Subcommittee on Energy and Mineral Resources
Paul Gosar, Chairman
Hearing Memorandum

March 12, 2018

To: All Subcommittee on Energy and Mineral Resources Members

From: Majority Committee Staff, Rebecca Konolige (x61879)
Subcommittee on Energy and Mineral Resources

Hearing: Oversight Hearing entitled *"Abandoned Hardrock Mines and the Role of Non-Governmental Entities"*

The Subcommittee will hold a hearing on **March 15, 2018 at 2:00 P.M. in room 1324 Longworth House Office Building,** focusing on the laws and procedures governing the reclamation of hardrock mining in the United States and highlighting areas were reform is needed.

Policy Overview

- Domestic hardrock mining contributes to local economies, creates jobs, and benefits our nation's overall economic security.
- Abandoned hardrock mines, deserted before the era of modern regulations and with no current responsible party, pose threats to the environment and widespread financial burdens at the State, federal, and local level.
- Certain third-party entities are willing and able to lend their resources to the cleanup of these abandoned mine sites, but their efforts are stymied by the threat of assumed liability.
- Empowering third parties to assist in reclamation efforts is vital to resolving the longstanding issue of abandoned hardrock mines.

Invited Witnesses (in alphabetical order)

Ms. Autumn Coleman
Vice President, National Association of Abandoned Mine Lands Programs
Program Manager, Abandoned Mine Lands Program
Montana Department of Environmental Quality
Helena, MT

Mr. Jeff Graves, PG
Director, Office of Active and Inactive Mines
State of Colorado
Denver, CO

The Honorable David Strohmaier
County Commissioner
Missoula County, Montana
Missoula, MT

Mr. Chris Wood
President and CEO
Trout Unlimited
Arlington, VA

Background

Hardrock mining on federal lands has built and fueled the United States for nearly two hundred years. Today, the rare and precious materials from this industry are used in everything from smartphones to advanced weapons systems to infrastructure. In fact, one of America's chief advantages over our international industrial competitors is our robust domestic resource base.[1] The procurement and sale of these materials stimulates local economies, creates jobs, and boosts the nation's overall economic wellbeing. For instance, nonfuel mineral production in the U.S. was valued at $75.2 billion in 2017 alone.[2]

Unfortunately, the hardrock mining industry faces decades-old challenges which will not be easily solved. One of the most problematic is the issue of abandoned mine lands (AML) – inactive mines abandoned before the era of modern regulation. It's estimated that as many as 500,000 abandoned sites exist across the country, although exact numbers are not known due to the lack of a comprehensive national inventory.[3] Some of these sites pose health and safety hazards, as well as significant environmental risks, exemplified by the catastrophic Gold King Mine spill in 2015. The economic losses from the Gold King spill have been valued at $1.2 billion.[4] The scale of the national AML problem is much larger, and will likely take decades to meaningfully address.

Complicating the issue is the lack of a single federal agency responsible for abandoned hardrock cleanup. The Bureau of Land Management (BLM), the U.S. Forest Service (FS), and the Environmental Protection Agency (EPA) each have some authority, to an ambiguous extent, in the management and mitigation of inactive mine sites. Numerous cleanup projects are also undertaken each year at the State level, but the number and costs of these projects can overwhelm State resources. The need for assistance in cleaning up these sites is strongly felt, particularly in local communities.

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[1] The National Academies, National Research Council Report, "*Competitiveness of the U.S. Minerals and Metals Industry*," 1990.
[2] United States Geological Survey, "Mineral Commodities Summaries 2018," January 31, 2018. https://minerals.usgs.gov/minerals/pubs/mcs/2018/mcs2018.pdf.
[3] Official government website managed by the Bureau of Land Management, accessed March 8, 2018. https://abandonedmines.gov/.
[4] Keith Coffman, "EPA Denies $1 Billion-plus in Claims from Toxic Colorado Mine Spill," *Reuters*, January 13, 2017. https://www.reuters.com/article/us-colorado-goldmine-spill/epa-denies-1-billion-plus-in-claims-from-toxic-colorado-mine-spill-idUSKBN14Y046

This need has been recognized by multiple non-governmental organizations (NGOs), who are willing and able to lend their resources and expertise toward these important projects. These groups, including conservation organizations, watershed groups, and industry, are third-party actors with no responsibility for the existing damage present at AML sites, and are willing to undertake cleanup projects voluntarily. Despite their good intentions and many States' desires to partner with them, numerous obstacles hamper the ability of these NGOs to participate in hardrock AML projects. In particular, the threat of liability surrounding water treatment requirements, often unfeasible and sometimes impossible to comply with, has acted as a deterrent for many years.

Scope of the Problem and the Need for Third-Party Entities

It is important to recognize the clear majority of AML sites do not pose health, safety, or environmental risks. Some are mostly aesthetic problems that can be solved reasonably simply. Others are "dry sites," calling for stabilization techniques such as contouring, covering with soil, and revegetation.[5]

It must also be emphasized that modern mining activities do not create the kinds of hazards present at some historic AML sites. Today's mines utilize advanced technology to locate and extract minerals and metals, tools that did not exist before modern times.[6] GPS systems, laser leveling devices, remote monitoring, and other modern instruments enable today's hardrock industry to comply with all appropriate environmental regulations, laws, and permits.[7]

Many of the AML sites were operated in the 1800s and early 1900s, well before the enactment of the nation's environmental and land management laws. As such, hardrock AML sites are considered those that were abandoned before January 1, 1981, the date of finalization of the BLM's 3809 mining regulations required under the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. 1701 et seq.).

In 1997, BLM and FS started working in earnest to address the hardrock AML problem on public lands, partnering with State and local municipalities. In 2011, BLM initiated an outreach program to claim holders, assisting in securing physical hazards on hardrock AML sites within their claim boundaries.[8]

Many States have also partnered with industry to address abandoned hardrock sites, and today numerous sites have been remediated, reclaimed, or secured. In several cases, the cleanup was paid for by the hardrock mining industry itself, such as the historic Anaconda Copper Mine in Nevada.[9]

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[5] Response to additional questions from Senator Inhofe by Scott A. Lewis, director, Environmental and Governmental Affairs, AngloGold Ashanti North America, INC re. Oversight Hearing to Consider Whether Potential Liability Deters Abandoned Hardrock Mine before the Senate Committee on Environment and Public Works – June 14, 2006

[6] *Id.*

[7] *Id.*

[8] Bureau of Land Management, "Abandoned Mine Lands: A New Legacy," May 2013. https://www.blm.gov/sites/blm.gov/files/uploads/AML_PUB_NewLegacy.pdf

[9] Amy Alonzo, "Anaconda Copper Mine cleanup transferred to state, private party," *Reno Gazette Journal*, February 6, 2018. http://www.rgj.com/story/news/local/mason-valley/2018/02/06/anaconda-copper-mine-cleanup-transferred-state-private-party/309877002/

While progress has been made in addressing some of the problem sites, much remains to be done. Federal agencies have approximated a yearly expenditure of $80–85 million on hardrock AML reclamation efforts.[10] This is an incredible financial and logistical burden for any government entity to tackle, and will be a drain on States and communities for decades to come.

Some States have already shown us how effective partnerships with third parties can be in achieving hardrock AML remediation goals. Pennsylvania, for example, enacted the "Environmental Good Samaritan Act" in 1999, encouraging third-party volunteers to improve locations affected by mineral extraction.[11] This program has proven to be a success, with almost 80 sites reclaimed in more than 20 counties across the State.[12] A similar provision at the federal level, specifically addressing abandoned hardrock mines and allowing third-party entities to partner with States, could yield similarly positive results.

CERCLA, CWA, and the Question of Liability

AML sites may host a spectrum of complex problems, but sites involving water discharges or those encroaching upon water sources are typically the most difficult of all to remediate, both technically and legally.[13]

While progress has been made in addressing some of the problem sites, there are significant legal barriers that stymie more substantial efforts to enable third parties to help clean up hardrock AML sites. The two biggest statutory hurdles are the liability threats created by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, 42 U.S.C. 9601 et seq.) and Clean Water Act (CWA, 33 U.S.C. 1251 et seq.) compliance requirements.

Under current law, a company, individual, non-profit group, or government agency that initiates reclamation activities of an AML site runs the risk of being held liable for historic discharges and other existing safety and environmental problems.

In the absence of any other federal statute dedicated to hardrock AML reclamation, primary cleanup responsibilities fall under the jurisdiction of the CERCLA, also known as "Superfund." CERCLA is the chief statutory authority overseeing and managing response actions in the event

[10] Official government website managed by the Bureau of Land Management. https://www.abandonedmines.gov/about_hardrock_mines

[11] Commonwealth of Pennsylvania. Department of Environmental Protection. Environmental Good Samaritan Act Fact Sheet. ftp://newftp.epa.gov/GKM_DOCUMENTS/SITE_FILE_MATERIALS/9.28.16/R08-1136194.PDF Accessed May 17, 2017.

[12] Statement of John Stefanko, Deputy Secretary, Active and Abandoned Mine Operations, Pennsylvania Department of Environmental Protection, on behalf of the Commonwealth of Pennsylvania, The Interstate Mining Compact Commission, and the National Association of Abandoned Mine Land Programs re. Legislative Hearing on the Discussion Draft of The Community Reclamation Partnerships Act before the Energy and Mineral Resources Subcommittee of the House Natural Resources Committee – May 24, 2017

[13] Response to additional questions from Senator Inhofe by Scott A. Lewis, director, Environmental and Governmental Affairs, AngloGold Ashanti North America, INC re. Oversight Hearing to Consider Whether Potential Liability Deters Abandoned Hardrock Mine before the Senate Committee on Environment and Public Works – June 14, 2006

of environmental contamination.[14] Under CERCLA's authority, States and the EPA may act to respond to environmental contamination or the release of hazardous substances.[15] Alternatively, the EPA is authorized to direct any potentially responsible parties (PRPs) to act to mitigate any environmental impacts.[16]

CERCLA's liability provisions cast a purposefully wide net. Under CERCLA, an actor is considered liable for cleanup costs and any damages caused by the release of hazardous substances if that actor is determined to be a PRP. Third-party entities volunteering to remediate historic abandoned sites did not cause the environmental contamination that may be still be affecting the AML site today. However, they may still be considered an "operator" of the "facility" where the hazardous release occurred, and therefore be held responsible for it.[17] Moreover, anyone deemed a PRP does not need to act negligently to be liable for damages, and a single party among many can be held accountable for the entire liability.[18]

CERLA's liability scheme adopts a "polluter pays" policy, which under most circumstances is a fair approach obligating a polluter to clean up their own contaminants, thereby reducing the amount of taxpayer dollars needed for later remediation. However, despite CERCLA's best intentions, leaving third-party volunteers vulnerable to these far-reaching liability rules actually works against the goals of the statute, deterring those who would voluntarily remediate ALM sites and increasing the burden on the government.[19]

Moreover, CERCLA was not built to perform hundreds of thousands of abandoned mine cleanups across the country. The top-down, one-size-fits-all approach necessitated by a statute like CERCLA ignores the differences in geology, geography, and mineral composition of hardrock mines across the country.

The other major law that affects third-party entities at AML sites is the CWA, which aims to protect water sources through the implementation of various water quality standards, and by barring the discharge of contaminants from specific "point sources" into those waters.[20] Discharges from abandoned mines are considered point sources,[21] and therefore require CWA permits to indicate compliance with discharge requirements. The CWA also contains a citizen suit provision, which opens a wide door to lawsuits against any person, group, or government entity if they are alleged to be in violation of CWA regulations.[22]

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[14] Official government website managed by the Environmental Protection Agency, accessed March 9, 2018. https://www.epa.gov/superfund/what-superfund
[15] *Id.*
[16] Official government website managed by the Environmental Protection Agency, accessed March 9, 2018. https://www.epa.gov/enforcement/superfund-enforcement
[17] 42 U.S.C. 9601
[18] Congressional Research Service, "Cleanup at Inactive and Abandoned Mines: Issues in "Good Samaritan" Legislation in the 114th Congress," November 25, 2015.
[19] Congressional Research Service, "Cleanup at Inactive and Abandoned Mines: Issues in "Good Samaritan" Legislation in the 114th Congress," November 25, 2015.
[20] CWA §§ 101 and 311
[21] U.S. Fourth Circuit Court of Appeals in *West Virginia Highlands Conservancy v. Huffman*, 625 F.3d 159 (4th Cir. 2010).
[22] CWA § 505(a)(1)

CWA standards were made deliberately strict to protect our water supply, and rightly so. However, the statute's blanket approach necessitates an unrealistic – and sometimes, impossible – standard for prospective third parties to achieve during hardrock AML remediation. Water treatment systems may produce large improvements to water quality and the environment, with completed treatment projects able to support healthy fisheries, but the resulting water quality may still not attain CWA standards.[23] For example, water treatment systems known as "passive wetland systems" can effectively treat highly-contaminated water, but may leave levels of manganese that are non-compliant with CWA requirements.[24] Looked at another way, third parties may be able to clean the water close to the CWA standard, but anything less than 100% opens them up to potential lawsuits.

Few groups would voluntarily take on a reclamation project if they run a significant risk of being sued. As it stands, any actor who does not achieve CWA requirements is vulnerable to a citizen suit. The EPA has issued some assurances through CERCLA, known as "comfort letters" as an attempt to offer some shielding from CERLA liability,[25] but there is no real legal protection against lawsuits. Legal liability is a staggering deterrent to third parties in addressing AML projects and water discharge issues throughout the United States.

To really empower these groups to do their work, they must have reasonable certainty that they won't be subject to a lawsuit for pollution that they didn't cause. Without meaningful relief from CWA and CERCLA for existing conditions, third-party entities should not be expected to take on the risk of assumed liability.

The Need for One Federal Hardrock Oversight Program

Another hurdle to the efficient remediation of AML sites is the lack of one federal program or agency with full authority over the issues. This role was once filled by the U.S. Bureau of Mines (USBM), a federal program within the Department of the Interior that existed from May 6, 1910, until March 30, 1996. The USBM was created to support the health, safety, and economic stability of the mining industry.

Today, the USBM is still authorized by the federal government, but is currently unfunded. Unlike inactive coal mines, the cleanup of which falls under the Surface Mining Reclamation and Enforcement Act of 1977, abandoned hardrock mines have no one regulatory body. Instead, several federal agencies have different programs for remediation of AML sites on federal land.[26] This leads to significant uncertainty about which agency has chief responsibility, as well as multiplying the confusion over which permits are required for which cleanup activities, and under what circumstances.

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[23] Statement of Trout Unlimited re. Legislative Hearing on the Discussion Draft of The Good Samaritan Cleanup of Orphan Mines Act of 2016 before the Senate Committee on Environment and Public Works – March 2, 2016

[24] *Id.*

[25] Environmental Protection Agency, "Good Samaritan Comfort/Status Letter," revised March 1, 2016. https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=736

[26] Official government website managed by the Bureau of Land Management, accessed March 7, 2018. https://abandonedmines.gov/

The disjointed nature of federal hardrock remediation attempt results in a lack of a singular, accurate inventory of AML sites. For instance, according to the Government Accountability Office, BLM and FS estimates of hardrock AML sites include some non-hardrock mines and mines that may not be on their lands.[27] Understandably, this is detrimental to national cleanup efforts. Without even knowing the real scope of the problem, solving it will be very difficult indeed.

[27] U.S. Government Accountability Office, "Information on Abandoned Mines and Value and Coverage of Financial Assurances on BLM Land," March 12, 2008. https://www.gao.gov/assets/120/119391.pdf