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SUBCOMMITTEE ON NATURAL RESOURCES AND MINING RESOURCES
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Thank you, Chairman Stauber, Ranking Member Ocasio-Cortez, and distinguished Members of the Subcommittee, for the opportunity to testify today. I'll be testifying concerning two of today's bills: The Community Reclamation Partnerships Act, and the Mining Schools Act of 2023.

I am a Professor of Law at The George Washington University Law School. I also serve as Vice Provost for Faculty Affairs for the University, and am a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. I am a professor and scholar of administrative law, energy law, and environmental law. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I regularly speak on topics related to my expertise. Among my areas of research is the legal history of SMCRA and the work of the community organizations that led its passage, especially in Appalachia where I grew up. Early in my career, I practiced as a civil and environmental engineer; that experience and training particularly inform my assessment of legal frameworks involving scientific or technical complexity.

I will begin with the Community Reclamation Partnerships Act, which brings to volunteer community organizations much-needed relief from legal uncertainty so that they can confidently engage in some of the most important cleanup work for our waterways. Second, the Mining Schools Act of 2023 is an important investment in higher education and should ensure robust attention to education and research in the full life cycle of mining—from protective practices for workers and the environment during mining operations to the time those operations cease. Overall, both these bills offer avenues for strengtheng environmental protections in very practical, meaningful ways.

I. The Legacy of Abandoned Coal Mines

As you know, Title IV of the Surface Mining Control and Reclamation Act of 1977 established the Abandoned Mines Reclamations program for coal mines abandoned prior to August 3, 1977.[1] The program demonstrates Congress's concern with the environmental hazards of abandoned mines as well as the detrimental economic impact such hazards bring to communities. With tens of thousands of abandoned coal mines across the United States—many of which are categorized as high-priority for cleanup given the threats they pose—this program is vitally important to communities and the environments they are a part of. The risks posed by

[1] 30 U.S.C. §§ 1231-40a, 1242-44.

abandoned mines are multi-faceted, but I will focus today on the impacts of acid mine drainage (AMD) to communities and waterways.

The Environmental Protection Agency (EPA) has estimated that over 5,000 miles of streams are impacted by AMD.[2] Appalachian states, with their long legacies of coal mining, are especially impacted—but impacted streams exist throughout the nation. AMD is water that has flowed through abandoned coal mines, picking up toxic metals and becoming highly acidic along the way. The story of the Cheat River in West Virginia provides a concrete example. Plagued by AMD from both abandoned and active coal mines, as early as the 1970s, whitewater paddlers reported bright orange rocks and experienced nosebleeds, stinging eyes, and other health impairments after spending time on the Cheat.[3] Then in 1994, polluted water from an illegally-sealed underground coal mine burst through a hillside into Muddy Creek—a Cheat tributary. The resulting fish kills and dramatically lowered pH of the Cheat, worsened by another 1995 blowout, led American Rivers to name the Cheat one of the nation's ten most endangered rivers. Today, the Cheat once again hosts a healthy fish population, and I can tell you from personal experience that it is a delight to swim in.

What happened in between? A lot of very dedicated people in the affected communities came together and formed Friends of the Cheat River. They used all the legal tools they had to access funding for cleanup. They developed a task force linking local, state, and federal agencies to academics, industry, and local businesses. Out of these relationships came opportunities to research the most effective ways to restore the river, and ultimately, that research supported a novel instream permit from EPA that allows direct treatment of the stream in addition to traditional treatment plants for discharges into the stream.

Friends of the Cheat is an example of the kind of organization that would qualify as a Community Reclaimer under the Community Reclamation Partnerships Act—a voluntary organization that did not cause the pollution they aspire to remediate. And importantly, the bill would remove a key area of uncertainty for these community organizations. This uncertainty relates to the interplay between SMCRA and the Clean Water Act (CWA). First, it is important to recognize that SMCRA defines lands and water eligible for cleanup under the Abandoned Mines program: They must be associated specifically with coal mining (whether underground or surface); and there must be "no continuing reclamation responsibility under State or other Federal laws."[4] Second, cleaning up acid mine drainage (AMD) was clearly one of Congress's

[2] J.M. Williamson et al., *Valuing Acid Mine Drainage Remediation of Impaired Waterwats in West Virginia: A Hedonic Modeling Approach*, EPA, Sept. 2006, at https://cfpub.epa.gov/si/si_public_record_Report.cfm?Lab=NRMRL&dirEntryId=159138.
[3] *See* Friends of the Cheat, *FOC History*, at https://cheat.org/foc-history/.
[4] 30 U.S.C. § 1234. In other words, the exclusion means there is not a remediation responsibility under the Comprehensive Environmental response, Compensation, and Liability Act (CERCLA) or other federal or state cleanup laws.

priorities for abandoned mines.[5] So the primary way of addressing AMD is through the SMCRA framework. Yet—third—SMRCA provides that any control or treatment for water pollution resulting from AMD shall not "in any way be less than that required" under the CWA.[6]

Ordinarily it is very important to require compliance with other environmental laws, especially where a mining company itself is responsible for cleanup or harm it caused.[7] But in the case of Community Reclaimers, this CWA compliance requirement has created uncertainty and even a barrier to making improvements to Appalachian waterways. The CWA bans discharges of pollutants without a permit under the National Pollutant Discharge Elimination System ("NPDES"), which incorporates water quality standards for the receiving water.[8] But what about a treatment operation that significantly restores the water quality in an impacted stream, even if the effluent can't meet all applicable water quality standards?[9]

This is a realistic scenario for streams impaired by AMD. And it is a disincentive to Community Reclaimers who stand to make a real impact in restoring these streams—but because of the nature of AMD, multiple full-blown, state-of-the-art active water treatment systems aren't financially feasible. Often, passive treatment systems make up a large part of the remedial work that is being done today and that can be further incentivized by the Community Reclamation Partnerships Act. These systems do not usually treat the full scope of water quality concerns, but they contribute substantially to improving water quality and can make non-passive systems cost less.[10]

In this respect, a key feature of the Community Reclamation Partnerships Act is that it shields Community Reclaimers from CWA liability (as well as liability under other federal laws) when they improve but do not perfect a stream's water quality.[11] This is an appropriate and limited

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[5] *Id.* § 1231(c)(1) (authorizing use of funds for "prevention, abatement, treatment, and control of pollution created by coal mine drainage including restoration of stream beds, and construction of water treatment plants").
[6] *Id.* § 1242(d).
[7] *See* W.V. Coal Ass'n v. Reilly, 728 F. Supp. 1276 (S.D.W.V. 1989) (upholding EPA's CWA authority to reject in-stream treatment ponds of mining wastewaters at active mining site).
[8] 33 U.S.C. §1342.
[9] In a closely analogous setting involving the bond forfeiture provisions of SMCRA, the Fourth Circuit Court of Appeals held that the State of West Virginia was obligated to obtain a NPDES permit for AMD treatment systems at various bond-forfeiture sites, even though the state was engaging in reclamation efforts for pollution it did not cause and even though its efforts were improving water quality. W.V. Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159 (4th Cir. 2010).
[10] *See, e.g.*, C. Zipper et al., *Passive Treatment of Acid-Mine* Drainage, Va. Coop. Ext. Pub. 460-133 (2018), at https://www.pubs.ext.vt.edu/content/dam/pubs_ext_vt_edu/460/460-133/CSES-216.pdf; Jeff Skousen, *Overview of Passive Systems for Treating Acid Mine Drainage*, at https://dep.wv.gov/WWE/getinvolved/sos/Documents/AMD/Overview_PassiveAMDTreatment.pdf.
[11] Discussion draft, § 4. By contrast, there is a "Good Samaritan" provision in CERCLA for hard rock mine cleanup. 42 U.S.C. 9607(d) ("no person shall be [strictly] liable . . . for rending care,

exception that would allow more organizations like Friends of the Cheat to undertake the important work of AMD remediation.

An important point about these activities is that they strengthen communities. My own interviews with individuals engaged in these activities in Appalachia suggest that at the local level, these communities have bridged the extreme polarity we see at the national level. They have promoted discussion not just about the immediate issue, but about the longer-term values and needs of a region that is both rich in beauty, resources, and culture, and overlooked by many other measures.

For all these reasons, I support the Community Reclamation Partnerships Act and suggest one modification. The discussion draft would add a provision authorizing approved states to enter into memoranda of understanding (MOU) with state and federal agencies to remediate land and water impaired by abandoned mines. A laudable feature of this provision is that it calls for a period of public comment—including a local public meeting—prior to submitting the MOU to the Secretary and Administrator (of EPA) for approval. However, it does not include any requirement that the state respond to significant comments raised. Although it is likely that there would be some response the state, enshrining that requirement in this bill would underscore the importance of ensuring that local voices are heard, treated with respect, and impactful.[12]

II. Ensuring Remediation in Mining School Curricula

The Mining Schools Act of 2023 promotes the purpose of establishing a grant program to strengthen domestic mining education. I want to highlight some of the purposes to which these grant funds may be put, and to suggest one other. Importantly, the purposes include education that may in the future avoid some of the harms our country faces from abandoned mines and irresponsibility operated existing mines. These include reclamation at abandoned sites, methods for mitigating AMD and reclaiming abandoned mine land, and mineral extraction methods that minimize environmental harms. But today's scientists and engineers need a bit more: they need to be able to engage with communities. Just as the Community Reclamation Partnerships Act contemplates such engagement, and just as the story of the Cheat River demonstrates the value of collaboration among activists, business interests, and scientists and engineers, so too should

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assistance, or advice . . . with respect to an incident creating a danger to public health or welfare or the environment") (preserving liability for negligence). *See also* EPA, Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans, June 6, 2007, at https://www.epa.gov/sites/default/files/2015-09/documents/cercla-goodsam-principles-mem-ed2015.pdf (establishing policies to implement this provision, including flexibility for water quality associated with cleanup discharges).

[12] For a discussion of procedural values like these, see Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 Harv. Envt. L. Rev. 313 (2013).

higher education prepare students for this reality. I thus recommend that training in community engagement and communication be among the purposes to which these grants may be put.

Thank you again for the opportunity to testify today. I look forward to your questions.