

# The Problem of Unabated Violations on Kentucky's Coal Mine Sites

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# About the Authors

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Amethyst joined ACLC's staff in September 2023 after serving as a summer legal intern in 2022. Amethyst grew up in Eastern Kentucky. She graduated summa cum laude from Morehead State University in 2016. She then attended law school at the University of Alabama School of Law, where she found her passion for environmental justice. Amethyst came home to Appalachia after law school, working with ACLC from September 2023 to May 2024. Amethyst is now the Staff Attorney for Kentucky Heartwood in Berea, Kentucky.

*Cover photo: Permit No. 898-0807 in Pike County, Kentucky. This permit is held by Cambrian Coal, LLC. At the time of this analysis, that permit had 10 outstanding violations for failure to contemporaneously reclaim, improper disposal of excess spoil, failure to properly maintain diversions and sediment control structures, and failure to report water monitoring.*

*Photo Credit: Appalachian Voices, December 2023.*

# Introduction

For some time, ACLC has been aware of particular problem coal mining permits for which the Kentucky Energy and Environment Cabinet's ("Cabinet") enforcement efforts have failed to effect a timely abatement of environmental violations, and the Cabinet has not taken action to revoke the permit and forfeit the bond.

The revocation and forfeiture processes are the final step in the scheme of ratcheting enforcement under Kentucky's Surface Mining Control and Reclamation Act (SMCRA). If a permittee fails to remediate its violation in the time allowed, the Cabinet is required to enter a process of ratcheting enforcement to ensure that the violation is abated. If the violation is not abated, the permit may be revoked and the bond forfeited. That final step in ratcheting enforcement is designed to ensure that the mine is taken over by an entity that will resolve the violations and reclaim the permit. During the bond forfeiture process, the surety that issued the bond is given the opportunity to reclaim provided certain conditions are met. If the surety does not reclaim, the Cabinet becomes responsible for ensuring that reclamation is conducted according to the approved reclamation plan.

For this project, we analyzed the enforcement processes for a set of outstanding SMCRA violations that had not proceeded to permit revocation or bond forfeiture. We began with a February 26, 2024 report of outstanding violations provided by the Cabinet under Kentucky's Open Records Act. A violation is considered outstanding if it has not been abated, terminated, vacated, or has not been otherwise resolved through a final disposition through the Cabinet's Office of Administrative Hearings. We removed from the list outstanding violations on any permits for which the Cabinet had issued an "administrative determination of bond forfeiture." We also removed outstanding violations connected to revoked permits. We then analyzed the characteristics of the remaining outstanding violations and present our analysis here.

## What the Law Requires

### 90 Days to Abate the Violation

At any given point, one would expect a certain number of violations to be outstanding because of the time it takes for the permittee to fix the problem. KRS 350.130 requires that when any of the requirements of the Kentucky SMCRA

program are not being met, the Cabinet must issue a notice of noncompliance and “set forth in its notice a reasonable time period but not more than ninety (90) days for abatement of the violation.” By regulation, the Cabinet allows the permittee to request an extension of the time to abate a violation, but only where the permittee can show that the extension is not needed because of its lack of diligence or intentional delay, and unusual circumstances exist that give rise to the need for additional time to abate the violation. (See Figure 1.)

## **What is Supposed to Happen When a Violation Is Not Abated Within the Time Period Allowed?**

If the permittee fails to abate the violation in the time allowed, there are two separate but parallel processes that must occur: (1) The Cabinet must issue a failure to abate cessation order, and (2) it must conduct a pattern of violations review.

**FTACO:** The failure to abate cessation order (FTACO) is an “order for immediate compliance and cessation of any mining activities or operations which are contributing to the violation.” The FTACO must prescribe a deadline for abatement of the violations cited “in the most expeditious manner possible.” Penalties assessed under cessation orders are higher than penalties for violations of notices of non-compliance.

If the violation is not abated by the FTACO deadline and the permittee has not otherwise reached an agreement with the Cabinet regarding abatement, the Cabinet must initiate the permit revocation and bond forfeiture processes or “initiate administrative hearings for other appropriate relief.”

**POV:** The Cabinet must also conduct a pattern of violations (POV) review, during which the Cabinet must identify permits on which more than one violation has occurred during a twelve-month period. The Cabinet must review those violations to determine if they are willful or demonstrate an unwarranted failure to comply with Kentucky’s SMCRA requirements. If the Cabinet determines that a pattern of violations exist that demonstrates an unwarranted failure to comply, it must issue an order to the permittee to “show cause” as to why the permit should not be suspended<sup>1</sup> or revoked. The show cause order initiates proceedings for the suspension or revocation of the permit.

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<sup>1</sup> A permit suspension requires cessation of all operations on the permit for the period of suspension, but unlike permit revocation, it does not require that the mine be reclaimed. Revocation, on the other hand, is permanent. When a permit is revoked, it must be reclaimed either by the surety or by the Cabinet.

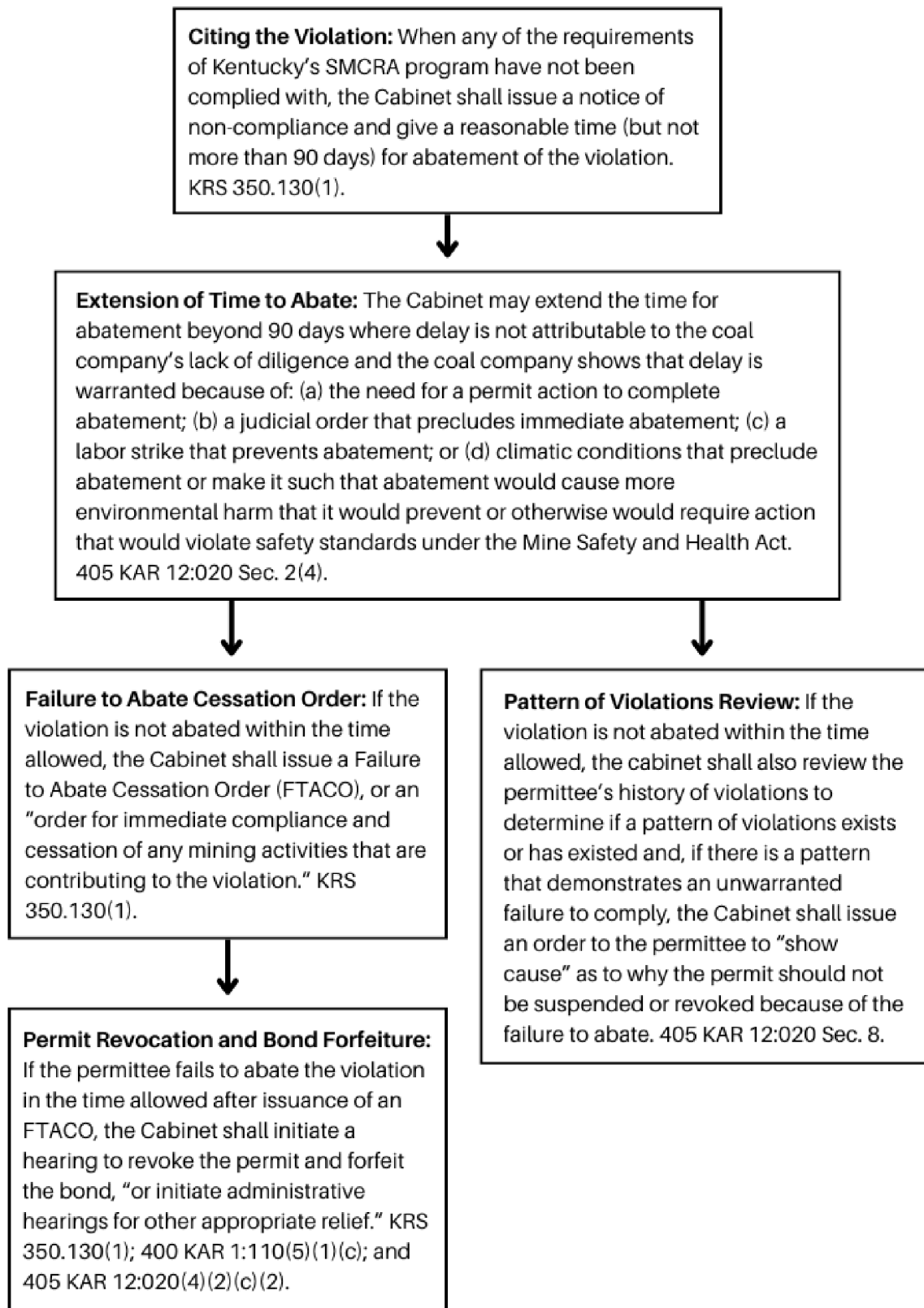


Figure 1: Diagram of Kentucky's violation enforcement process

In addition, if the Cabinet finds a “pattern of willful violations of this chapter of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of” Kentucky’s SMCRA program, the Cabinet must impose the “administrative death penalty,” under which the permittee and its operators and controllers are no longer eligible for coal permits in the state.

**Revocation and forfeiture:** The final step in ratcheting enforcement is permit revocation and bond forfeiture. A permit may be revoked by the Cabinet if the permittee does not comply with the FTACO within the prescribed period or if the permittee fails to show cause why the permit should not be revoked during the pattern of violations process.

When a permit is revoked, the Cabinet must also initiate bond forfeiture and allow the surety an opportunity to reclaim the mine to obtain bond release. If the Cabinet and the surety do not reach an agreement whereby the surety will conduct the reclamation, the Cabinet must forfeit the bond, and the Cabinet is then responsible for reclaiming the site.

**Bonding and the KRGF:** If a permittee does not abate its violations, either the Cabinet or the bonding company must take over the permit, remediate the violations, and reclaim the land. Proper remediation and reclamation depend on having funding sufficient to reclaim. Such funding is typically guaranteed by the performance bonds that are issued during the permitting process to cover the cost of reclamation . However, on the whole, many bonds on Kentucky’s mines are known to be insufficient.

In 2013, to address the problem of known and documented insufficiencies in bond amounts for Kentucky mine permits, Kentucky created the Kentucky Reclamation Guaranty Fund (KRGF). KRGF is a backstop fund that the state can draw upon to complete reclamation when a permit is revoked but there is not enough bond money to reclaim and the surety has elected not to conduct the reclamation. Most, but not all, Kentucky mines are covered by the KRGF. KRGF is funded by quarterly fees on permits in the state.

**Due Process:** Permittees have due process rights to challenge each of the determinations in the enforcement process before the Cabinet’s Office of Administrative Hearings. Specifically, the permittee can separately challenge the fact of the violation or legal basis for the violation cited in the notice of noncompliance and order for remedial measures, the cessation order, and the proposed penalty assessment. 400 KAR 1:110 Section 6, Section 7. The proceedings

following these challenges often go on for extensive periods before they result in a final order. However, except in extraordinary circumstances where the administrative court enjoins the Cabinet's enforcement, these challenges do not pause enforcement. A hearing officer may only grant "temporary relief" from the Cabinet's enforcement where it is found that there is a substantial likelihood that the permittee will prevail in its claim that the violation was wrongly cited and that granting temporary relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. 400 KAR 1:110 Section 11(6).

Others with an interest that is or may be affected by the outcome of the administrative proceedings have a due process right to intervene. 400 KAR 1:090 Section 14. Intervenors may object to a permittee's petition for temporary relief and can impact the hearing officer's determination on the petition. 400 KAR 1:110 Section 11(5). Moreover, an intervenor's due process rights may ultimately affect the remediation required, typically through a settlement process. Similar to a permittee's challenge, intervention does not pause enforcement measures.

Once the Cabinet secretary issues a final order, parties may seek judicial review of the order. Still, judicial review does not act as a stay of the final order unless specifically ordered by the reviewing court. 400 KAR 1:110 Section 14. The rules governing temporary relief from conditions of the secretary's final order pending a final determination of the reviewing court mirror those for a party seeking temporary relief from enforcement actions in an administrative hearing challenging a cabinet issuance of notice of noncompliance and order for remedial measures, cessation order, and proposed penalty. KRS 350.032(2).

While the due process rights of the permittee and intervenors may result in lengthy administrative proceedings, absent extraordinary circumstances, they do not, as a legal matter, justify the lack of timely remediation explored in this report.

# Our Analysis

Our analysis focuses only on the violations that were outstanding as of February 26, 2024 that had not been revoked, were not being reclaimed by a surety, and for which the Cabinet had not made an administrative determination of bond forfeiture. We also excluded from our analysis all violations that had been outstanding for less than 90 days, except in limited circumstances where the Cabinet had issued a cessation order (CO) within the 90-day period and the due date for the CO had passed.<sup>2</sup> Of the violations on the February 26, 2024 outstanding noncompliance list, **590** fit that criteria.

## How Long Has Remediation Been Stalled?

As discussed above, Kentucky law requires that the Cabinet give the permittee a “reasonable time period” for abatement “but not more than ninety days.” KRS 350.130(1). Despite that, our analysis found that of the 590 outstanding violations, **over half had been outstanding for more than one year** (Table 1). Over 20% had been outstanding for more than three years.

Table 1. How long have the violations been outstanding?

Years in Noncompliance	Number of Permits	Number of Permittees	Number of Violations
<1	101	36	291
>1	111	49	299
>2	76	34	181
>3	61	27	131
>4	50	25	93
>5	20	14	34
>10	3	3	5

<sup>2</sup> There are 12 violations that were less than 90 days old but where the due date for the cessation order had passed.



## To What Extent Is the Cabinet Granting Extensions of Time to Correct Violations?

The Cabinet’s regulations do allow for extensions of time to correct violations in extraordinary circumstances. However, when we looked at the duration between the original issuance of the notice of noncompliance and the deadline for remediation of the noncompliance, we found that **the Cabinet has allowed more than 90 days to correct the violation in many instances** (for 32% of the 590 violations we examined). In some instances, the Cabinet had given the permittee more than three years to come into compliance (Table 2).

Table 2. Duration of time between the issuance of a notice of noncompliance and the noncompliance due date

<b>Duration of time granted for compliance</b>	<b>Number of violations</b>
> 90 days	188
> 1 year	98
> 3 years	20

## Is Ratcheting Enforcement Working?

We wanted to determine whether the ratcheting enforcement processes that are designed to spur remediation are being used effectively. We found that the Cabinet had followed through with enforcement by issuing a cessation order in most instances. However, it appears that the agency has not been using the pattern of violations process to initiate the permit revocation process.

**FTACO:** Of the 590 outstanding violations, cessation orders had been issued for 458 (78% of violations). However, the due date for remediation under the cessation orders had passed.<sup>3</sup> In 147 instances, remediation under the cessation order was more than 1 year past due, but there was no indication that the Cabinet had initiated the permit revocation and bond forfeiture processes.

<sup>3</sup> In the data that the Cabinet provided on February 28, 2024, not all cessation orders were listed with due dates. However, the failure to abate cessation order must be an “order for cessation and immediate compliance.” 405 KAR 5:085 Sec.4(1)(a). The cessation orders that were listed without due dates were all more than 90 days old, so we presume that the due dates had passed for all of those.

So while the Cabinet is issuing FTACOs in most instances, for this group of violations, those orders have not brought about “immediate compliance” as intended. Further, for a large percentage (32%) of those “orders for cessation and immediate compliance,” more than a year has passed and the permit is still held by the same permittee and the violation is still outstanding. FTACOs require that the permittee cease all mining activities on the permit until the violations are abated. Where the permittee is not producing coal, the order of cessation is ineffective. However, the increased penalties that may ultimately be levied by the Cabinet for the failure to comply with the FTACOs should have some deterrent effect.

**Pattern of Violations:** With regard to the pattern of violations reviews that the Cabinet must conduct, there are two steps to the process. First, the Cabinet must track violations to determine whether a pattern of violations exists according to the regulations. We were unable to determine whether the Cabinet has been conducting these reviews. When we asked for a copy of the document on which the Cabinet “tracks violations for permits that may be subject to pattern of violations actions,” we were told that the document was “exempt from disclosure pursuant to KRS 61.878(1)(i),” which is the exception to Kentucky’s Open Records Act that allows agencies to withhold preliminary documents.

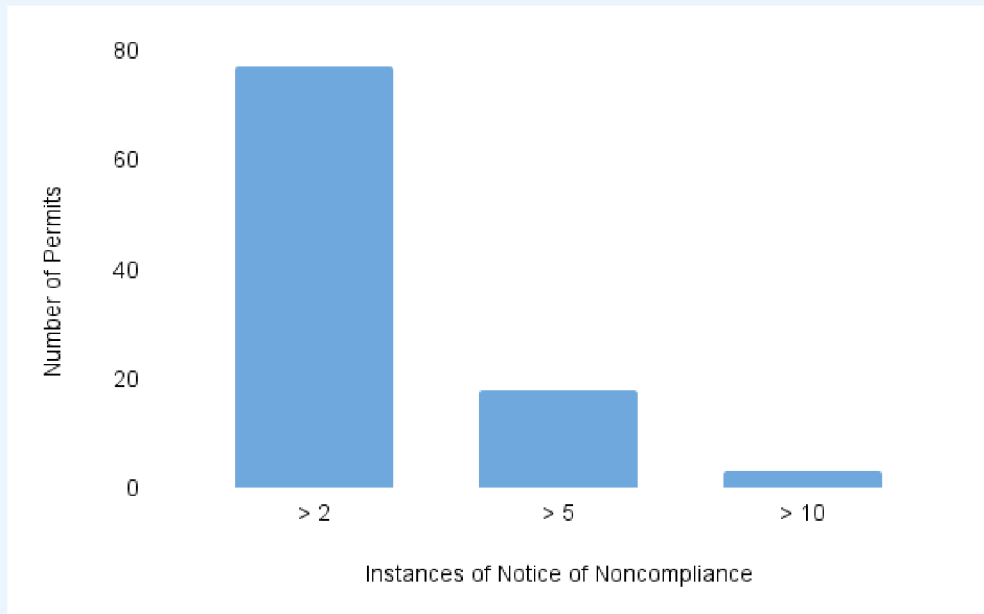
While we were unable to determine the degree to which the Cabinet is reviewing these outstanding violations, we did learn that as of the date of our analysis the Cabinet had not issued any show cause orders related to these 590 outstanding violations. In fact, through our Open Records requests, we learned that as of February 1, 2024, the most recent show cause order issued by the Cabinet was on March 23, 2020.

We cannot know for certain why the Cabinet has not used the show cause process to initiate permit revocation, which would ensure that the violations are corrected and the mine is reclaimed. We did not conduct a pattern of violations analysis to determine the number of outstanding violations that would be considered a pattern under the Cabinet’s regulations. However, we did find that of the 172 permits in our list, 77 permits had two or more outstanding violations from noncompliances issued at different times (Figure 2). The prevalence of permits with multiple outstanding violations suggests that patterns of violations have likely occurred on some of these permits, yet there have been no show cause orders issued.<sup>4</sup>

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<sup>4</sup> In addition, through our request for show cause orders issued for the 172 permits in the outstanding violations list, we found that one particular permit had, in the past, demonstrated patterns of violations related to excess spoil disposal, contemporaneous reclamation, general hydrologic requirements, and off permit disturbances. A show cause order was issued in 2015 that was based on 57 violations that occurred between June 28, 2004 and October 12, 2014. The permit, 898-0620, which is held by Cambrian Coal LLC, now has 10 outstanding violations, many of which are for the same violations that were part of the earlier show cause process. The permit was not revoked during the earlier process and has continued to violate the same standards.

Figure 2. Of the 172 permits with outstanding violations, the number that have outstanding violations from multiple notices of noncompliances issued on different days.



The Cabinet’s ratcheting enforcement processes are not working. Many of the violations have been outstanding for a significant amount of time, yet the permits have not been revoked. Most violations remain outstanding despite the fact that the Cabinet issued an “Order for Cessation and Immediate Compliance” (an FTACO) that was unheeded.

Perhaps even more troubling is the indication that the Cabinet has not been using its authority to address violations that are part of a pattern. The Cabinet’s failure to issue any show cause orders from at least March 2020 to February 2024 is particularly troubling because that is the process that is designed to allow the Cabinet to identify and revoke problem permits. It also allows the Cabinet to identify permittees that demonstrate an intent not to comply with the requirements of the Kentucky SMCRA program and permanently ban them from any future permits. Our analysis suggests that there are both problem permits and problem permittees for which the show cause process should likely have been initiated but has not.

## Where Are Problems Occurring?

As previously mentioned, these 590 outstanding violations are associated with 172 permits (approximately 14.4% of permits in the state). Those 172 permits are held by 62 permittees (approximately 32.6% of permittees in the state).

To better understand where problems are occurring, we categorized the 590 unabated violations according to mine type and found that the majority of these violations are associated with surface mine permits (Table 3). When we compared the number of mine permits with outstanding violations to the overall number of that particular type of mine permit in the state, we found that surface mines are disproportionately represented among the outstanding violations. While surface mines comprise just over 42% of all permits on Kentucky's current inspectable units list, they comprise 61% of all outstanding violations in our analysis.

Table 3. Types of mines with outstanding violations

Primary Mine Type	Number of mine types in these categories across the state	Number of Violations Outstanding for >90 days	Percent of Violations Outstanding for >90 days
OTHER	125 (10.5%)	21	3.6%
PREP PLANT	136 (11.4%)	95	16.1%
SURFACE	502 (42.1%)	365	61.9%
UNDERGROUND	428 (35.9%)	109	18.5%

We also wanted to better understand the mine status of the permits with outstanding violations (See Table 4). In this analysis, we found that a disproportionate number of mines with outstanding violations have been suspended. **In fact, while suspended mines comprise just over 8% of all mine permits in Kentucky, more than 36% of the outstanding violations are on suspended permits.** Further, of the 47 suspended permits on which these 214 outstanding violations occur, 44 are suspended for failing to pay Kentucky

Reclamation Guaranty Fund (KRGF) fees pursuant to KRS 350.518(9). This suggests that the significant problems that the KRGF is having with permittees not paying KRGF fees is indicative of broader compliance problems on those permits.<sup>5</sup>

We also found a surprisingly high number of outstanding violations were associated with permits in various phases of reclamation and bond release. (See Table 4.) This raises additional concerns because ratcheting enforcement processes may be insufficiently motivating for these permittees given that these permits are no longer producing coal or bearing profits. Up to the point of forfeiture, ratcheting enforcement is designed to work by forcing a mine to stop production until the violation is abated and applying increased penalties for failures to abate. For mines that are not actively producing coal, the order to cease operations has little deterrent effect. The imposition of penalties should still provide a deterrent, but the effectiveness of the Cabinet’s penalty assessment and collection processes are beyond the scope of this report.

Table 4. Status of mines with outstanding violations

<b>Mine Status</b>	<b>Number of mines in this status relative to IU list</b>	<b>Number of Outstanding Violations</b>	<b>Percent of Outstanding Violations</b>
Suspended	97 (8.1%)	214	36.3%
Reclamation Only	208 (17.5%)	151	25.6%
Active Operations	335 (28.1%)	140	23.7%
Phase I Bond Release	212 (17.8%)	53	8.9%
Actively Producing	71 (6%)	25	4.2%
Phase II Bond Release	36 (3%)	5	0.8%
Active Temporary Cessation	96 (8.1%)	1	0.16%
Reclamation Deferment	3 (0.25%)	1	0.16%

<sup>5</sup> As of March 25, 2024, almost half of all Kentucky mine permits, i.e., 593 of 1191 permits, were in arrearage for failure to pay KRGF fees. The KRGF fund is Kentucky’s only backstop against the problem of insufficiently bonded permits that are not properly reclaimed. KRGF is funded primarily through quarterly fees assessed on each permit. The large-scale failure of Kentucky’s permittees to pay the KRGF fees raises additional concerns about the long-term solvency of the fund and the state’s ability to fund reclamation of mine sites after revocation.

We also looked at the permittees to determine whether the problem of outstanding violations is greater among certain permittees. We looked at both the permittees with the most outstanding violations across all permits and the permittees with the most permits with outstanding violations (Figures 3, 4). Many of the same permittees showed up in the top ten for both lists.

To some extent, outstanding violations are expected for mines that are still held by bankrupt entities. In particular, Revelation Energy, LLC, Cambrian Coal, LLC, and Premier Elkhorn Coal, LLC, are entities that sought and received bankruptcy protection from the courts in 2019. The companies are still in the dissolution process, which is handled by the court and the bankruptcy trustee. Those companies no longer maintain their mine permits. Yet those permits have not transferred to any other responsible entity. To some extent, therefore, the problem with unabated violations is part of the larger problem that is occurring as companies dissolve in bankruptcy.

However, most of the companies on these two top ten lists have not sought bankruptcy protection. The failure of the Cabinet to effect remediation of violations by these active companies is another indication that SMCRA's ratcheting enforcement process is not working as designed in Kentucky.

Figure 3. Ten permittees with the most permits under violation

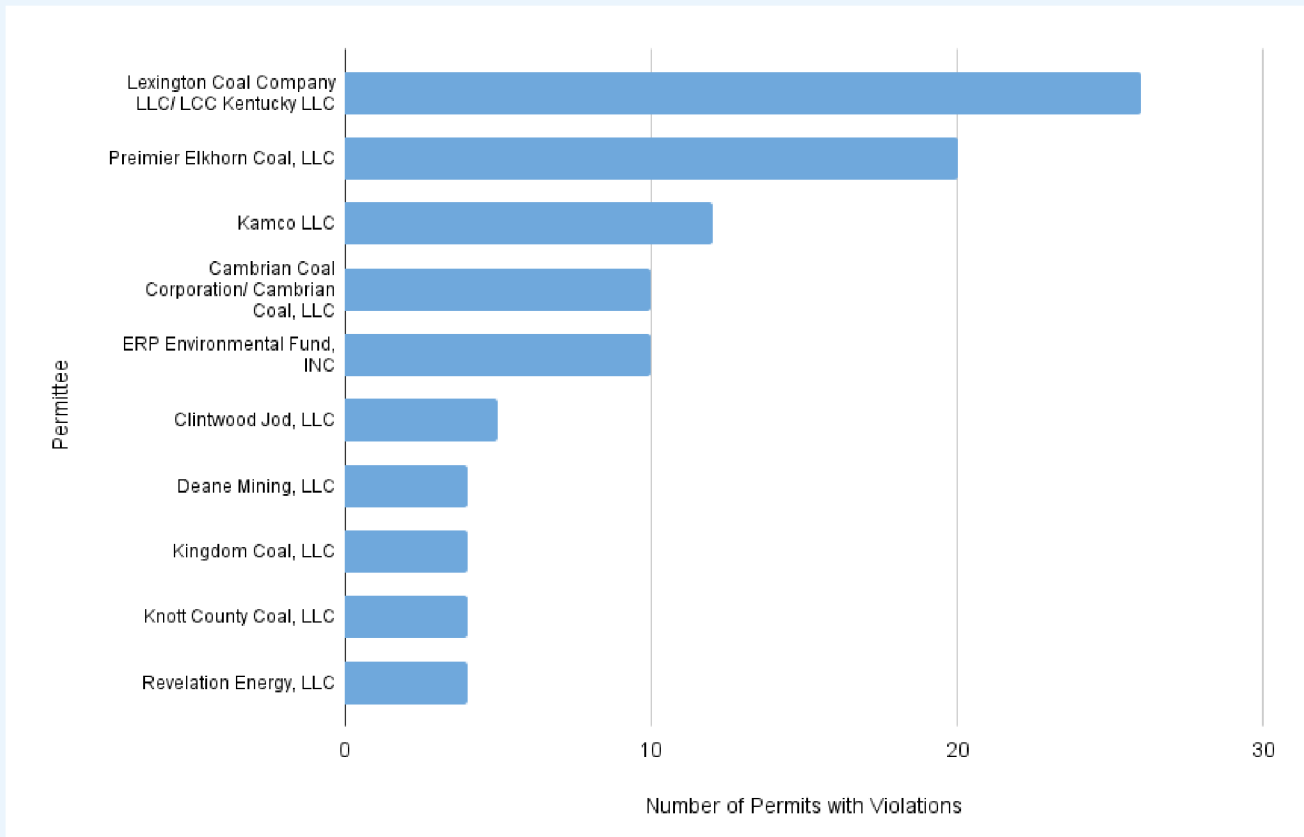
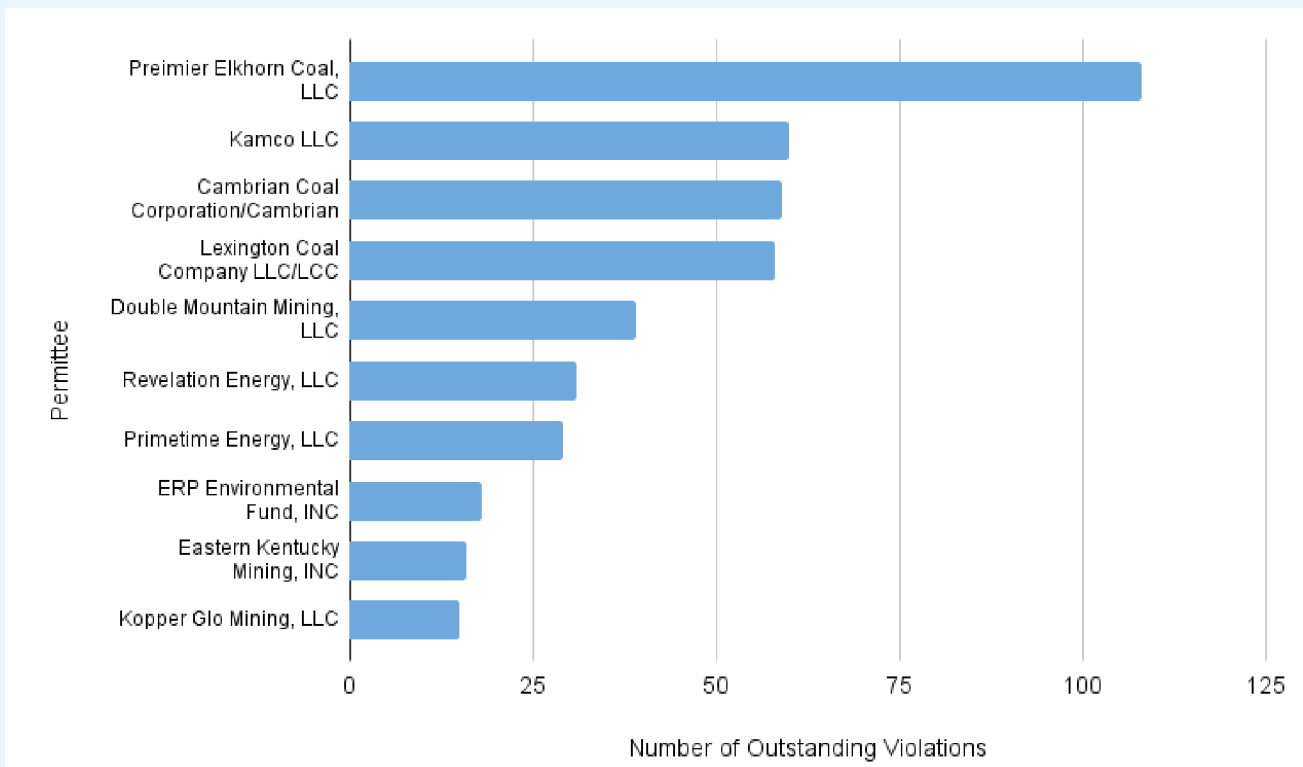


Figure 4. Ten Permittees with the most outstanding violations



## What Kinds of Violations are Most Common Among the Outstanding Violations?

We also examined the types of violations that have been outstanding for more than one year. Table 5 explains the different types of violations that are occurring. In terms of frequency, the failure to contemporaneously reclaim tops the list, along with the failure to properly backfill and grade, which is often a component of contemporaneous reclamation. Problems that indicate a lack of ongoing maintenance of these sites, such as water quality violations and failure to maintain proper sediment control,<sup>6</sup> also remain unabated (Table 6).

Table 5. Types of outstanding violations

<p style="text-align: center;">CR – Contemporaneous Reclamation</p> <p>Reclamation operations on all land that is disturbed by surface mining activities, shall occur as contemporaneously as practicable. 405 KAR 16:020.</p>
<p style="text-align: center;">BG – Backfilling and Grading</p> <p>Except where otherwise approved, all areas disturbed by mining operations shall be returned to their approximate original contour. Backfilling and grading shall proceed as concurrently with mining operations as possible. 405 KAR 16:020; 405 KAR 16:190.</p>
<p style="text-align: center;">WM – Water Monitoring</p> <p>Surface and groundwater monitoring shall be conducted at mining operation sites to demonstrate minimal disturbance to hydrologic balance, applicable effluent limitations and stream standards, and other reclamation and water quality standards. 405 KAR 16:110.</p>
<p style="text-align: center;">SC – Sediment Control</p> <p>Mining operations are to implement sediment control measures, including sedimentation ponds, to prevent, to the extent possible, additional contribution of sediment to stream flow or to run off outside permit area; meet water quality standards and effluent limitations; and minimize erosion. 405 KAR 16:060; 405 KAR 16:090.</p>
<p style="text-align: center;">OD – Disturbance Outside Permit</p> <p>Mining operations shall not impact areas outside the boundaries of the permit. 405 KAR 7:040.</p>
<p style="text-align: center;">IM – Impoundments</p> <p>Permanent and temporary impoundments shall be maintained to reduce erosion, to prevent deepening or enlargement of stream channels, and to minimize disturbance of the hydrologic balance. 405 KAR 16:060.</p>

<sup>6</sup> Failures to contemporaneously reclaim, backfill and grade, and maintain sediment control structures and diversion ditches put communities and downstream waterways at risk. As dirt from unreclaimed mine sites washes down, it clogs diversion ditches and sediment control structures on the mine. If those are not regularly cleaned out, they are quickly overwhelmed by heavy rainfall, causing slides and contributing to flooding in communities below. The failure to maintain those structures also increases sediment in water leaving the mine site, which harms downstream waterways.



#### WQ – Water Quality

Discharges of water from areas disturbed by surface mining activities shall at all times be in compliance with all applicable federal and state water quality standards. 405 KAR 16:070

#### OC – Ownership and Control

Applications for permits must identify and provide required information regarding the business entity applying for the permit; each person who owns or controls the applicant; other surface coal mining operations owned by the applicant or persons owning or controlling the applicant; and owners of property to be mined or owners of surface or subsurface property that is contiguous to any part of the proposed permit area. Additionally, a permittee proposing to change the operator should provide required information for the proposed operator. 405 KAR 8:030 Section 2; 405 KAR 8:010 Section 19(6).

#### AC – Access Roads

Permittees shall design, construct, utilize, and maintain roads and restore the area to meet the requirements laid out in 405 KAR 16:220 and to control or minimize erosion and siltation, air and water pollution, and damage to public or private property. To the extent possible using the best technology currently available, roads shall not cause damage to fish, wildlife and related environmental values and shall not cause additional contributions of suspended solids to stream flow or to run off outside the permit area. 405 KAR 16:220.

#### OT – Other

Permittee's activities have violated other regulations governing surface mining operations. This is the catch all for violations of the general provisions of the regulations or permit requirements that are not otherwise covered by a particular performance standard.

#### DV – Diversion

Mining operations must follow requirements for design and construction of temporary and permanent diversions of overland flow, shallow groundwater flow, ephemeral streams, and intermittent and perennial streams. The design, construction, and maintenance of diversion ditches must insure public health and safety, protect property, be stable, minimize adverse impacts to the hydrologic balance, and prevent additional contributions of suspended solids to stream flow and to run off outside the permit area to the extent possible using the best technology currently available. 405 KAR 16:080.

#### EL – Effluent Limitations - KPDES

Discharges of water from areas disturbed by surface mining activities shall at all times be in compliance with either: 1. if the operation does not have a KPDES permit, the effluent limitations for coal mining established in 40 CFR 434; or 2. the effluent limitations established by the KPDES permit for the operation. 405 KAR 16:070.

### HR – General Hydrologic Requirements

Activities must be planned and conducted to minimize disturbance of the hydrologic balance in the permit area and adjacent areas to prevent material damage to the hydrologic balance outside the permit area; assure the protection or replacement of water rights; and support approved post-mining land uses in accordance with the terms and conditions of the approved permit and applicable performance standards. 405 KAR 16:060.

### DS – Disposal of Excess Spoil

Excess spoil shall be placed in a manner to minimize adverse effects of leachate and surface water run-off from the fill on surface and groundwater; ensure mass stability and prevent mass movement during and after construction; and ensure that final fill is suitable for reclamation and revegetation compatible with natural surroundings and approved post-mining land use. 405 KAR 16:130.

### RV – Revegetation

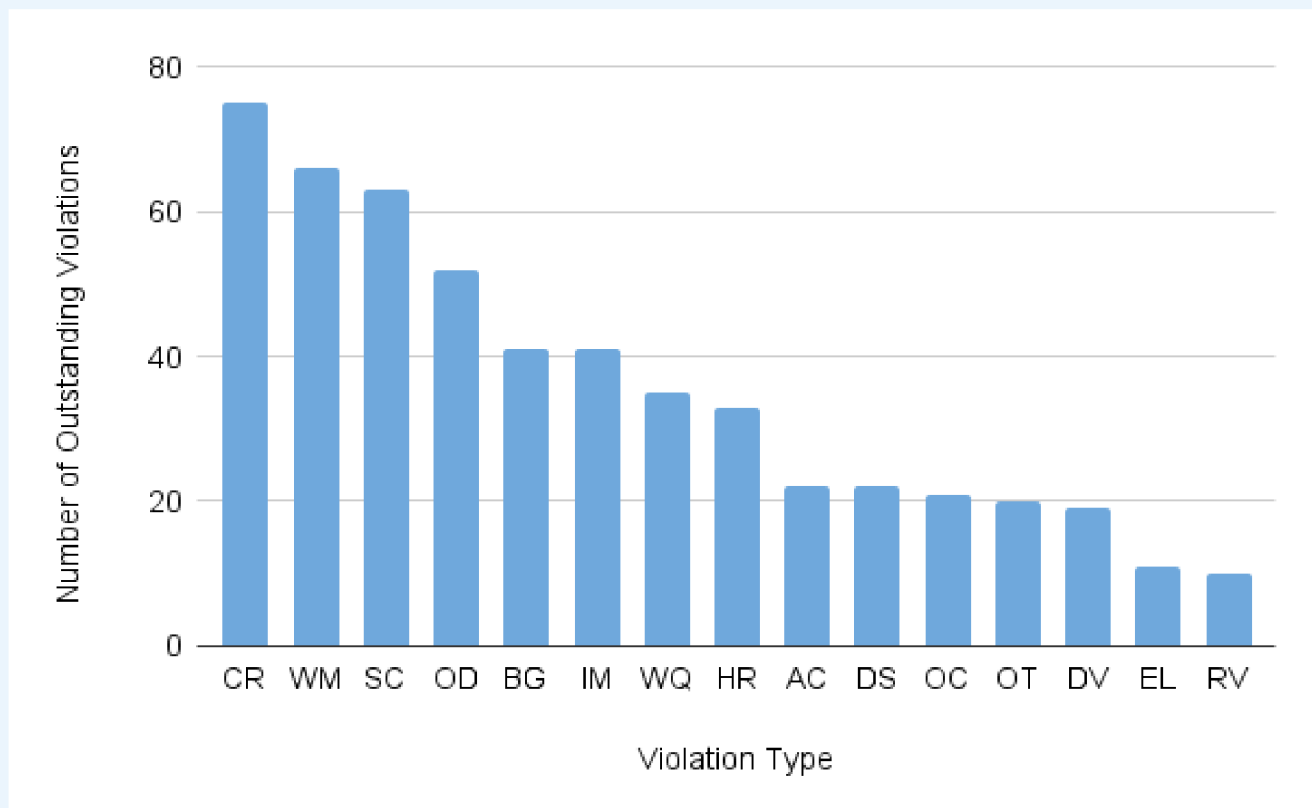
Mining operations must follow requirements for revegetation of areas affected by surface mining activities, including requirements for temporary and permanent vegetative cover, use of introduced species, timing of revegetation, mulching and other soil stabilizing practices, standards for measuring revegetation success, and reporting requirements. 405 KAR 16:200; 405 KAR 16:180.

Table 6. Years in noncompliance by type of violation

<b>Type of Violation</b>	<b>&gt;1</b>	<b>&gt;2</b>	<b>&gt;3</b>	<b>&gt;4</b>	<b>&gt;5</b>
CR	57	35	24	17	7
OD	34	20	10	6	3
SC	32	15	9	6	2
BG	27	16	9	2	0
WQ	23	16	14	13	6
IM	11	8	8	8	2
WM	9	9	9	8	2

Finally, we wanted to better understand the types of violations that are unabated and how they correspond to mine status and mine type. By far the most common outstanding violation is a violation for failure to contemporaneously reclaim (CR) (Figure 5). Other violations that appear to be particularly problematic are water monitoring violations, failure to maintain proper sediment control, and off-permit disturbances.

Figure 5. Types of violations that occur ten or more times among outstanding violations



It is helpful to associate the types of violations that are outstanding with mine types (Table 7). As expected, the unabated contemporaneous reclamation, backfilling and grading, and sediment control violations occur primarily on surface mines, while water monitoring violations are somewhat evenly spread between surface and underground mines.

Table 7. Type of violation by mine type

<b>Surface</b>		<b>Underground</b>		<b>Prep Plant</b>	
CR	53	WM	20	CR	11
BG	32	HR	14	IM	10
SC	45	WQ	13	SC	10
OD	41	CR	10	WM	12
WM	31	OD	9	WQ	8

We also wanted to look at the outstanding violations by mine status (Table 8). As discussed above, outstanding violations are disproportionately problematic on suspended mines. The types of violations that are particularly problematic on suspended mine permits include violations associated with the failure to properly and timely reclaim (i.e., contemporaneous reclamation, backfilling and grading violations, and disposal of excess spoil), as well as violations associated with failures to conduct ongoing maintenance of the site (i.e., water monitoring and sediment control). In addition, suspended sites were more likely to have outstanding water quality impacts as represented by the violations for damage to the hydrologic resources (HR).

Like suspended permits, reclamation-only permits showed significant problems with contemporaneous reclamation, water monitoring, and sediment control. Violations related to impoundments, ownership and control requirements, and failure to properly maintain access roads were also significant problems on reclamation only sites.

Active operations, on the other hand, have more outstanding off-permit disturbance violations. Off-permit disturbances can take longer to remediate both because a permitting action is needed to bring the disturbed area under permit and because the owner of the land where the off-permit impacts are occurring typically must be involved in the remediation process.

Table 8. Type of violation by mine status

<b>Suspended</b>		<b>Reclamation Only</b>		<b>Active Operations</b>	
CR	36	CR	25	OD	23
WM	31	WM	19	SC	18
SC	19	SC	16	CR	12
BG	18	IM	16	BG	11
DS	15	OC	10	OT	10
HR	15	AC	9	AC	9

# Conclusions

## Summary of Findings

- Over half of the notices of noncompliance examined have been outstanding for more than one year. Over 20% have been outstanding for more than three years
- The Cabinet is regularly allowing remediation deadlines that are longer than 90 days even though longer remediation deadlines are supposed to be granted only in extraordinary circumstances. The Cabinet had extended the deadline to abate the violation past 90 days for nearly a third of the outstanding violations. In 20 instances, the Cabinet had allowed remediation deadlines of greater than three years. We were unable to assess the circumstances on which those extensions were allowed.
- In most instances (78% of violations) the cabinet issued an order for cessation and immediate compliance (i.e., an FTACO). But those have failed to effect compliance. In all instances, the deadline for immediate compliance has passed, yet the violation remains outstanding.

- In no instance did the Cabinet initiate the show cause process that could lead to permit suspension or revocation related to any of the violations on this list, despite the fact that there are indications of likely patterns of violations among both the permits and permittees represented.
- The most common outstanding violations are related to reclamation, i.e., the failure to contemporaneously reclaim or backfill and grade.
- Most of these outstanding violations are occurring on surface mines.
- Most of these outstanding violations are occurring on suspended mines.
- However, the primary reason for suspension is not associated with these outstanding violations or a pattern of violations on the permit, but instead is based on the permittee's failure to pay KRGF fees, indicating a link between the companies' failures to pay required quarterly fees and failures to reclaim.
- To some extent, the problem with unabated violations is part of the larger problem that is occurring as companies dissolve in bankruptcy. The inability to transfer the permits of the bankrupt company to viable entities during the bankruptcy process has been a common occurrence in recent coal bankruptcies.
- However, the problem is not confined to bankrupt companies, there are several viable coal companies that have multiple unabated violations and unabated violations across multiple permits.
- Over a third of the outstanding violations are on permits in various phases of reclamation and over a third of these violations are on suspended permits (together accounting for 72% of the outstanding violations). As coal production cannot occur on either of these types of permits, enforcement measures that rely on orders for the cessation of production until the violation is remediated are largely ineffective.

## Takeaways

When a violation is not corrected within the time allowed, increased punitive measures undertaken through ratcheting enforcement are designed to spur recalcitrant companies to fix the problem. If that does not work, the permit must be revoked and the bond forfeited. The time period for these processes should take months, not years. Yet, in our analysis we found that more than half of the 590 outstanding violations had been outstanding for more than one year, and 20%

had been outstanding for more than three years. None of the permits on which those 590 outstanding noncompliances occurred had been revoked. To better understand why these violations had been allowed to remain unremediated for so long, we examined the Cabinet's use of its ratcheting enforcement measures. The Cabinet's ratcheting enforcement processes are not working as intended. We found that the cessation order process has been ineffective, and the Cabinet has completely failed to use the pattern of violations process to weed out and revoke problem permits and ban problem permittees as the law intends. The failure of cessation orders to spur compliance may in part be explained by the fact that the vast majority of the outstanding violations are on mines that cannot produce coal because they are either suspended or are in reclamation only status. For these mines, the threat of an order to cease operations has little deterrent effect. However, the increased penalties that go along with ratcheting enforcement should incentivize compliance, if the company intends to eventually pay its fines, come into compliance, and reclaim the site.

The failure to abate violations in a timely manner not only increases overall pollution and land hazards but also makes reclamation more costly as problems accumulate on mine sites. The majority of outstanding violations relate to failures to contemporaneously reclaim and backfill and grade and the failure to monitor and report water quality. These are the types of violations that can lead to off-site pollution, land stability, and sedimentation issues that can greatly harm nearby communities. Failures to contemporaneously reclaim and backfill and grade are problems that tend to worsen over time; while the failure to monitor water quality can mask significant pollution issues. All of these violations are of the type that can greatly increase the cost of reclamation if they are left unaddressed.

Overall, based on our analysis, there is cause to be concerned about reclamation failure on many permits across Kentucky, because outstanding contemporaneous reclamation and backfilling and grading violations are prominent, many of the suspended permits are not paying KRGF fees, and many of the outstanding violations are on sites that are in various phases of reclamation, perhaps indicating a lack of interest in maintaining and proceeding expediently with reclamation on those sites. The failure of the threat of increased penalties to incentivize compliance, especially in combination with the widespread failure to pay KRGF fees and the resulting permit suspensions, should be viewed as indications of abandonment of the permittee's responsibilities to comply and ultimately reclaim the permit. Revocation should proceed as quickly as possible in all situations where an order for immediate cessation and compliance goes unheeded.

Today, as the economics of the coal industry are in decline, the regulatory structure for remediating violations is not functioning well due to lax regulatory enforcement, lack of incentives (occurring on mine sites that are no longer producing), and lack of coal operator accountability (occurring on mine sites protected by bankruptcy). **The economics of the industry cannot be changed, nor can bankruptcies be prevented. The only leverage available is better enforcement.** It is critical that the Cabinet strictly enforce the law at these sites. The lack of strict enforcement may be based in the Cabinet's knowledge that many of these mines are insufficiently bonded, combined with the lack of funding being contributed to KRGF. Given the perceived or likely shortfall in funding to reclaim permits that are revoked, the Cabinet may be hesitant to force revocation out of concern that it will lack the necessary funding to conduct the reclamation itself. Regardless, the Cabinet must act quickly to revoke permits before problems on these sites worsen.

## Recommendations

- Immediately begin permit revocation and bond forfeiture proceedings on each permit where the order for cessation and immediate compliance was unheeded and the violation remains unabated.
- Ensure that enhanced penalties for failure to comply in a timely manner are assessed in all instances.
- Going forward, ensure that the allowed time for abatement of violations is no more than 90 days absent truly extraordinary circumstances. Climatic conditions cannot be a regular basis for allowing violations to remain unfixed.
- Work with KRGF to immediately refer all suspended permits for revocation proceedings.
- Immediately conduct a pattern of violations review on all permits and permittees with outstanding violations and issue show cause orders for all patterns found.
- Re-assess the cost of reclamation for all permits with outstanding violations and increase the required bond amounts where necessary.