

Questions and Answers
Clean Water Act § 402 National Pollutant Discharge Elimination System (NPDES) Permit
Requirements for “Good Samaritans” at Orphan Mine Sites
December 12, 2012

1. Why is EPA issuing this memorandum at this time?

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”). The 2012 memo is intended to encourage "Good Samaritan" cleanup activities at abandoned mine sites by reducing perceived legal vulnerability to those who want to conduct such cleanups.

2. Is the 2012 memo binding?

No. The EPA is explaining its interpretation of the Clean Water Act (CWA) and the EPA’s regulations that implement the CWA, but this document itself is not binding.

3. What does the 2007 Guidance do?

The purpose of the 2007 Guidance is to reduce barriers under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for volunteers ("Good Samaritans") to clean up abandoned hard rock mine sites. The 2007 Guidance notes that discharges from on-site response actions associated with creating or modifying point sources do not need an NPDES 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).

4. How is this new memorandum different from the 2007 Guidance?

This memorandum focuses more on Good Samaritans’ responsibilities under the CWA. Specifically, this memorandum discusses potential CWA responsibilities for a Good Samaritan after the cleanup activity undertaken consistent with the 2007 Guidance is successfully completed, including when a passive treatment system remains. In the alternative, the CERCLA action could also be continued,

5. How is this memorandum helpful for a Good Samaritan?

Interested parties should review pages 4 – 5 of the memorandum. In brief, the memorandum discusses responsibility under the CWA for Good Samaritans that have successfully completed work under the 2007 Guidance. The EPA’s NPDES permitting regulations require permit applications from the "operator" if there is both an "owner" and an "operator." The memorandum provides five factors that may be used to help determine if the Good Samaritan is still the “operator” and would be responsible for obtaining an NPDES permit for continuing discharges from the site. The NPDES permitting authority is usually best able to make this determination based on the facts of the individual situation

6. Is the use of the word "power" in the factors intended to imply that states and tribes will usually be considered "operators" because "power" could be interpreted to include the sort exercised by a state or tribe as part of a sovereign's police powers?

No. The factors listed in this latest memorandum are not meant to be applied as if they were rules, and there is no hard-and-fast number of factors for determining that an entity will -- or will not -- be considered an "operator" after work under a CERCLA tool is successfully completed. The question whether any given entity is an "operator" should be answered on a case-by-case basis. In the case of a sovereign entity -- such as a state or tribe -- the EPA anticipates the focus to be more on the sovereign's "responsibility" to take action rather than "power" to take action.

7. Haven't the courts already dealt with this situation?

Not directly, but this memorandum is consistent with court decisions on related matters, as explained on pages 5 – 7 of this memorandum. As noted in the memorandum, the facts of those decisions are different than those we expect to arise for Good Samaritans.

8. Who is responsible for any remaining discharges from the abandoned mine site after the Good Samaritan finishes their work?

In many cases, the EPA anticipates there may be unpermitted discharges that continue after the CERCLA action is complete. While the Good Samaritan would not usually be the entity responsible for obtaining an NPDES permit, any remaining point source discharges of a pollutant would likely 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.