



June 18, 2018

Ben Owens, Division Chief  
Office of Surface Mining Reclamation and Enforcement  
Pittsburgh Field Division  
3 Parkway Center  
Pittsburgh, PA 15220

Lanny Erdos, Chief  
Ohio Department of Natural Resources  
Division of Mineral Resources Management  
2045 Morse Road, Building H-2  
Columbus, Ohio 43229-6693

**RE: Citizen complaint and request for inspection and enforcement action regarding insufficient bonding for active coal mining operations in Ohio participating in the RFF**

To Division Chief Ben Owens and Chief Lanny Erdos:

In accordance with Sections 517(h) and 521(a) of the Surface Mining Control and Reclamation Act ("SMCRA"), Sierra Club and the Ohio Environmental Council (collectively, the "Groups") submit the following citizen complaint and request for inspection and enforcement action regarding insufficient reclamation bonding at all active coal mining operations in Ohio participating in the Reclamation Forfeiture Fund ("RFF"). As discussed below, the Groups have reason to believe that Ohio's RFF contains inadequate funds to cover the costs of reclamation, and therefore any mine relying on the RFF is conducting surface coal mining operations without sufficient reclamation bonding as required by SMCRA and the Ohio Surface Mining Act.

The Groups hereby provide notice of this complaint to both the Ohio Division of Mineral Resources Management ("DMRM") and the Office of Surface Mining Reclamation and Enforcement ("OSMRE"). Should the DMRM fail to take appropriate action within 10 days, the Groups request that OSMRE issue a notice of violation to every operator that is relying on the RFF and that the notice require the operator to either post a substitute financial assurance or immediately cease coal removal operations and immediately commence reclamation. The

groups are aware that OSMRE continues to assess the adequacy of Ohio's SMCRA program under its Part 733 authority, but does not believe that the Part 733 process obviates the need for immediate action to address the ongoing violations at all operations relying on the RFF.

In accordance with 30 C.F.R. § 842.12(d), the Groups request that OSMRE report the results of any inspections within 10 days from the date of the inspection or, if OSMRE chooses to not conduct an inspection, to explain the reasons for that decision within 15 days from the date on which this letter is received.

### **Evidence of insufficient bonding**

The bedrock requirement of SMCRA is that every active coal mining operation must maintain a reclamation bond or participate in an adequately funded alternative bonding program "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." 30 U.S.C. § 1259(a); S. REP. NO. 95-128, at 78 (1977) (Senate Committee on Energy and Natural Resources referring to SMCRA's bonding scheme as "one of the most important aspects of [a] program to regulate surface mining and reclamation."). Congress passed SMCRA in 1977 in large part to address the problem of unreclaimed mine sites and the attendant "social and economic costs on residents in nearby and adjoining areas." 30 U.S.C. § 1201(h).

The majority of Ohio's mines participate in the RFF. Under that approach, permittees must post a bond in the amount of \$2,500 per acre of land, irrespective of actual projected reclamation costs. In the event of forfeiture, any difference between that amount and the actual cost of reclamation will be made up by the RFF. Currently, 25 mining companies, representing 100 active permits, participate in the RFF.<sup>1</sup>

DMRM retained Pinnacle Actuarial Resources to evaluate the solvency of the RFF. In a June 2017 report, Pinnacle calculated the "present value of potential expected liability of the Fund" to be \$25,107,115.<sup>2</sup> That liability estimate includes \$5.8 million in reclamation costs at

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<sup>1</sup> Pinnacle Actuarial Resources, "Actuarial Analysis of the Ohio Reclamation Forfeiture Fund – June 2017 Report," at 5, 13 (available at [http://minerals.ohiodnr.gov/portals/minerals/pdf/bond%20forfeiture/pinnacle\\_report\\_2017.pdf](http://minerals.ohiodnr.gov/portals/minerals/pdf/bond%20forfeiture/pinnacle_report_2017.pdf)).

<sup>2</sup> *Id.* at 9.

already forfeited mines, and an estimate of additional forfeitures and related costs.<sup>3</sup> At the time of its report, Pinnacle concluded that the RFF was adequately funded because it contained \$25.9 million in assets, meaning that the RFF assets exceeded the potential expected liability.<sup>4</sup>

Shortly after the Pinnacle report was finalized, Ohio transferred \$5 million out of the RFF for use in the state's general fund, with no plans or commitment to replace those funds.<sup>5</sup> That transfer reduced the funds in the RFF to approximately \$20.9 million, which is below the projected liability for the RFF. Accordingly, the RFF is no longer adequate 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 required under 30 U.S.C. § 1259(a).

Even before the transfer of 20% of its funds, the adequacy of the RFF was in serious question. In its 2017 Annual Evaluation Report for Ohio, OSMRE determined that "[a]lthough the fund balance is continuing to build, there is still a significant deficit," and that "[t]he noted deficit in the Reclamation Forfeiture Fund becomes more critical as the national coal market continues to slump, increasing the potential risk of future forfeitures."<sup>6</sup> That deficit has now been significantly exacerbated by the removal of the \$5 million.

As the OSMRE Annual Evaluation Report noted, any conclusion that the RFF was solvent even prior to the removal of the \$5 million was premised on unsupported and dubious assumptions. The Pinnacle report itself noted that even before the transfer, "[a]n additional \$25.7 million would be needed to cover an 'average' shock loss," and the potential cost "should one of the largest operators be unable to meet its obligations . . . could approach \$206.2 million."<sup>7</sup> Pinnacle defines "shock loss" as the cost of a single operator forfeiting all of its permits at once.<sup>8</sup> The total potential fund liability, should every mine operator forfeit their permits simultaneously, would be \$539.9 million."<sup>9</sup>

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<sup>3</sup> *Id.* at 4, 29.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> Letter from Lanny Erdos, Chief, DMRM, to Ben Owens, Chief, OSMRE's Pittsburgh Field Division, dated September 21, 2017.

<sup>6</sup> OSMRE's 2017 Annual Evaluation Report for Ohio at 13.

<sup>7</sup> Pinnacle Report at 9.

<sup>8</sup> *Id.* at 20.

<sup>9</sup> *Id.* at 18.

Pinnacle’s projection of future revenue into the RFF is also highly suspect and unsupported. Pinnacle projects that coal production in Ohio will gradually reduce from 15.3 million tons per year in 2016 to 10.8 million tons per year in 2040.<sup>10</sup> That’s a 29% decrease over a 24 year period. Pinnacle’s projection ignores the fact that coal production in Ohio is already in the midst of a precipitous decline, plummeting from 25.3 million tons in 2013 to 12.9 million tons in 2016, according to OSMRE.<sup>11</sup> That’s a decrease of almost 50% over just a 3 year period. Further, Pinnacle itself acknowledges that its projection is premised on the “important assumption . . . that the supply of coal is more or less unlimited and thus the revenue to the Fund is not constrained or limited over the time horizon.”<sup>12</sup> The highly questionable nature of this assumption of future revenue is critical because it belies any assertion that the RFF will be able to recoup the \$5 million transfer simply on the basis of future revenue. In fact, the data on the recent drastic declines in coal production makes clear that RFF revenue will continue to decline even as the reclamation liability remains high.

The federal SMCRA regulations provide that once an operator ceases to have adequate bond coverage—including as a result of the actions of a third party—it must either secure replacement bond coverage within 90 days, or “cease coal extraction and . . . immediately begin to conduct reclamation operations in accordance with the reclamation plan.” 30 C.F.R. § 800.16(e). Here, because the RFF is no longer adequately funded to ensure bond coverage for the 25 operators and 100 permits participating in Ohio’s alternative bonding program, those operators must either secure alternative bonding coverage or must cease coal removal and switch to reclamation.

Participation in the RFF is voluntary. *See* Ohio Revised Code, Title XV, § 1513.08(C). Permittees may opt instead to provide a full cost performance security rather than participate in the RFF. *Id.* As a result, permittees have a readily available option under Ohio’s current regulatory regime that would allow them to continue coal removal activities after exiting the RFF. Requiring mine operators to immediately substitute full cost performance securities will

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<sup>10</sup> *Id.* at 37.

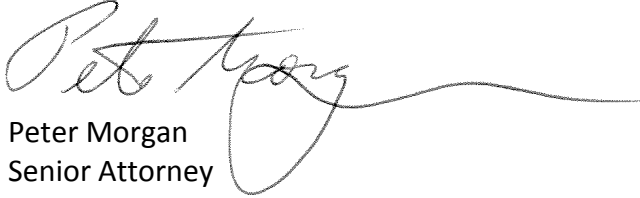
<sup>11</sup> OSMRE Annual Evaluation Report at 35.

<sup>12</sup> Pinnacle Report at 38.

guarantee that those mine operators continue to meet their duty to ensure that the cost of reclamation will be fully covered.

We look forward to your response to this citizen complaint and request for inspection and enforcement action.

Sincerely,

A handwritten signature in cursive script, appearing to read "Peter Morgan", with a long horizontal flourish extending to the right.

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*On behalf of Sierra Club and the Ohio Environmental Council*