

Representative Pete Stauber, Chair  
Subcommittee on Energy and Mineral Resources  
U.S. House of Representatives Committee on Natural Resources  
1324 Longworth House Office Building  
Washington, DC 20515



December 4, 2023

Dear Chairman Stauber,

Thank you again for the opportunity to appear before the Subcommittee on Tuesday, November 14, 2023 to present testimony on “Examining the Biden Administration’s Abandoned Mine Lands and Active Mining Programs.”

I provide here my answers to the additional questions for the record submitted by members of the Subcommittee.

**Question from Rep. Grijalva for Mr. Peter Morgan, Senior Attorney, Sierra Club:**

**1. During the hearing, OSMRE’s proposed Ten-Day Notice rulemaking was criticized as creating uncertainty and federal overreach. How would you respond to these criticisms of the rulemaking?**

The ten-day notice (“TDN”) provisions of the Surface Mining Control and Reclamation Act (“SMCRA”) provide a critical tool for communities suffering from the negative effects of coal mining to seek federal oversight of ongoing violations unaddressed or inadequately addressed by state regulators. Unfortunately, these protections were significantly weakened under a misguided and illegal Trump Administration rulemaking. OSMRE’s proposed rule—published in proposed form in the Federal Register (88 Fed. Reg. 24944 (April 25, 2023)) and slated for finalization by February 2024—removes unnecessary and inappropriate barriers to public participation imposed by that 2020 rulemaking and restores policies and procedures that had been in place for decades.

The TDN process was intended by Congress as the communication mechanism by which OSMRE—prior to engaging in oversight enforcement expressly authorized under the SMCRA statute—would provide an opportunity for state regulators to respond to citizen information regarding potential violations of law. Congress bounded OSMRE’s deference in order to assure that in the absence of a timely state response, federal inspection would occur so as to assure that potential violations would be addressed and not worsen. The Trump Administration changes skewed the process and would have allowed systemic on-the-ground environmental problems to continue unaddressed over an indefinite period.

OSMRE's proposed rule restores the proper framework of cooperative federalism and supports communities negatively impacted by coal mining in the following ways:

- The proposed rule properly eliminates the unnecessary, burdensome, and unsupported change from the 2020 Rule that allowed OSMRE and state regulators to engage in an open-ended process of information gathering prior to OSMRE issuing a ten-day notice letter to the state regulator. This "pre-review review" offered a means by which state regulators and OSMRE could delay or prevent OSMRE's response to properly filed community-member complaints. Under OSMRE's proposed rule, OSMRE's threshold "reason to believe" analysis would be limited to consulting its own files and publicly accessible electronic databases in addition to the information provided in the complaint. By once again narrowing the sources of information for OSMRE's initial review, the proposed rule will avoid the delays in processing citizen complaints that OSMRE has recognized was created under the 2020 Rule, and will ensure that complaints are promptly processed and acted upon by OSMRE.
- The proposed rule also corrects an additional significant error from the 2020 rule: the elimination of violations relating to permit defects by state regulators from the categories of violations addressable under the TDN process. This approach is consistent with congressional intent and long-standing OSMRE practice. Under the proposed rule, OSMRE will once again be able to address case-by-case violations arising from permit defects promptly via the TDN process, while also recognizing that underlying programmatic issues may then need to be further addressed and resolved via SMCRA's separate Part 733 process for reviewing state programs' compliance with the federal program. This change will allow OSMRE to respond promptly to alleged violations that have the potential to create significant, and potentially permanent, on-the-ground impacts.
- OSMRE's proposed rule also gives effect to SMCRA's promise of robust community participation by eliminating unnecessary hurdles to such participation imposed by the 2020 Rule. Most notably, the proposed rule requires OSMRE to treat any citizen complaint as a request for a Federal inspection whether or not certain "magic words" are used, and ensures that community members who file complaints can accompany OSMRE inspectors on site inspections.

OSMRE retains critical oversight functions in states that have secured primacy, and the proposed Ten-Day Notice Rule ensures that those functions will be carried out with the robust community participation required by SMCRA.

**Question from Rep. Ocasio-Cortez for Mr. Peter Morgan, Senior Attorney, Sierra Club:**

**1. Do you believe the Office of Surface Mining Reclamation and Enforcement (OSMRE) has the authority to address today’s coal mining reclamation crisis, or does SMCRA need to be updated to reflect today’s industry?**

SMCRA as currently drafted provides OSMRE with tools and authority to begin to address the reclamation and bonding crisis. To date, OSMRE has not made adequate use of those existing authorities. However, in order for OSMRE to fully address the crisis, additional changes must be made to the SMCRA statute.

OSMRE must immediately take the following actions under its existing SMCRA authority: First, OSMRE must collect information on mine production and reclamation status for all coal mines to identify the full set of functionally abandoned “zombie” permits, and must make this information available to the public. Second, OSMRE must conduct stress-tests for all state bond pools and for those surety bond providers that have issued the majority of coal mine reclamation surety bonds. These stress-tests must be based on projections of future mine abandonments based on forecasted trends in coal production, not on historic rates of mine abandonment during periods of time when demand for coal was still high. Third, OSMRE must ensure that states are rigorously enforcing SMCRA’s contemporaneous reclamation requirements to ensure every mine minimizes the disturbed, unreclaimed area. Finally, OSMRE must reinstate the policy advisory on self-bonding originally issued in August 2016.

Even if OSMRE were to immediately take these actions, fully addressing the current coal mine reclamation and bonding crisis will require additional changes to the federal SMCRA statute, and to state programs to bring them in line with the amended federal program. Legislation is needed to amend SMCRA to require better and more timely assessments of bond adequacy and reclamation progress, including by requiring regulators to reconsider bond adequacy at permit renewal and permit transfer. SMCRA must also be amended to require that mine operation and reclamation plans assess the potential impacts of unplanned mine closure on the cost of reclamation, including whether sufficient spoil exists for reclamation in the event of premature cessation of coal production activities. SMCRA must also be amended to eliminate self-bonding, and to end the use of bond pools by prohibiting the entry of any new permits into existing bond pools and providing a process for states to transition permits out of existing bond pools. Finally, SMCRA must be amended to authorize—and encourage the use of—new financial assurance approaches better aligned with the current reality, such as sinking trust funds, and funding mechanisms for longterm water treatment.

**Questions from Rep. Kamlager-Dove for Mr. Peter Morgan, Senior Attorney, Sierra Club:**

**1. A 2021 report from the nonprofit Appalachian Voices, “Repairing the Damage: The costs of delaying reclamation at modern-era mines,” detailed the gap in coverage of bonds and the outstanding reclamation work that needs to be done. Can you elaborate on the scale of the bonding and reclamation issue, and what will happen if reforms are not made soon?**

The “Repairing the Damage” report from Appalachian Voices<sup>1</sup> evaluated outstanding reclamation obligations in seven eastern states (Alabama, Tennessee, Virginia, Kentucky, West Virginia, Ohio, and Pennsylvania), estimated the total cost to complete that reclamation, and compared that cost estimate to the available bonding. Using data from OSMRE and state regulators, the report found that across those seven states, a total of 633,000 acres were partially or completely unreclaimed (426,000 acres partially reclaimed, 207,000 acres completely unreclaimed). The report then estimated the total cost to complete that reclamation at between \$7.5 billion to \$9.8 billion. Meanwhile, total bonding for those permits totalled only \$3.8 billion.

Those conclusions are completely consistent with data from other sources. In the recent bankruptcy proceedings for Blackjewel, LLC, the Kentucky coal mine regulator—the Kentucky Energy and Environment Cabinet—looked at 20% of the permits held by the company in that state and found that for the 33 permits studied the actual reclamation cost would exceed the bonded amount by \$28 million. In West Virginia, a recent legislative audit report found that individual bonds in the state cover only 10 percent of projected reclamation costs. When one of the largest mine operators in the state—ERP Compliant Fuels—became insolvent in 2020, the state placed the company into a special receivership in order to avoid having to revoke the company’s permits and forfeit its inadequate bonds. The legislative audit found that the special receivership held 91 permits for the company, and that those permits were backed by \$83 million in reclamation surety bonds. Based on the 10 percent coverage estimate, that means the total reclamation liability for those mines could be as high as \$830 million. The West Virginia bond pool contains approximately \$36 million, with another approximately \$150 million in a separate fund for water treatment, meaning the outstanding reclamation obligations for just the ERP permits would easily wipe out the entire bond pool. The most recent actuarial assessment of Ohio’s bond pool found that the pool currently contains \$26.4 million. The assessment report concluded that the failure of any of the five largest coal mine operators in the state would wipe out that bond pool, because their reclamation liabilities ranged from \$31.6 million to \$187 million, with an average liability of \$73.3 million.

The consequences and implications of these massive bonding shortfalls are significant. Most obviously, there is the risk that hundreds of millions of dollars in reclamation costs could be

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<sup>1</sup> [https://appvoices.org/resources/RepairingTheDamage\\_ReclamationAtModernMines.pdf](https://appvoices.org/resources/RepairingTheDamage_ReclamationAtModernMines.pdf)

passed on to taxpayers. Even then, it would likely take decades for government regulators to complete the reclamation. More than 46 years after Congress passed SMCRA to address the then-existing backlog of abandoned unreclaimed mines, many of those mines still remain unreclaimed. We cannot allow that shameful story to repeat, particularly because unreclaimed modern coal mines pose serious threats to nearby communities in the form of air and water pollution, on-site hazards, and elevated risks of flooding and landslides. In addition, when reclamation bonding is inadequate it gives mine operators enormous leverage over regulators. Regulators become hesitant to enforce the law—including laws meant to protect human health and the environment—out of fear that doing so could prompt an operator to abandon its under-bonded mines and make them the responsibility of the regulator.

**2. Nearly three years into the Biden Administration, the agency that oversees and enforces reclamation of active and abandoned coal mines, the Office of Surface Mining Reclamation and Enforcement (OSMRE), still does not have even a nominee for Director. What is the impact of not having a Senate-confirmed Director of OSMRE?**

The dramatic changes currently affecting the coal mining industry—most notably the significant and permanent decline in demand for coal, and increasing numbers of mine abandonments—require a radical change in approach from OSMRE. The drop in coal production and lack of interest in new permits, and resulting threats to reclamation and bonding programs, mean that OSMRE and state regulators cannot continue to implement SMCRA according to the status quo that has prevailed for the preceding 46 years. Instead, OSMRE must immediately implement a major course correction that realigns the agency with the new reality. Such a change in agency mission and approach requires the type of leadership best provided by an administration-nominated and Senate-confirmed Director. It is too much to ask of career staff to initiate and oversee the required change in approach. The Biden Administration should prioritize nominating and securing confirmation for an OSMRE director who acknowledges that coal mining is in permanent decline, that mines across the country are under-bonded and inadequately reclaimed, and that there is an enormous risk of mines being abandoned in an unreclaimed condition that threatens nearby communities.

**3. If the Committee takes one thing away from this hearing, what would you want that to be?**

The main thing I hope the members of the Subcommittee will take away from my testimony is that we are experiencing a coal mine reclamation and bonding crisis driven by the permanent decline in demand for coal, and that there is a narrowing window for OSMRE and Congress to

act to address the crisis and protect impacted communities.

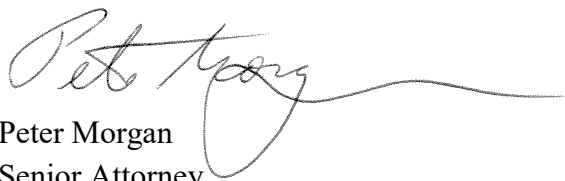
The crisis is here. As demand for coal decreases, so too does coal production, which means less revenue coming into the coal mining industry. Those mines that are still operating are choosing to put their limited resources toward coal removal rather than reclamation. Hundreds of mines have already been abandoned unreclaimed, with workers laid off and equipment removed. But poor recordkeeping requirements, combined with regulator complacency, have conspired to hide the true number of these functionally abandoned “zombie” mines. The negative impacts from these zombie mines—in the form of air and water pollution, onsite hazards, and increased risk of flooding and landslides—will continue to grow.

OSMRE can still act to address this crisis. Specifically, OSMRE must provide a clear-eyed assessment of which mines are no longer producing coal nor conducting reclamation. This will alert nearby communities to sources of pollution and other threats, and will allow regulators and Congress to accurately assess the scale of the problem and the need for immediate action. OSMRE must also acknowledge which elements of SMCRA are no longer effective, and must utilize the remaining tools to their fullest extent.

Congress, too, must act. Congress must strengthen SMCRA to eliminate harmful provisions such as self-bonding, require additional permit reviews to better assess bond adequacy and reclamation progress, and authorize—and encourage the use of—new financial assurance approaches better aligned with the current reality.

Only through this sort of quick and decisive action that recognizes and addresses the present crisis can we avoid the return of dangerous, polluting, economically unproductive abandoned mine lands.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Morgan", with a long, sweeping horizontal line extending to the right.

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