



December 12, 2024

VIA EMAIL

Sharon Buccino  
Principal Deputy Director  
OSMRE  
1849 C Street NW  
Mail Stop 4526 Washington, DC 20240

Dear Principal Deputy Director Buccino,

On behalf of Appalachian Voices, the West Virginia Highlands Conservancy, Allegheny-Blue Ridge Alliance, the West Virginia Chapter of the Sierra Club, Christians for the Mountains, Greenbrier River Watershed Association, Kanawha Forest Coalition, Coal River Mountain Watch, the Alliance for Appalachia, the West Virginia Native Fish Coalition, and West Virginia Rivers Coalition. I write to urgently request that the Office of Surface Mining Reclamation and Enforcement (OSMRE) issue a cessation order and suspend the permit and coal hauling activities associated with Permit O302211, subsequent to Ten Day Notice X24-111-440-003. We believe this cessation order should remain in effect until OSMRE completes its Valid Existing Rights (VER) determination for Haulroad #2 (Permit O302211) and until the ongoing litigation against the U.S. Forest Service (USFS) concerning the legality of the commercial road use permit (RUP) issued to South Fork Coal Company (SFCC) to cross the Monongahela National Forest (MNF) is resolved.

**Haulroad #2 Lacks a Determination of Valid Existing Rights within the MNF as Required by Section 522(e) of SMCRA Prior to the Initiation of Surface Mining Operations**

A determination of whether SFCC holds VER to the haul road should have been made during the original permit application process, begun in 2011 and completed in 2013, but SFCC erroneously claimed that “there are no lands within the proposed permit area which lie within or are adjacent to the boundaries of the...National Forest” while acknowledging in the very same Proposal and Drainage Map that the United States of America was a surface property owner for Tract M within the permit area. This egregious error deprived regulators and the public of ensuring that the restrictions on permitting coal operations on federal land were enforced.

*Protecting environmental integrity in the Allegheny-Blue Ridge region  
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Consequently, SFCC did not have approval from the USFS to use the National Forest land when O302211 was issued in 2013, and SFCC would therefore not have been able to satisfy the second prong of the VER determination it now claims to satisfy. From the time the haul road was permitted in 2013 until the USFS granted the now-contested commercial RUP in 2021, SFCC was using Haulroad #2 without permission from the USFS across the MNF, in violation of the Surface Mining Control and Reclamation Act (SMCRA) Section 522(e). That violation should not just be papered over, and it certainly should not work in SFCC's favor now.

SFCC now seeks a VER determination under 30 C.F.R. § 761.5(c)(1), which requires:

1. **The road existed when the land came under protection** (Section 761.11 or 30 U.S.C. § 1272(e)); and
2. **The person has a legal right to use the road for surface coal mining operations.**

Regarding the first criterion, OSMRE should not accept SFCC's and the State of West Virginia's assertions as sufficient to establish the existence of VER. Since the initial permit application, SFCC has submitted blatantly inaccurate information to the West Virginia Department of Environmental Protection (WVDEP), and the agency has failed to fulfill its oversight obligations. OSMRE should conduct independent research into whether the road existed in compliance with regulatory requirements when the land came under protection.

As for the second criterion—that SFCC has the legal right to use the road—OSMRE should perform its own title, deed, easement, and other relevant records search, independent of the materials provided by SFCC. The fact that SFCC neither possessed a commercial RUP from the USFS until 2021 (nearly a decade after commencing use of Haulroad #2), nor sought the required VER determination despite knowing the road crossed National Forest, renders it imperative that OSMRE independently verify the information SFCC only recently submitted. Such scrutiny is required given previous inaccuracies in SFCC's submissions. OSMRE should not take SFCC's evidence at face value.

Furthermore, WVDEP withdrew the Notice of Violation (NOV 10) for failure to submit a request for a VER determination, citing only that it was "issued in error" without further explanation. If WVDEP's action was to avoid having to issue violation extensions and failure to abate cessation orders while the VER process unfolds, such motivation would be a gross abuse of discretion.

**Without a cessation order by OSMRE, Haulroad #2 will be allowed to operate indefinitely with a recognized defective permit connected to an issue central to SMCRA's Section 522(e) prohibitions.** Allowing SFCC to continue hauling coal during the interim effectively renders the VER determination by OSMRE a mere formality and Section 522(e) a toothless paper tiger. Allowing this to continue would constitute a dangerous moral hazard, by establishing that there are no consequences to submitting inaccurate permit applications and that permit defects and violations can be wiped away through ex-post VER determinations.

## **The Current USFS RUP for Haulroad #2 is Invalid**

In a previous VER determination involving the Daniel Boone National Forest in Kentucky (*see* 71 Fed. Reg. 70,533 (Dec. 5, 2006)), OSMRE took the stance that the issuance of a USFS road use permit is already covered under NEPA actions taken by the USFS in compliance with its Environmental Policy and Procedures Handbook. Even if that position were correct, it would be inapplicable here. There is ongoing litigation challenging the USFS's failure to conduct any level of NEPA review or Section 7 Consultation under the Endangered Species Act (ESA) prior to granting the RUP.

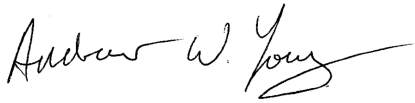
Even if OSMRE's decision on the VER request is a legal opinion categorically excluded from NEPA requirements, the second prong of the VER determination claimed by SFCC hinges on permission by the USFS to use the land—a condition not truly satisfied until the current litigation, and obvious RUP defects, are resolved. As it stands, the USFS RUP to SFCC violates NEPA and the ESA by failing to conduct necessary environmental reviews and consultations, rendering the USFS RUP void ab initio and nonexistent for the purposes of OSMRE's VER determination for O302211. Thus, the second prong of the VER determination cannot be satisfied until the litigation is resolved. Although the NEPA process here is wholly for the USFS to handle, OSMRE should not succumb to this tragedy of the regulatory commons. That is, OSMRE cannot rely on a fatally flawed USFS RUP to conclude that the second prong of the VER analysis is satisfied.

## **Conclusion**

Allowing SFCC to continue hauling coal on O302211 under the currently defective SMCRA and USFS permits not only jeopardizes environmental protections and frustrates the intent of Federal law, but also erodes public trust in regulatory institutions and undermines the importance of accuracy in permitting applications and their review. Your decisive action here as Principal Deputy Director is needed to uphold the integrity of environmental laws and ensure regulatory processes are transparent, just, and effective. SFCC should not be allowed to haul coal on O302211 through the MNF until the VER determination process is completed, an effective Protection and Enhancement Plan or Habitat Conservation Plan is in place to protect the endangered candy darter, and the ongoing litigation against the USFS is resolved.

Thank you for your attention to this pressing matter. We are prepared to provide any additional information or assistance as needed and appreciate your commitment to safeguarding environmental and legal standards.

Sincerely,



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On Behalf of:

Appalachian Voices

The Allegheny-Blue Ridge Alliance

The West Virginia Highlands Conservancy

Coal River Mountain Watch

Christians for the Mountains

Kanawha Forest Coalition

Greenbrier River Watershed Association

West Virginia Chapter of the Sierra Club

The Alliance for Appalachia

The West Virginia Native Fish Coalition

West Virginia Rivers Coalition

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