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# Cleanup at Inactive and Abandoned Mines: Issues in “Good Samaritan” Legislation in the 114<sup>th</sup> Congress

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## Summary

On August 5, 2015, an accidental spill from the Gold King Mine, a long-abandoned gold mine site in Colorado, released an estimated three million gallons of acid mine drainage (AMD) wastewater into a tributary of the Animas River. The Colorado spill has raised interest in facilitating cleanup of legacy pollution at inactive and abandoned mine sites, especially hardrock mines such as Gold King, in order to prevent similar accidents. Several federal agencies have authority to clean up abandoned mines on public lands, but resources are limited, and most sites on private lands are not included. One approach that has drawn attention is encouraging remediation by so-called "Good Samaritan" 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 AMD or other historic mine residue of pollution.

Legislation to authorize Good Samaritan remediation has been introduced regularly since 1999. In the 114<sup>th</sup> Congress, proposals include H.R. 963, H.R. 3843, and a discussion draft bill developed by several Members. These bills propose incentives to potential Good Samaritans in the form of reduced liability from environmental laws and less stringent environmental standards for cleanup activities. Senate and House committees have held oversight hearings on the Gold King Mine spill and to review legislative responses to it, including bills that seek to overcome obstacles to potential Good Samaritans.

This report discusses several issues that have drawn attention: eligibility for a Good Samaritan permit, minerals covered by a permit, standards applicable to a Good Samaritan cleanup, scope of liability protection, funding, treatment of revenues from cleanup, enforcement, the appropriate role for states and Indian tribes, terminating a permit, and sunseting the permit program. Of all of the issues raised by Good Samaritan proposals, two are most prominent.

One issue is funding. Although inventories of the number of abandoned hardrock mines do not exist, most stakeholders agree that the cost to clean up mines that harm or threaten water quality is likely to be in the tens of billions. But federal funding to carry out remediation projects is limited. The Obama Administration and H.R. 963 propose to assess a fee on active hardrock mining operations to pay for cleaning up abandoned mine sites, similar to a fee on active coal mining operations that is used for remediating abandoned coal mine sites. H.R. 3843 and the discussion draft bill do not propose a fee or royalty on hardrock mining. The mining industry opposes such a new fee, even as they acknowledge that existing cleanup funding for hardrock mine sites is limited.

The second key obstacle is liability under environmental laws, especially the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund) and the Clean Water Act (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, at least two of which might apply to the Good Samaritan who attempts cleanup of an inactive and abandoned mine (IAM). The CWA comes into play chiefly because a Good Samaritan could be deemed subject to the act's requirement that all point source discharges into waters of the United States must be authorized by a permit. However, many potential Good Samaritans are reluctant to engage in activities for which they might have continuing obligations beyond the end of a cleanup project and termination of a CWA permit, because water treatment projects typically have ongoing discharges long into the future. The Environmental Protection Agency has attempted to address both CERCLA and CWA liability concerns through administrative initiatives in 2007 and 2012. Stakeholders say that these initiatives are helpful but incomplete. In the 114<sup>th</sup> Congress, H.R. 963 would exempt Good Samaritans from the CWA, and H.R. 3843 and the discussion draft bill

would provide exemption from CERCLA and CWA. The discussion draft bill appears to provide long-term protection from liability (after a project or permit terminates) that some stakeholders seek, while the other two bills do not.

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## Introduction and Overview

On August 5, 2015, an accidental spill from the Gold King Mine, a long-abandoned gold mine site in Colorado, released an estimated three million gallons of acid mine drainage (AMD) wastewater into a tributary of the Animas River. From there, the contaminated wastewater migrated downstream to the San Juan River into New Mexico, Utah, and tribal lands.<sup>1</sup>

Water samples taken in days immediately after the mine blowout indicated elevated levels of some metals (copper, lead, and manganese), although concentrations diminished to "pre-incident" levels as the plume moved downstream. Nevertheless, the spill led to widespread concern about impacts on water quality, public health, agriculture, fish, and wildlife. It also raised concern about other inactive or abandoned hardrock mine (IAM) sites on public and private lands in the United States.

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 or safeguarded 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. The Government Accountability Office (GAO) estimated that there may be more than 160,000 abandoned hardrock mines in the western states and Alaska and that 20% of these sites (about 33,000) had degraded the environment outside the mine.<sup>2</sup>

Although most sites do not pose environmental problems, drainage or runoff from some continue to pose a threat to both surface water and groundwater. The Environmental Protection Agency (EPA) estimated in 2000 that approximately 40% of headwaters in rivers and streams in the West, which are the source of drinking water for thousands of persons, have been impacted by discharges from abandoned hardrock mines, thus threatening community and agricultural water supplies, increasing drinking water treatment costs, and limiting fishing and recreation.<sup>3</sup> The number of mines that are causing or have potential to harm the environment is unknown, but is generally believed to be a small percentage of the total: perhaps 5%-10% of all IAM sites. But even so, 5%-10% of 500,000 possible sites still represents a large number of potential sites (25,000 to 50,000) that concerns many persons.<sup>4</sup>

The Colorado spill has raised interest in facilitating cleanup of legacy pollution at IAM sites in order to prevent similar accidents. One approach that has drawn attention is encouraging remediation by so-called "Good Samaritan" 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 AMD or other historic mine residue of pollution. Legislation to authorize Good Samaritan

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<sup>1</sup> For background, see CRS Insight IN10341, *Gold King Mine Spill: EPA Response and Related Issues*.

<sup>2</sup> U.S. Government Accountability Office, *Abandoned Mines, Information on the Number of Hardrock Mines, Cost of Cleanup, and Value of Financial Assurances*, GAO-11-834T, July 14, 2011.

<sup>3</sup> U.S. Environmental Protection Agency, *Liquid Assets 2000: America's Water Resources at a Turning Point*, EPA-840-B-00-001, May 2000, p. 12.

<sup>4</sup> The Bureau of Land Management has an estimated 48,000 IAM sites on BLM lands, and it estimates that 5%-10% pose environmental hazards. If those percentages are extrapolated to the estimated national total of IAM hardrock sites, the total with potential to harm the environment could be 25,000 to 50,000. See [http://www.blm.gov/wo/st/en/prog/more/Abandoned\\_Mine\\_Lands/frequently\\_asked\\_questions.html](http://www.blm.gov/wo/st/en/prog/more/Abandoned_Mine_Lands/frequently_asked_questions.html).

remediation has been introduced regularly since 1999, including H.R. 963, H.R. 3843, and a Discussion Draft bill<sup>5</sup> in the 114<sup>th</sup> Congress.<sup>6</sup>

These bills propose 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 include mining companies, industry associations, and some conservation groups, maintain that any degree of cleanup is better than inaction or the status quo, and they argue that, if not addressed in this legislation, the issues of liability exposure under environmental law and strict regulatory standards will continue to stymie voluntary cleanups. Opponents, especially many environmental and conservation advocates, acknowledge that cleanup would benefit the environment, but they express concern that exemptions and relief might be the first step in dismantling key environmental legislation, due to vague standards that would apply to a Good Samaritan cleanup. Other stakeholders in the debate include states (many, especially in the West, support the idea of facilitating cleanup of abandoned mines) and the federal government.

H.R. 963, H.R. 3843, and the Discussion Draft propose to establish a process for issuing permits to those who would be Good Samaritans. Permitting authority would vest in EPA, but could be delegated to qualified states and Indian tribes. The bills would allow 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. The bills would establish a process for identifying what entities and lands are eligible, specifying goals of cleanup and conditions for permits, and issuing permits.

The bills reflect several differences, as well. H.R. 963 is drafted as a measure that would amend the Clean Water Act (CWA, 33 U.S.C. §1251 et seq.). Under this bill, the permit provision would be 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. 963 would amend 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. This bill includes a dedicated cleanup fund for abandoned hardrock mines from a royalty fee on minerals taken from public lands. In contrast, H.R. 3843 and the Discussion Draft are stand-alone bills. These bills propose 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.). Neither includes dedicated funds for IAM cleanups.

Proponents of Good Samaritan legislation have discussed issues related to proposals since bills were first introduced in the 106<sup>th</sup> Congress. In the 109<sup>th</sup> Congress, a number of bills were introduced (including one supported by the Administration), and a Senate committee reported legislation, but no further activity occurred.<sup>7</sup> Bills were introduced in each subsequent Congress,

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<sup>5</sup> The Good Samaritan Cleanup of Orphan Mines Act of 2016 was developed by several Members of Congress from Colorado. Although not yet formally introduced, the bill has been widely circulated and was discussed at a hearing of the Senate Environment and Public Works Committee on March 2, 2016. The text is available at [http://www.epw.senate.gov/public/\\_cache/files/42437eb2-95a7-489e-a9ea-6a4b92d0cccc/good-samaritan-cleanup-of-orphan-mines-act-of-2016.pdf](http://www.epw.senate.gov/public/_cache/files/42437eb2-95a7-489e-a9ea-6a4b92d0cccc/good-samaritan-cleanup-of-orphan-mines-act-of-2016.pdf). Hereinafter, the bill will be referred to as the Discussion Draft.

<sup>6</sup> H.R. 963 and H.R. 3843 include a number of provisions that are beyond the scope of Good Samaritan proposals. Unless otherwise indicated, this report focuses on the Good Samaritan provisions of the current legislation: Title VI of H.R. 963, Title III of H.R. 3843, and the Discussion Draft.

<sup>7</sup> For information, see CRS Report RL33575, *Cleanup at Abandoned Hardrock Mines: Issues Raised by "Good Samaritan" Legislation in the 109th Congress*.

as well. With apparent renewed interest in the 114<sup>th</sup> Congress, the current legislation reflects concepts from a number of earlier proposals, with some refinements and modifications. Senate and House committees have held oversight hearings on the Gold King Mine spill and hearings to review legislative responses to it, including bills that seek to overcome obstacles to potential Good Samaritans.<sup>8</sup>

## Selected Issues in Good Samaritan Legislation

This report discusses several issues that have drawn attention: eligibility for a Good Samaritan permit, minerals covered by a permit, standards applicable to a Good Samaritan cleanup, scope of liability protection, funding, treatment of revenues from cleanup, enforcement, the appropriate implementation role for states and Indian tribes, terminating a permit, and sunseting the permit program. This discussion does not address every issue in the current 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 mine sites.<sup>9</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, especially conservation groups, 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 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. Such opponents contend that, 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,

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<sup>8</sup> Hearings on Good Samaritan proposals have been held by a House Transportation and Infrastructure subcommittee on October 21, 2015, a House Natural Resources subcommittee on November 4, 2015, and the Senate Environment and Public Works Committee on March 2, 2016.

<sup>9</sup> For background on these issues, see Patricia N. Limerick, Joseph N. Ryan, and Timothy R. Brown, et al., *Cleanup of Abandoned Hardrock Mines in the West, Prospecting for a Better Future*, Center of the American West, University of Colorado at Boulder, 2005; U.S. Environmental Protection Agency, *Abandoned Mine Site Characterization and Cleanup Handbook*, EPA 910-B-00-001, August 2000; and Lisa Sumi and Bonnie Gestring, *Polluting the Future: How Mining Companies Are Contaminating Our Nation's Waters in Perpetuity*, Earthworks, May 2013.



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.

H.R. 963 and the Discussion Draft include an expansive listing of parties eligible for a Good Samaritan permit, presumably on the theory that a broad list would include more entities with resources and expertise to undertake cleanup. Under H.R. 963 and the Discussion Draft, a person eligible to apply for a Good Samaritan permit could include an individual; private entities (a firm, corporation, partnership, consortium, commercial entity, or joint venture); a nonprofit organization; commission; federal, state, interstate, or local government; or Indian tribe. H.R. 3843 does not include a similar list of eligible entities, but instead bases permit eligibility on the bill's definition of a Good Samaritan. Under H.R. 3843, a Good Samaritan could be a person that has an ownership interest in the IAM site, so long as the person did not create or cause pollution related to the historic mine residue or is not liable or potentially liable for remediation costs.

All three bills exclude orphan mine sites that are included on the National Priorities List (NPL) under CERCLA from potential eligibility for a Good Samaritan permit. In addition, the Discussion Draft excludes orphan mines that were actively mined or processed minerals after December 11, 1980 (the date of enactment of CERCLA)—even if the site is not included on the NPL.<sup>10</sup>

A related issue 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 such as the CWA and CERCLA, a person who owns or operates a site that is responsible for environmental pollution continues to be responsible for mitigating that pollution. All three of the current bills take the position that an identifiable, financially capable owner or operator that had a role in creating the pollution should not be eligible for a Good Samaritan permit and that existing requirements to clean up according to applicable environmental standards should apply where there is an identified owner or operator who was involved with creation of the historic mine residue. 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. Under all three bills, a Good Samaritan is defined as a person that had no role in creating the historic mine residue or environmental pollution caused by the historic mine residue and is not liable for remediating the historic mine residue. In addition, under the Discussion Draft, a Good Samaritan also is someone who is not a past or current owner or operator of all or a portion of the site.

In past consideration of Good Samaritan legislation, some proposals would have barred the federal government from qualifying as a Good Samaritan (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 should therefore not be eligible for Good Samaritan relief. 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 need Good Samaritan incentives. Critics argued that these restrictions presented

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<sup>10</sup> Some contend that this date should be October 18, 1972, the CWA enactment date, saying that most of the pollution problems addressed in the legislation come from pre-1972 mines, since after that date, mining companies were responsible for their pollutant discharges into U.S. waters. See, Testimony of Jennifer Krill, Executive Director, Earthworks, before the Senate Environment and Public Works Committee, March 2, 2016.



excessive hurdles for cleaning up the large number of abandoned mine sites in western states that involve mixed public and private ownership. Presumably these same arguments would be raised for a state seeking a Good Samaritan permit for an IAM site on state-owned land. None of the bills in the 114<sup>th</sup> Congress would bar the federal or state governments from being a Good Samaritan.

Another related issue concerns what efforts permit applicants must make to search for a responsible owner or operator. All of the current bills would require that the permit applicant make reasonable and diligent 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, nonprofit 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.

## **Minerals Covered by a Good Samaritan Permit**

Supporters of Good Samaritan proposals differ on the issue of whether legislation should apply only to remediation of abandoned and inactive hardrock mineral mines—gold, copper, silver, and iron ore, for example—or also to abandoned and inactive coal mines. Many of the legislative proposals in past Congresses, and H.R. 963 and the Discussion Draft in the 114<sup>th</sup> Congress would limit Good Samaritan permits to hardrock mineral mines. But some industry and state stakeholders favor authorizing Good Samaritan cleanup of abandoned coal mines, as well as hardrock IAMs. H.R. 3843 would apply to both non-coal and coal IAM sites. Although some proposals in past Congresses would have required that remediation of a coal IAM site by a Good Samaritan must be carried out pursuant to a coal mine reclamation plan approved under the Surface Mining Control and Reclamation Act (SMCRA), H.R. 3843 does not include such a requirement.

Those arguing in favor of including coal remediation under Good Samaritan proposals say that inactive and abandoned coal mines are sources of acidified mine drainage that impairs surface water and groundwater quality in locations throughout the country, but especially in the East (unlike IAM hardrock mine sites, which are found predominantly in the West). Further, the funding needs for known abandoned coal mine sites exceed available resources, including under SMCRA's Abandoned Mines Lands (AML) program.<sup>11</sup> Advocates of authorizing Good Samaritan permits for coal sites say that some cleanup of abandoned coal mine sites, even at less stringent standards, is better than none, since unaddressed sites often worsen over time, thus increasing

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<sup>11</sup> Title IV of SMCRA (30 U.S.C. §§1231-1244) authorizes collection of fees from active coal mining operations that are deposited in an Abandoned Mine Reclamation Fund. Monies in the Fund are distributed to state and tribal programs for reclamation of abandoned coal mine sites that were mined prior to August 3, 1977 (the enactment date of SMCRA). After a state certifies that it has completed reclamation of all known coal projects, it can use monies from the Fund for high-priority non-coal projects (30 U.S.C. §1240a). Currently, five states (Louisiana, Mississippi, Montana, Texas, and Wyoming) and three Indian tribes have provided such a certification and receive a total of about \$63 million annually in AML grants to address non-coal sites. The Office of Surface Mining Reclamation and Enforcement estimates that there are more than \$4 billion worth of high-priority health and safety coal-related sites in its inventory of abandoned coal mine sites. See <http://www.osmre.gov/programs/aml.shtm>.

costs. Remediating coal sites poses many of the same challenges of liability under environmental laws as cleanup of hardrock mineral sites. Groups that might step forward to reclaim sites do not do so because, by re-affecting the site, they could be held liable under state and federal law to permanently treat the discharge (see "Scope of Liability Protection").

Opponents of authorizing Good Samaritan permits for coal remediation projects acknowledge the environmental problems of IAM coal sites, but some see including coal sites in the legislation as a way to weaken existing standards and requirements applicable to coal mine remediation projects, including those that receive funds under the SMCRA AML program, without amending SMCRA or its implementing regulations. In addition, some opponents believe that including coal mine sites would complicate policymakers' consideration of issues concerning IAM hardrock mineral sites, which lack comparable statutory authorities.

## **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 environmental protection standards that would otherwise apply. The basic concern was explained by an EPA official in 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 disincentive to voluntary cleanups. Unfortunately, this has resulted in the perfect being the enemy of the good.<sup>12</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>13</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

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<sup>12</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>13</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.

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 authorize poorly conceived projects.

The National Research Council (NRC) 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>14</sup> This approach would complement states' existing efforts to attain specific designated uses (such as fishing, swimming, and drinking) for their surface waters.

The three current bills attempt to strike a balance between identifying a cleanup standard and doing so flexibly. H.R. 3843 states that the purpose of a permitted project is to "improve the environment," and the purpose of H.R. 963 is to "encourage the partial or complete remediation of inactive and abandoned mine sites for the public good." The purpose of a permitted project under the Discussion Draft is "the reduction of pollution caused by historic mine residue to enhance the public good." Under all three bills, a Good Samaritan permit may be issued for a project that will assist in the attainment of applicable water quality standards "to the extent reasonable and practicable under the circumstances" and will not result in water quality that is worse than baseline conditions, as determined by the permitting authority. It is unclear whether any of these bills fully satisfies all concerns about defining cleanup standards. None of the proposals defines terms such as "reasonable and practicable," thus potentially giving considerable discretion to the permitting authority.

## **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 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.

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<sup>14</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*, 2004, p. 426. Hereinafter, 2004 NRC Report.

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" reduces the public funding needed for cleanups. However, current legislative proposals do not envision PRPs being eligible for a Good Samaritan permit, and many stakeholders argue 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 CERCLA and the CWA. Without exemptions, according to one industry witness, "... 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>15</sup> Recently, a wider range of stakeholders, including some conservation groups and states, has come to support the view that protection from CERCLA liability is needed in order to encourage voluntary cleanups. CERCLA's complexities and perceived risks are considered daunting by watershed and other groups that are potential Good Samaritans.

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. A number of courts have held that discharges from abandoned mines are point sources that require a CWA permit. CWA permits impose "liability," or obligations, 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 likely to already be violating these standards. Thus, there is "liability" for the necessary expense of complying with a permit. 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.

Stakeholders involved in cleanup projects say that there are many projects where water quality could be improved by collecting runoff, or taking an existing discrete discharge and running the water through either an active or passive treatment system. For example, following the spill at the Gold King Mine site, mine water is being treated passively in a series of settling ponds. Lime and other chemicals are added to water in the ponds in order to increase sedimentation and decrease the acidity of the water before eventual release to a nearby creek.<sup>16</sup>

Stakeholders cite two problems arising from CWA liability and compliance. First, nonprofit and similar groups are not well suited to apply for and hold CWA permits, because they lack funding to pay for perpetual costs of operating a water treatment facility. The liability risk of complying with a permit, or constructing a treatment system without a permit, creates an unfunded financial risk to the organization. Many are reluctant to engage in activities for which they might incur

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<sup>15</sup> Jack Lyman, Executive Director, Idaho Mining Association, in U.S. Congress, Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Wildlife, and Drinking Water, *Good Samaritan Abandoned or Inactive Mine Waste Remediation*, Hearing, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 22, S.Hrg. 106-955, p. 33.

<sup>16</sup> See <http://www2.epa.gov/goldkingmine/roles-epa-and-other-responders-after-2015-gold-king-mine-release>.

liability beyond the termination date of a permit, as would be the case with water treatment projects that have continuing discharges long into the future.

Second, for many projects it may be impossible to obtain a permit, because the treatment systems cannot treat abandoned mine wastewater to a level that meets all applicable water quality standards. Further, abandoned mine cleanup projects often are done in remote mountain areas where access for monitoring—as required by CWA permits—is difficult. These groups do not advocate weakening CWA standards; they seek incentives for potential Good Samaritans to make water cleaner, even if it is still short of full CWA standards.<sup>17</sup>

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. However, one can envision IAM remedial actions that do not call for CWA permits, or releases to other environmental media in addition to surface waters, negating this argument in those cases. In short, if there is no CWA permit for the project, the liability immunity under CERCLA Sections 107(j) and 101(10) would not be available.

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>18</sup> Under these provisions, actions taken under Superfund generally must provide liability protection equivalent to those under other environmental laws, such as the CWA. This exemption 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 doing so would raise certain questions. For 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.

Some 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 under Superfund that tailors liability relief and environmental requirements to a project and obviates the need for additional federal, state, and local permits for cleanup. In 2007, EPA announced an initiative to encourage voluntary cleanups of abandoned hardrock mine sites consisting of administrative tools

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<sup>17</sup> Statement of Chris Wood, President and CEO of Trout Unlimited, before the House Natural Resources Committee, Subcommittee on Energy and Mineral Resources, November 4, 2015, p. 4.

<sup>18</sup> The National Oil and Hazardous Substances Pollution Contingency Plan, or NCP, contains the procedures and regulations for implementing the Superfund program. It is codified at 40 C.F.R. Part 300.



intended to reduce the threat of CERCLA liability for Good Samaritans. Its purpose is to encourage Good Samaritans to perform work at IAM sites without having to invest time and resources in negotiating a formal settlement agreement with the federal government under CERCLA. The initiative established two tools under existing CERCLA authorities to shield a qualifying Good Samaritan from potential liability under CERCLA that could arise as a result of conducting a cleanup. First, a model Good Samaritan comfort/status letter is a nonnegotiable document accepting a Good Samaritan's proposed cleanup plan. Second, a model Good Samaritan settlement agreement is a more formal option for more complicated cleanups that provides a federal covenant not to sue or take administrative action against the Good Samaritan, in exchange for complete and satisfactory performance of the cleanup. EPA cites CERCLA Section 107(d) as the statutory authority for both tools. Under this initiative, a Good Samaritan is not a past or current owner of the property and is not potentially liable for remediation of the existing contamination under CERCLA or any other federal, state, or local law applicable to remediation.<sup>19</sup>

The August 2015 Gold King Mine spill occurred during a site investigation by EPA, not a Good Samaritan, to assess ongoing water releases and the feasibility of remediation. If a Good Samaritan had been conducting cleanup at the Gold King Mine site in Colorado pursuant to a CERCLA administrative tool, it might have been exempt from CERCLA liability for the August 2015 spill, so long as the remediation was being conducted pursuant to an EPA-approved plan.

Under the 2007 initiative, EPA may determine that attainment of water quality standards at the site during remediation activities (as a CWA permit normally would require) may not be practicable, and the agency can authorize site-specific requirements that ensure that the project results in environmental improvement. However, EPA recognized that CWA liability can arise after the Good Samaritan satisfactorily completes its obligations pursuant to the CERCLA administrative tool and leaves the site, because the discharge of pollutants from a point source such as a passive treatment system would continue releasing pollutants that do not meet water quality standards. Thus, EPA followed with a 2012 guidance memorandum that addressed circumstances that would preclude potential CWA responsibilities for a Good Samaritan after a project done pursuant to the CERCLA tools is complete. CWA rules require the "operator" of a facility to obtain necessary CWA permits. The 2012 guidance provides five factors that may be used by permitting authorities to help determine if the Good Samaritan is still the "operator" and would be responsible for obtaining a CWA permit for continuing discharges from the site. For example, if the Good Samaritan does not have power or responsibility to abate environmental damage caused by the remaining discharges, after cleanup is complete, he would no longer be the "operator" of the facility and would not be responsible for obtaining a CWA permit.<sup>20</sup>

One group that has had experience in using both of the administrative tools is Trout Unlimited, a conservation organization. It has negotiated three separate agreements with EPA covering projects in Utah and Colorado and also has worked on cleanup projects (without such agreements) in other

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<sup>19</sup> Granta Nakayama, Assistant Administrator, Office of Enforcement and Compliance Assurance, Susan Bodine, Assistant Administrator, Office of Solid Waste and Emergency Response, and Benjamin Grumbles, Assistant Administrator, Office of Water, et al., *Interim Guidance Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans*, U.S. Environmental Protection Agency, Memorandum, June 6, 2007.

<sup>20</sup> Cynthia Giles, Assistant Administrator, Office of Enforcement and Compliance Assurance, Mathy Stanislaus, Assistant Administrator, Office of Solid Waste and Emergency Response, and Nancy Stoner, Assistant Administrator, Office of Water, et al., *Clean Water Act § 402 National Pollutant Discharge Elimination system (NPDES) Permit Requirements for "Good Samaritans" at Orphan Mine Sites*, U.S. Environmental Protection Agency, Memorandum, December 12, 2012.

states. Officials of Trout Unlimited and other organizations say that EPA's initiatives are helpful but that they do not resolve all liability questions, especially those involving the CWA. EPA acknowledges that, so far, the CWA tool has not been used by a Good Samaritan. Details of the policy's application remain unclear, according to Trout Unlimited, because the policy has not been used, thus leaving open such questions as liability and compliance obligations of landowners where projects take place.

Previous Good Samaritan proposals have included varied approaches to conferring liability exemption. Some have focused on a single statute (e.g., the CWA), while some proposed broad liability protection (e.g., CWA, CERCLA, the Toxic Substances Control Act, Solid Waste Disposal Act, plus state, local, and tribal environmental laws and ordinances). Supporters of these broader proposals argued 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 criticized the potential exemptions as being unnecessarily broad and likely to generate substantial controversy.

The legislation in the 114<sup>th</sup> Congress does not take such a broad approach. H.R. 963 would exempt a Good Samaritan permittee from "each obligation and liability" under the CWA. This language presumably would confer liability protection from compliance with CWA Sections 301 and 302 (both concerning effluent limitations), Section 303 (water quality standards), Section 311 (liability for hazardous substance spills into navigable waters), or Section 404 (wetlands permits). It also specifically exempts a Good Samaritan permit from CWA Section 401. Under Section 401, applicants for a federal permit or license must obtain a state certification that the project will comply with state water quality standards. However, in a somewhat circular manner, the bill states that in a case where Section 401 would otherwise apply, the state in which the site is located or the Indian tribe that owns or has jurisdiction over the site must concur in the permit.

H.R. 3843 would exempt Good Samaritan permittees from compliance with CWA and CERCLA requirements and liability. The bill also would waive Section 102 of the National Environmental Policy Act (NEPA, concerning evaluation by federal agencies of major federal actions significantly affecting the environment) for actions by EPA under the Good Samaritan title of the legislation. Presumably, this would exempt EPA from conducting NEPA analysis before issuing a Good Samaritan permit or delegating a permit program to a state. Witnesses testifying at recent hearings have stated that NEPA and laws other than CWA and CERCLA have not been cited as obstacles to cleanup and that including them in legislation could draw opposition to creating solutions that would garner support.

Like H.R. 3843, the Discussion Draft would exempt Good Samaritans from compliance with certain CWA (sections 402 (NPDES permits) and 505 (citizen suit enforcement)) and CERCLA (sections 107 (liability) and 310 (citizen suits)) requirements and liability. It would not waive compliance with NEPA and would not exempt activities covered by a Good Samaritan permit from CWA Sections 404 (dredge and fill permits) or 401. Under this bill, any activity not related to remediation of historic mine residue would be subject to all requirements of the CWA and CERCLA.

As discussed above, H.R. 3843 would authorize Good Samaritan coverage of non-coal and coal IAM remediation projects. In addition, this bill includes a provision saying that a state or Indian tribe that is conducting remediation of an IAM coal mine pursuant to an approved plan under SMCRA shall not be required to obtain a CWA permit. This exemption would not extend to non-state or non-tribal entities carrying out such a project pursuant to SMCRA.

It is uncertain if either H.R. 963 or H.R. 3843 addresses the issue of perpetual pollutant discharges from an IAM site. The liability exemption under both bills would cease when the



permit terminates (after five years under H.R. 963, or when specified in a permit issued under H.R. 3843; see "Terminating a Good Samaritan Permit and Sunsetting the Program"), but this does not appear to cover discharges that could continue after the Good Samaritan's project is complete. The Discussion Draft, on the other hand, states that the liability relief provided under that bill would apply to "any past, present, or future discharges at or from the orphan mining site that is the subject of the permit"—thus seemingly addressing perpetual discharges from an IAM site.

## Funding

Beyond providing Good Samaritans with relief from environmental liability and related regulatory requirements, nearly all stakeholders say that the other major impediment—and an overriding concern—to encouraging voluntary cleanups is how to fund remediation projects. While no single source provides information on costs, EPA estimated in 2004 that the cost of remediating all hardrock mines is between \$20 billion and \$54 billion. However, EPA also stated that at then-current funding levels (averaging from \$100-\$150 million annually by federal, state, and private sources), no more than 20% of all the cleanup work could be completed in 30 years.<sup>21</sup> Stakeholders say that Good Samaritans may be able to tackle small projects that improve water quality but that, without additional funding, they will be unable to undertake projects at larger problem sites.

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 private, state, and federal sources,<sup>22</sup> but stakeholders contend that due to the large number of IAMs that pose environmental pollution problems and may require cleanup, a dedicated source of funding is needed. 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>23</sup>

In past Congresses, legislation has been introduced that would establish a reclamation fee on hardrock mineral producers and create a fund from those fees to help pay for cleanup of abandoned hardrock mines. 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. Industry also argues that current and prospective IAM environmental problems result from mining operations that occurred decades ago, before stringent environmental rules were in effect. Today's mining practices, they say, will not contribute to similar problems in the future, thus, it is inequitable for industry to pay fees or royalties to clean up historic mine residues for which they have no responsibility.

The Obama Administration's FY2017 budget proposes a reclamation fee on all hardrock mining, similar to the fee paid by the coal industry, to create an Abandoned Mine Lands Program for abandoned hardrock sites. The proposed program would be financed through a fee on production

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<sup>21</sup> U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response, *Cleaning Up the Nation's Waste Sites: Markets and Technology Trends*, EPA-542-R-04-015, 2004, pp. 11-12 - 11-13.

<sup>22</sup> A large number of IAMs are located on public lands that are owned or managed by federal agencies, including more than 120,000 hardrock and coal mine sites on Bureau of Land Management, U.S. Forest Service, and National Park Service lands. Federal agencies informally estimate that they expend \$80 million-\$85 million annually on hardrock IAM remediation. See [http://www.abandonedmines.gov/wbd\\_hm.html](http://www.abandonedmines.gov/wbd_hm.html).

<sup>23</sup> 2004 NRC Report, p. 417.

of hardrock minerals (uranium and metallic) on public and private lands and is estimated to generate \$1.8 billion over 10 years.

Legislation to create a cleanup fund for abandoned hardrock mines has been introduced in the 114<sup>th</sup> Congress. In addition to its Good Samaritan provisions, H.R. 963 would establish a Hardrock Mineral Funds in the U.S. Treasury consisting in part of a fee of 7 cents per ton of displaced material collection from hardrock mining operations and a hardrock minerals royalty of 8% of gross income for new projects and 4% of gross income for existing mines. Subject to appropriations, moneys in the Fund would be used for reclamation and restoration of land and water resources adversely affected by past hardrock mineral activities.<sup>24</sup> Separate legislation, S. 2254, would establish a similar Hardrock Minerals Reclamation Fund consisting in part of a reclamation fee on hardrock minerals mining operations and a royalty fee. Under this bill, the amount of the reclamation fee would be set by the Secretary of the Interior at not less than 0.6% or more than 2% of the value of production from the mining operation. The Secretary would set the royalty fee at not less than 2% or more than 5% of gross income of mining operations. Sponsors of this bill say that the intent of the legislation is that expenditures from the Fund would not be subject to appropriations.<sup>25</sup>

The Good Samaritan provisions of all of the current bills address one source of existing funding for IAM cleanup projects: grants under CWA Section 319. The CWA authorizes these grants 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, only a small amount of Section 319 grants has gone to abandoned mine land projects, for activities such as education, technical assistance, project demonstration, and groundwater protection.

H.R. 963, H.R. 3843, and the Discussion Draft would clarify that projects to implement IAM remediation are eligible for Section 319 grants, which received \$165 million in FY2016 appropriations, for all types of eligible activities, including abandoned mine land reclamation. H.R. 963 includes a separate provision authorizing EPA to make a CWA grant (unspecified) to any remediating party for activity covered by a Good Samaritan permit.

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

Another 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 relevant to all of the 114<sup>th</sup> Congress bills, as these proposals contemplate 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.

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<sup>24</sup> Title II of H.R. 3843 would establish a program, the Abandoned Noncoal Mine Lands Program, to identify, secure, and remediate non-coal IAM sites located on or affecting federal public lands. It would be administered by the Secretary of the Interior and funded by appropriations authorized at \$17 million per year for five years. The bill does not include a fee-based funding mechanism for the program.

<sup>25</sup> Personal communication, November 10, 2015.

All three bills would permit 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.

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). The legislation should clearly ensure any proceeds from the site are 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 all of the current bills, requiring no worsening of baseline water quality conditions, could 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.

Each of the current bills provides that a Good Samaritan permit could only authorize activities directly related to the remediation of historic mine residue at or from the site. H.R. 3843 further provides that a permit may not authorize any new mining actions "other than those directly related to carrying out remediation" at or related to the IAM site, suggesting that this legislation could, in fact, allow for some new mining to be authorized by the Good Samaritan permit. H.R. 963 is more restrictive than H.R. 3843 by requiring that proceeds of recovered materials must be used to defray remediation costs at the same site or other IAM sites. Under H.R. 963, the Good Samaritan permit would terminate when activity at the site changes from remediation to development, meaning that discharges associated with the site would then be subject to the standard non-Good Samaritan requirements of the CWA and other environmental laws.

The Discussion Draft would authorize re-mining to fund off-site remediation and to defray the costs of the permitted activities. H.R. 3843 and the Discussion Draft also require 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.” In the past, 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**

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. Citizen suits are equally vigorously supported by others, including environmental groups, who view them as critical tools to encourage compliance and enforce federal environmental laws, especially in light of what they see as a drop in government enforcement over time. 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, by 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 brought under the CWA is a civil action brought by any person against (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.<sup>26</sup>

Finally, CWA 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 approach in H.R. 963 would use that already in the CWA, seemingly rejecting the idea that Good Samaritans warrant special treatment. Under the bill, compliance with a Good Samaritan permit would constitute a “shield” against enforcement under any provision of the CWA. A permittee’s failure to comply with permit terms would be subject to enforcement under CWA Section 309. However, the bill would insulate permittees from the CWA’s citizen suit provisions, even if the permittee fails to comply with the Good Samaritan permit.

H.R. 3843, perhaps reflecting the view that Good Samaritans are not polluters and hence should be subject to lesser penalties, affords 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 H.R. 3843 do

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<sup>26</sup> CWA Section 505(a) (33 U.S.C. §1365(a)).

not appear to address either administrative penalties or citizen suits. This bill would allow the permitting authority a choice between an administrative "order to comply" or a civil action (penalties and injunctions). Possibly intended to further embody the view that Good Samaritan permit violators deserve leniency, the caps on daily court-imposed civil penalties in H.R. 3843 (\$5,000/day of violation, or \$32,500/day of violation in cases of "knowing conduct") are less than that in CWA Section 309 (\$37,500/day, as adjusted by EPA pursuant to the Debt Collection Improvement Act). And, unlike the CWA, this bill would not authorize criminal penalties.

The Discussion Draft would shield activities covered by a Good Samaritan permit from the CWA's citizen suit provision (CWA Section 505), but the possibility of including a separate citizen suit provision currently is unaddressed in this bill. Under the Discussion Draft, violations of a Good Samaritan permit would be subject to a civil penalty of up to \$10,000 per day. Some groups say that the \$10,000 per day limit is daunting for some potential Good Samaritans, while others believe that the penalty amount should be consistent with that in the CWA (i.e., \$37,500 per day).

Finally, all three bills explicitly disclaim any implication that a Good Samaritan permit abridges the government's authority to invoke emergency authorities.

Regarding judicial review, H.R. 3843 includes no provisions for challenges to issuance or denial of a Good Samaritan permit. H.R. 963 contains no separate judicial review provisions. Because it would amend CWA Section 402, however, one presumes that the CWA's judicial review provisions governing Section 402 would apply. These provisions, in CWA Section 509(b), require that a petition for review of permit issuance or denial be filed in the federal circuit in which the petitioner resides or transacts business directly affected by issuance or denial, and that an application for review shall be filed within 120 days of issuance or denial. Under the Discussion Draft, judicial review could be sought in federal courts (district courts or appellate courts is not specified) for actions by EPA or state or tribal permitting authority in issuing or denying a permit.

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

Also 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 three current bills would give EPA the primary responsibility to issue permits, and under all three, that authority could be delegated to qualified states or Indian tribes.

H.R. 963 and the Discussion Draft require that affected states and tribes consent or concur before a permit could be issued by EPA. Both also would bar issuance of a permit by EPA or a delegated state or tribe if there are objections by a federal, state, or tribal land management agency with jurisdiction over the IAM site, or by a public trustee for natural resources affected by historic mine residue associated with the IAM site. H.R. 3843 would require that notice of a permit application be provided to nearby local governments and federal, state, and tribal agencies having an interest in the project, but their consent is not a requirement under this bill. However, H.R. 3843 provides that for a project to be carried out on federal lands, the permit shall not be issued if the federal land management agency with jurisdiction over the project site objects. The bill does not specify criteria for an agency to make such an objection.

Under the CWA, EPA retains an oversight role when a delegated state issues an NPDES permit. EPA can object to a permit that a state proposes to issue, if the permit is outside the guidelines and requirements of the act. If the state does not revise the permit to meet EPA's objections, EPA may issue the permit. Thus, a Good Samaritan permit issued under the umbrella of the NPDES program (as in H.R. 963) would likewise be expected to be subject to these continuing oversight



provisions of the CWA. The Discussion Draft also provides for an ongoing oversight role for EPA. H.R. 3843 includes no similar oversight authority for EPA after a Good Samaritan permit program has been delegated to a state or tribe.

As noted previously, none of the bills in the 114<sup>th</sup> Congress would bar the federal or state governments from being a Good Samaritan. Consequently, following delegation of permitting authority to a state, the interesting situation could arise of a state issuing a Good Samaritan permit to itself, or a state issuing a Good Samaritan permit to a federal agency for a remediation project.

## **Terminating a Good Samaritan Permit and Sunsetting the Program**

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.

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. 963) would likewise be expected to expire in no more than five years. This bill addresses the issue of permit termination beyond normal expiration by generally including these factors: a permit would terminate when the permittee successfully completes implementing the remediation plan or 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 H.R. 3843 and the Discussion Draft would not amend the CWA, neither bill includes the CWA's regular five-year expiration of NPDES permits. They provide that, in issuing a Good Samaritan permit, the permitting authority is to include an end date to complete permitted activities. Under H.R. 3843, a permit could be terminated if work did not commence within one year of issuance, if work was 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. Under the Discussion Draft, projects authorized by a Good Samaritan permit shall be completed within six years of permit issuance or 10 years of enactment of the Good Samaritan legislation, whichever is later.

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. Some say 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. 3843 would sunset the program seven years after the date of enactment. H.R. 963 would sunset the program 10 years after enactment. The Discussion Draft would sunset the program on September 30, 2026. All of the bills require reports to Congress on implementation of the Good Samaritan program; H.R. 963 requires EPA to submit a report not later than one year before sunset of the program, and the draft bill requires a report from EPA by January 1, 2026. H.R. 3843 requires a similar study by the National Academy of Sciences to be submitted to Congress, appropriate federal agencies, states, and the Interstate Mining Compact Commission not later than seven years after enactment (i.e., the same as the end date of the program).

## Conclusion

Policymakers and stakeholders have been discussing Good Samaritan legislative and administrative proposals for more than 15 years in hopes of finding mechanisms to encourage cleanup and remediation of inactive and abandoned mine sites that harm or could harm the environment. Stakeholders who have been working for some time to achieve consensus on Good Samaritan issues believe that they have reached agreement on many but not all points.

The August 2015 release of several million gallons of acid mine drainage from the Gold King Mine in Colorado has brought renewed attention to the issue, including among Members of Congress. Testimony at congressional hearings held following the Colorado incident indicates some agreement on the basic point of liability relief to remove some of the obstacles to voluntary remediation of abandoned mine sites, but disagreement over a number of elements and important details. The Obama Administration has not taken a position on the need for Good Samaritan legislation or any specific current Good Samaritan proposal (although, as noted previously, the Administration does support creating a fund for remediation of abandoned hardrock mine sites). Previous legislative proposals, as well as bills in the 114<sup>th</sup> Congress, differ in many key and controversial respects—including scope of liability protection, need for funding, revenue and profit questions, and applicable standards—that may still require discussion and debate before consensus emerges.

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