



## ENVIRONMENTAL LAW & POLICY CENTER

Protecting the Midwest's Environment and Natural Heritage

October 25, 2019

*VIA E-MAIL AND CERTIFIED MAIL*

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**Re: Citizen Request for Immediate Evaluation of Ohio's Administration of its Reclamation Forfeiture Fund under the Surface Mining Control and Reclamation Act by Office of Surface Mining Reclamation and Enforcement**

Dear Sirs and Madam:

Pursuant to 30 C.F.R. § 733.12(a)(2), the Environmental Law & Policy Center ("ELPC") submits this request to the Office of Surface Mining Reclamation and Enforcement ("OSMRE") to evaluate Ohio's program for administering the federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1202 *et seq.* Specifically, ELPC requests an evaluation of Ohio's alternative bonding system, the Reclamation Forfeiture Fund ("Forfeiture

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Fund”), which violates federal SMCRA requirements. The purposes of SMCRA include protecting society and the environment from the adverse effects of surface coal mining operations, assuring that measures are taken to reclaim lands affected by coal mining, and assuring that surface mining operations are not conducted where reclamation as required by SMCRA is not feasible. *See* 30 U.S.C. § 1202. Where a bonding system violates SMCRA, however, those purposes are thwarted. ELPC is notifying both the federal OSMRE, through its Director, Regional Director for the Appalachian Region, and Chief of the Area Office, and the Ohio Department of Natural Resources (“ODNR”), including the Division of Mineral Resources Management, of this Citizen Request.

This request is made with particular urgency because Murray Energy Corporation (“Murray Energy”), one of the largest permitholders in Ohio,<sup>1</sup> is at risk of bankruptcy and/or abandoning its reclamation obligations,<sup>2</sup> and the Forfeiture Fund’s balance is insufficient to perform reclamation work on Murray Energy’s mines.<sup>3</sup>

By this request, ELPC provides information to ODNR and OSMRE sufficient to establish a reason for these recipients to believe that Ohio’s Forfeiture Fund is in violation of SMCRA because (1) it cannot “achieve the objectives and purposes of the bonding,” as required by 30 U.S.C. § 1259(c); and (2) it does not require bonds in sufficient amounts to assure the completion of reclamation work as required by 30 U.S.C. § 1259(a) and 30 C.F.R. § 800.11(e). The current Forfeiture Fund balance is \$22.2 million and the estimated cost of reclamation that the Forfeiture Fund is intended to secure is \$544.8 million.<sup>4</sup> Over \$200 million of the

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<sup>1</sup> Murray Energy operates in Ohio through its subsidiaries American Energy Corporation, Ohio American Energy Inc., Ohio Valley Coal Co., and West Virginia Resources.

<sup>2</sup> *See* Murray Energy Corp., *Murray Energy Corporation Enters Into Forbearance Agreements With Its Lenders*, Oct. 2, 2019, [murrayenergycorp.com/murray-energy-corporation-enters-into-forbearance-agreements-with-its-lenders/](http://murrayenergycorp.com/murray-energy-corporation-enters-into-forbearance-agreements-with-its-lenders/) (announcing that Murray Energy entered into forbearance agreements with lenders in early October after electing not to make amortization and interest payments due at the end of September); *see also* Murray Energy Corp., *Murray Energy Corporation Extends Forbearance Agreements With Its Lenders and Elects Not to Make Interest Payments to Noteholders*, Oct. 16, 2019, [murrayenergycorp.com/murray-energy-corporation-extends-forbearance-agreements-with-its-lenders-and-elects-not-to-make-interest-payments-to-noteholders/](http://murrayenergycorp.com/murray-energy-corporation-extends-forbearance-agreements-with-its-lenders-and-elects-not-to-make-interest-payments-to-noteholders/) (announcing the extension of forbearance agreements through October 28, 2019); *see also* Jonathan Randles, *Coal Bankruptcies Pile Up as Utilities Embrace Gas, Renewables*, THE WALL STREET JOURNAL, Oct. 14, 2019, <https://www.wsj.com/articles/coal-bankruptcies-pile-up-as-utilities-embrace-gas-renewables-11570971602> (reporting on several recent coal company bankruptcies and forecasting Murray Energy’s bankruptcy).

<sup>3</sup> “If Murray Energy, the state’s largest permit holder, were to abandon its mines, it would take an estimated \$202 million to clean up their sites. Without any other forfeitures, it would take the state fund more than 150 years to recover.” Beth Burger, *Cost To Reclaim All Active Ohio Coal Mines Could Be Nearly \$545 Million, Report Estimates*, THE COLUMBUS DISPATCH, May 23, 2019, <https://www.dispatch.com/news/20190523/cost-to-reclaim-all-active-ohio-coal-mines-could-be-nearly-545-million-report-estimates>; *see also infra* n.4 at Exhs. 7.1(a), 7.1(b).

<sup>4</sup> *See* Attachment 1, PINNACLE ACTUARIAL RESOURCES, INC., ANALYSIS OF THE RECLAMATION FORFEITURE FUND 6, 22 (June 2019),

reclamation costs the Forfeiture Fund is meant to secure are for lands covered by Murray Energy and its subsidiaries' 13 coal mining permits in Ohio.<sup>5</sup>

ELPC requests that ODNR take immediate actions to require permittees to provide financial assurance of reclamation work other than participation in the Forfeiture Fund, and that OSMRE evaluate the implementation, administration, enforcement, and maintenance of Ohio's SMCRA program and, specifically, the Forfeiture Fund. This request should be given immediate and emergency consideration in light of Murray Energy's rapidly deteriorating financial condition and inability to pay for coal mining reclamation costs.

## I. ARGUMENT

### a. **ELPC And Its Members Have An Interest That May Be Adversely Affected By Ohio's Failure To Require Sufficient Financial Assurance For Reclamation.**

ELPC and its members' interests are adversely affected by Ohio's continued failure to require sufficient reclamation bonds of its permittees in violation of SMCRA. ELPC's organizational interests in improving environmental quality, promoting clean water and protecting natural resources may be adversely affected, and ELPC's members' interests in living and recreating in a healthful environment are harmed when financial assurances for mine reclamation are inadequate.

ELPC is a public interest environmental legal advocacy and eco-business innovation organization, headquartered in Chicago, that works throughout the Midwest states to improve environmental quality and protect natural resources. ELPC has an office in Columbus, Ohio, that works to avoid risks and injuries to Ohio's public health, clean water, clean air, and landscapes on behalf of our organization, members, and clients. ELPC's organizational interests are adversely affected by Ohio's continued administration of the Forfeiture Fund in violation of SMCRA, and failure to require permittees to post adequate reclamation bonds makes all of these risks and injuries significantly more probable. Reclamation is only guaranteed to occur if there are sufficient funds available for that reclamation work.<sup>6</sup> If a company that holds a large number of permits, covering a large area of land to be reclaimed, abandons its reclamation obligations—as Murray Energy might attempt to do in its likely upcoming bankruptcy—then the Forfeiture Fund will not be able to cover Murray's incomplete reclamation work and ELPC members will be injured. Requiring third-party financial assurance provides an increased incentive for

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<http://minerals.ohiodnr.gov/portals/minerals/pdf/bond%20forfeiture/2019%20Ohio%20Mine%20Report%20FINAL.pdf>.

<sup>5</sup> *See id.* at Exh. 7.1(a).

<sup>6</sup> It should be noted that similar to showing whether a party is “adversely affected” under SMCRA, Article III standing “does not demand a demonstration that victory in court will without doubt cure the identified injury. . . . Our cases require more than speculation but less than certainty.” *Teton Historic Aviation Found. v. U.S. Dep’t of Defense*, 785 F.3d 719, 727 (D.C. Cir. 2015) (citation omitted).

reclamation work to occur in a timely manner, and will therefore reduce impacts for ELPC members.<sup>7</sup>

**b. Ohio’s Forfeiture Fund Is Violating SMCRA’s Bonding Requirements Because It Neither Requires Bonds In Sufficient Amounts To Assure Completion Of Reclamation Work, Nor Does It Hold Funds In Sufficient Amounts To Reclaim Mines Should A Large Permittee Go Bankrupt.**

ODNR administers a state program for permitting coal mines in Ohio, and this includes the Forfeiture Fund. SMCRA requires that a state’s program must be “in accordance” with—and at least as stringent as—federal requirements. 30 U.S.C. § 1253(a); *see also M.L. Johnson Family Props., LLC v. Bernhardt*, 924 F.3d 842, 845-46 (6th Cir. 2019) (recognizing the federal government’s “ongoing obligation” to ensure that state programs meet the “national minimum requirements for surface mining” set out in SMCRA). However, Ohio’s state program does not satisfy the baseline financial assurance requirements of SMCRA.

As a prerequisite for obtaining a coal mining permit, SMCRA requires a permittee to post a reclamation bond to ensure that the regulatory authority will have sufficient funds to reclaim the site if the permittee fails to do so. 30 U.S.C. § 1259(a). Pursuant to section 1259(a) of SMCRA, “[t]he amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture and in no case shall the bond for the entire area under one permit be less than \$10,000.” An approved state program may apply “an alternative [bonding] system that will achieve the objectives and purposes of the bonding.” *Id.* § 1259(c); *see also* 30 C.F.R. § 800.11(e). To be approved, an alternative bonding system must: (1) “assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time”; and (2) “provide a substantial economic incentive for the permittee to comply with all reclamation provisions.” 30 C.F.R. § 800.11(e)(1)-(2).

As designed and administered, the Forfeiture Fund is an alternative bonding system that will *not* “achieve the objectives and purposes of the bonding,” *see* 30 U.S.C. § 1259(c), because it does not require bonds in sufficient amounts to assure the completion of reclamation work, *see id.* § 1259(a), nor does it have sufficient funds to withstand the likely imminent bankruptcy of Murray Energy. *See also* 30 C.F.R. § 800.11(e)(1).

First, Ohio’s Forfeiture Fund has never been formally approved by the federal government or in full compliance with SMCRA. In 1982, OSMRE conditionally approved Ohio’s regulatory program and granted Ohio primacy in implementing SMCRA. 30 C.F.R. § 935.10. The approval was conditional because of Ohio’s alternative bonding system; the Forfeiture Fund does not meet the requirement of 30 C.F.R. § 800.11(e)(1) that any alternative bonding system “assure [] the regulatory authority will have available sufficient money to

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<sup>7</sup> *See In Re Idaho Conservation League*, 811 F.3d 502, 512-13 (D.C. Cir. 2016) (finding that economic incentives, such as stronger financial assurance, would reduce impacts to the organizations’ members whose aesthetic and other interests are adversely impacted by mining operations, and that bankruptcy would cause likely injuries because of the uncertainty of reclamation completion by a financially insolvent company).

complete the reclamation plan for any areas which may be in default at any time.” OSMRE itself wrote to ODNR in 2017 that it continues to review Ohio’s Forfeiture Fund to determine whether that condition could be removed, and expressed concerns about the Forfeiture Fund’s balance.<sup>8</sup>

Second, Ohio’s Forfeiture Fund is underfunded. Currently, the Forfeiture Fund contains \$22.2 million.<sup>9</sup> An actuarial report prepared for the Forfeiture Fund Advisory Board of the State of Ohio analyzed the Forfeiture Fund this year. Although the actuarial report found that the Forfeiture Fund is solvent, the report also found that the forfeiture of even an average-sized permit holder would quickly move the Forfeiture Fund into a negative balance.<sup>10</sup> The actuarial report concluded that the Forfeiture Fund could not cover catastrophic events:

Another indicator of financial soundness is the Fund’s ability to withstand a shock loss. It would take 9 more years of nonforfeitures before the Fund could cover an average loss and 27 more years to cover the forfeited permits of the failure of the fifth largest permit holder. . . . If the largest permit holder fails, the [F]und would need over 150 years of non-forfeitures in order to cover the loss.<sup>11</sup>

The Forfeiture Fund does “not currently have excess insurance to address catastrophic (i.e., shock) losses.”<sup>12</sup> The actuarial report suggested that the Forfeiture Fund Advisory Board should consider funding for a shock loss, “[g]iven the current economy and the financial condition of some of the coal operators in Ohio.”<sup>13</sup>

Because only a “small number of operators,” i.e., twenty-two mining companies, hold the 149 permits included in the Forfeiture Fund, there is “significant risk to the Fund from a concentration of risk perspective.”<sup>14</sup> There is “tremendous potential liability from a few of the larger operators . . . should one of the permit holders with a large number of sites become financially troubled, the cost to the Fund for reclamation could easily exceed \$50 million, with the largest potentially exceeding \$200 million.”<sup>15</sup> The permit holder with the largest potential cost for all reclamation is Murray Energy, with a potential cost to the Forfeiture Fund of \$202.2 million.<sup>16</sup> Murray Energy is financially troubled, which places the Forfeiture Fund in a precarious position. Murray Energy missed its last debt payments, entered into forbearance

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<sup>8</sup> Letter from Ben Owens, Chief, Office of Surface Mining Reclamation and Enforcement, Pittsburgh Field Div., to Lanny Erdos, Chief, Ohio Dep’t of Natural Res., Div. of Mineral Res. Mgmt. (Aug. 8, 2017) (available at <https://www.documentcloud.org/documents/4486577-OSM-Letter-to-ODNR.html>).

<sup>9</sup> See Attachment 1, *supra* n.4 at 6.

<sup>10</sup> *Id.* at 6, 9

<sup>11</sup> *Id.* at 6; *see also id.* at Exhs. 7.1(a), 7.1(b) (showing that Murray Energy will have the highest net reclamation costs of any permittee in the Forfeiture Fund and is calculated as 44.37% of the state’s total net reclamation costs).

<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 6, 7.

<sup>15</sup> *Id.* at 7, Exh. 7.1(b).

<sup>16</sup> *Id.* at 10, Exh. 7.1(b)

agreements with lenders, and, if it cannot reach resolution with its lenders, will likely seek protection from the bankruptcy court.<sup>17</sup>

Third, Ohio's state government has removed money from the Forfeiture Fund in the past for non-Forfeiture Fund purposes, and there are no assurances that such a raid will not occur again. In 2017, Governor Kasich removed \$5 million from the Forfeiture Fund to balance the 2017 state budget.<sup>18</sup> OSMRE noted that the removal of “nearly 20% of the [then-]current balance” from the Forfeiture Fund “for use other than the reclamation of bond forfeited sites, places the Fund well below any measure of financial solvency.”<sup>19</sup> OSMRE went on to state, “the removal of funds for uses other than its intended purpose as established by Ohio legislation, causes serious doubt that Ohio can meet its obligations under primacy to assure that it will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time.”<sup>20</sup> While ODNR asserted that “this was a one-time event,”<sup>21</sup> ELPC shares OSMRE's doubt that Ohio can meet its SMCRA obligations if the Governor of Ohio can take money from the Forfeiture Fund with impunity.

Fourth, too little money is going into the Forfeiture Fund because of the low per acreage bond rate.<sup>22</sup> For permittees participating in Ohio's Forfeiture Fund, bond rates are \$2,500 per acre (but not less than \$10,000 for an entire area to be mined under one permit), in addition to a \$0.12 to \$0.16 per ton of coal severance tax.<sup>23</sup> See Oh. Rev. Code §§ 1513.08(C)(2); 5749.02(A)(8). The \$2,500 per acre bond requirement is the lowest per acre financial assurance requirement of all coal mining states and is not based upon the estimated reclamation costs of a particular site.<sup>24</sup> Moreover, that figure is low when compared to historical reclamation work in

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<sup>17</sup> See *supra* n.3.

<sup>18</sup> Beth Burger, *Kasich's \$5M Raid and Coal Downturn Could Leave Ohioans Paying for Mine Reclamation*, THE COLUMBUS DISPATCH, Dec. 26, 2017, <https://www.dispatch.com/news/20181226/kasichs-5m-raid-and-coal-downturn-could-leave-ohioans-paying-for-mine-reclamation>.

<sup>19</sup> See *supra* n.8.

<sup>20</sup> *Id.*

<sup>21</sup> See Letter from Lanny Erdos, Chief, Ohio Dep't of Natural Res., Div. of Mineral Res. Mgmt., to Ben Owens, Chief, Office of Surface Mining Reclamation and Enforcement, Pittsburgh Field Div. (Sept. 21, 2017) (available at <https://www.documentcloud.org/documents/4486579-ODNR-Letter-to-OSM.html>).

<sup>22</sup> Additionally, Forfeiture Fund revenues from the severance tax are decreasing as coal production decreases. See Attachment 1, *supra* n.4 at 37-40.

<sup>23</sup> Eligibility to participate in the Forfeiture Fund is limited to companies with a record of performance in Ohio of at least five years. Oh. Rev. Code § 1513.08(c)(2); see also 84 Fed. Reg. 46703-01 (Sept. 5, 2019) (proposing rule to limit the ability of companies to gain access to the Forfeiture Fund by transfer, assignment or sale of permit rights). While the addition of this limitation on access to participation in the Fund may provide some protection of the Forfeiture Fund's resources, it does not address the potential for companies with a record of performance in Ohio but a declining financial situation to sap the Fund's resources dry.

<sup>24</sup> Mark Olalde, *US Coal Hasn't Set Aside Enough Money To Clean Up Its Mines*, Climate Home News. March 3, 2018, <https://www.climatechangenews.com/2018/03/14/us-coal-hasnt-set-aside->



Ohio. From 2000 to 2017, the average cost of reclamation construction per acre in Ohio was \$3,803.44.<sup>25</sup>

Fifth, coal mining companies are increasingly less financially secure, and bankruptcies of permittees that participate in Ohio’s Forfeiture Fund, such as Murray Energy, are likely. In the past year alone, more than half a dozen large U.S. coal companies have filed for bankruptcy.<sup>26</sup> Two other major coal companies, Murray Energy and Foresight Energy LP, entered forbearance agreements on interest payments to loans at the beginning of October, and appear headed toward bankruptcy filings.<sup>27</sup> Murray Energy only had “about \$73 million in cash and revolver loan availability” as of June of this year, and now Murray Energy “is expected to generate no more than \$100 million in cash over the next year.”<sup>28</sup> All of this contributes to Murray Energy “find[ing] itself too tight on cash to meet more than \$200 million in obligations coming due in the next 12 months.”<sup>29</sup>

Murray Energy or its subsidiaries hold 13 coal mining permits in Ohio, covering 3,286 implied bond acres.<sup>30</sup> At \$208,819,000, Murray Energy and its subsidiaries are responsible for the largest total land reclamation cost in Ohio.<sup>31</sup> In other words, Murray Energy defaulting on its reclamation obligations—which becomes more likely as Murray Energy approaches bankruptcy—is the exact “catastrophic event” that the recent actuarial analysis found the Forfeiture Fund could not cover.<sup>32</sup>

By allowing coal mining operations, such as Murray Energy, to participate in the Forfeiture Fund rather than provide performance bonds that financially assure the full value of

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[enough-money-clean-mines/](#) (comparing “Colorado, one of the best-protected mining states, holds \$10,732 for every acre, and Texas bonds are \$7,655 per acre,” with “Appalachian states [that] hold between \$2,373 per acre (Ohio) and \$4,604 per acre (Maryland)”).

<sup>25</sup> Ohio Dep’t of Natural Res., Div. of Mineral Res. Mgmt, *Reclaimed Forfeiture Sites Since 2000 (Coal)*, [minerals.ohiodnr.gov/portals/minerals/pdf/bond%20forfeiture/coalforfeitures\\_completed.pdf](http://minerals.ohiodnr.gov/portals/minerals/pdf/bond%20forfeiture/coalforfeitures_completed.pdf) (last visited Oct. 14, 2019). Although the average for projects in 2015-2017 was lower, at \$903.11 per acre, that average is the product of extreme differences in cost and appears to be a less reliable indicator of reclamation costs than the larger data set reflecting 2000-2017.

<sup>26</sup> See *supra* n.3.

<sup>27</sup> *Id.*

<sup>28</sup> Attachment 2, Soma Biswas and Alexander Gladstone, *Coal Baron Robert Murray’s Companies Edge Closer to the Brink*, THE WALL STREET JOURNAL, Oct. 7, 2019, <https://www.wsj.com/articles/coal-baron-robert-murrays-companies-edge-closer-to-the-brink-11570366800>.

<sup>29</sup> *Id.*

<sup>30</sup> See Attachment 1, *supra* n.4 at Exh. 7.1(a).

<sup>31</sup> *Id.* (measured as “Total PSE”). This amount is over one-third of all reclamation costs purportedly covered by the Forfeiture Fund. *Id.* The actuarial report also calculated Murray Energy’s Total PSE less the estimated potential Forfeiture Fund cost (referred to as the “Net Adjusted PSE”): \$206,188,502. *Id.*

<sup>32</sup> See *id.* at 4.

their reclamation work, Ohio undermines the purposes of SMCRA. Instead, OSMRE should determine that no permittees in Ohio qualify for participation in the Forfeiture Fund as a matter of law because the Forfeiture Fund cannot “achieve the objectives and purposes of the bonding program pursuant to [section 1259 of SMCRA].” 30 U.S.C. § 1259(c). OSMRE and ODNR should require each permittee to file bonds for the estimated cost of reclamation pursuant to section 1513.08(C)(1) of the Ohio Revised Code that “shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture,” as section 1259(a) of SMCRA demands. *See also* Oh. Admin. Code § 1501:13-7-03 (identifying surety bonds, collateral bonds, and/or trust funds as the allowed forms of performance security).

**c. ODNR Has The Authority To Adopt, Amend, And Rescind Rules To Ensure Ohio’s Program Complies With SMCRA.**

ODNR’s Chief of the Mineral Resources Division (“Chief”) is tasked with meeting the requirements of SMCRA and all requirements of Ohio’s program relating to reclamation. Oh. Rev. Code §§ 1513.02(A). The Chief has the authority to “[a]dopt, amend, and rescind rules” to implement the requirements of Ohio’s SMCRA program, including in regards to “other factors affecting coal mining and reclamation, to facilitate the return of the land to a condition required by this chapter . . . and to ensure full compliance with all requirements of this chapter relating to reclamation, and the attainment of those objectives in the interest of the public health, safety, and welfare to which these reclamation requirements are directed.” *Id.* § 1513.02(A)(1)(b). In recognition that the Forfeiture Fund cannot withstand the increasingly likely “shock loss” of a large permit holder,<sup>33</sup> OSMRE should inform ODNR that in order to come into compliance with SMCRA, the Chief must exercise this rulemaking authority to require financial assurances from permittees, other than participation in the Forfeiture Fund. Given the level of risk and uncertainty in the coal-mining market, the most appropriate form of financial assurance is third-party surety bonds in amounts sufficient to satisfy their reclamation requirements as required by 30 U.S.C. § 1259(a).

**d. OSMRE Has The Authority To Evaluate Ohio’s Administration Of Its Forfeiture Fund And Enforce SMCRA’s Bonding Requirements In Ohio.**

SMCRA vests the federal government “with an ongoing obligation to ensure that state programs comport with the federal Act’s minimum requirements.” *M.L. Johnson Family Props.*, 924 F.3d at 846 (citing 30 U.S.C. § 1253(a)). In the event that a state is not enforcing any part of its programs under SMCRA, OSMRE “may provide for the Federal enforcement” of the state program not being enforced pursuant to section 1271 of SMCRA. 30 U.S.C. § 1254(b); *see also Annaco, Inc. v Hodel*, 675 F. Supp. 1052, 1056 (E.D.Ky. 1987). Section 1271(b) provides:

Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved<sup>[34]</sup> State program result

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<sup>33</sup> *See* Attachment 1, *supra* n.4 at 6.

<sup>34</sup> Notably, Ohio’s Forfeiture Fund is not an “approved State program,” but a conditionally-approved program that has never been found to be in full compliance with SMCRA requirements. *See* 30 C.F.R. § 935.10.



from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this chapter, the Secretary shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith[.]

Further, OSMRE has the obligation to evaluate the administration of state programs at least annually, and OSMRE may initiate such an evaluation upon the request of any interested person, such as ELPC. 30 C.F.R. § 733.12(a). To the extent that OSMRE has been communicating with ODNR regarding the Forfeiture Fund, it has not been doing so under the processes prescribed by part 733.12. Upon reason to believe a state “is not effectively implementing, administering, maintaining or enforcing any part of its approved State program,” then OSMRE “shall” notify the state in writing and “[s]pecify the time period for the State regulatory authority to accomplish any necessary remedial actions.” *Id.* § 733.12(b)(3). Then, if a state still fails to come into compliance with SMCRA, either after an informal conference within 15 days of the expiration of the specified time period for remedial actions or in the absence of an informal conference, part 733.12(d) mandates public notice and a public hearing. Where, as here, the state never has been in compliance with SMCRA, such public involvement is all the more important.

Therefore, if ODNR’s Chief fails to take the necessary steps to come into compliance with SMCRA, OSMRE has the jurisdiction and authority to evaluate Ohio’s Forfeiture Fund, initiate a public notice and hearing process, and take charge of enforcing bonding requirements in Ohio.

## **II. CONCLUSION**

Based on the information provided above, it is clear that ODNR and its Forfeiture Fund violate SMCRA because the Forfeiture Fund cannot achieve the purposes and objectives of SMCRA and is itself at risk of imminent insolvency in the event of a large permit-holder, such as Murray Energy, filing for bankruptcy.

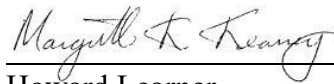
Having provided such sufficient information, through this request, ELPC requests:

- 1) That OSMRE provide federal enforcement of bonding requirements in Ohio in place of the never-formally-approved Forfeiture Fund; or,
- 2) That OSMRE direct ODNR that in order to come into compliance with SMCRA it must require financial assurances from permittees, other than participation in the Forfeiture

Fund and preferably in the form of third-party surety bonds, in amounts sufficient to satisfy their reclamation requirements as required by 30 U.S.C. § 1259(a);

- 3) That, pursuant to 30 U.S.C. § 1271(b) and 30 C.F.R. § 733.12(b), if ODNR does not promptly come into compliance with SMCRA, OSMRE specify that Ohio's Forfeiture Fund must come into compliance with the performance bonding requirements under 30 U.S.C. § 1259(a) and 30 C.F.R. § 800.11(e) within thirty days; and that, pursuant to 30 C.F.R. § 733.12(d), OSMRE provide notice to the public and to the state that it has reason to believe the Forfeiture Fund violates SMCRA and set a hearing schedule; and,
- 4) That this request be given immediate and emergency consideration in light of Murray Energy's potentially imminent bankruptcy proceedings; and
- 5) That OSMRE grant any other relief as is appropriate.

Respectfully submitted,



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