

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 Cronley". The signature is written in a cursive, flowing style.