Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

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October 16, 2015

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Hearing on "Abandoned Mines in the United States and Opportunities for Good Samaritan Cleanups"

PURPOSE

On Wednesday, October 21, 2015, at 10:00 a.m. in 2167 Rayburn House Office Building, the Subcommittee on Water Resources and Environment will meet to receive testimony on "Abandoned Mines in the United States and Opportunities for Good Samaritan Cleanups." Witnesses will include representatives of the Environmental Protection Agency (EPA), the Western Governors Association (WGA), the Interstate Mining Compact Commission (IMCC), the National Mining Association (NMA), Trout Unlimited, and Earthworks.

BACKGROUND

On August 5, 2015, the Environmental Protection Agency (EPA) along with its contractor, Environmental Restoration, LLC, and representatives of the Colorado Division of Reclamation Mining and Safety were conducting an investigation of the Gold King Mine in the vicinity of Silverton, Colorado. The intent of the investigation was to assess on-going mine drainage water releases from the mine in order to treat the mine water, and assess the feasibility of further mine remediation. This investigation was part of a larger effort within the Upper Animas Mining District to determine, along with the state, whether listing of the Gold King Mine on the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) National Priorities List (NPL) was warranted for further remedial action. The plan was to excavate unconsolidated material that had collapsed into the mine entry back to the timbering. During the excavation, the unconsolidated material gave way, opening the mine tunnel and spilling the water accumulated behind the collapsed material into Cement Creek, a tributary of the Animas River.

Estimates are that the release consisted of approximately three million gallons of water that had been held behind the unconsolidated material in the abandoned mine entry. There were several workers at the site at the time of the breach, all of whom were unharmed.

The contaminated plume of water stretched for miles, flowing downstream from Cement Creek into the Animas and San Juan Rivers, a course that stretches from Colorado into New Mexico and eventually into Utah and Arizona. The rivers also flow along lands of the Southern Ute Tribe and through the Navajo Nation.

The spill released heavy metals, including arsenic, copper, lead, mercury, and selenium, into the water, affecting water quality and contaminating river sediments. The effects of the spill, particularly the long term effects, continue to be monitored, but are not yet clear. The incident has brought renewed attention to the challenges posed by the Nation's multitude of abandoned mines.

Past mining activities have impacted hundreds of thousands of acres of land, altered surface and ground water drainage patterns, and generated substantial amounts of waste, much of which was left in waste piles scattered around the landscape. Waste includes tailings, dump/heap leaching wastes, and mine water. Most of these old sites were mined, and later abandoned by the mine owners or operators when it was no longer economically viable to retrieve minerals from the sites, prior to the environmental laws enacted in the 1970s.

Today, it is estimated that over half--a--million abandoned hard rock and coal mine sites are scattered throughout the United States, on private, state, or federal lands. Though not all abandoned mines are a threat, some of these abandoned mines, plus their associated residual waste, adversely impact the quality of surface and ground waters and pose other environmental and health hazards as a result of acid mine drainage and toxic loadings of heavy metals leaching into water sources. Many of these old mine sites also pose physical safety hazards. An estimated 15,000 abandoned hard rock mine sites present the most significant potential threat to surface and ground waters. Currently, there are few efforts underway around the nation to clean up abandoned mine sites, other than those sites that are directly being addressed under the EPA's Superfund program.

The potential costs to the environment and to society of these abandoned mines are great. Tens of thousands of miles of streams around the nation are contaminated by acid and metals from drainage from these abandoned mine sites, and hundreds of thousands of acres of lakes and reservoirs are impacted by runoff from abandoned mines. As a result, substantial amounts of aquatic habitat can be disturbed, spoiling these many streams, lakes, and reservoirs for fishing, hiking, and other recreational activities, and impacting aquatic species in those habitats. All of this results in the possibility of substantial loss of revenue for communities whose economies depend on outdoor activities.

Discharges of acid and heavy metals from mine sites have polluted water supplies, affecting residential, commercial, and industrial usage. Numerous communities and industries must spend hundreds of thousands of dollars to treat their surface or ground water supplies tainted by polluted runoff from abandoned mines.

BARRIERS TO ADDRESSING THE ABANDONED MINES PROBLEM

While it is widely acknowledged that the many abandoned mine sites around the Nation are a problem and that securing and cleaning up priority sites is warranted--particularly those sites that may be contributing to water quality problems or that present public health and safety concerns--it is less clear how to go about doing it. Several issues must be addressed at most abandoned mine sites.

Identifying Who Is Responsible

The first issue is responsibility. Most of the mine operations involved with abandoned mines ceased decades ago, prior to modern environmental concerns and standards. As a result, it is often difficult to identify a party responsible for a cleanup as many businesses may have gone bankrupt, merged with other companies, or simply vanished. In many instances, many abandoned mine sites on government-owned lands are so old that no financially viable parties who can be readily associated with abandoned mine sites exist today, and many of the abandoned mine sites are so old that the government property owner is the only remaining viable party.

Financial Issues

A second issue regarding the remediation of abandoned mines involves having sufficient resources available to address the multitude of sites. The leading federal program to address the environmental and human health challenges associated with abandoned mines is the Superfund program. While the Superfund statute aims to compel responsible parties to pay the cost of cleanup when such parties can be found and are financially viable, the Superfund program also has a "Fund-lead" program where the cost of cleanup is funded by appropriations from the U.S. Treasury.

Superfund cleanup generally can take two forms—the Superfund removal program, which covers short-term actions to address imminent threats to human health and the environment, and the Superfund remedial program, which addresses typically longer-term efforts to clean up contaminated sites that are listed on the NPL. Federal efforts to address abandoned mine sites under Superfund can be carried out under both programs. However, because the Superfund program focuses on more than just abandoned mine sites, funding for the cleanup of abandoned mine sites must compete against efforts to remediate other toxic sites across the Nation. In FY 2015, EPA's Superfund cleanup programs received $682 million.

The Surface Mining Control and Reclamation Act (SMCRA) of 1977 created an abandoned mine land (AML) fund to pay for the cleanup of abandoned coal mine sites. Certain authorized states can use a portion of their SMCRA AML funds to pay for abandoned hardrock mines when all of the state's coal-related sites have been addressed. On average, about $3.5 million in AML funds are available nationwide each year for abandoned hardrock mines.

Legal Obstacles

Legal requirements may present impediments to successfully addressing abandoned mine sites. There are potentially many voluntary parties, who did not own or operate the abandoned mines or have anything to do with causing pollution problems, willing to take steps to reduce the environmental, health, and safety problems associated with abandoned mine sites. These parties, sometimes referred to as "Good Samaritans," may include government agencies, nongovernmental organizations, mining companies, or other private parties.

These parties may be interested in being a Good Samaritan simply for the sake of helping to clean up the environment. Some parties may also have other important motivations. For example, some may wish to eliminate a pollutant source so that they can re-establish suitable fishery habitat to improve fishing in currently-impacted waters. Others may want to reduce the pollutant loadings to their impacted surface or ground water supplies to minimize their water treatment costs. Still other parties, for example, some mining companies, may wish to enter lands to clean up and reclaim a shut down or abandoned mine site for purposes of re-mining. In some cases, those parties interested in doing site remediation only want to achieve a level of environmental improvement compatible with their objectives and not necessarily in meeting all water quality or cleanup standards.

However, potential Good Samaritans have indicated a reluctance to become involved in site cleanup work at abandoned mines because of liability concerns under various environmental laws. For example, potential legal liability exists under the Clean Water Act (CWA), or comparable state law, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).

Under the Clean Water Act, anyone conducting cleanup activities at an abandoned mine site could become responsible for any new or continuing point source discharges of pollutants from the mine, and must obtain an NPDES (National Pollutant Discharge Elimination System) permit for such discharges from the site. Not only would that party be responsible for conducting the cleanup activities, but they could remain responsible for any point source discharges that continue after the cleanup activities are completed.

In addition, when a party receives an NPDES permit, that permit requires the party to meet all applicable technology-based standards, and may include more stringent water quality standards. A Good Samaritan may want to decrease the discharge of pollutants and acid mine drainage but, perhaps because of cost limitations, cannot undertake a comprehensive remediation project that would satisfy all Clean Water Act standards.

The liability scheme under the Superfund law could also be a deterrent to the cleanup of abandoned mine sites. Liability under Superfund is strict (that is, the potentially responsible party (PRP) need not have been negligent), joint and several (that is, any one PRP can be sued for the entire damage), and retroactive (that is, a current party can be sued for any damages caused by past disposal of hazardous substances, even if done by others). As a result, a Good Samaritan who did not cause the contamination problem in the first place, yet gets involved with cleaning up an abandoned mine site, could become liable for cleanup costs far greater than they

are willing to pay. However, Superfund provides liability protection where a release is pursuant to a Clean Water Act permit. This permit shield is effective as long as the release complies with the permit.

Over the past few years, the EPA has issued guidance in an attempt to address concerns over potential liability for parties desiring to conduct Good Samaritan cleanup projects at abandoned mine sites.

In 2007, EPA issued its "Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans." The stated purpose of this guidance document was to "provide greater legal certainty to Good Samaritans and resolve to the extent possible the threat of potential federal liabilities so that voluntary cleanups at these sites can proceed." The guidance created two tools aimed at addressing potential Good Samaritan liability concerns: (1) the model "Good Samaritan Comfort Letter," where EPA would pledge not to litigate, and defend the Good Samaritan against third party lawsuits, for agreed-upon cleanup efforts; and (2) a model "Good Samaritan Settlement Agreement and Order," which is a more formal covenant not-to-sue/settlement agreement for cleanup work by the Good Samaritan. This guidance was reaffirmed by the current administration in 2015.

In 2012, EPA issued a second guidance document entitled, "Clean Water Act § 402 National Pollutant Discharge Elimination System (NPDES) Permit Requirements for "Good Samaritans" at Orphan Sites." This guidance document clarified a Good Samaritan's obligations under the Clean Water Act while undertaking cleanup actions at an abandoned mine site. The guidance, among other things, states that "a Good Samaritan would be exempt for [Clean Water Act] permitting requirements for any discharge, including any periodic monitoring that occurs under the CERCLA [tools outlined in the 2007 guidance]." The guidance continues that, after the cleanup work is complete, the Good Samaritan "would also generally not be the entity responsible for obtaining an NPDES permit even where a discharge continues from a passive treatment system."

However, the 2012 guidance does conclude that "[although EPA expects] this memorandum to provide clarification regarding permit obligations for Good Samaritans, we recognize that it does not address or resolve all potential liability associated with discharges from abandoned mines."

Despite EPA's issuance of Good Samaritan guidance, few parties to date have been willing to proceed ahead with Good Samaritan cleanup projects at abandoned mine sites.

MODIFICATION OF LEGAL STANDARDS

The Subcommittee will examine through this hearing the impacts of abandoned mines in the United States and whether some modification of the current legal standards for cleanup is in the public interest when responsible parties cannot be found and Good Samaritans are willing to do a partial or complete cleanup of such sites. Such action may encourage more parties to step forward and become Good Samaritans.

Several hearing witnesses support creating incentives for remediation of abandoned mines to improve water quality. However, issues remain that must be resolved. These include: who should be allowed to remediate with liability protections; whether, and to what extent, anyone should try to find the original polluter; whether and how to apply cleanup benchmarks or standards; whether citizen suits should be allowed against a party acting as a Good Samaritan; and whether to extend Good Samaritan protections to abandoned coal as well as hard rock mines, and to public as well as private lands.

WITNESS LIST

PANEL I

The Honorable Mathy Stanislaus
Assistant Administrator for the Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
Washington, D.C.

PANEL II

Eric Cavazza, Director
Bureau of Abandoned Mine Reclamation
Pennsylvania Department of Environmental Protection
On Behalf of the Interstate Mining Compact Commission
and the National Association of Abandoned Mine Land Programs

Luke Russell, Vice President External Affairs
Hecla Mining Company
On Behalf of the National Mining Association

Doug Young, Senior Policy Director
Keystone Policy Center

Chris Wood, President
Trout Unlimited

Lauren Pagel, Policy Director
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