



# Cleanup at Abandoned Hardrock Mines: Issues Raised by “Good Samaritan” Legislation in the 109<sup>th</sup> Congress

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## Summary

In the 109<sup>th</sup> Congress, several bills were introduced to address the legacy of pollution from inactive and abandoned hardrock mines (IAMs) that degrades the environment throughout the United States, particularly in the West. The Environmental Protection Agency has estimated that 40% of headwaters in the West have been adversely impacted by acidic and other types of drainage from abandoned sites where gold, silver, copper, lead, and iron ore were mined. The core concept underlying the bills is that, in order to address the problem of pollution from IAM sites, it is appropriate to encourage cleanup by so-called “Good Samaritan” entities. To do so, the bills proposed to establish a process for issuing permits to Good Samaritans and to provide incentives in the form of reduced liability from environmental laws and less stringent environmental cleanup standards.

This report discusses four bills introduced in the 109<sup>th</sup> Congress: H.R. 1266 (M. Udall), S. 1848 (Salazar), S. 2780 (Inhofe), and H.R. 5404 (Duncan). S. 2780 and H.R. 5404 were identical bills, introduced at the request of the Administration. Three House and Senate committees held hearings during the 109<sup>th</sup> Congress on issues raised by the legislation. In September, an amended version of S. 1848 was reported to the Senate, but no further action occurred on any of the proposals. This report discusses several key issues in these bills:

- eligibility for a Good Samaritan permit (especially at issue is whether Good Samaritans should be limited to government entities or may also include the private sector);
- standards applicable to a Good Samaritan cleanup (defining what standards to apply to a remediation project is often a challenge);
- scope of liability protection (at issue is whether and to what extent the liability and other requirements of Superfund, the Clean Water Act, and other laws should be waived for Good Samaritans);
- treatment of revenues from cleanup (one particularly controversial issue is whether Good Samaritans should be allowed to benefit economically from minerals that are recovered during a cleanup);
- enforcement and judicial review;
- role for states and Indian tribes;
- funding (none of the bills proposed a comprehensive mechanism to fund hardrock remediation activities);
- terminating a permit; and
- sunseting the permit program.

Reviewing testimony from congressional hearings on these issues, it is evident that, except for witnesses testifying in support of their own bills, no witness endorsed any of the specific legislative approaches in total. For example, some stakeholders want an expanded definition of who may be a remediating party and favor elimination of additional regulatory and legal disincentives. But every effort to broaden the proposals’ scope seemingly enlarges the complexity of the legislation and raises stronger opposition from groups who prefer a narrower approach.

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## Introduction and Overview

Congress has recently been presented with legislative proposals to address the legacy of pollution from abandoned hardrock mines that degrades the environment throughout the United States, particularly in the West. In the 109<sup>th</sup> Congress, four bills were introduced that sought to encourage cleanup of inactive or abandoned hardrock mining sites by so-called “Good Samaritan” entities:

- H.R. 1266, introduced by Representative Mark Udall,
- S. 1848, by Senator Ken Salazar, and
- S. 2780, by Senator James Inhofe, and H.R. 5404, by Representative James Duncan, identical bills introduced at the request of the Administration.

In September 2006, the Senate Environment and Public Works Committee reported an amended version of S. 1848 that reflected a number of provisions in the Administration bill and other modifications (S.Rept. 109-351). The 109<sup>th</sup> Congress took no further action on any of the proposals, and the following discussion describes provisions of the bills as of December 2006. Whether these issues or specific legislation will be considered in the 110<sup>th</sup> Congress is uncertain.

Mining has been conducted throughout the country for nearly 150 years, but most occurred before the advent of environmental regulation. Many historic mining operations were abandoned without being adequately reclaimed against future environmental damage. There may be more than 550,000 of these sites on public and private lands in the United States; there is no single inventory of sites, and thus the precise number is unknown. Although most sites do not pose environmental problems, drainage or runoff from some (discharges including sulfate, copper, lead, arsenic, and mercury, for example) continue to pose a threat to both surface water and groundwater. The Environmental Protection Agency (EPA) has estimated that approximately 40% of headwaters in rivers and streams in the West have been impacted by discharges from abandoned hardrock mines, thus threatening drinking water and agricultural water supplies, increasing water treatment costs, and limiting fishing and recreation. The number of mines that are causing or have potential to cause water-related pollution problems is unknown, but is generally believed to be a small percentage of the total: perhaps 3%-5% of all inactive or abandoned (IAM) sites. But even so, 3%-5% of 550,000 possible sites in total still represents a large number of potential sites (16,000 to 27,000) that concerns many persons.

The principal objective indicated for each of the bills was to help solve some of the problems of environmental pollution emanating from IAM sites. The core concept underlying the bills is that, in order to address the problem of pollution from IAM sites, it is appropriate to encourage cleanup by voluntary entities, third parties who have no history of polluting at a particular site or legal responsibility for its pollution, but who step forward to clean up acid mine drainage or other pollution from an abandoned mine. The bills proposed incentives in the form of reduced liability from environmental laws (such as strict liability for cleanup costs and restoring damaged natural resources) and less stringent environmental standards applicable to cleanup activities. Proponents, who included mining companies and industry associations, maintained that any degree of cleanup is better than inaction or the status quo, and they argued that, if not addressed in this legislation, the issues of liability exposure under environmental law and strict regulatory standards could stymie voluntary cleanups. Opponents, especially many environmental and conservation advocates, acknowledged that cleanup would benefit the environment, but they expressed concern that exemptions and relief such as these bills proposed might be the first step in dismantling key environmental legislation, because the bills were vague about standards that

would apply to a Good Samaritan cleanup. Other stakeholders in the debate include states and the federal government.

All four bills proposed to establish a process for issuing permits to those who would be Good Samaritans. Under all four, permitting authority would have been vested in EPA, but could have been delegated to qualified states and Indian tribes. The bills would have allowed a potential remediating party to obtain a permit authorizing it to take steps to improve water quality without being required to comply fully with water quality standards that would otherwise apply. In addition to environmental benefits, an incentive for some Good Samaritans is that once a site is cleaned up, many mines would have the potential to resume mining operations that could result in economic gains. The bills would have established a process for identifying what entities and lands are eligible, specifying goals of cleanup and conditions for permits, and issuing permits. All four were limited to hardrock mines—gold, copper, silver, and iron ore, for example—although there are some industry and state stakeholders who favor similar Good Samaritan authority for cleanup of abandoned coal mines as well (S. 2780 and H.R. 5404, the Administration proposal, and S. 1848 as reported had one provision concerning coal mine remediation; it is discussed below on page 11).

There were differences among all of the bills, as discussed below. Of the four, H.R. 1266 alone was drafted as a measure that would amend the Clean Water Act (CWA, 33 U.S.C. §1251 et seq.).<sup>1</sup> In H.R. 1266, the permit provision would have been part of the CWA's overall regulatory, permitting, and enforcement mechanism. The CWA prohibits the discharge of pollutants into the nation's waters without authority under a CWA permit, and H.R. 1266 would have amended the act's principal permit provision, called the National Pollutant Discharge Elimination System permit (NPDES, Section 402, 33 U.S.C. §1342), by adding a new subsection with requirements specific to Good Samaritan permits.

The Administration bill, S. 2780 and H.R. 5404, was a stand-alone bill. It proposed Good Samaritan relief from requirements of the CWA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund, 42 U.S.C. §9601 et seq.). The fourth, S. 1848, also a stand-alone bill, proposed that a permitting authority could provide Good Samaritans with relief from the Clean Water Act and CERCLA, plus other specified federal environmental laws, as well as state and local laws.

Proponents of Good Samaritan legislation have discussed many of these issues for nearly a decade, but until recently, congressional committees have given limited consideration to the concept. In the 106<sup>th</sup> Congress, the Senate Environment and Public Works Committee held a hearing on S. 1787, a Good Samaritan bill introduced by Senator Baucus.<sup>2</sup> Another Good Samaritan bill was introduced in the 108<sup>th</sup> Congress (S. 1660, Senator Campbell), but no legislative action occurred.

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<sup>1</sup> Another bill in the 109<sup>th</sup> Congress that would have amended the Clean Water Act was H.R. 5071, introduced by Representative John Salazar. Like H.R. 1266, it would have authorized a CWA Good Samaritan permitting process, but its scope was much narrower than the other bills (it would have established a pilot project for remediation of IAMs in a portion of the Upper Animas River basin in San Juan County, Colorado), and thus it is not discussed in this report.

<sup>2</sup> U.S. Congress, Senate, Committee on Environment and Public Works, Subcommittee on Fisheries, Wildlife, and Water, "Good Samaritan Abandoned or Inactive Mine Waste Remediation Act," Hearing, 106<sup>th</sup> Congress, 2d Session, June 21, 2000 (S.Hrg. 106-955) 119 p. (Hereafter, 2000 Senate Hearing).

In the 109<sup>th</sup> Congress, three House and Senate committees held hearings on Good Samaritan issues raised by the legislation.<sup>3</sup> The Senate Environment and Public Works Committee approved a modified version of S. 1848, incorporating some provisions of the Administration's proposal and other amendments, in September 2006 (S.Rept. 109-351).<sup>4</sup> Testifying at the hearings were witnesses representing EPA, states, hardrock mining industry companies and associations, and environmental groups. Reviewing these recent hearings and the Senate hearing in the 106<sup>th</sup> Congress, it is evident that, except for EPA and congressional witnesses testifying in support of their own bills, no witness endorsed any of the specific legislative approaches totally or wholeheartedly. The proposals have been criticized as either too narrow or too broad, depending on the witnesses' perspective. For example, some stakeholders want an expanded definition of who may be a remediating party and favor elimination of additional regulatory and legal disincentives. But every effort to broaden the proposals' scope seemingly enlarges the complexity of the legislation and raises stronger opposition from groups who prefer a narrower approach.

## **Selected Issues in the Legislation**

This report discusses several issues that have drawn attention: Eligibility for a Good Samaritan permit, standards applicable to a Good Samaritan cleanup, scope of liability protection, treatment of revenues from cleanup, enforcement and judicial review, the appropriate role for states and Indian tribes, funding, terminating a permit, and sunseting the permit program. This discussion does not address every issue in the bills (for example, it does not analyze procedures for issuing Good Samaritan permits), nor does it discuss general background on the problem of inactive and abandoned hardrock mine sites.<sup>5</sup>

### **Eligibility: Who Can Get a Permit?**

The issue of permit eligibility concerns the universe of parties who may undertake IAM cleanup under a Good Samaritan permit. It has several aspects, including whether Good Samaritans should be limited to government entities or may also include the mining industry and others in the private sector, and how the legislation specifies that anyone with existing or prior responsibility for environmental pollution at the site is restricted from eligibility for the liability and regulatory relief exemptions provided by a Good Samaritan permit.

Some argue that a Good Samaritan should only be working on behalf of the public welfare, meaning that remediation actions must be entirely governmental. Government, it is argued, unlike commercial or philanthropic enterprises, seeks to balance the needs and desires of society's many

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<sup>3</sup> U.S. Congress, House, Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, "Hearing on Barriers to the Cleanup of Abandoned Mines Sites," March 30, 2006 (unpublished); U.S. Congress, Senate, Committee on Environment and Public Works, "Oversight Hearing to Consider Whether Potential Liability Deters Abandoned Hard Rock Mine Clean-Up," June 14, 2006 (unpublished); U.S. Congress, House, Committee on Resources, Subcommittee on Energy and Mineral Resources, "Oversight Hearing on Opportunities for Good Samaritan Cleanup of Hard Rock Abandoned Mine Lands," July 13, 2006 (unpublished).

<sup>4</sup> In this report, discussion of the provisions of S. 1848 refers to those in the bill as reported.

<sup>5</sup> For background on these issues, see Patricia N. Limerick, Joseph N. Ryan, Timothy R. Brown, T. Allan Comp, Center of the American West, University of Colorado at Boulder, *Cleaning Up Abandoned Hardrock Mines in the West, Prospecting for a Better Future*, 2005, 48 p.; U.S. Environmental Protection Agency, *Abandoned Mine Site Characterization and Cleanup Handbook*, EPA 910-B-00-001, August 2000, 129 p.

competing interests, and government agencies are accountable to elected politicians and ultimately to the public. According to this view, there is concern that if private entities are allowed to get involved in remediation, and profits from the activity are generated, the Good Samaritan's motives could be less focused on cleanup. If the point of the legislation is cleanup, eligibility should be limited, so that questions of monetary awards and profit do not arise. Further, in practical terms, some argue that the more expansive the range of possible eligible parties allowed under the legislation (especially if the private sector is included), the more complicated and controversial the legislation becomes.

Industry groups, on the other hand, argue that mining companies have the resources, knowledge, and technology to assess and remediate IAM sites. Industry believes that an existing company that is not responsible for creating an abandoned site should not be precluded from being a Good Samaritan. If such entities are not allowed to participate under a Good Samaritan permit, they say, fewer sites will be cleaned up, because companies will not risk the potential liability of a voluntary cleanup (see discussion below). The more the legislation is broadened in terms of eligibility, the more Good Samaritans will step forward, they say.

The bills offered several different approaches to this issue. H.R. 1266 would have limited the universe of eligible parties to the U.S. government, states, political subdivisions including municipalities, or Indian tribes. It would have barred the federal government from qualifying as a Good Samaritan with respect to IAM sites on federal land (that is, the federal government could clean up an IAM site on federal land, but not under the terms, exemptions, and waivers of a Good Samaritan permit). The apparent rationale for this limitation was that the federal government will always be considered to be a responsible party on lands that it owns or operates, and owners/operators are not eligible for Good Samaritan permits. Further, there is a related belief that federal agencies should be committed to cleanup of sites on lands that they own or manage in any case and should not, therefore, need Good Samaritan incentives. Critics argued that these restrictions presented excessive hurdles for cleaning up the large number of abandoned mine sites in western states that involve mixed public and private ownership. Under this bill, states would have been treated differently from the federal government: they would have been allowed to be Good Samaritans on state-owned land.

S. 1848, S. 2780, and H.R. 5404 included an expansive listing of parties eligible for a Good Samaritan permit, on the theory that a broader list of eligible permittees would include more entities with resources and expertise to undertake cleanup. Under these bills, eligibility would have included individuals, firms, corporations, partnerships, commercial entities, nonprofit groups, federal and state governments, political subdivisions of states, interstate entities, commissions, and tribes. These bills would not have restricted federal or state governments from qualifying as Good Samaritans on lands that they own or manage.

A related issue in all of these legislative proposals concerns the question of how to ensure that parties with current or prior legal responsibility for the site may not receive Good Samaritan permits. This issue arises from the fact that under current laws, a person who owns or operates a site that is responsible for environmental pollution continues to be responsible for mitigating that pollution. All of the bills took the position that an identifiable, financially capable owner or operator should not be eligible for relief under a Good Samaritan permit and that existing requirements to clean up according to applicable environmental standards should apply to an identified owner or operator. However, in the case of the majority of abandoned and inactive mines, a current owner or operator who could assume responsibility for cleanup may not exist, or

the current owner may be far removed in time or by legal tie from those who created pollution at the site.

S. 2780 and H.R. 5404 would have barred from eligibility a person or entity who had an ownership interest in the IAM site or who had had such an interest at any time during or since the creation of the historic mine residue at the site. Under this bill, a passive landowner's land could be cleaned up, but in the Administration's view, it would not be appropriate to give liability protection to that landowner. Under S. 1848, a person who had a role in creating the historic mine residue or in creating the environmental pollution caused by the historic mine residue would not have been eligible to be a Good Samaritan. However, innocent landowners, bona fide prospective purchasers, and anyone (other than the current owner) who held title during the period when hazardous substances were *not* disposed of at the site, could potentially have been Good Samaritans. H.R. 1266 did not address the issue of current or prior ownership.

A closely related issue concerns what efforts permit applicants must make to search for a responsible owner or operator. All of the bills would have required that the permit applicant make reasonable efforts to identify current owners or other legally responsible parties. Some stakeholders have questioned what level of effort should be required to demonstrate "reasonable efforts" to identify responsible parties, and they hope to see clarification in legislation. Doing a full search for potentially responsible parties (PRPs) for a privately funded cleanup is burdensome and costly, they say. Some also have argued that it would be preferable to put the burden of such a search on government because, they say, government has the resources and tools to do a search, which can be complicated. Requiring industry or some other Good Samaritans (for example, non-profit groups) to expend resources for owner/operator searches effectively reduces the permittee's resources for actual cleanup, some say. However, conducting such searches requires someone's resources in any case, whether private or public.

## **Eligibility: Consideration of CERCLA Lands for Good Samaritan Cleanups**

A related issue concerns whether lands that are currently or potentially listed on the National Priorities List (NPL) under CERCLA should be eligible for a Good Samaritan permit.<sup>6</sup>

CERCLA authorizes the federal government to respond to spills and other releases (or threatened releases) of hazardous substances, as well as to leaking hazardous waste sites, through direct action, or by requiring responsible parties to do so. It also established a trust fund to support federal response actions. Since the inception of this program in 1980, EPA has catalogued more than 45,000 potentially contaminated sites in a database called the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). To ensure that the most serious sites are addressed, the law called for EPA to assemble the NPL, a subset of the larger CERCLIS. As of July 2006, there were 1,244 NPL sites, including 79 abandoned hardrock mines and mineral processing sites, plus 580 more mining and mineral processing sites identified in the larger CERCLIS database.<sup>7</sup> Placing a site on the NPL does not necessarily mean that EPA will

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<sup>6</sup> For additional information on CERCLA, see CRS Report RL33426, *Superfund: Implementation and Selected Issues*, by (name redacted) and (name redacted).

<sup>7</sup> For a list of these sites, see <http://www.epa.gov/superfund/programs/aml/amlsite/npl.htm> and <http://www.epa.gov/superfund/programs/aml/amlsite/nonnpl.htm>.



take either a short-term removal action or long-term remedial action to mitigate the hazardous substances, nor does it assign cleanup responsibility to any specific owner or party at the site. However, if an NPL site is scheduled for a federal response, there will be a diligent search for responsible parties, whether or not monies from the Superfund trust fund will ultimately be used to pay for a cleanup (see discussion of liability, below).

With respect to the Good Samaritan legislation, some stakeholders contend that it would be appropriate to include certain IAM hardrock mining NPL sites as eligible for voluntary cleanups, since they might be cleaned up more quickly than under the Superfund program, which is widely criticized for excessive costs, bureaucratic processes, and delays. On the other hand, others argue that NPL sites should not be eligible for Good Samaritan cleanup, because doing so would likely result in less stringent cleanup standards than a Superfund cleanup would require. In addition, if federal Superfund resources are likely to pay for the cleanup, it would be more efficient for Good Samaritans' resources to assist non-Superfund lands, particularly since hardrock mining sites are in many cases much more expensive to clean up than other NPL sites. However, with the expiration of the Superfund taxing authority on December 31, 1995, Superfund cleanup funding has become heavily dependent on general revenue appropriations.

The bills presented different approaches to this issue. H.R. 1266 would have excluded lands identified for remedial action under CERCLA and lands designated for remedial action under the Uranium Mill Tailings Radiation Control Act.<sup>8</sup> S. 1848 would have excluded sites on the NPL. S. 2780 and H.R. 5404 would have excluded from eligibility lands that are included on the NPL or lands that are the subject of a planned or ongoing response or natural resources damage enforcement action under CERCLA.<sup>9</sup> In addition, S. 2780 and H.R. 5404 would have allowed case-by-case exceptions from these restrictions to be made if the remediation project would accelerate environmental improvements and would not otherwise interfere with any other planned remediation reasonably likely to occur at the IAM site.

## **What Cleanup Standard Should Apply to Good Samaritan Remediation?**

A key element of the Good Samaritan proposals is the concept of providing an incentive to those who voluntarily clean up IAM sites by not requiring that their activities meet stringent environment protection standards that would otherwise apply. The basic concern was explained by an EPA official in House testimony on March 30, 2006:

Under the CWA, a party may be obligated to obtain a discharge permit which requires compliance with water quality standards in streams that are already in violation of these standards....Yet, in many cases, the impacted water bodies may never fully meet water quality standards, regardless of how much cleanup or remediation is done. By holding Good Samaritans accountable to the same cleanup standards as polluters or requiring strict compliance with the highest water quality standards, we have created a strong

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<sup>8</sup> The Uranium Mills Tailing Radiation Control Act of 1978 (42 U.S.C. §7901) provides for the stabilization and disposal of the waste byproducts of the extraction and processing of uranium and thorium mining to mitigate the hazard of radon diffusion into the environment.

<sup>9</sup> CERCLA requires responsible parties to address the environmental harm caused to injured natural resources by paying to restore or replace the damaged resource and paying damages for the lost use of a publicly owned resource, including the costs of performing the associated damage assessment.

disincentive to voluntary cleanups. Unfortunately, this has resulted in the perfect being the enemy of the good.<sup>10</sup>

If most stakeholders agree that adjusted standards are appropriate, then the issues include what the goals of cleanup are, what standards should apply to Good Samaritan cleanup over what time frame, and what constitutes success. A report by the Center of the American West suggests a number of questions to consider in the context of recalibrating standards, beginning with, what is the intention of cleanup? If, for example, the intention is to restore fish to a stream, is partial cleanup adequate for that? Failing that, what cleanup benchmarks are appropriate? Would those goals be feasible and economic?<sup>11</sup>

Among stakeholder groups, there is a widely held view that a remediation project should be required to achieve significant environmental improvement over existing conditions. Most agree that implementation of a Good Samaritan project generally should not require achieving specific numeric effluent limitations for discharges to surface water (as would normally be required under a Clean Water Act permit). However, legislating definitions that provide sufficient clarity on the standard so that it can be interpreted and understood by all—the permit issuer, permit applicant, and the public—is particularly challenging. The challenge involves stating a standard broadly enough that the permit issuer has flexibility to tailor it to individual sites, but with sufficient specificity so that the permittee and the public understand what is required and what level of water quality improvement is anticipated. There is concern that, if the cleanup standard is loosely defined, it could permit poorly conceived projects.

Each of the bills attempted to strike a balance between identifying a cleanup standard and yet doing so flexibly. Each took a slightly different approach to this issue, but they generally included a broadly stated goal, such as improving water quality. Several referred to improving water quality to the maximum extent practicable, considering resources available to the Good Samaritan for use at the site. H.R. 1266, for example, stated that a permit could be issued if the applicant demonstrated “with reasonable certainty that the implementation of the [remediation] plan will meet applicable water quality standards to the maximum extent practicable, but in no circumstances worse than the baseline water conditions ... taking into consideration the resources available to the remediating party for the proposed activity.”

S. 1848 stated that the principal purpose of a project would be reduction of pollution caused by historic mine residue. A permit could be issued if the permitting authority determined that the project would improve the environment of the mine site “to a significant degree” and would meet applicable water quality standards “to the maximum extent reasonable and practicable under the circumstances.” S. 2780 and H.R. 5404 stated that the purpose of a project would be to mitigate effects of historic mine residue to improve the environment. A permit could be issued if the project “will result in improvement to the environment, including water quality, in the area of, or downstream from, the mine site.” The Administration bill also required the permit applicant to “minimize any short-term environmental impacts from the remediation, to the maximum extent practicable.”

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<sup>10</sup> Benjamin H. Grumbles, Assistant Administrator for Water, U.S. Environmental Protection Agency, Testimony before the Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, U.S. House of Representatives, March 30, 2006, pp. 2-3.

<sup>11</sup> Center of the American West, University of Colorado at Boulder, *Cleaning Up Abandoned Hardrock Mines in the West, Prospecting for a Better Future*, 2005, p. 37.

In congressional testimony, stakeholders expressed a range of concerns about how this issue was addressed in legislation, but all seemed to recognize that defining “significant improvement” is difficult. Environmental groups and states acknowledge that it is not always possible to achieve applicable water quality standards, but they worry (environmentalists, especially) that if the goal of meeting water quality standards is totally discarded for Good Samaritans, it has the effect of accepting that there is no realistic hope that standards will ever be met at those sites. This concern can be somewhat addressed, they say, by including “maximum extent practicable” language.<sup>12</sup> Industry groups, on the other hand, contend that “maximum extent practicable” language is too restrictive. Including such a term, they assert, will lead to delay in getting cleanup started because of protracted debate about its meaning.

It is unclear whether any of the bills discussed here fully satisfied these varied concerns, especially because none of the bills included definitions of terms such as “maximum extent practicable,” thus potentially giving considerable discretion to the permitting authority and those responsible for enforcing permits. The Administration bill, for example, stated that a permit could be issued if the permitting authority determined that the project “will result in improvement to the environment,” leading to the question of what that term might mean—10% improvement? 50%? 90%? or some other?

The National Research Council observed in a 2004 report on hardrock mines that the goal of IAM remediation (especially at very large mine sites) should perhaps be stated in terms of achieving characteristics of a healthy aquatic ecosystem (based, for example, on biological performance goals such as are derived from habitat indices), not on achieving a specified concentration of a contaminant. In doing so, the NRC said, it is important to specifically define what is necessary to achieve protection of the environment and what monitoring information is necessary to evaluate progress.<sup>13</sup> This approach would complement states’ existing efforts to attain specific designated uses (such as fishing, swimming, and drinking) for their surface waters.

## **Scope of Liability Protection**

Proponents of Good Samaritan legislation contend that liability under existing environmental laws is a major obstacle to voluntary cleanup of IAMs, citing in particular CERCLA and the CWA.

Under CERCLA, an entity is liable for cleanup costs and natural resource damages resulting from release (or threatened release) of hazardous substances if that entity falls into any of four categories of potentially responsible parties (PRPs). At least two of those categories might apply to the Good Samaritan who attempts an IAM cleanup. First, such an entity might, by virtue of its involvement at the mine, be deemed an “operator” of the “facility” where the release occurred. Second, a Good Samaritan might constitute an “arranger”—someone who arranged for transport of hazardous substances from the IAM facility to another site. A Good Samaritan could face a stringent liability scheme if designated a PRP under CERCLA. It is strict (does not require negligence) and joint and several (a single liable party among several can be held responsible for the entire liability). And liability may attach even though the Good Samaritan does not cause or

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<sup>12</sup> Sara Kendall, Western Organization of Resources Councils, in 2000 Senate Hearing, p. 35.

<sup>13</sup> National Research Council of the National Academies of Science, Board on Environmental Studies and Toxicology, *Superfund and Mining Megsites, Lessons from the Coeur D’Alene River Basin*, Washington, D.C., 2004, p. 426. (Hereafter, 2004 NRC Report).

contribute to the hazardous substance release. Finally, a Good Samaritan-PRP could not choose to deal with only certain aspects of an IAM's pollution, cleaning up only part way (i.e., the easiest or most cost-effective problems). Rather, CERCLA requires that cleanups meet all applicable or "relevant and appropriate" federal and state standards.

CERCLA's expansive liability scheme was intended to embody Congress's policy decision to adopt a "polluter pays" approach in the act, as is already provided in some other federal environmental statutes. Aside from its perceived fairness, "polluter pays" holds down the public funding needed for cleanups. Many stakeholders in the Good Samaritan debate argue, however, that holding those who voluntarily clean up IAMs to the same liability rules will, by inhibiting cleanup activity, only *add* to government costs. Mining companies have been the biggest supporters of providing broad liability exemptions to Good Samaritans—arguing strongly for explicit release from both the CWA and CERCLA. Without exemptions, according to one industry witness in 2000, "...we are afraid that a number of remediating parties will be fearful of the draconian liability system [in CERCLA] and the fact that liability could attach to any person who owned, operated, or otherwise controlled activities at the sites." Further, this witness said, "there is no guarantee that today's non-CERCLA site won't be a CERCLA site tomorrow," making the prospect of being subject to that law a strong disincentive to remediation.<sup>14</sup>

The Clean Water Act comes into play chiefly because of its requirement that all point-source discharges into waters of the United States must be authorized by a permit under the act, and the likelihood that a Good Samaritan could be deemed subject to that requirement. CWA permits impose liability in two senses that are somewhat different from CERCLA liability. First, they contain conditions requiring the permit holder to comply with effluent limitations and water quality standards in streams that are already violating these standards. Thus, there is "liability" for the necessary expense. Second, noncompliance with permit conditions may result in civil and criminal penalties. In addition, the CWA contains an "emergency powers" authority, rarely used, under which EPA can seek a court order requiring such action as may be necessary to remedy an imminent and substantial endangerment. But while CERCLA allows EPA to either order PRPs to clean up, or clean up itself and then seek reimbursement from PRPs, the CWA authorizes only the former.

Some have argued that it is unnecessary to include CERCLA in the legislation, because if the Good Samaritan's remediation activity is covered by a CWA permit, it would be immune from CERCLA liability under CERCLA Sections 107(j) and 101(10). These sections bar any person (including EPA) from recovering response costs or damages when the release was authorized by a CWA permit. (One can easily envision IAM remedial actions, however, that do not call for CWA permits, or releases to other environmental media in addition to surface waters, negating this argument in those cases.) Separately, CERCLA Section 107(d) exempts from the act's liability scheme those rendering care or advice on a cleanup in accordance with the National Contingency Plan.<sup>15</sup> Under these provisions, actions taken under Superfund generally must provide protection equivalent to those under environmental laws, such as the CWA. Some argue that Good Samaritans may take advantage of this exemption, which is available to a private party who is not otherwise liable at the site and whose actions or omissions are not considered negligent. Critics of including an exemption from CERCLA say that it would raise other questions as well. For

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<sup>14</sup> Jack Lyman, Executive Director, Idaho Mining Association, in 2000 Senate Hearing, p. 33.

<sup>15</sup> The National Oil and Hazardous Substances Pollution Contingency Plan, or NCP, contains the procedures and regulations for implementing the Superfund programs. It is codified at 40 CFR Part 300.

example, it is unclear whether the remediating party would still be shielded from CERCLA liability after the Good Samaritan permit expires, and not all stakeholders believe that post-remediation exemption from liability is appropriate, in any case.

Environmental groups urge caution in granting Good Samaritans exemptions from existing laws, as they worry that such exemptions might be the first step in dismantling key environmental legislation (although the CERCLA liability scheme already contains many exemptions). Lowering the floor for the mining industry is unwise, they say, because doing so could promote opportunities for environmental conditions to worsen. Stringent liability may have occasional adverse consequences, some in those groups say, but at the large majority of sites, such consequences are offset by the liability scheme's value in driving and achieving cleanup. According to this view, if Congress reaches too broadly to encourage cleanup of the most easily remedied sites, it will put at risk the current liability leverage that leads to cleanup of difficult and expensive mining sites. Proponents of the legislation, on the other hand, argue that actual or potential liability under existing environmental laws is a major obstacle to voluntary cleanups of IAM sites.

Some also have argued that Good Samaritan legislation is not needed, because IAM cleanup projects can be authorized by EPA using its inherent enforcement discretion (model orders or consent agreements under Superfund) that tailor liability relief and environmental requirements to a project and obviate the need for additional federal, state, and local permits for cleanup. One such project is being undertaken by the conservation group Trout Unlimited (TU) to clean up an abandoned mine in Utah's American Fork canyon. Working with a private landowner, TU is involved in a multi-year effort to improve the watershed's water quality and restore habitat of a rare cutthroat trout population. EPA and others acknowledge that using such enforcement mechanisms is an option, but say that doing so is cumbersome and does not guarantee public participation. Trout Unlimited testified in support of improving environmental quality at IAMs, either through new legislation or creation of a new permitting system at EPA under existing law.<sup>16</sup>

All four of the bills included in their stated purposes the limitation of liability for those who clean up IAMs, as a way of encouraging remediation. H.R. 1266 limited liability only, or primarily, for compliance with CWA standards. It stated that a Good Samaritan permit would require compliance with CWA Sections 301 and 302 (both concerning effluent limitations) and Section 402 (including the NPDES permit program) "to the maximum extent practicable," as specified in the permit. It also made clear that no immunity from CWA Section 504 (EPA emergency powers) was conferred. Nor did H.R. 1266 appear to confer liability protection in connection with CWA sections other than those listed, such as CWA Section 311 (liability for hazardous substance spills into navigable waters) or Section 404 (wetlands permits). Section 404 of the CWA prohibits the discharge of dredged or fill material into navigable waters of the United States without a permit. It is likely that some IAM remediation projects would involve dredging or filling activities.

H.R. 1266 also explicitly addressed Section 401 of the CWA. Under Section 401, applicants for a federal permit must obtain a state certification that the project will comply with state water quality standards. H.R. 1266 waived Section 401 for a Good Samaritan permit. However, in a somewhat circular manner, this bill stated that in a case where Section 401 would otherwise apply, the state must concur, or no permit could be issued. Finally, H.R. 1266 included a provision

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<sup>16</sup> Chris Wood, Trout Unlimited, Testimony before the Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, U.S. House of Representatives, March 30, 2006, p. 6.

requiring that states and Indian tribes not be relieved of obligations under CWA Section 303 to see that water quality standards are attained. Some states have been critical of this provision, since under that bill, the permitting authority could authorize a discharge that does not meet water quality standards.

S. 1848, S. 2780 and H.R. 5404 were broader in their liability exemptions than H.R. 1266. S. 2780 and H.R. 5404 conferred on Good Samaritan permittees a categorical exemption from CWA requirements and liabilities (avoiding the point made above as to noncoverage of unlisted sections of the act) and added an exemption from CERCLA. Moreover, the same liability protections were afforded, without the need for a Good Samaritan permit, for IAM remediation pursuant to a coal mine reclamation plan approved under the Surface Mining Control and Reclamation Act (SMCRA). On the other hand, the bill contained an exemption from its liability protection for government use of the emergency authorities in the CWA and CERCLA, or, for that matter, in any law at all. Such authorities could be used to compel extra measures by the Good Samaritan. In addition, the Administration bill exempted actions of a permitting authority or any other person under this legislation from compliance with the environmental assessment provisions of the National Environmental Policy Act (NEPA).

S. 1848 offered the possibility of the broadest liability protections of all. It declared that the permittee receives protection from liability under the environmental laws listed in the permit, and then enumerated, apparently nonexhaustively, laws that may be listed there: the Toxic Substances Control Act (TSCA), Solid Waste Disposal Act (or, the Resource Conservation and Recovery Act, RCRA), CWA, CERCLA, and state, local, and tribal environmental laws and ordinances. In this bill, which laws and which requirements of the laws were exempted would be entirely at the discretion of the permit issuer, unlike in S. 2780 and H.R. 5404. While this bill authorized exemptions from TSCA and RCRA, it also stated that a Good Samaritan permittee still must comply with TSCA and RCRA when treating or disposing of materials removed from the mine site, such as hazardous wastes or PCB-bearing soils that must be removed off-site.

Some argue that exemption from an extensive list of federal, state, and local requirements is appropriate, so as to eliminate all uncertainty about the scope of the bill's liability exemption and to give flexibility to the permitting authority. Others have criticized the potential exemptions as being unnecessarily broad, and the reported bill dropped some exemptions in the bill as introduced (the Clean Air Act and Safe Drinking Water Act). A further concern raised by critics is that waiving state, local, and tribal requirements could generate significant controversy in federal-state/local relations, but supporters pointed out that under S. 1848, a Good Samaritan permit could not be issued if the state or Indian tribe, or a political subdivision if its requirements were to be waived, was not a permit signatory. S. 1848 incorporated two provisions from the Administration bill: the same exemption from NEPA, and the same liability protection for IAM remediation pursuant to a coal reclamation plan under SMCRA.

## **Revenues from Cleanup: Can a Good Samaritan Make a Profit?**

At issue is how the legislation addresses the disposition of any revenues that may result when a Good Samaritan recovers mineral content from historic mine residue as part of a remediation project. This issue is especially relevant to S. 1848, S. 2780, and H.R. 5404, proposals which contemplated that the mining industry and others in the private sector would be eligible for a Good Samaritan permit, and it is one of the most controversial topics in the debate.

The legislation would have permitted incidental reprocessing or recycling of wastes directly related to cleanup of an IAM. This would differ, however, from re-mining at IAM sites, which involves the re-opening of an abandoned mine to develop remaining mineral reserves. While many stakeholders are greatly interested in opportunities for re-mining, most acknowledge that this larger issue brings into play policy considerations, stakeholders, congressional committees, and statutes beyond those in Good Samaritan remediation. Because of these greater complexities, industry agrees with critics that Good Samaritan remediation and re-mining (or, new mining of virgin ores and minerals) should be addressed separately.<sup>17</sup>

Mining industry stakeholders would like to be allowed under a Good Samaritan permit to engage in practices such as processing ore that remains as waste on an abandoned mine site in order to extract valuable materials. If such practices are allowed, industry says, waste material can be safely removed to ameliorate environmental problems, while also reducing net cleanup costs by the value of the recovered materials, saving costs of remediation by others, and benefitting the company's economic bottom line. Processing and recovering minerals and ore in the waste material, these groups say, may often be the most efficient and least costly means of cleaning up an IAM site, and the potential for making a profit would provide an added incentive to companies to become involved in cleanup and accelerate the process of cleaning up abandoned mines.

On the other hand, others including some states and many environmental groups oppose the idea that cleanup might be part of a commercial, for-profit enterprise, even incidentally. In their view, mineral recovery should be secondary to reclaiming the site, and Good Samaritans should not profit from their activities (in keeping with the view held by many of these groups that qualifying as a Good Samaritan is inherently only a governmental activity). Any proceeds from the site should be redirected back to remediation of that site to a higher standard or to another IAM site, they say. Critics worry that mining companies could abuse liability exemptions and reduced cleanup requirements provided under the Good Samaritan permit to escape from liabilities of their own operations, by engaging in mineral processing and new mining without complying with applicable environmental laws and standards. Industry responds that such concerns are misplaced, because, in an open permitting process, the permit issuer and the public will know precisely what the Good Samaritan intends to do. They agree that new mining activity would require a mining permit in accordance with applicable environmental laws. Environmental critics also point out that the practice of processing mine waste that remains at a site has its own potential environmental complications, especially when it involves the use of cyanide heap leaching to extract minerals, and might simply exchange one environmental problem for another. Thus, language in H.R. 1266, requiring no worsening of baseline water quality conditions, could have become more significant.

Addressing these issues legislatively involves a number of complexities, especially how to craft a Good Samaritan permit that provides desired liability and other relief only for the specified voluntary cleanup activity, but then distinguishes and ceases to provide those protections when economic activity at the site changes from remediation to development and broader re-mining that might occur. H.R. 1266 was more restrictive than the other bills by requiring that proceeds of recovered materials must be used to defray remediation costs at the same site or other IAM sites. Under this bill, the Good Samaritan permit would have terminated when activity at the site

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<sup>17</sup> Joan Card, Director, Water Quality Division, Arizona Department of Environmental Quality, Testimony on behalf of the Western Governors' Association and the Western States Water Council before the House Resources Subcommittee on Energy and Mineral Resources, July 13, 2006, p. 4.

changed from remediation to development (defined in the bill to include mineral exploration, processing, beneficiation, or mining), meaning that discharges associated with the site would then have been subject to the standard non-Good Samaritan requirements of the CWA and other environmental laws.

The remaining bills, S. 1848, S. 2780, and H.R. 5404, did not directly address the revenue or profit issue. They did not appear to preclude revenue-generating activity, nor did they specify how any proceeds must be used. S. 1848 stated that a Good Samaritan permit would only authorize activities directly required for remediation of historic mine residue at the site, while other activities (e.g., additional mining or processing, which could presumably generate proceeds or profits) could be authorized under otherwise applicable laws, including the CWA and other environmental laws. Advocates of these three bills hoped that the revenue-generating potential that they would allow might attract potential Good Samaritans.

S. 2780 and H.R. 5404 similarly provided that a Good Samaritan permit could only authorize activities directly related to the remediation of historic mine residue at or from the site, and this legislation explicitly prohibited authorization of new mining activity under a Good Samaritan permit. This legislation also required that, among other things, a permit application should describe the proposed remediation “including any proposed recycling or incidental reprocessing of historic mine residue at the site and how it relates to the remediation.” Some have suggested that this language could be interpreted as potentially restricting opportunities for Good Samaritans to reprocess mine residue and is thus a concern to certain stakeholder groups, such as those in the mining industry.

## **Enforcement and Judicial Review**

### **Enforcement**

A number of stakeholders contend that a different set of enforcement tools is warranted for Good Samaritans who, they argue, are not polluters and so should not face the possibility of citizen suits or large financial penalties for their activities. Many of these stakeholders focus particularly on citizen suits, which have long been a concern of regulated entities, but which are equally vigorously supported by others, including environmental groups, who view citizen suits as critical tools to enforce federal environmental laws, especially in light of what they see as a drop in government enforcement. At issue is whether activities associated with voluntary cleanup do justify alternative procedures for enforcement and if so, what mechanisms are appropriate.

A review of the CWA’s existing enforcement authorities, typical of federal pollution-control statutes, is useful here. CWA Section 309 is the act’s federal enforcement provision, authorizing EPA to enforce the substantive requirements in the act or permit terms embodying them. Section 309 gives EPA a broad array of tools. It may, on its own, issue administrative orders or impose administrative penalties. Or it may go through a court, filing civil actions (for injunctive relief or civil money penalties) and criminal actions (based on negligent or knowing violations, or “knowing endangerment”). The CWA also authorizes citizen suits, in Section 505. A citizen suit is a civil action brought by any person (who meets constitutional standing requirements<sup>18</sup>) against

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<sup>18</sup> Standing is a threshold question that asks whether a plaintiff is a proper person to be seeking a judicial determination of the issues he or she raises. To satisfy constitutional standing requirements, a plaintiff must allege a personal injury that is fairly traceable to the alleged unlawful conduct by the defendant and that is likely to be redressed by the (continued...)



(a) any person violating effluent standards or limitations under the act, or (b) EPA, for its failure to perform a duty that is nondiscretionary under the CWA. In the former instance, EPA may intervene as a matter of right. Remedies include injunctions and civil penalties.

Finally, Section 504 empowers EPA to deal with “imminent and substantial endangerments” to public health and welfare—whether or not any CWA requirements are being violated—by seeking a court order requiring the offending polluter to stop the discharge or take other necessary action. Section 504 is rarely invoked, possibly because CERCLA Section 106 gives EPA similar abatement authority without the need for the agency to go to court.

The enforcement approaches in the Good Samaritan bills fell neatly into two groups—those in the free-standing bills (S. 1848, S. 2780 and H.R. 5404), and those in the bill that would have amended the CWA, H.R. 1266.

The free-standing bills, perhaps reflecting the view that Good Samaritans are not polluters and hence should be subject to lesser penalties, afforded fewer enforcement tools than those available against violators of CWA permits. While CWA permit violations may be addressed by EPA-imposed administrative penalties and citizen suits, Good Samaritan permit violations under the free-standing bills did not appear to address either administrative penalties or citizen suits. S. 2780 and H.R. 5404 allowed the EPA Administrator a choice between only an administrative “order to comply” or a civil action (penalties and injunctions). S. 1848 authorized civil enforcement (penalties and injunctions) or enforcement by the permitting authority through “appropriate administrative or judicial proceedings.” Possibly intended to further embody the view that Good Samaritan permit violators deserve leniency, the caps on daily court-imposed civil penalties in the bills (\$10,000/day in S. 1848; \$5,000/day in S. 2780 and H.R. 5404, absent “willful or wanton conduct”) were considerably less than that in CWA Section 309 (\$32,500/day, as adjusted by EPA pursuant to the Debt Collection Improvement Act). And, unlike the CWA, the bills did not authorize criminal penalties.

Effective enforcement, of course, requires that the enforcer have access to pertinent information. Like the CWA (Section 308), S. 2780 and H.R. 5404 explicitly conferred upon the permitting entity a right of entry to the premises to inspect and collect information, and the power to require the permittee to maintain records and conduct monitoring. S. 1848 contained no such provisions, although by broadly allowing the permitting authority to insert into Good Samaritan permits any conditions deemed appropriate, it could potentially have achieved the same thing.

Under these free-standing bills (S. 1848, S. 2780 and H.R. 5404), government enforcement could have been carried out by EPA, or by a state that issued the permit under an EPA-approved Good Samaritan permit program.

The enforcement approach in H.R. 1266 was to use that already in the CWA, seemingly rejecting the idea that Good Samaritans warrant special treatment. It provided that a permittee’s failure to comply with permit terms relating to water quality would be subject to enforcement under CWA Section 309. Thus, this bill brought in enforcement by EPA administrative penalty and by criminal penalties, approaches in Section 309 that were left out of the free-standing bills. H.R. 1266 also made explicit that permit violators would be subject to CWA citizen suits, which was

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(...continued)  
requested relief.

not contemplated under the free-standing bills. Many states and environmental groups believe that the citizen suit enforcement tool is a useful incentive to encourage compliance with environmental laws and rules. On the other hand, proponents of the free-standing bills favor a different set of enforcement tools that do not include citizen suits, on the theory that a Good Samaritan permittee is not a “polluter.”

Because it would have amended the CWA, presumably H.R. 1266 also partook of the existing record keeping, monitoring, and inspection authorities in CWA Section 308. This bill further allowed government enforcement by EPA and, seemingly, by the states (since it expressly contemplated delegation of the permitting program to the states; see discussion below).

Finally, all of the bills explicitly disclaimed any implication that a Good Samaritan permit abridges the government’s authority to invoke emergency authorities.

## **Judicial Review**

At first blush, the bills appeared to differentiate by form into free-standing and CWA-amending.

The free-standing bills contained narrow, very targeted judicial review provisions. The full extent of S. 1848’s judicial review provision was that a court may set aside the permitting authority’s action in issuing a permit (or a state’s action in signing one) only on clear and convincing evidence of an abuse of discretion. Likewise, the entirety of S. 2780 and H.R. 5404’s judicial review provision was that review of EPA issuance or denial of a permit may be had in the federal circuit in which the petitioner resides or transacts business directly affected by the issuance or denial, and that application for review shall be within 120 days of such issuance or denial. The likelihood is that the many aspects of judicial review of permit issuance and denial left unaddressed by these provisions would have been governed by the Administrative Procedure Act (APA), which contains procedures that govern federal agency rulemaking.<sup>19</sup> In addition, EPA actions other than permit issuance or denial presumably would have been judicially reviewable under the APA.<sup>20</sup>

A key difference between the free-standing bills was that as applicable, S. 1848’s provisions for judicial review of EPA-issued permits appeared to vest original jurisdiction in the federal district courts, while those in S. 2780 and H.R. 5404 expressly vested such jurisdiction in the circuit courts. To be sure, S. 1848 did not actually say in which court original jurisdiction would lie for federal judicial review, but by default the federal-question statute appeared to vest jurisdiction in the district courts.<sup>21</sup> Historically, federal environmental statutes have required that review petitions be filed initially in the circuit courts, rather than the district courts, when Congress determines that the period of litigation-induced uncertainty following agency action should be as short as practicable. Possibly for the same reason, S. 2780 and H.R. 5404 also mandated that filing occur within 120 days of permit issuance or denial. S. 2780 and H.R. 5404 appear to have taken the judicial review provisions verbatim from CWA Section 509(b), which includes original

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<sup>19</sup> 5 U.S.C. §§ 701-706.

<sup>20</sup> The Supreme Court has said: “From the beginning ‘our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.’” *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

<sup>21</sup> 28 U.S.C. § 1331.

circuit-court review and a 120-day deadline for review of EPA action in issuing or denying any permit under CWA Section 402.

These free-standing bills authorized EPA to delegate permit-issuing authority to qualified states or Indian tribes (see discussion below), and all three provided that judicial review of state- or tribal-issued permits or of permit denial would be vested in state court, or in the tribal body that exercises judicial functions of an Indian tribe.

H.R. 1266 contained no separate judicial review provisions. Because it amended CWA Section 402, however, one presumes that the CWA's judicial review provisions governing Section 402 would have applied. As just noted, these provisions, in CWA Section 509(b), require that a petition for review of permit issuance or denial be filed in circuit court within 120 days.

In light of the above, one could say that substantively, if not by form, the bills differentiated into S. 1848 on the one hand, and S. 2780 and H.R. 5404 together with H.R. 1266 on the other. S. 2780 and H.R. 5404 can be grouped with H.R. 1266 in their common use of the APA standard of review<sup>22</sup> and common vesting of original jurisdiction for review of EPA issuance and denial of permits in the circuit courts. By contrast, S. 1848 used a more deferential to government, non-APA standard of review ("clear and convincing evidence of an abuse of discretion") in some circumstances, and appeared to contemplate legal challenges being filed initially in the district courts. Supporters of S. 1848 maintained that the provisions of that bill, by virtue of encouraging early public input in the permitting process, were intended to minimize litigation that could delay cleanups.

## **Role of States and Indian Tribes**

At issue is the role that states and tribes should play in the Good Samaritan permit process, and whether the responsibility to authorize permits should be delegated from EPA to qualified states and tribes.

Each of the bills gave EPA the primary responsibility to issue permits, and each had provisions requiring that states and tribes consent or concur before the permit could be issued. S. 1848 had some additional provisions, requiring that a state or Indian tribe must be a signatory on the EPA-issued permit. Under S. 1848, if the EPA-issued permit waived any local environmental requirements, the locality would also have to concur and be a signatory to the permit. Likewise, if a project were on federal land, the state or locality within which the federal land is located would have to concur and be a signatory.

All of the bills had procedures for public involvement in the permit process, but they differed regarding a role for adjacent states that might be affected by an IAM remediation project. None of the free-standing bills (S. 1848, S. 2780, and H.R. 5404) explicitly gave adjacent affected states a role in that process. For example, even if discharges from an IAM site affected downstream waters in another state, none of these bills gave such a downstream state any special rights to comment on the permit application. This contrasts with the regular process for issuance of NPDES permits, which presumably would have applied to a Good Samaritan permit under H.R. 1266. The CWA requires that other states whose waters may be affected receive notice of each

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<sup>22</sup> 5 U.S.C. § 706.

permit application, allows such states to submit written recommendations on the permit, and requires written notification if the permit issuer fails to accept such recommendations.

Under all four of these bills, EPA could delegate Good Samaritan permitting to qualified states and tribes, as is allowed for CWA NPDES permits (EPA has delegated this authority to 45 states, and EPA issues permits in the remaining states). Accompanying the delegation authority provisions, S. 1848, S. 2780, and H.R. 5404 also had several related provisions detailing the process for approval of a state or tribe's permitting program, transfer of permitting authority from EPA to the qualified state or tribe, oversight by EPA (EPA would have retained the right to review and could object to a proposed state or tribal permit), and procedures for termination or withdrawal of a delegated program.<sup>23</sup>

In the past, EPA had expressed the view that to ensure national consistency in the application of an innovative approach to the environment, like the Good Samaritan proposals, it is appropriate to have EPA in the decisionmaking role. At the time, the agency's view was that EPA would be in the best position to establish criteria, for example, defining terms such as "maximum extent practicable."<sup>24</sup> However, as reflected in the Administration's proposal, that view has apparently changed. Some also argue today that, because it is likely that only a small number of Good Samaritan permits will be issued, and only a limited number of states are likely to be involved, it makes little sense to complicate the permitting process by authorizing delegation to states and tribes. States, regardless of location or political leanings, tend to favor program delegation—the position reflected in all four bills. The traditional argument in support of delegation is that states are closer to the actual situation, and therefore are more likely to make appropriate individual decisions than can the national government.

## **Funding**

Beyond providing Good Samaritans with relief from environmental liability and related regulatory requirements, some stakeholders say that the other major impediment—and an overriding concern—to encouraging voluntary cleanups is how to fund those types of activities. While no single source provides information on remediation costs, EPA estimated in 2004 that the cost of remediating all hardrock mines is between \$20 and \$54 billion, and that CERCLA NPL sites account for about \$3.5 billion of this amount. However, EPA also stated that at current funding levels (averaging from \$100-\$150 million annually by federal, state, and private sources), no more than 8%-20% of all the cleanup work could be completed in 30 years.<sup>25</sup>

While other resource extraction sectors (coal, oil, gas, forestry on public lands) have a dedicated fee-based fund to support site reclamation and remediation, hardrock mining has no such funding mechanism. Abandoned hardrock mines have been cleaned up with assistance from an array of

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<sup>23</sup> None of the bills appears to allow the EPA Administrator to delegate his authority to another agency official, such as a Regional Administrator.

<sup>24</sup> J. Charles Fox, Assistant Administrator for Water, U.S. Environmental Protection Agency, in 2000 Senate Hearing, p. 17.

<sup>25</sup> U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response, "Cleaning Up the Nation's Waste Sites: Markets and Technology Trends," 2004, EPA-542-R-04-015, pp. 11-12 to 11-13. Note that the estimated cost for NPL sites in this EPA report is less than one-half of the total presented in a 2004 EPA Inspector General report (\$7.8 billion). See, U.S. Environmental Protection Agency, Office of Inspector General. "Nationwide Identification of Hardrock Mining Sites," Report No. 2004-P-00005, March 31, 2004, 91 p.

private, state, and federal sources,<sup>26</sup> but stakeholders contend that the large number of IAMs that pose environmental pollution problems and that may require cleanup argues for a dedicated source of funding. The NRC observed in its 2004 report that without a source of secured funding, there are serious concerns about how a remediation program that is expected to last for decades, if not centuries, can be successfully implemented.<sup>27</sup> In past Congresses, legislation has been introduced that would establish a reclamation fee on hardrock mineral producers and create a trust fund from those fees to help pay for cleanup of abandoned hardrock mines.<sup>28</sup> Those bills have been highly controversial, and none has been enacted. The industry has argued, for example, that a fee on hardrock mining would have an adverse effect on pricing of their commodities in international markets. However, with current record high prices for some commodities, such as gold, some observers find that this argument has lost some persuasiveness.

None of the Good Samaritan bills proposed a comprehensive, secured mechanism to fund remediation activities,<sup>29</sup> but all of them included provisions that addressed one source of current funding for IAM cleanup projects: grants under CWA Section 319. The CWA authorizes these grants to states for a range of activities under the states' EPA-approved programs to manage nonpoint source water pollution by restoring impaired waters and protecting threatened and good-quality waters. Abandoned mine land reclamation projects that are designed to restore water quality are eligible for Section 319 funding except where funds are used to implement specific requirements in an NPDES permit. For example, Section 319 funds cannot be used to build treatment systems required by an NPDES permit for an inactive mine, but they may be used to fund a variety of other remediation activities at the same mine. According to EPA, about \$1 million per year in Section 319 grants (out of total funding that has averaged about \$225 million annually in recent years) has gone to abandoned mine land projects, for activities such as education, technical assistance, project demonstration, and groundwater protection.

All of the bills would have clarified that projects to implement IAM remediation are eligible for Section 319 grants. H.R. 1266 also had a separate provision authorizing EPA to make a grant (unspecified) to any remediating party for activity covered by a Good Samaritan permit.

## **Terminating a Good Samaritan Permit**

Another issue is whether the proposed legislation should specify conditions for terminating a Good Samaritan permit, to determine when liability relief and regulatory exemptions provided by a Good Samaritan permit would cease.

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<sup>26</sup> A large number of IAMs are located on public lands that are owned or managed by federal agencies, including the Bureau of Land Management, U.S. Forest Service, and National Park Service. For example, the Forest Service estimates that there are 25,000 to 35,000 abandoned mines on its lands. The Bureau of Land Management estimates that about 5% of the 100,000-500,000 abandoned mines on its lands have caused or could cause environmental damage. Using appropriated funds, these agencies are able to clean up historic mine residue at a few sites—generally a few dozen—each year.

<sup>27</sup> 2004 NRC Report, p. 417.

<sup>28</sup> For example, in the 106<sup>th</sup> Congress, H.R. 395 was such a bill, and bills in the 105<sup>th</sup> Congress were H.R. 780 and S. 326.

<sup>29</sup> Representative Mark Udall introduced separate legislation, H.R. 1265, to establish a fee-based hardrock mineral reclamation fund. In past Congresses, he also introduced bills that combined Good Samaritan permit provisions with fee provisions to support an abandoned mine reclamation fund. These bills were H.R. 504 in the 108<sup>th</sup> Congress and H.R. 4078 in the 107<sup>th</sup> Congress.

Under the Clean Water Act, NPDES permits are authorized for up to five years and thereafter must be renewed. Thus, a Good Samaritan permit issued under the umbrella of the NPDES program (as in H.R. 1266) would likewise be expected to expire in no more than five years. H.R. 1266 addressed the issue of permit termination beyond normal expiration by generally including these factors: a permit would terminate when remediation was done, when EPA determined that water quality conditions were no worse than baseline conditions, or when an unanticipated event or condition occurred beyond the control of the permittee. In addition, H.R. 1266 stated that the permit would terminate when activity at the site changed from remediation to development, meaning that discharges associated with the site would be subject to non-Good Samaritan requirements of the CWA and other environmental laws.

Because the free-standing bills would not have amended the CWA, none of these bills had the regular five-year expiration of NPDES permits. Under S. 2780 and H.R. 5404, a permit could be terminated if work did not commence within one year of issuance, if work were not completed by the date specified in the permit (unless extended by the permitting authority), or for cause, including misrepresentation or a violation of a permit. S. 1848 provided that a permit would terminate if work did not commence within 18 months of permit issuance, and it required that projects be completed by 10 years after enactment of the legislation or four years after issuance of the applicable permit, whichever was later.

## **Sunsetting the Program**

Beyond the question of whether and under what circumstances a Good Samaritan permit should be terminated is the question of whether authorization for the permit program itself should be terminated. A few stakeholders have addressed this issue, stating that sunset after a specific period of time (such as 10 years) leaves room for Congress to extend the legislation, but also ensures that the act will automatically lapse if the program does not succeed. Others agree that there does need to be a time for Congress to review the program to assess the need for changes or improvements. Including a specific sunset period would give focus to that need for congressional review, they say. Others may argue, however, that a sunset is unnecessary, as Congress can review ongoing programs at any time.

H.R. 1266 included a 10-year sunset requirement and, nine years after enactment, a report to Congress by EPA on Good Samaritan-permitted activities. S. 1848 would have sunset the permit program on September 30, 2016, and would have required a report to Congress evaluating the permit program on January 1, 2016. The Administration proposal had no provisions for sunseting the program or a report to Congress.

## **Conclusion**

In congressional testimony in 2006, some witnesses expressed a certain frustration about the continuing debate over Good Samaritan issues. An EPA witness said that the issue has been discussed for over a decade and suggested that “action, not continued debate on this issue, is the only way to clean up what has been described as a very fixable mess.”<sup>30</sup> While most witnesses at

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<sup>30</sup> “EPA Official Urges Congress to Take Action On Legislation to Expedite Voluntary Cleanups,” *Daily Environment Report*, No. 135, July 14, 2006, p. A-3.

these hearings agreed on the basic point of liability relief to remove some of the obstacles to voluntary remediation of inactive and abandoned mine sites, others do not yet agree that a legislative solution like any of the 109<sup>th</sup> Congress bills is needed or appropriate. Further, as this report has described, these proposals differed in many key and controversial respects—including scope of liability protection, revenue and profit questions, and applicable standards—that may still require discussion and debate before consensus emerges.

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