
Help for Local Good Samaritans Could Come From EPA

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SAN JUAN MOUNTAINS – Agnieszka Przeszlowska, the newly hired director of the Uncompahgre Watershed Partnership, surveys a strange little confluence in Ironton Park near Ouray. She's standing just below what would normally be Crystal Lake reservoir (the lake was recently drained for dam reclamation work). Two creeks flow together near her feet and continue their co-mingled journey into the Uncompahgre Gorge.

One, which usually feeds into the reservoir, boasts crystal-clear water filtered through the wetlands complex of Ironton Park. The other, channeled to the spot via a culvert under U.S. Highway 550, is a rusty brew of dissolved heavy metals including silver, copper, lead and zinc.

This is Red Mountain Creek. It picks up a good bit of its heavy metal load from the richly mineralized mountains of its headwaters. The rest can be traced to acid mine drainage and leaching from the waste rock piles and old abandoned mines that are prolific in the area.

"You can just see the difference in water quality, based on the color," Przeszlowska said. "The Ph here drops as low at times as 2 or 3 (7 is neutral). When you get closer to the draining mine adits, it gets even more acidic."

The Uncompahgre Watershed Partnership, a grassroots coalition of citizens, nonprofits, local and regional governments, and federal and state agencies dedicated to understanding the Uncompahgre Watershed, would like to do something about this caustic problem child. Red Mountain Creek is, after all, a tributary of the Uncompahgre River, and one of the main reasons why the southernmost portion of the river is deemed "impaired" – or, as some would say, dead, because it cannot support aquatic life.

The coalition has recently identified its top priority as improving water quality so as to remove impaired segments of the Uncompahgre River from the State of Colorado's list of impaired streams.

Thus, Przeszlowska is watching with interest current efforts headed up by U.S. Senator Mark Udall (D-Colo.) to find a way to allow so-called Good Samaritans (ranging from individuals to citizen groups like UWP to governmental and nongovernmental agencies) to take on projects to improve water quality in areas where there are abandoned mines, without fear of incurring liability under the Clean Water Act.

Reclamation experts have found plenty of ways to shore up leaky old mines and reduce acid mine drainage flowing into impaired watersheds. These range from simple fixes, like reducing the amount of water entering into the mine by building plugs or diverting the water around old workings, to treating drainage with settling ponds, wetlands, limestone drains, or some other form of passive or active treatment.

But certain provisions in the federal Clean Water Act create major stumbling blocks to such efforts. The Clean Water Act likes big, perfect fixes – like permanent water treatment plants that cost millions to build and millions more annually to operate, and which convert toxic water into potable stuff that fish can cruise around in.

So-called Good Samaritans have had to walk away from more modest mine cleanup projects

for fear that if they don't bring the discharge water all the way up to CWA standards, they may be sued by a third-party citizen or even another environmental group.

Pat Willits, the executive director of the Ridgway-based Trust for Land Restoration, which helps communities deal with a myriad of issues related to abandoned mining, explains the liability problem like this: "Good Samaritans are spooked by the 'citizen suit' provision of the Clean Water Act, which says that if someone suspects a violation of the Clean Water Act, a citizen may begin a legal action and if successful, the defending party will have to pay all of the legal expenses of the citizen's group. If they are unsuccessful, the defendant does not have recourse to countersue."

Remember that old parable from Sunday School about the Good Samaritan? The one about the traveler who was beaten, robbed, and left half dead in a ditch alongside the road? Two local passers-by refuse to help the injured fellow. But then along comes this foreigner from Samaria – reviled by the natives of the land – who stops and tends to the victim. Let's say he puts a few bandages on the guy to staunch the bleeding. Not a perfect fix. But better than no help at all.

That Good Samaritan may have thought twice about lending a hand, had he known he was traveling through a litigious land where he could get his pants sued off by the victim's best friend, mother-in-law or any random "third party" on the street for failing to restore the victim to perfect health.

That's pretty much what's keeping potential modern-day environmental Good Sams, as they're often called, from helping clean up the hard-rock mine waste of a century ago – particularly those nasty places where acid mine drainage is oozing out of old abandoned adits and polluting streams and river basins across the West.

"If we can't make it perfect, we can't do it at all," lamented Elizabeth Russell, a mine restoration project manager for Trout Unlimited, a group that works for conservation, protection and the restoration of North America's coldwater fisheries and their watersheds. "If we make an improvement to the water quality coming out of a draining mine by building a passive treatment system and we clean up the water but don't get it clean enough to meet stream standards, we open ourselves up to Clean Water Act violations.

"Our heart is in right place, but it's too much of a risk" Russell said. "We aren't concerned with the state or EPA coming after us. It's the citizens' provision that is risky; anyone could sue us under the Clean Water Act for discharging without a permit."

The matter has never been tested in court. But even the specter of legal threat has been enough to deter Good Samaritans from touching the problem of acid mine drainage with a ten-foot pole.

Two decades' worth of efforts to shield would-be Good Samaritans legislatively by creating a new provision in the Clean Water Act (including, most recently, U.S. Senator Mark Udall's Good Samaritan Cleanup of Abandoned Hardrock Mines Act of 2009), have floundered in Congress, due to fears from environmentalists about opening up the Clean Water Act, even for such benign and altruistic purposes as protecting Good Samaritans.

"The fear is, if you open it up just a little bit to amend it, does someone try to drive a truck through it and strip out the integrity?" Udall legislative aide Jimmy Hague explained. "They don't like the trade off."

Fed up with past efforts, Udall is now taking a new approach. He believes that updating, or even simply clarifying, Environmental Protection Agency policy may accomplish pretty much the same thing as legislation in terms of affording legal protection to Good Samaritans.

The agency already has some existing guidance that encourages potential Good Samaritans to

enter into voluntary agreements with EPA or federal land management agencies that helps to facilitate certain kinds of Good Samaritan cleanups.

As they stand, these protections are considered good enough protection for Good Samaritans to undertake reclamation projects that do not include direct attempts to improve water quality beyond, for example, rerouting a stream so it does not flow through a mining waste dump, or preventing water from flowing into old mine workings.

Trout Unlimited has conducted some cleanups utilizing these provisions. Other examples can be found in neighboring San Juan County, where the Animas River Stakeholders Group has spearheaded cleanup projects in the Mineral Creek drainage with considerable success in terms of water quality outcomes.

But current EPA protections don't explicitly extend to water quality improvement projects at point-source discharges such as the draining mine adits that pollute Red Mountain Creek.

Udall and fellow U.S. Senators Barbara Boxer (D-Calif.) and Michael Bennet (D-Colo.) teamed up over the past year to send two letters to the EPA, asked the agency to dig deeper into its policies, to see if there are more opportunities under current law to further incentivize the cleanup of abandoned hardrock mines – and their acidic drainage – by Good Samaritans.

“These parties need specific guidance from the Environmental Protection Agency so that they are fully informed about cleanup opportunities and they need certainty that they will not be subject to enforcement under the Clean Water Act for taking appropriate actions to address contamination at abandoned hardrock mines,” the trio of senators asserted in their most recent letter to the EPA, which was penned in February 2012.

The EPA is expected to issue a ruling on the matter sometime soon. Very soon.

“The word is ‘any day, any day, any day,’ we will be getting this determination,” said Ouray County Commissioner Lynn Padgett, who has led an effort among her fellow county commissioners across the region, state, and nation to rally behind the Good Samaritan cause.

In March, due to Padgett's efforts, the National Association of Counties adopted a resolution supporting legislation and/or policy that would immediately limit liability for Good Samaritans.

Many of her fellow commissioners across the West were only too well aware of the problem; acid mine drainage flows from more than 160,000 abandoned hardrock mines in the U.S.

But it was a steep learning curve for others, some of whom at first thought Padgett was asking them to legislate people being nice to each other.

“I'm not kidding,” she said. “They really thought that.”

Most folks who are familiar with the issue agree that it will ultimately take an act of Congress – ideally a very narrowly crafted one – to fix the Clean Water Act liability problems. But everyone agrees that an administrative solution through the EPA is better than nothing. And, Padgett and others argue, it's not just about cleaning up the messes made by old mines. It's also about helping new mines to establish themselves and flourish.

“This is about the economy,” said Padgett. “It will help new mines get permits. If the water quality is improved in our watersheds, then they should be able to have a better time getting discharge permits for modern-day mines. We just don't even know what modern, post Clean Water Act mining looks like in our area.”

The Uncompahgre Watershed Partnership, meanwhile, is looking at three potential cleanup sites in the Red Mountain area. None of these projects involve directly treating acid mine

drainage.

If Senator Udall's efforts with the EPA succeed, or even better, if Good Samaritan legislation eventually passes, the group is eager to take on active, larger-scale remediation directly affecting water quality in the area.