

TESTIMONY OF MARY VARSON CROMER
BEFORE THE ENERGY AND MINERAL RESOURCES SUBCOMMITTEE
OF THE HOUSE NATURAL RESOURCES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
***ENVIRONMENTAL JUSTICE FOR COAL COUNTRY: SUPPORTING COMMUNITIES
THROUGH THE ENERGY TRANSITION***

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Chairperson Lowenthal, Ranking Member Stauber, and members of the Subcommittee, thank you for allowing me to address you regarding the environmental justice impacts of coal's decline on coalfield communities.

My name is Mary Cromer. I am an attorney at Appalachian Citizens' Law Center, a small non-profit law and policy office in Whitesburg, Kentucky. We represent miners, individuals, families, and community groups affected by coal mining in Central Appalachia. I lead ACLC's Environmental Justice Program. Over the past 12 years, I have represented a number of families and community groups in Central Appalachia who have been impacted by the environmental effects of coal mining in the region.

The issues I am here to talk about are environmental justice issues. Coal mining has taken a severe toll on coalfield communities across the country. And as coal exits, its impacts are more and more apparent. You see it in the miners whose years of backbreaking and dangerous work has left them with disabling impairments. Black lung disease is rampant and much more severe than ever before. In Central Appalachia, we now see young miners die from severe black lung disease that was nearly unheard of in past decades. Its impacts are likewise apparent in the scarred land and polluted streams and rivers left behind by past mining operations. These are prevalent across coal mining communities in Central Appalachia.

These are also economic transition issues. As the nation's reliance on coal continues to decline, the Administration has committed to investing in, rebuilding, and revitalizing these communities through efforts such as the Interagency Working Group on Coal and Power Plant Communities and Economic Revitalization. Those initiatives will be critical to addressing the industries' legacy impacts throughout the coalfields. But it is just as important to seize opportunities that will help prevent the industry from further burdening coalfield communities with costly environmental hazards. You cannot rebuild an economy on broken foundations. That is why I focus my comments on what the Office of Surface Mining Reclamation and Enforcement ("OSMRE") should do immediately to protect coalfield communities from the threats posed by abandoned, unreclaimed coal mines that are being left behind due to the coal industry's rapid decline.

The Surface Mining Control and Reclamation Act (“SMCRA”) is, on paper, one of the country’s most stringent environmental laws. It contains numerous provisions protecting the citizens’ right to enforce the standards of the law where the state regulatory authority or OSMRE fails to do so. It sets forth strict standards that require coal operators to include detailed mine and reclamation plans with their permit applications. It makes those plans strictly enforceable by citizens, by the state regulatory authorities, and by OSMRE. And, it protects against the threat of unreclaimed coal mines by requiring that each permit carry with it a bond to assure that the regulatory authority has the funds necessary to reclaim the mine should the operator walk away from its reclamation responsibilities. Together, SMCRA and OSMRE are the most critical tools for ensuring that coalfield communities are not left with unstable, unreclaimed land, choked streams, and perpetual water pollution as coal operators abandon their responsibilities.

But those protections are not sufficient to meet the challenges of coal mine abandonment currently faced by coalfield communities. Functionally, in the 44 years since SMCRA’s enactment, its protections have not been consistently enforced. OSMRE has not consistently been dedicated to its fundamental purpose of “protect[ing] society and the environment from the adverse effects of surface coal mining operations.” 30 U.S.C. §102(a). And structurally, SMCRA’s bonding provisions have failed to ensure adequate money for reclamation, especially where multiple permits are forfeited at one time.

When I first came to ACLC in 2008, I primarily represented clients who were dealing with the devastating impacts of mountaintop removal coal mining. In some instances, communities came together to try to stop a mine permit from being issued because they knew of the terrible environmental and public health effects of that radical form of strip mining. In other instances, I represented individuals and families whose homes and land were being destroyed by blasting, whose quality of life and health were being harmed as they were being inundated with dust from nearby mine sites, and whose waterways were polluted with mine runoff.

Much of my work changed beginning in around 2012.¹ As coal production began its precipitous decline in Appalachia and throughout the country, more of our clients were dealing with situations where mine operators had appeared to simply walk away from active mine sites. My direct representation of individuals and families turned more toward trying to compel enforcement of mine permit standards where mine operators had functionally abandoned their permits. We began to see a pattern. Mine sites were being left untended. Regular maintenance, like removing sediment from ponds on mountaintops, was not being done. As a result, those ponds were overflowing their banks and saturating steep hillsides, causing slides. In some instances, those slides threatened homes in the hollow below.

Most of the clients I have represented live in Kentucky. Often in the cases I handled, Kentucky’s regulatory authority had cited the company for violations. But for those functionally abandoned

¹ Coal production in Eastern Kentucky has seen a steady and dramatic decline over the past 13 years. Production decreased 90% between second quarter 2008 and first quarter 2021. It fell by 87% between second quarter 2011 and first quarter 2021. See Kentucky Quarterly Coal Report 2021-Q1, at 5. Available at <https://eec.ky.gov/Energy/News-Publications/Quarterly%20Coal%20Reports/2021-Q1.pdf>. The decline of coal production and coal mine employment are not unique to Kentucky. As shown in a briefing document prepared for staff of the Subcommittee on Energy and Minerals, presented here as Attachment 1, these same trends are playing out across the country.

permits, those citations seemed to have little effect. As many companies were no longer finding markets for their coal, they had no need to expand current permitted operations or seek new permits. That meant that SMCRA's permit block, which prohibits new permitting to companies with outstanding, unabated violations,² was toothless. OSMRE's annual evaluation reports for Kentucky clearly show the trend. When OSMRE conducted its oversight inspections on 174 of Kentucky's mine permits in 2019, it found only 56% of those permits to be in compliance with SMCRA. The report shows that the percentage of permits in compliance when OSMRE performed its oversight inspections steadily declined from 77% in 2007 to 56% in 2019.³

And then, Blackjewel LLC filed for bankruptcy protection in the summer of 2019. At the time of its filing, Blackjewel LLC held 213 permits in Eastern Kentucky, covering 328,000 acres. It employed about 700 Kentucky miners. Unlike the previous round of coal bankruptcies in 2014-16, Blackjewel did not seek to reorganize. Instead, it sought dissolution. It is important to note here that Blackjewel had acquired most of its coal mine permits from those earlier bankruptcy reorganizations. It turns out that those acquisitions just delayed, rather than prevented, the abandonment of those mines.

Because of the broader regional and national implications of Blackjewel's bankruptcy in particular, ACLC began working with a group of attorneys and citizen groups in Appalachia and Wyoming to try to bring the Blackjewel bankruptcy court's attention to what we saw as a looming crisis.⁴ Many of the mines in Blackjewel's portfolio were troubled. The company had numerous outstanding violations going into bankruptcy, and as the bankruptcy dragged on, the violations at the mine sites mounted.⁵ We feared that those troubled permits acquired out of the earlier bankruptcies would be unappealing to buyers, especially given the lack of demand for coal.

Members of the citizens groups we were working with on the Blackjewel bankruptcy began to come forward to talk about how Blackjewel's mining and bankruptcy were impacting them.⁶ Tracy Neece is one such member. His declaration was submitted to the bankruptcy court. I provide it here as Attachment 2, and I hope you will take a moment to read his testimony about his concerns for his community and his land. Mr. Neece leased the upper part of his property, the mountaintop, for mining to James River Coal. Revelation Energy, a Blackjewel subsidiary, purchased the mine from James River's bankruptcy in 2016. Since that time, according to Neece,

² See 30 U.S.C. §1260(c).

³ See Lexington Field Office, OSMRE 2019 Annual Evaluation Report, at pp. 28-29, available at <https://www.odocs.osmre.gov>. See also, Bill Estep, *Erosion Landslides and Pollution. Coal Industry's Compliance with Federal Rules Down*, Lexington-Herald Leader, June 27, 2019, available at <https://www.kentucky.com/news/state/kentucky/article232013522.html>.

⁴ We first addressed the bankruptcy court by letter expressing concerns regarding the bankruptcy company's "severe environmental mismanagement problems" and urged the court to "ensure[] that adequate resources are designated to fully account for the debtors' extensive environmental liabilities." See December 16, 2019 letter, Docket No. 1534, at <https://cases.primeclerk.com/blackjewel/Home-DocketInfo>.

⁵ We again addressed the court by letter on June 17, 2020 to express our "continuing significant concerns regarding the lack of permit transfers and increasing environmental violations." See June 17, 2020 letter, Docket No. 2084, at <https://cases.primeclerk.com/blackjewel/Home-DocketInfo>

⁶ In December, we filed an objection to Blackjewel's dissolution plan that included declarations from the groups' members regarding the bankruptcy's impacts. See December 10, 2020 Objection, Exhibits 2-7, Docket No. 2637, at <https://cases.primeclerk.com/blackjewel/Home-DocketInfo>.

the company had “not done anything to reclaim the land.” Mr. Neece continued, “My property is torn all to pieces, it looks like a bomb went off.” Mr. Neece describes a massive highwall that he fears someone will accidentally fall from or drive an ATV off and get hurt or killed. He describes mine ponds that were not maintained, causing saturation and landslides on the hillside below. He describes sediment running into the streams from the mine site. As Mr. Neece says, “I just want to make sure that my land gets fixed before someone gets hurt.”⁷

What we feared regarding Blackjewel’s permits turned out to be the case. When Blackjewel sought confirmation of its dissolution plan, it still held 204 permits in Appalachia. In confirming the plan, the bankruptcy court ordered that 33 of those permits in Kentucky were to be immediately forfeited, making the Kentucky SMCRA regulatory authority and the surety company responsible for reclaiming the sites.⁸ The court gave Blackjewel’s liquidating trust until September 2021 to transfer the remaining 171 permits.⁹ At this point, we fear that most of those 171 permits will also be forfeited and turned over to the surety company and the states for reclamation.

As we were working in coalition on the Blackjewel bankruptcy, we realized the need to bring together a wider group of grassroots groups, SMCRA lawyers, and policy experts to address the growing coal bankruptcy and coal mine abandonment crisis. ACLC co-convened a summit in December 2020.

During the summit we identified two primary problems facing coalfield communities as coal production declines and coal companies leave – (1) the inadequacy of performance bonds to cover the cost of mine reclamation when companies abandon their permit obligations and (2) the failure of SMCRA’s regulatory agencies to require mine operators to reclaim their sites and to prohibit companies from functionally abandoning their permits when the coal market declined.

The summit resulted in a Briefing Paper outlining what the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) can and should do immediately and in the near term to protect coalfield communities. That Briefing Paper was presented to OSMRE and the Department of Interior in February 2021. I provide that Briefing Paper, along with the cover letter, as Attachment 3.¹⁰

I focus this testimony on what OSMRE should do to respond to the current crisis.

What OSMRE Should Do Now

OSMRE can and should act now to protect coalfield citizens across the country. OSMRE’s most critical obligation under SMCRA as the industry declines is to ensure that SMCRA’s

⁷ The permit on Mr. Neece’s land was one of the 33 permits that the bankruptcy court allowed Blackjewel to forfeit when it confirmed the company’s dissolution plan on March 22, 2021. *See* Confirmation Order, March 22, 2021, at ¶¶PP, p.14, Docket No. 3147, at <https://cases.primeclerk.com/blackjewel/Home-DocketInfo>.

⁸ *Id.*

⁹ *Id.* at ¶TT, p.15-16.

¹⁰ We provide those recommendations by email with a request for a meeting to officials at OSMRE and DOI. We are working to schedule a meeting with OSMRE Deputy Director Glenda Owens regarding the issues in the near future.

performance standards are enforced, ensure that inactive mine sites are reclaimed as quickly as possible, and ensure that water pollution is treated. In doing so, OSMRE can also play a critical role in minimizing the impacts of coal's decline on these communities by working to ensure fair treatment and economic opportunities during the reclamation process. When completed contemporaneously or after a planned mine closure, reclamation work is often completed by individuals that were previously employed mining the coal. By requiring timely reclamation, OSMRE will also be preserving much-needed jobs in coal communities.

1. Assess the level of current risks posed by the functional abandonment of coal permits

The extent of the problem and the level of current risk posed by mine abandonment must be clearly understood. A nationwide inventory of all outstanding reclamation needs and costs is needed. Overall, there is a troubling lack of data on the statuses and liabilities of mine permits, due to inconsistent reporting and inconsistent terminology across states. For instance, throughout the Blackjewel bankruptcy process and our broader coalition work, we have been frustrated by our inability to determine the last date of coal removal on any given SMCRA permit. Knowing how long it has been since a company last produced coal on a given permit, and tying that to the permit's environmental compliance and reclamation statuses, would provide clear indications of the likelihood that that permit would ultimately be forfeited or abandoned.

2. Require strict enforcement, as well as reclamation or forfeiture of all functionally abandoned permits

There are hundreds of coal mine permits across the country where coal mining has stopped, reclamation funds are inadequate, and companies cannot or do not want to reclaim. In many instances, coal companies are “functionally abandoning” these sites. The coal companies are neither mining nor reclaiming on the site. In some instances, they are doing the bare minimum of required ongoing maintenance. In others, they are not even doing that and are instead allowing environmental violations that are harmful to nearby communities to pile up.¹¹

Given the clear trend in coal production across the country, coal companies will never have more money for reclamation than they do now. Yet, it appears that in many instances SMCRA regulatory authorities are reluctant to strictly enforce the law for fear of tipping the coal company toward bankruptcy.

I dealt with one such instance in Kentucky last year. I was called by a landowner who was very frustrated because he had called in more than five complaints in the preceding three months

¹¹ The recent audit of the West Virginia SMCRA bond system highlighted one aspect of this problem in discussing the failure of the West Virginia regulators to properly implement restrictions on whether and when mines could go into a “temporary cessation” or idled status, which would allow them to stop producing coal without being required to immediately reclaim. The audit found that of the 100 inactive status applications reviewed, there were 171 instances where the applicant failed to meet the requirements for inactive status, yet the mine was allowed to cease operations without reclamation. Audit Division of the Joint Committee on Government and Finance, West Virginia Office of the Legislative Auditor. *WV Department of Environmental Protection Division of Mining & Reclamation – Special Reclamation Funds Report*. June 7, 2021, at 3-4, available at http://www.wvlegislature.gov/legisdocs/reports/agency/PA/PA_2021_722.pdf.

asking that the Kentucky regulatory authority address the sedimentation that was coming from the mine site above his home. Sediment from the site was clogging the streams throughout his community. He told me that the state was not doing anything to correct the problem. I recommended that he ask for a federal inspection, which is a right all citizens have under 30 C.F.R. §842.12. When he called the OSMRE inspector, he was told that OSMRE would not inspect because the state had issued notices of non-compliance to the company.¹² When I investigated, I found that that was true. Kentucky's regulatory authority had issued more than ten notices of violation to the company in the preceding year and had escalated its enforcement by ordering the company to immediately cease all coal production and immediately bring the permit into compliance.

Those enforcement actions, however, had had no effect, as the company was no longer producing coal and had functionally abandoned this permit. The company was not mining the site, it was not reclaiming the site, and it was not even doing the bare minimum necessary to maintain the site's environment compliance. The state's enforcement efforts had failed. All that was left for the state to do was to initiate bond forfeiture proceedings. It had not yet done so.

This is exactly the type of situation where OSMRE's oversight enforcement authority should be used to protect coalfield citizens from the dangers of abandoned mine sites. In particular, OSMRE should use its authority to ensure effective enforcement by requiring bond forfeiture where necessary and making sure that the state is properly enforcing SMCRA's contemporaneous reclamation standards.

SMCRA includes contemporaneous reclamation as one of its fundamental purposes. 30 U.S.C. §1202(3) (stating that one of SMCRA's purposes is to "assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations.") To fulfill that purpose, SMCRA requires that permittees "insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with surface coal mining operations..." 30 U.S.C. §1265(b)(16). However, SMCRA does not define "contemporaneous reclamation." And, OSMRE's early attempts to define an enforceable contemporaneous standard were unsuccessful.¹³ To ensure consistent and effective enforcement of SMCRA throughout the country, OSMRE needs to undertake rulemaking to define stringent standards for contemporaneous reclamation.

¹² SMCRA expressly requires that when OSMRE has "reason to believe" a violation is occurring that does not rise to the level of an imminent harm, it must notify the state regulatory authority and give the state ten days to demonstrate that it is taking "appropriate action to cause said violation to be corrected." 30 U.S.C. §1271(a)(1). Here, OSMRE refused to initiate that process.

¹³ OSMRE first defined the term in 1979, but that regulation was rescinded in 1988. *See* 44 Fed. Reg. 15395, 15411 (Mar. 13, 1979) and 57 Fed. Reg. 33874, 33874 (Oct. 31, 1988). The regulation was again promulgated in 1991. *See* 30 C.F.R. § 816.101 (1991) (suspended indefinitely). The 1991 regulation was suspended upon settlement of litigation brought by the National Coal Association. *See, Nat'l Coal Ass'n v. Dep't of Interior*, Civ. No. 92-0408-CRR (D.D.C. 1992). OSMRE noticed the suspension in the Federal Register, stating as follows: "On April 16, 1992, the district court entered a Joint Stipulation of Dismissal in the case. The Joint Stipulation, without conceding the merits of any party's claim, provided for dismissal of the action without prejudice, the suspension of the regulation described above, [and] a reconsideration by the Secretary of all issues and the proposal of a new rule, if necessary." *Id.* Despite OSMRE's apparent ability to re-promulgate the regulation after the case was dismissed, it has failed to do so.

In the meantime, the current contemporaneous reclamation standard is enforceable, especially in situations where years have passed since coal was last produced on a mine site. OSMRE must use its oversight authority to ensure that state regulatory authorities are requiring contemporaneous reclamation.¹⁴

In addition, OSMRE should take the data gathered in the nationwide assessment of reclamation needs, determine where contemporaneous reclamation is not occurring, and use its oversight authority to require that it be done.

And, finally, where the permittee is unwilling or unable to contemporaneously reclaim, OSMRE should ensure that SMCRA's bond forfeiture process is immediately triggered.¹⁵

3. Ensure that surety and collateral bond amounts are sufficient to cover reclamation in the event of forfeiture

Unreclaimed mine sites were one of the primary findings that led to SMCRA's development.¹⁶ To address the problem of unreclaimed mines, SMCRA first requires that all surface mining permits include a reclamation plan that assures that all mined land is restored to its pre-mining capability. 30 U.S.C. §1258. To protect against instances where the coal mine operator is unable or unwilling to comply with the reclamation plan, SMCRA requires that a performance bond be posted before any permit is issued. The bond must be sufficient to "ensure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture." 30 U.S.C. §1259(a). The amount of the bond is to be adjusted as circumstances that would affect the cost of future reclamation change. 30 U.S.C. §1259(e).

Full-cost surety and collateral bonds are two types of performance bonds allowed under SMCRA. *See* 30 U.S.C. §1259(b). Unfortunately, those full-cost bond amounts are often inadequate even at the time the permit is issued.¹⁷ Furthermore, a particular permit's bond

¹⁴ *See, e.g., PCC v. OSMRE*, 174 IBLA 262, 278 (2011) ("We are hard-pressed to find a definition of the term 'as contemporaneously as practicable' that supports [the] opinion that PCC may reclaim the existing spoil piles at some indefinite future time of PCC's election.")

¹⁵ *See* 30 C.F.R. §800.50 ("If an operator refuses or is unable to conduct reclamation of an unabated violation, if the terms of the permit are not met, or if the operator defaults on the conditions under which the bond was accepted, the regulatory authority shall take the following action to forfeit all or part of a bond or bonds....")

¹⁶ *See* 30 U.S.C. §1201(h) ("there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground coal on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality.")

¹⁷ For example, OSMRE's 2011 review of Kentucky's reclamation bonding program "concluded that reclamation performance bonds in Kentucky were not always sufficient to complete the reclamation required in the approved permit. Bond forfeiture studies determined that a majority of forfeited permits did not always have sufficient bond to complete the reclamation to permanent program standards." 83 Fed. Reg. 3948, 3949 (Jan. 29, 2018).

inadequacy may emerge or worsen during the life of the mine, especially in instances where the permittee deviates from the original mine plan or accrues significant unabated violations.^{18, 19}

To address the inadequacy of full-cost bonding, OSMRE should require all SMCRA regulatory authorities to consider contingencies related to the current trajectory of the coal market when determining the feasibility of mine and reclamation plans and the related costs of reclamation upon which bond amounts are initially determined. In addition, at any point where the mine deviates from its approved mine and reclamation plan, bond adequacy should be reconsidered. At any point at which the mine accrues unabated environmental violations, bond adequacy should be reconsidered. Finally, bond adequacy should be reconsidered in light of the operation's compliance with the SMCRA's environmental performance standards, the approved mine and reclamation plans, and current coal production forecasts at midterm permit review, permit renewal, and permit transfer.

4. Immediately reassess all bond pools and self-bonding

SMCRA does not require the permittee to post a full-cost bond in all instances. Instead, it expressly allows "self-bonding" for companies with "a history of financial solvency and continuous operation sufficient for authorization to self-insure." 30 U.S.C. §1259(c). Despite the fact that self-bonding is expressly provided for in SMCRA, given the collapse of the industry, it is no longer a viable option for ensuring sufficient funds for reclamation. Wyoming's story shows that self-bonding can, and should, be easily replaced. Coal companies there at one point had the most self-bonds in the nation, but now they have replaced almost all of their self-bonds, leaving only one permit with self-bonding.

In addition, SMCRA allows states to develop "alternate bond programs," which must be approved by the Secretary of the Interior. *Id.* Under that provision, the Secretary has approved pool bonding programs in a number of states, i.e., West Virginia, Kentucky, Virginia, Indiana, and Ohio. In those states, the individual coal permittees pay a fraction of their total reclamation costs into a common pool. And, if a single operator forfeits its permits and the surety or collateral bonds for that permit are insufficient, the pool is tapped to fund reclamation. Such systems are inherently risky in a declining coal market. As OSMRE warned when it approved

¹⁸ This appears to be the case with KY SMCRA permit 836-0437, which is the permit on Tracy Neece's land. The bankruptcy court record revealed that Blackjewel's subsidiary Revelation had been in continuous violation of a number of SMCRA's performance standards on that permit since 2016. Those violations included, *inter alia*, the company's ongoing failure to properly reclaim the site and its highwalls, failure to maintain the sediment ponds, and failure to correct an improperly constructed and dangerous fill. December 10, 2020 Objection, Exhibits 3, Docket No. 2637, at <https://cases.primeclerk.com/blackjewel/Home-DocketInfo>. Kentucky estimates that the cost of reclaiming that site alone will exceed the surety bond amount by over \$8.5 million. *See* Kentucky Request for Payment of Administrative Expense Claim, May 14, 2021, Docket No. 3361, at <https://cases.primeclerk.com/blackjewel/Home-DocketInfo>.

¹⁹ The March 2018 GAO Report on Coal Mine Reclamation reported that two of the most common reasons that SMCRA bond amounts were insufficient to cover the costs of reclamation were that (1) "the operator mined in a manner inconsistent with the approved mining plan: and (2) "mining activity resulted in water pollution that was not considered when the amount of financial assurance was calculated." GAO-18-305, *Coal Mine Reclamation: Federal and State Agencies Face Challenges in Managing Billions in Financial Assurances*, Mar. 2018, at 13. Available at <https://www.gao.gov/assets/gao-18-305.pdf>. The GAO recommended that Congress amend SMCRA to eliminate self-bonding. *Id.* at 27.

Kentucky's pool bonding system in 2018: "the establishment of a bond pool, particularly in a declining coal market, brings inherent risks to participating permittees and to Kentucky. As the number of bond pool members and the amount of coal produced in Kentucky declines, the production fees placed on coal being produced will need to rise correspondingly to maintain a financially sound and stable bond pool. By exercising its discretion to establish this bond pool, Kentucky is accepting these risks." Kentucky Regulatory Program, 83 FR 3948, 3955 (Jan. 29, 2018).

OSMRE should address these structural bonding deficiencies by immediately reinstating the agency's August 15, 2016 Policy Advisory: Self-Bonding, <https://www.osmre.gov/resources/bonds/DirPolicyAdvisory-SelfBond.pdf>. OSMRE should also reassess all approved alternate bond programs and consider coal market forecasts in determining whether current pool bond systems are adequate and whether any proposed alternative bonding approach should be approved.

5. Ensure that all reclamation performed by SMCRA regulatory authorities is consistent with the approved reclamation plan and meets all SMCRA performance standards

Bond forfeitures, especially where they occur in mass and where bond amounts are insufficient to fully fund reclamation, put a significant strain on already overtaxed resources of the regulatory authority. In Kentucky, in a recent meeting of the commission overseeing Kentucky's bond pool fund, the Kentucky Reclamation Guaranty Fund Commission, Commissioners discussed the looming costs of reclaiming the forfeited Blackjewel permits. We were very concerned to hear Kentucky's state regulators talking openly during the meeting about the possibility of relaxing reclamation standards in response to the insufficiency of bond amounts on those permits.²⁰ On March 23, 2021, we sent a letter to the Kentucky regulatory authority regarding our concerns and the state's legal duty to ensure that reclamation is performed according to the approved permit reclamation plan. (*See* Attachment 4.)

Mines that are not reclaimed according to the approved reclamation plan and SMCRA's performance standards pose a continuing threat to coalfield citizens. In particular, failure to reclaim all highwalls and ensure proper drainage and pond removal can cause landslides and lead to serious accidental injury or death long after the mine site has been abandoned. Failure to require ongoing water treatment can leave communities with polluted streams in perpetuity. SMCRA requires reclamation according to the reclamation plan that was approved when the permit was issued in all instances. *See* 30 U.S.C. §1258. That standard cannot be relaxed simply because the bond is insufficient to pay for all that is required.

During the bond forfeiture process, OSMRE must use its oversight authority to ensure that the sureties or the regulatory authorities reclaim quickly and that all reclamation complies with the approved permit reclamation plan and SMCRA's performance standards and that ongoing water treatment is performed for as long as is necessary.

²⁰ Kentucky estimates that the cost of reclaiming the 33 Blackjewel permits that have already been forfeited will exceed those permits' bond amounts by over \$28 million. *See* Kentucky Request for Payment of Administrative Expense Claim, May 14, 2021, Docket No. 3361, at <https://cases.primeclerk.com/blackjewel/Home-DocketInfo>.

6. Ensure that bonding sureties are able to meet their obligations if numerous bonds are called in succession

Sureties that continue to bond thermal coal take on significant risks. This is particularly true for smaller less-financed and less-diversified sureties, like Indemnity National Insurance Company, that issue significant numbers of bonds for thermal coal companies in multiple states. While the surety's liability is capped at the amount of bond provided, when a company like Blackjewel forfeits multiple permits simultaneously or in close succession, many bonds may be called at once.²¹ There is a significant risk that the surety itself may become insolvent and unable to cover the bond amounts already committed. That, of course, would mean that the regulatory authority would be required to fund reclamation costs without that committed bond money.²²

There is no current mechanism by which a surety's potential aggregate liabilities across a single company and across the industry are considered in determining whether to accept performance bonds from that company. OSMRE needs to conduct a "stress test" analysis for all coal surety providers to ensure that each of those entities would be able to honor their bonds if large numbers of permits are forfeited. OSMRE and SMCRA regulatory authorities should not accept bonds from sureties that are not well-diversified and have significant aggregate thermal coal liabilities.

7. Participate in all coal bankruptcies to ensure that SMCRA's environmental obligations are upheld

The bankruptcy process is ill-equipped to deal with environmental compliance and reclamation obligations, especially where those obligations are likely to arise or come due after the bankruptcy is over. Bankruptcy reform is needed to address those, and other, deficiencies in the process. But, in the meantime, OSMRE should actively engage in all coal bankruptcies to oppose all attempts to sidestep SMCRA's enforcement processes and weaken reclamation plan standards and reclamation plan permit obligations.

8. Use SMCRA's permitting processes to address all potential effects of production declines

²¹ Currently, we are concerned about the solvency of Indemnity National Insurance Company ("INIC"), which has provided over \$100 million in surety bonds to Blackjewel. West Virginia's Department of Environmental Protection is also concerned about INIC's solvency. In court filings in the ERP Environmental Fund special receivership proceedings, WV DEP noted that INIC had provided \$115 million in reclamation bonding to ERP. WV DEP expressed concern that action by the state to forfeit those bonds would carry the risk of "potentially bankrupting [ERP's] principal surety and administratively and financially overwhelming the Special Reclamation Fund [the state's bond pool]." Audit Division of the Joint Committee on Government and Finance, West Virginia Office of the Legislative Auditor. *WV Department of Environmental Protection Division of Mining & Reclamation – Special Reclamation Funds Report*. June 7, 2021, at 16-17, available at http://www.wvlegislature.gov/legisdocs/reports/agency/PA/PA_2021_722.pdf.

²² The West Virginia audit echoes our concerns. The audit found that "a lack of limitations on amounts permitted to be underwritten by single insurers for mining reclamation surety bonds increases the risk of insolvency" of the state's bonding program. The audit specifically found that just five sureties hold 90.7% of the state's SMCRA bonds, and that Indemnity National Insurance Company holds 66.9% of SMCRA bonds in the state. *Id.* at 3.

Just as bonding adequacy needs to be addressed to consider production declines, the SMCRA permit's mine and reclamation plans also need to be reconsidered to ensure that they remain feasible in the event the market requires the slowing or cessation of coal production. Such reconsideration should occur during every permit review. It is particularly important that such reconsideration occur during the permit transfer process. Reclamation plans, especially backfilling and regrading, can depend on spoil generated by additional mining on a permit, or even on a nearby permit. If that mining is no longer likely to occur because the resulting coal has no buyer, the company must adjust reclamation plans for areas that have already been mined.

9. Ensure that long-term water treatment obligations fulfilled for as long as is necessary

Finally, long-term water pollution impacts are significant concerns throughout the coalfields. Because of particulars in geology or mining practices, pollution can discharge from mine sites for years, sometimes perpetually. SMCRA's permitting standards should prevent any mining that would cause such long-term pollution, but those standards have not been properly enforced, leaving numerous long-term water pollution sites across the country. SMCRA's traditional bonding is not set up to deal with the ongoing cost of water treatment.

It needs to be made clear that in some instances, coal mine reclamation will require funding long-term or perpetual water treatment. OSMRE can provide that clarity by issuing a directive asserting that the duty to reclaim includes the responsibility for all long-term water treatment, and that the regulatory authority cannot terminate its jurisdiction over any mine site until all required water treatment has ceased.

In addition, as soon as long-term water issues are discovered, the permittee must be required to provide additional financial assurance to cover those ongoing costs. That assurance should be in the form of a trust or annuity that will provide an income stream sufficient to fund water treatment for as long as is necessary.

In conclusion, thank you for the opportunity to provide testimony on these critical environmental justice issues. It is encouraging to know that this subcommittee is investigating this issue and seeks to ensure that OSMRE fulfills its duty to "protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. §1202(a). I realize that the task before the agency will be challenging as it deals with the unprecedented and rapid decline in the coal industry. But, despite the challenges, OSMRE must ensure that the harms that are resulting from the industry's decline are addressed immediately and coalfield citizens are not left with the burdens of unreclaimed or poorly reclaimed land and polluted waters. Thank you for taking my recommendations into consideration.

A handwritten signature in black ink that reads "Mary Varson Cronin". The signature is written in a cursive, flowing style.

The Coal Mine Abandonment and Reclamation Crisis

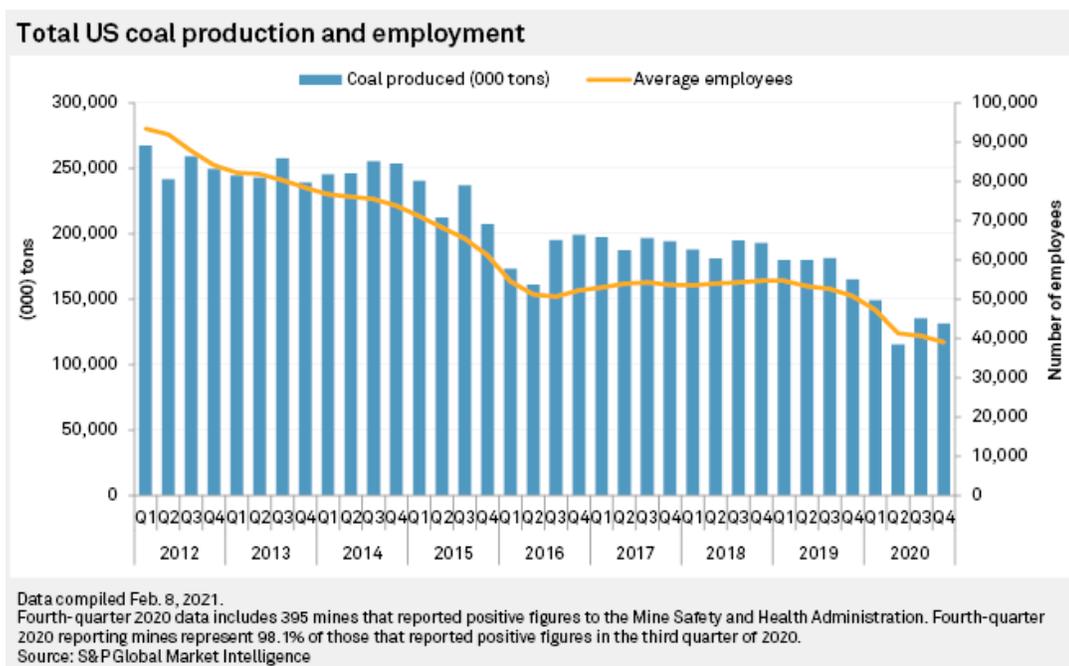
Peter Morgan - Senior Attorney, Sierra Club

The US coal mining industry is experiencing a dramatic decline from its peak in 2008.

- US Coal Production peaked in 2008 at 1,171.8 million tons.¹ 2019 production was 706 million tons, the lowest since 1978.² Coal production has continued to decline, and projections for 2020 suggest production may have been as low as 532 million tons.³ These trends were solidly in place pre-pandemic.
- The drop in production applies across the board, but is more acute in some states than others. Tennessee produced zero tons of coal in each of the last three quarters of 2020.

Job losses in the coal industry are closely tracking the declines in production.

- US coal industry jobs & production declined by 25.2% and 34% respectively between 2016 and 2020, despite the pro-coal policies of former President Trump.⁴



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¹ https://www.eia.gov/totalenergy/data/annual/pdf/sec7_7.pdf

² <https://www.eia.gov/todayinenergy/detail.php?id=44536>

³ Open Source Coal: <https://tinyurl.com/m27p7js4>

⁴

<https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/with-us-coal-jobs-decimated-groups-look-to-biden-to-aid-regional-transition-62622324>

⁵

<https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/with-us-coal-jobs-decimated-groups-look-to-biden-to-aid-regional-transition-62622324>

The decline in the coal mining industry is permanent.

- 30% of coal deliveries from US mines are going to plants slated for retirement by 2030.⁶
- Coal plants that are not slated for early closures are running less, contributing to significant - and irreversible - declines in coal production.⁷
- The second largest US coal mine by production—Arch Coal’s Black Thunder mine in Wyoming—is planning to close as the plants that purchase the majority of its coal plan to shut down.⁸
 - Arch CEO Steven Leer suggested in 2009 that Powder River Basin market demand, which was at about 450 million tons, could rise by 300 million tons. Instead, in 2020, PRB production was down 220 million tons as just 230 million tons were produced.

SMCRA is not meeting its primary purpose of ensuring that there will always be funds available to reclaim mines abandoned by mining companies, even in bankruptcy.

- Congress passed the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1201, et seq., in 1977 to address the problem of abandoned coal mines.
- SMCRA requires mine operators to post bonds that can be used by regulators to pay for mine reclamation in the event the company goes out of business.
- SMCRA also requires mines to conduct “contemporaneous reclamation” in order to minimize the area of land disturbed and unreclaimed at any given time.
- SMCRA also addressed the problem of already-abandoned mines by creating the Abandoned Mine Lands (AML) Fund. That fund is only available to reclaim mines abandoned before 1977.

SMCRA was never properly implemented, and is particularly ill-suited to address problems related to the sector-wide decline of the mining industry.

- Even when the mining industry was thriving, regulators failed to set bond amounts at levels adequate to cover the full costs of reclamation.
- Regulators also authorized alternative forms of bonding, like self-bonding and pool ponding, that only work when the risk of a company going out of business is very low.

⁶

https://platform.mi.spglobal.com/web/client?#news/article?id=62838631&KeyProductLinkType=14&utm_campaign=top_news_2&utm_medium=top_news&utm_source=news_home

⁷ <https://www.eia.gov/todayinenergy/detail.php?id=47196>

⁸

<https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/arch-resources-winding-down-massive-us-coal-mine-as-customer-base-dwindles-62788531>

- Regulators have also failed to enforce the contemporaneous reclamation requirement, and have allowed companies to let mines sit idle and unreclaimed, in some cases for decades.
- The enforcement mechanisms SMCRA relies upon—prohibitions against selling coal or obtaining new permits—are now meaningless to many companies that do not want new permits and have no buyers for coal, making enforcement of reclamation standards even more difficult for state and federal agencies. The presumptive “right of renewal” further limits the ability of regulators to employ these checks against existing permits.

We are now starting to see the leading edge of a coming wave of mine operator bankruptcies and abandonments that will overwhelm the reclamation bonding system.

- There have been more than 60 mine operator bankruptcies since 2012.⁹
- Blackjewel, LLC, recently abandoned 33 permits in Kentucky, and an additional 171 permits in KY, VA, TN, and WV have been placed in legal limbo for the next six months while Blackjewel attempts to finalize transfers to new buyers. Any permits that don’t transfer will be abandoned. Many of these are mines that Blackjewel itself acquired out of prior bankruptcies.
- Whereas earlier bankruptcies—like those of Alpha, Arch and Peabody—did not involve any direct mine abandonments, this next wave of bankruptcies is likely to result in significant numbers of abandonments because there are no longer any buyers for these mines.
- The reclamation obligations likely to be passed on to regulators exceed the value of the reclamation bonds and the Kentucky “Reclamation Guaranty Fund” bond pool.
 - The Kentucky mine regulator has assessed reclamation costs on approximately 20% of Blackjewel’s permits, and found that the required reclamation costs for just those 20% assessed would likely exceed the bonded amounts by approximately \$38,000,000 due to current on-the-ground conditions.¹⁰
- Even surety bonds are not a guarantee that the money for reclamation will be there, as many surety bond providers have been allowed to issue bonds that in aggregate dwarf the available cash on hand.
 - Aware of this, West Virginia regulators have attempted to place one mine operator, ERP, into a “special receivership” as a way to avoid the company liquidating in bankruptcy. The regulators cited the risk of pushing the

⁹ <https://umwa.org/wp-content/uploads/2021/04/UMWA-Preserving-Coal-Country-2021.pdf>

¹⁰ <https://cases.primeclerk.com/blackjewel/Home-DownloadPDF?id1=MTMxNjM2Ng==&id2=0> , at 3.

surety bond provider into its own bankruptcy as one reason for this approach.

- Many more mine operators have debt payments and other financial obligations that they will not be able to satisfy given the lack of a market for their product, and this will lead to more and more mine operator bankruptcies.

Abandoned unreclaimed coal mines pose a threat to surrounding communities that have already borne the heavy burden of pollution associated with active coal mines.

- Abandoned coal mines pose immediate hazards such as exposed highwalls; threaten surrounding communities with destructive landslides; and generate ongoing harm from perpetual sources of stream pollution. Exposed areas of mines left unreclaimed also create dust and air pollution that travels to neighboring homes. Additionally, the longer a mine is left unreclaimed, the harder it is to re-establish vegetation and restore the landscape to pre-mining conditions, in some cases preventing the mine site from being used in an economically productive way after mining.
- Coal mining can produce significant water pollution. Even after mining is complete, mines can serve as ongoing sources of pollution for streams and groundwater aquifers for decades. Treating this pollution to levels that are safe for people and ecosystems can impose a significant ongoing cost. Effective reclamation must also focus on ways to mitigate pollution sources and restore impacted aquifers.

Coal mine reclamation can be a source of employment for communities in transition.

- President Biden’s Executive Order on Tackling the Climate Crisis recognizes that “reclaiming abandoned mine land can create well-paying union jobs . . . while restoring natural assets, [and] revitalizing recreation economies.”¹¹
- While that statement appears to refer to reclamation of mines abandoned pre-1977, it holds true for existing mines.
 - For instance, the Decker mine in Montana laid off all of its workforce upon bankruptcy, but once the mine established a funded reclamation trust – with the backing and pushing of the Department of the Interior and the

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<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/> at Sec. 217.

UMWA – a portion of the workforce will be re-hired to carry out reclamation work.¹²

- However, if that reclamation money does not exist, like in the case of many of the Blackjewel mines, there is no funding to hire back workers.
- And in the case of Peabody’s Kayenta mine on Navajo and Hopi land, regulators have not required timely reclamation, forcing layoffs that could have been prevented had reclamation begun immediately upon mine closure.¹³
- Employment opportunities apply to three categories of mines: AML sites abandoned pre-1977, where reclamation can be covered through the AML Fund; current permitted mines where operators can be compelled to conduct additional reclamation; and newly abandoned mines where bonds will cover some, but not all, of the costs of reclamation. In other words, it takes a combination of funding and regulatory accountability to ensure reclamation jobs at coal mines.

The coal mining industry will never have more resources than it does right now, and it should be a priority for regulators to ensure those resources are used to satisfy companies’ reclamation obligations.

- The federal Office of Surface Mining, Reclamation and Enforcement and state mine regulators should prioritize compelling existing mine operators to conduct more reclamation right now by enforcing the contemporaneous reclamation requirement.
- For mines that are slated to close, regulators must ensure that mines have reclamation and closure plans that guarantee all reclamation work will be completed by the time of closure. Like in the case of the Decker Mine, if a mine is no longer selling coal and making a profit, the company must secure other sources of funding to ensure reclamation occurs.

The full extent of the crisis is unknown.

- Across the country, there are hundreds of mines that have not produced any coal for years and that have significant reclamation liabilities related to earlier mining. These are the mines with the greatest risk of being abandoned. It is critical that the government understand how many of these mines there are, and what costs will be passed on to the public when the mines are abandoned.

¹²

<https://news.bloomberglaw.com/employee-benefits/lighthouse-resources-restructuring-reclamation-plan-approved>

¹³ <https://www.nhnews.com/news/2020/nov/03/reclamation-kayenta-mine-could-create-hundreds-job/>

**IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

In re:) Chapter 11
)
 Blackjewel, L.L.C., *et al.*,) Case No. 19-bk-30289
)
 Debtors.¹) (Jointly Administered)

DECLARATION OF TRACY NEECE

I, Tracy Neece, state and affirm as follows:

1. I currently live at 4190 Rt. 979, Harold, KY 41635.
2. I am a current member of the Kentuckians For The Commonwealth.
3. I own property located on Little Mud in Printer, Kentucky.
4. I rent three residences on the property on Little Mud. The addresses for those rental properties are 2457 Little Mud, 2559 Little Mud, and 2407 Little Mud.
5. Those three rental properties are located on the same tract of land.
6. I have owned that property for seven years.
7. That property has been in my family for many years. My Great Grandpa bought the property in 1939.
8. The property extends from the base of the mountain, where the three rental units are, up to the ridgetop.
9. Years ago, I leased the upper part of that tract of land to James River Coal for its mining operation. The lease covers the portion of the land from the Elkhorn #1 coal seam to the ridgetop.
10. I was told that when James River Coal declared bankruptcy, it paid Revelation \$1 million to accept the mine site and do reclamation on the land.
11. The land is currently permitted to Revelation Energy, LLC as permit number 836-0437.
12. Since Revelation Energy took over the permit, they have not done anything to reclaim the land. My property is torn all to pieces, it looks like a bomb went off.
13. There is a highwall across the property that is at least 30 to 40 feet high. It extends more than a quarter of a mile. It has been six years or more since the highwall was created.
14. The silt ponds on the mine site are stopped up and water is not running in its natural course. Instead, the water is just coming down the mountain, cutting its own

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: Blackjewel, L.L.C. (0823); Blackjewel Holdings L.L.C. (4745); Revelation Energy Holdings, LLC (8795); Revelation Management Corporation (8908); Revelation Energy, LLC (4605); Dominion Coal Corporation (2957); Harold Keene Coal Co. LLC (6749); Vansant Coal Corporation (2785); Lone Mountain Processing, LLC (0457); Powell Mountain Energy, LLC (1024); and Cumberland River Coal LLC (2213). The headquarters for each of the Debtors is located at PO Box 1010, Scott Depot, WV 25560.

- path and saturating the hillside.
15. Sediment runs into the streams from the mine site.
 16. I was last on that part of my property during the summer of 2020. I saw that the land had broken below the mining bench where it was stripped. The mountainside below was saturated and sliding. The whole mountain had slipped down a few feet. I believe that the only thing that saved us over the summer is that we haven't gotten a big heavy rain like we have in the past.
 17. In addition, above the mine bench and highwall, the land was clear-cut and left bare. Now it's just a bunch of dirt and rock that is busted and loose and ready to come off the area above the bench. When I was up there, I saw that a rock as big as a two-story house fell from that area and landed on the bench. If the bench hadn't caught it, it likely would have killed someone.
 18. I worry for the safety of those living in my rental properties. There are probably eight kids living in those three properties. I'm worried that the mountain will come down and kill someone.
 19. I also worry about someone falling off the of the highwall or accidentally driving an ATV off the highwall and getting hurt or killed.
 20. I just want to make sure that my land gets fixed before someone gets hurt.
 21. I think the best way of making sure that the land gets fixed is for the bond to be forfeited and the state to have responsibility for doing the reclamation.
 22. I am worried that if the permit is left to the Reclamation Trust, that the land will not be fixed. I also worry that if the Reclamation Trust is in charge of the permit, that there won't be any way for me to hold them accountable if something happens on the permit. I don't have confidence that the Reclamation Trust would fix my land before someone gets hurt.
 23. I lose sleep worrying about someone getting hurt. I would sleep better if I knew the state was responsible for reclamation. If the state is responsible, I would at least know who to call and that they would have an obligation to act quickly if I reported that the slide was getting worse and threatening to come down.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct. Executed on this 8th day of December 2020.

/s/ Tracy Neece

Tracy Neece

[Original on file with attorney]

February 11, 2021

Scott de la Vega
Acting Secretary
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

RE: Recommendations for OSMRE's Response to Coal Bankruptcies

Dear Acting Secretary de la Vega:

The Briefing Paper that follows is written on behalf of Alliance for Appalachia, Appalachian Citizens' Law Center, Inc., Appalachian Mountain Advocates, Appalachian Voices, Center for Coalfield Justice, Citizens Coal Council, Environmental Law & Policy Center, Kentuckians For The Commonwealth, Kentucky Resources Council, Powder River Basin Resource Coalition, Sierra Club, Southern Appalachian Mountain Stewards, Statewide Organizing for Community eMpowerment, Tó Nizhóní Aní, West Virginia Rivers Coalition, and Western Organization of Resource Councils and our millions of members across the nation and in coal-impacted communities. Our recommendations are based on a sense of urgency for the current impacts of coal bankruptcies and mine abandonments on coalfield citizens. The coal mining industry is experiencing a permanent, systemic decline that promises to leave coal mining regions with hundreds of newly abandoned unreclaimed mines. Many of us have been working together for several years to identify potential responses to the growing coal bankruptcy and abandonment crisis. In December 2020, we hosted a two-day summit, which included community organizations and impacted people from across the country, to identify the most significant problems arising from the bankruptcies that the Office of Surface Mining Reclamation and Enforcement ("OSMRE") should address, and what OSMRE should do to address them. The Briefing Paper that is included here is the result of that summit.

We believe that this Briefing Paper presents what OSMRE can and should do to help coal-impacted communities respond to this crisis. Most of the actions recommended herein are actions that we believe OSMRE can and should undertake immediately. Other actions, like rulemaking and changes to SMCRA, will take longer. Unfortunately, for the past four years, a lack of strong leadership has translated into a lack of action. But, we have great hope for the future, and we know that together we can restore justice and environmental and economic prosperity in regions impacted by coal mining. We hope that the OSMRE will commit itself to an immediate and sustained response to this crisis as part of its ongoing charge "to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. §1202(a).

Coal Bankruptcy and Mine Abandonment Crisis

As the nation moves away from coal-fired power, the coal industry is experiencing an unprecedented and irreversible collapse. OSMRE must play a critical role in minimizing the impacts of this collapse on communities and workers by ensuring prompt reclamation. In doing so, OSMRE must also ensure fair treatment and economic opportunities for those that helped to power our nation for so long.

OSMRE must not only regulate stringently and hold the coal industry accountable to the law, but also oversee closure and compliance with the Surface Mining Control and Reclamation Act of 1977

(“SMCRA”). We believe that OSMRE’s most critical obligation under SMCRA as the industry declines is to ensure proper land and water reclamation at each mine site. For active mines, that requires enforcement of SMCRA’s contemporaneous reclamation standards and additional oversight of those sites requiring long-term water treatment. For mines sites that have been abandoned, either through bankruptcy or because the permittee has simply stopped mining and reclaiming because of market conditions, the bond forfeiture process must be triggered. During the bond forfeiture process, OSMRE must oversee the regulatory authorities to ensure that the sureties or the regulatory authorities reclaim quickly and that all reclamation meets SMCRA’s performance standards.

OSMRE’s role now, perhaps more than ever, is critical to ensuring that coalfield communities are not left with the burden of unreclaimed or poorly reclaimed mine sites. In doing so, OSMRE can also play a critical role in minimizing the impacts of coal’s decline on these communities by working to ensure fair treatment and economic opportunities during the reclamation process.

It is clear that the current coal bankruptcies are unlike previous bankruptcies. Whereas, previously, coal companies often used the protections of the bankruptcy code merely to restructure their operations and shed debt; coal companies that are now in bankruptcy are, for the most part, dissolving. While the earlier bankruptcies were very harmful to coalfield communities, especially where companies were allowed to offload their employee obligations, this round of bankruptcies is likely to have significant long-term environmental impacts. Without reliable buyers, dissolving coal companies are now more likely to walk away from their permit obligations. For example, Blackjewel LLC, once the Nation’s fourth largest coal company based on tons mined, recently gave notice to the bankruptcy court of its intent to abandon 232 of its SMCRA permits.¹

Unfortunately, SMCRA’s environmental performance bond protections are failing and cannot be relied upon to adequately protect the communities near these newly abandoned mine sites. As an example of the degree to which SMCRA’s bond program is failing, Blackjewel seeks to abandon 187 of its Kentucky SMCRA permits, 145 of which have “sold” but the buyer has yet to complete the SMCRA permit transfer process, and 42 of which did not sell during the course of the bankruptcy. For just the portion of those permits that did not sell, Kentucky’s Energy and Environment Cabinet “estimates that the reclamation obligations on [those permits] exceed the reclamation bonds by over twenty million dollars (\$20,000,000).”²

We believe there are two primary causes for SMCRA’s bond program failure: (1) insufficient bonding and (2) “functionally abandoned permits.” Many of the recommendations herein are designed to address those two problems, which are both front and center in every coal bankruptcy case.

The first is a known problem. In Kentucky, for instance, OSMRE has pushed the state to reform its bonding program. In 2012, OSMRE issued a Part 733 letter to Kentucky regarding multiple deficiencies in Kentucky’s bonding program. Part of Kentucky’s response to OSMRE’s action was to institute a bond pool fund, the Kentucky Reclamation Guaranty Fund. But now the Blackjewel bankruptcy alone threatens to wipe out all or most of that fund. In West Virginia, the state coal mining regulator recently sent a letter to OSMRE informing it of a “significant event” affecting implementation of its state

¹ *Notice of De Minimis Asset Abandonment*. In re Blackjewel LLC, et al., Case No. 19-30289 (Bkrptcy S.D.W.V. 2019) Dkt. No. 2747.

² *Objection of the Commonwealth of Kentucky, Energy and Environment Cabinet to the Debtors’ Notice of De Minimis Asset Abandonment*. In re Blackjewel LLC, et al., Case No. 19-30289 (Bkrptcy SDWV 2019) Dkt. No. 2800.

program, referencing West Virginia’s placement of one of the state’s largest mine operators—ERP Environmental Fund—into a “special receivership.” According to West Virginia, this action was necessary to avoid potentially catastrophic impacts to the state’s Special Reclamation Fund bond pool and to one of the state’s largest surety bond providers. In addition to the insufficiency of bond amounts, it is increasingly clear that alternate bond systems, like pool bonding and self-bonding, are wholly inadequate to meet the challenges posed by the rapid decline of the coal industry.

The second problem, that of functionally abandoned permits, is less well-documented. It has become clear during these recent bankruptcies, and before, that OSMRE and state regulatory authorities have allowed coal companies to cease mining, ostensibly until the coal market improves. Unfortunately, companies are not being required to reclaim when they stop mining. We refer to these as “functionally abandoned permits.” Given the significant current and projected declines in demand for coal, it is unlikely that most of these mines will ever resume production, and the permit holders may lack the financial means to complete reclamation. Functionally abandoned permits become more expensive and difficult to reclaim over time, further exacerbating the insufficiency of the permits’ bonds. When regulators finally recognize these mines as having been abandoned, it will only add to the strain on the already-broken bonding system.

We present our recommendations in four groups. First, we describe those measures that OSMRE can and should take immediately to address this crisis. Second, we describe a number of information gathering, analysis, and reporting measures that we believe are necessary to better inform OSMRE’s response to the collapse of the coal industry in the near future. Third, we recommend changes to the Secretary’s regulations under SMCRA. And finally, we ask for OSMRE’s support for recommended statutory changes to SMCRA.

We appreciate your time and attention to these recommendations and we look forward to meeting with you and others in Interior and OSMRE soon to discuss these recommendations further.

Sincerely,

Mary Varson Cromer, Deputy Director
Appalachian Citizens’ Law Center, Inc.

Erin Savage, Senior Program Manager
Appalachian Voices

Angie Rosser, Executive Director
West Virginia Rivers Coalition

Caroline Cox, Associate Attorney
Environmental Law & Policy Center

Marcia Westkott, Chair
Powder River Basin Resource Coalition

Lyndsay Tarus, Engagement Coordinator
Alliance for Appalachia

Derek Teaney, Deputy Director
Appalachian Mountain Advocates

Taysha DeVaughan, President
Southern Appalachian Mountain Stewards

Peter Morgan, Senior Attorney
Sierra Club

Nicole Horseheader, Director
Tó Nizhóní Ání

Cassia Herron, Chairperson
Kentuckians For The Commonwealth

Ann League, Executive Director
Statewide Organizing for Community
eMpowerment (SOCM)

Veronica Coptis, Executive Director
Center for Coalfield Justice

Tom FitzGerald, Director
Kentucky Resources Council

Aimee Erickson, Executive Director
Citizens Coal Council

Bob LeResche, Coal Team Chair
Western Organization of Resource Councils

cc:

Laura Daniel Davis
Principal Deputy Assistant Secretary, Land and Minerals Management
Department of Interior
1849 C Street, N.W.
Washington DC 20240

Glenda Owens
Acting Director
Office of Surface Mining Reclamation and Enforcement
1849 C Street, N.W.
Washington DC 20240

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February 11, 2021

I. Immediate Measures¹

The following is a summary of the fifteen immediate measures we ask that OSMRE take to address the problems caused by functionally abandoned permits and coal bankruptcies. The action items enumerated in the list immediately below are described in more detail in the body of this document:

A. Bonding Reform

1. Immediately reinstate the August 15, 2016 Policy Advisory: Self-Bonding, <https://www.osmre.gov/resources/bonds/DirPolicyAdvisory-SelfBond.pdf>.
2. Immediately require the consideration of coal market forecast in determining whether any proposed alternative bonding approach is sufficient.
3. Require the reconsideration of bond adequacy at midterm review, permit renewal, and permit transfer.
4. In each bond adequacy reconsideration, require a determination of whether the planned mine end date is realistic given coal market conditions.
5. Require the consideration of the potential impacts of unplanned mine closure on the cost of reclamation, including whether sufficient spoil exists for reclamation in the event of premature cessation of coal production activities.
6. Conduct a “stress test” for the largest coal surety providers to ensure that those entities would be able to honor their bonds if large numbers of permits are forfeited.

B. Reclamation Plans and Closure Planning

7. Actively engage in all coal bankruptcies to oppose all attempts to sidestep SMCRA’s enforcement processes and weaken reclamation plan standards and reclamation plan permit obligations.
8. Require full review of reclamation plans at each permit transfer to ensure that the plan remains feasible and sufficient given market conditions.
9. Ensure a more consistent, uniform, reliable, and engaged notice and comment processes at permit issuance, renewal, transfer, and with each significant revision.

¹ The recommendations presented herein can likely be implemented through a series of new and revised Directives, Policy Advisories, and other agency memoranda.

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C. Other Permitting Issues

10. Deem that “significant revision” includes, without limitation, all instances where (1) there is an announcement of mine closure or shutdown, (2) a mine seeks to go into temporary cessation, (3) mine reclamation plans are revised, or (4) the bond forfeiture process is initiated.

11. Require the following additional information at each permit renewal: data that indicate the financial status of the company; any estimates of reduced production or workforce; revised estimate of the life of the mine; disclosures of any outstanding liabilities regarding taxes, royalties, or employee compensation; updated reclamation cost estimates and corresponding replacement bonds; and any other information needed to assess the current status of the mine and its risk of forfeiture.

12. Improve the Applicant Violator System (AVS) database by requiring all SMCRA regulatory authorities to include all of the information in 30 C.F.R. §778.14 to allow the regulatory authority in another state to be able to verify the information contained in a permit application (or transfer or renewal application).

13. Ensure that no release of liability is given to previous owners and controllers of a mine until all taxes and other payments due to government agencies are made.

D. Long-Term Water Treatment

14. Issue a directive regarding all long-term water treatment permits clarifying that the entity responsible for reclamation is also responsible for all long-term water treatment and that the regulatory authority cannot terminate its jurisdiction over any mine site until all required water treatment has ceased.

15. Encourage all SMCRA regulatory authorities to require financial assurances for long-term treatment that provide a dedicated income stream using a trust or annuity, and that the permittee’s obligation to provide such financial assurance takes effect as soon as the presence of a source of long-term water pollution is detected.

A. Bonding Reform

Given the rapid decline of the coal industry, alternative bonding systems and self-bonding, which were previously allowable under 30 U.S.C. §1259(c), can no longer be relied upon to “assure the completion of the reclamation plan if the work had to be performed by the regulatory authority.” 30 U.S.C. §1259(a).

Categorically, self-bonding can no longer be allowed. The past decade of bankruptcies has shown that no coal company has the solvency and stability necessary for self-bonding. We therefore ask that the incoming OSMRE Director immediately reinstate the August 15, 2016 Policy Advisory: Self-Bonding, <https://www.osmre.gov/resources/bonds/DirPolicyAdvisory-SelfBond.pdf>, which directs SMCRA regulatory authorities to generally disallow self-bonding due to the inherent high risk of default posed by all coal companies.

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Additionally, OSMRE can take other immediate steps to ensure bond types and amounts are adequate. One of the issues that has arisen regarding the approvals of alternative bonding systems, such as bond pools, under 30 U.S.C. §1259(c) is the fact that the analysis of the appropriateness of alternative bonding has been backward-looking, looking to past financial history rather than future credit-worthiness. We ask that OSMRE and the SMCRA regulatory authorities consider economic forecasts in determining whether any existing or proposed alternative bonding approach is sufficient.

In many instances, for all forms of bonding, including surety bonding, bond inadequacy may be a problem as soon as a permit is issued and may also become worse over the life of the mine. We ask that OSMRE instruct its staff and the SMCRA regulatory authorities to reconsider bond adequacy at midterm review, permit renewal, and permit transfer. Likewise, we ask that all bond adequacy analyses include consideration of the potential impact of unplanned mine closure prior to completion of the mining plan on the cost of reclamation, including whether there is sufficient spoil available to reclaim given that future coal production may not occur as planned. In all such reanalyses, we ask that the SMCRA regulatory authority pay particular attention to the proposed termination date of the permit to ensure the end date (and therefore the anticipated final reclamation date) is realistic given coal market conditions.

Another aspect of the coal bankruptcy crisis is the potential secondary impact on the surety companies that provide performance bonds under 30 U.S.C. §1259. Frankly, we are very concerned about the possibility that one or more of the sureties that are heavily engaged in the coal market, with total liabilities that far exceed assets, may become insolvent.² Because of these concerns, we ask that OSMRE conduct a “stress test” for the largest surety bond providers to determine whether these providers will be able to pay out bonds for mines that may be abandoned in the near future.

B. Reclamation Plans and Closure Planning

Compliance with each SMCRA permit’s reclamation plan is critical to ensuring that coalfield communities are not burdened by poorly reclaimed mine sites that degrade the quality of the environment, prevent or damage the beneficial uses of land and water resources, and endanger the health and safety of the public. Unfortunately, we have seen that these reclamation plans are given little credence during the bankruptcy process.

To address this issue, we ask that OSMRE and all SMCRA regulatory authorities actively engage as parties in coal bankruptcies to oppose all attempts to weaken reclamation plan standards and reclamation plan permit obligations. This includes opposing the creation of new

² In court filings in the ERP Environmental Fund special receivership proceedings, West Virginia regulators noted that a single surety bond provider—Indemnity National Insurance Company—had provided \$115 million in reclamation bonding to ERP. West Virginia regulators expressed concern that action by the state to forfeit those bonds would carry the risk of “potentially bankrupting [ERP’s] principal surety and administratively and financially overwhelming the Special Reclamation Fund [the state’s bond pool].” Indemnity has also provided over \$100 million in surety bonds to bankrupt Blackjewel.

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approaches (such as reclamation trusts or special receiverships) intended to duplicate or replace SMCRA’s established bond forfeiture procedures. Reclamation plans, including water restoration obligations, long-term monitoring, and cultural artifact and burial site protection, must be upheld and enforced both during and after bankruptcy. Any changes to reclamation plans necessitated because mining ceased prematurely must be vetted through public notice and comment processes. Further, because many bankruptcy practitioners and courts are unfamiliar with these issues, we ask that OSMRE explore ways to partner with continuing legal education providers to educate bankruptcy judges and counsel on the protections and obligations of SMCRA.

Further, with regard to SMCRA permit transfers, whether they occur as part of the bankruptcy process or not, we ask that reclamation plans be reviewed for feasibility and sufficiency during any permit transfer and updated as necessary. If the permitted reclamation plan must be changed, the adequacy of the bond amount should be reanalyzed with the considerations set forth above.

C. Other Issues Related to Permitting

For each mine site, OSMRE and the SMCRA regulatory authorities have the opportunity to strengthen SMCRA’s protections against the possibility of future abandonment with inadequate reclamation at permit issuance, renewal, transfer, and with each “significant revision.” At each juncture, public participation is critical. Coal bankruptcies and the decline that precedes them trigger many changes to the planned course of mining and reclamation, these changes should be made more transparent, and the public should be given the opportunity to participate. We ask that OSMRE work with the SMCRA regulatory authorities to ensure more consistent, uniform, reliable, and engaged notice and comment processes, including the use of electronic notice and comment portals and listservs, so that the impacted public knows of the changes that are being proposed and has a meaningful opportunity to participate in the SMCRA regulatory authority’s decision making.

In addition, with regard to “significant revisions,” we ask that the Secretary’s “significant revision” regulation apply to all SMCRA regulatory authorities to require public notice and comment whenever the following occurs: (1) there is an announcement of mine closure or shutdown, (2) a mine seeks to go into temporary cessation, (3) mine reclamation plans are revised, or (4) the bond forfeiture process is initiated.

At each permit renewal, we ask that OSMRE and the SMCRA regulatory authorities require the following “additional revised or updated information” pursuant to 30 C.F.R. §774.15(c)(1)(vi): (1) data that indicate the financial status of the company; (2) any estimates of reduced production or workforce; (3) revised estimate of the life of the mine; (4) disclosures of any outstanding liabilities regarding taxes, royalties, or employee compensation; (5) updated reclamation cost estimates and corresponding replacement bonds; and (6) any other information needed to assess the current status of the mine and its risk of forfeiture.

Furthermore, we ask that OSMRE improve the Applicant Violator System (AVS) database by requiring all SMCRA regulatory authorities to include all of the information in 30 C.F.R.

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§778.14 to allow the regulatory authority in another state to be able to verify the information contained in a permit application (or transfer or renewal application). This is especially important for violations that have been appealed, but have not yet been abated or corrected to the satisfaction of the regulatory authority, as decisions made on permits with that status of violation are provisional only.

Finally, after a permit transfer is complete, we ask that OSMRE and the SMCRA regulatory authorities refrain from giving full release of liability to any previous owners and controllers of a mine until all taxes and other payments due to government agencies have been made. This is especially important for mines with delinquent federal or state royalties, abandoned mine land, or black lung excise tax payments. SMCRA regulatory authorities must work diligently to maintain liabilities for all actors in the chain of custody to ensure accountability and hold previous owners responsible, preventing them from offloading these responsibilities to a company that may not have the financial means to pay them.

D. Long-Term Water Treatment

Under no circumstances should coalfield communities be burdened with long-term or perpetual water pollution after mining ceases. Under SMCRA, no mines should be permitted that would produce long-term pollution discharges. Long-term pollution discharges represent a failure to properly identify and isolate acid and toxic-producing material, and remediation action to control and eliminate such discharges should be evaluated prior to any approval of long-term treatment. Unfortunately, many long-term pollution discharges are already occurring on permit sites.

For any new mining permit, toxic-producing discharges must be avoided. If avoidance is not possible, the permit cannot issue. But for those permits with existing discharges requiring long-term treatment, we ask that OSMRE issue a directive to all SMCRA regulatory authorities that makes absolutely clear that the entity responsible for reclamation is also responsible for all long-term water treatment, whether that entity is the permittee, the surety, or the SMCRA regulatory authority. Further, we ask that OSMRE make clear that the regulatory authority cannot terminate its jurisdiction over a site until water treatment is no longer necessary. And that long-term treatment is required so long as is necessary to ensure that all water sources (point sources, seeps, and groundwater) leaving a permitted area do not cause material damage, which means at a minimum both effluent limits and water quality standards are being consistently met.

Further, we ask that OSMRE encourage SMCRA regulatory authorities to require financial assurances for long-term treatment that provide a dedicated income stream using a trust or annuity, and that the permittee’s obligation to provide such financial assurance takes effect as soon as the presence of a source of long-term water pollution is detected.

II. Data Gathering, Analysis, and Reporting

During this time of rapid and significant decline in coal mining, what is required to protect society and the environment from the impacts of surface coal mining is shifting. In order to understand what actions are required at this time, OSMRE must develop an accurate and up-to-

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date assessment of the status of coal mining and reclamation across the country. Because the changes impacting the coal mining industry right now are unprecedented, existing data gathering and reporting requirements are not capturing critical aspects of the problem such as the number of mines that have been “functionally abandoned,” in that they have stopped producing coal and are not conducting reclamation. OSMRE has both the authority and duty under 30 U.S.C. §1211(c) to develop, maintain, analyze, and report on all aspects of coal’s decline and how it is impacting coalfield communities. OSMRE also has a duty to analyze how it can use its authorities to address mine closure and reclamation needs as job creation strategies that are part of a larger plan to address our nation’s rapidly changing energy landscape. This information will be critical in determining actions OSMRE must take, and in identifying weaknesses in SMCRA that Congress should address.

We ask that OSMRE report the status of all SMCRA regulatory authorities’ potential reclamation liabilities, including both land reclamation and long-term water treatment costs, that will result from coal mine abandonments and bond forfeitures. To facilitate this analysis, we ask that OSMRE require the SMCRA regulatory authorities to report data in a uniform manner such that trends and impacts can be assessed nationwide. Such reports should compare the bond amount and type for each permit with a current land reclamation and water treatment liability estimate. OSMRE should then review, compile, and publish a report on the status of land reclamation and water treatment liabilities and bond coverage for all SMCRA programs.

To better understand how to address the problem of functionally abandoned permits, we ask that OSMRE report the status of all mines that have ceased coal production but for which reclamation is not complete, with the goal of creating a national inventory of sites that may be abandoned with outstanding reclamation obligations.

To facilitate these reports, we further ask that OSMRE work with the SMCRA regulatory authorities to develop a uniform data management system for each SMCRA permit (or permit increment where applicable) that includes the following information: date of last coal removal; number of acres disturbed; number of acres regraded; number of acres revegetated; amount of current bonds; dates during which permit has been in temporary cessation or deferment status; whether during that status, the mine has produced coal, conducted reclamation activities, or undergone a permit transfer; whether the permit requires long-term water treatment; the number of citizen complaints received regarding the permit (including any previous permit numbers for the site); the number of non-compliances issued; and the number of non-compliances issued specifically for water quality or effluent limit violations and off-site damage.

We also ask that OSMRE initiate a review of mine and reclamation plan end dates. This review will help OSMRE assess how realistic reclamation plans are given the phaseout and retirement of coal-fired power plants. The review should separate metallurgical and steam coal. For steam coal, OSMRE should specifically identify any permit with a reclamation plan that extends past 2030, as amendments to shorten the reclamation plan may be needed given coal plant retirements and the downturn in coal markets.

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III. Rulemaking

In addition to the items listed above that we believe should be undertaken quickly, we ask OSMRE to promulgate several new rules or rule revisions that are needed to respond to this bankruptcy and coal mine abandonment crisis. Specifically, we ask for the following:

1. Undertake new rulemaking defining criteria for approval of alternative bonding systems pursuant to 30 U.S.C. §1259(c) that requires the consideration of economic forecasting in determining whether alternative systems are capable of “assur[ing] the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture....” 30 U.S.C. §1259(a).
2. To address the problem of permits with significant reclamation delays, which makes problems worse when these mines enter bankruptcy or go into temporary cessation, we ask that OSMRE reinstate the time and distance standards for backfilling and regrading found at 30 C.F.R. §816.101.
3. Undertake new rulemaking to close the “transfer, assignment, and sale” loophole that has allowed companies to avoid permit transfer applications when acquiring permits. In the bankruptcy context, we have seen abuses of the transfer process that have allowed permittees to sidestep the permit transfer process entirely and the 30 C.F.R. §774.17 notice and comment provisions that accompany transfer. This has occurred where a permittee’s parent company has been sold during the course of bankruptcy, but the subsidiary entity, which is the permittee, has remained the same.³ To resolve this disconnect between the change in permittee ownership and the permit transfer process, OSMRE should close the loophole by restoring the previous definition of transfer, assignment, or sale of permit rights at 30 C.F.R. § 701.5 to include all upstream owners and controllers, not just the permittee. In that way, the transfer, assignment, or sale of a mine without a permittee change would still trigger the notice and comment requirements. *See* 72 Fed. Reg. 68008 (2007).
4. Undertake new rulemaking to remove the loophole in 30 C.F.R. §773.14 that allows a company to get a provisional permit if they have appealed an outstanding violation.⁴
5. To better position OSMRE to take an active role in coalfield communities’ plans for transitioning away from coal, undertake rulemaking or support statutory change, if necessary, to require detailed closure plans for mines that ensure transparency regarding timing of mine closure and company resources available to fund closure. The new regulations could require mine closure plans at the time of permit transfer, if a permit has been in cessation or idled for more than six months, if a permit has obtained three or more amendments to delay reclamation work, if a mine drops 25% or more in production on an annual basis, or some other criteria that exemplifies risk of closure. Mine closure plans should include:
 - a. The anticipated timing of closure and conditions leading to closure;

³ For instance, when the Eagle Butte and Belle Ayr Mines in Wyoming were sold during the Blackjewel bankruptcy proceedings, the permits were still held by Contura Coal West. To avoid a permit transfer proceeding, the new owner, Eagle Specialty Materials acquired Contura Coal West as a subsidiary to keep the permits in their name.

⁴ *See also* 65 FR 79581 (Dec. 19, 2000).

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- b. Cost of uncompleted reclamation work and identification of company assets and/or income that is available to complete that work separate and apart from the permit’s performance bonding;
- c. Estimated worker numbers, a plan for hiring, and an economic impact analysis of the closure and reclamation work to better understand the direct and indirect benefits of cleanup;
- d. Evidence that adequate wage bonds have been filed with states (where required);
- e. Requirements for public notification of executive compensation during the pre- and post-closure periods;
- f. Plans for the disposition of mine lands and anticipated post-mine land use (especially if any changes are anticipated from the company's reclamation plan); and
- g. Other elements that are common to retirement plans for facilities such as power plants.

IV. Support Amendments to SMCRA

Finally, we ask that OSMRE support the following SMCRA amendments:

- 1. Reauthorization of the current Abandoned Mine Reclamation Fee.
- 2. An amendment that redefines “permit applicant” in 30 U.S.C. §1291(16) to mean “the legal entity that applies for issuance of a permit under this statute and each other legal entity that owns or controls an applying entity,” and likewise amends the third sentence of 30 U.S.C. §1260(c) to read: “Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant or by any entity that owns or controls the applicant is currently in violation....”
- 3. An amendment reducing the percentage of bonding released at Phase I to create more incentive for companies to continue reclamation to obtain Phase II and Phase III bond releases.
- 4. An amendment doing away with the “right of successive renewal” for SMCRA permits or modifying that right such that the permittee has the burden to demonstrate that renewal should be granted.
- 5. An amendment to eliminate self-bonding and modify requirements for approval of any alternative bonding mechanisms to ensure that such bonding mechanisms are only allowable to the extent that it can be demonstrated that they present no greater financial risk to the SMCRA regulatory authority than traditional, full-cost bonding.



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April 8, 2021

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VIA EMAIL

Dear Secretary Goodman,

We write in the hopes of clarifying the reclamation obligations that apply to bond forfeiture sites, including sites where a surety has assumed reclamation responsibility, and initiating a dialogue regarding concerns related to the Blackjewel bankruptcy and statements made at the March 23 Kentucky Reclamation Guaranty Fund meeting.

Courtney Skaggs stated during the KRGF meeting that for the 33 Blackjewel permits revoked by the Cabinet, Indemnity National Insurance Corporation (“Indemnity”) has expressed interest in performing reclamation in lieu of bond forfeiture at 21 of the permits, and that the Cabinet will forfeit the bonds for the remaining permits and assume reclamation responsibility. For the permits that Indemnity reclaims, it is our understanding that it will do so under the terms of Surety Reclamation Agreements that are negotiated between the Cabinet and Indemnity. Additional statements were made indicating that it would be the Cabinet’s preference for Indemnity to assume reclamation obligations at additional sites among the 33 permits, and that the Cabinet is looking into ways to encourage Indemnity to do so, including negotiating the applicable reclamation requirements.

Our concerns relate to statements that seem to indicate that the Cabinet believes it has the authority to authorize reclamation at any of these sites, whether performed by Indemnity or by the Cabinet, that would apply a reclamation standard lower than what is required in the approved reclamation plan for each permit. Deviation from the approved plan is not authorized by the federal SMCRA or by Kentucky’s approved program, both of which expressly require reclamation at bond forfeiture sites, or by sureties in lieu of bond forfeiture, to be adequate to complete the reclamation plan.

With regard to reclamation to be performed by the surety in lieu of bond forfeiture, Kentucky’s regulations provide as follows:



The cabinet shall withhold forfeiture and allow the surety or other financial institution providing bond **to complete the reclamation plan** if the surety or other financial institution can demonstrate the ability to complete the reclamation plan, including achievement of the capability to support the postmining land use approved by the cabinet, and will undertake to do so within a reasonable time frame and agrees to a compliance schedule.

405 KAR 10:050 Sec. 1(3) (emphasis added). The corresponding federal regulation likewise provides that the regulatory authority may allow a surety to complete reclamation “if the surety can demonstrate an ability to complete the reclamation **in accordance with the approved reclamation plan.**” 30 C.F.R. §800.50(a)(2)(ii) (emphasis added). Under these regulations, any reclamation performed by Indemnity must conform to the permit’s approved reclamation plan.

Likewise, for those mines for which the Cabinet will forfeit the bond and assume responsibility for reclamation, that reclamation too must be adequate to complete the approved reclamation plan.

In the Preamble to its bonding regulations, OSMRE noted that “[t]he intent of the bonding provision is to insure performance of the reclamation plan.” *Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations*, 48 FR 32932, 32938 (July 19, 1983). As such, OSMRE’s regulations require that in all instances, bond amounts must be “sufficient to assure the complete of the reclamation plan if the work has to be performed by the regulatory authority in the event of forfeiture.” 30 C.F.R. §800.14(b). The regulations direct that in the event of forfeiture the state regulatory authority shall “use funds collected from bond forfeiture **to complete the reclamation plan**, or portion thereof, on the permit area or increment, to which bond coverage applies.” 30 C.F.R. §800.50(b)(2) (emphasis added).

In conformity with those regulations, when OSMRE conditionally approved the KRGF, it noted that “KRGFC will establish the financial needs of the KRGF to ensure the solvency of the fund and assure sufficient money is available to complete the reclamation plan for any areas covered by the KRGF.” 83 Fed. Reg. 3948, 3953 (2018).

Accordingly, the Cabinet lacks authority to authorize reclamation, either by a surety or by the Cabinet itself, that falls short of completing the approved reclamation plan. Should the Cabinet adopt an approach that violates this obligation, it will have modified its OSMRE-approved program in a manner that brings it out of conformity with the minimum requirements of SMCRA.

We hope that the Cabinet will clarify its comments regarding the reclamation standards applicable to the revoked Blackjewel permits and other bond forfeiture sites. If the Cabinet



believes that we have misinterpreted the applicable provisions of the Kentucky or federal SMCRA programs, we request that the Cabinet identify any authorities that support its alternative interpretation.

Sincerely,
/s/ Mary Cromer

and

/s/ Peter Morgan

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