

Testimony by

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on behalf of
THE WESTERN GOVERNORS' ASSOCIATION
&
THE WESTERN STATES WATER COUNCIL
Regarding

Barriers to the Cleanups of Abandoned Mines

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Mr. Chairman, and members of the Committee, 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, 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 section 402 National Pollutant Discharge Elimination system (NPDES) permit program. However, there is currently no provision in the Clean Water Act which protects a “Good Samaritan” that 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 encouraged—in cooperation with Congressional Offices, the environmental community, the mining industry, EPA, and other interested parties—efforts to develop appropriate Good Samaritan legislation. To date, 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. While Western States believe that there could be benefits to addressing potential liabilities under a number of other environmental laws, they continue to believe that Clean Water Act liability is the primary obstacle to Good Samaritan cleanups taking place currently.

The Western States greatly appreciate recent efforts by EPA to examine and enhance administrative tools to facilitate Good Samaritan remediation efforts. However, Western States believe strongly that only a legislative solution can effectively address liability concerns, particularly for sites with draining adits, and therefore strongly encourage Congress to move forward on this issue.

Responses to Major Issues

Scope of “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.

Citizen Suit Enforcement

The citizen suit enforcement tool 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 states have believed that a different set of enforcement tools is warranted for Good Samaritan permittees. Other permittees are required to

get 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 attempts to step in and 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 citizen suit action is currently a major disincentive for such efforts.

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 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.” EPA should approve a permit only if it determines that the remediation plan demonstrates with reasonable certainty that the actions will result in an improvement in water quality to the degree reasonably possible, taking into consideration the resources available to the remediating party for the proposed project. Clearly, states and others will have no reason to undertake the expense of a 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, e.g., meeting specific numerical effluent limits. The exception to this structure that the states agree upon pertains to early termination of a permit due to unforeseen conditions. In such cases, the states agree that the conditions at the site must be no worse than the original baseline conditions, before the permit can be granted early termination.

Scope of Mining Sites Addressed

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 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 states advocate that any Good Sam 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

States agree on requiring that the Good Samaritan “remediation plan” include a summary of the results of a reasonable effort to identify parties whose past activities have affected discharges at the site. Additionally, states agree that the Administrator should make a determination that no identifiable, financially viable, owner or operator exists before issuing a permit. States further agree that existing liabilities for mined lands should not be affected by the proposal.

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. In developing a Good Samaritan proposal, Western states believe it is appropriate to allow limited incidental reprocessing of tailings or waste rock piles to take place on a Good Samaritan site, so long as the revenues which result from such reprocessing would go toward offsetting the total costs of remediating the site.

Delegation Authority

The Western states support including authority to the EPA Administrator to delegate permitting authority to states. This is consistent with the remainder of the NPDES program, which already results in a number of instances where one state agency issues an NPDES permit to another state agency. 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.

Funding for Remediation

Historically, Section 319 funds have been utilized for a number of projects remediating inactive and abandoned mined lands. To assure that 319 funds will continue to be available for such cleanup projects, any Good Samaritan proposal should include a provision clarifying that 319 funds may be used for projects subject to Good Samaritan permits. Such provision would not be intended to change the current 319 allocation formula or a state’s prioritization of projects under a state nonpoint source management program.

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 adoption of a Good Samaritan provision that, at a minimum, will allow states to proceed on Good Samaritan cleanups. Congress should avoid expanding the Good Samaritan proposal to extraneous issues such as remining or a general fee on mining. The Western states are frankly 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 adopted into law. As soon as a law is passed allowing Good Samaritan cleanups of abandoned or inactive mines, water quality will begin to improve in the West!

Comments on Behalf of State of Colorado

Finally, I would like to summarize the State of Colorado's position on Good Samaritan issues as articulated by Governor Owens. Governor Owens is on record in support of S.1848, the Cleanup of Inactive and Abandoned Mines Act, introduced by Senators Allard and Salazar. We believe that this bill provides a thoughtful and balanced approach to the range of issues and options that have been discussed.

Colorado's Minerals, Energy and Geology Policy Advisory Board supported the concept of Good Samaritan legislation in 1996. Colorado also has actively encouraged remining as a form of environmental clean up since the Colorado Mining Summit in 1987.

For us, this is not an academic debate about appropriate legislative language. If a Good Samaritan bill is enacted, water quality in Colorado could improve during the next available construction season. Our state Division of Minerals and Geology has several projects that it has put on hold due to liability concerns. These projects will be revived if legislation is passed. In addition, there are numerous public, private, governmental and non-profit groups and entities in Colorado anxious to pursue remediation projects in several of our river basins as soon as the Good Samaritan liability issue is resolved.

The State of Colorado urges Congress to move forward with S.1848 as the basis for Good Samaritan legislation.

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"