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Unnecessarily Hesitant Good Samaritans: Conducting Voluntary Cleanups of Inactive and Abandoned Mines Without Incurring Liability

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Until the 1970s, federal and state laws did little to control the harmful water quality impacts of mining exploration, and mine wastes were regularly deposited wherever was convenient, including directly into streams.¹ As a result, one enduring legacy of the boom and bust mining cycles in the United States from the mid-1800s to 1970 is widespread and unmitigated water pollution from inactive or abandoned mines. Uncontrolled pollution from inactive or abandoned mines contributes to the degradation of water quality in over 12,000 miles of rivers and streams in the United States and 180,000 acres of lakes and reservoirs.²

Inactive or abandoned mines create water pollution when sulfur-laden mine waste rock or tailings piles³ mix with precipitation or surface water runoff. The mixture of sulfur-laden mine waste rock, water, and air creates sulfuric acid. The sulfuric acid from mine waste rock causes heavy metals in these rocks, such as zinc, cadmium, magnesium, and aluminum, to mobilize and leach into hydrologically connected waterways.⁴ This pollution is commonly referred to as acid-rock drainage or acid-mine drainage (AMD). Individual inactive or abandoned mine sites can

disrupt ecosystems and threaten human health through contamination of drinking water supplies for thousands of years if left unremediated.⁵ In addition, the AMD creates acidic, or low hydrogen ion concentration (pH), conditions in receiving streams.⁶

There may be as many as 500,000 inactive or abandoned mines in the United States.⁷ A significant percentage, perhaps as high as 40%, of waste rock and tailings piles from inactive or abandoned mines degrade environmental quality of the receiving water bodies, impairing human and aquatic uses.⁸ It will cost somewhere between \$32 and \$72 billion to clean up these sites.⁹ To date, federal and state laws have been largely ineffective at facilitating cleanup of the persistent pollution that emanates from inactive or abandoned mines.

The U.S. Environmental Protection Agency (EPA) and the states have the power to regulate water contamination coming from inactive or abandoned mines under the Clean Water Act (CWA)¹⁰ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹¹ However, the mining companies or private individuals responsible for the historic contamination are often untraceable or financially insolvent. Similarly, current owners of these historic mine sites rarely have the financial ability to fund the cleanup of these sites. Moreover, current owners of sites containing inactive or abandoned mines often have no connection with the historic mining other than having purchased or inherited the property. As a result, EPA and the states regularly employ enforcement discretion to avoid requiring current owners to clean up abandoned mine waste

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1. See, e.g., Sean T. McAllister, *The Confluence of a River and a Community: An Experiment With Community-Based Watershed Management in Southwest Colorado*, 3 U. DENV. WATER L. REV. 287, 293, 295-96 (2000).
2. See CARLOS D. DA ROSA & JAMES S. LYON, *GOLDEN DREAMS, POISONED STREAMS* (1997).
3. Waste rock piles are formed when undesirable underground rock is discarded above ground without being significantly refined. Tailings piles are formed by waste rock that has been crushed and refined to extract valuable minerals. Tailings piles tend to be finer material, while waste rock piles consist of larger pieces of rock. Interview with Russ Allen, Project Manager of the California Gulch Superfund Site, Colorado Department of Public Health and Environment (Sept. 18, 2002).
4. See Colorado School of Mines, *AMD Chemistry, Environmental Chemistry in Colorado, Toxic Mine Drainage Chemistry and Treatment*, at http://www.mines.edu/fs_home/jhoran/ch126/amd.htm (last visited Jan. 6, 2003). The mixture of sulfurous minerals in waste rock with precipitation and air creates a sulfuric acid. This sulfuric acid facilitates the leaching of heavy metals from the waste rock into surface water runoff.

5. See *id.*

6. *Id.*

7. See DA ROSA & LYON, *supra* note 2. Also, in Colorado alone, there are approximately 22,000 inactive or abandoned mines. See WESTERN GOVERNORS ASS'N, *CLEANING UP ABANDONED MINES: A WESTERN PARTNERSHIP* 4 (1998).

8. See WESTERN GOVERNORS ASS'N, *supra* note 7, at 4 (estimating 20% of inactive or abandoned mines degrade environmental quality); JAMES S. LYON, *THE BURDEN OF GILT* 29-30 (1993) (estimating 40% of inactive or abandoned mines could be permitted under the Clean Water Act because they degrade environmental quality).

9. See DA ROSA & LYON, *supra* note 2.

10. See 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

11. See 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

on their land that they did not create.¹² Regardless of the enforcement discretion available to EPA and the states, current owners of land polluted by inactive or abandoned mines are vulnerable to liability if environmentalists or others initiate a citizen suit under the CWA or CERCLA.¹³

Recognizing the severity of the problem, many government entities and nonprofit groups have expressed interest in remediating inactive or abandoned sites where a financially viable potentially responsible party (PRP) cannot be found. Parties undertaking remediation of historic contamination from inactive or abandoned mine sites are often referred to as "Good Samaritans." "Good Samaritan" is a term used in this Article solely to describe parties, such as government agencies, nonprofits, or corporate entities, that seek to remediate abandoned mines that they do not own and for which they have no current legal responsibility. The term as used in this Article does not refer to parties that volunteer to remediate abandoned mines for which they have no responsibility in order to obtain regulatory relief at other properties. For example, mining companies may offer to "voluntarily" clean up a mine off of their property in order to reduce restrictions on facilities for which they are responsible. This type of activity is more properly characterized as a trading scheme and is beyond the scope of this Article. Rather, Good Samaritans will be used in this Article to refer to entities that volunteer to clean up abandoned mines for which they have no legal responsibility in order to improve environmental quality.

Unfortunately, Good Samaritans who seek to voluntarily remediate inactive or abandoned mines for which they have no responsibility fear they will obtain perpetual liability under both the CWA and CERCLA. For example, over the last 15 years, the Colorado Division of Minerals and Geology (DMG) has attempted to facilitate the construction and maintenance of at least 10 treatment systems to address contamination from abandoned mines.¹⁴ In 1993, the U.S. Court of Appeals for the Ninth Circuit held in *Committee to Save the Mokelumne River v. East Bay Municipal Utility District*¹⁵ that a current landowner, who attempted to clean up pollution from an abandoned mine on its own land, was liable under the CWA for the discharge of residual pollution coming from that treatment facility. Following this decision, the DMG and many other potential Good Samaritans concluded that they could no longer continue voluntary mine remediation projects without risking perpetual liability. The following are examples of abandoned mine remediation efforts in Colorado that were discontinued based on a fear of liability:

In 1987, DMG constructed a wetland treatment system at Thomson Creek in Pitkin County. While the wetland is still functioning, the DMG refuses

to undertake any maintenance work to extend the life and utility of the wetland out of fear of CWA liability.¹⁶

In 1991, the DMG created a demonstration wetland project near Creed, Colorado, to reduce heavy metal loading from a mine adit to a receiving stream. After the project was constructed and the liability issue was considered more closely, the DMG determined that the wetland should not be activated due to CWA liability issues. The Creed wetland is not currently functioning and needs to be rehabilitated. No one is willing to assume this responsibility for acquiring CWA liability.¹⁷

In the early 1990s, the DMG built a wetland treatment system at the Pennsylvania Mine in Summit County but never fully activated the system. After reviewing the *East Bay Utility District* case, the DMG abandoned its efforts to operate and maintain the wetland.¹⁸

In 1992, at the Boston Mine in La Plata County, the DMG constructed a wetland to treat acid coal mine drainage. The system was quickly overwhelmed by the high volume of metals in the water and the DMG has refused to refurbish the system out of fear of CWA liability.¹⁹

At the Marshall #5 Mine in Boulder County, the DMG built a wetland designed to reduce metal loading from an abandoned coal mine. In order to activate the system, the DMG needed the relevant water rights holder to agree to divert water into the treatment system. Fearing liability under the CWA, the water rights holder refused to agree to divert the needed water. As a result, the wetlands, while constructed, remain unused.²⁰

A nonprofit community group, Animas River Stakeholders Group, in Silverton, Colorado, has been working for years with state and federal regulators to address abandoned mine contamination in the area.²¹ However, the stakeholders group has avoided direct treatment endeavors out of fear of CWA liability.²²

In response to the *East Bay Utility District* decision, a broad coalition of environmentalists, mining companies, and politicians have called for the creation of a Good Samaritan exemption to the CWA to allow such projects to proceed.²³ At least two separate bills have been introduced into the U.S. Congress to create a Good Samaritan exemption to the CWA.²⁴ To date, Congress has not passed this legisla-

12. Letter from Max Dodson, Assistant Regional Administrator, EPA Region VIII, to Julie Annear, Colorado Division of Minerals and Geology 2-3 (Mar. 5, 1998) (on file with the author).

13. See 33 U.S.C. §1365, ELR STAT. FWPCA §505; 42 U.S.C. §9659, ELR STAT. CERCLA §310.

14. See WATER QUALITY CONTROL DIVISION (WQCD), COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, COLORADO'S NONPOINT SOURCE MANAGEMENT PROGRAM App. E (2000), available at <http://www.cdphe.state.co.us/wq/wqhom.asp> (on file with the author) [hereinafter WQCD NONPOINT SOURCE MANAGEMENT PROGRAM].

15. 13 F.3d 305, 24 ELR 20225 (9th Cir. 1993).

16. See Interview with Jim Herron, Colorado Department of Minerals and Geology (Sept. 17, 2002).

17. *Id.*

18. *Id.*

19. *Id.*

20. See *Id.*

21. See McAllister, *supra* note 1.

22. *Id.*

23. Mineral Policy Center and Western Governors Association, along with many others support this idea. See WESTERN GOVERNORS ASS'N, *supra* note 7.

24. See Abandoned Hardrock Mines Reclamation Act of 2002, H.R. 4078, 107th Cong. (2002). The Western Governors Association has also encouraged introduction of a Good Samaritan amendment to the

tion. However, as explained in the following sections, a new Good Samaritan exemption to liability may be unnecessary to facilitate more cleanups of inactive or abandoned mines.

As the CWA and CERCLA reach the limits of their independent ability to address inactive or abandoned mines, it is time to consider tapping the synergistic potential of these two important laws. There are numerous provisions of CERCLA that could facilitate additional voluntary cleanups of inactive or abandoned mines and simultaneously ameliorate Good Samaritans' concerns about CWA liability. However, in any case where EPA and the states can locate a viable PRP, those parties should be required to clean up the contamination. In order to facilitate more voluntary cleanups of inactive or abandoned mines, state and federal agencies will need to actively engage Good Samaritans and other interested stakeholders in order to avoid further costly litigation.

First, this Article explains why Good Samaritans believe they could be liable under the CWA and CERCLA for remediating abandoned mines. Next, this Article discusses various remediation activities that Good Samaritans can take to address inactive or abandoned mines without triggering CWA or CERCLA liability. Finally, this Article discusses the importance of a CWA grant program to address contamination from inactive or abandoned mines. This Article concludes that Good Samaritans can engage in significant additional work to address contamination from inactive or abandoned mines using existing authorities under CERCLA and the CWA.

Potential CWA and CERCLA Liability for Remediating Abandoned Mines

Good Samaritans fear that remediating abandoned or inactive mines will trigger CWA and CERCLA liability because Congress drafted these statutes broadly in order to ensure that polluters do not escape responsibility for the contamination they create. As explained below, Good Samaritans fear they will be liable under the CWA and CERCLA if their remediation efforts create a "discharge of pollutants" under the CWA or the "release of a hazardous substance" under CERCLA, which are similarly broad standards. For example, installing a small treatment system at the base of a mine adit or waste pile would likely discharge or release some residual amount of AMD back into the watershed, albeit in a lesser amount than would have existed without the treatment facility.

CWA Liability

EPA and the states have used the CWA with considerable success to regulate active mines and other industrial discharges.²⁵ The CWA requires EPA or the states²⁶ to set water

quality standards for individual water bodies in order to achieve the goal of making all water bodies in the United States fishable or swimmable.²⁷ This process begins by setting "use designations" for individual water bodies, such as drinking water supply, industrial uses, recreation, and fish and wildlife habitat.²⁸ The CWA requires EPA or the states to include as many use designations as possible.²⁹ Based on the use designations, EPA or the states set specific numeric or less-specific narrative water quality standards in order to protect the designated uses.³⁰

After setting water quality standards, the CWA empowers EPA or the states to restrict the discharging of pollutants through the use of national pollutant discharge elimination system (NPDES) permits or their state equivalents (collectively referred to in this Article as "discharge permits").³¹ Discharge permits must contain restrictions tight enough to ensure compliance with applicable water quality standards.³² The limitations in discharge permits for industrial discharges are enforceable by the states, EPA, or by citizen suit.³³ The implementation of these controls has resulted in the marked decline of the discharge of industrial pollutants into the nation's waters over the last 30 years.³⁴

Despite this notable success, there remain at least 20,000 individual water bodies that do not attain water quality standards.³⁵ As a result of poor water quality, about 20% of the

27. *See id.* §1251(a)(1)-(2), ELR STAT. FWPCA §101(a)(1)-(2).

28. *See id.* §1313(c)(2)(A), ELR STAT. FWPCA §303(c)(2)(A); 40 C.F.R. §131.6(a).

29. *See* 33 U.S.C. §1313(c)(2)(A), ELR STAT. FWPCA §303(c)(2)(A).

30. Numeric standards set specific concentrations of pollutants that may be present in a water body. *See* Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons From the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 211 n.46 (1999). In contrast, narrative standards use descriptive words to explain how water bodies will protect designated uses, such as "pollution" shall be limited to maintain present stream conditions. *Id.*

31. *See* 33 U.S.C. §1342, ELR STAT. FWPCA §402. The CWA allows EPA to delegate permit enforcement to the states. *See id.* §1342(b), ELR STAT. FWPCA §402(b). Forty-four states issue their own discharge permits with regular oversight from EPA. *See* U.S. EPA, *National Pollution Discharge Elimination System: State Program Status*, at <http://cfpub.epa.gov/npdes/statestats.cfm> (last visited Dec. 2, 2002). State regulations implementing the CWA must be at least as strict as the federal requirements. *See, e.g.*, Colorado Discharge Permit System Regulations at 5 COLO. CODE REGS. §§1002-61 (2002), at <http://www.cdphe.state.co.us/op/regs/waterregs/100261wqccdischargepermitsystem.pdf>.

32. *See* 33 U.S.C. §§1311(b)(1)(C), 1342, ELR STAT. FWPCA §301(b)(1)(C), 402; 40 C.F.R. §122.4(d).

33. *See* 33 U.S.C. §§1319, 1365, ELR STAT. FWPCA §§309, 505.

34. *See* Houck, *supra* note 25. It should be noted that between 1999 and 2001, 81%, or 5,116 of 6,332 major facilities, exceeded their permits at least once. The average excess was 10 times what the permit limits allowed. *See* U.S. PUBLIC INTEREST RESEARCH GROUP, IN GROSS VIOLATION: HOW POLLUTERS ARE FLOODING AMERICA'S WATERWAYS WITH TOXIC CHEMICALS (2002), available at <http://uspirg.org/uspig.asp?id2=8258&id3=USPIRG&> (last visited Oct. 18, 2002). In an effort to cure the lapses in enforcement, Sen. John Corzine (D-N.J.) introduced the Clean Water Enforcement and Compliance Improvement Act of 2002, H.R. 5079, 107th Cong. *See* U.S. EPA, Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43586 (July 13, 2000). It should be noted that a mere 23% of the nation's waters have been fully assessed, revealing that the true extent of the problem is largely unknown. *See* Houck, *supra* note 25.

35. *See* 65 Fed. Reg. at 43586. In contrast, according to the Water Quality Control Division, 97% of Colorado rivers and streams are fully supporting their designated uses. *See* WATER QUALITY CONTROL DIVISION, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, STATUS OF WATER QUALITY IN COLORADO 2000

CWA for several years. *See* WESTERN GOVERNORS ASS'N, BACKGROUND SUMMARY ON THE WGA PROPOSED AMENDMENT TO THE CLEAN WATER ACT REGARDING GOOD SAMARITAN CLEANUPS OF ABANDONED AND INACTIVE MINES (1998), available at www.westgov.org/wga/initiatives/aml/gs6-15cv.htm (last visited Dec. 6, 2002).

25. *See* Oliver A. Houck, *TMDLs IV: The Final Frontier*, 29 ELR 10469 (Aug. 1999).

26. EPA may delegate its authority to create water quality standards to the states if the states can show their standards are consistent with the applicable requirements of the CWA. *See* 33 U.S.C. §1313(a)-(b), ELR STAT. FWPCA §303(a)-(b).

nation's 4,000 native aquatic species are imperiled or critically imperiled and 4% may already be extinct.³⁶ Over 80% of this water quality impairment comes from largely unregulated sources of pollution including runoff from inactive or abandoned mines, agricultural runoff, hydromodification caused by dams or river channelization, and urban runoff/storm sewers.³⁷

EPA and the states clearly have the power to require a discharge permit for inactive or abandoned mines discharging pollutants. The CWA prohibits "the discharge of any pollutant by any person" without a permit.³⁸ The definition of a discharge of pollutants is (1) the addition (2) of any pollutant (3) to navigable waters (4) from any point source.³⁹

The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged."⁴⁰ In addition, courts will broadly construe the phrase point source in order to achieve the CWA's goal of restoring the integrity of all navigable waters.⁴¹ Wastewater effluent pipes from industrial sources, which discharge or convey pollutants, are classic point sources.⁴² Point sources also include structures where contaminated "surface runoff which is collected or channeled by man."⁴³ Collecting or channeling contaminated surface water includes any "effort to change the surface, or otherwise impede [water's] progress."⁴⁴ Based on this language, courts have held that sediment basins, lagoons, and leachate

collection ponds are point sources.⁴⁵ In addition, groundwater seeps traceable to mine waste piles are point sources.⁴⁶ EPA also views runoff from mine waste piles as a point source because the mine waste piles are a discernible conveyance from which pollutants are discharged.⁴⁷

Most inactive or abandoned mines have structures that collect or channel contaminated water in order to control it, such as leachate collection ponds. In addition, at any inactive or abandoned mine site where there are unmanaged sulfurous-laden rocks exposed to precipitation, there will likely be contaminated groundwater seeps traceable to these mine waste piles. Finally, any surface water runoff from unmanaged mine waste piles would qualify as a point source. Therefore, most inactive or abandoned mine sites contain a discernible, confined, or discrete conveyance that could easily be characterized as a point source.

The CWA defines navigable waters as "the waters of the United States."⁴⁸ EPA has interpreted waters of the United States broadly as "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."⁴⁹ More importantly, the CWA covers any water adjacent to or hydrologically connected with navigable streams.⁵⁰ Thus, any mining activity that discharges pollution into a watershed that is hydrologically connected with a navigable stream satisfies this element of liability.

The CWA defines pollutant as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."⁵¹ The components of AMD

(2000) [hereinafter WQCD Status of Water Quality in Colorado]. However, only 27% of Colorado's river miles have been surveyed. See WQCD NONPOINT SOURCE MANAGEMENT PROGRAM, *supra* note 14, at 12.

36. See H. JOHN HEINZ III CENTER FOR SCIENCE, ECONOMICS, AND THE ENVIRONMENT, *THE STATE OF THE NATION'S ECOSYSTEMS: MEASURING THE LANDS, WATERS, AND LIVING RESOURCES OF THE UNITED STATES* (Cambridge University Press 2002), available at <http://www.heinzctr.org/ecosystems/> (last visited Oct. 15, 2002).

37. *Id.*; see also Drew Caputo, *A Job Half Finished: The Clean Water Act After 25 Years*, 27 ELR 10574 (Nov. 1997).

38. See 33 U.S.C. §§1311(a), 1319(b), (c), (d), 1342(a), ELR STAT. FWPCA §§301(a), 309(b), (c), (d), 402(a).

39. See *id.* §1362(12), ELR STAT. FWPCA §502(12); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 13 ELR 20015 (D.C. Cir. 1982).

40. See 33 U.S.C. §1362(14), ELR STAT. FWPCA §502(14).

41. See United States v. Earth Sciences, Inc., 599 F.2d 368, 373, 9 ELR 20542, 20543-44 (10th Cir. 1979).

42. See *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 27 ELR 20622 (1st Cir. 1996) (snowmaking pipes transmitting polluted water are point sources); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001) (pipes transmitting pesticides are point sources); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 24 ELR 21480 (2d Cir. 1994) (pipes spreading manure from trucks and a center pivot irrigation rig are point sources); *Trustees for Alaska v. EPA*, 749 F.2d 549, 15 ELR 20146 (9th Cir. 1984) (a sluice box is a point source).

43. See 40 C.F.R. §122.2. Natural surface water runoff, which is not channeled or collected, is not a point source. See *Appalachian Power Co. v. Train*, 545 F.2d 1351, 6 ELR 20732 (4th Cir. 1976); *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1173, 26 ELR 20639, 20641 (D. Mont. 1995).

44. See *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45, 10 ELR 20552, 20553-54 (5th Cir. 1980); see also U.S. EPA, National Pollutant Discharge Elimination System Permit Applications Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (EPA regulation explaining that point sources include activities that change the surface of the land or establish grading patterns on land) [hereinafter U.S. EPA, NPDES Storm Water Regulations].

45. See *Sierra Club*, 620 F.2d at 46-47, 10 ELR at 20554-55 (sediment detention basins designed to impound AMD from an abandoned mine was a point source); *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55, 21 ELR 21133, 21138-39 (2d Cir. 1991) (culvert diverting contaminated water is a point source); *Umatilla Water Quality Protective Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1320-21, 27 ELR 21411, 21415-16 (D. Or. 1997); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 988, 25 ELR 20661, 20063 (E.D. Wash. 1994) (man-made ponds designed to impound mine waste are point sources); *Fishel v. Westinghouse Elec. Corp.*, 640 F. Supp. 442, 446, 16 ELR 20634, 20635-36 (M.D. Pa. 1986) (a lagoon receiving wastewater is a point source); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 655 (E.D. Pa. 1981).

46. See *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 19 ELR 20124 (E.D. Cal. 1988); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374, 9 ELR 20542, 20544 (10th Cir. 1979).

47. See Letter from Max Dodson, U.S. EPA, to Montana Department of Health and Environmental Sciences, Regarding NPDES Permit Issues Hard Rock Mines (Dec. 22, 1993) (on file with author).

48. 33 U.S.C. §1362(7), ELR STAT. FWPCA §502(7).

49. See 40 C.F.R. §122.2; 33 C.F.R. §328.3(a)(3).

50. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 16 ELR 20086 (1985); *Solid Waste Agency of N. Cook County v. U.S. Army Corp of Engineers*, 531 U.S. 159, 27 ELR 20566 (2001).

51. 33 U.S.C. §1362(6), ELR STAT. FWPCA §502(6). The CWA makes a distinction between pollutants and pollution. While the discharge of pollutants from a point source requires a CWA discharge permit, the discharge of pollution does not. The CWA defines pollution as "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of the water." *Id.* §1362(19), ELR STAT. FWPCA §502(19). As one court noted in a case involving changes in water quality resulting from operation of a dam, "[a]lthough alterations in the properties of the water are 'pollution' . . . all alterations do not fit the narrower definition of pollutants . . ." *Tennessee Valley Auth. v. Tennessee Water Quality Control Bd.*,

are not facially included in this definition. However, several courts have held that the components of AMD coming from abandoned mines are pollutants under the CWA.⁵² Thus, AMD is a pollutant under the CWA.

The definition of discharge of pollutants, “any addition of any pollutant to navigable waters from any point source,” suggests that for a discharge to occur, the activity must introduce or add pollutants that did not exist before.⁵³ As explained herein, this definition is circular and court cases have evaluated this element on an ad hoc basis. Some courts stress that the source must introduce a pollutant from the outside world and that merely transmitting pollutants between water bodies does not constitute the discharge of pollutants.⁵⁴ Other courts stress that the discharge of pollutants occurs when surface water runoff containing pollutants is collected or channelized by human activity.⁵⁵ Whether or not a particular activity will constitute a discharge of pollutants is a highly fact-sensitive inquiry. If EPA makes an administrative determination that a source is or is not discharging a pollutant, the courts will grant this determination considerable deference.⁵⁶ Thus, any Good Samaritan activity that can be characterized as discharging, adding, or introducing a pollutant from a point source into a navigable water will likely require a discharge permit.

CERCLA Liability

Similar to the CWA, the state and federal governments can use CERCLA authorities to address contamination from inactive and abandoned mines. Congress enacted CERCLA in 1980 to provide a mechanism to clean up sites contaminated by the release of uncontrolled substances.⁵⁷ EPA, or the states by delegation from EPA, can take cleanup actions independently and seek reimbursement from PRPs or the government can order PRPs to do the cleanup work.⁵⁸ CERCLA cleanups must protect human health and the environment and restore damaged natural resources to their original condition.⁵⁹ CERCLA is commonly referred to as the Superfund program because the law created a fund of money that

EPA can use to remediate sites where there is no viable responsible party.⁶⁰

Under CERCLA, EPA has conducted or facilitated cleanup actions at over 5,200 polluted sites.⁶¹ The CERCLA program is addressing contamination from numerous large inactive or abandoned mining sites, including the Coeur d’Alene basin in Idaho, the Berkley Pit in Montana, and most notoriously the Summitville Mine site in Colorado.⁶² However, EPA has only designated 52 inactive or abandoned mine sites as a high priority under CERCLA.⁶³ Large mining sites can take decades to remediate using the highly litigious CERCLA authorities, costing hundreds of millions of dollars.⁶⁴ As a result, EPA and the states are reluctant to continue to expand the use of CERCLA to address large inactive or abandoned mines.

CERCLA liability arises when there is a release⁶⁵ of a hazardous substance⁶⁶ from a facility⁶⁷ by past or present owners or operators⁶⁸ of the facility or by any person who ar-

717 F.2d 992, 998-99 (6th Cir. 1983). Good Samaritans could argue that active or passive treatment systems reduce the amount of contamination from abandoned mine sites. As a result, the remediation activity is a man-induced alteration of the properties of the water amounting to pollution but not pollutants, and, thus, a discharge permit is not required. However, this theory has never been tried outside of the context of dam cases.

52. See *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373, 9 ELR 20542, 20543-44 (10th Cir. 1979); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1435, 25 ELR 21275, 21276 (E.D. Cal. 1995); *Committee to Save the Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 24 ELR 20225 (9th Cir. 1993).
53. 33 U.S.C. §1362(12), ELR STAT. FWPCA §502(12).
54. See *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 13 ELR 20015 (D.C. Cir. 1982); *National Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 19 ELR 20235 (6th Cir. 1988); *Friends of Sante Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 26 ELR 20135 (D.N.M. 1995).
55. See *Committee to Save the Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 24 ELR 20225 (9th Cir. 1993).
56. See *Gorsuch*, 693 F.2d at 156, 13 ELR at 20015.
57. See generally Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).
58. See 42 U.S.C. §§9604, 9606, ELR STAT. CERCLA §§104, 106.
59. See *id.* §§9604, 9607(f), ELR STAT. CERCLA §§104, 107(f).

60. The Superfund was initially funded by taxes on the petroleum and chemical industries and was formerly called the Hazardous Substances Response Trust Fund. See Pub. L. No. 96-510, §221(b), 94 Stat. at 2801 (Dec. 11, 1980). Congress reauthorized the taxes in 1986 and again in 1990. See Pub. L. No. 99-499, §§511, 517, 100 Stat. at 1760-61, 1772-73 (Oct. 7, 1986); Pub. L. No. 101-508, 104 Stat. 1388 (Nov. 5, 1990). The taxes expired at the end of 1995. Since 1995, Congress has not reauthorized the taxes and the Superfund has dwindled from \$3.6 billion to a projected \$28 million in 2003. Over the last five years, Congress has increasingly relied on general taxpayer revenues to fund Superfund cleanups. In 2002, EPA requested \$450 million for response actions at 77 sites, but only received \$224 million. Thirty-three sites received no funding in 2002 and 12 did not receive the full amount requested. H. Josef Hebert, *EPA Says Bush’s Proposed Cuts in Superfund Mean Work Reductions and Halts in 18 States*, Associated Press, July 2, 2002, available at Environmental News Network, http://www.enn.com/news/wire-stories/2002/07/07022002/ap_47714.asp (last visited Jan. 15, 2003). Not surprisingly, the pace of Superfund cleanups has slowed from 87 completed sites in 2000 to 47 in 2001. Sierra Club, *Superfund Cuts*, at http://newyork.sierraclub.org/rochester/superfund_cuts.htm (last visited Jan. 15, 2003).

61. See U.S. EPA, *Superfund Accomplishment Figures to Date*, at <http://www.epa.gov/superfund/action/process/numbers.htm> (last visited Nov. 22, 2002). Private responsible parties have paid for over 70% of the cleanups at sites where the federal or state government is not a responsible party. *Id.*

62. See Luke J. Danielson et al., *The Summitville Story: A Superfund Site Is Born*, 24 ELR 10389 (July 1994).

63. See Paul Stokstad, *Restructuring a Reclamation Program for Abandoned Noncoal Mines*, 25 ECOLOGICAL L.Q. 121, 134 (1998).

64. See KATHERINE N. PROBST ET AL., SUPERFUND’S FUTURE: WHAT WILL IT COST VII (Resources for the Future 2001), available at http://www.rff.org/books/chapterpdfs/Executive_summary.pdf (last visited Nov. 22, 2002). Cleanup of one large mine site could cost over \$1 billion. Susan R. Poulter, *Cleanup and Restoration: Who Should Pay?*, 18 J. LAND RESOURCES & ENVTL. L. 77, 78 (1998). Sixty percent of Superfund costs go to litigation. See Burt Hubbard, *Superfund May Tackle Supermess*, ROCKY MOUNTAIN NEWS (Denver), Apr. 6, 1998, at A4.

65. Release includes spilling, leaking, emitting, emptying, discharging, escaping, leaching, or disposing into the environment. See 42 U.S.C. §9601(22), ELR STAT. CERCLA §101(22).

66. AMD is a hazardous substance under CERCLA. Hazardous substances include all pollutants designed under CWA §311(b). See 42 U.S.C. §9601(14), ELR STAT. CERCLA §101(14). See also *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 15 ELR 20460 (D.C. Cir. 1985); *United States v. Iron Mountain Mines*, 881 F. Supp. 1432, 25 ELR 21275 (E.D. Cal. 1995).

67. Facility means any place where hazardous substances have come to be located. See 42 U.S.C. §9601(9), ELR STAT. CERCLA §101(9).

68. The definition of owner is circular in CERCLA. See 42 U.S.C. §9601(20), ELR STAT. CERCLA §101(20). The U.S. Supreme Court held the term “operator,” which is poorly defined in

ranges for the disposal or treatment of a hazardous substance.⁶⁹ Liability under CERCLA is retroactive, joint and several, and strict.⁷⁰ Thus, current landowners, who may not have had any role in the historic mining, can be liable under CERCLA for cleanup of all of the contamination related to a release of AMD from their land.

The precise boundaries of ownership liability under CERCLA are not self-evident or easily defined.⁷¹ Clearly, fee simple owners qualify as owners under CERCLA. Several courts have extended the definition of owner beyond strict fee or record ownership to include lessees or sublessors.⁷² The owner of a fee simple is liable as an owner or operator for hazardous substances disposed of by a lessee.⁷³ However, a federal district court held that the United States could not be considered an owner under CERCLA based on its “bare legal title” to unpatented mining claims.⁷⁴

The U.S. Supreme Court held that to be liable as an operator under CERCLA, parties “must manage, direct, or conduct operations at a facility specifically related to pollution or decisions about compliance with environmental law.”⁷⁵ Operators must have “actual control” over the activities of the party that owned the facility.⁷⁶ The actual control must be substantial, and not merely nominal.⁷⁷ In other words, the operator must “exercise discretion over the facility’s

activities.”⁷⁸ Thus, parent corporations can be liable for the activities of their subsidiaries if it can be shown the parent company actually operated or controlled the activities of the subsidiary.⁷⁹

Finally, parties can acquire “arranger liability” under CERCLA if they (1) arranged for the disposal or treatment (2) of hazardous substances (3) owned or possessed by such person (4) or by any other party or entity (5) at any facility owned or operated by another party or entity and containing such hazardous substances.⁸⁰ Arranger liability must be determined on a case-by-case basis, taking into account such factors as ownership of the hazardous substances and the defendant’s participation in or control of the decision to dispose.⁸¹ It is possible that the holder of a royalty interest in a mining claim could be considered to have “arranged for disposal” of wastes associated with activities necessary to generate the royalty.⁸² To reach this conclusion, the courts will need to see evidence that the royalty holder had some ability to control or direct the mining operations on the property.⁸³ One court noted that “[a]lmost all of the courts that have held defendants liable as arrangers have found that the defendant had some actual involvement in the decision to dispose of waste.”⁸⁴

Good Samaritans can be liable under CERCLA for remediating an inactive or abandoned mine activities if their activities cause the release of a hazardous substance from a facility and if they fall within one of the categories of responsible parties. Good Samaritans could theoretically be considered owners, operators, or arrangers when they undertake voluntary cleanup activities. If the Good Samaritan owns the land upon which the remediation occurs, they would be liable as an owner under CERCLA. Good Samaritans could be considered operators of the facility under CERCLA because they will manage, direct, or conduct operations specifically related to pollution control as they engage in remediation activities. Finally, Good Samaritans could be considered arrangers for the disposal of a hazardous substance as they attempt to clean up wastes.

Fortunately, CERCLA contains provisions that should allow Good Samaritans to address contamination from inactive or abandoned mines without incurring liability. In addition, these same CERCLA provisions may provide a shield from CWA liability. Some federal, state, and private entities are already using these innovative techniques to address inactive or abandoned mines. The following section describes the liability risks associated with the most common types of Good Samaritan activities.

CERCLA, means any person “who directs the workings of, manages, or conducts the affairs of a facility . . . [A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *United States v. Bestfoods*, 524 U.S. 51, 66-67, 28 ELR 21225, 21228 (1998). The term “person” in the definition of operator includes government agencies. *See* 42 U.S.C. §9601(21), ELR STAT. CERCLA §101(21).

69. *See* 42 U.S.C. §9607(a), ELR STAT. CERCLA §107(a).

70. *See id.*

71. *See* *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 326-31, 30 ELR 20679, 20680-82 (9th Cir. 2000).

72. *See, e.g.,* *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 258-59 (S.D.N.Y. 1999) (“[T]he owner of a leasehold interest in a CERCLA facility may be liable as an owner of that facility, as long as the lessee exercised sufficient site control to place it in the shoes of owners.”); *Castlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360, 367, 25 ELR 20755, 20759 (N.D. Cal. 1994); *Burlington N. R.R. Co. v. Woods Indus., Inc.*, 815 F. Supp. 1384, 1391-92, 23 ELR 21047, 21049 (E.D. Wash. 1993); *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1332-34 (S.D.N.Y. 1992); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1002-03, 14 ELR 20272, 20277 (D.S.C. 1984), *aff’d in part, vacated in part sub nom.* *United States v. Monsanto Co.*, 858 F.2d 160, 19 ELR 20085 (4th Cir. 1988).

73. *See* *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. at 993, 1003, 14 ELR at 20275, 20277; Thomas F. Cope, *Environmental Liabilities of Non-Operating Parties*, 37 ROCKY MTN. MIN. L. INST. 1-1, 1-30 to 1-31 (1991) (“The owner of a royalty interest reserved in a lease would be liable in any event as an owner of the fee, or perhaps, as an owner of the minerals.”).

74. *See* *United States v. Friedland*, No. 96-N-1213, slip op. at 8-17 (D. Colo. Mar. 31, 2001).

75. *United States v. Bestfoods*, 524 U.S. 51, 66-67, 28 ELR 21225, 21228 (1998).

76. *See* *Aluminum Co. of Am. v. Beazer E., Inc.*, 124 F.3d 551, 562, 27 ELR 21510, 21514 (3d Cir. 1997); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 23 ELR 21534 (3d Cir. 1993).

77. *See, e.g.,* *United States v. Rapoca Energy Co.*, 13 F. Supp. 1161 (W.D. Va. 1985) (defendant was an operator because it: (1) determined which properties would be mined; (2) performed preliminary engineering work; (3) began actual site development work; (4) provided engineering and mapping services during operations; and (5) and the contract miners could not sell the minerals on the open market—they had to deliver them to the defendant at a set price per ton).

78. *Bestfoods*, 524 U.S. at 71, 28 ELR at 21229.

79. *Id.* Liability must be premised on activities related to the operation of the facility, as opposed to the operation of the subsidiary. *Id.* at 67, 28 ELR at 21228.

80. 42 U.S.C. §9607(a)(3), ELR STAT. CERCLA §107(a)(3).

81. *Raytheon v. Asarco*, No. 96-N-2072, slip op. at 16 (D. Colo. Apr. 17, 1998).

82. *See* David E. Pierce, *Structuring Routine Oil and Gas Transactions to Minimize Environmental Liability*, 33 WASHBURN L.J. 76, 164 (1993).

83. *Id.*

84. *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286-87, 22 ELR 20930, 20933-34 (2d Cir. 1992).

Potential Ways to Remediate Inactive or Abandoned Mines

Surface Water Diversion of Uncontaminated Water

Good Samaritans can address contamination from inactive or abandoned mines without incurring liability. Precipitation or surface water runoff crossing mine waste piles can create AMD if the waste rock piles have a sulfurous geochemistry. In addition, groundwater may re-surface via seeps through sulfurous mine waste piles creating the same problem. So long as surface or groundwater water passes through AMD-producing mine waste piles, there will be a continuing discharge or release of a pollutant or hazardous substance that could trigger CWA and CERCLA liability.

If Good Samaritans can stop the continuing releases or discharges from mine waste piles, there is no CWA or CERCLA liability. Continuing releases can be stopped by diverting up-gradient clean rainwater or other uncontaminated surface water runoff away from mining contamination. Good Samaritans already commonly engage in this activity without fear of liability.⁸⁵

The CWA provides an exemption from liability for these runoff diversion activities. In 1987, Congress amended the CWA to deal with stormwater runoff from industrial and mining sites.⁸⁶ The 1987 Amendments, along with EPA's implementing regulations, explain that:

[CWA discharge] permits shall not be required for discharges of storm water runoff from mining operations . . . composed entirely of flows which are from conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of such operations.⁸⁷

The purpose of this exception is to allow mine operators to divert clean water away from contaminated sources without the fear of CWA liability. The regulations explain that this exception was created to encourage good management practices at mining sites.

Congress also recognized that there are numerous situations in the mining and oil and gas industries where storm water is channeled around plants and operations through a series of ditches and other structural devices in order to prevent pollution of the storm water by harmful contaminants. . . . [T]he conclusion was that operators that use good management practices and make expenditures to prevent contamination must not be burdened with the requirement to obtain a permit.⁸⁸

85. For example, Colorado's Department of Minerals and Geology has undertaken numerous clean water diversion projects as a part of its Inactive Mine Reclamation Program. See Interview with Dave Bucknam, Colorado Department of Minerals and Geology (Oct. 15, 2001).

86. See 33 U.S.C. §1342(l)(2), ELR STAT. FWPCA §402(l)(2); U.S. EPA, NPDES Storm Water Regulations, *supra* note 44.

87. 55 Fed. Reg. at 47993; 33 U.S.C. §1342(l)(2), ELR STAT. FWPCA §402(l)(2); see also 5 COLO. CODE REG. §1002-61.3(2)(c) (2002), available at <http://www.cdph.state.co.us/op/regs/waterregs/100261wqccdischargepermitsystem.pdf>.

88. U.S. EPA, NPDES Storm Water Regulations, *supra* note 44, at 48029. This is also EPA Region VIII policy. See Letter from Max Dodson, *supra* note 47.

Thus, the CWA should not hinder Good Samaritan efforts to implement clean water diversion projects, assuming the diversion works do not come into contact with pollutants.

Similarly, without the release or threatened release of a hazardous substance, there is no liability under CERCLA for diverting clean surface waters. Assuming water diverted away from mining waste remains uncontaminated when it is released into the watershed, this type of work should not create the release of a hazardous substance. Thus, the utilization of runoff control techniques presents no risk of CERCLA liability.

Active and Passive Treatment Work

There are several active and passive treatment technologies for remediating abandoned mines. Active treatment facilities usually use recirculating ponds that allow metals to precipitate out of the water.⁸⁹ Active treatment may also involve making chemical amendments to the contaminated water to change pH or remove heavy metals. Passive treatment technologies include the creation or upgrading of a wetland system. Wetlands have proven effective for short-term removal of metals from contaminated water by allowing those metals to bioaccumulate in the wetland bog material.⁹⁰ This section discusses the possible CWA and CERCLA liability Good Samaritans could incur by building active or passive treatment systems. This section concludes that various provisions of CERCLA may allow Good Samaritans to conduct these activities without fear of liability.

CWA Liability for Active or Passive Treatment Systems

If a court can characterize an active or passive treatment system as discharging pollutants from a point source into navigable waters, CWA liability is possible. Passive and active treatment technologies have the potential to trigger CWA and CERCLA liability because they commonly continue to discharge pollutants, or release a hazardous substance, into the water even though overall water quality may improve. Active treatment systems are clearly point sources. If these systems discharge pollutants from overflow outlets or other discernible point sources, a court could hold the Good Samaritan liable under the CWA.

Passive treatment systems, such as wetlands or sediment detention basins, may leach contaminants into the groundwater if they are not lined. Passive wetland treatment systems are a common way to attempt to filter out mining contamination. Given the broad interpretation of the term point source, it is possible that a court could characterize a wetland as a point source consistent with the statutory definition if it views a wetland as a "discernible, confined, and discrete

89. See, e.g., *Committee to Save the Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 24 ELR 20225 (9th Cir. 1993).

90. See Jeff Skousen, Center for Agriculture, Natural Resources, and Community Development, West Virginia University, *Overview of Passive Systems for Treating Acid Mine Drainage*, at <http://www.wvu.edu/%7Eagexten/landrec/passtrt/passtrt.htm> (last visited Dec. 9, 2002). The use of wetlands to remediate abandoned mines has some problems. First, the systems often fail in the long run if they are not routinely maintained. Moreover, wetlands accumulate metals in the bog material. Over time, this material accumulates so many metals that it may be classified as solid and/or hazardous waste. Thus, on occasion, this material will need to be dredged out of the wetland and replaced with new material.

conveyance.”⁹¹ To counter this argument, Good Samaritans could argue that a wetland is a dispersed conveyance because there is no one point at which a wetland will release pollutants. However, point sources include structures where contaminated “surface runoff . . . is collected or channeled by man.”⁹² Collecting or channeling contaminated surface water includes any “effort to change the surface, or otherwise impede [water’s] progress.”⁹³ Thus, new wetland systems could easily be characterized as point sources discharging pollutants triggering liability under the CWA.

It is unclear if a court would consider the rehabilitation or upgrading of a preexisting wetland as a point source. Good Samaritans could claim that the scattered sowing of plants does not create a discernible, confined, and discrete conveyance. In addition, they could argue that the individual plants do not collect or channel surface water runoff. However, a court could view the rehabilitation of a wetland as a singular facility or structure that is channeling or collecting surface water. Viewed with this broader lens, a court could also characterize the rehabilitation of a wetland as a point source. Given the significant probability that a court would consider a new or rehabilitated wetlands as point sources, the main issue is whether these structures discharge a pollutant so as to require discharge permits under the CWA.

In the *East Bay Utility District* case and in other similar cases, the parties claimed they did not add or discharge pollutants into navigable waters because those pollutants were caused by the original party that created the discharge. Good Samaritans commonly fight liability by claiming their activities actually remove, rather than add, pollutants in the water. This argument is supported by several cases dealing with alleged discharges of pollutants from dam structures. However, the *East Bay Utility District* case rejected this theory.⁹⁴ The *East Bay Utility District* case created fear among Good Samaritans that they could be liable under the CWA for remediating historic mine discharges.

The East Bay Utility District bought land in order to build a reservoir to supply various cities with drinking water. A historic abandoned mine, known as the Penn Mine, was located on this land and discharged water contaminated with heavy metals into the watershed. The East Bay Utility District built a surface water impoundment system at the Penn Mine in an effort to protect the water quality of its drinking water reservoir. The system captured the contaminated surface water flowing through the site with a ponding and recirculation system to prevent the contaminated water from reaching the reservoir and river below. The ponding and recirculating system consisted of three impoundments. A pump and pipe owned by the East Bay Utility District recirculated polluted water from the lower impoundments back into the upper impoundments. The East Bay Utility District admitted that from time to time, contaminated

drainage collected in the impoundments passed over the spillway or through the discharge valve into the river.⁹⁵

The Committee to Save Mokelumne River brought suit against the East Bay Utility District for operating the facility without a discharge permit under the CWA. The East Bay Utility District conceded that AMD is a pollutant, the Mokelumne River is a navigable water, and the spillway and pipe valve of the impoundment system were point sources. However, the East Bay Utility District denied that the treatment system added or discharged pollutants to the river, claiming that it was the historic mine that added pollutants to the river and the treatment system actually removed pollutants from the water. The court found it irrelevant that the treatment system released a reduced amount of pollution into the watershed. Instead, the court found the East Bay Utility District discharged pollutants from a point source without a permit in violation of the CWA because its treatment system “collected or channeled”⁹⁶ the historic pollution.⁹⁷

It is important to note that the East Bay Utility District was not a Good Samaritan. The East Bay Utility District owned the mine adit where the discharge of pollutants originated. The East Bay Utility District was not voluntarily remediating a mine with which it had no connection. As an owner, it was treating pollutants originating from the Penn Mine on its land. The Penn Mine was discharging, or spilling, pollutants (AMD) from a point source (the adit) into navigable water. If the court had refused to require a discharge permit in this case, it would have left unregulated a discharge of pollutants from a point source even though there was an identifiable owner of the source. Despite Good Samaritans’ understandable concern about this case, the Ninth Circuit did not directly rule on whether a party can be liable when they have no connection with contaminated land other than voluntarily remediating mine waste.

One of the startling things about the CWA is the absence of a clear ownership requirement for liability to attach. As one court noted: “The person responsible for the discharge of any pollutant [is] strictly liable” under the CWA.⁹⁸ Being responsible for the discharge of a pollutant “is predicated on either (1) performance, or (2) responsibility for or control over” the activity that results in a discharge of pollutants into navigable waters without a discharge permit.⁹⁹ This focus on who has responsibility for or control over the discharge of pollutants seems to make ownership irrelevant. However, courts commonly hold landowners of land contaminated by mining waste liable under the CWA based on the assumption that ownership alone creates the prerequisite responsibility for or control over the discharge.¹⁰⁰ Following this logic, Good Samaritans could be liable under CWA for mere ownership of contaminated land. If the Good Samaritan does not own the contaminated land, ownership of contami-

91. 33 U.S.C. §1362(14), ELR STAT. FWPCA §502(14).

92. See 40 C.F.R. §122.2. Natural surface water runoff, which is not channeled or collected, is not a point source. See *Appalachian Power Co. v. Train*, 545 F.2d 1351, 6 ELR 20732 (4th Cir. 1976); *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1173, 26 ELR 20639, 20641 (D. Mont. 1995).

93. See *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45, 10 ELR 20552, 20553-54 (5th Cir. 1980); see also U.S. EPA, NPDES Storm Water Regulations, *supra* note 44, at 47997.

94. See *East Bay Mun. Util. Dist.*, 13 F.3d at 305, 24 ELR at 20225.

95. *Id.* at 306, 24 ELR at 20226.

96. EPA regulatory definition of the discharge of pollutants includes activities that collect or channel pollutants. 40 C.F.R. §122.2.

97. See *East Bay Mun. Util. Dist.*, 13 F.3d at 308, 24 ELR at 20227.

98. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374, 9 ELR 20542, 20544 (10th Cir. 1979).

99. *United States v. Board of Trustees of Fla. Keys Community College*, 531 F. Supp. 267, 274, 12 ELR 20391, 20393 (S.D. Fla. 1981).

100. See, e.g., *North Cambria Fuel Co. v. Department of Env'tl. Resources*, 621 A.2d 1155, 1160 (Pa. Commw. Ct. 1993) (“If a discharge occurs from a mine operator’s property, that is all that is needed to impose liability.”).

nated land will be immaterial and the central inquiry will be whether the Good Samaritan's activities result in the discharge of pollutants.

The first major case interpreting the term "discharge of pollutants" was *National Wildlife Federation v. Gorsuch*.¹⁰¹ In that case, the National Wildlife Federation sued the government, claiming that the government needed discharge permits to operate a dam because the dam was a point source discharging pollutants into navigable water. The water released from a dam generally has less dissolved oxygen, fewer dissolved minerals and nutrients, a lower temperature, and less sediment than the water flowing into a dam's reservoir.¹⁰² Despite these dam-induced water quality changes, the court held that the government did not need a discharge permit to operate a dam because there was no discharge of pollutants. The court held that for a discharge of a pollutant from a point source to occur, the point source must introduce or add the pollutant into navigable waters from the outside world. According to the court, the dam-induced water quality changes were only changes in water conditions because the dam itself did not introduce or add pollutants.¹⁰³ Several other U.S. courts of appeals have adopted this basic holding in cases involving dams.¹⁰⁴ The U.S. Court of Appeals for the Seventh Circuit explained that the requirement that "a point source must physically introduce pollutants into the water from the outside world is not explicitly, or even logically limited to dams."¹⁰⁵

These cases interpreting the phrase "discharge of pollutants" have been characterized as requiring a "trespass" to occur, meaning that a point source discharges pollutants when it causes pollutants to be introduced from the outside world.¹⁰⁶ Good Samaritans could claim that the cause of the pollutants is the inactive or abandoned mine as opposed to the remediation activities. Thus, Good Samaritans could argue that they are not discharging pollutants because their activities do not physically introduce a pollutant from the outside world.

Similarly, Good Samaritans could argue there is no "but for" relationship between their activities and the discharge of pollutants. At least one case held that a dam does not itself add pollutants from the outside world if the process of impounding the water does not create the damaging pollutant. In *South Carolina Wildlife Federation v. Alexander*,¹⁰⁷ the court held that:

If unpolluted water entered the reservoir and was then held in the reservoir in a manner resulting in stagnation, and the water was then released back into the [River], though defendants may not have added the first particle to the water in the reservoir, they would have unquestionably caused the addition of pollutants into a navigable water.¹⁰⁸

Similar to the dam cases, Good Samaritan activities would impound water in treatment systems already contaminated by historic mining activities and these activities would not worsen the water quality. Therefore, Good Samaritans could argue that there is no "but for" relationship between their active or passive treatment of the contaminated water and the presence of the damaging pollutants in the water.

Using either a trespass or but for test, Good Samaritans' fundamental argument is that the CWA does not apply to them because other parties are responsible for the original discharge and they are merely attempting to mitigate the negative impacts of that original discharge. Good Samaritan activities will improve water quality. The U.S. Court of Appeals for the D.C. Circuit held that the word discharge "contemplates the addition, not the withdrawal, of a substance or substances."¹⁰⁹ In addition, the court explained that "no definition of discharge in any source . . . suggests that the term includes withdrawal or reduction."¹¹⁰ Thus, Good Samaritans could claim that holding them liable for the discharges of other parties is anathema to the plain meaning of the term "discharge of pollutants" because their activities result in a net withdrawal of pollutants from the water.

A few courts have adopted this reasoning to limit the reach of EPA's power under the CWA. The U.S. Court of Appeals for the Fourth Circuit held that "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass."¹¹¹ The court explained that it is beyond the scope of EPA's authority to require industry "to treat and reduce pollutants other than those added by the plant process."¹¹²

Similarly, in *Friends of Sante Fe County v. LAC Minerals, Inc.*,¹¹³ a federal district court held that "migration of residual contamination resulting from previous releases is not an ongoing discharge within the meaning of the Act."¹¹⁴ In this case, waste rock piles deposited by a previous owner of the mining site were releasing AMD. Responding to these discharges, the new owner built a "small bermed catchment pond" to contain the discharge from the old waste rock piles and applied lime to neutralize the discharges. However, the catchment pond was leaching metals and creating seeps and springs of contaminated water at other points on the property. In response, the new owner injected an impermeable cement grout curtain into boreholes in the drainage to inter-

101. 693 F.2d 156, 13 ELR 20015 (D.C. Cir. 1982).

102. *Id.*

103. *Id.*

104. See *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584-86, 19 ELR 20235, 20237-38 (6th Cir. 1988) (noting that "if the dam itself added pollutants, rather than merely transmitting the water coming into it, in whatever altered form, then it would be subject to the NPDES permit system." *Id.* at 586, 19 ELR at 20238); *Tennessee Valley Auth. v. Tennessee Water Quality Control Bd.*, 717 F.2d 992 (6th Cir. 1983); *Missouri ex rel. Ashcroft v. Department of the Army*, 672 F.2d 1297, 12 ELR 20368 (8th Cir. 1982); *North Carolina v. Federal Energy Regulatory Comm'n*, 112 F.3d 1175, 27 ELR 20929 (D.C. Cir. 1997).

105. *Froebel v. Meyer*, 13 F. Supp. 2d 843, 864 (E.D. Wis. 1998), *aff'd*, 217 F.3d 928, 30 ELR 20746 (7th Cir. 2000).

106. See Cheri Y. Cornell, *The Clean Water Act: When Dumping Dead Fish Is Not the Discharge of a Pollutant*, 64 WASH. L. REV. 913, 923 (1989).

107. 457 F. Supp. 118, 8 ELR 20757 (D.S.C. 1978). See also *United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 15 ELR 21091 (11th Cir. 1985).

108. 457 F. Supp. at 126, 8 ELR at 20760.

109. *North Carolina*, 112 F.3d at 1187, 27 ELR at 20933.

110. *Id.* at 1187 n.4, 27 ELR at 20933 n.4. See also *National Mining Ass'n v. Corps of Eng'rs*, 145 F.3d 1399, 1404, 28 ELR 21318, 21320 (D.C. Cir. 1998).

111. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377, 6 ELR Digest 20732 (4th Cir. 1976).

112. *Id.*

113. 892 F. Supp. 1333, 1354, 26 ELR 20135, 20145 (D.N.M. 1995) (citing *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 589, 19 ELR 20235, 20240 (6th Cir. 1988)).

114. *Friends of Santa Fe County*, 892 F. Supp. at 1354, 26 ELR at 20145.

cept the minor quantities of AMD migrating in the shallow rock aquifer.

An environmental group sued the owner for discharging a pollutant from waste rock piles at the mining site without a CWA discharge permit. The owner admitted, and the court held, that this remediation system was a point source. However, the court held that the environmental group's claim must fail because the grout curtain did not create "fresh discharges."¹¹⁵ Similarly, Good Samaritans could argue that their remediation activities do not result in fresh discharges and are instead the result of residual contamination from previous releases.

Despite this case law, the *East Bay Utility District* case and other cases have held that it is immaterial if the remediating party created the original pollution.¹¹⁶ The *East Bay Utility District* court depended heavily on EPA regulations explaining that the term "discharge of pollutants" includes discharges from "surface runoff which is collected or channeled by man."¹¹⁷ The court held that because the East Bay Utility District collected and channeled pollutants, it therefore discharged pollutants under the CWA.

Unfortunately, the court's conclusion contributed little to a better understanding of what the terms "discharge" or "addition" mean. It should be noted that several courts have conflated the phrases "discharge of pollutant" and "point source" as they analyze the meaning of this regulation. Numerous courts have used EPA's regulations explaining that discharges of pollutants include discharges from structures that "collect or channel" contaminated surface water to analyze whether a particular activity constitutes a point source, without discussing the discharge issue.¹¹⁸ The source of this confusion is that a structure that collects or channels pollutants is a point source because it is a discernible, confined, and discrete conveyance.¹¹⁹ Similarly, by collecting or channeling pollutants, there is a recognizable place where those pollutants are added or introduced into the watershed regardless of their origin. Following this logic, after pollutants are initially released from a mine, every place downstream where that water is collected or channeled would be considered a point source triggering liability for whoever controls the structure.

This result is consistent with several courts' interpretations of the term "discharge" in the context of the redeposition of contaminants already present in the water back into wetlands.¹²⁰ Similar to the discharge permit pro-

gram, the CWA §404 prohibits the discharge of dredge and fill material into jurisdictional wetlands without a permit.¹²¹

While engaging in land clearing or wetland filling activities, parties often remove material, such as rock and debris, from a water body and later redeposit this material back into the water body when the activity is completed. The U.S. Court of Appeals for the Fifth Circuit held that redepositing excavated material back into a wetland constituted the discharge of pollutants even though the debris was indigenous to the watershed.¹²² Thus, the CWA §404 cases add support to the idea that parties can be liable for the redeposition of pollutants already in the water.

Given this case law, it is clear why Good Samaritans fear CWA liability for any treatment system that conveys pollutants. The broad interpretation of discharge in *East Bay Utility District* and in CWA §404 case law makes it irrelevant if there is a nexus between the Good Samaritan and the origin of the pollutant. It is similarly irrelevant if a Good Samaritan intends to improve water quality overall if those activities ultimately result in the discharge of a pollutant from a point source into navigable waters.¹²³ As the U.S. Court of Appeals for the Tenth Circuit noted, "[t]he touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated."¹²⁴ Even though Good Samaritans are improving water quality, if their actions result in the escape of pollutants into watersheds, they are using the waters for waste distribution. Therefore, unless other liability protection can be found, such as those discussed below, it is possible that courts could find Good Samaritans liable under the CWA if their active or passive treatment systems discharge pollutants into navigable waters.

□ *Udall Good Samaritan Bill*. Given the clear potential for liability under the CWA and recognizing the importance of addressing inactive and abandoned mines, Rep. Mark Udall (D-Colo.) introduced the Abandoned Hardrock Mines Reclamation Act of 2002 into Congress (Reclamation Act).¹²⁵ The Reclamation Act contains two important provisions

sediment from the sea floor, causing that material to be redeposited elsewhere with negative environmental effects, constituted the discharge of pollutants); *United States v. Deaton*, 209 F.3d 331, 30 ELR 20508 (4th Cir. 2000) (sidecasting, which is the deposition of dredged or excavated material from a wetland back into that same wetland, is a discharge of pollutants. The court found "that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before." *Id.* at 336, 30 ELR at 20510); *United States v. Bay-Houston Towing Co.*, 33 F. Supp. 596, 29 ELR 21011 (E.D. Mich. 1999) (it is a discharge when the defendant "removes materials from the bog and, after a varying period of time, deliberately redeposits the [same] materials in other locations within the bog at varying distances." *Id.* at 605, 29 ELR at 21014); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 9 ELR 20334 (8th Cir. 1979); *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 21 ELR 21323 (D. Mont. 1990).

115. *Id.*

116. *See United States v. Law*, 979 F.2d 977, 23 ELR 20466 (4th Cir. 1992). Fault and causation are immaterial in assigning CWA liability. *See North Cambria Fuel Co. v. Department of Env'tl. Resources*, 621 A.2d 1155, 1159 (Pa. Commw. Ct. 1993).

117. 40 C.F.R. §122.2.

118. *See Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 46-47, 10 ELR 20552, 20554-55 (5th Cir. 1980); *Fishel v. Westinghouse Elec. Corp.*, 640 F. Supp. 442, 446, 16 ELR 20634, 20635-36 (M.D. Pa. 1986); *Umatilla Water Quality Protective Ass'n v. Smith Frozen Foods*, 962 F. Supp. 1312, 1320-21, 27 ELR 21411, 21415-16 (D. Or. 1997); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 655 (E.D. Pa. 1981); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 988, 25 ELR 20661, 20663 (E.D. Wash. 1994); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 6 ELR Digest 20732 (4th Cir. 1976); *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1173, 26 ELR 20639, 20641 (D. Mont. 1995).

119. *See* 33 U.S.C. §1362(14), ELR STAT. FWPCA §502(14).

120. *See, e.g., United States v. M.C.C. of Fla., Inc.*, 772 F.2d 1501, 15 ELR 21091 (11th Cir. 1985) (a barge that stirred up vegetation and

121. *See* 33 U.S.C. §1344(a), (d), ELR STAT. FWPCA §404(a), (d).

122. *See Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 13 ELR 20942 (5th Cir. 1983).

123. Intent is irrelevant. *See, e.g., Committee to Save the Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 24 ELR 20225 (9th Cir. 1993); *SED, Inc. v. City of Dayton*, 519 F.Supp. 979, 12 ELR 20026 (W.D. Ohio 1981); *Minnehaha Creek Watershed*, 597 F.2d at 627, 9 ELR at 20388.

124. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373, 9 ELR 20542, 20543-44 (10th Cir. 1979).

125. H.R. 4078, 107th Cong. (2002).

that would be useful in addressing inactive or abandoned mines. However, there are some limitations to this new Act that may hamper its effectiveness.

First, the Reclamation Act imposes a small reclamation fee on any producer of hardrock minerals from mines with annual gross proceeds over \$500,000.¹²⁶ This money would be controlled by the Secretary of the Interior and distributed to states in the form of grants for reclamation and restoration work at abandoned mine sites.¹²⁷ In order to receive this grant money, the Reclamation Act requires states to complete statewide inventories of abandoned hardrock mines. However, it is unlikely that this reclamation fund would raise sufficient money to address all of the problematic inactive or abandoned mines. According to one source, this new provision may create as little as \$40 million per year, which is just a fraction of what would be necessary to address all inactive or abandoned mines in the United States.¹²⁸

Next, the Reclamation Act amends the CWA to create an abandoned or inactive mined land waste remediation permit.¹²⁹ In order to obtain a remediation permit, the applicant must submit a detailed plan to the Secretary of the Interior explaining how the contamination will be remediated and ensuring that the remediation will not degrade water quality below its baseline or original condition.¹³⁰ The Secretary of the Interior must give the public notice and opportunity to comment on the new permits.¹³¹

The remediation permit would supplant and be less stringent than a traditional discharge permit. While CWA discharge permits must limit the discharge of pollutants to satisfy water quality standards, the remediation permit would only require Good Samaritans to achieve water quality standards to the maximum extent practicable “taking into consideration the resources available to the remediating party for the proposed remediation activity.”¹³² These caveats in the remediation permit mean that Good Samaritans will not be required to remediate abandoned mines to meet water quality standards if doing so is financially or otherwise impracticable. There are no such caveats in normal CWA discharge permits. The bill did not make it out of committee in 2002. However, Representative Udall has promised to reintroduce the bill in 2003.¹³³

Unfortunately, the bill only extends this new remediation permit to state, federal, or tribal agencies.¹³⁴ Nonprofit groups and mining companies are not eligible to participate under this bill.¹³⁵ This may significantly limit the effective-

ness of this new permit because nonprofit environmental groups are often the most eager to take on these responsibilities.¹³⁶ In addition, the mining industry wants the Good Samaritan exception to extend to re-mining projects.¹³⁷ Despite these limitations, the proposed remediation permit would be a significant step toward allowing government agencies to remediate inactive and abandoned mines for which they have no responsibility without the fear of potentially bankrupting, perpetual liability.

In addition, the Reclamation Act does not address the potential of Good Samaritans to be liable under CERCLA for remediating inactive or abandoned mines. Even with a remediation permit, Good Samaritans can be liable under CERCLA if their activities release hazardous substances from a facility. Thus, the proposed Reclamation Act is incomplete and will not fully relieve Good Samaritans of their liability concerns.

CERCLA Liability for Active and Passive Treatment Systems

As previously explained, CERCLA liability arises when there is a release of a hazardous substance from a facility by past or present owners or operators of the facility or by any person who arranges for the disposal or treatment of a hazardous substance.¹³⁸ An active or passive treatment plant is likely a facility under CERCLA because the term “facility” includes any place where hazardous wastes come to be located.¹³⁹ AMD is a hazardous substance under CERCLA.¹⁴⁰ If there is any leaking, spilling, or leaching of residual metals from the treatment system, it will be considered a release.¹⁴¹ In addition, a court could easily characterize a Good Samaritan as an operator under CERCLA because the Good Samaritan will construct the system and thus manage, direct, or conduct operations specifically related to pollution control. Similarly, Good Samaritans would likely be arrangers under CERCLA because they will arrange for the disposal or treatment of a hazardous substance. Thus, Good Samaritans could potentially be liable under CERCLA for creating an active or passive treatment system to remediate mine waste.

However, CERCLA contains provisions that provide for Good Samaritan cleanups. Good Samaritans could poten-

work designed to remediate abandoned mines and not as a tool to relax restrictions on discharge permits elsewhere.

126. *See id.* §102. The reclamation fee will be based on a ratio of the net proceeds to the gross proceeds related to such production. *Id.*

127. *See id.* §103.

128. Interview with Lindsay Bennett, Clean Water Action (Sept. 18, 2002).

129. *See* H.R. 4078, §201.

130. *See id.* §201(3)(B).

131. *See id.* §201(3)(C)(i)(II).

132. *See id.* §201(3)(B)(vii), (D)(i)(III).

133. *Pick Mining Battles Wisely*, DENVER POST, Jan. 23, 2003, at A30.

134. *See* H.R. 4078, §201.

135. There is significant concern from environmentalists that private companies may use Good Samaritan cleanups to justify further polluting water bodies or degrading the environment. For example, a mining company may propose to relax its discharge permit limits in exchange for cleaning up an abandoned mine upstream. This author does not advocate these types of pollution trading schemes. Instead, EPA should use its discretion to only allow pure Good Samaritan

136. For example, the nonprofit group Trust for Land Restoration in Summit County, Colorado, is eager to remediate abandoned mines but fears liability. *See* Trust for Land Restoration, *Legal Guide/Projects/Proposals*, at <http://www.restorationtrust.org/legalguides.htm> (last visited Dec. 6, 2002).

137. Industry wants a Good Samaritan law that allows them to re-mine inactive or abandoned mines without having to strictly comply with water quality standards. Environmentalists oppose this concept because it will create additional discharges and pollution. *See Stakeholders Seek Compromise on Mining Cleanup Liability Bill*, INSIDE EPA'S SUPERFUND REP., Nov. 11, 2002, at 10-11.

138. *See* 42 U.S.C. §9607(a), ELR STAT. CERCLA §107(a).

139. “Facility” includes any structure, installation, pit, pond, lagoon, impoundment, ditch, and any site where a hazardous substance has come to be located. *See id.* §9601(9), ELR STAT. CERCLA §101(9).

140. *See* United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 25 ELR 21275 (E.D. Cal. 1995).

141. *See, e.g.,* Nurad, Inc. v. Wm. E. Hooper & Sons Co., 966 F.2d 837, 844-46, 22 ELR 20936, 20939-40 (4th Cir. 1992) (“release” includes passive migration).

tially avoid CERCLA and CWA liability for creating active or passive treatment systems by using these CERCLA provisions. Although these cleanups have to comply with the substantive environmental standards in all applicable and relevant and appropriate federal and state laws, cleanups conducted under CERCLA do not have to obtain federal or state permits, such as discharge permits. Moreover, new amendments to CERCLA will allow Good Samaritans to purchase contaminated land without the fear of obtaining liability. Therefore, as explained below, Good Samaritans could obtain CERCLA and CWA liability protection under CERCLA's cleanup provisions.

□ *CERCLA's Good Samaritan Exemption.* CERCLA allows EPA to act to address the release or potential release of a hazardous substance in order to protect public health and the environment.¹⁴² EPA can "enter into an agreement with any person . . . to perform any response action."¹⁴³ Thus, Good Samaritans can enter into an agreement with EPA to perform cleanup activities at inactive or abandoned mines in order to protect public health and the environment. CERCLA gives Good Samaritans liability protection when implementing EPA-ordered cleanups for contamination for which they have no responsibility.¹⁴⁴ CERCLA §107(d)(1) states:

No person shall be liable under this subchapter [meaning under CERCLA] for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan or at the direction of an [EPA-designated] on scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof.¹⁴⁵

The plain language of §107(d)(1) provides that parties are not liable for "damages as a result of actions taken" to clean up a site in accordance with the national contingency plan (NCP),¹⁴⁶ which contains the implementing regulations for CERCLA.¹⁴⁷ Good Samaritans could use this provision to obtain clear CERCLA liability protection for remediating abandoned mine waste.¹⁴⁸ Utilizing the liability protections in §107(d), EPA could allow a Good Samaritan to remediate abandoned mines using CERCLA's "removal action" authority.¹⁴⁹ Assuming the abandoned mine to be addressed

does not present an emergency threat to public health or the environment requiring immediate attention, EPA, in coordination with the Good Samaritan, would need to conduct an engineering evaluation/cost analysis (EE/CA) before undertaking the removal action.¹⁵⁰ The purpose of an EE/CA is to evaluate site conditions and propose various remediation alternatives, similar to an environmental assessment under the National Environmental Policy Act.¹⁵¹ Specifically, an EE/CA "identifies the objectives of the removal action and analyzes the effectiveness, implementability, and cost of various alternatives that may satisfy these objectives."¹⁵² In addition, the EE/CA will set out what other substantive federal and state environmental laws must be complied with in order to implement the proposed remedies. Following a period of time for comment from the public and interested state and federal agencies, EPA can issue an action memorandum allowing the Good Samaritan to conduct the work selected in the EE/CA.

There are several provisions of CERCLA and the EE/CA process that will ensure any Good Samaritan cleanup will at a minimum protect public health and the environment. First, private party cleanups must provide for public involvement and comment.¹⁵³ In addition, Good Samaritan cleanups under CERCLA must be done in accordance with the NCP or at the direction of an EPA-designated on-scene coordinator.

The cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Id. §9601(23), ELR STAT. CERCLA §101(23). "Remedial actions" are defined as:

Those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id. §9601(24), ELR STAT. CERCLA §101(24). Courts have noted that there is considerable overlap in the two definitions. *See, e.g., United States v. Akzo Nobel Coatings, Inc.*, 990 F. Supp. 897, 904 n.16, 28 ELR 21097, 21100 n.16 (E.D. Mich. 1998). However, the Tenth Circuit has noted:

Generally, a removal action costs less, takes less time, and is geared to address an immediate release or threat of release. In broad contrast, a remedial action seeks to effect a permanent remedy to the release of hazardous substances when there is no immediate threat to the public health. Remedial actions usually cost more and take longer.

Public Serv. Co. of Colo. v. Gates Rubber Co., 175 F.3d 1177, 1182, 29 ELR 21091, 21093 (10th Cir. 1999) (citations omitted).

150. *See* 40 C.F.R. §300.415(b)(4)(i).

151. *See* U.S. EPA, CONDUCTING NON-TIME CRITICAL REMOVAL ACTIONS UNDER CERCLA (1993) (EPA 540/R-93/057) (1993) (available from the ELR Document Service, ELR Order No. AD-3557). NEPA is found at 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209.

152. U.S. EPA, CONDUCTING NON-TIME CRITICAL REMOVAL ACTIONS UNDER CERCLA, *supra* note 151.

153. 40 C.F.R. §300.700(c)(6).

142. *See* 42 U.S.C. §9604(1), ELR STAT. CERCLA §104(1).

143. *See id.* §9622(a), ELR STAT. CERCLA §122(a).

144. *See id.* §9607(d), ELR STAT. CERCLA §107(d). Similarly, cleanup contractors hired by EPA to implement response actions are exempt from liability under CERCLA and other federal laws for "injuries, costs, damages, expenses, or other liability" that result from their work. *Id.* §9619(1), ELR STAT. CERCLA §119(1).

145. *See id.* §9607(d)(1), ELR STAT. CERCLA §107(d)(1).

146. *See Stewman v. Mid-South Wood Prods. of Mena*, 784 F. Supp. 611, 615 (W.D. Ark. 1992); *United States v. State*, 881 F. Supp. 1432, 1443-1444 (E.D. Cal. 1995).

147. The requirements necessary to be considered in conformance with the NCP are set out in Subpart H of the NCP. *See* 40 C.F.R. §300.700(c).

148. *See United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1443-44, 25 ELR 21275, 21281 (E.D. Cal. 1995). However, the provision does not protect Good Samaritans from liability for negligent actions during the cleanup. *See* 42 U.S.C. §9607(d), ELR STAT. CERCLA §107(d).

149. There are two types of response actions under CERCLA: removal and remedial actions. CERCLA defines "removal" as:

The NCP requires that private party cleanups result in a “CERCLA-quality” cleanup.¹⁵⁴

A CERCLA-quality cleanup is one that protects public health and the environment, incorporates treatment or resource recovery technologies to the maximum extent practicable, and complies with federal and state environmental laws that are legally applicable or relevant and appropriate regulatory requirements (ARARs) under the circumstances of the release.¹⁵⁵ The NCP defines ARARs as

cleanup standards, standards of control, and other *substantive* requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant contaminant, remedial action, location, or other circumstance found at a CERCLA site. [Or] that, while not applicable, to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.¹⁵⁶

Only promulgated state and federal environmental protection standards are ARARs.¹⁵⁷ Standards are deemed promulgated if they are generally applicable and legally enforceable.¹⁵⁸ In addition, the NCP sets out several criteria for determining if an environmental law is an ARAR.¹⁵⁹ EPA employs its professional judgment to determine whether a state or federal law is relevant and appropriate under the circumstances of the release of contamination.¹⁶⁰

Good Samaritan cleanups will need to comply with the substantive cleanup requirements in state and federal law that may be ARARs depending on the nature of the remediation work, including the substantive standards in the CWA.¹⁶¹ However, for removal actions under CERCLA, projects only need to comply with ARARs “to the extent

practicable considering the exigencies of the situation.”¹⁶² The NCP provides little guidance on what makes an ARAR practicable, simply stating that the lead agency may consider “appropriate factors, including: (1) The urgency of the situation; and (2) The scope of the removal action to be conducted.”¹⁶³ In addition, the NCP sets out six grounds for waiving ARARs.¹⁶⁴ This flexibility in CERCLA should allow Good Samaritans and EPA to create active or passive treatment systems that meet CWA standards “to the extent practicable given the exigencies of the situation.”

Consistent with CERCLA’s focus on complying only with substantive environmental laws, CERCLA cleanups do not need state or federal permits, which are seen as procedural requirements. CERCLA §121(e) states: “No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite^[165], where such remedial action is selected and carried out in compliance with this section.”¹⁶⁶ It is clear that Congress did not intend to require CERCLA response actions to comply with strictly procedural administrative requirements, such as permits. Administrative requirements include “the approval of, or consultation with, administrative bodies, issuance of permits, documentation, and reporting and recordkeeping.”¹⁶⁷ Using CERCLA §121(e) in conjunction with the Good Samaritan liability protections in §107(d) provides an avenue by which Good Samaritans can avoid CWA liability for cleanup actions.

If a Good Samaritan wants to create an active or passive treatment system that will regularly discharge a reduced amount of pollutants into navigable waters, it will need to enter into an Administrative Order on Consent (AOC) with EPA.¹⁶⁸ An AOC will set out in contractual form the responsibility of the Good Samaritan and EPA in relation to the removal action. Depending on the nature of treatment system, EPA can craft the AOC to ensure that Good Samaritan activities improve environmental quality while remaining accountable for any problems with the treatment system.

If a Good Samaritan wants to create an active treatment facility to remediate mine waste over the long term, a CWA permit would not be necessary. However, EPA would likely use the AOC to require the Good Samaritan to achieve the substantive standards of the CWA by performing long-term operation and maintenance activities on the treatment system.¹⁶⁹ For example, the Yak Tunnel Treatment Plant, which

154. See U.S. EPA, National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8793 (Mar. 8, 1990) (codified at 40 C.F.R. §700(c)(3)(i)) [hereinafter U.S. EPA, NCP Regulation].

155. See 42 U.S.C. §9621(d)(2), ELR STAT. CERCLA §121(d)(2); U.S. EPA, CERCLA COMPLIANCE WITH OTHER LAWS MANUAL (1988) (OSWER Directive No. 9234.1-01); U.S. EPA, CERCLA COMPLIANCE WITH OTHER LAWS MANUAL (1989) (OSWER Directive No. 9234.1-02).

156. 40 C.F.R. §300.5. (emphasis added).

157. See *Ohio v. EPA*, 997 F.2d 1520, 23 ELR 21157 (D.C. Cir. 1993); 40 C.F.R. §300.5; 42 U.S.C. §9621(d)(2)(A)(ii), ELR STAT. CERCLA §121(d)(2)(A)(ii). In addition, CERCLA encourages compliance with “TBCs” to the “maximum extent practicable.” See 40 C.F.R. §§300.400(g)(3), 300.415(i). TBCs are advisories, criteria, and guidance “to be considered” that do not meet the definition of ARAR but may be necessary to determine what is protective or may be useful in developing Superfund remedies. *Id.* Similarly, cleanups can be made to meet general goals found in statutes even if they do not have implementing regulations. See U.S. EPA, NCP Regulation, *supra* note 154, at 8746; *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1442, 22 ELR 20405, 20420 (6th Cir. 1991) (finding that promulgated antidegradation standards under the CWA prohibiting the discharge of any substance “which is or may be injurious to public health” were ARARs despite the lack of any implementing regulations).

158. See 40 C.F.R. §300.400(g)(4). Standards are “legally enforceable” if they are issued in accordance with state procedural requirements and contain specific enforcement provisions. See U.S. EPA, NCP Regulation, *supra* note 154, at 8746.

159. See 40 C.F.R. §300.400(g).

160. U.S. EPA, APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS 2 (1992).

161. See 42 U.S.C. §9621(d)(2)(A), ELR STAT. CERCLA §121(d)(2)(A).

162. See 40 C.F.R. §300.415(i).

163. *Id.*

164. See *id.* §300.430(f)(1)(ii)(C).

165. The NCP defines “onsite” to include “all suitable areas in very close proximity to the contamination necessary for implementation of the response action.” 40 C.F.R. §300.400(e)(1); *Ohio v. EPA*, 997 F.2d 1520, 1548-49, 23 ELR 21157, 21172 (D.C. Cir. 1993).

166. 42 U.S.C. §9621(e)(1), ELR STAT. CERCLA §121(e)(1).

167. U.S. EPA, NCP Regulation, *supra* note 154, at 8756. This interpretation was upheld by the D.C. Circuit in *Ohio*, 997 F.2d at 1527, 23 ELR at 21160. The court held that “[t]he States are surely correct that the procedural requirements of various environmental statutes are intended to ensure that the substantive contaminant levels are met. However, this does not compel EPA to impose these requirements under CERCLA.” *Id.*

168. EPA has the power to create AOCs using 42 U.S.C. §9622(a), ELR STAT. CERCLA §122(a).

169. For example, if a Good Samaritan constructs an active or passive treatment system, there will likely be ongoing maintenance requirements for that structure. Good Samaritans may not be eager to construct remediation projects that require such long-term maintenance.

treats AMD from mine waste at the California Gulch Superfund site in Leadville, Colorado, operates without a CWA discharge permit.¹⁷⁰ However, EPA requires the remediating party to operate the plant to attain the equivalent of discharge permit limitations.¹⁷¹ The same situation exists with the mine waste treatment plant at the Berkley Pitt Treatment Plant at the Silver Bow/Butte Creek Superfund Site in Montana.¹⁷²

If EPA can make a formal showing that strict compliance with CWA standards is not practicable, EPA could allow the Good Samaritan to attain less stringent alternative discharge limits in the AOC. It may be difficult to show that the achievement of CWA standards is impracticable. Active treatment systems are extremely expensive and can cost several hundreds of thousands, if not millions, of dollars to construct. Similarly, ongoing maintenance of such systems can cost a million dollars annually.¹⁷³ It is unclear how Good Samaritans could argue that they can afford to spend millions of dollars to construct and maintain such a facility, but they cannot afford the incremental cost increase of complying with the equivalent of a discharge permit.

However, as long as Good Samaritans are maintaining an active treatment facility under an AOC, CERCLA provides indefinite protection from liability. Section 113(h) of CERCLA explains that “[n]o federal court shall have jurisdiction . . . to review any challenge to removal or remedial actions selected under” CERCLA.¹⁷⁴ This bar from federal review of CERCLA actions ends upon completion of the cleanup action.¹⁷⁵ The courts agree that Congress enacted this section “to prevent delay of cleanup by litigation, including litigation concerning EPA’s compliance with laws other than CERCLA.”¹⁷⁶ As long as a Good Samaritan is operating and maintaining a treatment facility, the CERCLA action is ongoing and not complete.¹⁷⁷ Thus, Good Samaritans would be protected from CERCLA and CWA liability from the construction and operation of an active treatment plant.

It is unlikely that many Good Samaritans will want to take on the obligation of indefinitely operating and maintaining an active treatment facility. It seems more likely that Good

Samaritans will merely want to create or upgrade low-cost wetlands, which transfer heavy metals from contaminated water into the bog material of the wetland. Similarly, Good Samaritans could construct relatively inexpensive sediment retention basins to impound water contaminated with heavy metals, allowing the metals to settle out into the sediments at the bottom of the ponds. These passive treatment technologies produce short-term reductions of heavy metals in the water but will gradually become less effective unless continually maintained. However, these actions may be useful interim measures to help improve water quality while other more significant remediation activities are ongoing in other parts of the watershed.¹⁷⁸

For example, at large CERCLA mining sites, such as the California Gulch site in Colorado, full remediation efforts often take decades to complete. After final remediation efforts are complete, it often takes several more years for residual contamination in the watershed to be flushed out before the waterbody returns to equilibrium.¹⁷⁹ Passive treatment systems could be installed downstream of CERCLA sites to treat residual contamination over the short term until the final remedies are complete.¹⁸⁰

Just like the problem with active treatment facilities, Good Samaritans who desire to create or upgrade a temporary passive treatment system still need to comply with the CERCLA requirement that these actions comply with the substantive provisions of the CWA to the extent practicable given the exigencies of the situation.¹⁸¹ EPA could use its discretion to determine that strict compliance with the substantive provisions of the CWA is not practicable. EPA would likely need to issue a formal opinion on this matter, showing that it considered “appropriate factors” as allowed by the NCP, such as the short-term nature of the action and the limited resources of the Good Samaritan, and determined compliance with these substantive provisions was not practicable. Again, CERCLA clearly prohibits any challenge, such as citizen suits, to response actions while they are being carried out.¹⁸² Thus, while Good Samaritans are constructing passive treatment systems, they will be immune from liability under the CWA and CERCLA.

Upon completion of the wetland, Good Samaritans would not have to fear a lawsuit from the federal or state government assuming they fulfill their obligations under the AOC.¹⁸³ However, environmental organizations or other entities could theoretically bring citizen suits under the CWA against Good Samaritans upon completion of the work, claiming that the passive treatment system is discharging a pollutant from a point source without a discharge permit.

Instead, Good Samaritans may prefer undertaking one-time actions, such as the capping or removal of a waste rock pile. *See, e.g., In re Queen Elizabeth/Tom Boy Mines, Administrative Agreement on Consent for Removal Action*, EPA Region VIII, CERCLA Docket No. CERCLA-8-2000-05 (effective Oct. 26, 1999) (on file with author).

170. *See* Interview with Russ Allen, State Project Manager for the California Gulch Superfund Site, Colorado Department of Public Health and Environment (Dec. 5, 2002).

171. *See id.*

172. *See* Interview with Russ Forbath, Project Manager for the Berkley Pitt Treatment Plant, EPA Region XIII (Nov. 15, 2002).

173. *See* Interview with Russ Allen, *supra* note 170.

174. 42 U.S.C. §9613(h), ELR STAT. CERCLA §113 (h).

175. *Id.* §9613(h)(4), ELR STAT. CERCLA §113(h)(4). *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330, 25 ELR 20628, 20630 (9th Cir. 1995); *Schalk v. Reilly*, 900 F.2d 1091, 1095, 20 ELR 20669, 20670-71 (7th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990); *Fairchild Semiconductor Corp. v. EPA*, 769 F. Supp. 1553, 1559 (N.D. Cal. 1991).

176. *See Schalk*, 900 F.2d at 1097, 20 ELR at 20671; *Boarhead Corp. v. Erickson*, 726 F. Supp. 607, 610, 20 ELR 20546, 20547 (E.D. Pa. 1989); *Chemical Waste Management, Inc. v. EPA*, 673 F. Supp. 1043, 1055, 18 ELR 20307, 20313 (D. Kan. 1987).

177. *See* Interview with Katherine (Joni) Teter, Senior Enforcement Attorney, EPA Region VIII (Nov. 19, 2002).

178. *See* Interview with Lee Pivonka, Surface and Groundwater Specialist, Colorado Department of Public Health and Environment (Dec. 5, 2002).

179. *See id.*

180. *Id.*

181. *See* 40 C.F.R. §300.415(i).

182. *See* 42 U.S.C. §9613(h) (“No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under” CERCLA.). *Id.*; *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 25 ELR 20628 (9th Cir. 1995).

183. Good Samaritans should not proceed with these actions without compete buy-in from both the affected state and federal agencies. Assuming the agencies support these actions, it is highly unlikely that they would sue Good Samaritans for implementing a plan they approved.

The fact that passive treatment systems may continue to release heavy metals in a reduced amount after the work is complete should not alter the permit exemption under CERCLA, which again states that “[n]o federal, state, or local permit shall be required for the portion of any removal or remedial action.”¹⁸⁴ There is nothing in the language of CERCLA §121(e) that suggests the permit exemption only applies during the implementation of the work. Good Samaritans should argue the permit exemption extends out into the future indefinitely for their actions because they were taken as part of a removal action.

The breath of §121(e) has never been thoroughly explored by the courts. The Tenth Circuit did hold that CERCLA does not preempt other permit programs if they are independently applicable.¹⁸⁵ This means, for example, that a hazardous waste incinerator would still need to obtain hazardous waste disposal permits from state and/or federal agencies for activities unrelated to the CERCLA cleanup action. However, several other courts have held without much discussion that CERCLA §121(e) exempts response actions from permit requirements for any activity arising solely out of the cleanup action.¹⁸⁶

Good Samaritans should argue that so long as the activity requiring the permit is a part of the removal or remedial action, CERCLA §121(e) does not on its face require them to get a CWA permit. For Good Samaritans, creating a passive treatment system is inextricably linked to the CERCLA cleanup action and, in fact, is the only reason for the action. To interpret the plain language of CERCLA §121(e) otherwise would frustrate the primary purpose of CERCLA, which as one court noted is “the prompt cleanup of hazardous waste sites.”¹⁸⁷ Courts must understand that Good Samaritans will not engage in this work if they see liability as a real possibility and, thus, many mining waste sites will go unremediated.

The uncertainty with regard to the liability protection for Good Samaritans upon completion of a passive treatment system strongly intimates in favor of engaging in significant collaborative stakeholder discussions in advance of such work. If citizen groups, landowners, or other entities who can bring citizen suits against the Good Samaritan are involved early in the process and given a meaningful opportunity to participate, they will be less likely to sue. EPA and the states regularly undertake efforts to identify and involve stakeholders in environmental projects in many contexts.¹⁸⁸ For any Good Samaritan project involving a passive treatment system, this kind of public outreach and involvement will be essential for success.

184. 42 U.S.C. §9621(e), ELR STAT. CERCLA §121(e).

185. See *United States v. Colorado*, 990 F.2d 1565, 23 ELR 20800 (10th Cir. 1993).

186. See, e.g., *Missouri v. Independent Petrochemical Corp.*, 104 F.3d 159, 162, 27 ELR 20594, 20595 (8th Cir. 1997); *Monterey Bay Unified Air Pollution Control Dist. v. Department of the Army*, 176 F. Supp. 979, 990 (N.D. Cal. 2001); *United States v. Bliss*, 133 F.R.D. 559, 21 ELR 20984 (E.D. Mo. 1990); *McClellan Ecological Seepage Situation v. Cheney*, 763 F. Supp. 431, 435, 20 ELR 20877, 20872 (E.D. Cal. 1989); *United States v. Town of Moreau*, 751 F. Supp. 1044, 1046, 1048, 21 ELR 20650, 20651, 20652 (N.D.N.Y. 1990).

187. *J.V. Peters & Co. v. Administrator*, 767 F. 2d 263, 264, 15 ELR 20646, 20647 (6th Cir. 1985).

188. See *Interview with Katherine (Joni) Teter*, *supra* note 177.

Finally, it should be noted that EPA does not need to place contaminated sites on the national priority list (NPL) in order for a Good Samaritan to undertake a removal action. The NPL “serves primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant remedial action.”¹⁸⁹ However, many states and communities feel that designation on the NPL carries a stigma of serious pollution that drives down land values and discourages tourism.¹⁹⁰ The only legal significance of a particular site being placed on the national priority list is that “those releases included on the [NPL] shall be considered eligible for Fund-financed remedial action.”¹⁹¹ Good Samaritan work at abandoned mines would not be a Superfund-financed remedial action because EPA would not be using CERCLA money to pay for the cleanup.¹⁹² EPA commonly allows cleanup to proceed under CERCLA without officially designating a site as an NPL site in order to avoid stigmatizing property with the Superfund label.¹⁹³ The fact that Good Samaritan activities will not result in an official designation as a Superfund site, and may in fact avoid that designation, should be additional incentive for local communities to support these projects.

Using CERCLA’s Good Samaritan liability exemption, in conjunction with the permit exemption for removal actions, Good Samaritans can undertake active or passive treatment remediation at abandoned mine sites. If affected stakeholders are included in the process, the threat of CWA or CERCLA liability should be low. EPA and other federal agencies are using this same basic approach to allow a Good Samaritan to cap a waste rock pile from an abandoned mine site without acquiring CWA and CERCLA liability in Colorado.

Capping Waste Rock or Tailings Piles

The creation of AMD at inactive or abandoned mines can be stopped if sulfur-laden waste rock or tailings piles are isolated from contact with runoff from natural precipitation or other surface and groundwater flows. Waste rock and tailings piles can be separated from clean water flows by placing an impermeable cap over the piles. Following the capping, there would be no discharge of pollutants to trigger CWA liability. In addition, there would not be a discrete or confined conveyance that could be interpreted as a point source. Thus, the successful capping of waste rock or tailings piles by a Good Samaritan should not entail the discharge of a pollutant from a point source into navigable water. As a result, a CWA discharge permit should not be necessary for this activity.

Similarly, after a pile is capped, there should be no release of hazardous substances from a facility so as to trigger CERCLA liability. However, Good Samaritan could be subject to “arranger” liability under CERCLA because in doing the work they will be arranging for the disposal

189. See 42 U.S.C. §9605, ELR STAT. CERCLA §105; S. REP. NO. 96-848, at 60 (1980).

190. See *Interview with Russ Allen*, *supra* note 170. See also Kevin Taylor, *EPA Puts Cleanup in Local Hands*, HIGH COUNTRY NEWS, Sept. 2, 2002, at 3 (quoting Idaho Governor Kempthorne: “There is a stigma to Superfund.”).

191. 40 C.F.R. §300.425(b)(1).

192. See 42 U.S.C. §9604(c)(1), ELR STAT. §104(c)(1).

193. See *Interview with Katherine (Joni) Teter*, *supra* note 177.

of a hazardous substance. To avoid this result, EPA has used CERCLA's Good Samaritan provision in §107(d) to allow Good Samaritans to cap waste rock piles without incurring liability.

In the Clear Creek watershed in Colorado, EPA entered into an AOC with the American Smelting and Refining Company (ASARCO) under CERCLA §107(d) to perform the removal of a tailings pile that was contaminating the river.¹⁹⁴ The AOC provided ASARCO with liability protection under CERCLA §107(d) in exchange for removing a mine waste pile and disposing of the material in an environmentally appropriate location.¹⁹⁵ The AOC also provided ASARCO with protection from contribution suits by other PRPs under CERCLA.¹⁹⁶ EPA and the state of Colorado developed this agreement with ASARCO with the intention of using it as a model for future activities at sites where the Good Samaritan is not an owner or otherwise responsible for the release.¹⁹⁷

Similarly, the U.S. Bureau of Land Management (BLM), in consultation with EPA, used CERCLA authority to address abandoned mine waste near Leadville, Colorado.¹⁹⁸ The BLM identified waste rock piles near the Nelson Tunnel as significant contributors to water quality degradation in the area.¹⁹⁹ The BLM conducted an EE/CA in order to evaluate alternatives to be carried out as a removal action under CERCLA. After reviewing the EE/CA, the BLM issued a record of decision and action memorandum to consolidate, cap, and revegetate 15,000 cubic yards of material from two mine waste piles. The BLM chose the Colorado DMG as the cleanup contractor.²⁰⁰ Following the capping of the piles, the DMG reconfigured the drainage to its original course.²⁰¹ As explained above, CERCLA §107(d) protected the DMG from CERCLA liability during the capping as a Good Samaritan. In addition, CWA liability was not an issue because the project did not result in the discharge of pollutants from a point source. These innovative agreements should be replicated elsewhere to encourage Good Samaritans to remediate abandoned mine waste by capping waste rock or tailings piles.

New Brownfields Law

In December 2001, Congress passed a new law expanding the CERCLA liability exemption for parties that purchase previously contaminated properties.²⁰² The Small Business Relief and Brownfields Revitalization Act (SBRBRA) amended CERCLA in three significant ways. Along with other important reforms,²⁰³ the SBRBRA created a new defense for prospective purchasers to provide more assurances that redevelopment of contaminated sites by parties not responsible for the original contamination will not trigger liability. With the addition of the bona fide prospective purchaser defense to CERCLA liability, the Act codifies long-standing EPA guidance enabling prospective purchasers of contaminated property to avoid liability for past contamination they did not create.²⁰⁴ The SBRBRA will help Good Samaritans to acquire contaminated properties, such as abandoned mine sites, without the fear of also acquiring CERCLA liability.

The new "bona fide prospective purchaser" defense exempts parties who purchase contaminated properties from CERCLA liability if they can establish that all disposal of contamination occurred before they acquired the property.²⁰⁵ A bona fide prospective purchaser is defined as a person, or tenant of that person, who acquires ownership of a facility after January 11, 2002. In addition, the bona fide prospective purchaser must exercise "appropriate care" with respect to the hazardous substances found at the facility by taking "reasonable steps" to stop any continuing releases, prevent any threatened future release, and prevent or limit human, environmental or natural resource exposure to any previously released hazardous substance.²⁰⁶

EPA has until 2004 to develop new regulations implementing the Act. Presumably, EPA will explain in those regulations what landowners must do to "stop any continuing releases." If EPA interprets this provision to require something close to active remediation of existing waste, as opposed to merely not aggravating the existing problem, the utility of this new defense will largely be eviscerated.²⁰⁷

In exchange for this protection, the SBRBRA creates a new windfall lien.²⁰⁸ At sites funded by the Superfund, the

194. See *In re Queen Elizabeth/Tom Boy Mines*, Administrative Agreement on Consent for Removal Action, EPA Region VIII, CERCLA Docket No. CERCLA-8-2000-05 (effective Oct. 26, 1999) (on file with author).

195. *Id.*

196. EPA may provide remediating parties with liability protection from other PRPs under 42 U.S.C. §9622(h)(4), ELR STAT. CERCLA §122(h)(4).

197. Interview with Katherine (Joni) Teter, *supra* note 177.

198. Executive Orders 12580 and 13016 authorize the BLM to take actions necessary to protect public health and the environment under CERCLA for sites on BLM land. If the site in question is on the NPL under CERCLA and on public federal land, then the BLM can be lead agency with EPA approval. See Exec. Order No. 12580, 52 Fed. Reg. 2923, §§2(e), 2(j), 4(b) (Jan. 29, 1987), ADMIN. MAT. 45031, amended by Exec. Order No. 13016, 61 Fed. Reg. 45871 (Aug. 30, 1996), ADMIN. MAT. 45087.

199. See Interview with Rob Robinson, Reclamation Program Manager, Colorado BLM (Nov. 15, 2002).

200. The BLM required the DMG to submit a formal bid on the project. After BLM accepted the DMG's bid, the DMG hired a contractor to remove the two mine dumps from the drainage. See *id.*

201. Interview with Rob Robinson, Reclamation Program Manager, Colorado BLM (Nov. 25, 2002).

202. See Pub. L. No. 107-118, to be codified at 42 U.S.C. §§9601, 9604, 9605, 9607, 9622(g), ELR STAT. CERCLA §§101, 104, 105, 107, 122(g). See also Scott Reisch, *The Brownfields Amendments: New Opportunities, New Challenges—Part 1*, 31 COLO. LAW. 99 (2002).

203. The Act codified EPA policy regarding when a current owner can be considered an "innocent landowner" so as to avoid CERCLA liability. 42 U.S.C. §9601(35)(A), ELR STAT. CERCLA §101(35)(A). Next, the Act created a new category of liability protection for landowners whose property is contaminated by the migration of pollution from another person's property. *Id.* §9607(q), ELR STAT. CERCLA §107(q).

204. Since 1989, EPA has entered into prospective purchaser agreements that create a covenant not to sue for certain prospective purchasers of contaminated property. See U.S. EPA, GUIDANCE ON SETTLEMENTS WITH PROSPECTIVE PURCHASERS OF CONTAMINATED PROPERTY (1995), available at <http://es.epa.gov/oeca/osre/ppa.html> (also available from the ELR Document Service, ELR Order No. AD-3285).

205. 42 U.S.C. §§9601(40), 9607(r), ELR STAT. CERCLA §§101(40), 107(r).

206. *Id.* §9601(40)(A), ELR STAT. CERCLA §101(40)(A).

207. See Reisch, *supra* note 202; *Industry Presses EPA to Clarify Brownfields Liability Provisions*, INSIDE EPA'S SUPERFUND REP., Nov. 25, 2002, at 3, available at www.insideepa.com.

208. 42 U.S.C. §9607(r), ELR STAT. CERCLA §107(r).

windfall lien will allow EPA to place a lien on land to recover the increased value of the property from the bona fide prospective purchaser after a response action has been taken. While the new law obviates the need for using a prospective purchaser agreement in most cases, EPA will consider using the prospective purchaser agreement “where there is likely to be a significant windfall lien and the purchaser needs to resolve the lien prior to purchasing the property (e.g. to secure financing)”²⁰⁹

Good Samaritans can use this new authority to acquire land contaminated by inactive or abandoned mines without the fear of liability resulting from ownership. Next, after acquiring the property, Good Samaritans can use the CERCLA authorities discussed above to remediate the land while acting as a cleanup contractor implementing a removal action. These provisions should allow Good Samaritans to both own and remediate lands contaminated by inactive or abandoned mines without the fear of perpetual CWA and CERCLA liability.

Total Maximum Daily Loads (TMDLs) and §319 Grants for Nonpoint Source Management

The CWA separates pollution sources into two categories: (1) point sources regulated with discharge permits; and (2) nonpoint sources, which are addressed using best management practices and other voluntary measures. Contamination from inactive or abandoned mines is both a point and nonpoint source.²¹⁰ Clearly, if EPA and the states so desired, they could regulate abandoned mines under the point source program. However, EPA and the states normally attempt to manage mining pollution from inactive or abandoned mines under the nonpoint source authorities of the CWA due to a lack of financially viable landowners.

The CWA's TMDL program is one tool used by EPA and the states to identify nonpoint source pollution.²¹¹ The CWA delegates to the states the responsibility to identify waters, known as water quality impaired segments, where controls on point sources are insufficient to meet water quality standards.²¹² States or EPA must develop TMDLs for these water quality impaired segments.²¹³ TMDLs are conceptual tools that identify acceptable loadings of pollutants a water body can absorb from point sources, nonpoint sources, and natural background sources in order to meet the applicable water quality standard.²¹⁴ States must identify the

specific pollutants in each impaired segment that are causing or expected to cause exceedances of applicable water quality standards.²¹⁵

For watersheds impaired by pollution from inactive or abandoned mines, a TMDL identifies the major sources of pollution in that watershed. Next, the TMDL allocates or assigns acceptable pollutant loads to individual sources coming from inactive or abandoned mines. Finally, the states and EPA implement the loading allocations using all available enforcement authority. Ideally, after a TMDL loading allocation is implemented, water quality would improve to meet the applicable standards.

While the CWA requires the creation of TMDLs, it does not discuss implementation or compliance schedules.²¹⁶ Tightening controls on traditional point source discharge permit holders is one way to implement the loading allocation in a TMDL.²¹⁷ EPA and the states can also enforce TMDL restrictions through the newly expanded stormwater discharge permits program.²¹⁸ Thus, by designating abandoned mines as point sources, EPA or the states can require owners of these inactive or abandoned mines to reduce discharges to meet the loading reductions identified in a TMDL.

Reliance on reductions in discharge permits to implement TMDLs is ineffective where mine waste qualifying as a nonpoint source contributes all or a significant portion of the pollutants in a waterbody. As a result, states often rely on voluntary or incentive-based best management practices to regulate AMD contamination from inactive or abandoned mines. There are no enforceable standards in the CWA that require states to control nonpoint sources in order to implement the loading allocations developed in a TMDL.²¹⁹ This

209. See Memorandum from Barry Breen, Director of the Office of Site Remediation Enforcement, to Superfund Senior Policy Managers and Superfund Regional Counsels in Regions I-X, Entitled Bona Fide Prospective Purchasers and the New Amendments to CERCLA (May 31, 2002) (on file with the author) (also available from the ELR Document Service, ELR Order No. AD-4758). EPA intends to discuss the windfall lien issue more fully in subsequent guidance. *Id.*

210. Wherever there is a point source discharging pollutants into navigable waters from an abandoned mine site, these sites can be regulated with CWA discharge permits. Up to 40% of abandoned mine sites fall into this category. The remaining sites can be characterized as nonpoint sources because they are not traceable to a definable point source. See WESTERN GOVERNORS ASS'N, *supra* note 7.

211. See 33 U.S.C. §1313(d), ELR STAT. FWPCA §303(d).

212. See *id.* §1313(d)(1)(A), ELR STAT. FWPCA §303(d)(1)(A); 40 C.F.R. §130.2(j).

213. See *id.* §1313(d), ELR STAT. FWPCA §303(d).

214. See *id.* §1313(d)(1)(C), ELR STAT. FWPCA §303(d)(1)(C); 40 C.F.R. §§130.2(f)-(i), 130.32, 130.33; U.S. EPA, GUIDANCE FOR 1994 SECTION 303(D) LISTS (1993).

215. See 40 C.F.R. §130.7(b)(4); *Pronolino v. Marcus*, 91 F. Supp. 2d 1337, 30 ELR 20460 (N.D. Cal. 2000).

216. See 33 U.S.C. §1313(d), ELR STAT. FWPCA §303(d).

217. CWA discharge permits must be set at levels to comply with the relevant stream standards. See 33 U.S.C. §§1311(b)(1)(C), 1342(a)(1), ELR STAT. FWPCA §§301(b)(1)(C), 402(a)(1). The CWA regulations explain that discharge permit limitations must be “consistent with the assumptions and requirements of any available wasteload allocations [for point sources]” developed by a TMDL. See 40 C.F.R. §122.44(d)(1)(vii)(B). Similarly, Colorado’s discharge permit implementing regulations require point source pollution allocations developed in a TMDL to be “integrated into [point source] discharge permits.” See 5 COLO. CODE REGS. §1002-31.14(3) (2002), available at <http://www.cdphe.state.co.us/op/regs/waterregs/100261wqccdischargepermitsystem.pdf>. EPA guidance provides a methodology for incorporating point source loading allocations from TMDLs into NPDES permits. See U.S. EPA, GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS (1991) (available from the ELR Document Service, ELR Order No. AD-3550).

218. See 33 U.S.C. §1342(p), ELR STAT. FWPCA §402(p); 40 C.F.R. §122.26. Under these provisions, industrial sources of stormwater discharges can be regulated with effluent limitations and/or best management practices. See 33 U.S.C. §1342(p)(3)(A), ELR STAT. FWPCA §402(p)(3)(A). Similarly, municipal sources of stormwater discharges can be regulated to the maximum extent practicable with “management practices, control techniques and system, design and engineering methods” and “such other provisions” as EPA finds appropriate. See *id.* §1342(p)(3)(B), ELR STAT. FWPCA §402(p)(3)(B). Notably, the stormwater discharge permit program covers active and inactive mining operations. See 40 C.F.R. §§122.26(b)(iii), 122.1(b)(2)(iv).

219. EPA acknowledges that §303(d) does not create any new implementation authorities beyond what already exists in state, local, or federal law. See Memorandum from Robert Perciasepe, Assistant Administrator Office of Water, U.S. EPA, New Policies for Establishing and Implementing Total Maximum Daily Loads (Aug. 8,

lack of enforceable nonpoint source authority has translated into TMDLs that are generally devoid of serious attention to nonpoint sources.²²⁰ Moreover, most states lack sufficient resources or staffing to carry out the program effectively.²²¹

During the Clinton Administration, EPA attempted to promulgate more stringent TMDL regulations²²² to require states to provide assurances that pollution loading reductions for nonpoint sources identified in a TMDL are implemented.²²³ Before the new TMDL regulations took effect, Congress deferred their implementation until October 2001.²²⁴ In addition, industry and environmental groups filed 10 separate petitions to review the legality of the rules.²²⁵ The D.C. Circuit consolidated these petitions into one case.²²⁶ Given the controversial nature of the new rules, the Bush Administration announced in fall 2001 an additional delay of the implementation of the new rules until spring 2003.²²⁷ On December 27, 2002, EPA announced that it was withdrawing the rules to allow more time to evaluate how to move forward on TMDL implementation.²²⁸

Any new Bush Administration TMDL rules are unlikely to create new authority requiring mandatory controls of nonpoint sources of pollution, such as runoff from inactive

or abandoned mines.²²⁹ Instead, the new rules will seek to provide the states with more flexibility in all areas of the TMDL program.²³⁰ Most importantly, EPA will seek a significant increase in funding for the current grant programs that address nonpoint sources.²³¹

The CWA's §319 program is an important federal grant program designed to encourage voluntary best management practices to control contamination from abandoned and inactive mines.²³² Section 319 requires, among other things, states to prepare and submit a plan to EPA that: (1) identifies categories of nonpoint sources that add significant pollution to those water bodies; (2) describes processes, such as best management practices, that can be used to the "maximum extent practicable" to reduce the level of pollution from nonpoint sources; and (3) identifies state or local programs for controlling such nonpoint source pollution.²³³ Based on these plans, states then submit grant proposals to EPA to implement best management practices to control nonpoint sources.²³⁴ EPA views the §319 program as the "primary implementation mechanism" for TMDLs in waters impaired solely or primarily by nonpoint sources.²³⁵

The §319 program has provided significant funding for nonpoint source programs. For example, since the program's inception in 1987, Colorado has received over \$15 million dollars and funded over 100 voluntary or incentive-based nonpoint source pollution reduction programs through EPA's §319 program.²³⁶ EPA and the states give preference to §319 grant projects aimed at implementing TMDL loading allocations.²³⁷ There is no exception from

1997) (available from the ELR Document Service, ELR Order No. AD-3467) [hereinafter *New Policies for Establishing and Implementing Total Maximum Daily Loads*]. See Robert W. Adler, *Controlling Nonpoint Source Water Pollution: Is Help on the Way (From the Courts or EPA)?*, 31 ELR 10270 (Mar. 2001); Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program*, 28 ELR 10415, 10423 (Aug. 1998). For example, the Colorado Water Quality Control Division admits that the §319 program does "not establish an enforceable requirement that BMPs be implemented other than voluntarily." See WQCD NONPOINT SOURCE MANAGEMENT PROGRAM, *supra* note 14, at 22.

220. A recent investigation of 55 EPA-approved TMDLs revealed that TMDLs generally only discuss point source controls despite the requirement in the CWA to address nonpoint sources as well. See Houck, *supra* note 219. Nearly one-half of the approved TMDLs did not identify nonpoint source contributions to the impairment of water quality. Of the 30 that did acknowledge nonpoint source contributions, only 20 actually quantified these loadings and only 13 projected quantified reductions. In only one TMDL were the reductions to nonpoint sources mandatory. Finally, only one-third of the TMDLs provided for a margin of safety and only six discussed future growth as required by the CWA. *Id.*

221. See *States Lack Resources Needed to Implement TMDL Strategy*, EPA Told, Daily Env't Rep. (BNA), May 12, 1997, at A-8.

222. EPA promulgated the existing regulations for implementing TMDLs in 1985 and 1992. See 40 C.F.R. §130 et seq.

223. See U.S. EPA, Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43586 (July 13, 2000).

224. Congress passed an appropriations rider the day before the new rules were supposed to go into effect to prohibit EPA from implementing the new rules. H.R. 4425, 106th Cong. (2000). See also Oliver A. Houck, *The Clean Water Act TMDL Program V: Aftershock and Prelude*, 32 ELR 10385, 10386-89 (Apr. 2002).

225. See U.S. EPA, Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program, 67 Fed. Reg. 79020, 79024 (Dec. 27, 2002).

226. See *American Farm Bureau Fed'n v. Whitman*, No. 00-1320 (D.C. Cir. July 18, 2000).

227. See Susan Bruninga, *EPA Moves to Delay Action on TMDL Rule; Rule Changes May Be Proposed in Spring*, 32 Env't Rep. (BNA) 1415 (July 20, 2001).

228. See 67 Fed. Reg. at 79020.

229. See Susan Bruninga, *Planned Changes to TMDL Program Weaken Provisions*, State Official Says, 33 Env't Rep. (BNA) 30 (July 26, 2002).

230. *Id.*

231. Interview with Bruce Zander, National Expert on TMDLs at Region VIII, U.S. EPA (June 18, 2002).

232. See 33 U.S.C. §1329(h), ELR STAT. FWPCA §319(h). EPA can provide additional grant dollars for nonpoint source control through various other sections of the CWA. See *id.* §§1254(b)(3), 1256, 1384(b), ELR STAT. FWPCA §§104(b)(3), 106, 604(b).

233. See *id.* §1329(a)(1)(A)-(D), ELR STAT. FWPCA §319(a)(1)(A)-(D).

234. See U.S. EPA, Supplemental Guidelines for the Award of Section 319 Nonpoint Source Grants to States and Territories in FY 2003, 67 Fed. Reg. 54806 (Aug. 26, 2002).

235. See *New Policies for Establishing and Implementing Total Maximum Daily Loads*, *supra* note 219. If a state fails to fulfill its obligations under §319, EPA can disapprove a state's §319 submission and deny grant moneys to the state available under this section. See 33 U.S.C. §1329(d)(2)-(3), (h), ELR STAT. FWPCA §319(d)(2)-(3), (h). However, §319 does not give EPA the authority to prepare or implement a nonexistent or inadequate nonpoint source pollution control program if the state fails to do so. Adler, *supra* note 219. For example, EPA does not have any statutory authority to require TMDL loading allocations to be implemented through land use changes in mining areas.

236. See WQCD STATUS OF WATER QUALITY IN COLORADO, *supra* note 35, at II-21; WQCD NONPOINT SOURCE MANAGEMENT PROGRAM, *supra* note 14, at 3-9.

237. The division is assisted in its decisionmaking with regard to nonpoint sources by the Colorado Nonpoint Source Council (NPS Council). See WQCD NONPOINT SOURCE MANAGEMENT PROGRAM, *supra* note 14, at 14. The NPS Council consists of representatives from 25 agencies and interest groups dealing with nonpoint source issues. *Id.* The mission of the NPS Council is to promote a voluntary and cooperative nonpoint source program. *Id.* The NPS Council reviews management program changes, best management practices recommendations, and applications for CWA §319 grant funding. *Id.* at 22. However, the §319 program does "not establish an enforceable requirement that [best management practices] be implemented other than voluntarily." *Id.*

CWA or CERCLA liability for parties who implement §319 programs at abandoned mines.

In order to address fears of CERCLA liability, EPA and the state of Colorado entered into a memorandum of understanding (MOU) to exempt the state from CERCLA liability under §107(d) when its agents engage in the cleanup of abandoned or inactive mines under CWA §319.²³⁸ To use the MOU, EPA must determine that the release of a hazardous substance or pollutant from the area to be remediated presents an imminent and substantial endangerment to public health and the environment.²³⁹ The action needs to be undertaken in a manner consistent with CERCLA's NCP and at the direction of an EPA-designated on-scene coordinator. Projects implemented under this MOU cannot be carried out at sites on the NPL.²⁴⁰ EPA and the state of Colorado have used the MOU at several locations to remediate abandoned mine sites under the CWA's §319 program.

The Colorado DMG received §319 grants to address mining pollution from inactive or abandoned mines in the Chalk Creek watershed.²⁴¹ First, DMG consolidated and capped five mine waste tailings piles in the Chalk Creek watershed. Later, DMG received an additional \$310,000 in CWA grants to divert clean groundwater away from a contaminated mining tunnel in order to reduce the pollution. The program was successful in reducing dissolved zinc in the mine tunnel from 5,000 milligrams per liter (mg/L) to 250 mg/L, which eliminated the need for direct water treatment at the site.²⁴² Similarly, at the Vermilion Mine in the headwaters of the Animas River, DMG used §319 money to divert clean groundwater away from the underground ore body and piped it out of the mine to avoid contamination.²⁴³ As explained above, diverting clean water away from sources of contamination does not trigger CWA or CERCLA liability.

In Cement Creek, Mineral Creek, and at Handies Peak on the Animas River, DMG used §319 money to remove mine waste piles and deliver the waste piles to local mills for reprocessing.²⁴⁴ DMG used the MOU with EPA to protect itself from CERCLA liability during the removal process.²⁴⁵

CWA liability was not an issue because the removal of the piles did not create the discharge of pollutants into navigable water from a point source. Then, DMG paid the local mill a disposal fee to take the mine waste.²⁴⁶ Upon delivery, any ongoing liability for the mine waste piles shifts to the mill owner.²⁴⁷ The mill owners' disposal of the waste after reprocessing is governed by the existing reclamation standards in a DMG permit.²⁴⁸ Finally, DMG entered into agreements with the mill owners to require the mill owners to return any profits from the processing of the mine waste to the state.²⁴⁹ The money will be placed in a fund to be used for future reclamation of inactive or abandoned mines.²⁵⁰

In addition, EPA Region VIII in Colorado has begun an initiative to attempt to integrate Superfund cleanups of abandoned mines with the TMDL program.²⁵¹ As a part of this effort, EPA will attempt to ensure that Superfund cleanups lead to the attainment of water quality standards in water bodies affected by mine waste where resource limitations have prevented the implementation of TMDLs. As one EPA official noted: "If you schedule both efforts at the same time, you get a bigger, fuller picture of what the ultimate targets of the cleanup should be."²⁵²

Continued use of CWA §319 funding will be essential to remediating abandoned mine waste. Using agreements such as the MOU between EPA and the state of Colorado, §319 money can be used without the fear of CERCLA liability. In addition, the suggestion in this Article to use CERCLA §121(e) to insulate remediation activities from CWA permit requirements could also be applied to parties carrying out §319 projects. Finally, as shown above, remediation of abandoned mines can be done in conjunction with local mill owners in order to provide an economic benefit to the affected communities. Using these innovative solutions, governments can create benefits for both the environment and local economies.

Conclusion

Pollution from inactive and abandoned mines remains one of the most intractable problems in environmental law. If this problem is every going to be solved, the potential power of Good Samaritans must be unleashed. As this Article details, there are several actions Good Samaritans can take under existing law to address contamination from inactive or abandoned mines without triggering CWA or CERCLA liability.

Good Samaritans can undertake hydrologic runoff control work to divert clean water away from contamination

238. See Memorandum of Understanding Between the Colorado Department of Health, the Colorado Mined Land Reclamation Division, and the U.S. Environmental Protection Agency for CERCLA Liability of Clean Water Act Section 319 Projects (June 3, 1992) (on file with author).

239. The agreement also requires the site to be identified as a contamination source in Colorado's Nonpoint Assessment Report. Colorado no longer creates a Nonpoint Assessment Report. However, the state does describe its nonpoint source program in its biannual report to EPA pursuant to §305(b) of the CWA.

240. See Interview with Laurie Fisher, Colorado Department of Public Health and Environment Water Quality Control Division (June 18, 2002).

241. See U.S. EPA, *EPA Section 319 Success Stories, Vol. III, Colorado*, at <http://www.epa.gov/nps/Section319III/CO.htm> (last visited Jan. 16, 2003).

242. *Id.*

243. See DMG, *Abandoned Mines: Non-Point Source Program*, at <http://www.mining.state.co.us/abanandonedmines/nonpoint.html> (last visited Oct. 22, 2002).

244. See *id.*

245. See, e.g., Action Memorandum from Jim Herron, State Project Officer, Colorado Department of Natural Resources, Division of Minerals and Geology, to Dan Belay, Colorado Department of Public Health and Environment, Water Quality Control Division, and Kim Larson, §319 Program Administrator, U.S. EPA Region VIII, Water Division, titled "Request for Response Action Approval at the Congress and San Antonio Mine Sites in San Juan County" (Aug. 23, 2002) (on file with author).

246. Interview with Jim Herron, Colorado Division of Minerals and Geology (Nov. 25, 2002).

247. Agreement for Reclamation Between Silver Wing Company, Inc., and the Division of Minerals and Geology Inactive Mine Program, Cement Creek Mine Waste Control Project (Aug. 23, 2001) (on file with author) (stating "[o]nce the mine waste is transported and placed at the Mill, . . . there will be no further responsibility conveyed to either the contractor, DMG or SJRC&D").

248. See, e.g., *id.*

249. Interview with Jim Herron, *supra* note 246.

250. *Id.*

251. See *EPA Pilot to Test Greater Superfund, Water Office Coordination*, INSIDE EPA'S SUPERFUND REP., Nov. 25, 2002, at 18-19, available at <http://www.insideepa.com> (on file with author).

252. *Id.*

sources. Similarly, capping mine waste piles should not trigger CWA or CERCLA liability, assuming EPA and the Good Samaritan enter into an AOC protecting the Good Samaritan from CERCLA liability during the implementation of the work. Finally, Good Samaritans can construct and maintain a permanent active treatment facility in order to remediate abandoned mine waste without fearing CWA or CERCLA liability. However, passive treatment systems constructed under a CERCLA removal action may trigger liability if courts narrowly construe CERCLA's permit exemption provision. To avoid this result, EPA, the states, and Good Samaritans should engage in significant outreach before beginning such projects in order to get the support of potential stakeholders. If all affected parties "buy into" the Good Samaritan cleanup, the risks of litigation should be low.

In addition, Congress should pass the new Abandoned

Hardrock Mine Reclamation Act introduced by Representative Udall. While this bill limits Good Samaritan protections to government agencies, it is a good first step to removing liability barriers to the cleanup of abandoned mines. Eventually, the law should be expanded to allow nonprofits and possibly private companies to take advantage of the Good Samaritan liability protection.

In the meantime, EPA and the states will continue to rely on voluntary best management programs funded through CWA §319. States should continue to develop innovative agreements to allow more abandoned mine remediation projects to occur using §319 money, such as those highlighted in Colorado. While Congress continues to drag its feet on enacting a Good Samaritan exemption, EPA and the states should experiment with existing regulatory tools to address this problem. As long as pragmatic problem solving remains the guiding principle in protecting and rehabilitating the natural environment, all hope is not abandoned.