

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

In re:) Chapter 11
)
Blackjewel, L.L.C., *et al.*,) Case No. 19-bk-30289
)
Debtors.¹) (Jointly Administered)

OBJECTION OF POWDER RIVER BASIN RESOURCE COUNCIL, KANAWHA FOREST COALITION, KENTUCKIANS FOR THE COMMONWEALTH, CITIZENS COAL COUNCIL, APPALACHIAN VOICES, APPALACHIAN CITIZENS LAW CENTER, KENTUCKY RESOURCES COUNCIL, AND SIERRA CLUB TO DEBTORS' JOINT CHAPTER 11 PLAN OF LIQUIDATION AND DISCLOSURE STATEMENT

Powder River Basin Resource Council, Kanawha Forest Coalition, Kentuckians For The Commonwealth, Citizens Coal Council, Appalachian Voices, Appalachian Citizens' Law Center, Inc., the Kentucky Resources Council, Inc. and Sierra Club (collectively "the Citizen Groups"), by and through counsel, hereby file this objection to Debtors' First Amended Joint Chapter 11 Plan of Liquidation for Blackjewel L.L.C. and its Affiliated Debtors ("Liquidation Plan") (Dkt. # 2499) and the Plan Supplement, containing the proposed Reclamation Trust Agreement ("Reclamation Trust Agreement") (Dkt. # 2602-2).

In support of this objection, the Citizen Groups state as follows:

I. INTRODUCTION

1. The Citizen Groups are primarily concerned with the ultimate reclamation and remediation of the Debtors' mine permits that have not been sold, or have not yet transferred to purchasing entities. Those permits of concern include both the 45

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: Blackjewel, L.L.C. (0823); Blackjewel Holdings L.L.C. (4745); Revelation Energy Holdings, LLC (8795); Revelation Management Corporation (8908); Revelation Energy, LLC (4605); Dominion Coal Corporation (2957); Harold Keene Coal Co. LLC (6749); Vansant Coal Corporation (2785); Lone Mountain Processing, LLC (0457); Powell Mountain Energy, LLC (1024); and Cumberland River Coal LLC (2213). The headquarters for each of the Debtors is located at PO Box 1010, Scott Depot, WV 25560.

“Remaining Permits” and the 187 “Pending Permits,” in Kentucky, Tennessee, Virginia, and West Virginia. All 191 permits presented in Exhibits 1-A and 1-B that follow are currently part of the Debtors’ estate and slated to become the responsibility of the Reclamation Trust upon the Effective Date of the Debtors’ proposed Liquidation Plan. (Hereinafter referred to in the aggregate as “Debtors’ Permits”).²

2. **The Citizen Groups oppose creation of the Reclamation Trust because it will hamper the proper functioning of SMCRA and is unnecessary for ensuring the reclamation of the Debtors’ Permits.** Remediation of outstanding environmental violations and reclamation of the Debtors’ permits can and should be completed by the processes set forth in the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”) and other relevant federal and state environmental laws. The imposition of a Reclamation Trust would interfere with those statutorily mandated processes, in violation of the requirement imposed by 11 U.S.C. § 1129(a)(3) that a plan be “proposed in good faith and not by any means forbidden by law.”
3. The proposed creation and funding of the Reclamation Trust would actually reduce the funds available for reclamation. The only source of funds for the Reclamation Trust are the surety bonds, and those are already pledged to the SMCRA regulators. The surety bonds are pledged to the regulators because SMCRA provides a process for ensuring abandoned mines are reclaimed, and that process is overseen by the SMCRA regulators. Further, as First Surety argues in its objection, it is not even possible to fund the

² Citizens Groups present as Exhibit 1 the declaration of Daniel Firth, regarding his processes for gathering and analyzing data on Debtors’ permits on behalf of Citizen Groups. Firth’s declaration describes the specific errors found in Debtors’ Revised Exhibit C-1 (Dkt. #2622) and Debtors’ Exhibit C-2 to its Plan Supplement (Dkt. #2602-3). To correct those errors and ensure that the Court has a complete list of all Debtors’ Permits, Citizens Groups present Exhibit 1-A listing Debtors’ Remaining Permits and Exhibit 1-B listing Debtors’ Pending Permits.

Reclamation Trust using third-party sureties. (*See* First Surety's Objection, Dkt. #2630, at 28-29.)

4. Even if it were feasible to fund the Reclamation Trust using the surety bonds, creation of the Reclamation Trust would insert a duplicative and unnecessary extra step into this process, and would introduce new costs in the form of the Reclamation Trustee's compensation and other administrative costs.
5. For the 45 permits that have not sold, allowing the SMCRA regulatory authorities to assume responsibility for reclamation, or oversee the surety's reclamation work, is the most efficient course. Under the ordinary course of business, Blackjewel's dissolution will trigger the bond forfeiture process for those permits, thus ensuring the ultimate reclamation of those permits by either the surety or the SMCRA regulatory authority, without need of a Reclamation Trust.
6. That 187 permits have been sold but not transferred does not necessitate creation of the Reclamation Trust. At this point, the buyers of the Pending Permits have had more than adequate time to complete the permit transfer process, with most permits sold more than one year ago. During that time, those permits have been neglected and have accrued significant environmental violations. As time goes on, those environmental violations will continue to accrue, and the likelihood of some type of catastrophic environmental failure, like a landslide, increases. This Court has ordered that the transfer process be completed, but that has not happened for the 187 permits listed in Exhibit 1-B. It is now necessary for the Court to impose a hard deadline for transfers, and the Plan's Effective date provides the most appropriate end date. Any good faith buyers who are unable to complete transfer by the Effective Date would have the option of working with the

SMCRA regulatory authority to restart or continue the transfer process during the bond forfeiture process.

7. Creation of the Reclamation Trust will also impose a significant ongoing burden on this Court. The Reclamation Trust Agreement provides, at section 2.9(b), that the only recourse available to parties concerned with the performance of the Reclamation Trust is through this Court. That section states that “in the event that the Bankruptcy Court finds that the Reclamation Trust is seriously or repeatedly deficient or late in the performance of, or violates the provisions of this Agreement, the Chapter 11 Plan, or related implementation documents, the States may either (a) seek recourse with the Bankruptcy Court, or (b) seek appointment of a new trustee.” Given the high potential for coal mining sites—particularly sites that have been neglected for as long as Debtors’ permits have—to create significant unforeseen challenges including threats to human health and welfare, this Court should anticipate having to adjudicate frequent and serious disputes, forcing additional administrative expenses on the part of the Trust, and burdening this Court with unnecessary time and expenses.
8. **The Reclamation Trust is harmful to the Citizens’ Groups interests** in that it (1) reduces the money available for reclamation by using the available bond amounts to fund the Reclamation Trust expenses; (2) may further reduce the amount of money available for reclamation of these permits by cutting off the SMCRA regulatory authorities’ abilities to seek compensation for reclamation costs above the bond amounts from state bond pool funds and from the Debtors’ owners and controllers individually; (3) is likely to delay reclamation, thus increasing the amount of time during which these permits sit neglected and accrue environmental violations that may threaten members of Citizen

Groups; (4) creates unnecessary uncertainty regarding how to address environmental damage that may occur post-confirmation; and (5) unnecessarily extends the temporal jurisdiction of this Court over the Debtors' Permits, such that future claimants may be required to seek leave of this Court to address future environmental non-compliance and threatening and damaging harms like landslides. The Citizen Groups' concerns with the creation and operation of the Reclamation Trust are amplified by the Plan's inclusion of impermissibly broad release and exculpation provisions, including provisions applicable to the Reclamation Trustee.

II. Citizens Groups Have Standing to Object to the Liquidation Plan and Reclamation Trust Agreement

9. Standing in the bankruptcy court to be heard on a given matter is determined on a case-by-case basis, based on "whether a given party has a sufficient stake in a proceeding to enable them to be heard and to participate in a case". *In re Marcus Hook Dev. Park, Inc.*, 153 B.R. 693, 700 (Bankr. W.D. Pa. 1993). A "party in interest" under 11 U.S.C. § 1109(b) may object to plan confirmation in a Chapter 11 proceeding. "Party in interest" is "an expandable concept." *In re Morton*, 298 B.R. 301, 306 (B.A.P. 6th Cir. 2003). A party in interest includes "anyone who has a practical stake in the outcome of a case, and those who will be impacted in any significant way in the case." *Id.* at 307. "[S]ection 1109(b) must be construed broadly to permit parties affected by a chapter 11 proceeding to appear and be heard." *In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 211 (3d Cir. 2011). Satisfaction of the Article III standing requirements is sufficient to establish that a party is a "party in interest" with standing to object to plan confirmation because, at a

minimum, “Article III standing and [§ 1109(b)] are effectively coextensive.” *Id.* Here, the Citizen Groups, through their members, have standing to object to the Debtors’ proposed Liquidation Plan and Reclamation Trust Agreement because many of those members will be severely negatively impacted by creation of the Reclamation Trust.

10. The Citizen Groups have already participated in these bankruptcy proceedings to protect the interests of their members, including by submitting three letters to this Court expressing concerns and presenting information regarding the status of the Debtors’ surface coal mining permits in the East, as well as the status of environmental compliance on those mine sites. Those letters have been included in the Court’s Docket at Numbers 1534, 1670, and 2084. The Citizen Groups also previously filed a Reservation of Rights regarding the proposed Liquidation Plan and Reclamation Trust. (Dkt. # 2450.)
11. The Citizen Groups collectively represent hundreds of thousands of members, many of whom live in areas directly affected by the Debtors’ coal mining operations. The Citizen Groups have members who live near the Debtors’ coal mining operations and who may be harmed if those mine sites are not properly reclaimed, if erosion and water pollution issues related to those sites remain unresolved, and if other permit violations occur and are left unremedied. The Citizen Groups and their members do not believe the Reclamation Trust will result in expeditious or complete reclamation of Debtors’ mine sites. The concerns of the Citizen Groups’ members would most efficiently and effectively be addressed by allowing the SMCRA regulators to immediately assume responsibility for site reclamation.
12. For example, the Citizen Groups’ members include Tracy Neece. *See* Declaration of Tracy Neece, EX 2. Mr. Neece owns property on the Little Mud in Printer, Kentucky.

Mr. Neece leases the upper part of that property to debtor Revelation Energy, which operates a coal mine on the site under permit 836-0437.³ The lower part of the property contains three rental units currently rented to families with children. The permit area on Mr. Neece's property is unreclaimed and in a dangerous condition, containing exposed highwalls, stopped up silt ponds, and highly eroded areas.⁴ Mr. Neece describes the site as looking "like a bomb went off." Mr. Neece is very concerned about the safety of the families living in the rental units below the unreclaimed mine. This summer, he observed the slope saturated with water and sliding down the mountain, including a large rock the size of a two-story house. Mr. Neece just wants to see the site reclaimed and made safe. He believes the Kentucky state regulators are best situated to accomplish this. If the site instead becomes the responsibility of the Reclamation Trust, Mr. Neece would continue to worry that someone will be hurt before the site is reclaimed and that his property interests will be put at further risk.

13. Citizen Groups' members also include Teri Blanton. Ms. Blanton's declaration is attached to this Objection as Exhibit 4. Ms. Blanton is directly impacted by at least three of the Debtors' permits in Harlan and McCreary Counties, Kentucky. One of the Debtors' permits, 848-8092, is a coal preparation and processing plant located in the community of Dayhoit where Ms. Blanton grew up and where she still has family. Two other permits, 874-8006 and 874-9006, are for another prep plant located very close to where Ms. Blanton owns property and frequently visits. Ms. Blanton is very concerned about the

³ Permit 836-0437 is included in Exhibit 1-A as one of Debtors' Remaining Permits. Debtor mistakenly omitted that permit from Revised Exhibit C-1. (*See* Dkt. #2622).

⁴ Documentations of Kentucky's enforcement actions on permit 836-0437, including descriptions and pictures of the conditions on that permit, were first presented by Kentucky as Exhibit 025 to its Motion to Compel. (Dkt. #2335-1). Citizens Groups provide that exhibit again here as Exhibit 3.

water pollution coming from these sites. These concerns have led Ms. Blanton to conduct regular water testing, teach others how to conduct water testing, and to submit multiple complaints to Kentucky regulators regarding water pollution coming off of the mine sites. In response to one of Ms. Blanton's complaints regarding permits 874-8006 and 874-9006, from July 2019 following commencement of this bankruptcy, a state inspector determined that the permits were discharging high levels of pollutants in excess of effluent limits and issued "Imminent Danger Cessation Orders" to Revelation Energy for both permits. Ms. Blanton would like to see the Kentucky SMCRA regulator assume responsibility for cleaning up these sites, and is very concerned that the Reclamation Trustee will not be accountable to community members like herself.

14. Citizen Groups member Joanne Hill lives very close to Debtors' prep plant with permits 874-8006 and 874-9006. *See* Declaration of Joanne Hill, EX 5. Ms. Hill lives less than two miles from the site, and regularly observes discolored acid mine drainage pollution leaving the permit site and entering into local waterways. The waterways receiving this polluted water include streams within the Daniel Boone National Forest's Beaver Creek Wildlife Refuge, and streams that flow into the Lake Cumberland drinking water reservoir. Ms. Hill is concerned about the effect of this pollution on wildlife and on drinking water. Ms. Hill's concerns have led her to file multiple complaints with the Kentucky regulators. Ms. Hill believes that the best way for the site to be fully reclaimed is for the Kentucky regulators to immediately assume full responsibility for completing reclamation and addressing the sources of water pollution.

15. Citizen Groups member Erin Savage has worked to address the impacts of the coal mine with Virginia permit #1601982. *See* Declaration of Erin Savage, EX 6. Ms. Savage has

worked with community members to address coal mine dust and water pollution problems at the mine, including pollution that flows into the Clinch River. Ms. Savage frequently recreates on the Clinch River, last floating the river in November 2019. Ms. Savage objects to the Liquidation Plan because “the creation of a Reclamation Trust to handle reclamation of unsold permits will not adequately guarantee that reclamation is completed, and will not give citizens sufficient means to ensure regulations are followed.” *Id.* at ¶ 14. She is also concerned about the plan to extinguish the permit, rendering Virginia’s reclamation bond pool unavailable for reclamation of the mine and remediation of its impacts. Ms. Savage is also very concerned about the organizational resources that will be consumed by following up and being involved in “monitoring the status of reclamation at sites like permit #1601982, and trying to establish new forums through which impacted communities can raise concerns about the state of reclamation and ongoing environmental impacts.” *Id.* at ¶17.

III. Reclamation Trust Agreement is Harmful and Unnecessary

16. The proposed Liquidation Plan is unconfirmable because the Reclamation Trust conflicts with the requirement of 11 U.S.C. § 1129(a)(3) that a plan be “proposed in good faith and not by any means forbidden by law.” As discussed in more detail below, the Reclamation Trust is forbidden by law because it flatly conflicts with the well-established requirements of SMCRA pertaining to the disposition of permits abandoned by the permittee. Even if the Reclamation Trust were somehow permissible, it would still be impractical, ineffective, and unnecessary.

a. The Reclamation Trust is Unnecessary.

17. The “sole purpose” of the Reclamation Trust and Trust Account is to “implement[] the Reclamation Actions and meet[] the Debtors’ obligations under the Remaining Permits with respect to the Permitted Areas.” (Reclamation Trust, at 5, ¶2.2(b), Dkt. # 2602-2.) The Reclamation Trust is unnecessary because SMCRA’s bond forfeiture process is in place to ensure that those reclamation obligations are performed.
18. Rather than following the normal bond forfeiture process, the Liquidation Plan calls for all of the Debtors’ Permits to be extinguished as of the Effective Date. (Liquidation Plan, Section 1.186). The reclamation bond money would then be used to fund the Reclamation Trust. (Liquidation Plan, Section 1.179). This supplants the normal SMCRA process of bond forfeiture.
19. SMCRA’s bond forfeiture process was enacted to deal with situations like this, where “[t]he permittee has become insolvent,” or the “permittee cannot demonstrate or prove the ability to continue to operate in compliance with [Kentucky’s surface mining program], and the permit.” 405 KAR 10:050 Sec. 3(2)(b).⁵ For each SMCRA permit, the permittee must post a performance bond. *See* 30 U.S.C. §1259. In this instance, each of the Debtors’ Permits is secured by a third-party surety bond. The SMCRA Regulatory Authority is the beneficiary of each of these bonds. *See* 30 U.S.C. §1259(a). If and when the Debtor dissolves, the bond forfeiture process will begin on each of the Debtors’ Permits.⁶ Prior to actual bond forfeiture, the surety may be given the option of performing

⁵ Citizens Groups cite here to provisions of Kentucky’s SMCRA program. The provisions of Virginia’s and West Virginia’s state SMCRA programs contain the same regulatory standards, which are derived from SMCRA.

⁶ Based on conversations with Kentucky’s EEC, the Citizen Groups understand that the bond forfeiture process has already begun on a number of the Debtors’ Permits.

the required reclamation.⁷ If the surety does not reclaim, the bond will be forfeited to the SMCRA regulatory authority, which will be responsible for completing the reclamation.

b. The Reclamation Trust is Harmful in That Its Administrative Costs

Reduce the Amount of Money Available for Reclamation

20. The only purportedly guaranteed source of funding for the Reclamation Trust is the bond amounts of the Debtors' Permits.⁸ However, as is argued by First Surety in its objection, the actual value of those bonds is not an asset of the Debtors' Estate; instead, the bonds are pledged by the surety bond provider to the SMCRA regulatory authorities. (*See* First Surety Corporation's Objection, Dkt. #2630, at 28-29.)

21. The Debtors - nor any creditor of the Debtors - have no interest in or claim upon the surety bonds themselves. Even if the Debtors and the surety bond providers would prefer to direct those funds to the Reclamation Trust, such an approach requires the express approval of the bonds' beneficiaries: the SMCRA regulatory authorities.

22. Even if the bonds could be used to fund the Reclamation Trust, the limited Reclamation Trust Assets would then be used, not only to pay for the required reclamation at each of the Debtors' Permits, but also the Reclamation Trust expenses. (*See* Reclamation Trust

⁷ The surety's right to perform the required reclamation is not guaranteed. In Kentucky, for example, the surety may "assume[] liability pursuant to an agreement for the completion of reclamation." 405 KAR 10:050 Sec. 3(1)(c). In doing so, the surety would assume the obligation to "complete the reclamation plan." *Id.* at Sec. 1(3). However, the surety may only assume responsibility for completing reclamation after EEC makes an express finding that the surety has "demonstrate[d] the ability to complete the reclamation plan, including achievement of the capability to support the postmining land use approved by the cabinet, and will undertake to do so within a reasonable time frame and agrees to a compliance schedule." *Id.* Even then, SMCRA's block on individuals and entities with outstanding violations is maintained, as "[n]either the surety company nor other financial institution shall employ anyone to perform the measures who has been barred from mining pursuant to the provisions of [Kentucky's SMCRA Program]." *Id.*

⁸ While the Reclamation Trust Assets are defined to include other funds, such as "any personal property of the Debtors remaining on the Permitted Areas" and recoveries on claims related to the reclamation or remediation operations, it seems unlikely at this point that any money other than the bond amounts would be available for funding the Reclamation Trust because as the Court is well aware there is simply not enough money to fulfill all of the claims on the Debtors' assets. *See* Reclamation Trust, at 3.

Agreement, Section 4.4(a) and (b).) The administrative costs of the Reclamation Trust would therefore deplete the limited funds actually available for reclamation of the Debtors' Permits.

c. The Reclamation Trust Is Harmful in That It May Limit the SMCRA Regulatory Authorities' Abilities to Seek Compensation for Funds Needed for Reclamation Beyond the Bond Amounts.

23. As this Court is aware, the bond amounts available for reclamation of Debtors' Permits are likely to be woefully insufficient. For example, in January, Kentucky's Energy and Environment Cabinet ("EEC") stated, "[i]n December 2019, Cabinet representatives assessed reclamation costs on approximately twenty percent (20%) of the permits held by Debtors and found that the required reclamation costs, for just those twenty percent (20%) assessed, would likely exceed the bonded amounts by approximately thirty-eight million dollars (\$38,000,000) due to current on-the-ground conditions." (Dkt. # 1617, at 3.)
24. SMCRA has protections designed to ensure that bond shortfalls are covered. In Kentucky, EEC is authorized to seek compensation for the cost of reclamation above the amount bonded by either dipping into the Kentucky Reclamation Guaranty Fund ("KRGF"), by seeking compensation directly from the permittee's owners and controllers, or both. However, both mechanisms require bond forfeiture before they can be invoked.
25. The KRGF is a pool of money available only for the purpose of covering the costs of reclamation that exceed the value of any individual *forfeited* bond. KRGF was created to address "deficiencies in [Kentucky's] bonding program, namely the fact that surety bonds

in Kentucky had proven inadequate to cover the actual costs of reclamation.” *See* 80 Fed. Reg. 15,953 (March 26, 2015). KRGF is intended to supplement individual bond coverage in order to address reclamation obligations. However, KRGF money is *only* available in the event of bond forfeiture. *See* KRS 350.503(4)(a) (prohibiting the use of KRGF funds other than “in the event of forfeiture.”).

26. Likewise, the sidestepping of the proper bond forfeiture process may preclude the Kentucky Cabinet from seeking compensation from the Hoops Parties or other responsible individuals where bond amounts are insufficient to reclaim the mine site. (*See* 405 KAR 10:050 Sec. 2(4) “In the event the amount forfeited is insufficient to pay for the full cost of reclamation, the permittee or operator shall be liable for remaining costs. The cabinet may complete, or authorize completion of, reclamation of the bonded area and may recover from the permittee or operator all costs of reclamation in excess of the amount forfeited.”) If the bonds are not forfeited, it is likely that EEC would be unable to recover the excess costs of reclamation from potentially responsible individuals.

**d. The Reclamation Trust Is Harmful in That It Creates Uncertainty
Regarding How to Address Environmental Damage That May Occur
Post-Confirmation**

27. Neither the Liquidation Plan nor the Reclamation Trust Agreement indicates what entity would be responsible for compliance with all applicable environmental laws on the mine sites in the Reclamation Trust. Neither do they indicate any remedies that might be available when a violation occurs at one of the Debtors’ Permits after the Effective Date. Neither the Liquidation Plan nor the Reclamation Trust Agreement indicates whether the

Reclamation Trustee or any other entity will be subject to citizen enforcement complaints or suits brought under SMCRA, the Clean Water Act, or corresponding state laws and regulations.

i. SMCRA

28. SMCRA requires that reclamation be performed according to enumerated performance standards. 30 U.S.C. §1265. In addition, each approved SMCRA permit includes a specific reclamation plan that guarantees that each mine site is reclaimed according to those standards. Each approved reclamation plan includes provisions negotiated and agreed to by the underlying surface landowner⁹ as part of the permitting process.

29. Neither the Liquidation Plan nor the Reclamation Trust Agreement explain whether the Reclamation Obligations must be carried out in conformity with the approved reclamation plan for each mine site or whether new reclamation plans will be created. If new plans are created, there is no indication of what rights the underlying landholders will have in negotiating the requirements of the reclamation plan. While the Reclamation Trust Agreement speaks to Regulatory Authority review of annual reclamation plans, that review is likely a meaningless exercise because neither the Liquidation Plan nor the Reclamation Trust Agreement explain how or whether failure to conform with the approved Reclamation Plan will be enforced going forward or whether they will be enforced at all. In fact, there is no guarantee under the Plan that reclamation will ever occur at the mines.

⁹ Based on undersigned counsel's review of a number of the Debtors' Permits, for the most part, Debtor secured Right of Entry to extract coal by surface mining methods through leases with individual landowners. That means that most of the lands underlying the Debtors' Permits are held by individual landowners who negotiated leases with the Debtors or their predecessors that detail the way in which the land is to be reclaimed.

30. Nor has there been a finding that the Reclamation Trust has the financial or operational ability to complete the reclamation plan or is capable of supporting the approved post-mining land use. In particular, there is no reference to a time frame for reclamation, or a compliance schedule, designed for each permit. Instead, the Liquidation Plan provides that the Reclamation Trust will dissolve after seven years at the most (an original five-year term, that may be extended by no more than two years), whether or not reclamation is complete at all of the Retained Permits. (Liquidation Plan, Section 10.11.)
31. Further, there is also no prohibition against the Reclamation Trust employing anyone who has been barred from mining under SMCRA's Applicant Violator System database as is required by Kentucky's regulation at 405 KAR 10:050 Sec. 1(3).

ii. Clean Water Act

32. The Liquidation Plan and Reclamation Trust also fail to provide any explanation of the disposition of the Clean Water Act obligations that attach to all of the Debtors' Permits.
33. The Clean Water Act operates as a prohibition against any discharge of a pollutant from a point source, subject to the limitation that a regulator may authorize a discharge under the National Pollutant Discharge Elimination System. 33 U.S.C. § 1311(a). The Clean Water Act "establishe[s] a default regime of strict liability," and any discharge of a pollutant without permit authorization exposes the discharger to liability. *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County Md.*, 268 F.3d 255, 265 (4th Cir. 2001). Because this prohibition against all unpermitted discharges of pollutants is automatic, it cannot be extinguished by order of this or any other Court.
34. All of the Debtors' Permits are currently authorized to discharge pollutants under the Clean Water Act and corresponding state law and regulations. The Liquidation Plan

appears to provide that those Clean Water Act permits will be extinguished. (*See* Liquidation Plan, Section 1.1.86.) If those permit authorizations—and attendant limitations and compliance obligations—are not transferred to the Reclamation Trust, then Clean Water Act unpermitted discharge liability will attach to the Reclamation Trust Trustee, any contractor conducting reclamation, and any landowners.

35. Like the SMCRA permits, there is no language in the Liquidation Plan or the Reclamation Trust Agreement that demonstrates the Clean Water Act permits will be enforced by regulatory authorities at the state level, or by EPA. In fact, as discussed above, the language implies such permits, and all compliance obligations, will be extinguished, leaving unfortunate ongoing liability obligations to the Debtors' and an ongoing enforcement hassle left for the jurisdiction of this Court.

**iii. Liquidation Plan Does Not Recognize the Applicability of
Citizens Suits to Debtors' Permits**

36. Both SMCRA and the Clean Water Act authorize citizen suits to enforce violations of the statutes, regulations, and permits issued thereunder. 30 U.S.C. § 1270 (SMCRA citizen suit provision), 33 U.S.C. § 1365 (CWA citizen suit provision). These citizen suit provisions apply to both permit holders and state and federal regulatory agencies.

37. There is no language in either the Liquidation Plan or the Reclamation Trust Agreement that ensures the applicability of these citizen suit provisions to any of the Debtors' Permits.

IV. The Plan Cannot Be Confirmed Because It Contains Impermissible Release, Exculpation, and Injunction Provisions Which Could Frustrate Compliance with Environmental Laws, Including SMCRA and the Clean Water Act.

38. The Plan contains overly broad provisions relating to discharge, exculpation, and injunctions. *See* Plan at Section 12.4 (release); Section 12.5 (exculpation); and Section 12.6 (injunction). The Plan also provides for broad exculpation and indemnification of the Reclamation Trust and Reclamation Trustee. *See* Section 10.7. These provisions are “overly broad” in that they are not limited to what is allowed under bankruptcy and applicable non-bankruptcy law. Moreover, the overly broad provisions could improperly frustrate compliance with SMCRA and the Clean Water Act, including provisions of those statutes intended to apply in the event a permitted operation is abandoned.
39. Because the Liquidation Plan provisions are contrary to bankruptcy and applicable non-bankruptcy law, the Plan fails to satisfy the requirements for confirmation set forth in sections 1129(a)(1) and 1129(a)(3) of the Bankruptcy Code, 11 U.S.C. §§ 1129(a)(1) and 1129(a)(3). The Plan’s overly broad language provides a separate, independent basis for concluding that the Plan does not satisfy the 1129(a)(1) and 1129(a)(3) requirements, in addition to the basis offered by the Plan’s inclusion of provisions that directly conflict with the environmental laws. *See supra* ¶¶ 27-37.
40. In addition, the overly broad exculpation and indemnification provision specific to the Reclamation Trust provides that,

The Reclamation Trustee, the Reclamation Trust, the professionals of the Reclamation Trust, and their representatives will be exculpated and indemnified pursuant to the terms of the Reclamation Trust Agreement.

Section 10.7. This provision is improper because it could be cited – inappropriately – to support an argument that the Plan exculpates the Reclamation Trust and Reclamation Trustee from their obligation to comply with environmental law. As noted earlier, each of the Debtors’ SMCRA permits has an approved reclamation plan that dictates the reclamation the Trust must achieve. Each permit is also subject to a separate Clean Water Act NPDES permit. The Trust should not be put in a position to contend – inappropriately – that it is exculpated from the obligation to satisfy the requirements of the approved reclamation plan or maintain compliance with the pollutant limits in the NPDES permit. It is well-established that anyone who acquires property from a debtor must comply with environmental law applicable to the property. No one is entitled to maintain a nuisance or put the public at risk. *See, e.g., Ohio v. Kovacs*, 469 U.S. 274, 285 (1985) (“[W]e do not question that anyone in possession of the site-whether it is Kovacs or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee-must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.”); *In re General Motors Corp.*, 407 B.R. 463, 508 (S.D.N.Y. 2009) (a purchaser of estate property “would have to comply with its environmental responsibilities starting with the day it got the property”). *Cf. In re CMC Heartland Partners*, 966 F.2d 1143, 1146 (7th Cir. 1992) (a reorganized debtor that owns property that was contaminated prior to confirmation is liable under environmental law as the current owner of the property). The overly broad release of the Reclamation Trust and Reclamation Trustee fails to meet the Fourth Circuit’s prescription that non-debtor

releases must be granted “cautiously and infrequently.” See *Nat’l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014) (quoting *Behrmann v. Nat’l Heritage Found., Inc.*, 663 F.3d 704, 712 (4th Cir. 2011)). Indeed, Section 10.7’s allowance for an argument that non-debtors are not obligated to comply with environmental law is extremely incautious: it unnecessarily puts the public at risk and renders the Plan overly broad and contrary to bankruptcy and environmental law.

41. The Plan provision exculpating the Reclamation Trust and Reclamation Trustee is particularly problematic when read in connection with Section 1.1.86 of the Plan, which states that any “mining and operating permits remaining with the Debtors’ Estates as of the Effective Date . . . shall be deemed extinguished as of the Effective Date.” This section appears to act as a further release and exculpation provision, relieving the Reclamation Trust and Reclamation Trustee of any obligation to comply with the terms of those permits.
42. Not only is this release and exculpation provision overly broad and not permissible under the bankruptcy code, it actually *increases* liability for the Reclamation Trust, at least to the extent that it purports to apply to Clean Water Act NPDES permits. As set forth above in Paragraphs 32-35, the obligation for polluters to limit their pollution discharges originates not from a Clean Water Act permit, but rather from the Clean Water Act statute itself. Instead, the Clean Water Act permit acts to *limit* the polluter’s liabilities. All of the Debtors’ Permits are currently authorized to discharge pollutants under the Clean Water Act and corresponding state law and regulations. If those permit authorizations— and attendant limitations—are not transferred to the Reclamation Trust,

then Clean Water Act unpermitted discharge liability will attach to the Reclamation Trust Trustee, any contractor conducting reclamation, and any landowners.

43. The Plan's final overly broad provision, Section 12.6 ("Injunction Related to Releases and Exculpation"), provides:

all entities who have held, hold, or may hold Claims against or Interests in the Debtors are permanently enjoined . . . from . . . commencing or continuing in any manner any action or other proceeding of any kind; . . . commencing or continuing in any manner any action or other proceeding of any kind that does not comply with or is inconsistent with the Plan,...; and . . . taking any actions to interfere with the implementation or consummation of the Plan.

Section 12.6. This injunctive provision is improper for the same reasons that the aforementioned Reclamation Trust exculpation provisions are improper. The injunctive provision could be cited – inappropriately – by the Reclamation Trust to argue that the government and the Citizens Groups, as citizen suit plaintiffs, are enjoined from enforcing SMCRA or Clean Water Act obligations against it, even though those obligations are not properly subject to discharge or exculpation. For example, the Reclamation Trust could argue – inappropriately – that enforcement is enjoined because certain ongoing SMCRA or CWA obligations, even if not technically “claims,” provide a “Cause of Action” that was discharged pursuant to the Plan. The susceptibility of Section 10.6 to such an argument unnecessarily puts the public and the environment at risk and renders the provision overly broad and contrary to bankruptcy and environmental law. Accordingly, Section 10.6 underscores that the Plan fails to satisfy the requirements for confirmation set forth in sections 1129(a)(1) and 1129(a)(3) and cannot be confirmed.

44. In *Behrmann*, the Fourth Circuit enumerated several factors that should be considered in determining whether third-party releases and exculpatory clauses are appropriate, including, but not limited to, the following:
- (a) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
 - (b) The non-debtor has contributed substantial assets to the reorganization;
 - (c) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
 - (d) The impacted class, or classes, has overwhelmingly voted to accept the plan;
 - (e) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
 - (f) The plan provides an opportunity for those claimants who choose not to settle to recover in full; and
 - (g) The bankruptcy court made a record of specific factual findings that support its conclusions.
45. The Fourth Circuit was also clear, in *Behrmann*, that the standards it set forth apply not only to third-party releases, but also to exculpations and injunctions. At page 707 of the *Behrmann* Opinion, the Fourth Circuit defined the term “Release Provisions” as including the various “release, injunction and exculpation provisions” included in the plan before it. *Behrmann*, 663 F.3d at 707. It then held that the factors it set forth were the applicable test for considering all of the “Release Provisions.” *Id.* at 712.
46. The release, exculpation, and injunction provisions applicable to the Reclamation Trust in the Plan do not satisfy the *Behrmann* factors, and therefore must be rejected. First, there is no identity of interests between the debtors and the Reclamation Trust. Although the Plan purports to indemnify the Reclamation Trust and Reclamation Trustee, the funds available to achieve that indemnification do not come from the Debtors, but from the non-debtor, third-party surety bond providers. Those same surety funds would be available to cover the costs of reclamation even if there were no Reclamation Trust, as

they were pledged to that purpose prior to the filing of the petition, and SMCRA provides that the full value of the reclamation bond is available to the regulator in the event of permit abandonment. Second, the Reclamation Trust itself is providing *no* assets to the reorganization or to the Reclamation Trust. The only funds to carry out the purposes of the Reclamation Trust are being provided by the sureties, and would be available even if there were no Plan. Third, the injunction is not central to the reorganization. The Reclamation Trust offers no benefits to the Debtors or any other party that would not be achieved through permit abandonment and bond forfeiture by the state regulators. In either case, the funds available for reclamation come from the surety bond providers. Fourth, the entities impacted by the reclamation status of the permits in the Reclamation Trust – the individuals and communities directly impacted by those mine sites -- are not creditors and have not been provided any opportunity to vote on the plan. Fifth, the plan does not provide a mechanism to pay for complete reclamation of the sites. Instead, the plan imposes unnecessary barriers to complete reclamation, including extinguishing permits and imposing an artificial seven-year time limit for reclamation. Sixth, the Reclamation Trust is being forced upon the state regulators and impacted communities, counter to the requirements of SMCRA and the Clean Water Act, and there is no opportunity for those entities to ensure that environmental obligations will be satisfied in full. Seventh, the Debtors have not offered the required factual and evidentiary support for the proposed third-party release, exculpation, and indemnification provisions.

CONCLUSION

47. Citizens Groups file this objection on behalf of their members who have been and continue to be impacted by the poor environmental conditions on many of the Debtors'

mine sites. Citizens Groups strenuously object to the Liquidation Plan because it, along with the creation of a Reclamation Trust, would impede reclamation on the 191 permits that are in the Debtors' estate. Citizens Groups urge the Court to ensure that the Debtors' permits are abandoned at liquidation so that reclamation can proceed as intended under SMCRA.

Respectfully Submitted,

/s/ Mary Varson Cromer

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Certificate of Service

I certify that on this the 10th day of December 2020, I electronically filed the foregoing Objection with the Clerk of this Court using the CM/ECF filing system which will send notice of such filing to all CM/ECF participants who have appeared in this matter.

/s/ Mary Varson Cromer

Mary Varson Cromer
Counsel for Citizen Groups