

**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)

**RESERVATION OF RIGHTS BY 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 REGARDING
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 files this reservation of rights in response to Debtors' Chapter 11 Plan of Liquidation ("Liquidation Plan") [Docket No. 2397].

In support of this reservation of rights, the citizen groups state as follows:

Citizens Groups' Statement of Interests

1. The citizen groups collectively represent hundreds of thousands of members, many of whom live in areas directly affected by Blackjewel's coal mining operations. Based on information and belief, the citizen groups have members who live near Blackjewel's coal mining operations and who may be harmed if those mine sites are not properly reclaimed, if water

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.

pollution issues related to those sites remain unresolved, and if other permit violations occur and are left unremedied.

2. The citizen groups have written 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 Nos.1534, 1670, and 2084.

3. For the reasons summarized below, the citizen groups are concerned about the proposed extinguishment of the "Remaining Permits" and the transfer of responsibility for those mine sites to the Reclamation Trust.

Summary of Citizen Groups' Primary Concerns

4. The citizen groups are concerned that the Reclamation Trust assets will be insufficient to fully reclaim the mine sites that will become the responsibility of that Reclamation Trust. As has been presented on multiple occasions to this Court, the cost of reclaiming these mine sites is likely to be significantly greater than the permits' bond amounts. As the Reclamation Trust's assets are limited, for the most part, to the face value of the bonds, the trust assets will be insufficient to ensure proper reclamation.

5. The citizen groups are concerned that the mechanism by which the Reclamation Trust will be created will preclude and nullify the use of the bond forfeiture procedures that are provided in the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") and its respective state programs. The SMCRA regulatory scheme related to bonding was designed precisely to deal with the eventuality of a mine operator going out of business prior to completing reclamation and with insufficient funds to cover the costs of reclamation.

Accordingly, there is no need for this Court to create a separate, parallel system in the form of

the Reclamation Trust. In the absence of the utilization of bond forfeiture procedures available under SMCRA and Kentucky's approved regulatory program, Kentucky's Energy and Environment Cabinet ("the Kentucky Cabinet") will lack the authority to access money in the Kentucky Reclamation Guaranty Fund ("KRGF"), which is a supplemental bond pool created to ensure that adequate reclamation is performed in the event the individual permit bonds are insufficient. Likewise, in the absence of bond forfeiture, Kentucky will likely be unable to use its authority to seek compensation from the Hoops Parties for any bond shortfalls.

6. The citizens groups are likewise concerned that there appears to be no plan for assigning environmental obligations under both the Clean Water Act ("CWA") and SMCRA after the Effective Date. In fact, it appears from the Liquidation Plan that the intent is to extinguish all CWA and SMCRA permits and their attendant reclamation and remedial obligations for all mine sites that are to be transferred to the Reclamation Trust, to indemnify the Reclamation Trust against any actions that may be brought to enforce those and other laws, and to enjoin any actions, including enforcement actions, against the Reclamation Trust or Trustee that may arise going forward. In such a case, given the anticipated shortfall in individual permit bonds, a new legacy of abandoned mine lands and damaged waters will be created that might otherwise be mitigated through bond forfeiture, and, where appropriate, individual penalty provisions under SMCRA.

7. Furthermore, the citizen groups are concerned that there is no requirement that the Reclamation Trust follow the approved SMCRA reclamation plan for the Remaining Permits or ensure that the mine sites are reclaimed according to SMCRA's performance standards, as is required under SMCRA. In fact, it does not appear from the terms of the proposed Liquidation

Plan that there is any enforceable requirement that the Reclamation Trust perform reclamation on the Remaining Permits at all.

8. The citizen groups are further concerned that there is no plan to ensure compliance with the Clean Water Act permit limits going forward. The Liquidation Plan calls for all “mining and operating permits” to be extinguished as of the Effective Date. If that is to include the mine sites’ Clean Water Act permits, the outfalls on those mine sites would immediately become unpermitted discharges subject to Clean Water Act enforcement—against the Trust, the contractor, or the landowner—by the state regulatory authority, the Environmental Protection Agency, or private citizens. Based on the terms of the Liquidation Plan, there is no indication that there would be an entity responsible for those outfalls after the Effective Date.

9. Finally, the citizen groups are concerned that the proposed extinguishment of all environmental permits could be construed to limit the rights of citizens to bring citizen suits under the Clean Water Act or SMCRA. Likewise, the citizen groups are concerned that the broad indemnification and injunction provisions of the Liquidation Plan would hinder any other rights to ensure adequate reclamation and to bring any actions for damages that may occur as a result of conditions on these sites after the Effective Date.

Relevant Provisions of the Liquidation Plan and Disclosure Statement

10. The Liquidation Plan² and Disclosure Statement both reference a “Plan Supplement” and a “Reclamation Trust Agreement,” but neither of those documents has yet been filed in the docket. It is possible that some of the questions raised in this Reservation of Rights are more fully addressed in those documents, but the citizen groups are unable to comment on the content

² Throughout this Reservation of Rights, citizen groups refer to specific provisions of the Liquidation Plan. Based on our review of the Liquidation Plan and Disclosure Statement, the Disclosure Statement’s corresponding provisions do not provide any information not otherwise included in the Liquidation Plan.

of either of these documents at this time due to their non-disclosure. The citizen groups would respectfully request that these questions and concerns be addressed prior to approval.

11. The citizen groups' concern is with the fate of the "Remaining Permits." The Liquidation Plan defines the "Remaining Permits" as "those mining and operating permits remaining with the Debtors' Estates as of the Effective Date." (Liquidation Plan, 1.1.86).

12. The Liquidation Plan provides that those Remaining Permits "shall be deemed extinguished as of the Effective Date." (Liquidation Plan, at 1.1.86.)

13. The Liquidation Plan provides that the Reclamation Trust shall act as the Debtors' successor "solely for the purpose of performing, managing, and funding satisfaction of the Reclamation Obligations." (Liquidation Plan, at 10.2.1.)³

14. The Reclamation Trust will be primarily funded by "the Debtors' interest in any bonds issued by the Sureties in connection with the Remaining Permits." (Liquidation Plan, at 1.1.79.) Those funds will be "[c]ash in an amount equal to the total bonding in place for the Remaining Permits, which shall be transferred by the Sureties to the Reclamation Trust on the Effective Date to fund the initial operations of the Reclamation Trust." (Liquidation Plan, at 1.1.81.)

15. The Reclamation Trust will be administered by the "Reclamation Trustee," who will be appointed by "the Debtors in consultation with the Sureties and Impacted States." (Liquidation Plan, at 10.4.)

16. The Liquidation Plan is silent as to whether the automatic stay provided by 11 U.S.C. § 362 will continue to apply to the Reclamation Trust in any fashion. The Liquidation Plan states, "[u]nless otherwise provided in the Plan, all injunctions or stays arising prior to the Confirmation Date in accordance with sections 105 or 362 of the Bankruptcy Code, or otherwise, and in

³ "Reclamation Obligations" are defined as "all reclamation and remediation obligations associated with Remaining Permits." (Liquidation Plan, at 1.1.76.)

existence on the Confirmation Date, shall remain in full force and effect until the Effective Date.” (Liquidation Plan, at 12.2.) However, the Plan further states that “the Bankruptcy Court shall retain jurisdiction over the Reclamation Trust after closing the Debtors’ Chapter 11 Cases.” (Liquidation Plan, at 5.2.)

17. The Liquidation Plan further provides the following, which appears to provide broad indemnification of the Reclamation Trust and its administrators at the expense of the Reclamation Trust Assets:

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. The indemnification described in the Reclamation Trust Agreement will exclude willful misconduct and gross negligence. Any indemnification claim of the Reclamation Trustee or the other individuals entitled to indemnification under this subsection shall be satisfied solely from the Reclamation Trust Assets and shall be entitled to a priority, ahead of any other claim to or interest in such assets. The Reclamation Trustee and its representatives shall be entitled to rely, in good faith, on the advice of their retained professionals.

(Liquidation Plan, at 10.7.)

18. The Liquidation Plan further imposes a broad injunction on any future claims against, *inter alia*, the Reclamation Trust:

Except as otherwise expressly provided in the Plan or for obligations issued pursuant to the Plan, or Confirmation Order, all entities who have held, hold, or may hold Claims against or Interests in the Debtors are permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, their Estates, the Liquidation Trust, the Disbursing Agent, the Reclamation Trust, the Released Parties, or the Exculpated Parties on account of any such Claims or Interests including, but not limited to: (1) commencing or continuing in any manner any action or other proceeding of any kind; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order; (3) creating, perfecting, or enforcing any encumbrance of any kind; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from the Debtors’ Estates, the Liquidation Trust, or the Reclamation Trust, notwithstanding an indication in a proof of Claim or Interest or otherwise that such holder asserts, has, or intends to preserve any right of setoff pursuant to section 553 of the

Bankruptcy Code or otherwise; (5) 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, including any right of action against an Exculpated Party for any Exculpated Claim, obligation, Cause of Action, or liability for any Exculpated Claim; and (6) taking any actions to interfere with the implementation or consummation of the Plan; provided, however, that nothing herein shall preclude any entity from exercising rights pursuant to and consistent with the terms of the Plan or the Confirmation Order.

(Liquidation Plan, at 12.6.) Although this injunction is ostensibly restricted to entities who “hold Claims against or Interests in the Debtors,” it is unclear if this section is intended to apply to claims of ongoing environmental violations or property damage occurring at the Remaining Permits that may arise after the Effective Date.

Reclamation Trust Assets Will Be Insufficient to Ensure Proper Reclamation

19. The citizen groups are concerned that the Reclamation Trust assets will be insufficient to reclaim mines put into the trust (i.e., the “Remain in Estate permits”).⁴ In Kentucky in particular, the trust is slated to assume the obligations of environmental remediation and reclamation on at least 20% of Blackjewel’s coal mine permits. In a January 13, 2020 letter filed by the Kentucky Energy and Environment Cabinet (“EEC”) in this matter, EEC stated as follows, “[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.) Since that letter, the citizen groups and EEC have brought numerous outstanding environmental violations on Blackjewel’s Remain in Estate permits to this Court’s attention, and,

⁴ The lack of any plan for providing additional funds to meet the bonding shortfall is also Kentucky Energy and Environment Cabinet’s primary objection as stated in its Objection to Debtors’ Motion for Entry of an Order (I) Scheduling a Combined Hearing for Disclosure Statement Approval and plan Confirmation, (II) Establishing the Solicitation Procedures and Dates, Deadlines, and Notices Related Thereto, and (III) Granting Related Relief. (Dkt. #2438.)

absent the one site subject to this Court's Order after the hearing on September 10-11, 2020, there has been no reported remediation or reclamation activity on these sites. As EEC has stated, "conditions only get worse over time: Ponds fill in with sediment washed from unreclaimed mining areas resulting in polluted discharges, unreclaimed slopes erode and fail while depositing mud, rocks, and debris into creeks and the backyards and homes of the citizens that live in the valley bottoms below. Generally speaking, violations do not self-cure; they do not abate themselves simply with the passage of time." EEC Reply, Dkt. #2334, at pp. 3-4. The record makes clear that the Remaining Permits will have clean up and reclamation liabilities that significantly exceed the bonded amounts for the mine sites that are slated to go into the Reclamation Trust. Further, based on the proposed Liquidation Plan's definitions, the Reclamation Trust's assets will consist primarily, if not exclusively, of those bond amounts. (See Liquidation Plan, 1.1.79.) There is no indication that there will be any additional monies available for clean up and reclamation costs beyond the sureties' bond amounts.

Liquidation Plan Seeks to Circumvent SMCRA's Bond Forfeiture Process and the Protections and Authorities Contained Therein

20. Not only is the Reclamation Trust sure to be insufficiently funded to pay for the reclamation obligations on the Remaining Permits, the creation of the Reclamation Trust is structured such that SMCRA's bond forfeiture process and the protections and guarantees provided therein are circumvented.

21. The Kentucky Cabinet is required "to regulate surface coal mining and reclamation operations in a manner as to ensure that satisfactory reclamation is accomplished." 405 KAR 10:050. Bond forfeiture is an important part of the regulatory authority's ability to "ensure that satisfactory reclamation is accomplished." The Kentucky Cabinet is authorized to forfeit a bond 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.” *Id.* at Sec. 3(2)(b). The Kentucky Cabinet *must* forfeit the bond where “[t]he permittee has failed to conduct the surface mining and reclamation operations in accordance with [the Kentucky surface mining statute], the conditions of the permit or [the Kentucky surface mining regulations] within the time required; “ or “[t]he permit for the area or increment under bond has been revoked or the operation terminated.” *Id.* at Sec. 3(1). In other words, the Kentucky SMCRA program is already expressly designed to address scenarios such as Blackjewel’s liquidation.

22. The surface mining regulations allow an alternative to bond forfeiture only when express requirements are met. For example, a surety may “assume[] liability pursuant to an agreement for the completion of reclamation.” 405 KAR 10:050 Sec. 3(1)(c). When a surety assumes liability, it assumes the obligation to “complete the reclamation plan.” *Id.* at Sec. 1(3). Further, the surety may only assume responsibility for completing reclamation after the Cabinet 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.* Finally, the Kentucky surface mining regulations impose limitations on who the sureties may employ to carry out the reclamation, stating that “[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 KRS Chapter 350.” *Id.*

23. Here, neither the Liquidation Plan nor the Disclosure Statement demonstrates that the Reclamation Trust satisfies the limited enumerated criteria set forth in the Kentucky surface

mining regulations at 405 KAR 10:050 Sec. 3(1)(c), under which the Cabinet may forego forfeiting the bonds in lieu of allowing the sureties to assume liability.

24. Likewise, the Liquidation Plan does not indicate that the protection against contracting for reclamation with any entity that is barred from mining through SMCRA's Applicant Violator System will be enforced.

25. Furthermore, if the bond forfeiture process is not invoked and followed, Kentucky may be precluded from enforcing its statutory authority to seek additional money needed for adequate reclamation from either the Kentucky Reclamation Guaranty Fund ("KRGF") or from the Hoops Parties. Given the recognized inadequacy of surety bonds to fully cover the costs of reclamation, the inability to draw upon the bond pool to supplement funds available from the individual bonds virtually guarantees that the Reclamation Trust will not have adequate funds to complete reclamation in accordance with the reclamation plan for each permit.

26. Money that will be needed to cover the shortfall in bond amounts through the KRGF is unavailable if the bond forfeiture process is not followed. 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). As the federal Office of Surface Mining, Reclamation and Enforcement described it, the Reclamation Guaranty Fund "is an interest-bearing reclamation account, requiring mandatory participation and designed to cover the excess costs of reclamation for coal mining sites when the permit specific performance (penal) bond is inadequate." *Id.* at 15,955. KRGF is intended to supplement individual bond coverage in order to address reclamation obligations, as such, the 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.”).

27. Likewise, the sidestepping of the proper bond forfeiture process may preclude the Kentucky Cabinet from seeking compensation from the Hoops Parties 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 forfeiture were properly invoked, the Cabinet would be empowered to pursue the Hoops Parties for additional funds required for reclamation.

Liquidation Plan Contains No Plan for Assumption of Environmental Obligations and Liabilities After the Effective Date

28. The Liquidation Plan does not indicate what entity will be responsible for compliance with all applicable environmental laws on the mine sites in the Reclamation Trust. Neither does it indicate any remedies that might be available should the Reclamation Trust violate any applicable environmental laws, including whether the Reclamation Trustee or any other entity will be subject to citizen enforcement suit brought under SMCRA, the Clean Water Act, or corresponding state laws and regulations.

SMCRA

29. SMCRA requires that reclamation be performed according to enumerated performance standards. 30 U.S.C. § 1265 (setting forth performance standards “applicable to all surface coal mining and reclamation operations”). In turn, each approved SMCRA permit includes a specific reclamation plan that guarantees that each mine site is reclaimed according to those standards. Furthermore, each approved reclamation plan includes provisions negotiated and agreed to by

the underlying surface landowner as part of the permitting process. The Liquidation Plan does not 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. The Liquidation Plan does not 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.

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 postmining land use. In particular, there is no reference to a time frame for reclamation, or a compliance schedule. 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, at 10.11.) 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).

Clean Water Act

31. The Plan and Disclosure Statement also fail to provide any explanation of the disposition of the Clean Water Act obligations that attach to all of the Remaining Permits. 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 discharges of pollutants is automatic, it cannot be extinguished by order of this or any other Court. All of the operations covered under the Remaining 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.

Liquidation Plan Does Not Recognize the Applicability of Citizens Suits Regarding the Remaining Permits

32. 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.

33. There is no language in either the Plan or the Disclosure Statement that ensures the applicability of these citizen suit provisions to any of the Remaining Permits.

Reservation of Rights

34. The citizen groups file this Reservation of Rights now in the hope that any ambiguities regarding the Reclamation Trust in the Liquidation Plan may be clarified, and to put the Debtors and any other Interested Party on notice that the citizen groups remain prepared to exercise all rights granted to them under SMCRA and the Clean Water Act to ensure that all of the Remaining Permits are fully reclaimed with all environmental violations addressed.

35. The citizen groups therefore hereby expressly reserve all rights afforded to citizens under SMCRA and the Clean Water Act and those statutes' implementing regulations and all other applicable state and federal laws.

Respectfully Submitted,

/s/ Mary Varson Cromer

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Certificate of Service

I certify that on this the 14th day of October 2020, I electronically filed the foregoing Reservation of Rights 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