

EARTHWORKS

Dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions.

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Testimony of Lauren Pagel, Earthworks Policy Director, before the U.S. Senate Subcommittee on Chemical Safety, Waste Management, Environmental Justice, and Regulatory Oversight and Subcommittee on Fisheries, Water, and Wildlife on S. 3571, the Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022.

September 29, 2022

Thank you for the invitation to testify on S. 3571, the Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022. I appreciate the opportunity to discuss ways Congress can help address cleanup of abandoned hardrock mines and improve Good Samaritan mining policies. My name is Lauren Pagel, I am the policy director at Earthworks.

Earthworks is a non-profit organization dedicated to protecting frontline communities and the environment from the impacts of mineral and energy development while supporting a rapid, just, equitable, and fair transition to renewable energy built from responsibly sourced materials.

Earthworks supports S. 3571's goal of cleaning up abandoned hardrock mines that pollute ancestral, public, and private lands throughout the American West. Earthworks believes that any abandoned mine clean up policies must also protect today's communities from current and future mineral activities. Good Samaritan policies can assist in addressing the problem of the hundreds of thousands of abandoned mines that litter the West, but Good Samaritans alone are not the solution to all of the old mines that threaten our safety and clean water. Good Samaritan policy must be narrowly and carefully crafted to safeguard against potential inadvertent misuse or abuse and to ensure that downstream communities, Tribes, and the watershed do not end up with unintended environmental consequences.

S. 3571 focuses on abandoned hardrock mines permitted before the Interior Department finalized their public lands mining rules in 1980. However, mine pollution is not just a problem from the past. Perpetual pollution from mines permitted under current rules persists.¹

In February 2022, the Biden-Harris administration published their Fundamental Principles for Domestic Mining Reform² and their Interagency Working Group recommendations for EPA and other agencies are due by the end of 2022.³ These

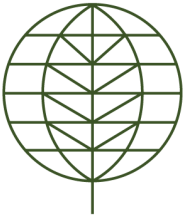
¹ See Bonnie Gastring, Polluting the Future, Earthworks (May 2013).

https://earthworks.org/resources/polluting_the_future/

² See Fundamental Principles for Domestic Mining Reform

<https://www.doi.gov/sites/doi.gov/files/biden-harris-administration-fundamental-principles-for-domestic-mining-reform.pdf>

³ See 87 Fed Reg. 42492 (July 15, 2022) <https://www.govinfo.gov/content/pkg/FR-2022-07-15/pdf/2022-15114.pdf>



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principles include several additional policy reforms that are essential to helping to address the problem of abandoned hardrock mines, including:

- Establish a Fully Funded Hardrock Mine Reclamation Program, paid for via reclamation fees similar to what the coal mining industry pays.
- Establish Strong Responsible Mining Standards that include financial assurance requirements to reduce the risk and consequences of legacy pollution, decrease the likelihood of catastrophic events, such as tailings impoundment failures, and protect taxpayers from companies that go bankrupt and leave operations inadequately closed.
- Require the EPA to review their financial assurance requirements for the hardrock mining industry pursuant to Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴

Creating a dedicated, significant stream of funding is necessary for this country to comprehensively inventory and prioritize abandoned mines, and to address this large scale problem that cannot be tackled without additional resources. Earthworks is happy to work with the Subcommittees to improve S. 3571 to ensure that communities and western waters are protected, while also giving appropriate Good Samaritans limited liability relief for low-risk clean up at abandoned mines.

Mining Reforms to Cleanup Abandoned Hardrock Mine: More Jobs, Cleaner Water

The principal way Congress can solve the problem of hardrock abandoned mine lands (AMLs) is to pass S. 4083, the Clean Energy Minerals Reform Act of 2022.⁵ Complicated, expensive cleanups require a dedicated cleanup fund with resources from S. 4083's hardrock mining royalty and reclamation fee.

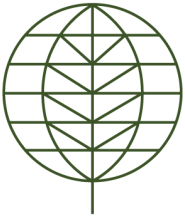
The Surface Mining Control and Reclamation Act (SMCRA) has for two generations required the coal industry to pay similar fees for abandoned coal mine reclamation.⁶ This fee has successfully funded coal mine clean ups across the country. Yet, the hardrock mining industry pays no such fee. In fact, in some certified states, the coal industry's funds go to clean up the messes from hardrock AMLs. Only an independent, dedicated funding source from a hardrock royalty and reclamation fee, analogous to coal's SMCRA AML program, will create the significant improvements needed to address the hundreds of thousands hardrock AMLs nationwide.

We appreciate Congress taking an important step by creating our nation's first ever fund specially dedicated to hardrock AML cleanup in Section 40704 of 2021's Infrastructure

⁴ See White House Fact Sheet on EO 13990 <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>

⁵ See S. 4083 <https://www.congress.gov/bill/117th-congress/senate-bill/4083>

⁶ See 30 U.S.C. 25 Subchapter IV §1231 et seq.



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and Investment Jobs Act. In the FY23 budget, we urge Congress to appropriate funds authorized for this important program.

Good Samaritan Cleanup of Abandoned Hardrock Mines

Earthworks can, and has, supported a reasonable pathway for Good Samaritans to receive limited liability relief for simpler hardrock AML restoration pilot projects.⁷ For instance, Earthworks testified before this Committee in support of a bipartisan discussion draft of the Good Samaritan Cleanup of Orphan Mines Act of 2016.

The Good Samaritan policy objective is to create a system that encourages volunteer mine cleanup without allowing for abuse or resulting in worse environmental outcomes. Therefore, the liability protections enjoyed by the Good Samaritan should neither be transferable nor extended to activities that involve dredge and fill. Before this bill moves forward, we urge the Subcommittees to incorporate reasonable necessary guardrails for this pilot program to ensure that it will meet this objective.

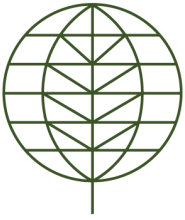
Some of these guardrails are discussed below or are also contemplated by EPA's existing administrative Good Samaritan process for hardrock AML.⁸ To facilitate the Good Samaritan work of civic, religious, and conservation organizations, the EPA has created a process through which qualified projects can receive liability relief from the Clean Water Act (CWA) and CERCLA. Due to lack of funds, very few mines have been cleaned up compared to the scope of the problem.

Improvements to the Good Samaritan Remediation of Abandoned Hardrock Mines Act of 2022

Good Samaritan policies should not exacerbate risks to drinking and other water by undermining the intent of the CWA or CERCLA. Nor should they prevent Americans from having their voices heard on projects that will directly impact them, through methods such as NEPA waivers or Categorical Exclusions. Good Samaritan policies should also ensure that Americans can seek justice under the law if a cleanup project goes wrong and protect against the abuse of corporate structures that could allow companies to inappropriately obtain waivers or otherwise evade funding clean up.

⁷ See Earthworks Policy Director Lauren Pagel June 14, 2006 testimony before the Senate Environment and Public Works at https://www.earthworksaction.org/files/publications/20060615_EARTHWORKS_GoodSam_testimony.pdf See also S. 1848, the Cleanup of Inactive and Abandoned Mines Act and S. 2780, the Good Samaritan Clean Watersheds Act. S. 1848, (109th Congress), and S.1777 - The Good Samaritan Cleanup of Abandoned Hardrock Mines Act of 2009 (111th Congress)

⁸ EPA memorandum - Clean Water Act Section 402 NPDES Permit Requirements for 'Good Samaritans' at Orphan Mine Sites. <http://www.scribd.com/doc/116560607/2012-EPA-Good-Samaritan-Memo>



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Earthworks is concerned about legislatively waiving liability from our bedrock environmental laws for activities that do not address, nor are related to, cleaning up the existing pollution, especially when those actions may cause increased pollution and harm to surrounding communities. Purported Good Samaritans already avail themselves of administrative waivers for individual cleanup projects through the EPA existing program for that purpose.

The long-standing CWA citizen suit provision for affected individuals and communities should be retained in any Good Samaritan policy. These provisions help hold our government accountable and allow affected persons to seek judicial review to protect the environment when the permitting agency fails to do so.

Additionally, any proposal should retain the need for an applicable Good Samaritan to apply for and obtain a CWA Section 404 permit from the Army Corps of Engineers. Otherwise, a fundamental protection for “waters of the U.S.” would be removed and would allow these waters to be turned into dry land, eliminating these waters from existence and from the protections they receive under the CWA.

Earthworks has been amenable to eligible Good Samaritans receiving limited liability waiver for certain point source discharges under Section 402 of the CWA. This waiver is non-transferable and limited in eligibility and duration, i.e. the period of cleanup activities; it would not persist in perpetuity. This limited waiver would excuse the Good Samaritan from obtaining a CWA discharge permit that otherwise applies to discharges where applicable water quality standards are not met. The legislation should terminate the liability waiver if water quality conditions worsen compared to the baseline.

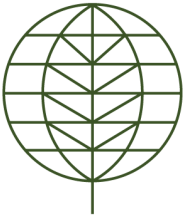
Pilot projects need to be guaranteed low-risk. The bill as currently drafted, however, specifically allows for “plugging, opening, or otherwise altering the portal or adit of an abandoned mine site” on federal lands.⁹ This is precisely the type of remediation that resulted in the 2015 Gold King Mine environmental disaster, near Silverton, Colorado, that caused a release of toxic-waste water into the Animas River.

Good Samaritan policies should not truncate the mine permitting process, including public input during the investigative sampling. Investigative sampling processes need to specifically exclude mineral exploration, prospecting, beneficiation, and metallurgical testing activities because these activities could pose risks to communities, lands, and waters. They should also be subject to public review. Further, the number of investigative sampling permits should be limited to the number of authorized pilot projects.

On public lands, a Good Samaritan performing investigative sampling should receive a Special Use Permit (SUP) from the applicable land management agency.¹⁰ In addition,

⁹ S. 3571 Section 4(c)(9)

¹⁰ The United States Forest Service special use regulations are at 36 CFR parts 251 and 261. The Bureau of Land Management special use regulations are at 43 CFR parts 2900 and 2920.



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and subject to valid existing rights, the public lands agencies should consider withdrawing lands around and affected by pilot projects from entry or location under the mining laws. It is important to ensure the integrity of Good Samaritan clean up by safeguarding against the possibility of mining activities that could remove or negatively affect the positive environmental gains obtained through the clean up. This would also safeguard against abuses where an entity with an interest in mining later is able to obtain liability waivers, and thus convolute its liability for pollution.

Preventing abuses like this are especially important since most hardrock mining occurs under the 150 year old General Mining Law—an already permissive statute whereby the mining industry claims public lands as their own, almost entirely for free, and at great expense to the public, especially Indigenous communities.¹¹ An SUP coupled with a mineral withdrawal on the lands around and affected by the pilot project could help ensure mining companies do not shroud themselves in a broad liability cloak over subsequent mining operations or activities reasonably incident thereto.

Public Review of Good Samaritan Permits

One benefit from S. 3571 is it requires compliance with NEPA,¹² an essential safeguard for Good Samaritan pilot projects. The bill also precludes pilot projects with a significant environmental impact and requires a public hearing, albeit upon request. Robust review and community input under NEPA is an essential part of ensuring community engagement in these types of projects.

NEPA, the National Historic Preservation Act (NHPA),¹³ and other laws require that federal agencies study the environmental and cultural impacts of their decisions, receive public input, respond to that input, and select alternatives that best balance these considerations. Communities will depend upon these laws to learn more about Good Samaritan pilot project proposals and to suggest alternatives that will result in improved social and environmental outcomes. We urge S. 3571 to require compliance with the National Historic Preservation Act (NHPA) as well.

Conclusion

Thank you for the opportunity to present the views of Earthworks. We look forward to working with the co-sponsors and the Subcommittees to craft a better path forward for Good Samaritans to help clean up some abandoned mines across the west.

¹¹ The process to privatize public lands with a patented mining claim is provided in the General Mining Law of 1872 30 U.S.C. 22 et seq. The process for public lands agencies to withdraw minerals from the General Mining Law is provided in Section 204 of the Federal Land Policy Management Act (FLPMA 43 U.S.C. 1714).

¹² See 42 U.S.C. 4332 et seq.

¹³ See 16 U.S.C. §§ 470 et seq.



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We also urge swift action to prevent future mining pollution and adequately address the larger scope of the abandoned mine reclamation challenge. Meaningful reform of our nation's mining laws and regulations are the best solution to create jobs and protect water and western communities from mine waste.

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