Chris Wood
President & CEO

March 15, 2018

Testimony of Trout Unlimited on the House Natural Resource Committee's Subcommittee on Energy and Mineral Resource Subcommittee hearing on: Abandoned Hardrock Mines and the Role of Non-Governmental Entities.

Chairman Gosar, Ranking Member Lowenthal, and Subcommittee Members:

My name is Chris Wood. I am the President and CEO of Trout Unlimited. Thank you for the opportunity to testify today on abandoned hardrock mines and the role of nongovernmental entities in helping to clean up pollution from them.

I offer the following testimony on behalf of Trout Unlimited and its nearly 300,000 members and supporters nationwide. My testimony will focus on the need for legislation and funding to facilitate the cleanup of abandoned hardrock mine lands and water, and specifically the need to facilitate abandoned hardrock mine cleanups by "Good Samaritans"— those individuals or entities who have no legal obligation to take on an abandoned mine cleanup, but who wish to improve water quality and watershed health.

We deeply appreciate the Subcommittee's focus on this issue, and we urge the Subcommittee to continue to work with us, the states, the Interior Department, the EPA, and other stakeholders to fashion a bill to help provide an important tool to facilitate cleanups. Last year's successful passage of the Subcommittee's "Community Reclaimers" bill to facilitate clean-up of abandoned coal mines was a great step forward.

But we need both the coal and hardrock Good Sam bills to cross the finish line and get enacted into law. Looking back, I was very involved in the effort to develop a hardrock Good Sam bill that passed the Senate Environment and Public Works Committee – but got no further – all the way back in 2006. We are 12 years down the road and past due for passage of Good Sam legislation.

In the vein of making it more, rather than less, likely that a bill could pass Congress this year, there are several legislative approaches that could work well for Good Samaritans that might reduce potential opposition to the Good Sam concept. Specifically, we urge your attention to the idea of legislating a pilot program whereby EPA, in coordination with the states, could authorize 5-10 projects in the western states to allow us and others to prove that the Good Sam concept can be turned into reality. Last Congress's Gardner, Bennet, Tipton Draft measure could be used as the permit mechanism for the pilot programs. Title III, of Representative Lamborn's HR 3843 of the previous Congress, could also work as the pilot project permit mechanism.

Whatever the legislative solution might be, TU is ready to go to work to clean up abandoned mine pollution. TU's mission is to conserve, protect and restore North America's trout and salmon fisheries and the watersheds they depend on. In pursuit of this mission TU has worked to restore streams and rivers damaged by pollution from abandoned mines from the Appalachian coalfields in Pennsylvania to the hardrock mining areas of the Rocky Mountain states, and my testimony is based upon these experiences. We need such legislation and additional funding to expand the pace and scale of work to clean up abandoned mines. We seek a bipartisan Good Sam bill to address what is clearly a bipartisan, multi-state, problem.

Allow me to take a few moments to describe one of the nation's worst remaining pollution problems – the scourge of acidic and toxic orange colored abandoned mine pollution coming down into the headwaters of the West's great rivers.

Abandoned mine pollution is a widespread problem but much of it is fixable

Americans want clean water. Americans do not want orange water running through their back yards and into their rivers.

Trout Unlimited members and staff are passionate about cleaning up abandoned mine pollution. Even a cursory look at the damages to our streams, rivers and groundwater caused by pollution from abandoned coal and hardrock mines show that we have a long way to go to achieve clean water for all. There is no better time than right now, as the Trump Administration and the 115th Congress discuss including water clean-up work as part of an infrastructure package, to address clean-up of pollution from abandoned coal mine.

Sadly, much of abandoned mine pollution is "out of sight, out of mind." But in August 2015, we received a vivid view of the mess. The three-million gallons spill of polluted water from the Gold King mine near Silverton, Colorado showed the world what TU members and staff who live in mining country see every day: Orange, polluted water leaking out from abandoned mines.

Cleaning up abandoned mines is challenging and expensive. That does not make it any less important. The legacy of historical mining practices — thousands of abandoned coal and hardrock mines with an estimated cleanup cost in the billions of dollars — has persisted for the better part of a century with insufficient progress toward a solution.

Abandoned coal mines dot the Rocky Mountain and Appalachian landscape. Pollution from abandoned hardrock mines impairs as much as 40 percent of the headwater streams in the region, and abandoned coal mines continue to damage thousands of miles of streams and rivers — over 10,000 miles just within Pennsylvania and West Virginia. While much has been accomplished through the Surface Mining Control and Reclamation Act's (SMCRA) extremely valuable Abandoned Mine Lands Fund (AML Fund) for abandoned coal mine clean up, no analogue exists for hard rock mines. Coming up with dedicated funding is essential to cleaning up abandoned hard rock mines in the western US.

We have developed several model projects that can be replicated and taken to scale. In Pennsylvania, aided by state-based Good Samaritan policy, watershed groups, including Trout Unlimited, are working with state agencies, communities, and other partners to conduct more than 250 abandoned coal mine pollution projects throughout the state. We can do lot more if the problem is fixed in the East, and we can develop similar model projects in the West if the right policies and adequate funding are in place. I will speak to the barriers, and then I will turn to the solutions.

Parts of our best environmental laws, the Clean Water Act and CERCLA (Superfund), can be barriers to abandoned coal mine cleanup

TU and other prospective Good Samaritans are interested in cleaning up smaller, lower risk abandoned mine sites. We are not interested in larger, higher risk, sites where ownership and reclamation responsibility is clear.

Smaller sites generally are not a high enough priority to get funding under the "Superfund" provisions of CERCLA. For these sites, where the parties responsible for the mining pollution are long gone, and with current owners having little to no incentive to do any of the cleanup because of liability risks, projects to reduce pollution can become a legal quagmire. A partnership between TU, western states, and EPA resulted in EPA policy that provides useful protection to Good Samaritans from CERCLA liability in 2007,[1] but CWA liability has remained a significant obstacle.

CERCLA: When TU first started working on abandoned hardrock mines in the West, we had liability concerns under CERCLA and the Clean Water Act that prevented many Good Samaritan projects from moving forward. CERCLA presented a significant barrier to Good Samaritan projects, both because the statute presents real risks for any party helping to clean up toxic wastes, but also because the statute's complexities and perceived risks are incredibly daunting for many watershed groups, local communities and NGOs. If any liability concerns were raised, even the legal cost of sorting through it would financially strain a nonprofit such as TU.

In 2006, TU completed a pioneering Good Samaritan cleanup in Utah's American Fork Canyon that overcame CERCLA liability concerns with the help of EPA, the Forest Service and the state of Utah. The liability protection document (an Administrative Order on Consent, or "AOC") negotiated with the EPA for the American Fork work led to the issuance of EPA guidance and model documents for dealing with CERCLA liability protection for future Good Samaritans to use in similar projects.

TU has now negotiated three separate AOCs with the EPA covering two different projects — one project on the American Fork in Utah (two AOC's for different phases of the project) and another on Kerber Creek in Colorado. These AOC's have allowed TU to undertake clean-up projects with significant local benefits while eliminating the risks of additional cleanup expenses or future liability under CERCLA. We greatly appreciate the work that EPA has put into their model AOC for Good Samaritan cleanups, and the work that EPA staff have put into negotiating the specific AOCs for TU. Though there remains the need for legislation, the AOCs have helped to reduce one of the major impediments that have prevented communities, watershed groups, conservation organizations, TU chapters and others from undertaking abandoned mine cleanup projects.

[1] http://water.epa.gov/action/goodsamaritan/

Clean Water Act: There are many projects where water quality could be improved by collecting run-off, or taking an existing discrete discharge, and running the polluted water through a treatment system. However, for would-be Good Samaritans, Clean Water Act (CWA) compliance and liability issues remain a barrier to such projects. Several courts have held that discharges from systems that treat wastewater from abandoned mines are point source discharges that require a National Pollutant Discharge Elimination System (NPDES) permit under section 402 of the CWA. Although EPA and some eastern states have not considered such projects to be point sources requiring NPDES permits, the Fourth Circuit's 2010 decision in *West Virginia Highlands Conservancy, Inc. v. Huffman* creates uncertainty around that approach.

Stakeholders in projects involving treatment of mine drainage have been held back because of CWA liability for two reasons. First, NGOs, including TU, are not well suited to apply for and hold permits for such projects. TU does not have an adequate funding mechanism to legally bind itself to pay for the perpetual costs associated with operating a water-treatment facility and permit compliance.

Second, for many projects it may be impossible to obtain a permit, because the treatment systems, even if they will greatly improve conditions, may not be able to treat abandoned mine wastewater to a level that meets all applicable water quality standards or other applicable criteria. It should be noted that while these treatment systems are certainly capable of producing water that will support a healthy fishery, the resulting water quality might not meet CWA standards for some pollutants that are particularly difficult to remove from mine waste. For example, passive wetland systems that effectively treat highly polluted water often leave levels of manganese that do not comply with CWA standards.

This is not to say that CWA standards should be weakened; just the opposite, in fact. But there should be incentives for would-be Good Samaritans to make water cleaner even if water quality is still short of full CWA standards. Put another way, federal law should provide incentives for would be Good Samaritans to make our water cleaner and communities safer, one project at a time. The rationale for this is simple – Good Samaritans can deliver outstanding projects with our local, state and federal partners, which cumulatively can make a huge improvement in a particular watershed.

TU has worked with the EPA to try to address these challenges, and we appreciate the efforts the agency has made to help us and other would-be Good Samaritans. For example, in December of 2012 the EPA issued a guidance memo designed to clarify how the Clean Water Act applies to Good Samaritan abandoned mine cleanup projects. The guidance memo requires potential Good Samaritans to fully comply with the 2007 Superfund Good Sam policy, but allows eligible Good Samaritans to avoid CWA requirements under certain circumstances.

Several years of experience now indicate that the restrictions in the guidance memo may not be a good fit for the type of work, such as passive treatment facilities, that is needed. Indeed, the details of the policies application remain quite unclear, in part because no one has yet opted to use it for a project because, among other questions, the policy leaves open the liability and compliance obligations of owners of land where projects take place. While the EPA's guidance memo is a good start, a legislative solution is necessary.

As we explain in more detail below, TU is working with our partners and allied watershed groups to restore miles of stream in places like Pennsylvania, Colorado, Montana and Washington right now under the constraints of current law. With Good Sam policy and increased funding in place, the sky is the limit on fighting back against pervasive abandoned mine pollution.

Good projects could be expanded and replicated with effective Good Samaritan policy for coal

Western Projects

By using the CERCLA liability protection and avoiding projects that trigger Clean Water Act liability, and with the support of the Tiffany & Co. Foundation, Freeport-McMoRan Copper & Gold, Inc., and other partners and supporters, TU has made substantial progress in cleaning up abandoned mine impacts in several watersheds in the West. These projects not only improve the environment, but also put local contractors to work, providing both clean water and jobs.

American Fork, Utah. The Pacific Mine cleanup in the American Fork Canyon was the first voluntary, non-profit-led abandoned hardrock mine restoration project in the West. TU and its partners received awards from the Utah Board of Oil, Gas and Mining and the EPA for work on the American Fork. Anglers can now catch Bonneville cutthroat trout immediately downstream of the area where pollution used to run off mine tailings piles.

Mores Creek, Idaho. To date, over 14,000 cubic yards of mine tailings have been removed from the banks of Mores Creek to create a more natural floodplain area, and trees planted along the stream will provide critically needed shade for coldwater fish. Hundreds of schoolchildren from the area have participated in tree plantings and other restoration work. Migratory fish are now seen using instream habitat structures installed as part of the restoration effort.

Kerber Creek Watershed, Colorado. In total, TU and its partners restored over 80 acres of mine tailings, improved 8 miles of stream, and installed more than 340 instream structures that are now home to a reproducing brook trout population. Volunteers logged over 13,000 hours of work in the watershed over the past three years. The restoration project has received four prestigious awards: the BLM's *Hardrock Mineral Environmental Award*, the Colorado Riparian Association's *Excellence in Riparian Area Management Award*, the Rocky Mountain Region of the USFS's *Forest and Grassland Health Partner of the Year*, and the Public Lands Foundation's *Landscape Stewardship Award*.

Leavenworth Creek Watershed, Colorado. In 2015, TU and Federal partners removed and capped 5,400 cubic yards of mill tailings containing high levels of zinc and lead, while constructing 2,500 feet of hardened channel through a dispersed tailings area adjacent to the Waldorf Mine. Removing the mill tailings, creating a vegetated floodplain, and establishing a hardened channel will allow for the conveyance of clean surface water runoff to Leavenworth Creek. This is an important step in improving water quality to downstream South Clear Creek, which acts as the drinking water source for the town of Georgetown, Colo.

Clark Fork River Basin, Montana. TU and partners have reclaimed four mine sites in the Middle Clark Fork River and have six ongoing mine reclamation project in the planning and design phases. For example, on Mattie V Creek, TU and its partners removed 12,000 cubic yards of dredge tailings and reclaimed 500 feet of stream channel reclamation project. Fish are now swimming up Mattie V Creek from Ninemile Creek for the first time in 80 years. Because of these and other accomplishments, the TU project manager in Montana was awarded with the American Fisheries Society's Individual Achievement Award and the US Forest Service's Rise to the Future Award in 2010.

Eastern Projects

In Pennsylvania, abandoned coal mine pollution is being successfully treated and streams and rivers are being brought back to life because the Commonwealth has provided Good Samaritans with dedicated funding. We believe that we can export the Pennsylvania model across the rest of the country if liability concerns are eased and funding is increased.

Kettle Creek, Pennsylvania. Our experiences in Pennsylvania are illustrative of the positive effect of Good Samaritan cleanups. Over the past 20 years, Pennsylvania has seen an increase in abandoned mine reclamation projects by watershed groups, including TU. This boom has been fueled by funding from the state's Growing Greener grant program and the federal Abandoned Mine Land (AML) reclamation fund. Most of these projects involve treatment of acid mine drainage using passive treatment systems, which run the polluted mine drainage through a series of limestone basins and wetlands that increase the water's pH and cause heavy metals to precipitate out. These projects have significantly improved water quality and restored fish populations in numerous Pennsylvania streams.

The Pennsylvania Department of Environmental Protection estimates that public funding sources have paid for the construction of nearly 250 passive treatment systems in the state, the majority of which have been constructed by private watershed groups, conservation districts or other local groups.

Beginning in 1998, the work of TU and its partners in the lower Kettle Creek watershed has resulted in the reclamation of approximately 160 acres of scarred abandoned mine lands and installation of nine treatment systems that successfully improved mine water polluted with high levels of acidity and metals. The results to date have been tremendous, with water quality restored to 3 miles of previously dead streams and 6 miles of a fully reconnected and thriving native brook trout population.

This story of recovery plays out again and again in individual streams and watersheds. Several years ago, the Babb Creek Watershed Association accomplished delisting 14 miles of Babb Creek, now a wild trout fishery, from EPA's impaired streams list. Another 14 miles in the Tangascootack Creek watershed is pending removal from the impaired streams list as a result of passive treatment systems constructed by the Clinton County Conservation District.

On a much larger scale, the West Branch Susquehanna River watershed has made tremendous strides over the past few decades. A comparison of conditions in the West Branch Susquehanna in 1972 with those in 2009 indicated that fish species increased 3,000 percent, and pH increased from 3.8 to 6.6.

These improvements result in economic benefits. In Pennsylvania, almost $4 billion was spent on fishing, hunting, and wildlife viewing in 2006. A 2008 study found that full remediation of the West Branch Susquehanna River watershed would result in "an additional $22.3 million in sport fishing revenues could be expected to be generated each year. Additional recreation spending—over and above that for fishing—would be expected after remediation is completed."[1]

Regardless of the overall scope of the abandoned mine problem, each of these projects restored a significant water body and represents a big win for the local community.

What we would like to see in a Good Sam bill

Good Samaritan projects need an appropriate mechanism that requires the project to produce significant improvements in water quality, implement best-design and management practices, and conduct appropriate monitoring, but that does not expose the Good Samaritan to liability if the project at some point fails to achieve a required criterion for a given pollutant.

Positive Features of a Draft Bill

- Authorizes EPA, in coordination with the appropriate state agencies, to approve 5-10 qualified Good Sam pilot projects.

- The Clean Water Act liability protection mechanism for should be narrowly tailored and ensures that water pollution clean-up results in a significant improvement to the environment.

- The bill should supply adequate public notice and comment for each project.

- The bill should clarify that private landowners who are not responsible for abandoned mine clean up on their lands, but who are willing to work cooperatively with the Good Sams and the state to clean up pollution from abandoned mines on their land, should also receive liability protection from the bill over the life of the project.

- Projects must meet applicable water quality standards to the maximum extent practicable "under the circumstances." We will need to make sure that implementing agencies understand that "under the circumstances" will mean performing cleanup activities that are cost-effective at high elevations and in remote locales.

- Projects are eligible for Clean Water Act Section 319 funding. Abandoned mine clean activities sometimes fall in to a gray area of the law between non-point and point source control. Greater application of 319 funds to this work will be very helpful.

- The bill should provide protection from future liability from the Clean Water Act and CERCLA once Good Samaritans have successfully completed their permitted work activities. This provision is much appreciated and is in fact, essential for any Good Samaritan projects.

More funding is needed

Clean up of abandoned coal mine pollution is a long term job, and long term funding is needed to get the job done.

We urge Congress to consider establishing a fair royalty from any minerals taken from public lands, a portion of which could be invested in an abandoned hardrock mine cleanup fund. Almost every commodity developed on our public lands — coal, wood fiber, oil, gas, and livestock forage — has dedicated funding for mitigation of impacts and restoration. The only commodity that lacks such a dedicated fund is hardrock minerals.

Conclusion

Improving water quality around the Nation is a fundamental goal of the work of this Subcommittee, and thus we are pleased that the Subcommittee is looking at one of the most vexing water problems remaining in coal country. We stand ready to work with you so that affected communities around the Nation will again have clean, fishable waters. Thank you for considering our views, and thank you for working with us on these important matters.