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Testimony
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Energy & Mineral Resources
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Hearing on Opportunities for Good Samaritan Cleanup of
Hardrock Abandoned Mine Lands
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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

[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.westgov.org/wga/publicat/miningre.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.

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 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

[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.

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 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 NGO's 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.