



Advancing Abandoned Mine Land Cleanup...  
With or Without Good Samaritan Legislation

# Legal Hurdles and Liability Release Mechanisms

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**“Liability has always been the sticking point.”**

Rep. Scott Tipton (R-CO)

House Natural Resources Hearing

Energy & Mineral Resources Subcommittee

March 15, 2018

- Federal Statutes
  - **The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**
  - **Clean Water Act (CWA)**
  - The Resource Conservation and Recovery Act (RCRA) addressing hazardous waste
  - Other federal laws
- State Statutes
  - Some states have a State CERCLA counterpart
  - The State may implement the CWA or RCRA
- Rigid legal framework

# CERCLA Liability

- CERCLA §107(a) liability elements:
  - “Release” of a “Hazardous Substance”
  - From a “Facility”
  - Causing the incurrence of “Response Costs”
  - Consistent/Not Inconsistent with the National Contingency Plan
  - By “**Potential Responsible Party**”
- **Liability is Strict, Joint & Several**
- Very limited defenses

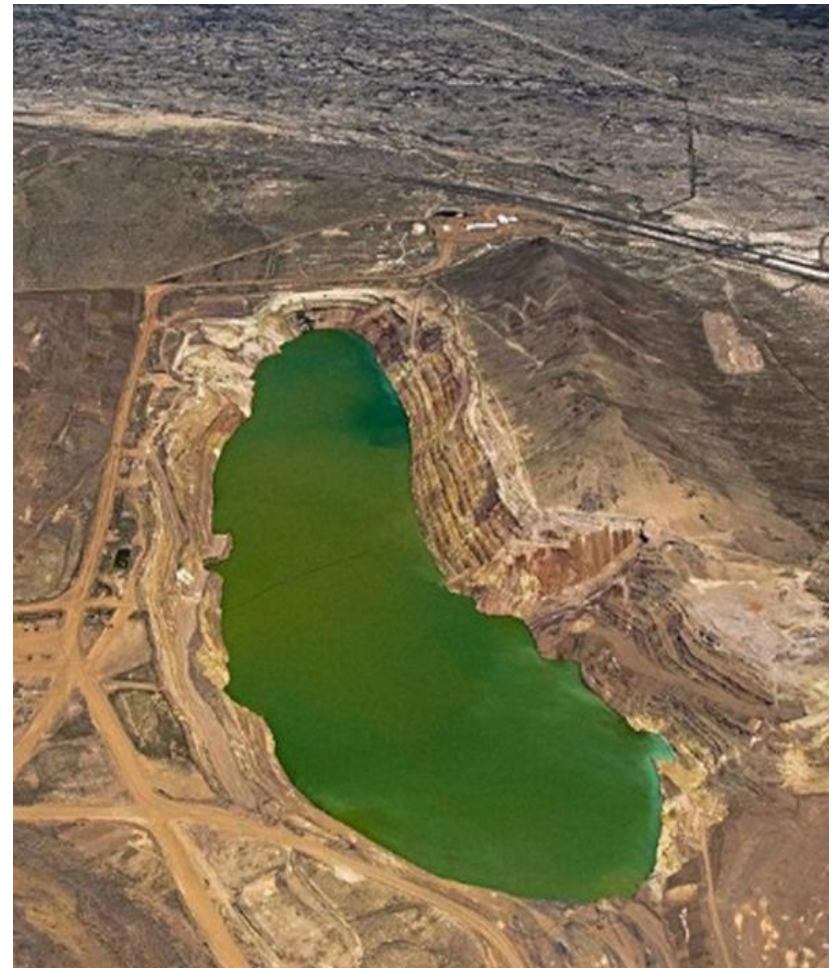


## ▪ Potentially Responsible Parties

- Current Owner or **Operator**
- (Past) Owner or Operator at the time of disposal
- Arranger
  - person who by contract, agreement, or otherwise arranged for disposal, transport, or treatment
- Transporter
  - person who accepts or accepted any hazardous substances for transport to disposal or treatment
- CERCLA § 107

# Other CERCLA Issues

- CERCLA doesn't preempt State law that may impose additional liability. CERCLA § 114(a)
- If HS remain onsite, remedies are supposed to meet
  - **All legally applicable or relevant and appropriate standards, requirements, criteria, or limitations, federal or state**
  - MCLs under the **SDWA**
  - Water quality criteria under the **Clean Water Act** §§ 303 & 304
  - CERCLA § 121(d)



# CERCLA Citizen Suit Provision



- **Any person may sue any other person**, including the United States or other governmental agency (subject to the 11th Amendment)
- For an alleged violation of any standard, regulation, condition, requirement, or order under CERCLA
- **To enforce the standard, regulation, condition, requirement, or order** concerned, to order action to correct the violation, and to impose any **civil penalty** provided for the violation.
- Requires 60 days advance notice to President, State, alleged violator
- **Includes award of costs of litigation** to substantially prevailing party
- CERCLA § 310

# CERCLA Protection Mechanisms: Do They Work for Good Samaritans?

## ■ Bona Fide Prospective Purchaser Protection

- CERCLA §§ 101(40) & 107(r)(1) give statutory liability protections for BFPPs, persons not responsible for property contamination
- Provisions are self-implementing

- Applies to “**a person that acquires ownership of a facility**” and meets a laundry list of requirements

## ■ Comfort letters?

- Provided solely for informational purposes
- EPA will not provide “no action” assurances in comfort/status letters
- Don’t provide a release from fed liability
- Don’t address state liability

## ■ Model Good Samaritan Comfort/Status Letter

- Based on CERCLA § 107(d)(1): “no person shall be liable 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 NCP or
- At the direction of an on-scene coordinator
- Requires a project plan
- If a 3<sup>rd</sup> party sues for CERCLA contribution, EPA “will be prepared to discuss...entering into a Good Samaritan settlement agreement”



# Good Samaritan settlement agreement



- Good Samaritan settlement agreement and order on consent
  - Model is 15 pages long—without any site specific information
  - Defines the Good Samaritan as a “person” for CERCLA liability
  - Requires a Work Plan
    - Record retention
    - Possible oversight cost payment
    - Compliance with applicable or relevant and appropriate requirements, depending upon “exigencies of the situation”
    - Financial assurance for indemnity
  - Provides broad contribution protection per CERCLA § 113(f)(2) for Existing Contamination

# Clean Water Act Liability

- Clean Water Act (“CWA”) § 303 liability elements:
  - an unpermitted “Discharge” (or discharge violating a permit under CWA § 402)
  - of a “Pollutant”
  - from a “Point Source”
  - into “Waters of the United States”
  - causing a violation of water quality standards
- Violation of state water quality standards under CWA §§303 & 305



# CWA Citizen Suit Provision



- Any citizen may sue **any other person**, including the United States, and any other governmental agency (subject to the 11th Amendment)
- **For an alleged violation of an effluent standard or limitation** or an order issued by EPA or a State with respect to a CWA standard
- Requires 60 days advance notice (w/exceptions) to the Administrator, the State, alleged violator
- **There must be ongoing violations** and failure of diligent prosecution
- **Includes award of costs of litigation** to substantially prevailing party
- CWA §505

- Guidance
  - 6.6.2007 Interim Guiding Principles
  - 12.12.2012 Guidance
- A Good Samaritan is not the entity responsible for obtaining a CWA § 402 discharge permit
  - “after successful completion of activities” under a “CERCLA tool” even if discharges continue from passive treatment
  - Provided the Good Sam does not perform additional work at the site
    - Addresses only abandoned or orphaned hard rock mine sites—not mining
    - Separate 9.12.2017 decision applied to coal
  - Good Sam must complete agreed work
  - Work should meet ARARs/WQ standards
  - Can require Good Sam to keep monitoring
  - Factors set for deciding whether Good Sam is a “operator” after completing work



# Brownfields Mine-Scarred Land Initiative for AML



- Brownfields Program provides
  - contract and grant resources to governments to assess & cleanup brownfields, including mine-scarred lands
    - lands, associated waters and watersheds where extraction, beneficiation, or processing ore or minerals has occurred
  - NGOs eligible for cleanup grants
  - Assessment grants don't need ownership
  - Work generally overseen by State
  - Enforcement bar protects persons doing work compliant w/State
  - Completed work covered by 12.12.2012 § 402 guidance
- EPA Targeted Brownfields Assessment
  - EPA regional brownfield staff may conduct free site assessment

# Conclusions & Recommendations

- Potential sites exist in many states that meet criteria and can be addressed
- Identify appropriate initial sites for pilots
- Identify and navigate the various legal liability pitfalls
- Work with eligible Response Action Contractors
- Consider the use of Comfort Letters, and Brownfields Program even though they do not go far enough
- Small Steps
- Document the basis for Good Sam
- Environmental improvement should be the goal



# Global Coverage

Abu Dhabi	Houston	San Francisco	Africa	Israel
Beijing	Kyiv	Santo Domingo	Argentina	Italy
Berlin	Leeds	Seoul	Brazil	Mexico
Birmingham	London	Shanghai	Chile	Panamá
Böblingen	Los Angeles	Singapore	Colombia	Peru
Bratislava	Madrid	Sydney	Cuba	Turkey
Brussels	Manchester	Tampa	India	Venezuela
Budapest	Miami	Tokyo		
Cincinnati	Moscow	Warsaw		
Cleveland	Newark	Washington DC		
Columbus	New York	West Palm Beach		
Dallas	Northern Virginia			
Darwin	Palo Alto			
Denver	Paris			
Doha	Perth			
Dubai	Phoenix			
Frankfurt	Prague			
Hong Kong	Riyadh			

■ Office locations

■ Regional desks and strategic alliances

