

**OVERSIGHT HEARING TO CONSIDER WHETHER
POTENTIAL LIABILITY DETERS ABANDONED
HARDROCK MINE CLEANUP**

HEARING

BEFORE THE

**COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE**

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JUNE 14, 2006

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ONE HUNDRED NINTH CONGRESS
SECOND SESSION

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OVERSIGHT HEARING TO CONSIDER WHETHER POTENTIAL LIABILITY DETERS ABANDONED HARDROCK MINE CLEANUP

Wednesday, June 14, 2006

U.S. SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 628, Senate Dirksen Building, Hon. James M. Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Warner, Thune, Vitter, Jeffords, and Boxer.

Senator INHOFE. Our meeting will come to order. Senator Jeffords and I have a policy that we start on time, even if we are the only ones here, and that is what is happening.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

It has been 6 years since the EPW Committee has held a hearing on the issue of whether liability concerns are a deterrent to the cleanup of abandoned hard rock mines. In reviewing that hearing's testimony, I was struck by the fact that both Senator Mike Crapo, the former chairman of the Subcommittee on Fisheries, Wildlife, and Water, as well as Senator Baucus, the former chairman of this committee both asked that we not let the perfect be the enemy of the good. Here we are 6 years later and several legislative proposals later, and I fear that is exactly what has happened.

We have come here today to find common ground as to how exactly liability fears are causing Good Samaritans to walk away from cleaning up abandoned mines. It is estimated that there are over 500,000 abandoned hardrock mines littering our country, and the Western Governors Association estimates that nearly 20 percent of them are posing a significant risk to the waterways into which they discharge.

It is particularly important to understand what is the abandoned hardrock mine. These are mines from the Gold Rush Era and mines that produced the ores and metals that were needed during World War II. They are also mines that were abandoned long before modern environmental laws were enacted. Interestingly, it is those very laws which have protected our natural resources that may in fact be hindering the restoration of some of the States' waterways. This is certainly never the intent.

John Whitaker, President Nixon's Undersecretary for the Environment said, "We did not envision at the time that the day would come when the Zero Discharge Provision" FE—we are talking about the Clean Water Act in this case FE—"would prevent Good Samaritans from cleaning up acid mine drainage or when the onerous and costly Federal permit requirements would snuff out any economic incentive to curb the acid mine drainage problems associated with abandoned mines." Keep in mind, that was back during the Nixon administration.

In light of the potential magnitude of the problem, if we were to enact legislation, we must broadly define the Good Samaritans, so that as many innocent parties as possible can participate while taking necessary precautions to ensure that those who may have had any role in the mining of these sites are legally and financially accountable. No one here today proposes to violate the Polluter Pays concept.

I was pleased to introduce, by request of the Administration, a Good Samaritan legislative proposal. As part of the President's commitment to cooperative conservation, the Administration has put forth a proposal to address the liability concerns of potential Good Samaritans. The Bush administration is following on support by the Clinton administration for the concept of addressing these liability issues.

Charles Fox, who was President Clinton's Assistant Administrator for Water, testified in 2000 on Senator Baucus' Good Samaritan legislation. This is Charles Fox from the Clinton administration, he said, "Unfortunately, there are limitations under the Clean Water Act that often hamper remediation and restoration activities at abandoned mine sites. In particular, the permitting requirements under Section 402 of the Clean Water Act require that the permittee meet all requirements and fluid discharge limits set out in their discharge permit. These discharge limits include water quality standards that have been established for the body of water into which the treated fluid is discharged. In addition, these requirements mean anyone conducting reclamation or remediation in an abandoned mine site may become liable for any continuing discharges from that site." Again, that was Charles Fox who made that statement back during the Clinton Administration.

Further, there have been bipartisan bills introduced in each of the past three Congresses, and the only person on all three of these bills was Senator and Minority Leader Harry Reid. For three Congresses and two Administrations, there has been bipartisan consensus that liability is a factor affecting these cleanups, and clearly Senator Reid agrees that we can't let the perfect be the enemy of the good.

We will hear today from a potential Good Samaritan who had funding available to clean up a mine but did not do it because of the fear of liability. We also will hear from the mining industry that may be better suited than anyone else to be a Good Samaritan. Today's mining industry is not responsible for the practices of several generations ago. They have the expertise, knowledge and resources to be able to effectively, quickly, and cost-efficiently restore more of these sites than potentially any other group.

We have been presented with a unique opportunity, thanks in large part to the Administration's proposal and to our two fellow Senators, Senator Allard and Senator Salazar, who came together to craft this bipartisan bill. Their bill is co-sponsored by two of the EPW Committee members, Senator Baucus and Senator Isakson. To put the final piece in place, our colleagues in the House have already held a hearing on this issue.

There is now more momentum behind addressing this problem and restoring thousands of waterways than ever before. However, we must be sure that other non-related issues involving Superfund should not be part of this discussion and do not end up killing this opportunity. I urge all of those concerned about clean, fishable, swimmable waters to help Congress seize this great opportunity and pass the Good Samaritan Law this year.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE
STATE OF OKLAHOMA

It has been 6 years since the Environment and Public Works Committee has held a hearing on the issue of whether liability concerns are a deterrent to the clean up of abandoned hardrock mines. In reviewing that hearing's testimony, I was struck by the fact that both Senator Mike Crapo, the former chairman of the Subcommittee on Fisheries, Wildlife and Water as well as Senator Baucus, former chairman of the EPW Committee, both asked that we not let the perfect be the enemy of the good. Here we are 6 years and several legislative proposals later and I fear that is exactly what has happened and what will continue to happen.

We've come here today to find common ground as to how exactly liability fears are causing Good Samaritans to walk away from cleaning up abandoned mines. It is estimated that there are over 500,000 abandoned hardrock mine sites littering our country and the Western Governors Association estimates that nearly 20 percent of them are posing significant risks to the waterways into which they discharge.

It is particularly important to understand what an abandoned hardrock mine is. These are mines from the gold rush era and mines that produced the ores and metals needed to build weapons during World War II. They are also mines that were abandoned long before modern environmental laws were enacted. Interestingly it is those very laws that have protected our natural resources for so many years that may in fact be hindering the restoration of some of the States' waterways. This was certainly never the intent. John Whitaker, President Nixon's Undersecretary for the Environment noted, "We did not envision at the time that the day would come when the zero discharge provision [of the Clean Water Act] would prevent Good Samaritans from cleaning up acid mine drainage or when the onerous and costly Federal permit requirements would snuff out any economic incentive to curb the acid mine drainage problem associated with abandoned mines." (Center for American West, page 23).

In light of the potential magnitude of the problem, if we were to enact legislation, we must broadly define a "Good Samaritan" so that as many innocent parties as possible can participate while taking necessary precautions to ensure that those who may have had any role in the mining of these sites are held legally and financially accountable. No one here today proposes to violate the polluter pays principal in which we all so firmly believe.

I was pleased to introduce by request the Administration's Good Samaritan legislative proposal. As part of the President's commitment to cooperative conservation, the Administration has put forth a proposal to address the liability concerns of potential Good Samaritans. The Bush administration is following on support by the Clinton administration for the concept of addressing these liability issues. As Charles Fox, Clinton's Assistant Administrator for Water testified in 2000 on Senator Baucus' Good Samaritan legislation: "Unfortunately, there are limitations under the CWA that often hamper remediation and restoration activities at abandoned mine sites. In particular, the permitting requirements under Section 402 of the CWA require that the permittee meet all of the requirements and effluent discharge limits set out in their discharge permit. These discharge limits include water quality standards that have been established for the body of water into which the

treated effluent is discharged. In addition, these requirements mean anyone conducting reclamation or remediation at an abandoned mine site may become liable for any continuing discharges from that site.” Further, there have been bipartisan bills introduced in each of the past three Congresses and the only person on all three bills was the Senator Minority Leader, Harry Reid. For three Congresses and two Administrations there has been bipartisan consensus that liability is a factor affecting these cleanups and clearly Senator Reid agrees that we can’t let the perfect be the enemy of the good.

We will hear today from a potential Good Samaritan who had funding available to cleanup a mine but opted not to out of fear of liability. We also hear from the mining industry that may be better suited than anyone to be a Good Samaritan. Today’s mining industry is not responsible for the practices of several generations ago. They have the expertise, knowledge and resources to be able to effectively, quickly and cost-efficiently restore more of these sites than potentially any other group.

We have been presented with a unique opportunity thanks in large part to the Administration’s proposal and to our two fellow Senators Wayne Allard and Ken Salazar who came together to craft a bipartisan bill. Their bill is cosponsored by two EPW Committee members, Senator Baucus and Senator Isakson. To put the final piece in place, our colleagues in the House have already held a hearing on the issue. There is now more momentum behind addressing this problem and restoring thousands of waterways than ever before. However, we must be sure that other non-related issues involving Superfund do not end up killing this opportunity. I urge all of those concerned about clean, fishable, swimmable waters to help Congress seize this great opportunity and pass a Good Samaritan law this year.

Senator INHOFE. Senator Jeffords.

**OPENING STATEMENT OF HON. JAMES M. JEFFORDS,
U.S. SENATOR FROM THE STATE OF VERMONT**

Senator JEFFORDS. Mr. Chairman, the title of this hearing implies that potential liability is the main deterrent to the cleanup of the thousands of abandoned mine sites in our country. I believe that this is only part of the picture presented in a manner designed to move us in only one direction for unnecessary waivers to environmental statutes that will cause undue risk to human health and the environment.

The true story becomes apparent as one evaluates the Nation’s hardrock mining policies. There are estimated to be over 500,000 abandoned contaminated hardrock mines in the United States, including three copper mines in Vermont that have been languishing on the Nation’s National Priorities List for years. In 2004, the EPA’s Office of Inspector General estimated that the potential cleanup costs nationwide could be as much as \$24 billion.

Can we expect Good Samaritans to volunteer to pay more than a small fraction of the cost to clean up the Nation’s abandoned mines? Of course not. How then, can we solve this problem?

I propose a twofold solution. First, we need to fully fund the Superfund, so that the EPA has the ability to do its job and cleanup contaminated toxic mining sites around the Nation. Due to this Administration’s failure to seek reinstatement of the Superfund fees, the Superfund program is limping along with about 35 percent fewer dollars in real terms than in 1993. Second, the EPA needs to take action to prevent new abandoned mines.

In a report I requested, the Government Accountability Office recommended that the EPA issue long overdue rules to require mining companies to set aside money now for existing and future cleanups. Yesterday, I co-sponsored legislation sponsored by Senator Cantwell that would require the EPA to take this action. The EPA has not pursued these rules and instead chose to put forward

a legislative proposal to waive the environmental statutes rather than focus on comprehensive long term solutions. Today's hearing reaches for another reason to justify waiving environmental statutes.

I urge my colleagues to consider the following questions as you listen to today's testimony. First, is liability actually an impediment? There are several abandoned mine cleanups that have gone forward under the EPA's existing authority.

Second, what would motivate someone to become a so-called Good Samaritan? It is conceivable that a State or a local Government would have an interest in cleaning up water supply for drinking water purposes. It seems contrary then to permit the waiver of drinking water standards as part of a cleanup action, but this is exactly what one legislative proposal would permit.

Third, why would a for-profit entity spend millions of dollars on cleanups unless it has a financial interest? The legislative proposals referred to this committee would permit remining at cleanup sites without the protection of existing environmental statutes, making this permit scheme a tool for future pollution.

Fourth, doesn't the public have a clear interest in seeing that abandoned mine cleanups occur? Some legislative proposals appear to intentionally restrict the public's role by minimizing public notice and comment, waiving NEPA, and attaching legal privilege to some documents.

I could go on and on, but in the interest of time, I will submit my full list of questions for the record, Mr. Chairman. I believe our focus at today's hearing is inadequate, and I urge our colleagues to take a look at the big picture.

Thank you.

[The prepared statement of Senator Jeffords follows:]

STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE
STATE OF VERMONT

Mr. Chairman, the title of this hearing implies that potential liability is the main deterrent to the cleanup of the thousands of abandoned mine sites in our country. I believe that this is only part of the picture, presented in a manner designed to move us in only one direction—toward unnecessary waivers to environmental statutes that will cause undue risk to human health and the environment.

The true story becomes apparent as one evaluates the Nation's hardrock mining policies. There are estimated to be over 500,000 abandoned contaminated hard rock mines in the United States, including three copper mines in Vermont that have been languishing on the Nation's National Priorities List for years. In 2004, the EPA's Office of Inspector General estimated that the potential cleanup costs nationwide could be as much as \$24 billion.

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How then can we solve this problem? I propose a two-fold solution.

First, we need to fully fund the Superfund program so that the EPA has the ability to do its job and clean up the contaminated toxic mining sites around the Nation. Due to this Administration's failure to seek reinstatement of the Superfund fees, the Superfund program is limping along with about 35 percent fewer dollars in real terms than in 1993.

Second, the EPA needs to take action to prevent new abandoned mines. In a report I requested, the Government Accountability Office recommended that the EPA issue long-overdue rules to require mining companies to set aside money now for existing and future cleanups. Just yesterday, I co-sponsored legislation authored by Senator Cantwell that would require the EPA to take this exact action. The EPA has not pursued those rules, and instead, chose to put forward a legislative proposal to waive environmental statutes.

Rather than focus on comprehensive long-term solutions, today's hearing reaches for another reason to justify waiving environmental statutes.

I urge my colleagues to consider the following questions as you listen to today's testimony.

First, is liability actually an impediment? There are several abandoned mine cleanups that have gone forward under the EPA's existing authorities.

Second, what would motivate someone to become a so-called Good Samaritan? It is conceivable that a State or local Government would have an interest in cleaning up a water supply for drinking water purposes. It seems contrary then, to permit the waiver of drinking water standards as part of a cleanup action. But, this is exactly what one legislative proposal would permit.

Third, why would a for-profit entity spend millions of dollars on cleanups unless it had a financial interest? The legislative proposals referred to this Committee would permit re-mining at cleanup sites, without the protections of existing environmental statutes, making these permit schemes a tool for future pollution.

Fourth, doesn't the public have a clear interest in seeing that abandoned mine cleanups occur? Some legislative proposals appear to intentionally restrict the public's role by minimizing public notice and comment, waiving NEPA, and attaching legal privilege to some documents.

I could go on and on, but in the interest of time, I will submit my full list of questions for the record.

Mr. Chairman, I believe our focus at today's hearing is inadequate, and I urge our colleagues to take a look at the big picture.

Thank you.

Senator INHOFE. Thank you, Senator Jeffords.

We are delighted to have on the first panel, our fellow Senators, Senator Allard and Senator Salazar.

I want to say something that will surprise everyone here, and that is I probably know more about these mines than anybody in this room. Back before most of you were born, I went to the University of Colorado and left to go back in the White River Forest country, and I prospected for uranium. At that time, what they had called fool's gold in these abandoned gold mines was really carnatite, and I was in there chopping it up. It is just a miracle that my remains aren't in there polluting a lot of streams right now.

[Laughter.]

Senator Vitter, I am sorry. I didn't see you way over in the corner there.

OPENING STATEMENT OF HON. DAVID VITTER, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator VITTER. Thank you, Mr. Chairman. I will submit my opening statement for the record, but I just want to thank you and the Ranking Member for this hearing on a very important issue. I want to thank our colleagues for their work on the issue and for testifying today, and certainly the EPA Administrator.

This is an important issue because thousands of rivers and streams are impacted by acid mine discharge, and many, many sites have to be cleaned up. I would hope that we all bring the spirit of common sense and unity of purpose to this discussion, and I would hope it would be virtually beyond debate that we want to encourage Good Samaritans, folks in that position, to help with the cleanup and certainly don't want to saddle them with liability for pollution they had nothing to do with producing. That should be a very common sense, straight forward principle.

I think if we all focus on that common sense principle and work out reasonable language, we can achieve an important result, even

as we may have continuing disagreements on levels of funding for various programs and other things. I encourage that spirit. I thank our two colleagues for bringing that spirit to the debate.

I think they are destined to have some success because I was at the Nationals game last night, and the Rockies are on a roll. Senator Allard was there as well. The Rockies are on a roll this week, so hopefully that will inure to the benefit of this issue as well.

Thank you, Mr. Chairman.

[The prepared statement of Senator Vitter follows:]

STATEMENT OF HON. DAVID VITTER, U.S. SENATOR FROM THE STATE OF LOUISIANA

I want to thank you Mr. Chairman and the Ranking Member for this hearing on a very important issue. I want to thank our colleagues for their work on the issue and for testifying today, and certainly the EPA Administrator.

This is an important issue because thousands of rivers and streams are impacted by acid mine discharge, and many, many sites have to be cleaned up. Most of these mines were developed and abandoned long before modern environmental laws were enacted. While those environmental laws have contributed greatly to the restoration of our environment, they are not perfect and in small ways may be negatively impacting the ability to clean up these sites. As the witnesses will point out in their testimony today, no amount of money will be enough to restore all of the possible 500,000 sites that may need mitigation. Liability is obviously a major factor in the inability to address abandoned mines.

I would hope that we all bring the spirit of common sense and unity of purpose to this discussion, and I would hope it would be virtually beyond debate that we want to encourage Good Samaritans to help with the cleanup. We certainly do not want to saddle Good Samaritans with liability for pollution they had nothing to do with producing; that would not encourage efforts to address these sites. It is time for Congress to address the liability concerns of municipalities and other Good Samaritans so that we can restore these thousands of waterbodies and improve water quality. That should be a very common sense, straight forward principle.

I think if we all focus on that common sense principle and work out reasonable legislation, we can achieve an important result. I encourage that spirit. I look forward to hearing from the witnesses today and working with the committee to seek to provide liability relief to Good Samaritans. Thank you, Mr. Chairman.

Senator INHOFE. The Rockies are on a roll, OK, good.

By previous agreement, we will hear from both of our Senators on the first panel. They will then be excused, and we will get to Mr. Johnson, the EPA Administrator.

Senator Allard.

**STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM
THE STATE OF COLORADO**

Senator ALLARD. Mr. Chairman, thank you. I would like to make my full statement a part of the record.

Senator INHOFE. Without objection.

Senator ALLARD. Then I would just like to talk a little bit about the problem that we have in the State of Colorado and I think many Western States. My hope is what we are putting forward here, meaning Senator Salazar and myself, is a common sense approach to the problem that we have in the State of Colorado. Our intention is not to let anybody off the hook but actually to create an opportunity for private parties and individuals to be able to step forward and cleanup these mines.

I want to thank you, Mr. Chairman, for allowing both Senator Salazar and myself to testify this morning. Certainly, we are not going to question your knowledge on mining. It is nice to have

somebody who is sitting in the Chair, who has some practical experience as far as mining is concerned.

As you probably are well aware, a mining claim in Colorado, well, all over the country, is a relatively small parcel of land, 600 feet by 1,500 feet long. This dates back to the early silver and gold days of Colorado when silver and gold was very profitable in the State, and we had many prospectors come to Colorado and file claims. They would start a mine, they would hit a small vein or something, and then maybe it wasn't financially practical to continue with it. Then these small, little claims, there wasn't anybody there to continue to operate the claim. So, it was sitting there.

There are individuals, single individuals, not large mining companies—these aren't Superfund sites—who have come in and said, well, I would like to purchase a small parcel of land, but I am concerned about the liability. These are individuals like you and I. You can't afford to go down and pay a lawyer thousands of dollars in order to try and fight a liability claim or an environmental claim because when you buy that, that liability then transfers to you. We try to prevent that from happening.

If you would not have the liability transfer over to the private party, then individuals will look at this and say, well, this is something, a piece of land I would like to purchase, and I can clean it up. I can take the tailings and whatnot from the mining operation there. We can clean it up. We can stop the discharge that comes out of the mine that is polluting the river. This creates a wonderful opportunity for small individuals like any member here on this committee to go and buy a small parcel of land to do that.

There are a number of reasons for them to buy a parcel of land. Sometimes they just want to have a little piece of property in the mountains for one reason or another. Sometimes it might be just somebody who has an intention to try and do their little part to clean up the environment. There are all sorts of reasons why somebody might want to do this. It may very well go beyond any profit motive. It may just strictly be a Good Samaritan effort to try and cleanup the environment.

This particular piece of legislation is targeted for these hundreds upon hundreds of small mining claims which I described, to make them available so that individuals, without fear of a lawsuit, can own these and clean them up. If we can accomplish this, you would see, I think, a big difference in the mountains of Colorado and other Western States who have had many prospectors come and have small mines which they are trying to clean up.

I just would ask the committee to act expeditiously on this. This is an important piece of legislation. It has nothing to do with the Superfund issue. It has more to do with small parties, individuals in particular, who want an opportunity to do something to help the environment for whatever reason they may desire to purchase that particular mining claim.

I see my time has expired.

Senator INHOFE. Thank you, Senator Allard.

Senator Salazar.

**STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR FROM THE
STATE OF COLORADO**

Senator SALAZAR. Thank you very much, Chairman Inhofe and Ranking Member Jeffords. It is an honor to appear before your committee. Thank you, Senator Vitter, as well.

I look forward to working with this committee and with my colleague, Senator Allard, as we move forward on this very specific issue that is focused on only the Good Samaritan legislation. It does not deal with the rest of the issues that we sometimes have to deal with, including Superfund liability and CERCLA reform. This is very specific and focused on what we do with respect to Good Samaritans.

Let me say that, as we have worked on this legislation over the last year and a half, I am proud of the work that Senator Allard and I have done. Supporters of the legislation, Senate bill 1848, include our Governor of Colorado, Bill Owens, and on this committee, Senator Isakson, a co-sponsor of the bill, as well as Senator Max Baucus and Senator Harry Reid. We also worked very closely with the National Mining Association, the Colorado Mining Association, the Colorado Water Congress, and the Western Business Roundtable in putting together legislation that we believe will address the issue of Good Samaritan liability.

The concept that we would pass in our legislation is simple. The main three points of what the legislation does are: It simplifies what we do with respect to permitting by requiring only one permit. It is an EPA permit that would be granted to somebody who is going to work on the Good Samaritan activity.

Second, the liability protections are customized. You look at a site and you determine what it is that you are going to protect the Good Samaritan from. That is a function and a responsibility that would be given to the EPA.

Third, we allow broad participation from those would-be Good Samaritans. It is not just local Governments or private landowners that happen to buy property, but also maybe companies and other non-profits that are very interested in the cleanup of a watershed. I will try to touch briefly on what some of those opportunities are within my State of Colorado.

I will submit my full statement for the record as well, Senator Inhofe. I will not read it all but would ask that you accept that for the record.

Senator INHOFE. Without objection.

Senator SALAZAR. Let me just say, in Colorado, we have 22,000 inactive and abandoned sites in my State, and some of those may have been the ones that you excavated, Senator Inhofe, but all of these sites today are beyond the reach of the EPA, Superfund, and the State Health Department. That is 22,000 sites in one State alone. It is not because the pollution laws don't apply to those 22,000 sites. It is simply that there are no identifiable owners or operators to take on the responsibility of cleaning up the sites.

Ironically, it is the draconian liability schemes under CERCLA and the Clean Water Act that deter would-be volunteers, Good Samaritans, from getting near those sites for fear of unlimited liability. With a sensible plan to clean up a mine site, a Good Samaritan assumes massive liabilities that dissuade them from working to

undo the environmental legacy of hardrock mining. The barriers discouraging Good Samaritans from helping with cleanups is one of the most frustrating realities of cleaning up abandoned mine sites throughout our country.

That is why, with my Republican and Democratic colleagues, I worked hard to draft this bill. The bill aims to fulfill a simple objective: We want to make it easier for Good Samaritans to clean up inactive and abandoned mine sites when a cleanup by the liable party is otherwise very unlikely.

I want to briefly highlight three ways in which this bill accomplishes the goal of providing Good Samaritan liability protection in a straightforward and pragmatic manner.

First, there is one permit for the Good Samaritan. In my experience with water and public land issues, I have found the best results are achieved when all stakeholders agree on the scope of a project before the project begins. Under our bill, the Good Samaritan applies for one permit from the EPA. In order to receive that permit for the project, local, State and Federal authorities must all agree that the overall environmental improvement will be significant and there will not be environmental degradation. At the end of that process, there will be one permit that is issued.

Second, there are customized liability protections that are included in the legislation. While some approaches have offered blanket liability protection from environmental laws for Good Samaritans, our legislation provides that liability protections will be crafted on a case by case basis. The local and State Governments can then create liability protections from their laws, and the EPA can offer limited or extensive liability protection under the Clean Water Act or CERCLA.

Mr. Chairman, I see my time is up. May I have two more minutes?

Senator INHOFE. Take all the time you want. That doesn't go for the future panelists.

[Laughter.]

Senator ALLARD. I think I quit a little early, so he can have some of my time.

Senator SALAZAR. Thank you, Senator Inhofe and Senator Allard. I was trying to speed read through it.

Third, what the bill does, it is also broad in its scope, and this goes to one of the questions that Senator Jeffords asked. It enables cleanups at abandoned mine sites where the person who may be responsible for the mine residue does not have the financial resources to pay for the cleanup. In that case, it is more important to clean up the site than it is to point a finger of liability. Given the safeguards in the bill, there is no good policy to limit Good Samaritan permits to local or State Governments when so many capable non-profit organizations, individuals, and businesses are willing and able to make significant improvements at these sites.

Mr. Chairman, I believe that our bill is a balanced and pragmatic approach to solving a vexing problem that has eluded resolution for a very long time. It creates an open and straightforward process that is neither bureaucratic nor unduly legalistic but based on consensus and a sound technically based work plan.

My experience in having worked for more than a decade in the natural resources section of the law and having worked on CERCLA cases and having run the Colorado Department of Natural Resources and being the Attorney General for Colorado, I believe that what we have put forward here will advance the cleanup of many abandoned mine sites in my State and across the country.

I want to thank you, Mr. Chairman, and Ranking Member Jeffords for holding this hearing today and for inviting both my colleague, Senator Allard, and me to testify. It is important work for the Nation.

If I may, I want to answer just two quick questions that Senator Jeffords posed.

First, he asked, "is the liability on cleaning up these sites an impediment?" The fact of the matter is that it is because once you touch one of these abandoned mine sites, the CERCLA liability that comes with cleaning up these abandoned mine sites attaches to you.

A related question that you asked, Senator Jeffords, is what would motivate a Good Samaritan to invest the financial resources in getting some of this done? I can think of a lot of examples, but I will point out only one. To the west of Denver is a place I know that Senator Allard knows well and Senator Inhofe I am sure visited while he was there in Colorado. There is a major brewing company by the name of Coors, the Coors Brewing Company. What they do is they take their water from a place called Clear Creek for much of the beer that is produced around the country by the company. Up above Golden, sitting in places that were historically mined as some of the richest mining lands in the history of the entire Nation, up in places like Central City and Black Hawk and Georgetown, are thousands upon thousands of abandoned mine sites.

The Coors Brewing Company, along with the city of Golden and many stakeholders that share the water supply from Clear Creek, have a major interest in making sure that these thousands of abandoned mine sites up there are in fact cleaned up because right now those sites are contributing to the degradation of the water quality within Clear Creek. There is a major incentive for the private sector and a major incentive for the local Governments—for the many counties and communities that share the water of Clear Creek—to clean up these abandoned mine sites. Also, there is a major incentive for non-profits that have been involved in the restoration of the Clear Creek watershed to try to move forward with a watershed restoration plan that necessarily must involve cleaning up these abandoned mine sites.

So, there is major incentive there, but at this point in time, most people would be afraid to touch these sites because of the CERCLA liability that comes attached to this.

This is very important legislation. I know there are issues and there is the Administration's proposal that Senator Inhofe and others have looked at. I think there is a way in which we can work through some of these issues, so that we can do something that is very good for the environment. I hope that we can continue, Senator Inhofe and Senator Jeffords, with the bipartisan approach that

my colleague, Senator Allard, and I come with to the table this morning to make this presentation to all of you.

Thank you very much, Mr. Chairman.

Senator INHOFE. Thank you, Senator Salazar. I thank both of you, and you may be excused now or you can stay.

I would like to ask Administrator Johnson to please come forward.

Mr. Administrator, you are recognized for an opening statement.

**STATEMENT OF STEPHEN L. JOHNSON, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY**

Mr. JOHNSON. Thank you and good morning, Mr. Chairman and members of the committee. I am honored to appear before you today to testify on one of the most important environmental challenges and, I believe, opportunities facing the United States: legacy impacts from abandoned hardrock mines and the innovative efforts that we can make to remove their threats and impairment to water quality.

First of all, I would like to thank you, Mr. Chairman, for introducing by request of the Administration, S. 2780, the Good Samaritan Clean Watershed Act. I also want to commend Senator Allard and Senator Salazar and their colleagues for their legislative efforts to date. Finally, I would like to acknowledge the long term efforts of the Western Governors Association to address this issue.

We hope that this committee reports out, that the Congress passes, and that the President signs into law S. 2780 or similar legislation this year.

Inactive or abandoned mine sites can pose serious public safety and environmental hazards. According to estimates, there are over a half million abandoned mines nationwide, most of which are former hardrock mines located in Western States. Acid mine drainage from these abandoned mines pollute thousands of miles of streams and rivers as well as groundwater. Mine drainage and runoff challenges can be extremely complex, and solutions are often highly site-specific. In many cases, the parties responsible for the pollution are either insolvent or no longer available to participate in remediation.

However, over the years, an increasing number of Good Samaritans, those not responsible for the pollution, have volunteered to clean up these mines. Unfortunately, the potential liability associated with voluntary hardrock mine cleanup has discouraged their good work. By clearing these legal roadblocks, we can accelerate the pace of watershed restoration and advance the President's ethic of cooperative conservation. Remediation of these sites can be complex and resource-intensive. Yet, even partial cleanups by Good Samaritans will result in meaningful environmental improvements.

By holding Good Samaritans accountable to the same cleanup standards as those that caused the pollution or requiring strict compliance with water quality standards, we have made the perfect enemy of the good. The EPA strongly believes that liability should rest squarely on parties responsible for the environmental damage, not on those volunteers trying to clean it up.

Let me emphasize, encouraging Good Samaritan cleanups is not about lowering environmental standards or letting polluters off the

hook. Those responsible for the pollution, if still in existence, will remain accountable, consistent with the Agency's Polluters Pay policy. This legislation will hold Good Samaritans, those not responsible, to a realistic standard that ensures environmental results.

Last August, as part of the President's Conference on Cooperative Conservation, I announced the EPA's Good Samaritan Initiative as a means to encourage more effective voluntary efforts to remediate damage from abandoned mines. The initiative accomplishes the objectives of cooperative conservation by empowering communities and grassroots organizations to confront environmental challenges. Unfortunately, our one success to date took far too long to accomplish.

By passing the Good Samaritan Clean Watershed Act, we would quickly clear the legal roadblocks and allow more projects to get off the ground. Safeguards in the bill ensure that abandoned mines will be properly remediated. This legislation requires a thorough due diligence evaluation of a Good Samaritan and a proposed project. It requires a determination that a project will result in environmental improvements, limits liability relief to only those activities undertaken through an issued permit, and nullifies liability protection for those engaged in fraud. Initially, this legislation requires robust public participation before a permit is issued and provides ongoing Federal oversight and enforcement of cleanup activities.

In conclusion, thank you, Mr. Chairman, for the opportunity to discuss with you the Administration's Clean Watershed Good Samaritan Act legislation. The issue of abandoned hardrock mines has been discussed and debated for well over a decade, and a solution is long overdue. The American people and our water deserve results. We applaud bipartisan efforts in both Houses of Congress to address this issue and look forward to working with you and your colleagues to get this important environmental legislation to the President's desk as soon as possible.

Thank you, Mr. Chairman.

Senator INHOFE. Thank you, Mr. Administrator. That is an excellent opening statement.

We have been joined by Senator Warner. He tells me he does not have an opening statement, so I will go ahead and just ask a couple of questions.

Mr. JOHNSON. Please.

Senator INHOFE. Some of our colleagues and some of the witnesses suggest we just need to do three things to take care of this problem. One would be reform existing laws; another is make the mine owners more financially responsible; and third is put more money into Superfund. Now, those are three things. How do you respond to that?

Mr. JOHNSON. Well, what we are doing is focusing on a narrow but important issue—allowing volunteers to go in and cleanup abandoned hard rock mines without fear of liability. It just makes sense. We are not talking about major reforms of CERCLA or the Clean Water Act. We are talking about just allowing volunteers to go in and do the right thing without fear of liability.

Senator INHOFE. It would seem to me if you are doing that, one of the objections I have heard is maybe these people don't know

how to do it, but even if it is improved a little bit, that is better than it is today. The magnitude of this thing, for example 500,000 mines are going to have to be cleaned up, is pretty overwhelming.

In your testimony, you speak of the value of providing legislative solutions to the problem. What would you say to those who suggest that providing administrative relief is really all we need?

Mr. JOHNSON. We are pursuing the administrative path. We have one success story with Trout Unlimited, but what we have found through that experience is it is very time consuming. There is still legal uncertainty. The value of legislation is that it provides legal certainty; it provides a streamlined permitting process; and it also ensures inclusive stakeholder involvement. I think one of the important things is that this is very similar to the brownfields voluntary cleanup legislative model which has had bipartisan support and has had great success.

Senator INHOFE. It seems to me that this legislation and other legislation that has been introduced before really empowers local Governments to get involved in this process, whether it is a licensing process or permit process or just to get some of these things cleaned up. It seems to me that the closer you get to the problem in government, the better job that is being done.

Mr. JOHNSON. Absolutely.

Senator INHOFE. Senator Warner.

Senator WARNER. Thank you, Mr. Chairman. I have to disclose a bias or conflict. I am a member of Trout Unlimited, but I don't believe that will disqualify me from voting. I wanted to come and lend my support to this legislation this morning because I really think it is a wise thing, and I concur wholeheartedly in your observation that, while the regulation might suffice, there is a world full of trial lawyers out here who will challenge that. If these Good Samaritans are willing to step up, I don't want to see them exhaust all their funds in legal fees.

I am going to support this legislation. I thank the Chair for bringing this matter up here this morning.

Senator INHOFE. Thank you, Senator Warner. Do you have any questions of the Administrator?

Senator WARNER. No.

Senator INHOFE. Senator Boxer, we have made our opening statements. If you have a great desire to make an opening statement, we would recognize you to do that if you would keep it within the time limit.

Senator BOXER. Thank you. I will keep it within the time limit. I apologize, my grandchild graduated from fifth grade. They do a graduation.

Mr. JOHNSON. Congratulations.

Senator INHOFE. With honors?

Senator BOXER. Always with honors. It is an honor just to have him as a grandchild.

**OPENING STATEMENT OF HON. BARBARA BOXER,
U.S. SENATOR FROM THE STATE OF CALIFORNIA**

But anyway, thank you, Mr. Chairman. I can't stress enough how critical it is that we address the threat of toxic waste sites in the Committee, particularly the threat these sites pose to the health of

families including children in nearby communities. I hope we can have a series of hearings on environmental cleanup issues that go beyond the issue for today's hearing.

I also greatly appreciate your agreement with me to allow a Superfund oversight hearing in the Superfund Subcommittee tomorrow because the information we have gathered on the current status of toxic sites around the country makes it clear the threat posed by these sites merit our immediate attention.

I am pleased that Mr. Johnson is here today, and I have several questions for him on EPA's approach to clean up programs, including mine cleanup. It is worth noting that the Administrator is testifying today in support of an effort—and he is certainly not the only one, there are colleagues who support this—to roll back environmental laws and standards that would provide a direct financial benefit to industry. The enthusiasm shown by the Administration for waivers and rollbacks of environmental laws that protect public health is striking. Proposals to streamline environmental cleanup by undermining standards is the wrong approach. I don't really think they are streamlinings so much as they are rollbacks, and they raise the risks to communities that things could possibly get worse, not better.

Abandoned mine sites pose a serious threat to water resources. Mine wastes frequently contain high levels of heavy metals, including mercury and arsenic, and cyanide and other hazardous chemicals are used in mine operations. In California, there are 47,000 abandoned mines, so this is an issue that I care deeply about for my State.

If mishandled, well-intentioned efforts can have disastrous effects. In fact, in my home State, we have a clear example of a well-intentioned cleanup effort gone wrong, and this is the problem. When someone gets injured, they don't care whether it was a well-intentioned effort or a not well-intentioned effort. If it goes wrong, it is very, very dangerous. I will briefly describe that experience to highlight why environmental rollbacks are the wrong path to take when it comes to cleaning up abandoned mine sites.

The experience at the Penn Mine in Calaveras County, CA, was well-intentioned but poorly executed and destructive. This mine site has been used to justify the so-called Good Samaritan initiative because it involved litigation and significant cleanup costs. As you will see, the limited regulatory review and the poor engineering at the site made a bad situation worse.

Let me read from a letter from a long list of groups opposing the so-called Good Samaritan legislation and hear what they have to say about the lessons at Penn Mine. "At Penn Mine, the waiving of environmental review coupled with an egregious lack of understanding of complex geochemical and hydrogeological processes at the site led to terrible water quality problems, accelerating the formation of acid mine drainage by up to a million times. A prominent geochemist testified that 'The facility could not have been better designed had its intention been maximum reduction of toxic acid mine drainage.'"

There is a long list of groups on the letter opposing the rollback legislation, including S. 1848 as well as S. 2780, and with good rea-

son. I would ask unanimous consent that the letter in opposition be printed in the record.

Senator INHOFE. Without objection.

[The referenced letter can be found on page 80.]

Senator BOXER. Thank you.

If you read this, it would astound you to see the opposition to what I think we are trying to do here today.

I think there is a much better way to approach this issue, Mr. Chairman. First, the EPA does in fact have significant administrative authority and could streamline the cleanup process with model orders under Superfund. These orders could contain appropriate liability relief, could be limited in scope, and could maintain environmental standards. The EPA has some experience with this approach and, with effort, could do more. I appreciate well-intentioned efforts to allow so-called Good Samaritan cleanups to proceed more efficiently.

However, environmental rollbacks are not the answer. The Good Samaritan proposals don't even contain the basic protections of the brownfields law and raise the risk that things could get worse, not better. We also cannot afford to lose sight of one of the key parts of any solution to the toxic waste problem. Superfund must be funded, and polluters must once again pay into the fund. The need for cleanup of abandoned mine land dwarfs any Good Samaritan initiative. This is a large and complex problem, and the Good Samaritan proposals are a drop in the bucket, but they could be worse if things go wrong.

Thank you very much, Mr. Chairman.

[The prepared statement of Senator Boxer follows:]

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE
STATE OF CALIFORNIA

Mr. Chairman, I cannot stress enough how critical it is that we address the threat of toxic waste sites in this committee, particularly the threat these sites pose to the health of families, including children in nearby communities. I hope we can have a series of hearings on environmental cleanup issues that go beyond the issue for today's hearing. I also appreciate your agreement to allow a Superfund oversight hearing in the Superfund Subcommittee tomorrow. Information we have gathered on the current status of toxic sites around the country makes it clear—the threat posed by these sites merits our immediate attention.

I am pleased that the EPA Administrator is here today, and, as you might imagine, I have a few questions for Administrator Johnson on EPA's approach to cleanup programs, including abandoned mine cleanup.

It is worth noting that the Administrator is testifying today in support of efforts to rollback environmental laws and standards that would provide a direct financial benefit to industry. The enthusiasm shown by this Administration for waivers and rollbacks of environmental laws that protect public health is striking. Proposals to streamline environmental cleanup by undermining standards is the wrong approach and raises the risk to communities that things will get worse, not better.

Abandoned mine sites pose a serious threat to water resources. Mine wastes frequently contain high levels of heavy metals, including mercury, and arsenic. Cyanide and other hazardous chemicals are used in mine operations. In California, it is estimated there are 47,000 abandoned mines.

If mishandled, well-intentioned efforts can have disastrous results. In fact, in my home State we have a clear example of a well-intentioned cleanup effort gone wrong. I will briefly describe that experience to highlight why environmental rollbacks are the wrong path to take when it comes to cleaning up abandoned mine sites.

The experience at the Penn Mine in Calaveras County, CA was well-intentioned but poorly executed and is instructive. This mine site has been used to justify the so-called "Good Samaritan" initiatives because it involved litigation and significant

cleanup costs. As you will see, the limited regulatory review and poor engineering at this site made a bad situation dramatically worse. Let me read from a letter from a long list of groups opposing the "Good Samaritan legislation" and what they have to say about the lessons of Penn Mine:

"At Penn Mine, the waiving of environmental review coupled with an egregious lack of understanding of complex geochemical and hydro-geological processes at the site led to exacerbated water quality problems. . . . accelerat[ing] the formation of acid mine drainage by up to one million times." A prominent geochemist testified that "the facility could not have been better designed had its intention been maximum production of toxic acid mine drainage." There is a very long list of groups on this letter opposing the rollback legislation, including both S. 1848 as well as S. 2780 and with good reason. (See letter for groups attached)

There is a much better way to approach this issue. First, EPA does in fact have significant administrative authority and could streamline the cleanup process with model orders under Superfund. These orders could contain appropriate liability relief, could be limited in scope and could maintain environmental standards. EPA has some experience with this approach and with effort could do more.

I appreciate well intentioned efforts to allow so-called "Good Samaritan" cleanups to proceed more efficiently. However, environmental rollbacks are not the answer. The Good Samaritan proposals do not even contain the basic protections of the Brownfields law and raise the risk that things will get worse not better. There is another way that does not involve rollbacks or waivers, or giveaways to industry. We also cannot afford to lose sight of one of the key parts to any solution to the toxic waste problem. Superfund needs to be funded and polluters must once again pay into that fund. The need for cleanup of abandoned mine lands dwarfs any Good Samaritan Initiative. This is a large complex problem and the Good Samaritan proposals are a drop in the bucket. Worse if they go wrong.

Senator INHOFE. Thank you, Senator Boxer. You may proceed with your questions now. It is around to you. Thank you for staying within your time limit.

Senator BOXER. Administrator, welcome.

Mr. JOHNSON. Thank you.

Senator BOXER. You say in your written testimony that the impacts of abandoned mines are one of the most important environmental issues and opportunities facing the United States. Do you believe the fact that children are living in communities where exposure to toxic material from Superfund sites is not under control is also one of the most important issues facing the United States, and what opportunities and specific plans have you formulated to remedy the problem?

Mr. JOHNSON. Thank you, Senator Boxer. I do believe that those Superfund sites in cities where children may be exposed are significant and very important. I, too, believe 500,000 abandoned mines are also an important issue and again, provide a tremendous opportunity for us to be innovative and allow volunteers liability protection to go in and make environmental improvements.

This is not a rollback. This is an opportunity to actually improve the environment. Very much as the lessons we learned from brownfields in starting with voluntary programs, here is another opportunity for us to make significant progress. It is not a rollback. We have a number of safeguards to ensure that it is not increased risk, and we learned a lot from the Penn Mine example that you mentioned earlier in your testimony.

I look forward to working with you and the chairman to move this forward because it just makes sense.

Senator BOXER. Mr. Johnson, are you aware that the EPA career staff in the Superfund program concluded in written comments, after reviewing the Good Samaritan legislation, but that most of their comments were not incorporated, including comments on the

inadequate environmental standards in the bill, in other words, what they considered to be rollbacks? Are you aware that is the case and we have those comments?

Mr. JOHNSON. I am aware that there were a number of discussions inside the Agency. Again, this is not about Superfund reform. This is not about Clean Water Act reform. This is about providing a very narrow opportunity for voluntary cleanup of abandoned hard rock mines by third parties, Good Samaritans. These are people who have not caused the problem. They are not legally responsible for cleanup of pollution. They want to volunteer, and we want to provide them the opportunity to do the right thing.

Senator BOXER. Well, why weren't their comments included?

Mr. JOHNSON. Again, this is the opportunity for voluntary cleanup. This is to make incremental progress. This is not requiring, as under the brownfields program, meeting a strict environmental standard.

Senator BOXER. No, no, no, their comments on the legislation. Obviously, they were asked to comment on it. Why didn't you include their comments? Why would they be deep-sixed?

Mr. JOHNSON. Again, our focus is to provide for incentives for people to voluntarily cleanup and make progress, not requiring a strict standard.

Senator BOXER. I understand, but they disagreed.

Mr. JOHNSON. Well, that is fine.

Senator BOXER. Is that why you left it out?

Mr. JOHNSON. Well, that is right because I disagree with that.

Senator BOXER. You disagree?

Mr. JOHNSON. I disagree.

Senator BOXER. So, you think we ought to waive standards then for this program.

Mr. JOHNSON. What I believe, Senator, is I believe that we ought to provide volunteers with the opportunity and liability protection to do the right thing. To do the right thing is to improve the environment. These sites—

Senator BOXER. What if it doesn't work out that way?

Mr. JOHNSON. Senator, you know what, nothing has happened in decades, absolutely nothing. Here is a wonderful opportunity for there to be environmental progress, and that is what we want to do, to allow volunteers to be able to do that.

Senator BOXER. The issue that I described to you, where scientists said it was an absolute disaster when this happened, that doesn't concern you?

Mr. JOHNSON. Of course, it concerns me. That is why we have built into the legislation a number of safeguards, both a rigorous screening process including data to demonstrate that they are good actors. We require that they make sure they have adequate financial resources. The EPA and the State and tribes retain our oversight and enforcement authority. We have penalties, both civil and if there are local violations, and we also have a very rigorous public comment period, both notice and comment as well as a requirement for hearing, again all to help ensure that we are making environmental progress and that nothing goes wrong.

Senator BOXER. Your staff said, nowhere does the legislation specify what standards would govern whether there is an improve-

ment to the environment. It appears that water quality, under this act, would not apply. How will the permitting authority assess whether a project will result in improvement? How do they measure improvement? They said, it lacks national guidelines and you can't really do cost benefit analysis.

As I said, in this last experience, a prominent geochemist said, "A facility could not have been better designed had its intention been maximum production of toxic acid mine drainage."

I am not sure that we are learning from experience. That is one thing that I thought we would do.

Mr. JOHNSON. I think that the experience you mentioned, the Penn Mine example, is actually an excellent mine example because they started out trying to do a voluntary cleanup. The East Bay Municipal Utility District found themselves being responsible for a \$10 million cleanup. They started to try to do things voluntarily. Again, there are probably lessons learned of how they could have done things better; more importantly, certainly, are the safeguard which we have included in our legislative proposal. But the point is: here is an organization that tried to do things voluntarily and then ended up being responsible or saddled with a \$10 million cleanup.

Again, we are trying to see and trying to encourage voluntary Good Samaritans. We are trying to see environmental progress, and we put in safeguards to make sure they do that, they document it, and it is done well.

I think that there are many issues we have to face under Superfund as well as others.

Mr. Chairman, I would like to submit for the record a letter that has been sent both to Chairman Inhofe and myself from the Western Governors Association which says, "We strongly support the efforts of the U.S. Environmental Protection Agency in developing this legislation and believe it represents a solid basis for moving forward."

Senator INHOFE. Without objection, that will be part of the record. I received that letter and read it, and I find it to be a very good letter.

[The referenced letter can be found on page 88.]

Senator INHOFE. Do you have one more question?

Senator BOXER. Yes, I do, one more. Thank you very much.

Now, the EPA can already issue a Good Samaritan administrative order that protects innocent parties and allows cleanups at abandoned mines, is that correct?

Mr. JOHNSON. Under CERCLA 107(j), it does not protect volunteers from liability. It still leaves volunteers subject to CERCLA Section 106.

Senator BOXER. Would you support EPA standardizing the process and applying it nationwide to help facilitate cleanups? You already have a process.

Mr. JOHNSON. The problem is the law. The current construct of the law does not provide liability protection for volunteers. That is why. That is what the focus is on.

Senator BOXER. That is not my understanding at all. So, why don't we talk about that later?

To me, this thing seems to be a rollback, plain and simple. We have seen it from this Administration before, and that is what I see.

The last thing I would ask, and I am done here, is I would like to submit into the record an article called "Good Intentions Do Not Confer a Right to Pollute," and it is the whole story about what goes wrong in some of these cases where you don't have rigorous standards, if I might put this into the record.

[The referenced article can be found on 76.]

Senator INHOFE. Sure, without objection, so ordered. Thank you very much, Senator Boxer.

Thank you, Mr. Administrator. When I look at this legislation, you see such individuals as Senator Baucus and Senator Reid and Senator Salazar. This is bipartisan. It is a problem. We can't just keep putting it off.

I think you have done an excellent job of testifying today, and you may be excused.

Mr. JOHNSON. Thank you, Mr. Chairman. Thank you for your leadership.

Senator INHOFE. Thank you.

I will invite our next panel to come forward. We have a very distinguished panel. Dennis Ellis, Executive Director of the Colorado Department of Public Health and Environment; Velma Smith, National Environmental Trust; John Gioia, Chairman of the Board of Supervisors for Contra Costa County Public Works; Terry Harwood, former Executive Director of the Hazardous Material Policy Council, USDA, and former U.S. Forest Service Chief Environmental Engineer; and Scott Lewis, Director of Environmental and Governmental Affairs, AngloGold Ashanti North America.

We will start with you, Mr. Ellis, and then work across. We would like to ask you to try to confine your opening remarks to 5 minutes. We do have the timer up here. You are recognized.

STATEMENT OF DENNIS E. ELLIS, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Mr. ELLIS. Thank you, Mr. Chairman and Senator Boxer. Thank you for the opportunity to appear before you today to discuss an issue of great importance to the State of Colorado: abandoned or inactive mines and the liability barriers that exist to clean ups of these mines.

Abandoned or inactive mines are responsible for the greatest threats and impairments to water quality in Colorado and indeed across the Western United States. Due to the impacts on water quality caused by these abandoned mines and the difficulties in identifying responsible parties to remediate the sites, Colorado is very interested in undertaking and encouraging voluntary Good Samaritan remediation initiatives, such as cleanup efforts by States or other third parties who are not legally responsible for existing conditions at the site. However, Good Samaritans currently are dissuaded from taking measures to clean up the mines due to an overwhelming legal disincentive.

Colorado has found that there would be a high degree of interest and willingness on the part of Federal, State, and local Agencies,

volunteer organizations, and private parties to work together toward solutions to problems commonly found on inactive mine lands if an effective Good Samaritan provision were adopted. Consequently, for over a decade, Colorado has participated in and encouraged, in cooperation with other States, congressional offices, the environmental community, the mining industry, EPA, and other interested parties, efforts to develop bipartisan Good Samaritan legislation. Colorado strongly believes that only a legislative solution can effectively address liability concerns and therefore strongly encourages Congress to move forward on this issue.

We encourage this committee to consider the following six components of a Good Samaritan proposal.

Scope of remediating party: First, Colorado believes that participation in a Good Samaritan cleanup should not be limited solely to governmental entities since there are many other persons willing to contribute to Good Samaritan cleanups. The provision should include broadly excluding those with prior involvement at the abandoned site, broadly excluding those with current or prior legal responsibilities for discharges at a site, assurance that any non-remediation-related development is subject to the normal NPDES system rules, and be narrowly enough constructed to minimize fears over potential abuses of this liability protection.

Second, the Citizen Suit Enforcement Tool has proven to be a useful incentive to encourage permit compliance by point source dischargers subject to the NPDES program. However, from the outset, Colorado has believed that a different set of enforcement tools is warranted for Good Samaritan permittees. Other permittees are required to get permits because they are undertaking activities that cause pollution. A Good Samaritan is not a polluter. Rather, they are an entity that voluntarily attempts to step in and remediate pollution caused by others. In this case, sound public policy needs to be focused on creating incentives for Good Samaritans' actions, not on aggressive enforcement that creates risks to those that might otherwise undertake such projects.

Third, the analysis and standard for cleanup of a proposed project needs to occur at the front end. Once there is agreement that a specific project is expected to result in water quality improvement with no reasonable likelihood of resulting in water quality degradation, the Good Samaritan's responsibility must be defined as implementing the approved project rather than meeting specific numerical effluent limits.

Fourth, Colorado supports the adoption of a Good Samaritan bill that addresses abandoned or inactive hard rock mines. Colorado is concerned that any efforts to include coal mines in Good Samaritan legislation would bring into play additional issues that would make adoption of legislation much more challenging and lead to further delays of cleanups.

Fifth, Colorado has actively encouraged remining as a form of environmental cleanup since 1987. Colorado Governor Bill Owens supports remining as an option that presents the potential for achieving further cleanup of historic mining impacts. Options for promoting responsible remining that can result in additional remediation of historic mining impacts should be fully explored.

Sixth, regarding funding for remediation, Clean Water Act Section 319 funds have been utilized for a number of projects remediating inactive and abandoned mine lands. To assure that Section 319 funds will continue to be available for such cleanup projects, any Good Samaritan proposal should include a provision clarifying that such funds may be used for projects subject to Good Samaritan permits.

In conclusion, Governor Owens is on the record in support of S. 1848, the Cleanup of Inactive and Abandoned Mines Act, introduced by Senators Allard and Salazar. We believe this bill provides a thoughtful and balanced approach to the range of issues and options that have been discussed. Governor Owens also applauds the efforts of the EPA to pursue administrative as well as legislative avenues to move forward on Good Samaritan efforts.

For Colorado, this is not an academic debate about appropriate legislative language. If a Good Samaritan bill is enacted, then water quality in Colorado will improve as soon as the next available construction season. The State of Colorado urges Congress to move forward with S. 1848 as a basis for Good Samaritan legislation.

Thank you for allowing me to testify today. I would like to submit my full statement for the record, and I am more than willing to answer any questions you may have.

Senator INHOFE. Yes, without objection, all full statements will be submitted as part of the record. We appreciate your keeping within your time.

Ms. Smith.

**STATEMENT OF VELMA M. SMITH, SENIOR POLICY ASSOCIATE,
NATIONAL ENVIRONMENTAL TRUST**

Ms. SMITH. Thank you, Mr. Chairman. On behalf of the National Environmental Trust, I thank you for this opportunity to testify on the important issues surrounding cleanup of abandoned mines. Since Monday morning when I submitted my written testimony, that testimony has been joined by the Wilderness Society and the Sierra Club who would also like to join in on that testimony.

While we appreciate the good intentions of those who worked so hard on the bills before you today, we know that they focused attention on a long festering and still growing national problem, and that focus would be useful if it would prompt new action to clean up mine sites and to stop new mines from joining the enormous universe of abandoned mining messes. But I must be perfectly frank. The bills before you don't do that. On the contrary, in our view, they may well take us in the wrong direction.

If you want to address mine sites, there are two things that are needed: more funding for cleanup and better regulation of mining. On the latter, I point out the legislation that Senator Jeffords mentioned, sponsored by Senator Cantwell, as one such piece of improvement that may make a contribution to the problem.

I am going to depart a little from what I had planned to say because I need to speak to the characterization that those of us who have concerns with these bills are letting the perfect become the enemy of the good. I say that is not the case at all, and we are fearful that the slapdash will replace the thoughtful and deliberate. We

must be careful about making improvements. The Penn Mine case indeed shows us and many others do, with wetlands that have failed, with waste rock piles that have collapsed, with tailing stems that have collapsed, that mistakes can be made which is not to say the intention was ill to start with, but mistakes can be made and we have to be careful.

I also want to depart from my notes because I am somewhat baffled that Administrator Johnson is calling this effort similar to brownfields, and I am also baffled that he would say nothing has happened. In fact, I went to the EPA web site, and there you will find that there is much going on in the way of abandoned mine cleanup. These are not only Superfund sites, they are Superfund alternative sites; they are brownfield sites; they are State efforts; they are the Forest Service and BLM. The brownfields program itself is being used to clean up mine sites, to assess mine sites, to redevelop mine sites. What would be useful would be to continue to use that program and to put more money into the brownfield program, specifically for mining sites.

I would also point out that the EPA has worked with USGS and the Federal Land Managers, developing a watershed-based approach to setting priorities and doing cleanup from a watershed approach. That has great promise and is being used successfully in certain areas. What is needed is additional money, once they identify what needs to be done, for cleanup in a watershed and to have funds to implement that cleanup.

As my time is running out, I did want to mention that I think if you wanted to pursue legislation, I would look to the other body and to Congressman John Salazar who has a demonstration project based in Colorado on the upper Animas River. The Animas River Stakeholders Group has been in existence for 12 years, and they have developed some plans that they would like to implement for cleanup in that watershed. I think if you look at Congressman Salazar's bill, that is the way you may find a constructive approach if you want to legislate on this area.

I thank you for the time, and I look forward to your questions.

Senator INHOFE. Thank you, Ms. Smith.

Mr. Gioia.

**STATEMENT OF JOHN GIOIA, CHAIR, BOARD OF SUPERVISORS
OF CONTRA COSTA COUNTY AND CONTRA COSTA COUNTY
FLOOD CONTROL AND WATER CONSERVATION DISTRICT**

Mr. GIOIA. Thank you, Mr. Chairman and Senator Boxer. Thank you for the opportunity to discuss an issue of great importance for water quality and the environment in our county and throughout this country.

I am here as the Chair of the Contra Costa County Board of Supervisors, and I would like to describe to you a project in our county that would greatly benefit water quality in the San Francisco Bay Area but has not been completed due to liability exposure concerns. Contra Costa County has one million people and fronts on San Francisco Bay in the Sacramento Delta through which most of the runoff from the Sierra Nevada Mountains flows on its way to the Pacific Ocean. Probably most importantly, we are just across the bridge from Senator Boxer's home county of Marin.

The abandoned Mount Diablo mercury mine is located on private property near the headwaters of Marsh Creek on the upper slopes of Mount Diablo, one of the most prominent landmarks in the San Francisco Bay Area. Rainwater washing over the mine tailings transports mercury into Marsh Creek which flows through several communities with a population of over 60,000 people and ultimately into San Francisco Bay. Nearly 90 percent of the mercury in the Marsh Creek Watershed originates from this abandoned mine. Also, one of the most significant sources of mercury in San Francisco Bay is runoff from abandoned mines like the Mount Diablo mercury mine. In fact, advisory notices are posted for adults to not eat fish from the bay more than twice every month.

The property owner in this case purchased the abandoned mine and surrounding property in 1974. The property is bordered on three sides by a popular State park. The current owners never intended to develop or mine the property but bought it as a beautiful site to raise their children and retire.

In 1978, the Regional Water Board issued the property owners a cleanup and abatement order, even though they did not create the problem. The owners have taken efforts to clean up the property as best they can but do not have the resources to complete a full scale mine remediation. In fact, they stated they spent well over \$300,000 of their retirement money in cleaning the mine.

In 1997, Contra Costa County applied for grant moneys to voluntarily conduct remediation of the mine. After legal consideration of the liability issues, the county withdrew the grant application because it would be exposed to substantial liability if the project were built. We are still interested in remediating the mine and are confident we can obtain the grant funds to do so. Money is not the issue for us.

The county has been working cooperatively with a very supportive local watershed council, environmental groups, and property owners who are all supportive of our remediation efforts. Last year, we partnered with Sustainable Conservation, a non-profit with experience in liability exposure in environmental projects. This has led to discussions with the Environmental Protection Agency on their Good Samaritan initiative and the prospect of emulating the recent Trout Unlimited cleanup project in Utah, accomplished through an administrative order on consent developed during a collaborative process with the EPA.

However, in order for this collaborative administrative process to be successful in the future, the process needs to be made more straight forward, shorter, less cumbersome, and less costly. It took over a year for Trout Unlimited to develop an AOC with the EPA that limited their liability. Rather than developing each administrative order on consent from scratch which involves substantial resources and time, a model should be developed which can be replicated by other Good Samaritan public agencies seeking to remediate abandoned mines. We fully expect and support appropriate protections for the environment in this process.

We believe our project can be a demonstration project and model for others. We are ready, willing, and able to fix a source of pollution in our county and improve water quality for the San Francisco Bay Area. We support any efforts of the EPA and Congress to de-

velop legislation for an effective and efficient collaborative administrative process that will allow public agencies like ours to responsibly and safely remediate an abandoned mine without becoming exposed to unlimited liability.

Thank you for the opportunity to address you on this issue.

Senator INHOFE. Thank you, Mr. Gioia.

Mr. Harwood.

STATEMENT OF TERRY A. HARWOOD, FORMER EXECUTIVE DIRECTOR, HAZARDOUS MATERIALS POLICY COUNCIL, USDA; FORMER CHIEF ENVIRONMENTAL ENGINEER, USFS

Mr. HARWOOD. Good morning, Mr. Chairman and Senator Boxer. I thank the committee for this opportunity to testify on the issue of cleanup of abandoned mines and mining-related contamination.

You mentioned, Senator Inhofe, that you had been in the woods many years ago. Well, I have been in the woods 37 years.

Senator INHOFE. I said in the mines, not in the woods.

[Laughter.]

Mr. HARWOOD. Anyway, a long time. I managed the Abandoned Mine Programs in USDA and the Forest Service at national and regional levels, and this experience included managing programs as well as actual on the ground work on cleanup of hundreds of sites. I continued to be professionally involved in cleanup of mining-related contamination and natural resource damage restoration after retirement from Federal service.

The intent of this hearing is to consider whether potential liability deters abandoned hardrock mine cleanup. Our intention is focused on the potential for Good Samaritans to assist in the cleanup process, but this is not the right focus. It runs the risk of us ignoring the monster in the room which is the lack of sufficient commitment and funding for the State and Federal Governments and the industry to adequately address the task of cleanup. The potential for good intentioned, technically qualified Good Samaritans to make a discernible impact on this huge problem is highly questionable. There seems to be an attitude that volunteerism will offset real commitment by Government and industry to deal with mining-related environmental problems.

One of my major concerns is, while attempting to deal with the list of impediments to voluntary action, we hide from public discussion and consideration the really important issue which is a lack of adequate funding and commitment by Government and industry. But this isn't my greatest concern. The proposed legislation may be an attempt to hide the true nature of cleanup challenges with a gross simplification or disregard for science and engineering that is needed to ensure that we end up with an environmental improvement. Effective cleanup actions oftentimes require a high level of expertise and substantial resources, and an improperly regulated Good Samaritan is not the answer.

After review of S. 1848 and S. 2780, I see an attempt to remove most environmental regulation for potential Good Samaritan operations as an answer to this fear of liability issue. This can lead to degraded environmental conditions after the voluntary action is undertaken and may fail. The schemes outlined in the proposed legislation do not protect us from things getting substantially worse.

For example, we cannot afford to have a remining operation where hazardous chemicals such as cyanide are used in leaching operations to be uncontrolled. Current new mining operations must meet environmental regulations and so must operations that are done by volunteers.

For example, with S. 1848, we would regress to a time when there was little control over environmental disturbance activities, only the good intent of the party taking the action. This is the very reason why we find ourselves with the current environmental mess. They didn't have good intent. The bill is appropriately numbered because 1848 was a time in history when we didn't give much credence to the effect that our activities had the environment.

The proposed intent of this discussion and the proposed legislation is to deal with disincentives to voluntary cleanups because of potential liability. What the proposed legislation does is eliminate most, if not all, environmental regulation and safeguards from voluntary actions.

There is a better solution which has already been mentioned. It can be done under current CERCLA regulations through the use of a Good Samaritan administrative order on consent. With this process, we could assure that appropriate environmental regulations were considered. We could address the liability question for the Good Samaritan. We could protect the environment from the activities of an unscrupulous or highly speculative business interest acting as a volunteer. We need not create an entirely new program within EPA.

Thank you for the opportunity to discuss my concerns and recommendations with you. My hope is that the Nation is not misled into thinking that a solution to the Good Samaritan liability issue through currently proposed legislation is a meaningful solution to the abandoned mine problem. It is not and far from it. With the legislation proposed, we run the risk of substantially adding to our environmental problems by creating a program where necessary scientific investigation of site conditions is not performed, where the development of regulations and cleanup standards is either nonexistent or weak, parties looking to make a buck can tear into the sites with little or no regulatory consequence to their behavior, and even with the best of intentions, the State and Federal land managers and the EPA will end up with a larger mess to deal with.

I would like to add to my comments. I ran the program in USDA and the Forest Service for many years, and we got a lot of work done. So, there have been a lot of things done in the field that aren't being given credit.

Thank you.

Senator INHOFE. Thank you for that excellent statement, Mr. Harwood.

Mr. Lewis.

STATEMENT OF SCOTT A. LEWIS, DIRECTOR, ENVIRONMENTAL AND GOVERNMENTAL AFFAIRS, ANGLOGOLD ASHANTI NORTH AMERICA, INC.

Mr. LEWIS. Good morning, Mr. Chairman and Senator Boxer. I am the Director of Environmental and Governmental Affairs for

AngloGold Ashanti North America. Our U.S. offices are located in Denver, CO. The parent company, AngloGold Ashanti, Limited, has 21 operations on four continents.

Over my 23 years of environmental experience in the mining industry, I have had the opportunity to examine a number of orphaned sites primarily in the West and evaluate them. That has provided some insights and opportunities that we will discuss later in terms of cleanups that have already occurred.

The spectrum of disturbance or the environmental damage is broad and ranges from safety hazards to very complicated issues. The sad reality is without meaningful Good Samaritan legislation, there will be little more done. Some has already been done but little more will be done than has already been accomplished. This is an opportunity to really open the door and get a variety of stakeholders involved in the process.

I am here today representing the National Mining Association and the member companies. Mining companies must be allowed to qualify as Good Samaritans if they have not caused or are not liable for the environmental damage. This is a key provision. We should not automatically be excluded from participating as Good Samaritans. We have and will continue to be responsible stakeholders in the process, doing the work. In many cases, it just makes sense for the mining companies to participate because we have the staff, the technology, the resources, contractors, etcetera in the area to do the work.

The EPA must authorize Good Samaritan projects through a formal permitting process. That is a key to this, and we cannot forget that. It must be demonstrated through that process to EPA and the public and other interested parties that there will be an environmental benefit, that environmental quality will be improved. Similarly, that process should prevent a misuse of the Good Samaritan bill.

Next, the EPA must be given discretion to relax certain regulatory and liability provisions of the environmental laws. This may indeed include CERCLA, the Clean Water Act, the Clean Air Act, and RCRA, but in order to get other people, industry, communities, local Governments involved, that is a key element when it is done on a case by case basis, again focusing on improvement in environmental quality.

Good Samaritan legislation must not unduly narrow the types of activities that constitute legitimate remediation, and this is the reprocessing issue. There are opportunities in active mining districts to take historic wastes and reprocess those. Those reprocessed wastes then fall under the scrutiny and requirements of current environmental law. So, there are merits to considering reprocessing in Good Samaritan legislation.

Mining companies should be allowed to potentially make a profit on certain cleanup activities. There can be no guarantees, that any profits will be made currently and in the future, as each project is evaluated. There is a lot of downside potential, but there needs to be some upside potential to doing these projects in the future under Good Samaritan legislation. It should not be prohibited if a profit is possible.

In conclusion, legislation such as Senate bill 1848 by Senators Allard and Salazar and the Administration bill, Senate Bill 2780, are a great start. They really are. They offer some creative and innovative approaches to a solution that we have been struggling with for decades. We would encourage this committee to continue the process and further explore the merits of those two bills and move forward.

Thank you, and I would be pleased to answer any questions.

Senator INHOFE. Thank you very much, Mr. Lewis.

I am hoping that this hearing today will provide a solution to the problem. We keep eating, meeting, and retreating, and nothing gets done. Let us hope that it will this time.

Ms. Smith, I take issue with your statement that the perfect must not be the enemy of the good, and I will take your characterization of that statement along to its author, Harry Reid, who will be very interested in your comments.

In all seriousness, Trout Unlimited spent a year negotiating the administrative order by consent, so that it could cleanup a site without incurring liability under the Superfund. One of our panelists has money to clean up an abandoned mine but won't touch it because of the liability issue, and I understand that you want us to focus on mines that will be abandoned and hold the current mining industry liable for the financing of these cleanups.

But what about the mines they are talking about, Trout Unlimited and the mine our panelist talked about, where there is no current mining company to go after? Are you proposing that we go after mining companies even if they have nothing to do with the problem?

Ms. SMITH. Mr. Chairman, if they are not responsible parties, if they don't own the land, never owned the land, didn't participate in creating the problem, didn't generate the waste, no.

I think there are a variety of ways to craft programs that will allow for voluntary cleanups, for cleanups by all sorts of people. If you look through EPA's data on cleanups that have been happening, you will find casino developers. You will find a whole variety of private land owners who have indeed volunteered and managed to find their way through to work within the context of existing laws, no doubt sitting down with people and figuring out what they had to do and what they needed to do to be protected but who have done cleanups. You have Viacom. You have Aventis. You have a whole variety of names of participants in cleanups that weren't mining companies. So, it is not a matter of trying to just stick it to the mining companies.

Reprocessing and remining is a fine activity, and I think it would be a useful thing to do, but that can be done within the context of existing laws and existing permits and existing environmental reviews.

Senator INHOFE. I will ask others to respond to that.

Mr. Harwood, in your testimony, you take issue with what you believe to be a lack of accountability for the Good Samaritan projects. As you know, the Clean Water Act is delegated to the States to administer. I would ask the question, if the States are able to administer the Clean Water Act, why would they not be able to administer the Good Samaritan proposal?

Mr. HARWOOD. I am not questioning the States' abilities to administer environmental regulations. I work with the States all the time in that role. It is part of the cooperative effort that we have between all the Governments in an area.

The question that I had was concerning the open-endedness of the language in the legislation and my concern as to where we are headed with that open-ended language.

Also, like I said in my testimony, I think people are having a tendency to say, well, these are all easy things to do, and all the engineering and science that is necessary to get the job done just gets in the way of progress. Having worked on hundreds of these sites and been responsible for accomplishing hundreds of site clean-ups, I know that is not the case. There is every level of scientific and engineering expertise needed from the very small sites to the very biggest ones.

I think what we need to do is get the EPA and the Federal Land Management Agencies, which are pretty well left out of this whole discussion, involved in the process of working on this model AOC process.

Senator INHOFE. I appreciate that clarification because I think it is good for the record to know that you believe the States would be capable of doing something like this.

Mr. Lewis, do you agree? Do you believe that the delegation of this to the States, that they would have the ability to do this, and the administration of this program would be as good or better than if it were done at the Federal level?

Mr. LEWIS. Thank you, Mr. Chairman. I think an EPA-delegated program to States with robust programs like Colorado, where I am from, is a good example. It has great programs in place now for the clean water, mining, and reclamation. I think that needs to be the criteria. There needs to be a decent, respectable State program in place. But, yes, the States are qualified. They have the staff. They deal with these issues on a daily basis. They are familiar with the site-specific conditions in and around these properties. So, they are imminently qualified, yes, sir.

Senator INHOFE. I think that is an area where we are all in agreement.

Mr. Gioia, first of all, help us out a little bit. Where is Contra Costa County?

Mr. GIOIA. Contra Costa County is just across the Bay from San Francisco and Marin County and just north of Berkeley and Oakland.

Senator INHOFE. OK, well, thank you very much. I understand that the county had a grant.

Mr. GIOIA. We applied for a grant that we were pretty sure we were going to get, and we withdrew the grant application because of the liability issues.

Senator INHOFE. What was the size of the grant?

Mr. GIOIA. Two to three million dollars is the cleanup cost we estimate, and we have been assured that there are many grant opportunities available for this type of cleanup in the San Francisco Bay area.

Senator INHOFE. Yes, it is my understanding that you would have been granted that.

Mr. GIOIA. Yes, right.

Senator INHOFE. In fact, for all practical purposes, you turned down a grant.

Mr. GIOIA. We did.

Senator INHOFE. Just to reiterate, what the county then really needs is some kind of liability relief. If you had the liability relief, would you have accepted the grant?

Mr. GIOIA. If we had the liability relief, we would have accepted the grant. I mean this is clearly a case where we are the true Good Samaritan. We are a public agency. We are not a responsible party. We are working with the local community, with environmental groups, so we all are on the same page. We were just concerned about future liability.

Senator INHOFE. Mr. Ellis, based on the sites in Colorado, would providing more money but not addressing the liability concerns resolve your problem?

Mr. ELLIS. Thank you, Mr. Chairman. I still believe liability is clearly the largest hurdle in addressing these mine sites. I would like to believe that we could get a check for a billion dollars to clean up everything in Colorado, from the Federal Government, but I am also a pragmatist and a realist, and I know that is not going to happen. There is more and more pressure on Federal funding all the time, and it is reflected in the EPA's budgets and other areas. I see this initiative or this legislation as a new, innovative way to try to provide additional infusion of public and private capital to try to replace those Federal dollars that aren't there.

I certainly think it would be foolish to not look into that area and see if we can't pass a bill that will probably have a zero cost from CBO. That is an amazing thing for an environmental bill. I believe there is no authorization of any appropriation. To me, that means a higher chance of passage. If it can result in environmental clean-up, that is a great thing.

Senator INHOFE. You heard Ms. Smith say she believes there are people out there who would, under the current law, be willing to come in and cleanup these sites. What is your response to that, without any kind of liability protection?

Mr. ELLIS. That certainly may be the case. I don't know of every site in Colorado. She did mention Representative Salazar's bill, and I think that is an innovative way to try to tackle the problem as well. I wish them the best of luck in that effort. But anybody who has ever done even Federal land exchanges of 10 acres, understands the difficulty of passing Federal legislation. If we were to do that for every single watershed, I don't know that that is a great thing to hang your hat on to solve the problem Westwide. It takes an act of Congress.

Senator INHOFE. Ms. Smith, you are shifting around there. Did you want to respond? Did I mischaracterize your statement?

Ms. SMITH. Well, Mr. Chairman, I think it is not a question of liability relief by waiving the law and changing the law or no liability relief. You have a tool. You can do an administrative order on consent. The EPA spent a year, and perhaps that was far too long to spend on the Trout Unlimited project, but now they have a model. They have other models. They have done consent agreements in a whole variety of places, some much more complicated

than the Trout Unlimited project. They can use that to offer protections.

I think part of the unsaid piece of this is there are dry cleanups and there are going to be discharging cleanups. Those cleanups where there will be a continuing discharge, and because many mines will have perpetual pollution, acid mine drainage that will last for thousands of years, there is going to be a continuing discharge. So, if somebody comes in, makes the discharge better, and then walks away, somebody has to be responsible for overseeing what happens in the future. Hopefully, the States or the counties would step up to the plate if they had the funds for helping them.

Senator INHOFE. I appreciate that. I do appreciate that.

Mr. Gioia, first of all, what is your title with this county?

Mr. GIOIA. I am the Chair of the Board of Supervisors.

Senator INHOFE. You are the boss.

Mr. GIOIA. There are five of us who were elected throughout the county, and I just happen to be the Chair this year.

Senator INHOFE. It is your turn. I have been there; I understand.

They kind of implied that perhaps the county wouldn't have the ability or the resources or be able to take care of one of these remediations. How would you do this? Would you have mining engineers advise you? How would you go about doing it? How would you answer that?

Mr. GIOIA. What we would do in this situation is clearly we would be hiring experts to consult and to affect this remediation. These grants that we would obtain require a fair amount of oversight and require clearly a process that would need to be followed to insure the integrity of the cleanup.

Now, there have been some issues raised about what is the best way to do this. For us, ultimately, it is about protecting liability because, as all of you know, local governments spend a fair amount of money on health and social services and public works and planning. For us, how much we may have in terms of liability for something that we are voluntarily taking upon ourselves to do is a concern. We would rather be spending our money handling health and social services which is one of our major responsibilities.

So, if we can get the money and we are confident we can, we don't want to have a blank check out there where we start the cleanup and run into a "touch it, you own it" kind of philosophy and we then have the potential for payments over a period of years. We don't want that. We need certainty. That is why we just want to have liability capped if we do cleanup responsibly and safely. We know that we have that responsibility. We would hire the experts to do that. We wouldn't be doing all that ourselves, and we would be doing it in a very public way, working with the community.

Senator INHOFE. Thank you, Mr. Gioia.

Senator Boxer, I am just insisting you take more than the 5 minutes you normally have, more than 10 minutes, a full 12 minutes with one proviso.

Senator BOXER. What?

Senator INHOFE. That would be when Senator Thune arrives, between your questions, you would allow him to make an opening statement, all right?

Senator BOXER. Absolutely.

Senator INHOFE. All right.

Senator BOXER. Thank you very much.

First of all, welcome to Washington, I say to my constituent, Supervisor Gioia. As you know I started out as a Marin County Supervisor.

Mr. GIOIA. I remember. I worked on the staff of a Supervisor across the Bay when you were the Supervisor at Marin.

Senator BOXER. You young thing.

The point is I hear you so well because we were facing a lot of things like that. For example, our beautiful Frank Lloyd Wright Civic Center had to be earthquake-proofed. I remember being faced with this because at that time it was millions of dollars that we didn't know where to get. It was scary.

I think you did the right thing. Unless you were certain that you didn't have this open-ended problem at the end, you did the right thing. However, knowing Contra Costa County and listening to you very carefully, I am assuming—and tell me if I wrong or right here—while you want liability protection, that is your main thing, you are not asking us to lower the cleanup standards, are you?

Mr. GIOIA. No. We do not want you to lower environmental protections.

Senator BOXER. Fine.

Mr. GIOIA. We are very careful. We are very concerned about that.

Senator BOXER. That is important to me because if I told you, as Ms. Smith tried to do and I am going to try to do too, that there are a couple of other ways you could proceed without this particular law and in fact, as Mr. Harwood has pointed out and Ms. Smith pointed out, that weakens the bottom line protections for the public in terms of the water quality because it is so vaguely drafted. All you have to do is read the EPA staff comments that were deep-sixed in this deal to see that. Then I assume you would be content with that.

Mr. GIOIA. We would.

Senator BOXER. In other words, you don't have a dog in our fight.

Mr. GIOIA. Our issue is to protect the true Good Samaritan which we believe we are.

Senator BOXER. Yes, I hear you. I hear you, OK.

Now, I just want to go forward with this little dialog that was started between our good chairman, and he is my really good friend, and Ms. Smith. That is there already is a way to do all this through the EPA, through the consent order which, by the way, is done outside the court. It says consent, so it sounds like a court, but it is not a court. It is an administrative decision. Mr. Harwood referred to it. The EPA is kind of throwing up its hands as if it is too difficult for them, but they can do this. They can provide for liability protection right in that order and keep the same standards, and we all go away happy.

The other way is through a piece of legislation that I so supported and helped write, which is the brownfields law which unfortunately is not funded the way it should be funded. It still could be able to afford a \$2 to \$3 million grant. Specifically in brownfields, it allows for mine cleanups, and it goes along with Good Samaritan capabilities because it essentially gives the money

to the county. The county makes decisions on how it acts. My view is both of those things could work.

Now, I would be glad to pause here for Senator Thune.

Senator INHOFE. That would be good. Why don't we stop the clock and recognize Senator Thune.

Senator Thune, this was worked out before your appearance. If you would like to make an opening statement, you may do so at this time. Then we will go back to Senator Boxer's question and then ask if you have questions.

**OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR
FROM THE STATE OF SOUTH DAKOTA**

Senator THUNE. Thank you, Mr. Chairman. I appreciate that. I am just coming over from an Indian Affairs Committee hearing. I appreciate joining you and others for this hearing today as we learn more about how liability concerns may be impacted in clean-up of abandoned hard rock mines across the country.

There is no doubt that the 500,000 abandoned hardrock mines pose varying degrees of risk to the public, including watersheds. As chairman of the Subcommittee on Superfund Waste Management, I can tell you I have learned a great deal since joining this committee, including some of the pitfalls associated with our environmental laws such as Superfund which is a stringent liability scheme that can impede clean ups by innocent parties.

As a Senator who hails from a Western State that experienced a gold rush in the 1870's, I can certainly understand the concerns raised by Senators Allard and Salazar as they work to address a major issue that continues to impact residents of their home State. I applaud the President and Administrator Johnson for joining us today to better explain why a Good Samaritan provision is needed to help address the impact of abandoned mines and the discharge of pollutants that continue to this day.

Last, I understand that some on this committee oppose efforts to establish a Good Samaritan provision for hardrock mine cleanup because they feel the Superfund program should pay for the cost of cleanup. I would like to point out, Mr. Chairman, the Superfund program has limited resources, and not all abandoned mines qualify for such funding. While emergency removal funding can be used to protect human health regardless if the site is listed on the National Priority List, removal funding is limited to a 1-year effort totaling not more than \$2 million. Also, long term remediation costs can only pay for out of the Superfund program if the site is listed on the NPL. I believe this distinction is important to keep in mind due to the larger Superfund cleanup needs that exist throughout the country.

Seeing the proposals to provide Good Samaritan protection are in no way a solution for the cleanup of all abandoned hard rock mines, I do believe that if Congress can provide some ability for interested parties to clean up pollution from abandoned mines, then that is something we should all support.

I appreciate the opportunity to come here, Mr. Chairman, and to make that statement, and I appreciate very much the testimony that has been offered today. I would also like to acknowledge that our subcommittee will be holding a hearing on the Superfund pro-

gram tomorrow, and we will look forward to taking testimony at that as well.

I will allow you to go back to the Senator from California, so that she can continue her line of questioning.

[The prepared statement of Senator Thune follows:]

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As a Senator who hails from a western State that experienced a gold rush in the 1870's, I can certainly understand the concerns raised by Senators Allard and Salazar as they work to address a major issue that continues to impact residents of their home State.

I applaud the President and Administrator Johnson for joining us today to better explain why a Good Samaritan provision is needed to help address the impact of abandoned mines and the discharge of pollutants that continue to this day.

Lastly, I understand that some on this committee oppose any effort to establish Good Samaritan protections for hardrock mine cleanup because they feel the Superfund program should pay for the cost of cleanup. I would like to point out that the Superfund Program has limited resources and not all abandoned mine sites qualify for such spending.

While, emergency removal funding can be used to protect human health, regardless if a site is listed on the National Priority List (NPL), removal funding is limited to a 1-year effort totaling not more than \$2 million. Also, long term remediation costs can only be paid for out of the Superfund program if a site is listed on the NPL.

I believe this distinction is important to keep in mind due to the larger Superfund clean-up needs that exist throughout the country.

Seeing that proposals to provide Good Samaritan protection are in no way a solution for the cleanup of all abandoned hardrock mines, I do believe that if Congress can provide some ability for interested parties to clean up pollution from abandoned mines then that's something we should all support.

Senator INHOFE. Thank you, Senator Thune.

Senator THUNE. Thank you, Mr. Chairman.

Senator INHOFE. Senator Boxer.

Senator BOXER. Thank you both.

As I was saying, Supervisor, what I get from you is your problem is you want assurances that you are not going to be sued for doing a very good faith, not only good faith but well designed, cleanup.

Mr. GIOIA. Yes.

Senator BOXER. I am with you on that, and I want to help you on that. We will be working with you because we believe we can accommodate this under current law. So, we will be working with you on that.

Mr. GIOIA. Great.

Senator BOXER. Now, I want to shift the remainder of my time to Mr. Harwood who I consider to be a real expert witness. How many years have you worked in this mine cleanup area?

Mr. HARWOOD. I have worked in the mine cleanup area since 1983, totaling 37 years of Federal service, and I am still working in mine cleanup.

Senator BOXER. OK. Well, let me ask you this. The New York Times did a very deep analysis about these cleanups, and I want to read some of the words they say and see if you agree with them.

In October, the New York Times reported that mines usually need to dig up 30 tons of rock to create one ounce of gold, and they often use cyanide to capture the gold. The paper stated, "Before they are through, miners in some of the largest mines move a half million tons of earth a day, pile it in mounds that can rival the Great Pyramids, and drizzle the ore with a poisonous solution for years." That is one quote.

Another quote is "Some metal mines, including gold mines, have become the near equivalent of nuclear waste dumps that must be tended in perpetuity."

Do you think those are overstatements, or do you think they capture some of it?

Mr. HARWOOD. The outline or definition of the heap leach operation is fairly accurate because the folks who are in the mining business now are working on ore bodies that have very small amounts of what they are hunting, so they have to move a horrendous amount of material, and one of the processes they use is a cyanide heap leach process. That has been a problem on active mining sites, and it has also been a problem on sites where the mining company, for whatever reason, has gone bankrupt, and the Federal Government or the State or whomever is left with this heap leach pile to try to neutralize.

The other point I think was made that some of these sites will go on in perpetuity. I worked on a site in Central Idaho that has a water treatment plant on it which is treating the adit discharge from the mine works, and that water treatment plant, to meet water standards, will have to run forever, for eternity. Somebody has to maintain that water treatment for eternity. So, there are sites like this that I am talking about that will need to have maintenance and quality maintenance, somebody who knows what they are doing, forever to keep it clean.

Senator BOXER. We are not talking about a bunch of volunteers. They keep saying volunteers. Administrator Johnson talks about volunteers as if it is some kind of a beach cleanup where we all meet and we cleanup the beach. We are talking about some serious cleanup here.

Mr. HARWOOD. Some of the sites that I am working on have repositories where you put the contaminated mill tailings and waste, and one of these repositories holds over 22 million cubic yards of material. That is 2.2 million dumptruck loads of waste we had to dispose of. That is just one site.

Now, not every site is like that. These are mega sites. At small sites I worked on with the Forest Service, where they built their own repository onsite, we are looking at 135,000 to 200,000 cubic yards of material to dispose of. It is not some small project.

Senator BOXER. Do you agree with me and some of the others on the panel that there already are ways we can handle the Good Samaritans through these consent orders? You alluded to that in your testimony.

Mr. HARWOOD. I alluded to that. We talk about American Fork Canyon. I started the American Fork Canyon project off just before

I retired. Of course, now I am finding out what finally happened there.

One of the things I found out in all the years of Federal service I had was there was always somebody going to say you can't do that or you can't do this. There was a roadblock, and I usually drove a truck through the roadblock. The idea that we can't deal with this from an administrative standpoint, I think is not correct. We can. It is just that everybody who is involved needs to put their minds to getting this done in a reasonable manner.

Again, I don't want to miss emphasizing the fact that the Federal Land Management Agencies have CERCLA authority on the public lands, and they have just as good a staff of people to work with the EPA on drawing up these administrative orders as anybody does.

Senator BOXER. After listening to you and just listening to my staff explain to me the nuances of what we already have to work with here, the Administration could do these orders. We have brownfields legislation.

At the end of the day, I am asking why do we have this legislation? The only answer I come up with is to weaken environmental laws because you described how some of these sites will have to be monitored essentially forever. I understand from the mining industry's perspective they are not happy about that because if they are one of the parties involved with it, then they have to live up to standards.

It seems to me, unless I am missing something and I could be, but my environmental gut says I am not, I think the whole point of this is to weaken standards at the end of the day. That is my sense of it. Do you think that is a possibility here? I don't know why we need to create legislation if we already have the means to get Good Samaritans the help they need.

Mr. HARWOOD. I think that is the key. That is what concerned me, and that is why I came here to testify. Both of these pieces of legislation are such a tremendous oversimplification of what the problem is, and I am concerned that, as we get into a rush to issue permits or whatever, we will disregard some really important environmental requirements. The thing about it is if we don't do that, then the EPA has to establish a whole new program and regulations on how to write these permits and manage these permits. So you are starting a whole new program within the Agency.

Senator BOXER. Right. It occurred to me it is a whole new bureaucracy for something that we have already addressed through administrative consents and through brownfields.

Ms. Smith, my final question will be to you. I think I just expanded on your position. Did I, pretty much?

But there was one thing that you brought to the table that I am not aware of. Could you explain Congressman Salazar's bill just a little bit more? Does it take this concept of model sites? Is that what it does? Tell me about it.

Ms. SMITH. Congressman Salazar's bill is a demonstration project for a particular area. Quite a number of years ago, the EPA and the Federal Land Management Agencies along with some of the States began looking at a watershed-based approach. A group, a stakeholders group was created, and they have worked through

looking at the whole watershed, identifying priorities, and doing monitoring. They are doing this in the context of the TMDL.

Senator BOXER. What does his bill do?

Ms. SMITH. His bill creates a demonstration project and provides funding for allowing cleanup projects within the upper Animas River basin in Colorado.

Senator BOXER. And the hope is if this works for Colorado, it could be adopted for the rest of us.

Ms. SMITH. Right, it includes a report. It is a 10-year sunset. There are reporting requirements. There are monitoring requirements.

Senator BOXER. But it is just limited to that geographic area.

Ms. SMITH. Yes.

Senator BOXER. In general, do you think, again just because now my time is really running out, that what we have been saying is accurate, that there already are ways to give liability protection through the administrative order and through the brownfields law?

Ms. SMITH. Absolutely, the tools are out there, and I think it is a shame not to use the tools that have been developed. I am thinking of my 15 year old son. When he has homework he doesn't want to do, he comes out and he looks for one pencil and then he looks for a different pen and then he wants a different pad of paper. I am like, just get on with it and get it done.

I just would like the Agency to use the tools they have and get on with it.

Senator BOXER. That is why I like women on panels because you tend to cut through everything.

[Laughter.]

Senator BOXER. Can I say one last word about the panel? I think this has been really helpful because I think what you had is you had your best spokespersons for all the different varieties and shapes for where we may come out.

Thank you.

Senator INHOFE. I was thinking the same thing, Senator Boxer.

Senator Thune, each one of us took 12 minutes for questions. You may have a full 12 minutes if you want, and you are recognized for your questions.

Senator THUNE. Thank you, Mr. Chairman. I understand you are probably trying to wrap this up, and it sounds like all the ground has been adequately covered. I do appreciate the perspectives presented by the panelists here today, and all bring great insights to this issue.

Again, I would just echo what I said earlier in my statement about wanting to work with you and the committee as we move the legislation forward. I think it looks like it has very broad bipartisan support in the U.S. Senate, and hopefully we will be able to do something that is meaningful in terms of addressing this problem.

Thank you.

Senator INHOFE. All right, thank you, Senator Thune.

Let me thank the panelists. Nobody got in a fight with anyone. You were all very respectful. We appreciate the knowledge and the ability and the message that you brought forward today. Thank you so much.

We are adjourned.

[Whereupon, at 11:19 a.m., the committee was adjourned.]

[Additional statements submitted for the record follow.]

STATEMENT OF HON. WAYNE ALLARD, U.S. SENATOR FROM THE
STATE OF COLORADO

Mr. Chairman, thank you for holding a hearing on this important issue. Last year the EPA's Inspector General released a report stating that hardrock mine sites would soon become the biggest drain on an already strained Superfund program. That report identified 156 hardrock mining sites, including copper, gold, iron ore, lead and silver mines, which could cost anywhere from \$7 to \$24 billion to clean-up. That figure is 5 to 12 times EPA's average annual Superfund budget. While this legislation exempts sites eligible under Superfund, I think that these estimates can help us to realize the potential clean-up costs.

These estimates are made all the more frightening by the fact that, in 1993, the Mineral Policy Center estimated that, nationwide, there are over one-half million abandoned hardrock mine sites in the United States. The same organization estimated that it would cost between \$32 billion and \$72 billion to reclaim about 363,000 sites—the ones it classified as contributing the most contamination. If there is a way to clean-up some of these sites, without placing such a heavy burden on the taxpayer, Congress should be jumping at the opportunity to make it happen.

Anyone who has driven westward up the I-70 corridor in Colorado from Denver, or on many other mountain roads throughout the Rocky Mountain West, has seen the impact of abandoned mines on the landscape. These sites, which dot the landscape, are called "abandoned mines" because there is no longer anyone who is legally responsible for their clean-up due to the fact that the owners have died or mining firms have long gone bankrupt. When responsible parties can still be located, they often do not have the resources to properly remediate these sites. In the meantime, these abandoned mines continue to pollute the surrounding land and water with toxic surface runoff and tailings.

Allowing outside parties to contribute to the clean up of abandoned mines in Colorado and across the West is a common sense approach to dealing with what is a continuing environmental problem. The legislation that Senator Salazar and I have introduced, S. 1848 "The Cleanup of Inactive and Abandoned Mines Act," would shield Good Samaritans from legal liability for environmental damage they did not generate. A Good Samaritan is a company, individual, or any group made of entities not responsible for the mine waste that is willing to clean-up historic mine residue at no cost to the taxpayers. Good Samaritans should be rewarded for doing the right thing, not put at legal risk. This legislation has been years in the making and I am pleased that we are here before the committee today with a bi-partisan solution.

The legislation will provide legal protections for mining firms, communities, non-profit organizations or individuals that step in to clean up these abandoned mines from liability under Federal and State laws, but it also contains stringent requirements to prevent abuse.

A Good Samaritan permit would only be issued if the interested party submits a concrete action plan that identifies problems that need to be fixed and includes a clear plan for completion. The permit application and work plan would also have to be approved by the relevant State agencies in order to be valid. After the permit is approved the sites would be subject to ongoing monitoring to ensure that the remediation is completed as the permit states it will be; permittees would be subject to heavy fines for non-compliance with their permit.

Before I close, I would like to take a moment to extend a special welcome to Dennis Ellis, executive director of the Colorado Department of Public Health and the Environment, and Scott Lewis with Anglo-Gold. Both of these gentlemen are Coloradans, I thank them for making the trip out to DC to share their perspectives on this important issue.

Thank you again for holding this hearing, Mr. Chairman. We have a window of opportunity to accomplish a "win-win" solution for the environment and the taxpayers. I intend to continue working with you, Senator Salazar, and our colleagues in the Senate and the House in developing legislation this session to allow for deliberate and conscientious abandoned mine land clean-ups.

STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR FROM THE
STATE OF COLORADO

Thank you, Mr. Chairman and Ranking Member Jeffords. Thank you for agreeing to hold this hearing. I appreciate the opportunity to testify in support of S. 1848,

the Good Samaritan “Cleanup of Inactive and Abandoned Mines Act,” which I introduced with my colleague from Colorado, Senator Allard. And I look forward to working with both of you and with all of the members of this committee to pass this important legislation during this session. I am particularly grateful to Senator Baucus for his prior work in this area and for his support for my bill.

For almost 25 years, first as a natural resources lawyer, then as Executive Director of the Colorado Department of Natural Resources, and then as Colorado’s Attorney General, I have been working to help clean up the many contaminated mine sites in my State. As I’m sure Mr. Ellis could affirm, I, as a regulator and as the State’s chief legal counsel, had ample tools in my toolbox and—most of the time—ample resources at my disposal to force polluters to clean up contaminated mine sites that were large enough and that posed a sufficient risk to public health and the environment to warrant the attention of the EPA or the State Health Department. Usually that was the case when a site like Leadville and Summitville was listed on the National Priorities List under CERCLA or when the Health Department identified an unpermitted discharge of acid mine drainage or other contaminants into the waters of the State.

But there are some 22,000 inactive and abandoned mine sites in my State that are beyond the reach of EPA and the State, not because our pollution laws do not apply to them, but because there is no identifiable owner or operator who is responsible for performing the cleanup and because neither the State nor the Federal Government has the resources to step in and conduct its own cleanup.

And ironically, the draconian liability schemes under CERCLA and the Clean Water Act deter would-be volunteers, or “Good Samaritans,” from getting near those sites for fear of unlimited liability. Even with a solid, sensible plan to clean up a mine site, Good Samaritans assume massive liabilities under the Clean Water Act and CERCLA, in addition to State and local laws. These liabilities dissuade efforts to erase the environmental legacy of hardrock mining.

And so, year after year, over half a million mine sites across the country stand idle, awaiting cleanup as lead, cadmium, mercury, copper, arsenic and zinc seep into our watersheds; as mine tailings blow in the wind and taint our air and soil; as acidic compounds leach into the water, killing fish and aquatic life and polluting our drinking water.

The continued pollution from these sites and the barriers discouraging Good Samaritans from helping with cleanups is one of the most frustrating realities I have faced as a natural resources lawyer.

When I was the head of the Colorado Department of Natural Resources and Colorado’s Attorney General, I was anxious for State and Federal legislators to pass laws that would allow Good Samaritans to conduct these mine cleanups. Over the past several years, Congress has considered a number of Good Samaritan proposals—some to amend the Clean Water Act and CERCLA, some to create financial incentives for mining companies to act as Good Samaritans, some with extensive liability protection, and some with more limited liability protection. I was disappointed that Congress didn’t pass a comprehensive Good Sam bill at that time, because many of these proposals, including bills of Senator Baucus, Representative Udall from Colorado, and Senator Campbell from Colorado would have yielded good results. But I also thought there should be a more straightforward way of providing Good Samaritans the liability protection they need to conduct these cleanups.

The goal of Good Samaritan legislation is simple: we want to make it easier for Good Samaritans to clean up inactive and abandoned mine sites when a cleanup by the liable party is otherwise very unlikely. This is a pragmatic objective, which recognizes that making the environment cleaner, especially when a Superfund-quality remediation is not possible and not necessary, is better than doing nothing. As is often said, the perfect should not be the enemy of the good.

Because the goal of Good Sam legislation is simple and pragmatic, the means to achieve that goal should be simple and pragmatic, not legalistic or bureaucratic.

So how do we do this? How do we create a permitting process for Good Samaritan mine cleanups that is straightforward yet thorough, simple yet rigorous?

In my experience with water deals, public lands issues, and disputes over natural resources, I have found that the best results are achieved when all stakeholders agree on the scope of a project before the project begins. This consensus-based approach reduces bureaucracy, limits the potential for conflict, and ensures transparency.

I have written this bill based on my experiences with consensus-building. Under my bill, a Good Samaritan applies for a permit from the EPA. It is a technically-based permit application that depends on a sound work plan and achievable results. In order to receive the permit for the project, local, State, and Federal authorities must all agree that the overall environmental improvement will be significant, that

there is no environmental degradation—at the project or anywhere else—and that the project is technically sound.

If the State or the local communities whose laws are affected do not agree with the proposed cleanup plan, they simply refuse to sign the permit and the project does not go forward. But if they think the cleanup plan is sound, they determine the scope of liability protection afforded under the permit.

While some bills offer blanket liability protection from environmental laws for all Good Samaritans, my bill provides that the liability protections should be crafted on a case-by-case basis. The local and State Governments can create liability protections from their laws, and the EPA can offer limited or extensive liability protection under the Clean Water Act and CERCLA or other relevant statutes. Presumably, each project is unique, so the liability protections afforded under each permit should be designed to fit the project.

The permit process is entirely open to the public at every step of the way. The EPA must give public notice of the permit application, hold a hearing, consider public comment, and make public all records in the permit process.

Only after the public has weighed in and the stakeholders have agreed that the project will result in an overall improvement to the environment, the EPA issues the permit. In the permit, the applicant lays out a clear, concrete list of liability protections as well as the terms and conditions of cleanup that must be satisfied in order to benefit from those protections. That's it—one permit, issued after extensive public input and the consensus of all stakeholders.

This pragmatic, simple approach not only reduces bureaucracy, but it strikes a careful balance that protects Good Samaritans from liability without creating an end-run around environmental laws.

Let me emphasize that last point: My bill, like the administration bill, makes clear that a party that is liable for the cleanup under any applicable Federal, State or local law is not eligible for a Good Samaritan permit. Furthermore, my bill makes clear that only the activities necessary for the cleanup are authorized under a Good Samaritan permit. Any new mining activities at the site would require a mining permit and must be performed in accordance with otherwise applicable environmental laws. It is certainly not my intention or the intention of the co-sponsors of my legislation to enable polluters to escape liability through a Good Samaritan permit, directly or indirectly, nor is it our intention to authorize mining or "remining" operations without the necessary mining permit and in compliance with all applicable laws. My bill recognizes those distinctions and draws those lines clearly.

Just as we should facilitate Good Samaritan cleanups where there is no identifiable liable party, we should enable volunteers to clean up abandoned mine sites where the person who may be responsible for the mine residue does not have the financial resources to pay for the cleanup. In that case, it is more important to clean up the site than it is to point fingers.

Based on my experience, we should also allow a range of stakeholders to apply for permits. Given the safeguards in the bill, there is no good policy reason to limit Good Samaritan permits to local or State Governments when so many capable non-profit organizations, individuals, and businesses are willing and able to make significant improvements at these sites.

Importantly, my bill would not disqualify a company or individual from capturing and retaining whatever ore values may exist in abandoned tailings piles or other mine residue. If the technologies available today enable a company to reprocess mine tailings and recover valuable minerals that could not be recovered more than 100 years ago—when many of these mines sites were last active—then it should be permitted to retain those mineral values as a modest incentive for performing the cleanup and to offset its costs.

Mr. Chairman, my bill reflects a balanced and pragmatic approach to solving a vexing problem. It creates an open and straightforward process that is neither bureaucratic nor unduly legalistic, but that is based on consensus and a sound, technically-based work plan. As I said earlier, in my experience the best solutions come not through subpoenas or paperwork, but at a conference table, with people of good will in open discussion, finding common ground.

Passing this bill would be a great step forward for Colorado and Western States. For too long we in the West have been frustrated by the legacy of mining, stymied by liability schemes that focus primarily on who is responsible for what, rather than on developing a practical solution to the problem. The truth is that because we have all benefited, and continue to benefit, from resource extraction, we share a responsibility for cleaning up our land and our water. In the end, we will be judged not by who we find liable to clean these sites, but by whether we get them cleaned up for our children and our grandchildren.

Mr. Chairman, I want to thank you again for holding this hearing today and for inviting me to testify. I very much look forward to working with you and the Committee to pass this Good Samaritan legislation, which is of such importance to the land, water, and people of Colorado and the Nation.

Thank you.

STATEMENT OF DENNIS E. ELLIS, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF
PUBLIC HEALTH AND ENVIRONMENT

Mr. Chairman, and members of the committee, thank you for the opportunity to appear before you today to discuss an issue of great importance to the State of Colorado—abandoned or inactive mines and the liability barriers that exist to the clean-up of these mines. Abandoned or inactive mines are responsible for many of the greatest threats and impairments to water quality in Colorado and across the western United States. Thousands of stream miles are severely impacted by drainage and runoff from these mines, often for which a responsible party is unidentifiable or not economically viable.

Regulatory approaches to address the environmental impacts of abandoned or inactive mines are often fraught with difficulties, starting with the challenge of identifying legally responsible and financially viable parties for particular impacted sites. Mine operators responsible for conditions at a site may be long gone. The land and mineral ownership patterns in mining districts are extremely complex and highly differentiated. The surface and mineral estates at mine sites are often severed and water rights may exist for mine drainage. It is not uncommon for there to be dozens of parties with partial ownership or operational histories associated with a given site.

In view of the impacts on water quality caused by these abandoned mines and the difficulties in identifying responsible parties to remediate the sites, Colorado is very interested in undertaking and encouraging voluntary “Good Samaritan” remediation initiatives, i.e., cleanup efforts by States or other third parties who are not legally responsible for the existing conditions at a site. However, “Good Samaritans” currently are dissuaded from taking measures to clean up the mines due to an overwhelming legal disincentive.

To date, Environmental Protection Agency (EPA) policy and some case law have viewed abandoned or inactive mined land drainage and runoff as problems that must be addressed under the section 402 National Pollutant Discharge Elimination system (NPDES) permit program. However, there is currently no provision in the Clean Water Act that protects a “Good Samaritan” that attempts to improve the conditions at these sites from becoming legally responsible for any continuing discharges from the mined land after completion of a cleanup project. In addition, the potential for creating liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) has been a disincentive for parties interested in undertaking remediation efforts. These potential liabilities create an overwhelming disincentive to voluntary remedial activities to address the serious problems associated with inactive or abandoned mined lands.

Colorado has found that there would be a high degree of interest and willingness on the part of Federal, State and local agencies, volunteer organizations and private parties to work together toward solutions to the multi-faceted problems commonly found on inactive mined lands if an effective Good Samaritan provision were adopted. Consequently, for over a decade Colorado has participated in and encouraged—in cooperation with other States, Congressional Offices, the environmental community, the mining industry, EPA, and other interested parties—efforts to develop appropriate Good Samaritan legislation. Colorado’s Minerals, Energy and Geology Policy Advisory Board supported the concept of Good Samaritan legislation in 1996.

Colorado believes strongly that only a legislative solution can effectively address liability concerns, particularly for sites with draining adits, and therefore strongly encourages Congress to move forward on this issue.

COMPONENTS OF A GOOD SAMARITAN PROPOSAL

Scope of “Remediating Party” Definition

Colorado believes that participation in Good Samaritan cleanups should not be limited solely to Governmental entities, since there are many other persons likely willing to contribute to Good Samaritan cleanup initiatives. The statutory provisions should do the following:

- broadly exclude those with prior involvement at the abandoned or inactive mine site;

- broadly exclude those with current or prior legal responsibility for discharges at a site;
- assure that any non-remediation-related development at a site is subject to the normal NPDES rules, rather than the Good Samaritan provision; and
- be narrowly enough constructed to minimize fears over potential abuses of this liability protection.

CITIZEN SUIT ENFORCEMENT

The citizen suit enforcement tool has proven to be a useful incentive to encourage permit compliance by point source dischargers subject to the NPDES program. From the outset of development of the Good Samaritan proposal, Colorado has believed that a different set of enforcement tools is warranted for Good Samaritan permittees. Other permittees are required to get permits because they are undertaking activities that cause pollution, and a policy decision has been made that a broad array of enforcement tools are appropriate to assure that these polluting activities are adequately controlled. A Good Samaritan is not a “polluter,” but rather an entity that voluntarily attempts to step in and remediate pollution caused by others. In this case, sound public policy needs to be focused on creating incentives for the Good Samaritans’ actions, not on aggressive enforcement that creates real or perceived risks to those that might otherwise undertake such projects. It is clear that the perceived risk of citizen suit action is currently a major disincentive for such efforts.

STANDARD FOR CLEANUP

The analysis of a proposed project needs to occur at the front end of a project. Once there is agreement that a project is expected to result in water quality improvement, with no reasonable likelihood of resulting in water quality degradation, the Good Samaritan’s responsibility must be defined as implementing the approved project rather than, e.g., meeting specific numerical effluent limits.

SCOPE OF MINING SITES ADDRESSED

Colorado supports the adoption of a Good Samaritan bill that addresses abandoned or inactive hardrock mines. Colorado is concerned that any efforts to include coal mines in Good Samaritan legislation would bring into play additional issues that would make adoption of legislation more challenging and likely lead to further delays.

REMINING

Colorado has actively encouraged remining as a form of environmental clean up since the Colorado Mining Summit in 1987. Governor Owens supports remining as an option that presents the potential for achieving further clean-up of historic mining impacts. Options for promoting responsible remining that can result in additional remediation of historic mining impacts should be explored.

FUNDING FOR REMEDIATION

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

Conclusion

Governor Owens is on record in support of S.1848, the Cleanup of Inactive and Abandoned Mines Act, introduced by Senators Allard and Salazar. We believe that this bill provides a thoughtful and balanced approach to the range of issues and options that have been discussed.

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

or potential mine remediation projects in Colorado that are affected by the need for Good Samaritan legislation.

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

RESPONSE BY DENNIS ELLIS TO AN ADDITIONAL QUESTION FROM SENATOR JEFFORDS

Question. What are the basic capabilities that you believe a State would need to demonstrate prior to receiving authority to issue a Good Samaritan permit addressing Clean Water Act and CERCLA?

Response. Basis capabilities a State would need to demonstrate for Clean Water Act (CWA) delegations would be similar to other showings for CQA delegations that currently exist, such as the ability and resources to effectively issue and enforce permits to the same level the Federal Government would provide.

In order for a State to demonstrate the capability to receive delegation from a CERCLA perspective, the State should have:

- Statutory Authority to participate in the CERCLA program;
- A Memorandum of Agreement with EPA defining the roles and responsibilities of the agencies;
- Experience in site characterization, review of site data, and formulation of appropriate response actions based on that data; and
- Experience in response action construction oversight.

STATEMENT OF JOHN GIOIA, CHAIR, BOARD OF SUPERVISORS OF CONTRA COSTA COUNTY AND CONTRA COSTA COUNTY FLOOD CONTROL AND WATER CONSERVATION

Mr. Chairman, and members of the committee, thank you for the opportunity to appear before you today to discuss an issue of great importance for the water quality of our County, the State of California, and other States of the Union—the clean-up of abandoned or inactive mines. I appear before you as Chair of the Board of Supervisors of Contra Costa County and the Contra Costa County Flood Control and Water Conservation District. I am pleased to provide you with our experiences and recommendations related to abandoned mine cleanups and the liability associated with a county agency involved in the clean up work.

I would like to describe to the Committee an example of a project in Contra Costa County that would greatly benefit water quality in the region, yet has not been able to be completed due to the lack of “Good Samaritan” legislation.

BACKGROUND

Contra Costa County is located in the San Francisco Bay Area of California. The west portion of the County fronts on the Bay, while the northern portion fronts along the Sacramento River, and the east portion drains into the Sacramento-San Joaquin Delta. Mount Diablo, the most prominent and tallest mountain in the area, presides in the center of the County. Marsh Creek drains from its headwaters at the top of Mt. Diablo to the west towards the Delta and discharges into the Sacramento River. An abandoned mercury mine is located in the upper slopes of Mt. Diablo, near the headwaters of Marsh Creek. Rain water washing over the mine tailings transports mercury down into Marsh Creek and ultimately out into the San Francisco Bay. Marsh Creek also flows through the communities of Brentwood and Oakley with a total population of 60,000 residents.

In the early 1960's, our Flood Control District built flood protection improvements in the Marsh Creek watershed, channelizing the downstream reaches of Marsh Creek through the flat alluvial area near the City's of Brentwood and Oakley.

In 1963 the Flood Control District built a dam across Marsh Creek approximately five miles upstream of the City of Brentwood for flood control purposes. The resulting Marsh Creek Reservoir impounds water year round, and has extensive riparian, marsh and aquatic growth along the shoreline, providing habitat for a variety of wild life including resident populations of fish. The Flood Control District owns the Marsh Creek Reservoir and most of the downstream channel.

HEALTH ISSUE

In 1980 the California Department of Fish and Game analyzed fish from the reservoir and found mercury levels in the fish flesh were above existing health standards. The reservoir has since been fenced off and noticed for no trespassing or fishing due to the mercury contamination. Mercury is a health problem in the San Francisco Bay Area and advisory notices are posted for adults to not eat fish from

the Bay more than twice every month (only once a month for children and pregnant women) due to elevated levels of mercury in the flesh of the fish.

THE MERCURY MINE

Mercury was first mined in this area in 1875 and continued on and off until 1971. In 1974, the current property owner purchased the abandoned mine and surrounding property. The property totaled 109 acres and is bordered on three sides by Mount Diablo State Park. The current owners were not looking to develop the property, but looked at the property as a beautiful spot to raise their children and retire. The owner and his wife intended to build their retirement home on the property, they had no plans nor any desire to mine the property, or contract with others to mine the property.

The State's Regional Water Quality Control Board (RWQCB) first issued waste discharge requirements (WDR) to prior mine operators in 1952 and recommended corrective action be taken. Although waste discharge requirements were issued to the mine operators, contaminated discharges continued after the mine was abandoned. In 1978 the RWQCB issued the property owner a Cleanup and Abatement Order because of mercury discharging from the mine site, even though the property owner was not a mining operator and did not create the problem. In response, the property owner has taken efforts to clean up the property as best he can, but does not have the resources to complete a full scale mine remediation project. The property owner recently said, "So far we have spent over \$300,000 of our retirement money, in 1975 dollars, and the "well" is nearly dry."

ATTEMPTED REMEDIATION

In 1995 Contra Costa County contracted with a team from the University of California at Davis, lead by Dr. Darryl G. Slotten, to study and provide an assessment of mercury in the Marsh Creek watershed. The study showed that approximately 90 percent of the mercury in the watershed originates from the piles of tailings at the abandoned mercury mine. Based on the study, Contra Costa County applied for a Calfed grant in 1997 to remediate the mercury mine and reduce the mercury transported from the mine to the downstream watershed and into the Bay/Delta system. Our County Counsel and Risk Manager reviewed the grant in light of the lawsuit that the East Bay Municipal Utility District was facing with the remediation work they had done at the Penn Mine site and concluded that our county would be exposed to liability if the project was built. As a result, we withdrew the grant. Our sentiment was summed up in a staff memo that said, "It is sad that we can't try to help this problem, but we cannot risk getting into a situation that costs the county \$5 million plus huge attorney bills like it did the East Bay Municipal Utility District".

The Flood Control District is still interested in remediating the mine and we are confident we can get the grant funds to do so. The local watershed council in the Marsh Creek watershed is a stakeholder group that includes several local environmental groups and is very supportive of our efforts to remediate the mine. The property owner is also very supportive of our efforts. The barrier to us implementing the project is liability.

GOOD SAMARITAN INITIATIVE

Understanding that liability exposure was the fundamental issue preventing us from participating in remediating the mine, Contra Costa County partnered with the Natural Heritage Institute and the cities of Oakley and Brentwood for a grant in 2000 that sought to solve the liability problem. This grant application was unsuccessful. Still interested in pursuing the remediation of the mercury mine, last year we partnered with Sustainable Conservation, a non-profit organization with experience in the arena of liability exposure with environmental projects. This has lead to discussions with EPA on their Good Samaritan Initiative and the prospect of emulating the Trout Unlimited cleanup project in the American Fork River watershed in Utah.

The Good Samaritan Initiative is based on EPA's administrative authority to issue an Administrative Order and Consent. This is intended to be used in enforcement actions for liable parties. The difference is we are not a liable party. We are interested and willing to help clean up the mine site, but we don't legally have to. Since the Administrative Order and Consent is an enforcement tool, it would take an inordinate amount of our staff time and resources to modify it to be used for voluntary work. The other concern we have is that throughout the negotiation process to draft the Administrative Order and Consent there is no public input. In our experience, projects that have no public input end up creating huge problems later on.

When the public ultimately finds out about the project, we have to spend an inordinate amount of staff time and resources to change the project design based upon subsequent public input. As a result, we will not sponsor a project development process without public input.

We support legislation specifically tailored to agencies cleaning up mines on a voluntary basis. This would be much better than the current attempt to modify an existing enforcement tool to achieve the same purpose.

LIABILITY ISSUE

Our liability exposure occurs in at least two ways. One is under the Clean Water Act. This would be similar to the situation the East Bay Municipal Utility District (EBMUD) found themselves in after working on improving the Penn Mine drainage. EBMUD worked with the State's Regional Water Quality Control Board (RWQCB) in developing a remediation plan for the mine site. The remediation work, which was completed in 1978, reduced the pre-project copper discharge from an average of 64,000 pounds per year to an average of 13 pounds per year. An environmental group sued claiming that EBMUD should have taken out a National Pollutant Discharge Elimination System (NPDES) permit. The courts agreed and found that in performing the remediation work EBMUD should have obtained a NPDES permit, then followed the NPDES requirements to improve the discharge to current water quality standards. After the court case, EBMUD and the RWQCB worked on a follow-up remediation plan that brought the site back to pre-mining conditions at a cost of approximately \$10 million.

There is also liability exposure to the county under the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). This law imposes liability for response costs upon owners and operators for the release of hazardous materials from a facility.

SUMMARY

California's State Water Resources Control Board has identified the entire length of Marsh Creek, from the mine site to the Sacramento-San Joaquin Delta, as an impaired water body for mercury and heavy metals under Section 303(d) of the Clean Water Act. The San Francisco Bay Regional Water Quality Control Board is currently developing a total maximum daily load (TMDL) for mercury in the Bay Area. The TMDL will provide a long range plan and goals for reducing mercury in the watersheds that drain into San Francisco Bay. With the Mt. Diablo mercury mine being one of the important sources of mercury into the bay, it will be imperative to remediate the mine tailings and prevent further discharge of mercury from the abandoned mine site.

Contra Costa County and the Contra Costa County Flood Control and Water Conservation District have been interested in remediating the mercury mine in our county for the last fifteen years. We are confident that we will be able to obtain the grant funding necessary to remediate the mercury mine. Every granting entity we have talked to is extremely excited about the prospects of the Flood Control District remediating the mercury mine. We are ready, willing and able to fix a source of pollution in our county once the issue of liability exposure is addressed. We strongly support the efforts of EPA and Congress to adopt legislation that would eliminate our liability exposure and allow us to improve the water quality for the residents of Contra Costa County and downstream San Francisco Bay Area.

STATEMENT OF TERRY A. HARWOOD, FORMER EXECUTIVE DIRECTOR, HAZARDOUS MATERIALS POLICY COUNCIL, USDA; FORMER CHIEF ENVIRONMENTAL ENGINEER, USFS

Good morning Mr. Chairman and members of the committee. I thank the Committee for this opportunity to testify on the issue of cleanup of abandoned mines and mining related contamination. This issue is and has been a major focal point of my professional life for over twenty years. I managed the abandoned mine cleanup programs in USDA and the

Forest Service at the national and regional level. This experience included managing the programs as well as on-the-ground cleanup activities at hundreds of sites. I continue to be professionally involved in cleanup of mining related contamination and natural resource damage restoration after retirement from Federal service.

The intent of this hearing is to consider whether potential liability deters abandoned hard rock mine cleanup. Our attention is focused on the potential for "Good Samaritans" to assist in the cleanup process. This is not the right focus. This ap-

proach runs the risk of us ignoring the monster in the room which is the lack of sufficient commitment and funding by State and Federal Governments and industry to adequately address the task of cleanup. During the years that I managed the abandoned mine programs in USDA, funding levels were never increased from Fiscal Year 1995 to the day I retired in 2002 and those funding levels have subsequently been cut. There are thousands of abandoned sites to deal with and at current funding levels the program will take hundreds of years. The potential for good intentioned, technically qualified Good Samaritans to make a discernable impact on this huge problem is highly questionable. There seems to be an attitude that volunteerism will offset real commitment by Government and industry to deal with mining related environmental problems.

I could spend a great deal of time relating all of the abandoned mine problems and challenges to cleaning them up and how the problems run from rather small environmental issues on remote public lands to massive complexes in Idaho and Montana affecting human health and large eco-systems. Others testifying today may outline those issues and numbers more thoroughly.

One of my major concerns is while attempting to deal with alleged impediments to voluntary action we hide from public discussion and consideration the really important issue, the lack of adequate funding and commitment by Government and industry.

But this is not my greatest concern. The proposed legislation may be an attempt to hide the true nature of cleanup challenges with a gross simplification or disregard for the science and engineering needed to insure that we end up with environmental improvement. Effective cleanup actions require a professional honest intentioned approach to the problem, often times a high level of expertise and substantial resources. Improperly regulated Good Samaritans will not get the job done. After review of S. 1848 and S. 2780, I see an attempt to remove most environmental regulation from potential Good Samaritan operations as an answer to the fear of liability issue. This can lead to degraded environmental conditions after the volunteer action is undertaken. The schemes outlined in the proposed legislation do not protect us from things getting substantially worse.

For example, with S. 1848, we would regress to a time when there was little control over environmental disturbance activities, only the good intent of the party taking the action. This is the reason we find ourselves with the current environmental mess. The bill is appropriately numbered, because 1848 was a time in history when we did not give much credence to the effect our activities had on the environment.

Let us also discuss the type of Good Samaritan we may be talking about. For example, they could be a conservation group whose only intent is to assist the governments with no profit in mind, they could be a developer concerned about the impact of contaminated abandoned mine sites on a project they are involved in, or they could be a mining company that believes they can reprocess mine wastes in a profitable manner. As metals prices escalate, there is more potential for speculation and reining proposals. Under both bills you could have a situation in a mining district where a mining company operating a new or existing facility would be required to meet all of the appropriate environmental regulations while another company operating at a previously abandoned site would be shielded from critical environmental regulation. The reining operations can have the same potential for environmental impact as new mining operations where hazardous chemicals such as cyanide are used in leaching operations. There can be activities where there is no difference between a new operation and a reining operation.

Both bills are rife with other problems, for example:

- No adequate provision for the development of regulations for permitting;
- No environmental accountability. The legislation says that projects have to result in improvement to the environment. The improvements are not defined and normal standards are waved by the legislation;
- Weak or non-existent language to prevent collusion between parties liable for cleanup and so called Good Samaritans exempted from environmental regulation;
- No recognition of the mature abandoned mine cleanup programs in the Federal land management agencies. Enabling EPA to issue permits on Federal public lands in conflict with the authorities granted under CERCLA in EO 12580;
- Creation of an unnecessary new Federal program within EPA for permitting voluntary actions; and
- The potential for States to permit activities on Federal public lands without fully accounting for Federal resource issues, to name a few.

The supposed intent of this discussion and the proposed legislation is to deal with disincentives to voluntary cleanups because of potential liability. What the proposed

legislation does is eliminate most if not all environmental regulation and safeguards from volunteer activities.

There is a better solution. There seems to be the idea that under current environmental regulation we must hold potential Good Samaritans accountable to the same remedial cleanup standards as those who caused the contamination and that this creates a strong disincentive to voluntary cleanup. Experience tells me that we can use incremental removal actions as defined under CERCLA to work toward final cleanup standards and that each removal action does not need to result in the final standard. It just needs to be done in a manner that insures that the removal action does not affect our ability to meet final standards in the future and that it has positive results.

This can be done under current CERCLA regulations through the use of a Good Samaritan Administrative Order on Consent (AOC). With this process we could insure that appropriate environmental regulations were considered, we could address the liability question for the Good Samaritan, protect the environment from the activities of an unscrupulous or highly speculative party acting as a volunteer, and not need to create an entirely new program in EPA. This would also recognize the authority and ability of the States and Federal land management agencies to use this tool as well.

This would require that the EPA and Federal land managers with CERCLA authority develop a model Good Samaritan AOC working with potential volunteers and that there be a commitment by these agencies to not allow the process to bog down in a bureaucratic swamp. It could result in a volunteer program that assists in working toward a final cleanup standard while relieving Good Samaritans from the fear of liability.

Thank you for the opportunity to discuss my concerns and recommendations with you. My hope is that the nation is not misled into thinking that a solution to the Good Samaritan liability issue through currently proposed legislation is a meaningful solution to the abandoned mine problem. It is not. Far from it, with the legislation proposed, we run the risk of substantially adding to our environmental problems by creating a program where necessary scientific investigation of site conditions is not performed; development of regulations and cleanup standards is nonexistent or weak; parties looking to make a buck can tear into these sites with little or no regulatory consequence to their behavior; and, even with the best of intentions, the States, Federal land managers and the EPA will end up with a larger mess to deal with.

RESPONSE BY TERRY A. HARWOOD TO ADDITIONAL QUESTIONS FOR SENATOR INHOFE

Question 1. You speak a great deal about the AOC reached with Trout Unlimited as the possible solution to the issue of liability deterring the cleanup of abandoned hardrock mine sites. However, the AOC addresses only Superfund Liability and the site at the American Fork Canyon did not involve any discharges into a navigable waterway. Are you aware of a means to address Clean Water Act liability, an issue at the center of proposals introduced by Senator Baucus (107th Congress), Co-sponsored by Senator Minority Leader Reid in each of the past three Congresses and sponsored this Congress by Senator John Salazar, and separately by Congressman Ken Salazar?

Response. I did not speak extensively in either my written or oral testimony concerning an AOC reached with Trout Unlimited in American Fork Canyon, Utah, nor did I ever mention Trout Unlimited. I am fully aware of the conditions and circumstances involved in American Fork Canyon Mining District because that site was placed on the USDA and Forest Service CERCLA program of work by my staff long before EPA and Trout Unlimited were ever involved. The project is a cooperative effort by EPA and the Forest Service because they were required to work together at this mixed ownership site containing both private and Federal lands. What I did speak about and recommend was that EPA and the Federal Land Management Agencies with CERCLA authority develop a Good Samaritan AOC process using a model AOC that would address all liability issues for legitimate volunteers while insuring that appropriate environmental regulations were considered and human health and the environment were protected. CERCLA and the National Contingency Plan allow for certain provisions that can mitigate Clean Water Act liability under a CERCLA AOC.

Incremental CERCLA Removal actions or interim Remedial actions are used at many sites to work toward final cleanup standards and the actions of a Good Samaritan can be treated as one of these steps, not making the volunteer necessarily liable for final standards. Most abandoned/inactive mine cleanup actions are not

Superfund listed sites and the process I recommend and used successfully for years in the USDA and Forest Service results in incremental environmental cleanup accomplishment while working toward the goal for achieving final standards.

My testimony addressed the language in S.1848 and S.2780 and testimony by others given during the hearing, not other legislation proposed by Senators Baucus and Reid or Congressman John Salazar. If those proposals allow for the elimination of environmental regulations concerning the cleanup of abandoned mines or some open ended permitting process, my comments on them would be similar.

Question 2. Mr. Harwood, you agreed with Senator Boxer's claim that S1848 and S. 2780 rollback our environmental protections. The cleanup standards in these bills are similar to that proposed by Congressman Ken Salazar in his legislation praised by your fellow panelist Ms. Smith. It is also similar to that proposed by Senator Baucus in 107th Congress. Further, the Clinton Administration's Assistant Administrator for Water supported the cleanup standard in Senator Baucus' bill, stating "a permit may only be issued where it is demonstrated, with reasonable certainty, that improvement in water quality will take place to the maximum extent practicable taking into consideration the resources available to the remediating party." Are you suggesting then that Senators Baucus and Reid as well as Congressman Salazar and the Clinton Administration supported rolling back environmental laws?

Response. My testimony concerned the language in S. 1848 and S. 2780 and testimony by others at the hearing and the removal of environmental control over the acts of potential Good Samaritans working at abandoned mine sites. I am very concerned as to how the EPA would implement such an open ended permitting process where so called good intent would trump compliance with environmental regulations. I am also concerned that the permit issuing process would require more time than the use of a properly written model Good Samaritan AOC. Other concerns and comments I have are included in my testimony.

As far as the intent of the testimony of Velma Smith concerning Congressman John Salazar's proposed legislation involving the Upper Animas River in Colorado, I am not in a position to comment on her intent and questions about her testimony could best be answered by Ms. Smith.

RESPONSE BY TERRY A. HARWOOD TO AN ADDITIONAL QUESTION FROM
SENATOR JEFFORDS

Question. Can you give a few examples of successful abandoned mine clean-ups conducted within the scope of the existing authority under CERCLA?

Response. Following is a partial list of successful abandoned mine cleanup actions involving the USDA and Forest Service. The majority of the sites were not listed on the Superfund list and a most were cleaned up under USDA and Forest Service CERCLA authority or were joint EPA/USDA actions on mixed ownership sites containing private and Federal lands. Some were performed by the Potentially Responsible Parties (PRP), some using Federal and State funding, and some work performed by the agencies utilizing reclamation bond funds and CERCLA settlement funds from the PRPs.

STATEMENT OF STEPHEN L. JOHNSON, ADMINISTRATOR, U.S. ENVIRONMENTAL
PROTECTION AGENCY

Good morning Mr. Chairman and members of the committee. I am honored to appear before you today to testify on one of the most important environmental issues, and opportunities, facing the United States—legacy impacts from abandoned mines and the innovative efforts we can all take to help clean up pollution from abandoned mines. The President is committed to accelerating environmental progress through collaborative partnerships, and the Good Samaritan legislation before the committee today is the embodiment of this cooperative conservation philosophy.

First, I want to thank you, Mr. Chairman, for introducing, by request, S. 2780—the "Good Samaritan Clean Watershed Act." S. 2780 is the Administration's legislative proposal to encourage voluntary cleanup of abandoned mines. I also want to commend Senator Allard and Senator Salazar and their colleagues for their legislative efforts to date. Finally, I would be remiss if I failed to acknowledge the long-term efforts of the Western Governors Association to address this issue as well. We hope that this Committee reports out, that Congress passes, and that the President signs into law S. 2780, or similar legislation, this year. We pledge to work with you to make that happen.

THE ABANDONED MINE PROBLEM

Inactive or abandoned mine sites can pose serious public safety and environmental hazards. According to estimates, there are over half a million abandoned mines nationwide, most of which are former hardrock mines located in the western States, which are among the largest sources of pollution degrading water quality in the United States. Acid mine drainage from these abandoned mines has polluted thousands of miles of streams and rivers, as well as ground water, posing serious risks to human health, wildlife, and the environment. This problem can affect local economies by threatening drinking and agricultural water supplies, increasing water treatment costs, and limiting fishing and recreational opportunities.

CHALLENGES TO CLEANING UP ABANDONED MINES

Mine drainage and runoff problems can be extremely complex and solutions are often highly site specific. In many cases, the parties responsible for the pollution are either insolvent or no longer available to participate in the remediation. However, over the years, an increasing number of "Good Samaritans," not responsible for the pollution, have volunteered to clean up these mines. Through their efforts to remediate these sites, we can help restore watersheds and improve water quality. Unfortunately, as a result of legal obstacles, we have been unable to take full advantage of opportunities to promote cooperative conservation through partnerships that will restore abandoned mine sites throughout the United States.

The threat of liability, whether under the Clean Water Act (CWA) or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), can be an impediment to voluntary remediation. A private party cleaning up a release of hazardous substances may become liable as either an operator of the site, or as an arranger for disposal of the hazardous substances. As well, under the CWA, a party may be obligated to obtain a discharge permit and comply with the permit's effluent limitations, which must be as stringent as necessary to meet water quality standards. The potential assignment of liability occurs even though the party performing the cleanup did not create the conditions causing or contributing to the degradation. Addressing this liability threat will encourage more Good Samaritans to improve the water quality of watersheds impacted by acid mine drainage.

Remediation of these sites can be complex and extremely resource intensive. Yet even partial cleanups by Good Samaritans will result in meaningful environmental improvements and will help accelerate achieving water quality standards. By holding Good Samaritans accountable to the same cleanup standards as those that caused the pollution or requiring strict compliance with 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. EPA strongly believes that liability should rest squarely on parties responsible for the environmental damage, not on those who are trying to clean it up. EPA has seen this concept work successfully all across the country to clean up and restore brownfield properties to beneficial reuse. By removing this threat of liability, we will encourage more voluntary and collaborative efforts to restore watersheds impacted by acid mine drainage.

Let me emphasize, however, that encouraging Good Samaritan cleanups is not about lowering environmental standards nor letting polluters off the hook. Instead, this legislation will hold Good Samaritans to a realistic standard that ensures environmental improvement. And those responsible for the pollution, if still in existence, will remain accountable, consistent with the Agency's "polluter pays" policy.

COOPERATIVE CONSERVATION AND EPA'S GOOD SAMARITAN INITIATIVE

President Bush's August 2004 Executive Order on Cooperative Conservation directs Federal agencies to ensure—when taking actions that relate to the use, protection, enhancement, and enjoyment of our natural resources—that the agencies will engage in collaborative partnerships with State, local, and tribal Governments, private for profit and nonprofit institutions, and other non-Government entities and individuals. Last August, as part of the President's Cooperative Conservation conference, I announced our Good Samaritan Initiative as a means to encourage more effective voluntary efforts to remediate damage from abandoned mines.

This Good Samaritan Initiative accomplishes the objectives of cooperative conservation by clearing legal roadblocks and empowering communities and grass-roots organizations to confront environmental challenges. The initiative equips America's eager army of citizen conservationists with important tools to protect our watersheds.

The first project under the Agency's Good Samaritan Initiative is the cleanup of an abandoned mine in Utah's American Fork Canyon. We are working with the volunteer group Trout Unlimited (TU) and the private landowner who did not cause the pollution. This project will restore a watershed that has been impacted for well over a century, improving the water quality and the habitat of a rare cutthroat trout species. Restoration of the American Fork is part of an ambitious multi-year effort by TU to draw attention to the problem of abandoned mines in the western United States while also identifying solutions. EPA has learned from the experience of the TU project and is putting those lessons to good use. This is a win-win situation for the environment and all involved and shows how cooperative conservation—placing a premium on collaboration and cooperation over confrontation and litigation—can accelerate environmental protection.

GOOD SAMARITAN CLEAN WATERSHED ACT

The purpose of the Administration's "Good Samaritan Clean Watershed Act" bill is to restore watersheds and improve water quality by encouraging remediation of inactive or abandoned hardrock mining sites by persons who are not otherwise legally responsible for such remediation. In the spirit of cooperative conservation, this bill recognizes that environmental progress can be accelerated by encouraging citizens and government at all levels to achieve environmental results through cooperation instead of confrontation. This bill is one of several cooperative conservation legislative proposals that will be submitted by the Administration this year.

This bill establishes a streamlined permit program that would be administered at the Federal level by EPA, and which can be administered by States or tribes if certain conditions are met. A permit issued under this bill would allow a Good Samaritan to clean up an inactive or abandoned mine site and would offer targeted protection from CWA or CERCLA liability for the actions taken under the permit. As drafted, the bill is a freestanding piece of legislation and not an amendment to any existing Federal environmental statute.

The bill also contains specific requirements regarding who is eligible for a Good Samaritan permit, the sites for which permits may be issued, and what must be included in the permit. Importantly, the bill encourages all volunteers, whether a private citizen, municipality, company, watershed group, or non-profit organization, to participate as a "Good Samaritan" provided that they did not contribute to the creation of the pollution, are not responsible under Federal, State or tribal law for the cleanup, and do not have an ownership interest in the property.

I want to take a moment to highlight a number of additional safeguards the bill provides to ensure that abandoned mines will be properly remediated:

- It requires a thorough "due diligence" evaluation of a Good Samaritan and proposed project, ensuring that the Good Samaritan is a "good actor" who has a history of good environmental compliance elsewhere and has sufficient financial resources to complete a project;
- It requires a determination that a project will result in improvement to the environment before any permit for the project is issued;
- While it provides that permits shall not authorize the extraction of new mineral resources, it allows the recycling of historic waste piles if directly related to the cleanup, and only after such activities are identified in a permit application and approved;
- It limits liability relief to only those activities undertaken pursuant to a permit issued under the Act;
- It nullifies liability protection under the Act where an applicant engages in fraud or provides materially misleading information;
- It requires robust public participation, including a mandatory public hearing before a permit is issued; and lastly,
- It provides ongoing Federal oversight and enforcement of cleanup activities.

CONCLUSION

Thank you, Mr. Chairman, for the opportunity to discuss with you the Administration's Clean Watershed Good Samaritan Act legislation. The issue of abandoned mine remediation has been discussed and debated for well over a decade. A comprehensive solution is long overdue. We applaud bipartisan efforts in both houses of Congress to address the issue, and we look forward to working with you and your colleagues to get this important environmental legislation to the President's desk as soon as possible.

RESPONSES BY STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS BY
SENATOR INHOFE

Question 1. Can you please describe the types of discharges occurring at the American Fork Canyon abandoned mine site? Does the site involve any water quality discharges or is a "dry site"?

Response. While the abandoned mine does contain a small draining adit, the clean-up activities by Trout Unlimited (TU) at the site covered by the Administrative Order on Consent (AOC phases 1 and 2) involve only the removal and disposal of contaminated mine tailings, which are contributing to the leaching of heavy metals. The clean up activities do not include the adit, consequently, TU is not required to obtain a Clean Water act.

Question 2. Two witnesses have argued that the AOC the Agency reached with Trout Unlimited can be used as a model to clean up the roughly 100,000 abandoned hardrock mine sites that the Western Governors Association has estimated are causing water quality degradation. However, the AOC only addressed Superfund liability. Can an AOC be written to address Clean Water Act liability?

Response. While an AOC can be written in some cases to mitigate Clean Water Act liability, an AOC does not automatically provide a blanket waiver of liability. For all Superfund responses actions, the EPA must consider all applicable or relevant and appropriate requirements (ARARs) that may apply to a particular site. The potential applicability of Clean Water Act requirements must be decided on a case-by-case basis. EPA has the authority and may decide to waive such requirements. In such case, the AOC would mitigate Clean Water Act liability consistent with the extent of the Water.

RESPONSES BY STEPHEN L. JOHNSON TO ADDITIONAL QUESTIONS BY
SENATOR JEFFORDS

Question 1. Under the EPA legislation, you limit the statutes that may be waived under the permit scheme envisioned for Good Samaritan mine clean-ups to Clean Water Act and Superfund. Why did you exclude the statutes that were included in S. 1848

Response. The Administration's legislation is narrowly targeted to remove the most significant disincentives to voluntary clean ups. EPA believes that the Clean Water Act and Superfund pose the greatest disincentive to voluntary actions. EPA does not believe that other Federal, State or local laws, as reflected in S. 1848, create legal road blocks to voluntary clean ups.

Question 2. The EPA IG reported recently that there were 200,000 abandoned mines nationwide. You are testifying today that there are about 500,000 such mines. Can you identify what assessments EPA has conducted and what information the Agency is using to develop the 500,000 estimate? How many of those mines impact water quality, and what are the primary contaminants at issue?

Response. While a complete and accurate inventory of abandoned mines has never been prepared, the Mineral Policy Center concluded in 1995, based on a survey of State and Federal Agency database, that there are over 557,000 abandoned hardrock mines nationwide. The Bureau of Land Management (BLM) in 1996 estimated that there are approximately 70,000 abandoned hardrock mines sites (AMLs), encompassing over 300,000 features, on BLM-administered lands. The Western Governors Association has also estimated that at least 400,000 abandoned mine sites exist in the West. EPA estimates thousands of stream miles have been impacted by acid mine drainage (AMD) which, depending upon the site, may include heavy metals such as lead, copper, zinc, arsenic, mercury, and cadmium. The former U.S. Bureau of Mines estimated that 12,000 stream miles and 180,000 acres of lakes in the West have been impacted by AMD.

Question 3. Response. Recently, the GAO recommended that EPA issue rules under CERCLA section 108(b) requiring mining companies to establish financial assurances in advance of developing a site that would ensure that funds were available when required for clean-ups. Please explain why EPA has not previously issued this statutorily required rulemaking, and what your plans are with regard to completing this rulemaking in the future. If the Agency does not plan to complete a rulemaking, please provide your justification.

Response. Congress did not establish a date for promulgation of a rule under CERCLA section 108(b). EPA has not yet made a decision on when to commence rulemaking under CERCLA section 108(b). EPA currently has underway analysis of data that lead to a decision on the timing of such a rulemaking. EPA anticipates that the first part of this analytical effort will be available later this year.

Question 4. How many abandoned mines does EPA estimate are affecting water quality and upon what does the Agency base that assessment?

Response. The Western Governors Association has estimated that approximately 20 percent of abandoned hardrock mines are contributing to water quality impacts. This information was based on two intensive priority watershed evaluations by Federal land managers. EPA, in its May, 2000 report entitled, "Liquid Assets 2000: American's Water Resources at a Turning Point," estimated that about 40 percent of headwaters in the West have been impacted by discharges from abandoned mines. The former U.S. Bureau of Mines has estimated that 12,000 stream miles and 180,000 acres of lakes and reservoirs in the West have been impacted by abandoned mines.

Question 5. Why did the EPA propose a stand-alone permit scheme for Good Samaritan clean-ups rather than incorporate permitting into the Clean Water Act or other statute?

Response. Good Samaritan legislation is intended to provide volunteers with targeted relief from liability that may arise from one or more statutes, such as the Clean Water Act and Superfund. Offering this protection would require either amending these existing statutes or, alternatively, providing stand-alone legislation that would provide liability protection through a streamlined permitting program.

Question 6. Why did the EPA propose a permitting scheme executed by the States rather than by EPA?

Response. The permitting structure in the legislation is modeled after and builds upon the success of the National Pollutant Discharge elimination System (NPDES) permitting program under the Clean Water Act. Forty-five States currently have the authority to administer the Federal NPDES permitting program. Similarly, the Good Samaritan legislation provides for a Federally administered permitting program for the clean up of abandoned hardrock mines that States may obtain authorization under the legislation.

Question 7. During the hearing, Mr. Scott Lewis from AngloGold Ashanti testified that it would be a good idea to require that States have "robust" programs before they received authority to issue good samaritan permits. Does the EPA believe that a State should demonstrate some minimum basic proficiencies, such as having a State-run NPDES program under the Clean Water Act, before receiving the authority to issue good samaritan permits?

Response. Similar to the process for authorizing States to administer an NPDES permitting program, the Administration's Good Samaritan legislation establishes threshold requirements before a State or tribe would be authorized by EPA to administer the permitting program. Threshold requirements include demonstrating that the State or tribal program (1) is at least as stringent as the Federal program, (2) provides for judicial review of permits that would safeguard public participation in the permitting process; and (3) would ensure that the State and tribes requirements are met before EPA will approve a State or tribe to administer the permitting program. The capacity of States and tribes to properly administer a Good Samaritan permitting program is essential to the effective and efficient clean up of these abandoned mines.

Question 8. What were the major time constraints in executing the AOC for Trout Unlimited in the American Fork clean-up?

Response. Substantial time and resources were devoted by EPA Region 8 and Headquarters, DOJ, and TU to negotiate the terms and conditions of the administrative order on consent related to, among other items, payment of response costs, site access, reservations of rights, covenants not to sue, indemnification, and contribution protection. The AOC required a little over a year to complete, although the majority of the work occurred during the last 6 months. The TU AOC is one of the first times that an administrative order on consent has been used with a nonliable party that is not also a bona fide prospective purchaser. Therefore, a number of legal and policy issues of first impression had to be fully considered and decided.

Question 9. In 2000, the EPA issued a report on abandoned mine sites. This report noted that there are thousands of inactive and/or abandoned mine sites. Many of these sites create significant environmental problems, such as acid drainage, metals contamination of ground and surface water and sediments, sedimentation and cyanide releases. In 2000, 70 of these sites were listed on the National Priorities List. The EPA has determined conclusively that these abandoned mine sites pose significant environmental impacts. Why then is the EPA proposing that the cleanup of these sites be subject to broad regulatory flexibility? The environmental risk posed by these facilities remains the same.

Response. The purpose of the regulatory flexibility under Good Samaritan legislation is to encourage non-labile parties to accelerate the mitigation of the environ-

mental risks posed by these abandoned mines. The overwhelming majority of abandoned hardrock mines are small to medium size sites. The Administration's Good Samaritan legislation is aimed principally toward these small and medium sites. Of the estimated hundreds of thousands of abandoned and inactive hardrock mines sites, only 83 are currently on the NPL. Mines sites on the NPL are not eligible for a Good Samaritan permit except where the permitting authority determines, on a case-by-case basis, that the remediation project is not inconsistent with any other planned clean up at the site and will accelerate environmental improvements.

Question 10. Does the EPA believe that receiving waters from a good samaritan clean-up involving water contamination should be used for drinking water if the SDWA does not apply to such clean-ups?

Response. Drinking water that is provided to consumers by public water systems must meet the requirements of the Safe Drinking Water Act, regardless of the source of drinking water. The Administration's Good Samaritan legislation would not affect any SDWA requirements and would thus have no adverse effect on drinking water. Furthermore, because the legislation will accelerate the clean up of discharges from abandoned mines, we expect any effects on drinking water sources would be positive.

Question 11. Under the permit scheme envisioned by the EPA, it appears that the determination of whether or not there is a responsible party for an abandoned mine is dependent solely on the applicant. Why does the EPA believe that potential good samaritans, some with limited resources, will have the ability to conduct this investigation with any degree of confidence that it is thorough and accurate? Does the EPA envision any type of State or Federal investigation or validation of this investigation occurring as part of the regular permitting process? If so, what could actually be accomplished within the 120 day permit review period prescribed by the Agency's legislation?

Response. The availability of information regarding potentially liable parties will vary depending upon the site. A Good Samaritan applicant will be required to describe, based upon a reasonable inquiry, all persons that may be legally responsible for remediation at the site and certify that the applicant knows of no person who is potentially legally responsible for the remediation of the mine site person who is potentially legally responsible for the remediation of the mine site (excluding the owner of the mine site who did not cause or contribute to the historic mine residue). Information regarding historic property use may be obtained, for example through conducting interviews and obtaining chain of title searches, tax records, and city or regional directory abstracts that would reveal site and operational histories. Much of this data is now automated and can be cost-effectively obtained through third party vendors specializing in providing site historic research data. Any potentially responsible party not identified by this inquiry is, as a practical matter, unlikely to take responsibility for cleanup of the site in the foreseeable future. Thus, even if such a potentially responsible party exists, clean up by the Good Samaritan will accelerate environmental progress. Nonetheless, regardless of the protection afforded the Good Samaritan, all parties responsible for the contamination will remain liable.

Question 12. Does the EPA believe that any improvement in water quality, no matter how small, would justify the issuance of a good samaritan permit?

Response. The EPA believes that improvements to water quality, even if incremental in nature, help move us one step closer to achieving water quality standards and, as such, are preferred over no improvements at all.

Question 13. In your proposal, the EPA provides for cases where a permittee's actions exacerbate the pollution from historic residue as a result of gross negligence or intentional misconduct. Can you identify the baseline conditions that the Agency envisions would be used for such a determination, who measures those conditions, at what point such measurements would be taken in the permit process, where such data would be maintained, and who would conduct follow-up monitoring to determine if historic residue was in fact exacerbated? Can you give an example of what you believe "gross negligence or intentional misconduct" would be under a good samaritan clean-up?

Response. The baseline condition would be the condition of the site at the time the Good Samaritan commences clean up. What constitutes the baseline and the amount of data needed to determine the baseline will vary from site to site and will depend largely upon such site specific factors as the location and size of the mine, its proximity to sensitive receptors, the nature and extent of contamination, and the scope and complexity of the clean up. The permitting authority would be expected to consider these factors, among others, in determining how much baseline and monitoring data is appropriate. Whether a particular action does or does not meet

the standard of care (e.g., gross negligence, intentional misconduct) is a determination that a court will act in good faith to clean up sites in accordance with the Good Samaritans will act in good faith to clean up sites in accordance with the terms of their permits. However, we have included the provision you reference as a “safety valve” to address exceptional circumstances where this does not occur.

Question 14. Does the EPA envision that the life of a permit would include any long-term groundwater monitoring, and if so, would remining be permitted on the permitted site outside the protections of environmental laws for the duration of the life of the permit?

Response. Good Samaritan projects that propose recycling of tailings of waste piles would generally be expected to include baseline and monitoring data as part of the proposed remediation work plan to ensure that site conditions improve. Only those activities identified in a permit application and undertaken pursuant to the approved permit are eligible to receive liability protection; any activities beyond this are subject to all applicable environmental laws. The precondition for issuance of a Good Samaritan permit is environmental improvement relative to the status quo.

Question 15. The EPA’s proposal would allow “temporary suspensions” of work under a good samaritan permit. How long does the EPA envision these lasting, would all work, including remining, be required to stop during this period, and why didn’t the Agency apply a finite time limit for such temporary suspensions.

Response. The legislation allows the permitting authority to approve temporary suspensions of site work due to “adverse weather and other circumstances.” The purpose of this provision is to recognize and allow for acts of God or other circumstances (e.g., labor disputes, work stoppage) that may cause a delay in the project schedule and may merit allowing a delay in clean up. The duration of the temporary suspension would be appropriate to the circumstances, as determined by the permitting authority.

STATEMENT OF SCOTT A. LEWIS, DIRECTOR, ENVIRONMENTAL AND GOVERNMENTAL AFFAIRS ANGLOGOLD ASHANTI NORTH AMERICA INC.

INTRODUCTION

My name is Scott Lewis. I am the Director, Environmental and Governmental Affairs for AngloGold Ashanti North America Inc. Our U.S. offices are located in Denver. One of our subsidiaries operates a large surface mine and processing facility that recovers gold and silver within a 115-year old mining district approximately an hour southwest of Colorado Springs, Colorado. AngloGold Ashanti Ltd., our parent company, presently has a total 21 operations on four continents.

I have been an environmental professional for AngloGold Ashanti and the predecessor companies for over 15 years, with over 23 years of environmental experience in the mining industry and almost six years of formal college training in the environmental sciences. In these capacities I have had an opportunity to examine and evaluate a number of orphaned sites in the west that were created decades before modern environmental laws were enacted. Today, mines of all types are required to comply with strict environmental and reclamation requirements. While many of the orphaned sites are primarily safety hazards, others represent varying degrees of environmental impairment. Some of these sites would be amendable to relatively straight forward reclamation, while others are considerably more complicated and expensive to fix. The sad reality is that most of these sites will likely remain as is without thoughtful Good Samaritan legislation. Orphaned sites that are cleaned-up in the absence of Good Samaritan legislation will probably be limited to those on land owned by and in close proximity to active mining operations. We have received awards for such work in the vicinity of our Colorado operations. Another interesting opportunity that we have discovered with respect to orphaned sites that represent a low risk to human health and the environment is the attractiveness of these areas for historic tourism. For instance, we have supported efforts of a local economic development group to build trails on our land within the historic mining district to enable both tourists and local residents to gain access to view a number of historic buildings, foundations, and headframes. Similar opportunities may arise with certain Good Samaritan projects.

I am here on behalf of the National Mining Association and its member companies to urge this Committee to develop Good Samaritan legislation that will create a framework and incentives for a broad array of persons or parties, ranging from local, State, and Federal agencies to citizen’s groups, non-Governmental Organizations, and private landowners, extending all the way to corporations, partnerships,

joint ventures and the like to voluntarily remediate the environmental problems caused by others at such abandoned hardrock mine lands (“AMLs”).

The Western Governors’ Association, the National Academy of Sciences, and the Center of the American West have all recognized the legal impediments to voluntary clean-ups of AMLs deriving from Federal and State environmental laws, and have urged that these impediments be removed.¹

I would like to summarize five key concepts that must be included for effective Good Samaritan legislation:

1. Mining companies that did not create the environmental problems caused by the AML in question should qualify as “Good Samaritans.” Mining companies have the resources, expertise, experience, and technology to efficiently and appropriately assess the problems present at an AML and to remediate those problems, often in conjunction with undertaking reclamation measures at nearby active mines which the company operates.

2. Individual Good Samaritan projects should be subject to review and authorization by EPA, after adequate opportunity for public notice and comment. Such authorization, which can be granted in the form of a Good Samaritan permit, should specify the scope and details of the Good Samaritan project that will be undertaken. Governmental authorization of such projects will ensure that a mining company or other person cannot misuse the Good Samaritan permit in order to engage in other activities that are not necessary to remediate the site.

3. Perfection or significant improvement should not always be the clean-up standard in every case, particularly where persons will be voluntarily remediating problems for which they have no legal or factual responsibility. Good Samaritan projects should be allowed so long as they will result in an improvement to the environment, even if they will not result in the clean-up of all contaminants at an AML or the attainment of all otherwise applicable environmental standards, such as stringent water quality standards.

4. EPA must be given discretion under any Good Samaritan program to adjust environmental requirements, standards and liabilities arising under State and Federal environmental laws (particularly liability under CERCLA, the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act and others) that could otherwise be applicable and that deter Good Samaritans from undertaking beneficial remedial actions.

5. The types of remedial activities that can be authorized as Good Samaritan activities must include the reprocessing and reuse of ores, minerals, wastes, and materials existing at an AML—even if this may result in the mining company recovering metals from such wastes and making some cost recovery and profit on its Good Samaritan operations. Such processing and reuse of historic mining materials may often be the most efficient and least costly means of cleaning up an AML, with the wastes from any reprocessing or reuse activities being disposed of in accord with current environmental standards. The fact that a mining company could potentially make a profit on such activities would provide an added free market incentive for companies to clean up AMLs, although it should be kept in mind that, given the costs involved and the volatility of commodity prices, it is just as likely that a company would lose money as make a profit. Considering the level of downside risk involved, there must be the possibility for at least some upside potential. The goal should be on remediating the AMLs and if the potential to realize a profit from an AML provides an incentive to achieve that goal then it should be allowed.

BACKGROUND

By way of background, mining activities have taken place in the western States (including on public lands) for the past century and a half. Most of this mining occurred before the advent of modern environmental regulation at the State or Federal level. As a result, many historic mining operations were abandoned without being adequately reclaimed to ensure against potential future environmental damage. Although there are thousands of AMLs located in the western States, no one really knows how many pose significant dangers to our nation’s waterways, soils, groundwater or air. The Western Governors’ Association has estimated that more

¹ See Western Governors’ Association & National Mining Association, *Cleaning Up Abandoned Mines: A Western Partnership* at 8, available at www.westgov.org/wga/publicat/mininggre.pdf; National Research Counsel, *Hardrock Mining on Federal Lands* (1999) at 72, reproduced at <http://www.nap.edu/html/hardrock-fed-land/index.html>; Center of American West, *Cleaning Up Abandoned Hardrock Mines in the West* (2005) at 20-24, available at www.centerwest.org/cawabandonedmines.pdf.

than 80 percent of AMLs do not pose any environmental or safety problems.² The Center of the American West recently concluded that “only a small fraction” of the abandoned mines are causing significant problems for water quality.³ Nonetheless, the Federal land management agencies and the States are generally agreed that at least some percentage of these AMLs are causing or contributing to the impairment of rivers and streams, and potential contamination of air and groundwater resources.

At the vast majority of AMLs, there are no financially viable owners, operators, or other responsible persons whom the Federal Government or the States can pursue in order to fund clean-up of these sites. While the Federal land management agencies can use monies within their budgets to investigate or remediate AMLs located on the public lands, the fact is that those budgets are limited. So are grant monies that can be provided under environmental programs aimed at investigating or remediating pollution, such as Clean Water Act §319 grants or grants under the Brownfields Revitalization Act. Effective Good Samaritan legislation can, we believe, provide incentives for a diverse assemblage of persons or parties, ranging from local, State, and Federal Agencies to citizen’s groups, non-Governmental Organizations, and private landowners, extending all the way to corporations, partnerships, and joint ventures, to partially fill this gap and help remediate some AMLs posing environmental dangers.

ELEMENTS OF EFFECTIVE GOOD SAMARITAN LEGISLATION

Efforts to enact Good Samaritan legislation have been ongoing in the Congress for the past decade. It has become clear to NMA and its members that, in order to be effective, Good Samaritan legislation must include a number of elements.

1. Mining companies must be allowed to qualify as Good Samaritans. The NMA supports the concept that to be a Good Samaritan, an entity must not have caused the environmental pollution at issue. That does not mean, however, that all mining companies should automatically be excluded from the universe of persons who can qualify as Good Samaritans. The majority of AMLs were created decades before modern environmental laws were enacted. There is simply no reason to preclude an existing company that is not liable or somehow responsible for creating the orphaned site from being a Good Samaritan, simply because it is a mining company.

To the contrary, there are good reasons why mining companies should be allowed to qualify as Good Samaritans. Mining companies have

the resources, know-how, and technology to properly assess environmental dangers posed by an AML, and to efficiently remediate such sites. Indeed, to the extent that AMLs are located near active mining operations, a mining company would be in the best position to efficiently use equipment and personnel from its current operations, including its current reclamation operations, to remediate or reclaim a nearby AML for which it never had been responsible.

In fact, the mining industry has been front and center in trying to deal responsibly with AMLs. The National Mining Association, in cooperation with the Western Governors’ Association, initiated the Abandoned Mine Land Initiative (“AMLI”). The AMLI was the first cooperative effort between industry and government to address AML issues, and focuses on disseminating data on the scope of the AML problem, technologies that can be used to address AML sites, and legal impediments to voluntary cleanup of AMLs. NMA, along with the Office of Surface Mining (“OSM”) and the Interstate Mining Compact Commission representing the States also co-founded the Acid Drainage Technology Initiative (“ADTI”). The purpose of the ADTI is to develop and disseminate information about cost-effective and practical methods and technologies to manage drainage from active and abandoned mining and processing operations. Industry has also already spent tens of millions of dollars to clean up numerous AMLs throughout the West. Some of these efforts are documented in a study published in 1998 by the National Mining Association entitled “Reclaiming Inactive and Abandoned Mine Lands—What Really is Happening”.⁴ The NMA study presents compelling evidence that given the right opportunity, the mining industry can play a significant role in improving the environment at abandoned and inactive mines.

Unfortunately, some Good Samaritan bills introduced over the past several years have proposed to exclude mining companies from participation as Good Samaritans.

²Western Governors’ Association & National Mining Association, *Cleaning Up Abandoned Mines: A Western Partnership* at 5, available at www.westgov.org/wga/publicat/miningre.pdf.

³Center of the American West, *Cleaning Up Abandoned Hardrock Mines in the West* (2005) at 31.

⁴Reclaiming Inactive and Abandoned Mine Lands—What Really is Happening, Struhsacker, D.W., and Todd, J.W., prepared for the National Mining Association, 1998.

There seems to be a view among some that, merely by having engaged in mining at other sites, the mining industry is somehow “morally culpable” for the pollution caused at the AML by someone else. That simply makes no sense.

2. EPA Must Authorize Good Samaritan Projects. Good Samaritan projects should be approved by EPA, after prior notice to and comment from the public. Such approval should be given only if EPA concludes that the project will result in environmental benefits. EPA should also be allowed to impose conditions (such as monitoring requirements and financial assurance requirements) on the Good Samaritan as a condition of its going forward with its project. Approval of the project should be embodied in a Good Samaritan permit.

EPA must be given discretion, on a case by case basis, to relax the regulatory and/or liability provisions of Federal and State environmental law that might otherwise apply to the Good Samaritan. The main obstacle to mining companies and others to conduct voluntary clean-ups at AMLs are the potential liabilities and requirements deriving from Federal and State environmental laws. A Good Samaritan that begins to clean up, or even investigate, an AML runs the risk of being an “operator” under CERCLA, and could become liable for cleaning-up all pollution at the site to strict Superfund standards. A Good Samaritan also runs the risk of having to comply in perpetuity with all Clean Water Act requirements for any discharges from the site, including stringent effluent limitations and water quality standards. These are liabilities and regulatory responsibilities that mining companies and others are unlikely to voluntarily accept, particularly with respect to AMLs that are posing significant environmental problems. AngloGold Ashanti has, for instance, in the past considered taking actions to voluntarily address pollution at a certain inactive site near its operation in Colorado, but ultimately declined to do so because of the potential liability concerns under CERCLA, the Clean Water Act, the Clean Air Act, and possibly other environmental laws.

Many have argued that the EPA’s discretion to relax regulatory requirements should be limited to the Clean Water Act and CERCLA. A Good Samaritan could easily find itself acquiring liability under other environmental acts as well. While NGO’s may not be particularly worried about being sued under these other laws out of professional courtesy to each other, a mining company has no such expectation. In order for the mining industry to participate in Good Samaritan efforts, there needs to be assurance that the mining company will not be subject to frivolous suits after the fact for having done exactly what was permitted by the EPA.

To provide an incentive for mining companies and others to undertake Good Samaritan efforts, the legislation must allow the permit issuer, on a case-by-case basis, to relax the liability provisions and regulatory standards that might otherwise apply to the Good Samaritan project, so long as: (1) the project would result in some environmental benefit; and (2) the project would not go forward absent the waiver of such provisions and standards. As discussed previously, the Western Governors’ Association, the National Academy of Sciences, and the Center of American West have all urged that certain environmental standards and liabilities otherwise applicable to a Good Samaritan be waived or relaxed, in order to encourage Good Samaritan clean-ups.

3. Good Samaritan Legislation must not Unduly Narrow the Types of Activities that Constitute Legitimate Remediation. Abandoned hardrock mines pose a variety of environmental and safety problems throughout the West. They also call for a variety of clean-up measures. At some sites, the physical removal of wastes and their disposal off-site may be the appropriate solution. At other sites, it may be a matter of diverting stormwater or drainage away from wastes and materials that are highly mineralized. And at yet still other sites, the best, most efficient, and least costly way to partially or wholly remediate the environment may be to collect the various wastes and materials located at the site, to then process those wastes and materials to remove any valuable minerals contained in them, and then to dispose of the wastes from the reprocessing operation in an environmentally-sound manner.

AMLs are located in highly mineralized areas—that is why mining occurred at those sites in the first place. Often, materials and wastes abandoned by historic mining operations have quantities of a desired metal (such as gold, silver, zinc, or copper) that can be recovered with modern mining technology. Allowing the mining company—particularly a company with operations nearby to an AML—to process such materials and wastes as part of the Good Samaritan project would provide a financial incentive for mining companies to remediate such sites.

We recognize that some groups are opposed to allowing mining companies to ever make a profit through Good Samaritan activities. Some groups have even argued that a mining company might seek to misuse Good Samaritan legislation as a way to engage in new mining, beneficiation and mineral processing operations without complying with the environmental laws that apply to such operations.

Such concerns are misplaced. NMA member companies have no plans to utilize Good Samaritan legislation to undermine application of all environmental laws and regulations to legitimate mining projects. Nor could they. Under our proposal, a Good Samaritan could not proceed without a permit from EPA. Prior to issuing a permit, EPA will certainly be aware—and if they are not, the public would make them aware—if a given project is in fact a stand-alone economically viable project that the mining company would undertake even absent Good Samaritan protections. The permit-issuer will also know whether the mining company's proposed project is an operation that will be remediating existing pollution, as opposed to merely a for-profit operation that is not cleaning up any existing environmental dangers.

4. We also disagree with the notion that a mining company should never be in a position to make a potential profit from clean-up activities. Unlike governmental entities and some NGOs who might undertake Good Samaritan activities, a mining company will be spending its own funds otherwise potentially targeted to going to its shareholders (not grants obtained from EPA or States) to undertake remediation activities. If it turns out that the price of a metal recovered through remediation activities is such that the mining company has made a profit, this does not detract from the fact that, without spending public funds, the mining company has in fact remediated an environmental danger. Moreover, the price of any given metal could as well go down as go up, leaving the mining company with no profit. In fact, a number of potential complications or unexpected conditions could arise during clean-up and rapidly change the economics. Considering the level of downside risk involved, there must be the possibility for at least some upside potential.

CONCLUSION

Legislation that embodies the concepts discussed above will provide incentives to mining companies and other entities to go forward and voluntarily remediate AMLs, while fully protecting the environment and the interests of the public. We would commend to the Committee's attention

S. 1848, the Cleanup of Inactive and Abandoned Mines Act introduced by Senators Wayne Allard (R-Col.) and Ken Salazar (D-Col.) as well as S. 2780 the Good Samaritan Clean Watershed Act introduced by Chairman Jim Inhofe (R-Okla.) on behalf of the Administration. We believe that these bills represent a good starting point for those elements necessary to remove existing legal impediments that deter mining companies and others from undertaking investigations and remediation of AMLs. We also believe that these bills fully protect the public interest by requiring EPA to sign off on any Good Samaritan permit, and by only allowing such permits in situations where the environment will be significantly benefited.

I would be happy to answer any questions that members of this committee may have.

RESPONSES BY SCOTT A. LEWIS TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. Can you please describe your background and current position?

Response. I have been an environmental professional for AngloGold Ashanti and the predecessor companies for over 15 years, with more than 23 years of environmental experience in the mining industry and almost 6 years of formal college training in the environmental sciences. Mined land reclamation planning, design and evaluation have been an important part of my responsibilities as well as being an area of great interest to me throughout my professional career as well as during college. It is those skills combined with my extensive experience in environmental permitting, compliance, and monitoring that have provided the insights and background required to recognize important elements of any Good Samaritan legislation.

Question 2. Further, can you respond to Mr. Harwood's description of current mining practices, specifically, were those same practices used in the hardrock mines abandoned before modern environmental laws and are all sites as complicated as those described by Mr. Harwood?

Response. Contemporary mining involves sophisticated technologies to identify, excavate, process and extract metals from ore that did not exist at mines abandoned before modern environmental laws were enacted. Global Position System (GPS) technologies, automatic laser leveling devices, dispatch systems, communications networks, sophisticated containment systems, remote monitoring and control instrumentation, and other modern technologies are extensively utilized in the hardrock mining industry today to assure compliance with applicable environmental permits, regulations, and laws. As indicated in my testimony, there is a full spectrum of complexities associated with remediation of abandoned sites. Some are safety hazards or aesthetic impairments that can be rectified with relatively simple methods.

Others are dry sites requiring contouring, covering with soil, revegetation, and perhaps other straight forward stabilization techniques. Abandoned sites involving water discharges or encroaching upon streams tend to be the most difficult and complex to remediate. These are the sites that often require a higher level of engineering design and planning to successfully ameliorate.

Question 3. Mr. Lewis, can you explain to the Committee how a prohibition on a landowner from being a Good Samaritan will affect the willingness of mining companies, and other potential Good Samaritans, to clean up abandoned hardrock mines?

Response. A prohibition on landowners from being a Good Samaritan could actually preclude mining companies and other Good Samaritans from cleaning up abandoned sites. Mining companies and other potential Good Samaritans are commonly "passive" landowners that have purchased, acquired, or held onto a property with an abandoned site. Oftentimes, the mining company or other potential Good Samaritan never caused or contributed to conditions at, or otherwise affected, the abandoned site and under these circumstances should not be prohibited from remediating that site. Moreover, to ensure control of a remediation site and to meet permit conditions, Good Samaritan mining companies may feel the necessity to acquire ownership interest in abandoned sites even if they have not previously owned them.

Question 4. Mr. Lewis, do you have any graphics or pictures showing some mine sites that have been or could be remediated?

Response. Attached as Figure 1 is an example of the types of sites that are being voluntarily cleaned up in cooperation with State agencies in the absence of Good Samaritan legislation. Figure 2 shows the same area after the building, carbon columns, and associated debris were removed. Another example of a recently completed voluntary effort is provided in Figure 3, where additional backfilling of a surface mine was conducted. As shown in Figure 4, this enabled the area to be contoured and blended into the surrounding terrain. Voluntary cleanup efforts of this nature are typically relatively straightforward with a low risk of future exposure to liability issues. Many of these low risk sites are simply visual impairments on the landscape. Larger sites, as shown in Figure 5 and Figure 6, with a greater potential for environmental damage and possible liability implications will likely be avoided by the mining industry and other non-governmental Good Samaritans in the absence of meaningful legislation.

Question 5. You mentioned in your testimony that you believe a State must have a "robust" program prior to receiving any authority to issue a Good Samaritan permit. Can you elaborate on what you believe are the basic capabilities a State should be able to demonstrate prior to receiving authority to execute a Good Samaritan permit program?

Response. States with delegated Clean Water Act and solid waste management programs that are functioning effectively would be good candidates for receiving authority to execute a Good Samaritan permit program. The existence of an effective Voluntary Cleanup Program like the one that exists within the Colorado Department of Public Health and Environment would be another good indicator that a State is capable of administering a Good Samaritan program.

Please let me know if you have additional questions or comments. Again, I appreciate the opportunity to support legislation that will enable the cleanup of abandoned sites that blemish the environment.



Figure 1. Voluntary Clean-Up Before Facility Removal

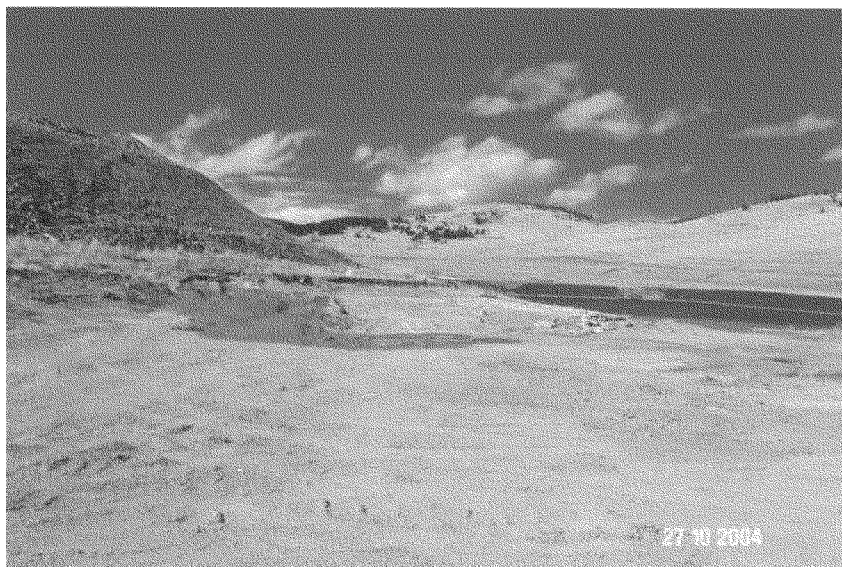


Figure 2. Voluntary Clean-Up After Facility Removal



Figure 3. Enhanced Reclamation During Operations



Figure 4. Enhanced Reclamation After Recontouring



Figure 5. Potential Good Samaritan Site



Figure 6. Aerial View of Potential Good Samaritan Site

STATEMENT OF VELMA M. SMITH, SENIOR POLICY ASSOCIATE, NATIONAL ENVIRONMENTAL TRUST

On behalf of the National Environmental Trust, I thank the Committee for this opportunity to testify on the important issue of cleaning up abandoned mine sites.

The notice of this hearing is poses the question before the Committee as “whether potential liability deters abandoned hard rock mine cleanup,” and I know that the committee will hear testimony about the role of environmental laws in discouraging mine cleanups. I would begin, however, by asking you not to be too quick to narrow your focus to perceptions of liability as the primary culprit behind lingering problems. Rather, we urge you to consider other factors—factors that loom even larger in the challenge to clean up abandoned mining sites.

Consider, first, the sheer size of the universe of abandoned mine sites and the diversity of that universe—from relatively modest areas of waste rock or small scale tailings piles to vast mining complexes. Consider also that the vast universe of abandoned mine sites keeps growing larger, even as we sit here today.

In addition, though I realize you may tell me that I’m in the wrong hearing room, we would argue that the single most compelling barrier is not regulatory but financial: Mining sites are not being cleaned up fast enough because neither the industry nor the government is contributing sufficient money to the task. The Federal budget is tight, but to really address this problem, you must find a way to bring more resources to a serious cleanup effort.

We would also remind you that while fear of liability may, in some cases, give pause to non-mining parties who would otherwise venture into mine cleanup, that pause, in and of itself, may not be a bad thing when it comes to cleaning up these difficult messes. Mining sites can be not only difficult to diagnose but also enormously difficult to cure. Entered upon without solid information, with poor design or with faulty execution, cleanups can and have gone terribly wrong.

Finally, we urge you to consider that liability for both previous operators and land owners is an important factor that has been driving many cleanups—cleanups that are happening at listed Superfund sites like the Iron Mountain Mine in California and the Captain Jack Mill in Colorado and at non-listed sites like Yerington, Nevada, Bingham Canyon, Utah and the Copper Basin Mining District of Tennessee. If Congress reaches too broadly to encourage the cleanup of the most easily remedied mine sites, it will put at risk the current liability leverage that leads to cleanup of enormously difficult and expensive mining messes. And if a Congressional response brings remining operations into the definition of “Good Samaritan” actions, you may end up creating the exception to swallow the rule, removing normal, for-profit operations, which nearly always take place in old mining districts, from existing regulatory requirements.

So please, don’t look simply through the narrow prism of regulatory hurdles for cleaning up a few of the many mining problems. Look broadly at the full scope of the problem and recast your topic as “Solutions to Mining Contamination.” In that context, figure out not only how to drive more of the easier cleanups but also how to stop adding to the problem and how to address the large and seemingly intractable mining messes.

Hardrock mining is enjoying a boom. Metals prices are breaking records; exploration fever has once again hit the West; and even old operations that seemed like economic losers are attracting new attention. So now, while hardrock mining is flush, is the time to engage the industry in cleaning up its past and current operations.

A BIG PROBLEM

In 1993 the Mineral Policy Center, now known as Earthworks, assembled data on hardrock abandoned mines from State and Federal agencies, private contractors and associations.¹ From this effort, they estimated nearly 557,000 abandoned hardrock mines in 32 States. Their numbers, though perhaps considered high at the time, are generally in line with other best judgments—including estimates from the Western Governors’ Association, the Bureau of Land Management and the Environmental Protection Agency.

A compilation of abandoned mine land data assembled by the Western Governors Association, for example, shows counts ranging from 150 abandoned mines in North Dakota to 100,000 in Arizona.² The WGA report cautions that different States use different definitions of abandoned mines and count mines and mine sites in different

¹Mineral Policy Center, Burden of Gilt, June 1993.

²Western Governors’ Association, Abandoned Hardrock & Noncoal Mines in the West: A Partnership Report, 1998 available online at <http://www.westgov.org/wga/publicat/minigre.pdf>.

ways. It also clearly acknowledges that existing inventories are incomplete. The report's numbers for 13 States total more than a quarter of a million dollars.

Estimates from Federal agencies are high as well. BLM, for example, places the number of abandoned mines on lands that it administers at a low of 100,000 or a high topping half a million.³ About 5 percent of those sites—possibly more than 25,000 mines—have caused or could cause environmental damage, according to the Bureau. The Forest Service estimates that about 5 percent of an estimated 25,000 to 35,000 abandoned mines on its lands will require cleanup under Superfund authorities; another 12 percent of those sites are expected to require water-related cleanup using authorities other than Superfund. Excluding lands in Alaska and California, the National Park Service estimates the number of abandoned sites on its lands at 2,500.

A VARIED UNIVERSE, IN THE WEST AND BEYOND

What types of sites are these and what types of remediation is called for? The answers run the gamut from small problems to large complexes. And though much of the focus in this discussion is on the West, where the number of sites is huge, there are mine messes in other parts of the country as well.

In some instances, the highest priority problems may be open shafts and adits that pose physical hazards to people and wildlife. These must be plugged, filled, secured or closed off.

- A motorcyclist was killed in 2003, for example, when he rode his bike over a tailings pile directly into an open mine shaft in the Red Mountain area of California.

- In Nevada, the State reports that people have died swimming in open pit lakes and suffocated after entering open mine shafts.

- Wyoming has reports of mine subsidence affecting an interstate highway, a public water line and a housing development.

In Alaska, 500 feet of dangerous high wall was reported in a heavily used area near Juneau, and open portals and shafts found within a few hundred feet of a public use cabin in a State park

- In Oklahoma, the community has learned that a third of the small town's 400 houses sit atop or near a huge mining cavern with a probability of collapse.⁴

- In California alone, the Office of Mine Reclamation has stated that 84 percent of the State's abandoned mines—that's nearly 33,000 mines—present physical hazards.⁵

In other cases, the threats are from elevated levels of pollutants in mine wastes, contaminated soils, blowing tailings and abandoned ponds of cyanide solutions or other wastewaters. Abandoned mines, as the U.S. Geological Survey reports, may degrade water quality and aquatic resources with releases of acid drainage, seepage from tailings piles, streambank erosion and storm runoff.

Overall, the government estimates that old mines have contaminated about 40 percent of all Western river headwaters, and scientists have reported loss of fish populations and deterioration of fish health as well as groundwater contamination, including contamination of drinking water wells, all associated with continuing pollution from abandoned or inactive mines.

- In Arkansas, for example, a 1996 report attributed problems in nearly 200 miles of streams to the impacts of old lead, zinc and coal mines.

- In Oklahoma, a report from that same year identified 23 lakes and streams adversely impacted from past and then present mining operations.

- In Utah an estimated 300 uranium mines have moderate to high levels of radiation.

- A 1999 Nevada report on abandoned mines notes problems with breached tailings dams spreading heavy metals and acidic wastewaters, elevated levels of contaminants including mercury, lead, cyanide and arsenic from abandoned mines, and mining-related threats to local agricultural activities and the habitat of the endangered Desert Tortoise and the Northwest Valley Fly Catcher.

³U.S. EPA, Office of Solid Waste and Emergency Response, *Cleaning Up the Nation's Sites: Markets and Technology Trends*, September 2004.

⁴Omer Gilham, "Calls for Tar Creek buyouts intensify: A Corps Engineers report brings home to residents the dangers of possible cave-ins," *Tulsa World*, February 2, 2006.

⁵California Department of Conservation, Office of Mine Reclamation, *Abandoned Mine Lands Unit, California's Abandoned Mines: A Report on Magnitude and Scope of the Issue on the State*, June 2000.

- In March of 2005, a “flash report” by the Department of Interior’s Office of Inspector General reported dangerous levels of arsenic and contaminated groundwater in a growing area of Pima County, AZ.

Solutions to these problems will run the gamut as well, ranging from removing small piles of waste rock or tailings from a floodplain or reseeding a disturbed area, to removing transformers, machinery and buildings, stabilizing large waste piles, re-routing water flows, building new retention ponds, reinforcing old dams, managing toxic lagoons, removing or covering contaminated soils.

OLD AND NEW CONTRIBUTIONS TO THE PROBLEM

Much of the discussion of abandoned mines brings to mind the grizzled prospector with mule and pick axe, faded sepia-tone images and thoughts of the Wild West. But before you assume that the nation’s abandoned mine messes all date from the 19th century, well before modern environmental regulation, consider this.

Modern-day mines are often located in historic mining areas, where mining wastes have been deposited in stream beds and other fragile areas, and where acid drainage still flows from old mine workings. In some cases, this makes it difficult to say with certainty just how much of a pollution problem is linked solely to recent activity.

In many instances, however, it is clear that modern operations not only worsen existing problems but also create new problems. Modern mine operations can cover large acreages and employ enormous earth-moving equipment. Frequently they use large amounts of toxic chemicals, and collectively they release more toxics into the environment than any other industry. Their impact on the environment is enormous—and not always according to plan.

- Perhaps the most notorious example of a modern mine gone wrong is from Colorado. The Summitville gold mine opened in 1986 and was abandoned in 1992. It became one of the nation’s most expensive Superfund cleanup sites, while the Canadian business tycoon behind the venture moved his schemes and his assets overseas. The Summitville area had a long history of mining, but the acid and cyanide drainage that killed miles of the Alamosa River were clearly connected to this faulty heap leach mine operation.

- In 1996, Canyon Resources boasted that reclamation of the northern section of its Kendall heap-leach operation was 90 percent complete, and they predicted that they would rinse out the “last traces of cyanide” through the next year. Reclamation of the mine that opened in the late 1980s is still incomplete today, and according to Montana news reports, the mining company is resisting State calls for more extensive cleanup. Canyon extracted gold and silver from the ground from 1989 until 1995. Treating the mine-contaminated water, says the State, will have to continue indefinitely.

- Near Riddle, Oregon, a now-defunct Canadian company ran the Formosa copper and zinc mine between 1990 and 1993. The company abandoned the 100-acre property in 1994, and by 1997 the system they had installed to handle acid mine drainage was no longer working. As is the case with many other mines—some reclamation was accomplished by the company before its departure, but those efforts did not stop copper, cadmium, lead and zinc from polluting some 18 miles of a nearby stream. According to the State, the contamination has “. . . severely harmed the ecosystem of these streams, including protected Coho and Steelhead salmon populations.”

- Idaho’s Grouse Creek mine began production in 1994, and its tailings impoundment, declared “state-of-the-art” when it was built, included clay and plastic liners and, according to a company spokesperson, exceeded permit requirements. But Hecla’s gold find wasn’t as rich as anticipated, and the company ran into processing problems. In July of 1995, EPA cited this mine near the Frank Church Wilderness for violations of cyanide, mercury and total suspended solids water quality standards. The problem: leakage from the impoundment liner. A month later, it was the pipeline carrying slurried mill wastes that caused more violations. In 1996, according to the U.S. Forest Service, another 19,000 gallon spill occurred in the mill area. The mine closed in 1997 and by 1999 “pervasive levels” of cyanide were found in Jordan Creek.

I could go on. But suffice it to say that mining’s mistakes have and will always be characterized by the mining industry as its misguided past. In the 1970’s, history included the turn-of-the-century gold rush mines as well as mine operations from the 1940s and 50s. Now, it appears, that mines from the 1960s, 70s and 80s have taken their place in “history” as well. By 2020, will the mines of today be lumped in with those “turn-of-the-century” mines that bear all the responsibility for pressing pollution problems?

From Brewer Gold in South Carolina to the Battle Mountain mine in Nevada, from Zortman Landusky in Montana to Red Dog in Alaska, modern mines have given us ample evidence of continuing pollution problems. The facts on the ground suggest that regulation—even today—is sorely lacking in substance or enforcement, or perhaps both. And in too many instances mining companies seek the shelter of bankruptcy courts before they meet their reclamation and cleanup obligations.

We agree with the National Center for Manufacturing Sciences: “[T]he mining sector is, from an environmental standpoint, the least regulated of any comparable industry sector.” (Emphasis in original.) The Center goes on to state that the lack of regulation for mining “is no chance oversight,” but actually the result of a specific legislative loophole. Their reference is to the so-called Beville amendment that shields the mining and mineral processing industry from Federal hazardous waste rules. This hard-fought and carefully protected special deal for mine-related wastes keeps EPA from regulating wastes derived from extraction and beneficiation of minerals, even if they met established criteria for designating wastes as “hazardous.”

These wastes are frequently the crux of the problem at abandoned mine sites.

EPA issued a National Hardrock Mining Framework in September of 1997, with the specific aim of improving environmental protection with coordination and collaboration across programs and agencies, but in August of 2003, the EPA Inspector General declared that it “found no evidence that the Framework contributed to environmental improvements or protections at specific hardrock mining sites.” The IG noted that the Framework’s goal of protecting human health and the environment at hardrock mining sites was hampered by EPA’s lack of direct regulatory authority.

In addition, as the Government Accountability Office made so clear in its August 2005 report,⁶ the Federal Government’s cleanup burden grows as businesses reorganize and restructure to limit their future expenditures for environmental cleanups. GAO points out that “EPA has not yet implemented a 1980 statutory mandate under Superfund to require businesses handling hazardous substances to maintain financial assurances” for environmental cleanups.

Only 2 months earlier, the GAO also concluded that BLM’s failure to obtain proper financial assurances from mining operations on Federal lands has left a gap of some \$56.4 million in unfunded reclamation costs.⁷ That number, by the way, covers only 48 hardrock mines that had ceased operations by the time the study was undertaken. It doesn’t cover mines that are still operating.

A MATTER OF MONEY, LOTS AND LOTS OF MONEY

Because abandoned mine inventories have not been completed—and indeed may never be—it is difficult, if not impossible, to offer any certainty about the likely costs of addressing these problems. Some sobering numbers have been put forward, however.

Earthworks, working with experienced mining engineers, has predicted that approximately 15,000 mines would require cleanup of water-related problems. The cleanup tab for the full universe of abandoned mine sites, according to the group, may run as high as \$72 billion.

In January 2003, the EPA Inspector General reported that 87 sites classified as abandoned hardrock mines or mine-related sites had been placed on the Superfund National Priorities List (NPL).⁸ At the time of the IG’s report, EPA’s rough estimate of cleanup costs for these specific sites was about \$2 billion. Since then, more mine-related sites have been added to the list—and many more are possible candidates.

Looking beyond these few sites, EPA’s Superfund office has predicted that somewhere between 7,700 and 31,000 mines will require cleanup—either under Superfund or under another program.⁹ An EPA report on the cleanup technologies, notes that the need for cleanup grows as the public looks increasingly toward rural areas for recreation and as some old mining areas are developed for primary housing or second homes. Data from several sources cited in this report indicate a range of cleanup cost running from \$20 to \$54 billion, with about \$3.5 billion of that related to Superfund designated sites.

⁶U.S. Government Accountability Office, “Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations,” August 2005.

⁷U.S. Government Accountability Office, “Hardrock Mining:BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs”, June 2005.

⁸Office of the Inspector General, U.S. EPA, Nationwide Identification of Hardrock Mining Sites, March 31, 2004, Report 2004-P-00005.

⁹U.S. EPA, Office of Solid Waste and Emergency Response, Cleaning Up the Nation’s Waste Sites: Markets and Technology Trends, September 2004.

The Bureau of Land Management estimates that cleanup of abandoned mine sites in its jurisdiction may cost as much as \$35 billion.¹⁰ Damage on U.S. Forest Service land alone would cost \$4.7 billion to fix.¹¹

How do expenditures match up against these figures? According to EPA¹², the total Federal, State and private party outlays for mining site remediation have been averaging about \$100 million to \$150 million per year.

At this rate of expenditure, notes the report, only 8 to 20 percent of all the cleanup work will be completed over the next 3 decades.

NO EASY SOLUTIONS

And now for the bad news. Cleaning up mining problems can be, not only expensive, but also technically challenging.

The case of the Penn Mine in California—the case that initially prompted the call to loosen Clean Water Act requirements for mining cleanups—makes the point.

The abandoned old copper mine in the Sierra Nevada Mountains was producing acid mine drainage flowing into the Mokelumne River watershed, the same watershed that provides drinking water to the East Bay Municipal Utility District. The water utility, with the best of intentions, took on what it apparently thought would be a modest project to protect downstream fish and its water source. The Utility constructed a small dam, diversion facilities and retention ponds. Unfortunately, however, the results fell short.

The ponds were not sized properly and maintenance of the structures was reportedly minimal. So the facilities—though they solved some problems—actually created additional problems at certain times of year. People in the community were upset and took legal action to compel more cleanup. The Utility found itself with a long-term cleanup job that it had not initially anticipated.

Was this particular “Good Samaritan” particularly inept or sloppy? Probably not.

- In 1997, a mining company in Arizona was attempting to cover a tailings impoundment with waste rock. The impoundment failed and tailings and debris moved into Pinto Creek.¹³

- In Montana, a mining company reconstructed a tailings dam that had failed. Today, the State, the Forest Service, the EPA and the community are searching for answers and money to fix this previous “fix” that is now leaking and considered unstable. The company involved in this case and dozens of others is in bankruptcy.

- A host of engineers tried to address the problems of acid drainage running through the Oklahoma lead mining district some 20 years ago. They apparently managed to keep acidic waters from returning to the surface through unplugged boreholes, and they thought they got it right with water diversions and “rerouting.” But just recently monitoring has shown high levels of lead and arsenic headed toward Oklahoma’s Grand Lake.

In other words, mining problems can be a bear to solve.

An adit may be plugged, only to blow out as water pressure increases. New seeps from a closed tunnel may open up, not at the original point of discharge, but in other unexpected areas.¹⁴ Constructed wetlands may function for a time but cease their cleaning function when they reach a point of saturation. Acid-generating rock may be encountered where none was anticipated; a season of drought, can pull groundwater into a pit lake faster than expected; storms or heavy snowmelt overwhelm the capacity of detention ponds.

These examples are offered, not to suggest that nothing can be done to abate the problems of mining, but only to caution against a “solution” that tries to fast-track decisions that should not be fast-tracked, that skims over the need for critical baseline data, that imposes unreasonable deadlines on those reviewing cleanup plans, or that skimps on oversight.

These real world lessons also remind us that time is an element to be reckoned with in mine cleanup efforts. In many cases, mining cleanups will have to be viewed as holding actions, and responsibility for long-term management must fall to someone, if not to the party that initiates cleanup. According to EPA, nearly 60 percent of the mining sites listed on the Superfund NPL are expected to require from 40

¹⁰ Ibid.

¹¹ Robert McClure and Andrew Schneider, “More than a century of mining has left the West deeply scarred,” *The Seattle Post-Intelligencer*, June 12, 2001.

¹² U.S. EPA, Office of Solid Waste and Emergency Response, *Cleaning Up the Nation’s Waste Site: Markets and Technology Trends*, September 2004.

¹³ U.S. EPA, Region 9, “Total Maximum Daily Load for Copper in Pinto Creek, Arizona,” April 2001.

¹⁴ See, for example, “The Earth’s Open Wounds: Abandoned and Orphaned Mines,” *Environmental Health Perspectives*, Volume 111, Number 3, March 2003.

years to “perpetuity” for cleanup operations.¹⁵ Many other mine sites will require long-term maintenance and vigilance in similar time frames.

These examples also make it clear that a directive to “do no harm” may be difficult to follow. Because things can go wrong, despite the best of intentions, we think it would be more than reasonable for any provisions that encourage “Good Samaritan” actions to also ensure against the unforeseen. Financial assurance would add an upfront cost to cleanup projects, but that cost would be a small fraction of a project’s overall cost. It could be subsidized by a bond pool or special trust, and its existence would help to ensure that the cleanup projects undertaken today do not become tomorrow’s emergency removals, that what are anticipated to be small projects do not end up draining the government’s resources for response and remediation.

LIABILITY PLAYS A USEFUL ROLE

It is, no doubt, frustrating to hear of cases in which a willing Samaritan hesitates to act because he doesn’t want to become embroiled in Clean Water Act permitting, is wary of a citizen suit or fears the reach of Superfund liability. But consider that there is another side to that coin. Liability, in many instances, is driving cleanups.

In Nevada, a 3,500-acre copper mine has long been known to have unreclaimed tailings and other problems, but only in the last few years has the surrounding community learned that the old mine site has serious problems of radioactive contamination. The course has been difficult and it will take many years to clean the site, but progress on the site is being made, because the property owner is compelled by Superfund liability to proceed.

In Utah, the Kennecott case is instructive. It has been heralded as a “voluntary” effort to clean up massive amounts of groundwater, but the more than 20-year cleanup was “voluntary” only in the sense that Kennecott negotiated out and agreed to a cleanup plan—after complaints were filed by regulatory agencies. In 1986, the State Health Department, acting as Trustee of Natural Resources as provided for under the Superfund law, filed a complaint against Kennecott Utah Copper Corporation for groundwater contamination. Superfund liability, again, drove cleanup.

In the Copper Basin of Tennessee, at the Rio Tinto mine in Nevada and in dozens of other cases, cleanup and stabilization happens, not in spite of liability, but because of it.

CONGRESS CAN ACT

The problems of abandoned mines are large and difficult, and Congress should be wary of simple solutions. Any effort to “encourage” cleanups with exemptions from Clean Water Act obligations, or worse still, from Superfund liability, is fraught with difficulty.

If a “Good Samaritan” is relieved of achieving Clean Water Act standards, what standards must they achieve? Over what time frame? If a remedy fails, who bears responsibility? Who can be called upon for additional work or for maintaining treatment systems and reclamation work? Should there be a size or “class” limit on exempted projects—should the line be drawn at revegetating or removing waste piles? Should “Good Samaritans” tackle major mining complexes? What data should they have in hand to assure that they understand critical aspects of water flow and geochemistry?

It would be nice to think that there’s a responsible way to answer these questions and make these distinctions in law or by rule, but there may not be at this time. Useful generalities are hard to come by, and the wrong generalities could take us backwards rather than forwards in the quest for cleanup.

So what to do instead? We have a few recommendations.

1. Endorse EPA’s efforts to use a model consent agreement to promote “Good Samaritan” projects, and draw on important experience in mining cleanups to craft, not a broad exemption, but a major demonstration project. Engage one or more States along with all the relevant Federal agencies, allowing interested States to look on a watershed basis for those areas where they believe that modest, voluntary efforts could bring lasting improvements in water quality. One option would be to do this in the context of TMDL or Total Maximum Daily Load reviews for particular watersheds. A watershed focus can assure that the broader context is kept in mind and that individual projects do not unintentionally improve water quality for one parameter or in one location only to undermine it elsewhere. In addition, several projects within a single watershed may be able to share important baseline data and technical information. Within this context, and only within this context, allow for

¹⁵ Ibid.

alternatives to the traditional National Pollutant Discharge Elimination System permits. Provide funding to get the demonstration program going, including funds to support a team of mining reclamation experts that will act in an advisory capacity to all chosen projects and to underwrite financial assurances for dealing with unforeseen problems. Assure that all projects have appropriate oversight, and require a report—say on a two-to-three-year time-frame—about successes and problems with the projects chosen. At that point, renew the effort to answer some of the questions I have just posed and, if necessary, amend the Clean Water Act to allow for new mining cleanup best practices by “Good Samaritans.”

2. At the same time, look to the mining industry to help fund cleanup of abandoned mines, following the model set out for coal mine restoration under the Surface Mining Reclamation and Control Act (SMCRA). Congress should impose a tonnage fee on all metals mined from private and public land to fund a serious, long-term remediation program. Use the resulting trust fund to pay for cleanup at old sites where responsible, solvent entities cannot be found.

3. In addition, boost Federal funding for cleanups and provide for coordination and sharing of funds among States, BLM, Forest Service, EPA and other appropriate agencies. By encouraging Federal agencies and the States to do joint planning and to pool resources, the best expertise and capacities of many parties can be leveraged for the maximum results.

4. Engage States and Federal agencies in developing adequate inventories of sites and, perhaps more importantly, selecting priority areas for voluntary cleanups and for re-invigorated enforcement-driven cleanups.

5. Direct EPA to get off the dime and issue rules for financial assurance for the mining sector, which makes such an enormous contribution to the country's Superfund burden. This duty already exists in law, so you don't have to pass new legislation. Make things happen with directions and appropriations.

6. Don't tolerate the continued creation of abandoned mine messes. Stop the creation of additional mine problems by first clearly defining “abandoned,” as recommended by the National Academy of Sciences and as done under SMCRA. And begin work on legislation to set out minimum performance standards, strong financial assurance requirements and clear permitting guidelines. Have the agencies create clear requirements for operators to notify regulators of changing conditions at operating mines, and be certain that mine permits—as well as bonding amounts—are updated as conditions change. Set out monitoring and reporting requirements as well fair and firm enforcement mechanisms. Build regulatory capacity and expertise in the field with grants to support State programs.

7. Weed out irresponsible investors and operators with solid “bad actor” provisions to deny future permits or government contracts to companies that violate environmental rules or walk away from reclamation obligations. Make sure bad actors cannot hide behind corporate reshuffling and creation of new subsidiaries.

8. Deal with the most dramatic regulatory loophole for mine operations by directing EPA to establish waste regulations specifically crafted for the management of mine waste rock, tailings or other mineral-processing wastes, including wastes currently covered by the Bevill amendment.

9. Invest in research that will allow for more reliable predictions about mining's impacts on water resources, looking closely at the potential for creating acid mine drainage but also focusing on other difficult issues, such as disruption of aquifers from dewatering, mechanisms for groundwater contamination and impacts of pit lakes that refill with acids, metals and other pollutants after mine operations cease. Make sure that the best available predictive tools are used to plan cleanups and to permit mines in the first instance.

10. Learn from past mistakes with failure analyses conducted in conjunction with mine cleanups. Whenever Federal dollars or enforcement authorities are used for cleanup of a mine site that operated during the mid-1980s or forward, regulators should analyze those aspects of the operation that led to a need for cleanup. As these analyses identify problem management areas—be they heap leach pads, faulty liners, pipeline breaks, unstable waste piles, poorly characterized geology or something else—regulators should act to disseminate new information on “best practices” and, as necessary, adopt new regulations to prevent repeat failures.

11. Commit to carrying out your oversight duties. This is a thorny issue, but there is much activity in the field. Congress should keep a close eye on developments, positive and negative, regarding mining and water quality.

Again, Mr. Chairman, I appreciate this opportunity to testify, and I hope that Committee members find this information and these recommendations of help. I look forward to your questions and to working with your staff on these important issues.

RESPONSES BY VELMA M. SMITH TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. During questioning from Senator Boxer, you argued that there is not a need for legislation to address liability concerns and that fear of liability is not really a factor in the cleanup of abandoned mines. However, you indicated your full support for legislation introduced by Congressman John Salazar which provides a legislative solution to fear of liability which is deterring the cleanup of a site in Colorado. Just to clarify, is there a need for legislation and is the concern about potential liability a legitimate concern or not?

Response. We recognize that some parties who are interested in mine cleanup fear entanglement with environmental liability. We do not believe that fear of liability, however, is an insurmountable barrier to cleanup.

On the contrary, fear of liability and possible enforcement action, in many instances, prompts landowners and other responsible parties to clean up abandoned mine problems—under consent agreements worked under Superfund, RCRA, or other corrective action authorities. Parties that are not currently liable but wish to avoid possible future liability also have an incentive to undertake cleanups, and many have done so, using prospective purchaser and prospective operator agreements and, in some cases, simply taking prudent action on their own to mitigate or prevent problems.

Important work has been done under existing law, for example,

- by OXY Oil and Gas USA at the Copper Basin Mining District in Tennessee,
- by Honeywell at the Burlington Mine in Colorado,
- with the help of the Taconite Economic Development Fund in Minnesota,
- by Atlantic Richfield, successor to Anaconda, at mines like Leviathan and Yerington,
- by the Montana Department of Environmental at the Wickes Smelter site and elsewhere,
- under the auspices of the State of Colorado's Voluntary Cleanup Program,
- through collaborative efforts of groups such as the Dubuque County Conservation Board, the Iowa Natural Heritage Foundation, and the Iowa Department of Natural Resources, to deal with old lead mining areas, and
- by Rhodia chemical company, an owner of old mine problems that worked with the U.S. Fish and Wildlife Service, the San Francisco Bay Regional Water Quality Control Board and others to clean up Peyton Slough.

Given these and many other cleanup stories, the variety of options for addressing abandoned mine sites, and the host of determined and creative individuals and organizations that are making things happen on the ground, we do not believe that a legislative "fix" is required.

However, we do agree that additional cleanup funds are sorely needed, and Congressman John Salazar's bill, H.R. 5071, provides funding for a well-thought out, comprehensive cleanup program in a particular watershed in Colorado. This project could serve as a model in two respects: one, for careful and comprehensive planning on a watershed basis and, two, for a collaborative approach that engages a cross-section of the community in long-term cleanup. The Animas River Stakeholders Group has already done impressive work in the area over the last decade. They have sampled and prioritized 175 draining mines and about 160 mine waste piles and determined those areas where targeted remediation would provide the most bang for the buck in reducing metals loadings to streams.

The legislation would provide needed funds for the project on a cost-share basis. It also includes some carefully drawn leeway with regard to meeting particular provisions of Clean Water Act permitting requirements. It does not waive the Clean Water Act in its entirety but adjusts the requirements of the NPDES permitting section to address concerns of the group that they would have to continue to hold a discharge permit far into the future. It includes requirements for careful assessment, for monitoring and reporting, and for enforcement. It allows for sale of materials recovered in the cleanup but requires the proceeds of such sales to be returned to cleanup efforts. It does not alter the rights of citizens to participate in permit decision-making, and it doesn't alter Superfund liability or waive any other environmental law.

For these reasons, we think that members of Congress should look to this bill as the underpinning of any legislative vehicle on this topic.

Question 2. Ms. Smith, You indicated that with the AOC model and a few pilots abandoned mines could be cleaned up without legislation. However, the AOC used in trout unlimited only waived liability under Superfund. If the Western Governor's Association is correct and there are approximately 100,000 abandoned hardrock mine sites that are affecting water quality in thousands of streams and rivers

throughout the country, will a few pilots and an AOC that doesn't address water quality solve the problem?

Response. While the AOC with Trout Unlimited did not address a water pollution discharge directly, it did address water quality. In fact, that was the entire rationale for the project: to improve water quality and return fish to the impacted stream. In this particular case, the water quality improvement was made without creating or affecting a direct discharge of pollutants other than that associated with non-point runoff, so the order did not need to speak directly to Clean Water Act permitting. Many other cases may be similar—where a “dry” cleanup involving removal of debris, regrading or capping of contaminated areas or revegetation can bring about water quality improvements.

In other cases, remediation projects will involve surface water flows directly, but these may still be handled with orders or agreements based on existing Superfund, RCRA or other existing authorities. For example, the Yak Tunnel treatment plant at the California Gulch mine site operates without a Clean Water Act discharge permit but under an agreement worked out through Superfund cleanup authorities. The same is true for the treatment plant used for the Berkley Pit in Montana.

On the issue of the extent of the problem, I return to my earlier point. Additional resources are needed—not just to “deputize” thousands of would-be Good Samaritans to do the best they can manage, but to help States and communities make and implement strategic decisions about cleanup priorities on a watershed basis. There is also a pressing need to assure that the mining industry does not continue to add to the enormous universe of unreclaimed and polluting sites.

Question 3. You speak a great deal about the AOC reached with Trout Unlimited as the possible solution to the issue of liability deterring the cleanup of abandoned hardrock mine sites. However, the AOC addresses only Superfund Liability and the site at the American Fork Canyon did not involve any discharges into a navigable waterway. Are you aware of a means to address Clean Water Act liability, an issue at the center of proposals introduced by Senator Baucus (107th Congress), Co-sponsored by Senator Minority Leader Reid in each of the past three Congresses and sponsored this Congress by Senator Ken Salazar, and separately by Congressman John Salazar?

Response. I understand fully that the discussion of “Good Samaritan” relief began with the Clean Water Act. Indeed, many of the long-time backers of “Good Samaritan” legislation have urged Congress to limit any liability waivers to the Clean Water Act alone.

We have heard two primary issues with regard to the Clean Water Act.

One, that a “Good Samaritan” may be able to take action to improve the quality of an existing discharge but not to the degree that the discharge would meet water quality standards.

Second, that a “Good Samaritan” who is truly an innocent bystander and with no existing obligation to maintain a permit for the discharge does not want to create an obligation to hold an NPDES permit far into the future. Since many cases of acid mine drainage will continue for decades—if not forever—watershed groups and other third parties fear how long they would be tied to an NPDES permit.

On the first point, I believe—based on my own experience on the Virginia State Water Control Board and on a review of much of the literature on mine cleanups—that the Clean Water Act allows for standards to be adjusted. Regulatory bodies frequently exercise enforcement discretion, providing extended compliance time lines and interim limits, and, if a strong case can be made, they may grant economic variances or waivers. They may make adjustments to use designations of affected streams, and create site-specific stream standards, where necessary.

In Colorado, in fact, this discretion has been used so frequently and so widely that it has drawn criticism. A Denver Post investigative report from 2004 pointed out one mine where “temporary modification” of standards had been allowed for nearly 20 years.

The second point is a difficult one, because so much mining pollution will remain as a perpetual problem. This point is why we believe that the States, local Governments and the Federal land management agencies must take a leadership role in cleanup. Where perpetual acid discharges are anticipated on land that does not have a viable owner, we believe that those agencies must assume responsibility for continuing discharges. They must either hold NPDES permits or work out agreements with EPA under Superfund authorities to otherwise provide for ongoing treatment and discharge. Undeniably, this is a burden, but given the existence of the pollution, it is necessary.

Again, this argues for new funding to assist with these efforts and for new regulation to assure that mining activities do not continue to create these problems.

RESPONSES BY VELMA M. SMITH TO ADDITIONAL QUESTIONS FROM SENATOR
JEFFORDS

Question 1. Am I correct that Good Samaritans, including corporations, are already shielded from potential Superfund liability from voluntary cleanup efforts as long as they follow existing standards under CERCLA section 107(d)?

Response. Yes. Potential Good Samaritans—be they State or local governments, non-profit organizations or corporations—may avail themselves of protections in the law, working with EPA to plan and carry out efforts to clean up and restore abandoned mine sites. Agreements may be crafted to assure that the Good Samaritan is protected—not only from action by the Federal Government but also by contribution actions brought by other parties.

Under such agreements and other approaches, including use attainability assessments and site-specific water quality standards under the authorities of the Clean Water Act, cleanups can and have been undertaken. Such cleanups have involved volunteers, Government agencies, non-profits and for-profit businesses. For example:

- In Colorado, EPA reports that casino developers have capped and removed mine waste piles contributing to cleanup.
- In an area near the Birch Creek National Wild River Corridor, the Bureau of Land Management, the Alaska Department of Fish and Game, the Alaska Department of Transportation and the Alaska Department of Natural Resources worked together to restore portions of a reclaimed channel breach on land that had been used for placer gold mining from 1984 to 1990.
- In an area along the Hammond River, also in Alaska, BLM worked cooperatively with the State and Alyeska to clean up mine waste from an old 1930s to 1950s mine.
- The Martin Mine restoration project in Idaho was undertaken by the National Park Service in cooperation with the Craters of the Moon Natural History Association, the BLM and a local Boy Scout troop. This modest but useful project helped to eliminate a water quality threat to Little Cottonwood Creek.
- In Virginia, the Park Service worked with the State of Virginia and local volunteers to clean up the old Cabin Branch pyrite mine in the Prince William Forest Park.
- In Nevada and elsewhere, Bat Conservation International has worked cooperatively with U.S. Borax and others to address hazards in old mines in ways that help conserve bat habitat. Their work includes closure at the abandoned Murphy Gold Mine in Nevada designed to protect a large colony of pallid bats—again accomplished within the context of current law.
- In California, the Deltakeeper Chapter of Baykeeper and the California Department of Parks & Recreation signed a consent decree aimed at preventing a hundred year-old toxic waste at Empire Mine State Historic Park from continuing to degrade local waterways. The agreement—which actually grew out of challenge to the polluting discharges coming from the mine, was hammered out—not in spite of Federal environmental law but because of it.

Question 2. Can you elaborate on the points you and others raised regarding the importance of preventing the creation of abandoned mines and how you would modify current policies to achieve this goal.

Response. As I and many others have pointed out, there are enormous numbers of abandoned mine sites across the country. A portion of these date back 50 to 100 years.

But a substantial number of these mines are of much more recent vintage. Some have argued that modern mines are subject to exceedingly strict regulation, but “modern” mines—including mines that date from the 1980s and 1990s—have been abandoned without adequate reclamation and sometimes with dire acid drainage problems that will last for decades if not centuries.

The Zortman Landusky mine in Montana is just one example. Billed as a model for environmental management when it began operations in 1979, Zortman Landusky was one of the first large-scale, open-pit cyanide operations in the United States. Mining continued until 1996; the company declared bankruptcy in 1998; but the pollution is expected to continue in perpetuity. Though reclamation bonding was required for the mine, that bonding didn’t come close to covering the true costs of cleanup, and the State of Montana has had to set aside nearly \$20 million to supplement the company’s bond for the long term care of just this single site.

Unfortunately, though Zortman Landusky is a very bad case, it is not totally unique.

In fact, according to EPA’s Office of Inspector General, nearly 60 percent of the mining sites listed on the NPL are expected to require from 40 years to “perpetuity” for cleanup operations. Some of these cleanups will be extraordinarily expensive—

not to take the property back to pristine or pre-mining conditions, but simply to remove the threats to local communities, water supplies and the environment.

There are several factors behind such problems.

Most importantly, there is no comprehensive environmental statute governing hardrock mining—no parallel to the Federal Surface Mining Control and Reclamation Act that governs coal mining. Instead, we continue to rely on the grossly outdated General Mining Law of 1872 and a patchwork of State laws that, in many instances, have not been up to the job.

In addition, the mining industry has fought for and won exemptions and loopholes in coverage of other major environmental laws. For example, gold ore roasters emit airborne mercury but those facilities are not currently regulated under the Clean Air Act. Mine operations can also be significant contributors when it comes to particulates and other air pollutants, but recent rules give mining a pass when it comes to cleaning up such air pollution.

Hardrock mining produces enormous volumes of waste which would meet the definition of hazardous under the Resource Conservation and Recovery Act—save for the Bevill amendment, which has stymied any rational control over these hazards. And though hardrock mining releases enormous amounts of toxic materials, such as lead, into the environment, the industry prevailed in its effort to have significant portions of those releases absolved from reporting requirements under the Toxics Release Inventory.

Just recently, EPA, the U.S. Army Corps of Engineers and the State of Alaska have interpreted a newly devised loophole in the Clean Water Act to allow a mining company to put nearly 3 million cubic yards of processed mine wastes into a 23-acre alpine lake.

In the face of these regulatory failures, there is much to be done, and my written testimony includes several recommendations. High on this list is reform of the outdated 1872 Mining Law and override of the Bevill amendment that keeps EPA from regulating mining waste. Clearly, these are large and controversial steps, and we understand they won't happen overnight. In the meantime, however, there is one thing that Congress could do quickly that would have a major impact.

Congress could insist that EPA implement the existing provisions of Superfund that authorize financial assurance rules for polluting businesses. It should do this, not only for mining communities, but also for other communities who suffer from mining problems, because abandoned mines are becoming increasingly serious drains on Federal cleanup resources.

An August 2003 EPA Inspector General report touched on the problem of inadequate financial assurances for mine operations, and even suggested that some States may be motivated to set bonds for mining operations at low levels in order to hold operations in within their States. Nearly three years later, the U.S. Government Accountability Office looked at some of the same issues and found, once again, dramatic failings. "Environmental Liabilities: Hardrock Mining Cleanup Obligations" documents the burden that mining companies impose upon the American taxpayer, and it notes that EPA inaction on financial assurance exposes "the Superfund program, and ultimately the U.S. taxpayers, to potentially billions of dollars in cleanup costs."

Thus, we agree with the EPA presentation on abandoned mines that States flatly: "The best immediate way to reduce CERCLA liabilities at mine sites is to aggressively improve reclamation and closure bonding at State and Federal level." We urge this Committee to address this problem now by moving Senator Cantwell's important legislation, the Cleanup Assurance and Polluter Accountability.

Question 3. Should a good Samaritan permitting scheme ever be adopted, would it be important to ensure that such a scheme make all information available to the public prior to granting a permit, and that there be opportunity for notice and comment on the permit application?

Response. Absolutely. Speaking from my own direct experience serving on the State of Virginia's Water Pollution Control Board, I can say—without question—that informed public input is invaluable to those making decisions about the environmental management of potentially-polluting operations. The public, in many instances, has proven to be a critical source of important information about local conditions, impacts and concerns, a valuable "fact-checker," and a source of useful perspective and common sense.

In fact, a recent EPA report, "Integrating Water and Waste Programs to Restore Watersheds," stresses that cleanup of abandoned mines is often most effective when regulators and mining companies work with the public, engaging a broad cross-section of a community in setting priorities and laying out cleanup plans. This cannot happen without disclosure and ample opportunities for meaningful input.

Question 4. How would the proposed waiver(s) of NEPA in both S. 1848 and S. 2780 affect the public's ability to participate in the permitting process envisioned in both bills?

Response. In the absence of a Federal law that deals with environmental impacts of hardrock mining on a comprehensive basis, NEPA serves a critical role as the sole forum for looking at the overall impacts of mining-related activities. Broad waivers from would eviscerate the opportunities for real public participation.

Question 5. One of the issues surrounding abandoned mine clean-ups and Good Samaritan permitting is whether and how any enforcement action could be taken should a clean-up action actually worsen water quality or other environmental conditions. In order to make such a determination, one would need to first conduct baseline monitoring and then long-term monitoring. Can you comment on your views regarding the optimum monitoring that should occur on any mine clean-up, regardless of whether it is conducted by a Good Samaritan or a responsible party?

Response. Many stories in the history of mining and mining cleanup make it clear that lack of information can result in big problems. The old Anaconda copper near Yerington, Nevada is a case in point. Information about the co-occurrence of uranium with the copper ores has come to light only recently as has the extent of groundwater contamination at the site. The impact of lack of information in this case could be cleanup price tag closing in on half a billion dollars compared with earlier estimates of \$10 million.

Yerington and other cases make us extremely wary of the restrictions in S. 1848 and S. 2780 regarding the collection of baseline data. Data needs remain—despite costs—and questions about underlying conditions should be answered up front—not only to ensure that the right cleanup decisions are made but also to ensure that actions taken do not complicate or even worsen conditions.

Where cleanups may encounter water, permit reviewers must, at a minimum, ensure that actions are taken with a solid understanding of hydrological conditions—water flow conditions and interconnections, including flow under different weather conditions and other scenarios, groundwater interaction, water quality levels, co-occurrence of pollutants and possibilities for acid-generation.

Such an understanding cannot be developed without site-specific data. Generalized information must be verified with on-site testing, and a record of site-specific testing must be sufficiently dense and span the seasonal variations that will be encountered. Monitoring for a full-year period is essential, but if that monitoring occurs in periods that are unusually dry or wet, then testing must continue beyond those periods.

The lesson of a robust record is brought home by the case of the Sulphur Bank mine—an old mercury mine in California. There initial cleanup efforts were guided by monitoring data from what turned out to be an unusual dry spell. When precipitation levels changed, the conceptual model of the mine's release of mercury into the environment was proven wrong and adjustments to the remedy were essential.

Mine cleanups directed by new legislation should not repeat problems brought on by lack of information.

SAN FRANCISCO

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Daily Journal

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Good Intentions Do Not Confer a Right to Pollute

By William Jennings,
Maria Savasta Kennedy
and Adria LaRose

On Feb. 8 and 11, the Daily Journal printed two articles, one by Craig Johns and another by William Wick, both attorneys with Crosby, Heafey, Roach and May, decrying the 9th U.S. Circuit Court of Appeals' recent decision in *Committee to Save the Mokelumne River v. East Bay Municipal Utility District*, 93 Daily Journal D.A.R. 16674 (Dec. 29, 1993).

According to Johns, the 9th Circuit's decision was a "disastrous... Jurassic Park dinosaur" because the defendants in the case, the East Bay Municipal Utility District and the Central Valley Regional Water Quality Control Board, were unfairly saddled with liability under the Clean Water Act for their "good Samaritan" efforts to clean up an abandoned mine site. The decision, claim Johns and Wick, will discourage such good Samaritan efforts in the future and will result in fewer environmental cleanups by governmental agencies.

The facts of the matter tell a different story. Contrary to what Johns and Wick assert, it was not the alleged good Samaritan efforts of the EBMUD and the regional board that got the defendants into trouble, but their efforts to conceal serious mistakes and their failure to provide a worthwhile environmental solution to the acid mine drainage problems at Penn Mine. According to a 1993 report commissioned by the regional board itself, such a solution would cost between \$10.8 and \$16.1 million, not the \$100 million claimed by Johns.

Unlike the good Samaritan of the Old Testament who bore no responsibility for the victim lying by the side of the road, both the EBMUD and the regional board had ongoing legal obligations to the Mokelumne River. In 1929, the EBMUD constructed Purdee Dam on the Mokelumne River upstream from the historic Penn Mine. Diversion of up to 65 percent of the river's natural flow reduced water available for dilution of acid mine runoff and led to an increase in the frequency and severity of fish kills in the river.

In 1963, the EBMUD built Camanche Dam downstream from Penn Mine and, in the process, acquired 187 acres of Penn

Mine property containing tailing heaps, slag and sediment dumps, and the former site of the milling and processing structures. When the EBMUD acquired this property, it also acquired the acid mine drainage problems associated with the land. Contaminated runoff originating from and flowing through the EBMUD's property was spilling into the river and causing fish kills.

Johns characterizes the EBMUD's actions as a voluntary effort to stop pollution. However, the EBMUD was subject to a cleanup and abatement order from the regional board when the EBMUD proposed that the board join with it in constructing the present recirculation and evaporation facility. In accepting the EBMUD offer, the regional board apparently never considered the potential conflicts of interest that might arise from a regulatory agency joining in partnership with those they are required to regulate.

So, in 1978, the EBMUD and the regional board jointly constructed the present system, a large series of pits, drainage ditches and a pump, designed to capture contaminated surface water runoff originating in and around EBMUD property and to contain and evaporate the leachate through ponding and recirculation.

Unfortunately, there were serious problems with this approach: EBMUD and the regional board constructed major portions of the facility out of the very reactive materials that combine with water and oxygen to form acid mine drainage, a point neither Johns nor Wick chose to mention.

In their haste to find a quick fix to the pollution problem, the EBMUD and the regional board failed to follow applicable environmental regulations and standard engineering practices, and failed to develop an understanding of the complex geochemistry and hydrogeology of the site. As a result, the ponding and recirculation system leached additional heavy metals and created an enhanced environment for bacteria that can accelerate the formation of acid mine drainage by up to one million times. One acid mine drainage expert, who coauthored a major study on California's problem mines, testified that "the facility could not have been better designed had its intention been maximum production of toxic acid mine drainage."

At the same time, the pits built at the facility were too small to contain the contaminated leachate collected during rainy weather. Immediately following construction, the facility began spilling hazardous wastes into the river. Twenty-one days after the discharge began, the EBMUD and the regional board signed a memorandum of understanding claiming that they were not responsible for the problem and that the facility was not expected to be successful. In every normal

rainfall year since it was built, the facility spilled an average of more than 19 million gallons of concentrated, untreated and unmonitored acid mine drainage into the Mokelumne River. In addition, because the pits were unlined (with the exception of one pit whose liner deteriorated), the system was discharging unknown quantities of concentrated acid mine drainage into the groundwater.

When the regional board recognized that the facility had failed, it had two options: fix the problem it helped create, or defend its involvement in building the facility at the expense of the Mokelumne River. Unfortunately, the Regional Board chose the latter. Over the next 14 years the regional board, whose job it is to regulate pollution in the waterways of the Central Valley, exempted the facility from every waste discharge requirement under California and federal law, and stalled efforts to study the effects of the facility's discharges of acid mine drainage to surface and groundwater.

The regional board abandoned its role as a regulator at the site to become a partner in pollution, and most of its subsequent actions with respect to the site were devoted to covering up this disastrous mistake. In November 1988, when a regional board staff geologist released an extensive 70-page investigative report demonstrating that the facility had exacerbated existing problems at the site, the report was suppressed. Subsequently, the staff geologist was banished to another section of the agency for failing to support the regional board's position.

In January 1989, a regional board staff attorney prepared a legal opinion on Penn Mine that expressed concern that arguments could be made that "the Regional Board is also discharging pollutants to navigable waters." The memorandum said that a federal Clean Water Act permit "must be issued" to the EBMUD and concluded by recommending that the memorandum of understanding between the EBMUD and the regional board be renegotiated because it stood "in the way of necessary regulatory action against EBMUD." The regional board executive director conceded in a memo to his staff, "we actually discharge it into waters of the state. Your assignment," he instructed, "is to talk our attorneys into doing nothing at all or at the most giving EBMUD a permit to do exactly what they are doing now."

The regional board's conflict of interest in regulating a site that it helped build was obvious, even to its executive director, who readily acknowledged this conflict at a 1990 hearing on the EBMUD's request for an exemption at the facility under the Toxic Pits Cleanup Act: "I am convinced that they're [EBMUD] set up pretty good legally, with all the things they made this staff sign, and made Fish and Game sign

through the years. If we don't grant them the exemption, we are likely to find ourselves a party to a major groundwater investigation on this site."

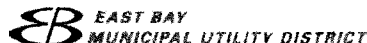
In 1990, the U.S. Environmental Protection Agency identified the facility at the major cause of degradation of the Mokelumne River, and identified the EBMUD as a discharger of pollutants required to obtain a permit under the Clean Water Act. After a year passed and the EBMUD refused to apply for a permit or to regulate the discharges from its land, the Committee to Save the Mokelumne River sued the water district and the regional board under the citizen-suit provision of the Clean Water Act.

Due to the defendants' failure to take responsible action at the site, EPA was forced to issue EBMUD orders in February and March 1993 requiring emergency action to treat the leachate spilling into the river. Efforts at reaching a consent decree failed, and in December 1993, the EPA issued a unilateral order under the Clean Water Act directing the EBMUD to remove waste rock and tailings from the site.

Whatever the defendants' murky mix of public and private intentions in constructing the facility, good intentions do not confer immunity under the Clean Water Act from the permit requirements applicable to every other discharger of pollutants since the act was passed in 1972. No court has ever recognized the theory that good intentions translate into a right to pollute. In that respect, the district court's and the 9th Circuit's decisions in *Committee to Save the Mokelumne* are squarely consistent with previous decisions under the Act.

For example, in *United States v. Earth Sciences*, 599 F.2d 368, 374 (10th Cir. 1979), the court stated that the regulatory provisions of the Clean Water Act "were not limited to intentional violations, 'making the person responsible for the discharge of any pollutant strictly liable.'" Johns, who is vice chairman of the San Francisco Regional Water Quality Control Board, warns that as a result of this case his board may take no corrective action at a site that is "somewhat similar to the Penn Mine case." It is puzzling that Johns would seek to expand the ruling in the case to encompass the San Francisco regional board, since the actions of the Central Valley regional board fall squarely outside the ambit of prescribed conduct of regulatory agencies. And it is deliberately misleading to attempt to place blame on a citizen group that was not content to sit by and watch millions of gallons of untreated and unregulated acid mine drainage spill into the Mokelumne River, while the water district and state agency responsible for protecting the river looked the other way.

William Jennings is chairman of the Committee to Save the Mokelumne River, a nonprofit corporation established to protect and restore the Mokelumne River. Maria Savasta Kennedy, of Rosen, Brien & Asaro, and Adria LaRose of the Sierra Club Legal Defense Fund, are counsel for the Committee to Save the Mokelumne River in the case discussed in this article.



DENNIS M. DIEMER
GENERAL MANAGER

June 20, 2006

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the East Bay Municipal Utility District (District), I respectfully request that this letter be entered into the record of the Committee's hearing of June 14, 2006 into S. 1848 and S. 2780, legislation to provide Good Samaritan liability protections where nonresponsible parties seek to clean up inactive or abandoned mine sites. The District is deeply concerned about representations that were made during the hearing that contained misleading and inaccurate statements on the status and history of the Penn Mine site restoration. We submit the following comments in order to clarify the record and to ensure that any deliberations the committee may make on this or other related initiatives are with the appropriate informed data.

During the hearing, references were made to the mine site known as Penn Mine and a letter signed by a number of nongovernmental organizations was transmitted to all committee members (NGO letter) citing work at Penn Mine as a case study supporting the organizations' opposition to the legislative proposals before the committee. The NGO's letter references abatement actions at the site that, as described below, were never intended as or considered to be site restoration efforts. Rather, the abatement actions were successful efforts to reduce acute toxicity to fish in the District's Camanche Reservoir, the receiving water body for acid mine drainage from the Penn Mine site. We appreciate the need to ensure peer review and clear performance standards in developing Good Samaritan legislation, as the NGO letter advocates. Any such legislation should, however be informed by an accurate, factual record. Thus, while we do not take a position on the relative merits of either S. 1848 and S. 2780, we take strong exception to the contents of the NGO letter that seeks to use the Penn Mine site restoration as a reason to not consider any legislative remedies.

Today, the Penn Mine site has been fully restored and meets all requirements of the federal and state agencies that oversaw the restoration work. This most successful effort was publicly acknowledged by the United States Environmental Protection Agency and the California Water Resources Control Board in October 2000 as it was by the Committee to Save the Mokelumne, a signatory to the letter referenced above and a member of the Penn Mine project advisory committee during the restoration project. Furthermore, the site has been restored to approximate its condition prior to the hard rock mining that began in the mid-1800's.

Honorable Inhofe
June 20, 2006
Page 2

The NGO letter alleges that "...an egregious lack of understanding of the complex geochemical and hydrogeological processes at the site led to exacerbated water quality problems". On the contrary; all activities at the site had the effect of reducing toxicity to fish and lowering the total mass load of copper discharged from the site by over 98%. Estimated copper loads of 60,000 pounds per year were reduced to approximately 20,000 pounds per year with implementation of the abatement action to which the NGO letter refers. Later, following full site restoration in 1999, the copper load was reduced to an estimated 300 pounds per year. These results demonstrate a sound understanding of the geochemical and hydrogeological processes at the site, and the ability to implement an effective solution to acid mine drainage.

The NGO letter also refers to relaxed environmental review and protections for Penn Mine. Again, this is not a true statement. Prior to implementation of the abatement action, the Penn Mine site was a serious water quality threat to the District's Camanche Reservoir and caused the downstream Mokelumne River to be federally listed as an impaired water body. Because Penn Mine was an inactive and abandoned site, there was no responsible party to address the threat other than the State of California. The State had been operating a series of collection ponds that recirculated acid mine drainage in an attempt to avoid discharges to the reservoir. During severe storm events, however, the system was periodically overwhelmed. In an effort to protect water quality as well as the fishing and recreational values of the watershed, the District -- in partnership with the State -- developed an abatement action to stem the releases from the collection ponds. It is important to highlight the fact that these initial efforts, which alone reduced estimated copper discharges from 60,000 to 20,000 pounds per year in high runoff years, were not restoration efforts; they were an abatement action. That action secured its desired end: the reduction of acute copper toxicity in the receiving water.

Despite these improvements to water quality, the District's abatement activities at the site resulted in protracted litigation under the Clean Water Act's (CWA) Citizen Suits provision. The District was found to be liable for additional cleanup and restoration of the site even though the District was not the owner or operator of the site and because we had acted as a Good Samaritan. The District completed the final restoration project in 1999 at a cost to our ratepayers of \$10 million. The project was evaluated and selected under the California Environmental Quality Act (CEQA) with full public disclosure and review. In addition, a public outreach and information program was implemented and continued throughout the restoration project.

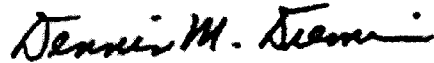
The District understands first hand that mine restoration actions are complex undertakings and require coordinated technical planning, input and regulatory review. The Penn Mine restoration effort met all of these requirements and resulted in almost 100% removal of toxic copper contamination into a major California watershed. As such, it is a good example of the benefits that can accrue from Good Samaritan restoration action. Facing the prospect of significant risk and liability under the current

Honorable Inhofe
June 20, 2006
Page 3

CWA, however, the District would not participate again in an abandoned property restoration that would put our ratepayers at such financial risk.

The District appreciates the opportunity to supplement the record and hope that this clarifies the circumstances surrounding the inactive and abandoned Penn Mine site.

Sincerely,

A handwritten signature in black ink, reading "Dennis M. Diemer". The signature is written in a cursive, flowing style.

DENNIS M. DIEMER
General Manager

DMD:RK:EW

cc: Members of the Committee on Environment and Public Works, U.S. Senate

June 21, 2006

The Honorable James Inhofe, Chair
The Honorable James Jeffords, Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Chairman Inhofe and Ranking Member Jeffords:

Re: Good Samaritan Legislation

We, the undersigned groups, represent hundreds of thousands of hunters and anglers, commercial interests, and fish and wildlife professionals. We are writing in support of congressional efforts to pass Good Samaritan legislation that would help ease liability concerns associated with cleaning up abandoned hard rock mines for non-profit organizations, watershed groups, and western communities.

Cleaning up abandoned mines is one of the single most important, least addressed restoration challenges in the nation. EPA estimates that abandoned hard rock mines degrade nearly 40 percent of all western headwater streams. Estimates for clean up run into the tens of billions of dollars. The enormity and scope of the problem have led to a collective sense of futility that has fostered inactivity in many places.

Headwaters streams and other areas that are affected by abandoned mines possess some of the nation's healthiest fish and wildlife habitats. Many of these areas are sources of drinking water for local communities. Cleaning up the pollution from abandoned hardrock mines should be a higher national priority, and clean-up can be cost-effective at many sites.

One of the more important ways to increase the scope and scale of abandoned mine clean-up is creation of a federal permitting process that encourages Good Samaritan restoration projects. To that end, we welcome legislative efforts intended to address this issue. Senators Salazar and Allard and Congressmen Udall and Beauprez, among others, deserve credit for their leadership in offering Good Samaritan legislation over the past few years. While we have specific suggestions that we would like to share with you and your staff, we believe S. 2780 is a good starting point for legislation, and commend you and the Environmental Protection Agency for your leadership.

We look forward to working with you.

Sincerely,

Chris Wood
Vice President for Conservation
Trout Unlimited

Thomas M. Franklin
Conservation Director
Izaak Walton League of America

Robert Ramsay
President
American Fly Fishing Trade Association

Jim Range
Chairman
Theodore Roosevelt Conservation
Partnership

Noreen Clough
Conservation Director
BASS/ESPN Outdoors

Gordon Robertson
Vice President
American Sportfishing Association

R.P. VanGytenbeek
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Assistant City Attorney
Public Works General Counsel
City of Los Angeles
Los Angeles, CA

SECRETARY

Marian Orfeo
Director of Planning
& Coordination
Massachusetts Water
Resources Authority
Boston, MA

EXECUTIVE DIRECTOR

Ken Kirk

June 19, 2006

The Honorable James M. Inhofe
Chairman
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

NACWA applauds your introduction of the *Good Samaritan Clean Watershed Act*, S. 2780. The bill would effectively and fairly eliminate disincentives for voluntary, cooperative efforts aimed at cleaning up abandoned mines. This innovative approach is important to interested stakeholders, including publicly owned treatment works (POTWs) who want to prevent further degradation of and help to improve the quality of waters impaired by runoff from abandoned mines.

Passage of the *Good Samaritan Clean Watershed Act* is long overdue and is strongly supported by NACWA as a necessary means to help clean up our watersheds to attain the nation's clean water quality goals. Failure to enact S. 2780 would negatively impact municipalities that want to voluntarily clean up all or portions of abandoned mine sites due to the increased risk of inheriting the liability for any continuing discharges. As you heard in testimony at your June 14 hearing, POTWs, have one overarching goal in mind - water quality improvement - and need as many tools as possible to clean up impaired waterways. Significantly, S.2780 would offer liability protection to municipalities upon approval by, and the ongoing oversight of, the U.S. Environmental Protection Agency (EPA).

NACWA understands the concerns voiced by some stakeholders and Senators at the hearing regarding the CERCLA liability waiver that constitutes the primary incentive to attract Good Samaritans. The Association, however, believes these concerns are mitigated by the legislation's requirement that prospective Good Samaritans must apply for a permit from EPA prior to remediation activity beginning at the site. Indeed, EPA would approve such a permit only if it determines that the remediation plan demonstrates with reasonable certainty that the actions will result in an improvement in water quality.

National Association of
Clean Water Agencies
1816 Jefferson Place, NW
Washington DC 20036-2505

p 202.833.2672 f 202.833.4657
www.nacwa.org • info@nacwa.org



Thank you for your continuing support for clean water in America and we look forward to working with you to enact S. 2780 into law.

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk". The "K" is large and stylized, with the first name "Kirk" written in a cursive script.

Ken Kirk
NACWA Executive Director

The Honorable James Inhofe, Chair
The Honorable James Jeffords, Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, DC

June 13, 2006

Dear Chairman Inhofe and Ranking Member Jeffords:

I am writing to provide Trout Unlimited's perspective on the Environmental Protection Agency's Good Samaritan legislative proposal; S. 2780 (introduced by request) and entitled "the Good Samaritan Clean Watershed Act," intended to increase efforts to clean up abandoned hard rock mines in the western United States. TU commends EPA's leadership and will support S. 2780 if amended as described below.

Trout Unlimited has over 160,000 members in 36 states. We have a long organizational history of engaging in stream clean-ups and restoration projects designed to improve drinking water, fisheries, and watershed health. In fact, each of our more than 400 chapters contributes well over 1000 hours of volunteer time to stream restoration projects every year.

TU has a long history of working to improve water quality and recover fisheries in watersheds degraded by abandoned mines. Some of the places we are presently cleaning up fisheries and water quality degraded by abandoned mines, include: Utah's American Fork Canyon; the upper Boise River in Idaho; Montana's Eustache Creek; the Snake River in Colorado; and Nevada's Maggie Creek.

Cleaning up abandoned mines is one of the single most important, least addressed environmental challenges in the nation. The geographic scope of the problem is staggering. EPA estimates that abandoned hard rock mines degrade nearly 40 percent of all western headwater streams. Estimates for clean up range from \$36-72 billion. The enormity and scope of the problem have led to a collective sense of futility that has fostered inactivity in many places.

TU believes that cleaning up the pollution from abandoned hardrock mines should be a higher national priority, and can be cost-effective at many sites. Therefore, we welcome legislative efforts intended to address this problem. Senators Salazar and Allard and Congressmen Udall and Beauprez, among others, deserve credit for their leadership in offering Good Samaritan legislation over the past few years. We believe that S. 2780

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incorporates concepts from these bills and would create a permitting process to greatly assist would-be Good Samaritans in abandoned mine clean up efforts. Based on our experience, the two greatest needs for increasing the scope and scale of abandoned mine clean-up are funding and the creation of a federal permitting process that encourages Good Samaritan restoration projects.

Every single commodity developed off public lands – coal, wood fiber, oil, gas, and forage – has dedicated funding for mitigation of impacts and restoration measures. The only commodity that lacks such a dedicated fund is hard rock minerals. As a result, organizations such as TU are dependent on cobbling funding from an array of private, state, and federal sources to get work done on the ground.

TU prides itself on being entrepreneurial in identifying funding for abandoned mine cleanup. Our capacity to match funding with restoration projects, however, is dwarfed by the scale of the problem. Communities and organizations such as ours could get a lot more done if the resources were more readily available and in more obvious places than they are today. We encourage you to look for ways to provide a dedicated funding source for abandoned mine restoration through this legislation.

The second impediment to making progress on the ground is the lack of a clear permitting process that allows for would-be Good Samaritans to initiate cleanups. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Water Act are outstanding tools for holding polluters and other potentially responsible parties accountable for their actions and for preventing water pollution. But on many of the sites where we work, there is no potentially responsible party, or the area is not high enough of a priority to warrant federal funding or enforcement actions. On these sites, there is often no party available as a target for an enforcement action, and the simple fact is that there is absolutely no prospect of any future enforcement action to drive clean-up.

Using existing tools to facilitate clean-up by Good Samaritans sometimes feels like pounding a square peg into a round hole. We are making progress, however, and hopefully the pace of our progress will continue. For example, in our American Fork project, we reached an agreement with EPA that can serve as a model for other cleanups across the country. Our agreement protects Trout Unlimited by making our essential obligation the completion of an agreed upon clean-up plan. In exchange for raising the money and doing the work, we get from EPA:

- A covenant from EPA not to sue us if they decide to go after a polluter.
 - Protection from other potentially responsible parties suing us if EPA goes after them.
 - A cap on our liability if EPA chooses to step in and complete the work itself.
- And,

- An expedited permitting procedure for meeting state and federal regulatory requirements.

Recommended Amendments

TU has four principle concerns about and suggestions for improving S. 2780. We base our suggestions for improving S. 2780 on what we learned in developing our agreement with EPA and our other abandoned mine restoration experience.

- First, we recommend that the legislation contain a five to seven year sunset provision, at which point Congress may choose to reauthorize the legislation or make changes based on experience. Please note that the Western Governors' Association also supports a sunset provision.
- Second, the standard of clean up in S. 2780 is limited to those projects that "will result in improvement to the environment, including water quality." While we appreciate the bottom-line nature of such a standard, it is so loosely defined that it could permit poorly conceived projects. Instead, we commend to you the clean up standard proposed in H.R. 1266, introduced by Congressman Udall and Congressman Beauprez. Their standard requires that clean up projects meet water quality standards to the maximum extent practicable taking into consideration resources available for remediation. We think this standard sets a high enough bar to discourage fly-by-night actors from attempting remediation but practical enough not to discourage non-profits and communities.
- Third, TU believes it is important to keep a clear line between reprocessing associated with a remediation and re-mining. S. 2780 defines "inactive or abandoned mine sites" as those that have "historic mine residue, which *may include*, among other materials from prior mining activities: tailings or mine waste piles; abandoned equipment...; or acidic or otherwise polluted flows in surface or ground water." (Emphasis added).

In order to maintain the clear line between re-mining for profit, which should be subject to the regular mining permitting process and truly Good Samaritan clean ups, we strongly believe this definition should be made more prescriptive and *limited to* tailings or mine waste piles; abandoned equipment; and acidic or otherwise polluted flows in surface or ground water.

- Overall, a final bill sent to the President must provide for a very narrowly tailored permitting process available to only truly Good Samaritans that have no historic or financial interest in the restoration of the lands.

We have other less significant concerns that we would be pleased to share with your staffs, as appropriate. Thank you for considering the views of Trout Unlimited and our members.

Sincerely,

Chris Wood
Vice President for Conservation

cc: Members of the Committee on Environment and Public Works
United States Senate



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June 13, 2006

The Honorable James M. Inhofe
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510-6175

Dear Chairman Inhofe:

The Western Governors commend you for introducing S. 2780, "Good Samaritan Clean Watershed Act." We strongly support the efforts of the U.S. Environmental Protection Agency in developing this legislation, and believe it represents a solid basis for moving forward. There are a limited set of issues that we would like to discuss with you and the Committee, but we are confident that these issues can be easily resolved. A description of the issues is attached.

The Western governors have consistently identified the Good Samaritan provision as one of the high priorities regarding water quality. Abandoned or inactive mines are responsible for many of the greatest threats and impairments to water quality across the Western United States. Thousands of stream miles are severely impacted by drainage and runoff from these mines, often for which a responsible party is unidentifiable or not economically viable.

Regulatory approaches to address the environmental impacts of abandoned or inactive mines are often fraught with difficulties, starting with the challenge of identifying legally responsible and financially viable parties for particular impacted sites. Mine operators responsible for conditions at a site may be long gone. The land and mineral ownership patterns in mining districts are extremely complex and highly differentiated. The surface and mineral estates at mine sites are often severed and water rights may exist for mine drainage. It is not uncommon for there to be dozens of parties with partial ownership or operational histories associated with a given site.

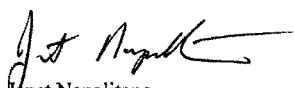
States are very interested in undertaking and encouraging voluntary "Good Samaritan" remediation initiatives, i.e., cleanup efforts by states or other third parties who are not legally responsible for the existing conditions at a site, however, "Good Samaritans" currently are dissuaded from taking measures to clean up the mines due to an overwhelming disincentive in the Clean Water Act. To date, Environmental Protection Agency (EPA) policy and some case law have viewed abandoned or inactive mined land drainage and runoff as problems that must be addressed under the section 402 National Pollutant Discharge

The Honorable James M. Inhofe
June 13, 2006
Page 2

Elimination system (NPDES) permit program. However, there is currently no provision in the Clean Water Act which protects a "Good Samaritan" that attempts to improve the conditions at these sites from becoming legally responsible for any continuing discharges from the mined land after completion of a cleanup project. This potential liability is an overwhelming disincentive to voluntary remedial activities to address the serious problems associated with inactive or abandoned mined lands.

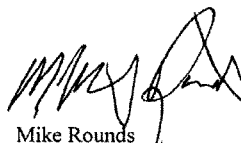
The Western states have found that there would be a high degree of interest and willingness on the part of federal, state and local agencies, volunteer organizations and private parties to work together toward solutions to the multi-faceted problems commonly found on inactive mined lands if an effective Good Samaritan provision were adopted. Consequently, for over a decade Western states have participated in and encouraged—in cooperation with Congressional Offices, the environmental community, the mining industry, EPA, and other interested parties—efforts to develop appropriate Good Samaritan legislation. The Western Governors' Association and the Western States Water Council have focused historically on amending the Clean Water Act in order to eliminate the current disincentives that exist in the Act. However, the Western States believe that there could be benefits to addressing potential liabilities under CERCLA as well.

Again, the Western Governors commend you for introducing S. 2780, "Good Samaritan Clean Watershed Act." We would welcome the opportunity to work with you to clarify a limited set of issues outlined in the attached document. We look forward to working with the Senate Environment and Public Works Committee, Senator Salazar, Senator Allard and the sponsors of S.1848, Representative Udall and Representative Beauprez and the sponsors of H.R.1266, EPA, the mining industry, environmental groups and other interested parties to see Good Samaritan legislation enacted this year.



Janet Napolitano
Governor of Arizona
WGA Chair

Sincerely,



Mike Rounds
Governor of South Dakota
WGA Vice Chair

cc: The Honorable James Jeffords, Ranking Minority Member
Senate Environment & Public Works Committee

The Honorable Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency

Issues in S. 2780 for which WGA Seeks Clarification

- *Scope of Liability Protection* – WGA supports allowing liability relief to Good Samaritans for both the Clean Water Act and CERCLA (as contained in the bill under the definition of “Environmental Laws”). However, we would like clarification of how the CERCLA liability relief would function under the bill.
- *Federal Lands* – WGA would like clarification regarding the extent to which Good Samaritan cleanups would be allowed on federal lands, and the potential role of federal agencies in Good Samaritan projects.
- *Early Termination of a Permit* – WGA would like clarification regarding the standards for cleanup in the event of early termination, .e.g. “no worse than before,” and clarification of whether the permitting agency would have the authority to set such standards.
- *Implementing Regulations* – WGA would like clarification of whether EPA would be required to issue regulations before Good Samaritan permits could be issued.

United States Government Accountability Office

GAO

Testimony
Before the Committee on Environment
and Public Works, U.S. Senate

For Release on Delivery
Expected at 9:30 a.m. EDT
Wednesday, June 14, 2006

ENVIRONMENTAL LIABILITIES:

Hardrock Mining Cleanup Obligations

Statement for the Record by John B. Stephenson, Director
Natural Resources and Environment



GAO-06-884T

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June 14, 2006

ENVIRONMENTAL LIABILITIES

Hardrock Mining Cleanup Obligations



Highlights of GAO-06-884T, a report to the Committee on Environment and Public Works, U.S. Senate

Why GAO Did This Study

Key federal environmental statutes, such as the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which established the Superfund program, require that parties statutorily responsible for pollution bear the cost of cleaning up contaminated sites. In many cases, liable parties meet their cleanup responsibilities. However, many parties responsible for hardrock mining sites include businesses that no longer exist, having been liquidated through bankruptcy or otherwise dissolved. Under these circumstances, some hardrock mining companies that have caused environmental contamination have left the problem for others, typically the government, to address.

We were asked to provide a statement for the record on the cleanup of contamination resulting from hardrock mining as it relates to our August 2005 report, *Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations* (GAO-05-658). We made nine recommendations in this report aimed at reducing the government's financial burden for costly environmental cleanups. The agency generally agreed with many of the recommendations, stating its intent to further evaluate some of them.

www.gao.gov/cgi-bin/getrpt?GAO-06-884T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact John B. Stephenson at (202) 512-3841 or stephensonj@gao.gov.

What GAO Found

EPA could better ensure that companies at high risk of incurring environmental liabilities—including hardrock mining companies—meet their cleanup obligations by making greater use of existing authorities. Most significantly, EPA has not implemented a 1980 statutory mandate under Superfund to require businesses handling hazardous substances to provide the agency evidence of their ability to pay to clean up contamination that could result from their operations. Businesses can provide this evidence, called financial assurance, in several ways, including providing a letter of credit from a financial institution and establishing a dedicated trust fund. The 1980 law requires EPA to use a risk-based approach for both (1) identifying the entities that would be covered and (2) specifying the financial assurance coverage they would be required to have. The law also requires EPA to give priority in developing these requirements to those classes of facilities, owners, and operators that EPA believes present the highest level of risk of injury. Although implementing the financial assurance requirement could help avoid the creation of additional Superfund sites and could provide funds to help pay for cleanups, EPA has cited competing priorities and lack of funds, among other things, as reasons for having made no progress in this area for nearly 25 years. Without the mandated financial assurance regulations, significant gaps in EPA's environmental financial assurance coverage exist, thereby increasing the risk that taxpayers will eventually have to assume financial responsibility for cleanup costs. For example, none of EPA's current financial assurance regulations require companies or industries that pose significant risk of environmental contamination to provide assurance that they can meet cleanup obligations for potential accidents or spills of hazardous substances or wastes.

Hardrock mining can cause significant environmental problems; these sites are typically large, complex, and costly to clean up. For example, in 2004, the EPA Inspector General estimated that cleaning up 63 mining sites on the Superfund's National Priorities List would cost up to \$7.8 billion. In applying the Superfund law's risk-based approach for developing financial assurance requirements, EPA may want to consider hardrock mining—for example, gold, copper, and iron ore mining—a high priority because it presents taxpayers with an especially serious risk of having to pay cleanup costs for thousands of abandoned, inactive, and operating mines in the United States. Some mine owners have defaulted on multiple occasions on environmental liabilities associated with their mines, and the cleanup costs for these sites are being, or are expected to be, borne largely by taxpayers. As a result, EPA may wish to give priority in developing financial assurance requirements to facility owners whose prior actions indicate that they may pose a high risk of default on their environmental obligations. Finally, financial assurances for businesses at risk for environmental contamination can help mitigate the fact that businesses can legally organize or restructure in ways that can limit their future expenditures for cleanups by, for example, separating their assets from their liabilities using subsidiaries to protect their assets.

United States Government Accountability Office

Mr. Chairman and Members of the Committee:

We are pleased to have the opportunity to comment on the cleanup of contamination resulting from hardrock mining as it relates to our work on environmental liability issues. Key federal environmental statutes, such as the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹ which established the Superfund program, require that parties statutorily responsible for pollution bear the cost of cleaning up contaminated sites.² In many cases, liable parties have met their cleanup responsibilities. However, many parties responsible for hardrock mining sites include businesses that no longer exist, having been liquidated through bankruptcy or otherwise dissolved. Under these circumstances, some hardrock mining companies that have caused environmental contamination have left the problem for others, typically the government, to address.

As the Committee considers legislation that would waive certain cleanup requirements for such parties as industry partners and nonprofit organizations who agree to clean up contaminated hardrock mining sites abandoned by their owners, it is also appropriate to consider other actions the government can take to better ensure that companies with a high risk for incurring environmental liabilities—including hardrock mining companies—meet their cleanup obligations. As detailed in our 2005 report on environmental liabilities, the Environmental Protection Agency (EPA) could better ensure that bankrupt and other financially distressed businesses carry out their cleanup responsibilities by making greater use of EPA's existing authorities and enforcement tools.³

¹For simplicity in this testimony, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 will generally be referred to as the Superfund law.

²The Superfund law generally applies to cleanups of contaminated sites that are no longer in use. RCRA generally applies to operating businesses that treat, store, or dispose of hazardous wastes.

Most significantly, EPA has not implemented a 1980 statutory mandate under Superfund to require businesses handling hazardous substances to provide the agency evidence of their ability to pay to clean up potential spills or other environmental contamination that could result from their operations. Businesses can provide this evidence, called financial assurance, in several ways, including providing a letter of credit from a financial institution and establishing a dedicated trust fund. The 1980 law requires EPA to use a risk-based approach for both (1) identifying the entities that would be covered and (2) specifying the financial assurance coverage they would be required to have. The law also requires EPA to give priority in developing these requirements to those classes of facilities, owners, and operators that EPA believes present the highest level of risk of injury. Although implementing the financial assurance requirement could help avoid the creation of additional Superfund sites and could provide funds to help pay for cleanups, EPA has cited competing priorities and lack of funds, among other things, as reasons for having made no progress in this area for nearly 25 years.

As we noted in our 2005 report, in applying the Superfund law's risk-based approach for developing financial assurance requirements, EPA may want to consider hardrock mining—for example, gold, copper, and iron ore mining—a high priority because history tells us that it presents taxpayers with an especially serious risk of having to pay cleanup costs for thousands of abandoned, inactive, and operating mines in the United States. As detailed in a 2004 report by EPA's Office of Inspector General, hardrock mining can cause significant environmental problems, and these sites are typically large, complex, and costly to clean up.⁴ According to the EPA IG report, 63 hardrock mining sites were on the Superfund's National Priority List (NPL) and another 93 sites had the potential to be added to the list. At least 19 of the 63 NPL mining sites had estimated cleanup costs of \$50 million or more. In total, the 63 sites were estimated to cost up to \$7.8 billion to clean up, \$2.4 billion of which was expected to be borne by taxpayers rather than

⁴ *Environmental Liabilities: EPA Should Do More to Ensure that Liable Parties Meet Their Cleanup Obligations*, GAO-05-658, Aug. 17, 2005.

the parties responsible for the contamination. The IG report also highlighted the fact that the projected operation and maintenance period for cleanup remedies ranges from 40 years to “in perpetuity.” Thus, the costs to taxpayers would increase if the liable parties expected to pay for the cleanup remedies proved to be unable to do so.⁵

Further, we reported in 2005 that some mine owners have defaulted on multiple occasions on environmental liabilities associated with their mines, and the cleanup costs for these sites are being, or are expected to be, borne largely by taxpayers. These owners may reasonably be viewed as at high risk for defaulting on environmental obligations associated with mines or businesses that they currently own. For example, one individual is associated with several businesses that have filed for bankruptcy protection. Like other mine owners with serial bankruptcies involving contaminated mining sites, this owner continues to operate businesses having sites with significant contamination whose cleanup may eventually fall to the Superfund. If EPA developed and implemented the financial assurance regulations that the Superfund law mandates, EPA could require such owners to provide financial assurances now for existing and future cleanups, thereby reducing the amount that taxpayers would otherwise likely be required to pay.

However, without the mandated financial assurance regulations, significant gaps in EPA’s environmental financial assurance coverage exist, thereby increasing the risk that taxpayers will eventually have to assume financial responsibility for cleanup costs. First, none of EPA’s current financial assurance regulations require companies or industries that pose significant risk of environmental contamination to provide assurance that they can meet cleanup obligations

⁵EPA, Office of Inspector General, *Nationwide Identification of Hardrock Mining Sites*, 2004-P-00005 (Washington, D.C.: Mar. 31, 2004).

⁶The EPA Inspector General reported that at least one “clearly viable” party had been identified for 70 percent of the 63 NPL mining sites (including 11 percent where the viable party was a federal agency, such as the Department of the Interior). However, the report also emphasized that EPA should be concerned about the viability of these parties over time because of the long-term nature of the cleanups liabilities at mines.

associated with potential accidents or spills of hazardous substances or wastes. For example, when EPA reaches settlement agreements with parties regarding cleaning up existing Superfund sites, the agency generally requires the businesses to provide financial assurance demonstrating their ability to pay for the agreed-upon cleanup activities. Similarly, under RCRA's corrective action program, EPA typically requires that owners and operators of hazardous waste treatment, storage, and disposal facilities provide financial assurance for cleanups of spills or other existing contamination at hazardous waste facilities.⁶

Another significant gap in financial assurance coverage that the Superfund mandate could address involves types of waste excluded from RCRA coverage. Some types of wastes associated with mining activities can result in substantial cleanup costs but are excluded from the definition of hazardous wastes and therefore are not regulated under RCRA's hazardous waste provisions. This exclusion has resulted in a significant gap in financial assurance. In addition, we note that mining activities on private lands are not covered by the Department of the Interior's Bureau of Land Management financial assurance requirements for mines on federal land it manages.⁷ However, some of these mining facilities handle hazardous substances as defined under the Superfund law, and, therefore, financial assurance regulations issued under the Superfund law could apply to these facilities. The Superfund financial assurance mandate could also address the significant gap in financial assurance that exists because generators of hazardous waste (such as metal-plating facilities), which are regulated under RCRA, are generally not required to maintain any financial assurances for contamination they have caused.

⁶RCRA's closure and post-closure financial assurances cover normal costs of closing and conducting post-closure care but do not cover cleanups stemming from accidental releases.

⁷Our report *Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs*, GAO-05-377 (Washington, D.D.: June 20, 2005) recommends ways for BLM to better manage financial assurances it requires of operators to guarantee reclamation costs if they fail to reclaim BLM-managed lands after operations cease.

By its inaction on the Superfund mandate to require businesses to provide financial assurance, EPA has continued to expose the Superfund program, and ultimately the U.S. taxpayers, to potentially billions of dollars in cleanup costs for facilities that currently are not required to have financial assurances for cleanup costs, such as many gold, lead, and other hardrock mining sites and metal-plating facilities. By implementing the financial assurance requirement under Superfund, EPA could help close the financial assurance gaps discussed above by requiring financial assurances for cleaning up existing and future contamination at facilities that handle hazardous substances but are not subject to RCRA's closure/post-closure or corrective action programs, including many mining sites and facilities that generate, but do not treat, store, or dispose of hazardous waste. These financial assurance gaps may be more significant since the authority for an environmental tax on corporations, crude oil, and certain chemicals, that had largely funded the Superfund program expired in 1995. As a result, the federal government's general appropriations fund is increasingly being tapped to fund the cleanups paid for by the Superfund trust fund when responsible parties do not. For example, for fiscal year 2004, EPA's appropriation for the Superfund program was from general revenues only.

As we noted in our 2005 report, EPA may wish to give priority in developing financial assurance requirements to facility owners whose prior actions indicate that they may pose a high risk of default on their environmental obligations. Factors EPA may wish to consider in evaluating owner risk include compliance history—such as a history of noncompliance with environmental laws, including cleanup obligations, and magnitude of past, current, and potential environmental liabilities.

Finally, financial assurances for businesses at risk for environmental contamination can help mitigate the fact that businesses can legally organize or restructure in ways that can limit their future expenditures for cleanups by, for example, separating their assets from their liabilities using subsidiaries. A

subsidiary that is engaged in a business that is at risk of incurring substantial liability, such as mining or chemical manufacturing, can protect its assets by transferring the most valuable ones—such as equipment and patents—to a related entity, such as the parent or other subsidiary engaged in less risky endeavors. The high-risk subsidiary can continue to use the transferred assets, as appropriate, by leasing or renting them. It has become common practice for experts in asset protection to recommend that corporations protect their assets in this way. A goal is to continually draw down on the subsidiary's remaining assets, such as cash from the sale of equipment, to pay operating expenses, including rental and lease payments and salaries. If a liability arises, the high-risk subsidiary's remaining assets may be reached—but generally not those of the parent corporation or other subsidiaries to which assets were transferred.

While these asset protection strategies are generally legal depending on the circumstances, it is generally unlawful to transfer assets with the intent to hinder or defraud creditors. Most states have laws that contain prohibitions on fraudulent transfers. Creditors generally must seek to invalidate such transfers within 4 years of their occurrence. Perhaps for these reasons, publications by financial and legal advisors have suggested that asset transfers be implemented in stages over time to avoid calling attention to them. The use of such strategies by parties liable for environmental cleanups presents a significant challenge to EPA in obtaining cleanup costs because it is hard for the agency to know about such transfers, much less obtain sufficient information to successfully challenge them within the time permitted by law. Further, because businesses typically are aware of Superfund liabilities for many years before they actually have to fund the cleanups, they have ample time to reorganize and structure themselves in ways that can limit the expenditures they may be required to make in the future.

In closing, these are issues we believe the committee should consider in evaluating legislation to encourage the cleanup of contaminated hardrock mining sites. Our report on environmental liabilities identifies several ways EPA can and

should protect its financial interests, including implementing the mandate in the Superfund law to require businesses at risk of environmental contamination to provide financial assurance that it can clean up any spills or contamination that might occur in the future.

**GAO Contact and
Staff Acknowledgments**

For further information on this statement, please contact John Stephenson at (202) 512-3841 or stephensonj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals who contributed to this statement include Nancy Crothers, Christine Fishkin, Chet Joy, Richard P. Johnson, and Susan Swearingen.

