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Abandoned Mines in the United States and Opportunities for Good Samaritan Cleanups

Subcommittee on Water Resources and Environment
U.S. House Committee on Transportation and Infrastructure

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Testimony of

Doug Young
Senior Policy Director, Keystone Policy Center

Mr. Chairman, members of the Committee, thank you for the opportunity to present testimony for today's hearing on this important and timely topic.

My name is Doug Young, and I am a Senior Policy Director with Keystone Policy Center (Keystone). Keystone is headquartered in Keystone, Colorado, with offices in Denver, and Washington, D.C. I work out of the Denver Office. I am testifying today on behalf of Keystone and my past experience working on this issue.

I have been with Keystone since September 2014, where I have focused on environmental and natural resource issues. This includes the cleanup of abandoned hardrock mines and the so-called Good Samaritan legislation.

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Personal Background

In various elected offices, I have worked over the past 20 years on efforts to develop and reach consensus on proposed legalization regarding incentivizing Good Samaritan cleanups of abandoned hardrock mines. This involved bringing together various interests—from the environmental community, the mining industry, federal and state regulators, and local mine cleanup organizations—to address concerns and develop statutory language that would provide, in federal law, a program to better utilize volunteers in cleanup efforts.

I started working on Good Samaritan policy while an environmental staffer for Colorado Governor Roy Romer in 1993. As his Staff Council representative to the Western Governors' Association (WGA), I interacted with staff from other western states' governors offices. At the time, we learned that volunteers who were attempting to address safety and environmental problems at abandoned mine sites in western states were encountering questions about their potential liability for ongoing contaminated water discharges. As a result, these volunteers halted such ongoing work, stayed away from discharging water while addressing other issues at sites, or declined to engage in such work at the outset. I and other Staff Council members—with the assistance of WGA staff—decided to work on this problem. Given that these laudable voluntary efforts were designed to render aid by improving the condition of sites, the moniker "Good Samaritan" seemed appropriate and thereafter became attached as the name of legislative efforts to address liability concerns for voluntary abandoned mine cleanups. WGA has produced a number of policy resolutions on abandoned mines since 1993 and currently has a policy in place encouraging support for abandoned mine cleanup and for Good Samaritan legislation. That resolution can be found here: http://www.westgov.org/images/stories/policies/Cleaning_Up_Abandoned_Mines_in_the_West_2013.pdf

I continued to work on this issue with many stakeholders while in Representative and then Senator Mark Udall's Office. A number of bills were introduced that represented the work of these negotiations, which focused on amending the Clean Water Act (CWA), as well as bills introduced by other members.

At Keystone, we have initiated an effort bringing together a broad coalition to explore options and approaches with the goal of reaching consensus around a single approach and a corresponding Good Samaritan legislative package. This effort, which was initiated a couple of months ago, will have its first meeting on October 23, 2015. We hope that it can help provide input and perspectives for this Subcommittee's efforts.

My testimony today has been informed by these current and past efforts, and will provide the Subcommittee my perspectives on why these past efforts have been unsuccessful, the obstacles encountered, and on ways to move forward with new ideas and approaches. I will also focus on abandoned *hardrock* mines as these are the sites that present the largest concerns in the western United States.

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Reports on the Extent of the Problem and History

As the Subcommittee is aware, although a complete and reliable inventory doesn't presently exist, thousands of abandoned mines have been identified throughout the country. Not all of these sites discharge contaminated water, but they all do present issues needing to be resolved and addressed. This legacy is based on our history of essential mineral exploration and development, and the techniques employed and laws in place at the time.

There are a number of reports documenting the extent of the problem and the history of western hardrock mining. These include reports from the General Accountability Office (GAO) as well as federal and state agency assessments.

In addition, an excellent report regarding mining's legacy, abandoned mines and efforts to address obstacles to cleanup was produced by the Center of the American West, an organization located at the University of Colorado's Boulder campus. This 2005 report, "Cleaning Up Abandoned Mines in the West: Prospecting for a Better Future," was the result of a number of meetings with various interests to discuss the issue and work on possible solutions. It contains examples of mines, the experience of volunteers at cleanup sites, and discussions of history and ideas to promote cleanup. I was a participant of the group discussions that led to the creation of this report. It can be found at the following link: http://centerwest.org/projects/mining/abandoned-mines-remediation

Although these reports and history are useful, our task today is not to assign blame or lament the practices of the past, but to work together to find ways to address this legacy and improve the environment and public safety by stemming—or at least reducing—the threats presented by these old mines.

Who is a Good Samaritan in the Abandoned Hardrock Mine Context?

A Good Samaritan in this context is any entity that had no past connection or involvement at an abandoned mine that seeks to cleanup, make safe and/or reduce pollution existing on and emanating from an abandoned mine. This is a broad definition and comes with a set of complicating factors that would need to be explored and addressed in any statutory program. But there is a precedent in the context of addressing environmental hazards. The Superfund law (the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)) has a Good Samaritan provision that captures the same concept of a person who is seeking to administer aid to stem pollution releases without any past connection regarding those releases (Section 107(d)(1)). The idea here would be similar.

What is the Issue? Draining Abandoned Hardrock Mines

Abandoned hardrock mines that affect water quality dot many western state watersheds. Each mine has its own special concerns and challenges. But when it comes to water concerns, the issues are essentially similar. Water contamination at abandoned mines is typically produced in two ways. One is when water flows through underground mine workings that are exposed to air, the water

becomes acidic and thereby dissolves metals and other substances from the surrounding rock, and then emerges on the surface from mine tunnels (adits) and other pathways. The other is when surface water (ether from the mine tunnels or unconnected from the mine workings) flows over mine tailings and picks up contamination and transports it downstream.

Good Samaritans have been at work over the years addressing the second method by removing tailings piles and other material that come into contact with surface water flows. By and large, these efforts have been successful and have not been deterred by legal liability issues. Projects have been developed and approved here so that no wastewater permits are necessary or come into play.

It's the second situation where the legal obstacles emerge and thwart cleanup to reduce water contamination emanating from abandoned hardock mines. This is also where most of the benefit could occur with a Good Samaritan program as these draining tunnels are a significant source of water pollution harming aquatic life, riparian ecology, recreation and public health.

Are There Potential Good Samaritans? The Colorado Example

Given the complexity of this problem and the possible risks involved in cleaning up these sites, the question arises as to whether there are Good Samaritans out there willing and able to do the work. **The answer is yes.** In fact, as mentioned above, there are already Good Samaritans doing some work at these sites. There are even Good Samaritans working to address water discharges at these sites. But those examples are few and are typically the result of being listed as Superfund sites and thus have federal or state agencies partnering with local groups to get work done. But this is the exception to the rule.

To put this into perspective, consider the example of one western state: Colorado. The Colorado Division of Reclamation, Mining and Safety (DRMS) has been inventorying the mines and water impacts in the state. As of today, the agency has identified a total of 230 mines that are draining contaminated water. Of these, 47 are being addressed with active water treatment efforts, 35 mines are under investigation or are being remediated, and 148 mines—well over half—are likely impacting water quality but the draining water is not being treated. The result: Colorado has determined that about 1,645 miles of Colorado streams are impaired by this untreated mine drainage. This data can be found on a map and in a table at the DRMS website at these links:
http://mining.state.co.us/Programs/Abandoned/Documents/Draining_Mines_GISData-DRMS_08-18-15.pdf
http://mining.state.co.us/Programs/Abandoned/Documents/LegacyMineWork.pdf

There are also thousands of other inactive mine sites that also drain water, but it has been determined that the draining water is not contaminated enough to cause a measurable impact to receiving waters and thereby warrant significant cleanup activity.

At the 82 sites where some work is being done much of that involves ways to stem water contamination by removing contamination sources or implementing techniques so as to avoid becoming liable for the ongoing water discharges. In very rare cases permits are secured for active

treatment systems and are paid for by federal and state funding sources. In even rarer cases, the mine is being address due to its status as a Superfund site.

The state, through the DRMS, has spent $12 million over the past 6 years on their abandoned mine cleanup efforts. They can tackle three or four projects per year. At this rate, finding the funding and the capacity to address all 183 mines (the 230 total mines minus the 47 being addressed today) will take nearly 50 years and hundreds of millions of dollars.

And this is based on DRMS—a Good Samaritan—presently not being able to address the bulk of the problem: draining tunnels and adits. DRMS, like its colleague agencies in all western states, is interested and willing to work with others to address draining water at all 183 mine sites. But the state, as well as many other nongovernmental potential Good Samaritans, is deterred in doing so due to the long-term liability exposure from the CWA and CERCLA. If these legal obstacles can be resolved, the pace of cleanup—and the potential partners, resources and funding—could increase dramatically and shorten the 60 year time horizon of address all the identified sites in Colorado alone.

Although these sites can present complex problems, there are many Good Samaritans—like Colorado's DRMS—that are ready, willing and able to get to work to tackle these complex issues. Possible Good Samaritans have plenty of experience in addressing sites throughout the country. Trout Unlimited (TU), a representative of which is on the panel today, has been one such group that has worked on sites across the country and in Colorado, such as the Tiger Mine near Leadville, Colorado. But, TU ended up halting its helpful work at the Tiger Mine due to liability concerns. There are also many local watershed groups that know the situation with the abandoned mines in their regions and partner with state and federal agencies on cleanups. In Colorado, there are about 30 such groups. Any of these could benefit directly or indirectly by the establishment of a Good Samaritan program that would effectuate more cleanups.

<u>What Are the Legal Obstacles Facing Good Samaritan Cleanups?</u>

a. The Clean Water Act: Compliance and Liability

The past efforts to develop federal Good Samaritan legislation have focused on the primary impediment to cleanup work: the Clean Water Act.

As mentioned, the primary deterrent to the voluntary cleanup of abandoned hardrock mines has been concerns with liability for ongoing mine drainage. These are considered "point sources" of water contamination and as such fall under the jurisdiction of CWA, meaning that they need to be controlled through a permit (the national pollution discharge elimination system (NPDES) permit), meet certain state and federal water quality standards for each contaminant present in the discharge through treatment, and ensure perpetual compliance. At large complex abandoned hardrock mine sites, this issue can be—and at some places has been—addressed as the cleanup has involved entities (including states) that have the wherewithal to construct and maintain active and perpetual water treatment systems.

However, it is both uneconomical and infeasible to establish such active water treatment systems at the many thousands of draining abandoned mines. And yet other techniques—such as passive water treatment systems—are very effective at reducing the level of contaminates in the water and are much less expensive. But, these passive techniques typically do not result in water that is fully compliant with state and federal water quality standards and thus not complaint with the CWA. By affixing liability and responsibility to an entity who affects a polluting discharge—even if that entity had no past connection to that discharge and is seeking to reduce the level of contamination—the CWA deters Good Samaritans. Today, every Good Samaritan would have to secure an NPDES permit, meet state and federal water quality standards for the contaminants emanating from the mine, and ensure compliance for those standards forever. Using Colorado's numbers as an example, it effectively means that some sort of expensive and active water treatment facility would have to be constructed to address the pollution coming from all 230 draining sites.

b. CERCLA Liability

Draining abandoned mines typically contain contaminants at levels that constitute hazardous substance releases. As a result, they also fall within the jurisdiction of CERCLA. Nevertheless, the vast majority of draining abandoned mine sites do not become listed Superfund sites as they do not score high on the National Priorities List (NPL). But, because they still involve releases, these sites fall within the requirements of CERCLA.

A Good Samaritan working at a site that is producing hazardous releases could thereby become a "responsible party" and thus face perpetual liability and be required to perform or pay for activities that would stop those releases or meet permitting and contaminant standard requirements. As with the CWA, these concerns deter volunteers from doing work to stem pollution from these sites.

c. Citizen Lawsuits

The CWA contains a provision that allows third parties—citizens who are not connected with the site or the Good Samaritan—to sue if the entity is not complying with the requirements of the CWA. This is designed to help federal and state agencies promote greater enforcement and compliance with the CWA. As a statutory right, these citizen lawsuits remain available to enforce the full requirements of the CWA regardless of whether federal agencies or states have adopted policies to encourage Good Samaritan cleanups. As most Good Samaritan efforts would not involve NPDES permits or compliance with federal and state cleanup standards, every Good Samaritan project would run the risk of a citizen lawsuit. Thus, this aspect of the law would need to be addressed under any Good Samaritan program.

d. Funding

As highlighted above regarding Colorado's abandoned mine land program, cleaning up the water discharges from abandoned mines is expensive. Although there are a number of proven and effective passive treatment systems in lieu of much more expensive active water treatment systems,

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these passive systems still require resources and funding. Federal agencies have funding programs in place for cleanups, but pale in comparison with the needs. Proposals have been offered to assess a fee to assign a royalty on current hardrock mining activities to help, but these have been unsuccessful due to a number of concerns, such as (1) what formula to apply, (2) what size of mining operations to assess a fee or royalty, (3) how the revenue from such a program would be allocated to states and sites, (4) and concerns about "double taxation" regarding existing state mining reclamation fees and any possible federal fee or royalty, and the possibility of an royalty assessed regarding 1872 General Mining Law reform efforts.

It is possible that if a Good Samaritan program can be established, such a program could bring additional resources and expertise to the cleanup of these sites—from philanthropic sources and the mining industry—so that establishing a separate fee or royalty could be unnecessary.

e. Other

The above issues are the primary impediments to Good Samaritan work related to water discharges from abandoned mines. It has been suggested that other environmental laws and requirements also present obstacles and should be addressed or waived to promote more voluntary cleanups, such as the National Environmental Policy Act (NEPA), the Resource Conservation and Recovery Act (RCRA), and the Toxic Substances Control Act (TSCA). However, these and other federal, state and local environmental requirements have not been cited as an obstacle to cleanup, and, in many cases, could be complied with or could be addressed as part of any Good Samaritan cleanup plan or statutory solution. Adding blanket waivers from these other laws without understanding how they may deter Good Samaritans or evaluating how they could be accommodated could draw opposition to creating a solution that could garner wide support.

<u>Addressing Legal Obstacles</u>

a. CWA Good Samaritan Permit

Past legislative efforts to address the legal obstacles have focused on creating a new permit program under the CWA called a Good Samaritan permit. Under this approach, Good Samaritan permits would (1) be separate from NPDES permits, (2) require an approved cleanup plan that is reasonable and effective but not as extensive as what would be required under an NPDES permit, (3) require water quality improvement but not to the standards commensurate with what would be required under an NPDES permit, (4) allow the Good Samaritan to cancel the permit when the treatment work was completed under the plan or if unforeseen complications arose that were too much for the permittee, and (5) shield the permittee from citizen lawsuits.

As can be expected, this effort quickly became cumbersome and contentious. The new permit had to address a multitude of issues including: (1) defining an abandoned mine site, (2) who can be a Good Samaritan, (3) how much detail needs to be in the permit, (4) what standards to apply, (5) can a site be "re-mined" so as to recover economically valuable minerals, (6) providing protection for potential permittees to investigate the site to determine if the permittee is able to address the issues

at the site and even seek a Good Samaritan permit, (7) who could be eligible as subcontractors to the permittee and addressing their liability coverage, and (8) long-term maintenance of the site and how to address issues if something goes wrong with the work after the permit is closed.

Each of these issues required extensive negotiation. Although compromises were largely reached that resulted in legislation, few were completely comfortable with the final package. In addition, larger political issues emerged from the negotiation that stymied progress on this approach. Those issues included: (1) discomfort by some with reopening the CWA, especially due to the issues surrounding the Supreme Court's decisions regarding the jurisdictional scope of the CWA, (2) the desire by some to include a CWA Good Samaritan permit program as part of larger efforts to reform the 1872 General Mining Law, (3) concerns about allowing re-mining under Good Samaritan permits and even including mining companies in the cleanup work, (4) concerns about establishing a precedent under the CWA of relaxing the requirement to meet state and federal water quality standards, (5) the desire by some to include liability protection to Good Samaritans from a number of other state and federal environmental laws and requirements, and (6) the view by some that no legislative fix was necessary as Good Samaritans liability concerns could be addressed administratively by the U.S. Environmental Protection Agency (EPA).

Because of these and other concerns, no CWA Good Samaritan permit legislation advanced. As a result, some local watershed groups that were poised to get critically needed cleanup work underway became interested exploring pilot program for their area, and a couple of bills were introduced for this purpose.

I believe it's still possible to develop a CWA Good Samaritan permit approach. However, given the concerns of some, and the complication of working through all the issues involved with these concerns, it seems unlikely that this would be a fruitful mechanism.

b. Expanding Upon CERCLA's "good Samaritan" Program

As mentioned above, CERCLA contains a "good Samaritan" provision that protects an entity from the full requirements and liabilities of CERCLA. In addition, the EPA has developed administrative policies that provide further assurances to volunteers that they will not be subject the full brunt of CERCLA.

Nevertheless, even with these statutory and administrative protections, issues remain about many aspects of CERCLA to cause concern and deter Good Samaritans. The main issue is with ongoing CWA liability from a non-permitted release that do not meet water quality standards. CERCLA's "good Samaritan" provision only shields a volunteer from liability and other requirements while doing cleanup work onsite. Its scope does not cover the ongoing water discharge post-onsite cleanup. Thus, there would still be a need to address this aspect.

Still, given CERCLA's existing "good Samaritan" provision and the EPA's policy, there may be ways to reach consensus on making small changes to CERCLA to provide protections to Good

Samaritans doing work at abandoned mine sites. This has the value of avoiding a number of the concerns listed above regarding the CWA Good Samaritan approach.

It's important to note that these possible revisions to CERCLA to create a Good Samaritan program would not necessarily result in sites being listed as Superfund sites. Many communities remain concerned that such a designation may harm the economy and other historic preservation and recreational aspects that can come with such a designation. Under this approach, communities may in fact be more welcoming of having sites cleaned up under a Good Samaritan approach without the Superfund designation and yet still see the significant cleanup work under CERCLA authorities.

Keystone hopes to explore this CERCLA-only approach with others as part of its meeting on October 23rd in Denver.

c. Separate Good Samaritan Permit Program

Because of the lack of full consensus around a CWA Good Samaritan program, past efforts have included developing a Good Samaritan permit program separate from the CWA and as a wholly new permit program. This proposal would require states (or the EPA) to establish Good Samaritan permit programs that would approved by the EPA that would include details about cleanup plans as well as other issue similar to what was included in the CWA Good Samaritan permit program.

However, this proposal also included very broad liability waivers for Good Samaritans for essentially all federal, state and local environmental laws and regulations. It also did not address a number of issues that were extensively negotiated under the CWA Good Samaritan permit legislation, and in some cases, such as re-mining, included provisions that were at odds with compromises previously reached.

Nevertheless, such a "stand-alone" Good Samaritan permit approach could be pursued. However, it would require further negotiations to address the broad environmental waiver provision, the re-mining provision, and other issues to garner wider consensus.

d. Brownfields Program

Some abandoned mine sites have been addressed through the Brownfields program, which provides funding and technical assistance to cleaning up contaminated sites for beneficial uses. Although this program could be of use to potential Good Samaritans, it does not address or provide protection to Good Samaritans from potential liability under the CWA and other issues associated with such work. As a result, if this approach were to be explored, the law would need to be amended to include Good Samaritans who do not wish to develop the land further and thus do not have the resources or interest in the long-term maintenance and operation of any necessary treatment systems.

e. Federally Permitted Releases

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Current law provides a number of instances where a water discharge is exempt from the full CWA requirements. However, these exemptions are typically connected with an NPDES permit. As a result, even if this approach were to be pursued for Good Samaritan purposes, current law would need to be amended so as to make it clear that an ongoing discharge from a site where cleanup was performed by a Good Samaritan and an NPDES permit does not apply, that the discharge was a "federally permitted release" and thus not subject to other legal liabilities and requirements.

Conclusion

No matter what approach is selected to establish a Good Samaritan program to encourage greater cleanup of abandoned hardrock mines, efforts to develop consensus on the scope of the problem and the specific solutions to address those problems will need to occur.

Most agree that these sites do create ongoing concerns, risks and threats. The current laws and regulations, although critically important in protecting human health and the environment, are not fully adequate in addressing this particular problem. Most laws and regulations work best when a specific entity can be identified—and has the resources—to comply with requirements. In the case of abandoned hardrock mines, there isn't anyone to keep "on the hook." But there are plenty of interests and entities that have the capacity and ability to prove assistance—if they are not treated as "owners" of these sites and thereby must face the sorts of legal requirements and liabilities of such owners.

This is not a failure of these laws—it is a situation where good laws and intentions work to discourage other good intentions.

Adjusting these laws, regulations and policies in light of this reality should be attempted. However, that attempt should be conducted is a spirit of collaboration and consensus. As most want the same thing—to promote voluntary cleanup of abandoned hardrock mines and thereby improve water quality—all interests should be able to come together and negotiate a program that can be effective.

Keystone Policy Center is willing to work with all sides in that spirit with the hope of achieving a legislative solution that can garner wide support. Again, thanks for convening this important hearing and I hope it leads to productive discussions and solutions.