



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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MEMORANDUM

SUBJECT: Clean Water Act § 402 National Pollutant Discharge Elimination System (NPDES) Permit Requirements for "Good Samaritans" at Orphan Mine Sites

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TO: Regional Administrators, Regions I-X

On June 6, 2007, the EPA issued "Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans" (hereinafter, the "2007 Guidance").¹ We have received inquiries regarding the applicability of the Clean Water Act ("CWA") § 402 National Pollutant Discharge Elimination System ("NPDES") requirements to the activities of Good Samaritans and to their potential for long-term liability under that statute. This memorandum describes two clarifications, one under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and one under the CWA. These clarifications may be considered separately or used in conjunction with one another depending on site-specific facts and needs.

As a general matter, a Good Samaritan, as described in the 2007 Guidance, would not be the entity responsible for obtaining an NPDES permit under the CWA after the successful completion of activities under a CERCLA removal plan developed pursuant to an Administrative Settlement Agreement and Order for Removal Actions at Orphan Mine Sites, or Good Samaritan

¹ The 2007 Guidance and this memorandum are intended as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied on to create a right or benefit, substantive or procedural, enforceable by law or in equity, by any person. The Agency reserves the authority to take action at variance with such guidance.

Comfort/Status Letter (collectively, the “CERCLA tool”) with the EPA, so long as the Good Samaritan does not perform additional work at the mine site.² While performing work under a CERCLA tool, the Good Samaritan would be exempt from CWA permitting requirements for any discharges, including any periodic monitoring that occurs under the CERCLA tool. After completion of work under the CERCLA tool and as described further below, the Good Samaritan would also generally not be the entity responsible for obtaining an NPDES permit even where a discharge continues from a passive treatment system. Although we expect this memorandum to provide clarification regarding permit obligations for Good Samaritans, we recognize that it does not address or resolve all potential liability associated with discharges from abandoned mines.

This memorandum does not address responsibility under the CWA for any “person,” other than a Good Samaritan performing work under the 2007 Guidance, who discharges pollutants from a point source to waters of the United States. This memo applies only to situations where parties have no relationship with, responsibility to, and/or liability for any existing pollution at the site, except for their actions taken as a Good Samaritan as described in the 2007 Guidance.

Discussion

The 2007 Guidance provides that discharges from on-site³ response actions associated with creating or modifying point sources do not need an NPDES⁴ or any other federal permit during the CERCLA removal action under the provisions of CERCLA §121(e), and 40 C.F.R. §300.400(e)(1). Whether Good Samaritans operate under an Administrative Order or a Comfort/Status Letter, a Good Samaritan would not have CWA permit obligations if all activities are carried out as described in the CERCLA tool as developed in accordance with the 2007 Guidance.⁵ As stated in the 2007 Guidance, it is advisable for the Region and the Good

² Consistent with the 2007 Guidance, this memorandum addresses Good Samaritan activities at abandoned or orphaned hard rock mining sites. We express no opinion regarding the application of this memorandum to mining activities other than those being undertaken by a Good Samaritan at hard rock mine sites.

³ EPA believes that any treatment system addressing an abandoned mine discharge would be entirely “on-site.” Section 300.400(e)(1) of the National Contingency Plan (NCP) defines “on-site” to include “the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.” Further, in the preamble to the proposed NCP, EPA stated that “a direct discharge of CERCLA wastewater would be an on-site activity if the receiving water body is in the area of contamination or is in very close proximity to the site, even if the water flows off-site.”

⁴ 40 C.F.R. § 122.3(d) (States that “Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 C.F.R. part 300 ...” does not require an NPDES permit.)

⁵ See 2007 Guidance, pages 3-7. Unlike a Comfort/Status Letter, an Administrative Settlement Agreement and Order for Removal Actions at Orphan Mine Sites also provides the Good Samaritan with a federal CERCLA covenant not to sue and contribution protection. *Id.* Page 6-7. See also 40 C.F.R. § 122.3(d).

Samaritan to agree, before the cleanup actions begin, on all aspects of the cleanup covered by the CERCLA tool and those actions should be specified in a workplan or statement of work attached to the order. The provisions of the CERCLA tool should include post-removal site control or any other activities performed by the Good Samaritan that could result in potential discharges. In addition, the Good Samaritan should complete any earth-disturbing or site stabilization activities and operations and maintenance activities under the CERCLA tool.⁶

As discussed in the 2007 Guidance, all on-site actions performed by a Good Samaritan pursuant to a CERCLA § 107(d) Settlement Agreement and Order for Removal Action, or Comfort/Status letter, are required, to the extent practicable as determined by the EPA considering the exigencies of the situation, to attain applicable or relevant and appropriate requirements (ARARs) under federal environmental or state environmental or facility siting laws. In some cases, Regions may determine that attainment of water quality standards at Orphan Mine Sites by Good Samaritans performing removal actions may not be practicable. If a Region makes such a determination, Good Samaritans would be expected to meet site-specific work plan requirements for water quality in order to ensure that the project results in environmental improvement.⁷

One option available to the EPA and the Good Samaritan would be for a Region to determine that the Settlement Agreement and Order for Removal action, or Comfort/Status letter, should include a provision which requires Good Samaritans to continue the removal action performance through periodic monitoring or other activities which would help ensure that the project results in environmental improvement. Continued Good Samaritan removal action performance would remain subject to the CERCLA § 121(e) and 40 C.F.R. § 300.400(e) permit exception provisions.

For the Good Samaritan, the issue of CWA liability can arise after the Good Samaritan satisfactorily completes its obligations pursuant to the CERCLA tool and leaves the site, but the discharge of pollutants from a point source continues. Section 301(a) of the CWA provides that “[e]xcept as in compliance with this section and sections ... [402] ... of this Act, the discharge of any pollutant by any person shall be unlawful.”⁸ The EPA’s NPDES regulations provide that “any person who discharges or proposes to discharge pollutants” has a duty to apply for an NPDES permit.⁹ The regulations clarify that when “a facility is owned by one person but

⁶ The 2007 Guidance, page 5, discusses development of a workplan that can be used to deal with such matters.

⁷ See, 2007 Guidance discussion in Part III, the Model Good Samaritan Comfort/Status Letter and Model Settlement Agreement and Order for Removal.

⁸ 33 U.S.C. § 1311(a). The terms “discharge of a pollutant,” “person,” and “point source” are defined in sections 502(12), (5) and (14) of the CWA, respectively. 33 U.S.C. § 1362.

⁹ 40 CFR § 122.21(a). The CWA is a strict liability statute making any person who discharges a pollutant from a point source into waters of the U.S. liable for that discharge under Section 301(a) unless, inter alia, the discharge is authorized under the Section 402 NPDES permit

operated by another, it is the operator's duty to obtain a permit."¹⁰ The NPDES regulations require the "operator" to obtain a permit because the operator of a facility or activity is likely to be an entity capable of exercising control over the discharge, and therefore capable of ensuring any discharge is in compliance with applicable permit limits.

As described in the 2007 Guidance, by definition, a Good Samaritan cannot be an "owner" of an orphan mine site or have a legal obligation to take action where they are working to improve the site and/or its discharges.¹¹ While performing work under the CERCLA tool, the Good Samaritan would, as the "operator", ordinarily be the entity under the CWA responsible for obtaining a permit. However, under the CERCLA exemption, as long as the Good Samaritan's on-site activities are conducted pursuant to the CERCLA tool, those activities do not require an NPDES permit. The question *after* the CERCLA action is satisfactorily completed is whether the Good Samaritan would be considered an "operator" of any discharges that continue at the facility. In the context of a successful Good Samaritan cleanup, the Good Samaritan would not be the entity responsible for obtaining an NPDES permit *after* the CERCLA removal action is complete if they are no longer the "operator" of the facility.

The initial question to be considered is whether the Good Samaritan successfully completed the work described in their CERCLA tool. If so, then the following factors may be used to determine whether a Good Samaritan would be an "operator" who is responsible for obtaining an NPDES permit after completion of work under the CERCLA tool.¹² (Positive answers would suggest a Good Samaritan may be an operator, while consistently negative answers would indicate the Good Samaritan is likely not an operator):

- Does the Good Samaritan have access and authority to enter the site?
- Does the Good Samaritan have an ongoing contractual agreement or ongoing relationship with the owner of the site to control any remaining discharge(s)?

program. The NPDES regulations establish the process and requirements for applying for an NPDES permit.

¹⁰ 40 C.F.R. § 122.21(b). 40 C.F.R. § 122.2 defines "owner or operator" as the "owner or operator of any 'facility or activity' subject to regulation under the NPDES program."

¹¹ 2007 Guidance, page 2.

¹² These factors for considering whether a Good Samaritan ought to be considered an "operator" reflect the factors EPA has considered in its establishment of requirements for submission of Notices of Intent for coverage under EPA's NPDES general permits for stormwater discharges from industrial activity (the multi-sector general permit (MSGP)), for stormwater discharges from construction activity (CGP) and for discharges from the application of pesticides (PGP), and with the requirements for filing Notice of Termination to end coverage under those permits. See 73 FR 56572 (Sept. 29, 2008) and Appendix H, 77 Fed. Reg. 12286 (Feb. 29, 2012) and Appendixes J and K of the CGP; 76 Fed. Reg. 68750 (Nov. 7, 2011) and Appendixes D and E of the PGP. These factors are also consistent with the District Court's decision in *Beartooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168, 1175 (D. Mont. 1995).

- Does the Good Samaritan have the power or responsibility to make timely discovery of any changes to the discharge(s)?
- Does the Good Samaritan have the power or responsibility to direct any activities of persons who control the mechanisms, if any, causing the ongoing discharge(s)?
- Does the Good Samaritan have the power or responsibility to prevent and abate the environmental damage caused by the remaining discharge(s)?

If the Good Samaritan, after successfully completing its obligations under the CERCLA tool, answers “no” to all of the factors above, then the Good Samaritan should not be considered an “operator” responsible for obtaining NPDES permit coverage even where a discharge continues from a passive treatment system. While the Good Samaritan would not be the entity responsible for obtaining an NPDES permit, any remaining point source discharges of a pollutant would require a permit. If no other “operator” is present, the facility owner would generally be responsible for obtaining any necessary NPDES permits because the owner is most likely to be the entity with control over the discharges. In many cases, the EPA anticipates there may be unpermitted discharges that continue after the CERCLA action is complete.

Case Law

Since the EPA issued the 2007 Guidance, a number of potential Good Samaritans have asked the Agency about some judicial opinions that heighten the Good Samaritans’ concerns regarding long term liability under the CWA. The case law supports the positions described in this memorandum.

The case raised to the EPA’s attention most often in discussions regarding potential long-term liability for Good Samaritans under the CWA has been *Committee to Save the Mokelumne River v. East Bay Municipal Utility District*, No. CIV. S-91-1372-LKK, 1993 U.S. Dist. LEXIS 8364 (E.D. Cal. Mar. 3, 1993) (*East Bay MUD*).¹³ This case does not weaken or contradict the EPA’s expectation that Good Samaritans will generally not be responsible for obtaining NPDES permit coverage for discharges continuing after completion of work they do to remediate legacy pollution problems at abandoned mine sites. Although the district court found both defendants liable for discharges from a treatment facility, at least one of the defendants was an “owner” of the discharging facility and the other defendant exercised “intimate ... control over [the facility’s] discharges.” *Id.* at *40. As discussed below, neither of the defendants in this case would qualify as Good Samaritans under the 2007 Guidance.

The plaintiff in *East Bay MUD* alleged that the East Bay Municipal Utility District (the “District”) and the California Regional Water Quality Control Board (the “Board”) were discharging pollutants from the Penn Mine facility into the Mokelumne River without an NPDES permit in violation of the CWA. *Id.* at *2. Copper and zinc mining operations at the Penn Mine property had been abandoned in the 1950’s after approximately a century of activity. *Id.* at *3. Around 1966, the District acquired a portion of the abandoned property and, in 1978, the District

¹³ *East Bay MUD* was upheld on appeal, but the arguments discussed in this memorandum were not among those raised on appeal. *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993).

and the Board built a treatment facility on the property in an attempt to reduce polluted runoff, which included acid mine drainage. *Id.* at *3-4. The Board argued that it could not be held responsible for obtaining an NPDES permit for the periodic discharges from the facility it and the District built because the Board did not own the facility. *Id.* at *35. The district court rejected this argument, reasoning that a non-owner may be liable if it has “control over discharges” in its capacity as an “operator.” *Id.* at *38-39. Such control was demonstrated in this case because the Board had not only purchased and installed the pump and pipes involved in the facility, but it (1) paid for repair and replacement of the pump, (2) paid for the electricity to operate the pump, (3) held land use permits for continued housing and operation of the pump, and (4) retained “veto power of decisions concerning releases” from the facility. *Id.* at *40-41.

We generally do not expect Good Samaritans as described in the 2007 Guidance to be responsible for obtaining NPDES permit coverage as were the defendants in *East Bay MUD* because Good Samaritans should not be considered owners or operators of the site or facilities at issue once they have completed all activities at the site pursuant to a CERCLA tool. The District was an “owner” of the facility at issue in *East Bay MUD*, and although the district court did not clearly conclude whether the Board was also an “owner,” the court’s reasoning indicates that it considered the Board to be liable because of the control the Board had over discharges from the facility. Such control would render an entity an “operator” under the factors outlined in the previous section of this memorandum.

Another case raised by prospective Good Samaritans more recently is *West Virginia Highlands Conservancy v. Huffman*, 625 F.3d 159 (4th Cir. 2010) (*Highlands*). In this decision, the United States Court of Appeals for the Fourth Circuit upheld an injunction imposed by the district court requiring the West Virginia Department of Environmental Protection (WVDEP) to obtain an NPDES permit for the discharges associated with reclamation efforts at some abandoned coal mining sites. *Id.* at 161. The Court of Appeals cited the EPA’s regulations at 40 C.F.R. § 122.21(b) (“When a facility or activity is owned by one person but is operated by another person, it is the operator’s duty to obtain a permit.”) as confirmation of its conclusion that “where, as here, the mine owner generates pollution but then abandons the site, the subsequent operator is the party responsible for obtaining a permit.” *Id.* at 167. We believe this decision has been raised by various prospective Good Samaritans because the Court of Appeals explicitly rejected an argument made by intervenor Interstate Mining Compact Commission (IMCC) that requiring WVDEP to obtain an NPDES permit for the discharges it was managing would “discourag[e] volunteer ‘good Samaritans’ from entering into ‘public/private partnerships’ at bond forfeiture sites for fear of ‘incurring liability ... for failure to meet NPDES permit requirements.’” *Id.* at 169.

The *Highlands* case does not contravene the analysis set forth in this memorandum. Although some of the governmental bodies that take over the operation (or possession) of abandoned mine sites will become owners or operators of those sites as in the *Highlands* case, we do not expect Good Samaritans to maintain control of such sites in a way that would render them “operators” within the NPDES regulations after completion of work under the CERCLA tool. We understand that the *Highlands* court was not swayed by the argument that requiring WVDEP to obtain an NPDES permit might discourage “good Samaritans” from conducting work at abandoned mine sites. However, the Court’s use of the term “good Samaritans” appears to be

lifted from IMCC's argument, and there is no indication that the Court had in mind any particular Good Samaritan or that it had considered the EPA's 2007 Guidance. Nothing in the Court's analysis suggests that a Good Samaritan that lacks sufficient control over ongoing discharges at an abandoned mine site should be treated as an "operator" responsible for obtaining a permit for such discharges.

Conclusion

For the reasons described above, a Good Samaritan that satisfactorily completes its obligations pursuant to the CERCLA tool would generally not be responsible for obtaining an NPDES permit during the response activities by virtue of CERCLA § 121(e) and 40 C.F.R. §§ 300.400(e)(1) and 122.3(d), or after completion of the response activities, so long as the Good Samaritan is no longer an "operator" based on the factors described in this memorandum. If you have any questions about this memorandum, please contact Gary Hudiburgh at (202) 564-0626 or Roger Gorke at (202) 564-0470.

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