



By Benjamin H. Grumbles

Environmental
advocates &
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protection

Good Uncle Sam

When is the slope too slippery to give liability relief to “good guys” who clean up abandoned hard rock mines and prevent toxic runoff downstream?

For two decades, national legislators, policy makers and advocates have been trying to find the right balance under the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (“Superfund”). The goal, shared by many, is to shield from liability certain “Good Samaritans” who volunteer to reduce the flow of heavy metal pollution at legacy sites where the polluters (or at least their assets) are long gone. Actions in pursuit of this noble goal have been mixed, but recent developments provide a clearer stream of hope for the future.

The stakes are high and the scope of the problem immense: Inactive or abandoned mine sites can pose serious public safety and environmental hazards. Estimates range from 230,000 to more than 500,000 abandoned mines nationwide, most of which are former hard rock mines located in the western states. Colorado alone has 7,000 such sites. Acid mine drainage damages watersheds and degrades water quality throughout the U.S.

Liability Insurance

There are many volunteers (a.k.a. “Good Sams”) interested in helping restore watersheds impaired by abandoned mines. Trout Unlimited is one of the most active and engaged. The threat of liability under the CWA and/or Superfund, however, can throw a wet blanket on third-party cleanups. A volunteer conducting a partial cleanup can become liable for the entire cleanup or be obligated to get a discharge permit, which requires compliance with strict water quality standards in streams that already are in violation of these standards. Liability may occur even though the volunteer did not cause the pollution. By removing—or at least reducing—this threat, policies and legislative initiatives can encourage more Good Sams to step in and protect watersheds.

This is not a new issue. Since the 1990s, the Western Governors Assn. and other important groups have urged Congress to act. Hearings and bills have come and gone, but broadly supported legislation has never made it to the president’s desk. Sometimes it is politics that get in the way; other times, it is legitimate concerns about scope, precedent and the fear of exceptions that swallow up the hole.

The issue received considerable attention by Congress and the U.S. Environmental Protection Agency (EPA) in 2006 and 2007. Sen. Ken Salazar, now Secretary of the Interior, sponsored a bill. The Bush administration also developed a comprehensive bill, the “Good Samaritan Clean Watershed Act,” which also received bipartisan support in the House and Senate, but never advanced through either chamber. The key concepts were providing a new type of permit to protect legitimate Good

Sams (who had no ownership interests in the site or any connection to the previous polluter), but also retaining governmental accountability and public scrutiny to ensure profit-making entities were not masquerading as “Good Sams,” and that volunteers acted with the best of intentions and without gross negligence.

EPA also issued administrative tools under the Superfund law in 2007 to help Good Sams. This included a model “comfort letter” and a model settlement agreement (an administrative order on consent or AOC). The agency also issued a memorandum to EPA regions, describing the purpose and intended use of the tools.

Closing Loops

More recently, EPA issued a Dec. 12, 2012, Memorandum on National Pollutant Discharge Elimination System Requirements for Good Sams at Orphan Mine Sites. It is available at <http://water.epa.gov/action/goodsamaritan/upload/2012-good-samaritan-memo-signed.pdf>.

Four of EPA’s leaders—from the Water, Superfund, Enforcement and General Counsel’s offices—described EPA’s desire not to require CWA permits for all Good Sam situations, during, after and outside of Superfund cleanups at inactive or abandoned sites. The memo will be helpful to some volunteer organizations considering cleanups but intimidated by potential liability. It certainly has the support of one of the Congressional members who has been fighting for Good Sam legislation: Sen. Mark Udall. It also leaves many caveats and questions—par for the course with nonbinding, lengthy guidance on tricky legal topics.

Uncle Sam—whether it is EPA, Department of the Interior, Department of Agriculture or Congress—can do some good for Good Sams without giving away the store or creating a loophole for sloppy Sams or sneaky polluters. EPA should be commended for its incremental efforts, done administratively without the force of law. The intent behind EPA’s multi-office December 2012 effort is good. The spirit is willing, but the memo is weak. Congress should find common ground and pass bipartisan legislation to strengthen the broadly supported policy direction. Of course, that can only happen if environmental advocates and agencies work together to climb the steep slope. Reasonable progress with rational safeguards, tailored to individual watersheds, will be at the top of the hill, and cleaner water will begin to flow down the other side. **WWD**

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