



Steve Moyer

Vice President for Government Affairs

June 13, 2013

The Honorable Doug Lamborn
Chairman
Subcommittee on Energy and Mineral Resources
437 Cannon House Office Building
Washington, DC 20515

The Honorable Rush Holt
Ranking Member
Subcommittee on Energy and Mineral Resources
1214 Longworth House Office Building
Washington DC 20515

RE: Oversight Hearing on Mining in America: The Administration's Use of Claim Maintenance Fees and Cleanup of Abandoned Mine Lands

Dear Chairman Lamborn and Ranking Member Holt:

I offer the following testimony on behalf of Trout Unlimited (TU) and its 145,000 members nationwide. My testimony will focus on the cleanup of abandoned mine lands, specifically the need to facilitate abandoned mine cleanups by Good Samaritans—those who have no legal obligation to take on an abandoned mine cleanup, but wish to do so in order to improve water quality. TU's mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. In pursuit of this mission, TU has worked to restore abandoned mines from the Appalachian coal fields to the Rocky Mountains, and my testimony is based upon these experiences.

Historically, mining played a large role in settling the American West and building up the nation. However, its legacy – more than 500,000 abandoned hard rock mines with an estimated cleanup cost ranging from \$36-72 billion – has persisted for the better part of a century with little progress toward a solution. According to the Environmental Protection Agency (EPA), abandoned hard rock mines affect 40 percent of headwaters in the western United States. The lack of dedicated funding sources and burdensome liability for would-be Good Samaritans have hindered abandoned hard rock mine cleanups. In the East, abandoned coal mines dot the landscape, and while much has been accomplished through the Surface Mining Control and Reclamation Act's Abandoned Mine Lands Fund, a great deal more remains to be done. The cost of cleanup in Pennsylvania alone has been estimated as high as \$15 billion.¹ The primary focus of this testimony is the cleanup of abandoned hard rock mines, but as I will explain, the Clean Water Act liability concerns for Good Samaritans extend to the East as well.

¹ <http://pa.water.usgs.gov/projects/energy/amd/>

In short there are two main ingredients for effective abandoned mine land reclamation: well-designed liability relief for Good Samaritans involved in cleanup efforts, and dedicated funding. We encourage Congress to develop legislation to provide the needed certainty to Good Samaritans who are working to comply with the Clean Water Act for voluntary abandoned mine cleanups. Also, we urge Congress to develop mining reform legislation that recovers a fair royalty from all minerals taken from public lands and establishes an abandoned mine clean up fund.

With hundreds of thousands of abandoned hard rock mines and cleanup costs in the billions, and with a lack of a dedicated funding source for hard rock mine cleanup, the challenge is daunting. While TU continues to advocate for hard rock mining law reform and a dedicated funding source for abandoned mine cleanup, we are working in local communities to leverage the resources that are available and restore rivers and streams that are impacted by abandoned mines. This work demonstrates the positive affect that dedicated Good Samaritans can have on local waters, as well as the limitations placed on Good Samaritans as a result of liability concerns under the Clean Water Act. Although projects by TU and other Good Samaritans have addressed only a tiny fraction of the overall problem, each project has significantly restored the health of a particular river or stream. These projects represent significant local victories, and also provide lessons on Good Samaritan restoration generally.

The following testimony is based on TU's considerable experience with these projects, and will describe the work that has been done by Good Samaritans, the roadblocks to Good Samaritan cleanups, and our recommendations for how to facilitate abandoned mine cleanup in the future.

BARRIERS TO GOOD SAMARITAN ABANDONED MINE CLEANUP

Our tried and true pollution cleanup laws, the Clean Water Act and Comprehensive Environmental Response, Compensation, and Liability Act (better known as "CERCLA" or "Superfund"), place the burden of cleanup squarely on the owners of the property. Generally this is an excellent policy for most forms of pollution, but in the West, where the parties responsible for developing most of the old mine sites are long gone, and with current owners having little to no incentive to do any of the cleanup because of the liability from the laws, cleaning up the sites is a legal quagmire.

A partnership between TU, Western states, and EPA resulted in EPA policy that provides useful protection to Good Samaritans from Superfund liability in 2007, but Clean Water Act liability has remained a significant obstacle.

1. CERCLA (Superfund)

When TU first started working on abandoned hard rock mines, there were liability concerns under CERCLA and the Clean Water Act that prevented many Good Samaritan projects from moving forward. CERCLA presents a significant barrier to Good Samaritan projects, both because the statute presents real risks for any party helping to clean up toxic wastes, but also because the statute's complexities and perceived risks are incredibly daunting for many watershed groups and other NGOs. In 2006, TU completed a pioneering Good Samaritan

cleanup in Utah's American Fork Canyon that overcame CERCLA liability concerns. The liability relief document (an Administrative Order on Consent, or "AOC") negotiated with the EPA for the American Fork work led to the issuance of EPA guidance and model documents for dealing with CERCLA liability relief for future Good Samaritans to use in similar projects. TU has now negotiated three separate AOC's with EPA covering two different projects—one project on the American Fork in Utah (two AOC's for different phases of the project) and another on Kerber Creek in Colorado. We greatly appreciate the work that EPA has put into its model AOC for Good Samaritan clean ups, and the work that EPA staff have put into negotiating the specific AOC's for TU. Though there remains room for improvement, the AOC's have helped to remove one of the major impediments that have prevented communities, watershed groups, conservation organizations, TU chapters, and others from undertaking abandoned mine cleanup projects.

2. Clean Water Act

There are many projects where water quality could be improved by collecting run-off, or taking an existing discrete discharge, and running the water through either an active or passive treatment system. Clean Water Act (CWA) compliance and liability issues remain a barrier to such projects. A number of courts have held that discharges from systems that treat wastewater from abandoned mines are point source discharges that require an NPDES permit under section 402 of the CWA. Although EPA and some Eastern states have not considered such projects to be point sources requiring NPDES permits, the Fourth Circuit's 2010 decision in *West Virginia Highlands Conservancy, Inc. v. Huffman* (discussed more below) creates some uncertainty around that approach.

Stakeholders in projects involving treatment of wastewater have balked because of CWA liability for two reasons. First, NGOs, including TU, are not well suited to apply for and hold permits for such projects. TU does not have an adequate funding mechanism to legally bind itself to pay for the perpetual costs associated with operating a water treatment facility and permit compliance. Typically, NGOs implement Good Samaritan projects through specific grants provided by government agencies, private foundations, and other donors. Although such grants may include funding for future monitoring and maintenance, nonprofit groups would not have funding for major improvements to a system should those improvements be needed to comply with a permit. As a result, the liability risk associated either with complying with a permit, or building a system without a permit, represents a completely unfunded risk for TU that could threaten the financial health of the organization.

Second, for many projects it may be impossible to obtain a permit, because the treatment systems may not be able to treat abandoned mine wastewater to a level that meets all applicable water quality standards or other applicable criteria. A given project may produce significant improvements in water quality that does not result in full compliance with all criteria, or it may comply with all criteria most of the time, but go out of compliance under certain circumstances (such as during very heavy storm events). It is also sometimes difficult to predict in advance with precision the results that a given treatment system will achieve. Although one can know in advance that a project will produce a significant improvement in water quality, one cannot always know the exact treatment level it will achieve for every parameter until the treatment system has been in operation for some time. Finally, many of these projects are built in remote

mountain areas where access for monitoring and maintenance is very difficult. In short, these projects are not well suited for traditional NPDES permits that included monitoring for and compliance with detailed numeric criteria.

In short, Good Samaritan projects need some sort of permit mechanism, be it a general permit under existing rules, or the type of permit contemplated by legislation previously introduced by Senator Mark Udall in the 112th Congress (S. 1777) that requires the project to produce significant improvements in water quality for a specific period of time, implement best design and management practices, and conduct appropriate monitoring, but not expose the Good Samaritan to liability if the project at some point fails to achieve a required criterion for a given pollutant.

NGOs, government agencies, and landowners have been reluctant to take on CWA liability for treatment systems. Projects in Colorado have not been completed because none of the relevant stakeholders (state agencies, private landowners, and NGOs) have been willing to take on CWA liability. For example, without federal protection that shields Good Samaritans from liability, the sulfate-reducing bioreactor phase of the Tiger Mine Restoration Project near Leadville, CO, a proposed project in the headwaters of the Lake Fork of the Arkansas River, is on hold. Though the other portions of this project will be successful in reducing the amount of metals pollution entering the Lake Fork of the Arkansas, the sulfate-reducing bioreactor is necessary to treat the acid mine drainage coming from the tunnel. The planned bioreactor is designed to address the low pH and high metals concentrations that are causing the Lake Fork of the Arkansas to be considered one of Colorado's most polluted waterways. Despite the fact that the project would dramatically improve water quality, TU and its partners cannot proceed without liability protection under the CWA.

Colorado's Upper Animas River, once a shining example of the benefits of abandoned mine cleanup, now demonstrates the limits placed on Good Samaritans under the Clean Water Act. The Upper Animas River Stakeholders group was instrumental in partnering with state and federal agencies since the 1990s to clean up abandoned mines and restore water quality in the Animas River, which resulted in the reestablishment of an outstanding trout fishery downstream in Durango. Today, however, we are losing ground in the fight against abandoned mine pollution in the Animas, and the necessary restoration projects are held up by CWA liability concerns.

In short, any entity that constructs a bioreactor or other similar treatment system becomes liable for that discharge in perpetuity under the Clean Water Act. Understandably, this is a risk that the Tiger Mine project partners are not willing to take even though the bioreactor design is nearly completed, the cells have been excavated, the liner has been purchased, and all of the funding is in place.

TU has worked with the EPA to address these challenges, and we appreciate the efforts the agency has made to help us and other would-be Good Samaritans. In December of 2012 the EPA issued a guidance memo designed to clarify how the Clean Water Act applies to Good Samaritan abandoned mine cleanup projects. The guidance memo requires potential Good Samaritans to fully comply with the 2007 Superfund policy, but allows eligible Good Samaritans

to avoid CWA requirements under certain circumstances. The result is that eligible Good Samaritans are required to produce significant improvements in water quality for a specific period of time, implement best design and management practices, and conduct appropriate monitoring, all under the 2007 Superfund policy, but then are shielded from CWA liability if they meet qualifying criteria. The new policy guidance is complex, and some on-the-ground testing will be required to determine whether it can work over the long run. Our initial reviews indicate that the restrictions in the guidance memo may not be a good fit for the type of work that is needed, but we hope to engage EPA in a “test-drive” of the new guidance. Nonetheless, we are pleased that EPA is making abandoned mine cleanup a higher priority, and we are eager to explore ways to put the guidance to use on sites around the West. In spite of this progress, the Clean Water Act remains a barrier to cleanups at the Tiger Mine and Upper Animas, and similar projects elsewhere. Federal legislation is needed to facilitate these and other cleanups in a way that provides clarity and certainty to Good Samaritans.

3. Western Hard Rock Mines and Eastern Coal Mines; Similarities and Differences

Eastern coal mines are not subject to the CERCLA liability, but a recent court decision has extended the Clean Water Act liability concerns that have long plagued the West to the Eastern coal fields. In *West Virginia Highlands Conservancy v. Huffman*, 625 F. 3d 159 (4th Cir. 2010), the Fourth Circuit held that facilities run by the state of West Virginia to treat water pollution coming from abandoned coal mines met the definition of a point source under the CWA. In addition, the court held that the state was the operator of those facilities and therefore needed a permit under sections 301 and 402 of the CWA. The decision has introduced some uncertainty regarding how the CWA applies to projects that treat acid mine drainage from abandoned coal mines in Pennsylvania and other Eastern states.

WHY GOOD SAMARITANS?

There are numerous citizen groups that have formed in this country for the purpose of protecting, conserving and enhancing the natural resources of their local communities. They work collaboratively with government agencies to develop solutions to complex environmental problems. These “Good Samaritans” need liability protection to voluntarily clean up the abandoned mine sites that directly affect the quality of water that serves their communities.

By using the CERCLA liability relief and avoiding projects that trigger Clean Water Act liability, and with the support of the Tiffany & Co. Foundation and others, TU has made substantial progress in cleaning up abandoned mine impacts in several watersheds in the West.

American Fork, Utah. The Pacific Mine cleanup in the American Fork Canyon was the first voluntary, non-profit-led abandoned hardrock mine restoration project in the West. TU and its partners received awards from the Utah Board of Oil, Gas and Mining and the EPA for work on the American Fork. Anglers can now catch cutthroat trout immediately downstream of the area where pollution used to run off mine tailings piles.

Mores Creek, Idaho. To date, over 14,000 cubic yards of mine tailings have been removed from the banks of Mores Creek to create a more natural floodplain area, and trees planted

along the stream will provide critically needed shade for coldwater fish. Migratory fish are now seen using instream habitat structures installed as part of the restoration effort.

Kerber Creek Watershed, Colorado. In total, TU and its partners restored over 65 acres of mine tailings, stabilized over a mile of stream bank, and installed over 230 instream structures that are now home to brook trout. Volunteers logged over 13,000 hours of work in the watershed over the past three years. The restoration project has received four prestigious awards: the BLM's *Hardrock Mineral Environmental Award*, the Colorado Riparian Association's *Excellence in Riparian Area Management Award*, the Rocky Mountain Region of the USFS's *Forest and Grassland Health Partner of the Year*, and the Public Lands Foundation's *Landscape Stewardship Award*.

Clark Fork River Basin, Montana. TU and partners have reclaimed 4 mine sites in the Middle Clark Fork River and have 6 ongoing mine reclamation project in the planning and design phases. For example, on Mattie V Creek TU and its partners removed 12,000 cubic yards of dredge tailings and reclaimed 500 feet of stream channel reclamation project. Fish are now swimming up Mattie V Creek from Ninemile Creek for the first time in 80 years. Because of these and other accomplishments, the TU project manager in Montana was awarded with the American Fisheries Society's Individual Achievement Award and the US Forest Service's Rise to the Future Award in 2010.

Our experiences in Pennsylvania, where Clean Water Act liability has historically not been a concern, is illustrative of the positive affect of Good Samaritan cleanups. Over the last 10-15 years, Pennsylvania has seen a dramatic increase in abandoned mine reclamation projects by watershed groups, including TU. This boom has been fueled by funding from the state's Growing Greener grant program and the federal Abandoned Mine Land (AML) reclamation fund. Most of these projects involve treatment of acid mine drainage using passive wetland treatment systems, which run the polluted mine drainage through a series of wetlands that increase the water's pH and cause heavy metals to precipitate out. These projects have significantly improved water quality and restored fish populations in numerous Pennsylvania streams.

The DEP estimates that public funding sources have paid for the construction of at least 300 passive treatment systems in state, the majority of which have been constructed by private watershed groups, conservation districts, or other local groups. According to DEP, local groups are currently responsible for operations and maintenance on "hundreds" of passive treatment systems in the state.

The story of recovery plays out in individual streams and watersheds. In Pennsylvania, the Babb Creek Watershed Association recently celebrated the delisting of Babb Creek, now a wild trout fishery, from EPA's impaired streams list. Native brook trout have been found for first time in decades in Middle Branch. The West Branch Susquehanna River watershed has made tremendous strides over the past few decades. A recent assessment compared conditions in the West Branch Susquehanna in 1972 with those in 2009. Fish species increased 3,000%, and pH increased from 3.8 to 6.6.

These improvements result in economic benefits. In Pennsylvania, almost \$4 billion was spent on fishing, hunting, and wildlife viewing in 2006. A 2008 study found that full remediation of the West Branch Susquehanna River watershed would result in “an additional \$22.3 million in sport fishing revenues could be expected to be generated each year. Additional recreation spending—over and above that for fishing—would be expected after remediation is completed.”²

Regardless of the overall scope of the abandoned mine problem, each of these Good Samaritan projects restored a significant water body and represents a big win for the local community.

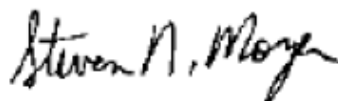
RECOMMENDATIONS

There are potentially two paths to addressing liability issues for Good Samaritans. The first is to identify a mechanism under existing law that would facilitate Good Samaritan projects. The EPA guidance described above is a positive step that may clear the way for more Good Samaritan cleanups, but remaining concerns about Clean Water Act liability continue to prevent Good Samaritans from completing some much-needed projects. TU would like to work with EPA to test the utility of the new guidance, and explore other possible administrative means to facilitate Good Sam projects.

The uncertainties regarding the extent of current administrative authorities under CERCLA and the Clean Water Act should also be addressed by new legislation that provides a workable pathway for Good Samaritan abandoned mine cleanups. Legislation introduced by Senator Mark Udall in the 112th Congress (S. 1777) that requires a project to produce significant improvements in water quality for a specific period of time, implement best design and management practices, and conduct appropriate monitoring, but not expose the Good Samaritan to liability if the project at some point fails to achieve a required criterion for a given pollutant, is one such pathway worthy of consideration.

TU does not see these paths as being mutually exclusive, and we would like to work with EPA on administrative solutions and with Congress to find workable legislative solutions. We look forward to working with interested members of this Subcommittee to find ways to facilitate more Good Samaritan abandoned mine cleanups so that affected communities around the country will again have clean, fishable waters.

Sincerely,



Steve Moyer

² Evan Hansen, Alan Collins, Julie Svetlik, Sarah McClurg, Alyse Shrecongost, Rob Stenger, Mariya Schilz, and Fritz Boettner. *An Economic Benefit Analysis for Abandoned Mine Drainage Remediation in the West Branch Susquehanna River Watershed, Pennsylvania*. Downstream Strategies, LLC. July 3, 2008.