Environment and Public Works on the Discussion Draft of the Good
Samaritan Cleanup of Orphan Mines Act of 2016
March 2, 2016**

Chairman Inhofe, Ranking Member Boxer, and members of the Committee, thank you for the opportunity to testify before you about the Discussion Draft of the Good Samaritan Cleanup of Orphan Mines Act of 2016. We especially appreciate the leadership of Senators Bennet and Gardner and look forward to working with the sponsors and this Committee to achieve legislation that will both protect water quality and encourage cleanup of abandoned mines.

Earthworks is a non-profit organization dedicated to protecting communities and the environment from the destructive impacts of mineral and energy development. For over a quarter century, we have worked closely with a broad coalition of local governments, Native Americans, citizen groups and other conservation organizations to improve the policies governing hardrock mining.

In the wake of the August 5th Gold King Mine disaster that spilled million gallons of acid mine drainage into a tributary of Colorado's Animas River, communities who live with the threat of old mines have demanded solutions. In the near term, the communities downstream from the Animas River spill need a permanent water treatment facility and immediate compensation for losses. But this problem is not limited to the Gold King Mine. It is nationwide, focused on the west.

Good Samaritan Policies Alone Won't Solve the Problem

To solve the problem of perpetual pollution from inactive and abandoned hardrock mines, we must reform the 1872 Mining Law and institute a reclamation fee similar to the one paid by the coal industry. Good Samaritan initiatives cannot solve the massive problem faced by western communities and water resources due to abandoned mine pollution.

Complicated, expensive clean ups like the Gold King Mine require a dedicated cleanup fund with significant resources, not a Good Samaritan. If Congress had reformed the 1872 Mining Law and created an abandoned mine reclamation fund, Silverton, Colorado would have had the ability to clean up surrounding old mines years before they became a catastrophic threat.

The Environmental Protection Agency (EPA) has an existing and clear administrative process¹ for bona fide Good Samaritans to clean up abandoned or inactive mines - yet pollution from abandoned mines continues. To facilitate the Good Samaritan work of civic, religious, and conservation organizations, the EPA has created a process through which qualified projects can receive what is effectively a Good Samaritan permit. Due to lack of funds, very few mines have been cleaned up compared to the scope of the problem.

Old Mines Pollute Western Waters

In the early 1990's, Earthworks assessed the scope of this problem estimating that the United States has over 500,000 abandoned hardrock mines². To date, there is still no comprehensive inventory of abandoned hardrock mines, no system to prioritize clean up of the most dangerous of these mines, and almost no funds to pay for it.³

According to EPA, estimated cleanup costs total approximately \$50 billion dollars.⁴ This staggering figure far exceeds the resources available to Good Samaritans, illustrating the need for a polluters pay funding mechanism similar to that paid by the coal industry.

The Surface Mining Control and Reclamation Act (SMCRA) has for nearly two generations required the coal industry to pay a fee for abandoned mine reclamation.⁵ This fee has successfully funded coal mine clean ups across the country. Yet, the hardrock mining industry pays no such fee. In fact, in some states, the coal industry's funds go to clean up the messes of their hardrock brethren.

If the hardrock mining industry had been subject to a SMCRA-like law, the Gold King Mine spill likely would not have happened. An independent, dedicated funding source for hardrock abandoned mine cleanup, similar to the SMCRA program, is long overdue. Incentivizing the work of Good Samaritans is not enough. Only an industry-funded reclamation program will solve our nation's abandoned and inactive mine problem.

A Hardrock Mining Reclamation Fund: More Jobs, Cleaner Water

Senators Udall, Bennet, Heinrich, Markey, and Wyden have introduced legislation that would bring us closer to ensuring that the Animas mine disaster does not happen again. S. 2254, the Hardrock Mining and Reclamation Act of 2015, would facilitate the cleanup of abandoned hardrock mines while creating tens of thousands of reclamation jobs across the west far into the future.

¹ x EPA memorandum - Clean Water Act Section 402 NPDES Permit Requirements for 'Good Samaritans' at Orphan Mine Sites. <http://www.scribd.com/doc/116560607/2012-EPA-Good-Samaritan-Memo>

² Earthworks/Mineral Policy Center, Burden of Gilt: The legacy of environmental damage from abandoned mines, and what America should do about it, (1993). See https://www.earthworkSACTION.org/library/detail/burden_of_gilt

³ Government Accountability Office, Information on the Number of Hardrock Mines, Cost of Cleanup, and Value of Financial Assurances, Jul 14, 2011. See <http://www.gao.gov/products/GAO-11-834T>

⁴ i EPA Liquid Assets 2000: Americans Pay for Dirty Water at <http://water.epa.gov/lawsregs/lawsguidance/cwa/economics/liquidassets/dirtywater.cfm>

⁵ See 30 U.S.C. 25 Subchapter IV §1231 et seq.

This bill modernizes the antiquated 1872 Mining Law by balancing mining with other land uses, ensures a fair royalty return for taxpayers, and creates a reclamation fee to fund cleanup of abandoned and inactive mines.

Creating a dedicated, significant, stream of funding is the only way to fully address the pollution problem from half a million abandoned hardrock mines. Without it, state, local and tribal governments and citizen groups can only clean up a small number of them. We also need a comprehensive inventory of these sites in order to prioritize which abandoned and inactive mines require immediate attention.

Good Samaritan Legislation: General concerns

Earthworks has supported several legislative proposals in past Congresses that create narrow exemptions from Clean Water Act (CWA) liability.⁶ Given the scope and scale of the problem, and the technical complications at many old and inactive mine sites, it is important to carefully word Good Samaritan legislation to adequately protect communities and water supplies.

Some language in the current draft leaves room for interpretation and should be clarified, edited or changed to protect the environment and nearby communities. Earthworks looks forward to working with the Committee and the sponsors to ensure that the necessary sections are altered.

One place where it is clear language needs to be changed is in regards to the cleanup standard. This standard must be clear and manageable to guarantee that land, water, wildlife and communities are protected. A clear and manageable standard will allow straightforward implementation.

Good Samaritan permits must be reserved for truly Good Samaritans -- those entities that did not contribute to the pollution and are not interested in profiting from reclamation. Any monies from the reprocessing of tailings for cleanup purposes must be used only to offset the cost of the project. True Good Samaritans are not concerned about monetary gain, and Earthworks opposes any legislation that includes re-mining for profit.

This legislation must include provisions to hold Good Samaritans accountable if mistakes are made and water quality on site is made worse than before reclamation began. Barring a well-defined case of force majeure, Good Samaritans must be liable for mistakes and permit violations, as well as held responsible for adhering to permit conditions.

Citizen suits provide accountability and ensure that agencies and permittees follow the intent and letter of the law. If something goes wrong, nearby communities must have access to the courts to

⁶ See Earthworks Policy Director Lauren Pagel June 14, 2006 testimony before the Senate Environment and Public Works at https://www.earthworkSACTION.org/files/publications/20060615_EARTHWORKS_GoodSam_testimony.pdf

See also S. 1848, the Cleanup of Inactive and Abandoned Mines Act and S. 2780, the Good Samaritan Clean Watersheds Act. S. 1848, (109th Congress), and S.1777 - The Good Samaritan Cleanup of Abandoned Hardrock Mines Act of 2009 (111th Congress)

adequately enforce all of our important environmental laws. Citizen suit provisions promote judicial economy, efficient enforcement, and citizen participation.

During the permitting process, it is important that the Good Samaritan include detailed information about the expertise of those involved in the cleanup process. It is important that the permittee hires qualified persons to do the job, and if any uncertainty exists about the qualifications or expertise of the persons involved, that should be considered when approving or denying the permit. This requirement to demonstrate technical capabilities must be a permit requirement. The current discussion draft lacks the details needed to certify that a mine engineer, geologist, or other qualified professional is onsite as needed.

In addition to technical expertise, Good Samaritans must establish clear and sufficient financial assurances to receive a permit. Good Samaritans should prove they have the funding in hand to carry out all required reclamation. Clear guidelines for what type of instruments represent adequate financial assurance should be defined by Good Samaritan legislation to ensure that monies are available if something goes wrong or a Good Samaritan goes bankrupt before reclamation is completed.

It is important to include clear emergency action and notification requirements in Good Samaritan legislation. As we learned from the Gold King mine disaster, if something goes wrong, there needs to be a process for who is notified and when.

The role of federal land managers must be clarified in the discussion draft to make sure that land managers have an approval and oversight role during the permitting process and remediation process.

Discussion Draft of the Good Samaritan Cleanup of Orphan Mines Act of 2016

Earthworks praises Senator Bennet and Senator Gardner for their work on the discussion draft thus far. It is important that key issues in the discussion draft be addressed so that we avoid potentially destructive unintended consequences. By making necessary improvements to the bill, we will ensure that the law can be properly implemented and avoid unplanned loopholes.

Section 2 Definitions: (7) Historic Mine Residue

The definition of historic mine residue should replace December 11, 1980 with October 18, 1972, the effective date of the Clean Water Act. Upon that date, mining companies became responsible for their pollutant discharges into waters of the United States. Mines permitted after the Clean Water Act are also more likely to have responsible owners or operators. Most of the pollution problem this discussion draft seeks to solve comes from pre-1972 mines.

Generally, some definitions in this the definitions section are problematic, vague or conflicting. It is important that all definitions are clear and precise.

Section 4(f)(2)(C) Activities Not Relating To Remediation

It is important that the scope of the discussion draft's liability waivers apply only to those activities authorized by the Good Samaritan permit. Off site activities or on site activities not described in the permit application (absent well-defined force majeure -- force majeure should be defined similar to the Clean Water Act and CERCLA definitions) should not receive liability waivers. This section should be clarified to achieve this intent.

Section 4(e)(1)(A)(ii) Permit Issuance - Meeting Applicable Water Quality Standards

Earthworks supports the discussion draft's requirements that permittees adhere to applicable water quality standards to the maximum extent practicable. The current language is potentially ambiguous and may make it difficult to ensure that Good Samaritans are doing everything possible to achieve the standards. This language should be rewritten to ensure easy and clear implementation.

Section 4(e)(1)(A)(iv) Financial Assurances

Earthworks supports the discussion draft's requirement that permittees provide adequate financial assurances to complete the permitted work. We suggest that the financial assurances, including bonding levels, be sufficient to cover the costs of clean up should something go wrong following project closure. This legislation should specifically bar corporate guarantees as an acceptable financial assurances instrument.

In order to make sure that taxpayers are not left to foot the bill for cleanup, Good Samaritans must prove financial solvency as well as post an adequate bond in case something goes wrong. Post-close maintenance must be addressed as well, with the permittee providing a funding source for any long term work that needs to be done onsite. The discussion draft should be edited to make sure that adequate funding is present at every stage of the project.

Section 4(l) Failure to Comply

Any non de minimus deterioration of ground or surface water quality resulting directly or indirectly from permitted activities must result in the removal of the liability protections. Even if that deterioration occurs following the termination of the permit.

Section 4(m) Enforcement

No policy or regulation makes any difference if not for effective enforcement. Under (m)(1), the Committee should raise the cap of the per penalty violation to \$37,500 per day. This is consistent with other environmental laws.

Section 4(f)(1)(D) Effect of Permits- Remining

This discussion draft authorizes re-mining to defray the costs of the permitted activities. The Committee should delete Section 4(f)(1)(D)(ii), which authorizes re-mining to fund off site remediation. Since mining inevitably creates a substantial risk of water quality deterioration, no Good Samaritan permit should allow any mining. Truly Good Samaritans should not receive compensation. Any funds generated from reprocessing of ores should only be allowed to offset the cost of the reclamation at the orphan mine site.

The current discussion draft leaves a potential opening for Good Samaritans to exploit remining for profit because of the way this section is drafted. We believe the intent of this section is to require all monies be used for current or future hardrock mine remediation projects, and the language should be changed to ensure that intent.

Section 4(o) Citizen Suits

In addition, this discussion draft must also include provisions allowing for citizen civil actions. Many of our bedrock environmental laws, including CWA⁷ and CERCLA⁸, include citizen suit provisions. We suggest that the citizen suit provision for this discussion draft contain a 60 day notice period similar to those found in the above mentioned statutes.

These provisions limit jurisdiction to cases where the permitting authority fails to act during the notice period. It allows agencies, citizens, and permittees the opportunity to resolve disputes and avoid litigation. This process promotes both judicial economy and agency action.

Congress provided mechanisms for citizen enforcement of our environmental laws to hold both agencies and permittees accountable to the standards and protections Congress created under their laws.

Everyone agrees that EPA is responsible for Gold King. As a practical matter, foreign mining companies may be some of the most likely candidates for the more challenging Good Samaritan projects. A citizen suit provision will hold these companies accountable and act as a deterrent from cutting corners on a project.

Section 4(f)(3) Termination of Permits

It is important to clarify who is responsible for the site once a permit ends under this section. Often long-term active or passive treatment is required on site, and the discussion draft is silent on what occurs once the permit is terminated.

⁷ 33 U.S.C. § 1365

⁸ 42 U.S.C. § 6972

For projects on federal land, it is important the taxpayer not be responsible for ongoing maintenance. If land managers are to operate the needed treatment long term, they must use a trust fund set up by the permittee or another non-taxpayer funded source.

Section 4(u)(1) Sunset Provision

Earthworks supports sunsetting the permitting agency's authority to issue Good Samaritan permits after 10 years. This sunset provision will incentivize this Committee to evaluate the successes or shortcomings of Good Samaritan policy and, if necessary, make changes.

Section 4(u)(5) No Enforcement Liability

This section is too broadly drafted and needs to be changed in order to make sure bad actors are not unintentionally left off the hook.

Conclusion

Thank you for the opportunity to present the views of Earthworks on this discussion draft and we look forward to working further with the co-sponsors and the Committee to solve the problem that abandoned mine sites pose to air, water and public safety in western states.

Whether we find a path forward for Good Samaritans to help clean up some abandoned mines across the west or not, we must ensure that policymakers take care to prevent future mining disasters. And, while Good Samaritans will tackle a few reclamation projects, the scope of the problem will dwarf their best efforts. Real and meaningful mining reform with a robust reclamation fee, as in S. 2254, is the best solution to protect water and western communities from toxic mine waste.