



Via hand-delivery

August 4, 2016

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RE: Amended citizen complaint and request for inspection and enforcement action regarding Peabody Power River Mining, Peabody Caballo Mining, and Peabody School Creek Mining's coal mining operations in Wyoming, and specifically their qualification for self-bond use through bond guarantor Peabody Investments Corporation

Dear Mr. Fleischman:

On March 21, 2016, in accordance with Sections 517(h) and 521(a) of the Surface Mining Control and Reclamation Act ("SMCRA"), the Powder River Basin Resource Council and the Western Organization of Resource Councils (collectively the "Resource Councils") submitted the attached citizen complaint and request for inspection and enforcement action regarding ongoing surface coal mining operations of Peabody Caballo Mining, Peabody Powder River Mining, and Peabody School Creek Mining (collectively "companies" or "operators") in Wyoming¹ that violate SMCRA and the Wyoming Environmental Quality Act ("WEQA").

In that complaint, the Resource Councils submitted information documenting that the companies and their bond guarantor Peabody Investments Corporation ("PIC") no longer qualify for self-bond status and therefore the companies are operating mining operations without sufficient reclamation bonding in place, in violation of SMCRA, the WEQA, and corresponding federal and state regulations.

¹ As identified in the original complaint, the permit numbers for the mines at issue are PT 240, PT 433, PT 569, and PT 761. Shoshone Coal Company was included in the original complaint, but Peabody has since committed to replace self-bonds for the Shoshone No. 1 mine with third-party surety bonds. While the company is technically in violation of self-bonding requirements until the replacement of its self-bonds for Shoshone No. 1, the Resource Councils anticipate bond replacement within the 90 day substitution period afforded under state and federal regulations. See Wyoming Agreement discussed *infra* at 8, ¶ 5.

Since the filing of the original complaint, the companies filed for bankruptcy along with their bond guarantor PIC, their ultimate parent entity Peabody Energy Corporation (“PEC” or “Peabody”), and all of Peabody’s other wholly-owned subsidiaries (for a total of 154 entities) on April 13, 2016. As discussed below, the Resource Councils now have even more reason to believe that these companies are operating surface coal mining operations in Wyoming without sufficient reclamation bonding as required by SMCRA and the WEQA. The Resource Councils hereby amend and supplement their initial complaint with the following facts and information.

Requested Relief

The Resource Councils request that the Office of Surface Mining (“OSM”) issue a notice of violation to the operators along with a bond substitution demand that will require the operators to post substitute financial assurance within the appropriate regulatory timeframe.²

We also request that OSM send a notice letter to the companies, PIC, and Peabody, demanding that they set aside sufficient funds to allow for substitute bonds for the *entire* reclamation obligation as part of any restructuring plans filed in the bankruptcy proceedings.

However, it should be noted that until the companies post the necessary bond substitutes, the companies are in noncompliance with SMCRA and the WEQA. As such, OSM should instruct DEQ to not approve any permit renewals, modifications, additional increments, or incidental boundary revisions (IBRs) for these mines so long as self-bonds are used as financial assurance.

We ask for immediate enforcement action from OSM because the State of Wyoming’s Department of Environmental Quality (“DEQ”) has refused to initiate enforcement actions against the companies. DEQ responded to the Resource Council’s March 21, 2016 Citizen Complaint on March 28, 2016, stating:

In short, Peabody Investments Corporation, the guarantor of Peabody’s self-bonds in Wyoming, remains eligible for self-bonding, and therefore, there is no basis for the Division to take enforcement action against any of the permits identified in your complaint.

With its response to the Resource Councils, DEQ attached its response to OSM’s February 16, 2016 Ten Day Notice (“TDN”) regarding the companies’ reclamation bonds.³ In its

² Federal and state regulations provide operators with up to 90 days to post substitute financial assurance. This 90 day period is consistent with the timeframe allowed to correct a violation that does not create an imminent danger to the health or safety of the public. 30 U.S.C. § 1271(a)(3).

³ OSM’s previous TDN was issued in response to a Citizen Complaint received by WildEarth Guardians. The Resource Councils’ Citizen Complaint was submitted shortly after the TDN was issued, and DEQ responded to both Complaints with its response to OSM issued on March 28, 2016. DEQ also issued a separate cover letter to the Resource Councils specifically responding to their Citizen Complaint. OSM’s TDN and the DEQ responses are attached.

response, DEQ did not specifically address the likelihood of the companies and PIC filing for bankruptcy and instead focused on its position that the companies and PIC continue to qualify for self-bonding based on DEQ's interpretations of PIC's most recent year-end audited financial statements.

Since the bankruptcy filing, DEQ has made no public statements about PIC's self-bond qualifications, nor has it initiated any enforcement actions against PIC or the mining companies. To the contrary, DEQ has said that it has put reviews of PIC's self-bond status "on hold" as a result of the bankruptcy filing.⁴ Instead of enforcing self-bond requirements, DEQ entered into an agreement with Peabody to stay all enforcement actions during the bankruptcy proceedings. *See* Peabody Energy, Motion of the Debtors and Debtors in Possession, Pursuant to Bankruptcy Rule 9019, for Entry of Stipulation and Order Concerning Reclamation Bonding of Their Surface Coal Mining Operations in Wyoming, Doc. No. 964, Case No. 16-42529, U.S. Bankruptcy Ct., Eastern District of Missouri (July 26, 2016) (hereafter "Wyoming Agreement"). The Wyoming Agreement states that "absent approval of this Stipulation and Order, [WDEQ] may immediately issue a substitution demand to the Debtors . . . followed, if necessary, by a Notice of Violation and Order at the appropriate time." Wyoming Agreement at 4. However, as opposed to pursuing a substitution demand, under the Wyoming Agreement, DEQ agreed that:

(a) Wyoming shall not seek additional collateral or revoke, terminate, refuse to grant, renew, or amend or take any other adverse action with respect to the Wyoming Mine Debtors' mining permits or licenses on account of any failure by the Wyoming Mine Debtors to comply with reclamation bonding obligations; (b) except as provided in this Stipulation, Wyoming shall not seek to enforce the Wyoming Mine Debtors' Self-Bonds and Corporate Guarantees or seek to revoke, terminate, refuse to grant, renew or amend to take any other adverse action with respect to the Wyoming Mine Debtors' mining permits or licenses on account of their non-payment of obligations under the Wyoming Mine Debtors' Self-Bonds and Corporate Guarantees; and (c) any proceedings by Wyoming relating to Debtors' self-bonding status shall be stayed.

As the Resource Councils have seen in the previous bankruptcies of Alpha Natural Resources and Arch Coal, the Wyoming Agreement's language is sweeping and will prevent DEQ from considering objections and complaints raised by the Resources Councils related to the companies' self-bonding status. *See, e.g. Re Eagle Butte Mine Permit Renewal*, Wyo. Env't'l Quality Council Docket No. 15-4801; *see also* DEQ response to OSM regarding Ten Day Notice related to Arch Coal Inc. and its Subsidiaries' Mining Operations in Wyoming, Feb. 22, 2016, at 18-20.

As such, DEQ has indicated that it will not take action to correct the violations. As a result, under the authority of 30 U.S.C. § 1271(a)(1), OSM may lawfully find that "the State regulatory authority [has] fail[ed] within ten days after notification to take appropriate action to

⁴ Leigh Paterson and Stephanie Joyce, *Peabody, World's Largest Private Sector Coal Company, Takes a Fall*, Rocky Mountain PBS, Apr. 27, 2016, available at <http://inewsnetwork.org/2016/04/27/peabody-energy-worlds-largest-private-sector-company-takes-a-fall/>.

cause said violation to be corrected” and OSM must therefore immediately initiate a federal inspection and enforcement action against the companies.⁵

The Resource Councils hereby waive their rights to confidentiality and request the right to accompany the inspector on any inspection of the mine site if such a field inspection is held. You can reach the Resource Councils at the address and telephone number listed below.

In accordance with 30 C.F.R. § 842.12(d), the Resource Councils request that OSM report the results of any inspection within 10 days from the date of the inspection, or if OSM chooses not to inspect, to explain the reasons for that decision, within 15 days from the date that this letter is received.

Statement of Interest

The Resource Councils are persons who are or may be adversely affected by the coal mining operations that are the subject of this complaint. The Resource Councils are organizations that advocate for the conservation of Wyoming’s unique land, mineral, water, and clean air resources consistent with responsible use of those resources to sustain the livelihood of present and future generations. The Powder River Basin Resource Council has worked on coal mining issues in Wyoming since its founding in 1973, advocating for responsible reclamation and bonding policies, reduced air pollution, and better water management. The Resource Councils and their members advocated for the passage of the WEQA and SMCRA. Having supported their passage, the Resource Councils have a legally cognizable interest in the application of these laws and their implementing regulations, and OSM’s application of them to the coal mine permits at issue.

In addition to this organizational interest, the Resource Councils’ members are adversely affected by the lack of sufficient reclamation bonding at the mines. Resource Council members own property, ranch, work, travel, and/or recreate next to the mines that are the subject of this complaint. As such, the members experience aesthetic and other legally recognizable injury from the mining operations, which will be prolonged and increased if reclamation activities are delayed or not completed.⁶ Conversely, the Resource Councils’ members’ property and personal interests will be benefited if reclamation occurs at the mine as required by SMCRA regulations. Such reclamation is only guaranteed to occur if there are sufficient funds available for that reclamation work.⁷

⁵ See also *Pennsylvania Federation of Sportsmen’s Clubs, Inc. v. Hess*, 297 F.3d 310, 328 (3d Cir. 2002) (“The Secretary may step in to withdraw approval of the state’s ineffective program or a part thereof and to enforce, in federal court, federal provisions and sanctions for violations of the minimum standards set forth in [the Act].”).

⁶ See *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs.*, 528 U.S. 167, 183 (2000) (holding that “[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.”); See also *Great Basin Mine Watch v. Interior*, 456 F.3d 955 (9th Cir. 2006), where a plaintiff organization challenged, in part, financial assurance requirements for a mining operation, based on its aesthetic and recreational injuries.

⁷ It should be noted that similar to showing whether a party is “adversely affected” under SMCRA and the WEQA, Article III standing “does not demand a demonstration that victory in court will without doubt cure the identified

Requiring third-party backed financial assurance will provide an increased incentive for reclamation work to occur in a timely manner, and will in turn reduce impacts for Resource Council members.⁸ Additionally, if the companies and PIC default on their obligations and the mines have not yet posted third-party financial assurance, the state or OSM will be forced to fund reclamation work through public funds, the source of which is currently unavailable. The April 13, 2016 bankruptcy filing makes these injuries even more likely as the companies, their ultimate parent entity, or PIC may try to use their bankruptcy filing to avoid paying for environmental liabilities, to shelter assets that would otherwise be available for reclamation work or reclamation bonding, or to liquidate assets such as the Wyoming mines. All of these probable actions pose a risk that reclamation at the mines will be delayed – if completed at all. Therefore, the Resource Councils and their members are adversely affected by the mining operations and their lack of sufficient reclamation bonding.

Basis of the Complaint

SMCRA provides:

The regulatory authority may accept the bond of the applicant itself without separate surety when the applicant demonstrates to the satisfaction of the regulatory authority the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount or in lieu of the establishment of a bonding program, as set forth in this section, the Secretary may approve as part of a State or Federal program an alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section.

30 U.S.C. § 1259(c). Under this authority, Wyoming has elected to allow alternative bonding, specifically self-bonding. However, similar to SMCRA, the WEQA provides that self-bonds *may* be accepted only if the operator demonstrates “a history of financial solvency” and only if “the objectives and purposes of [the WEQA]” are being fulfilled. W.S. § 35-11-417(d).⁹

The mining companies, and their bond guarantor PIC, are in violation of these requirements because they can no longer demonstrate a “history of financial solvency” and no longer meet the financial tests set forth in federal and state self-bonding regulations. Specifically,

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).

⁸ See *In Re Idaho Conservation League, et al.*, No. 14-1149, slip op. at 11-14 (D.C. Circuit Jan. 29, 2016) (finding that economic incentives, such as stronger financial assurance, would reduce impacts to the organizations’ standing declarants 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).

⁹ This language, both in SMCRA and the WEQA, provides utmost discretion to the regulator about whether or not to accept self-bonding or to require bond substitution. Irrespective of the legal violations detailed in this complaint, there are grounds for DEQ and OSM to act proactively and require bond substitution now.

PIC has filed for bankruptcy, along with the mining companies and Peabody itself. As explained below, the companies' bankruptcy filings show that they are no longer financially solvent. As such, the objectives and purposes of SMCRA and the WEQA are not being fulfilled by allowing the companies to continue to self-bond because the public is left at risk for covering the liability of the companies, should they default on obligations through, during, or following the bankruptcy proceeding.

Therefore, OSM should require the companies to substitute new financial assurance for the companies' self-bonds within ninety days as required under state and federal regulations.¹⁰ Additionally, OSM must continue to enforce its substitution demand through an outside-the-bankruptcy enforcement proceeding, along with any filings necessary inside the bankruptcy proceeding.¹¹

PIC No Longer Qualifies for Self-Bonding Because It Does Not Meet the Self-Bonding Financial Tests

State regulators, including DEQ, previously determined that PIC qualified for self-bond status because it met the series of financial tests laid forth in state and federal regulations. Specifically, the mining companies' self-bond applications show that they elected to use the following financial test to qualify for self-bonding, based on PIC's assets, liabilities, and net worth:

(B) The operator has a tangible net worth of at least 10 million dollars, and a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater. The two ratio requirements must be met for the past year, and documented for the four years preceding the past year. Explanations should be included for any year where the ratios fall below the stated limits.

Wyo. Land Quality Rules & Regulations, Ch. 11 § 2(a)(vii)(B).

PIC no longer meets these tests and, as such, no longer qualifies to be a guarantor of the companies' self-bonds.

As demonstrated in the attached Summary of Assets and Liabilities filed on June 13, 2016, PIC has more liabilities than assets, equating to a multi-billion dollar negative net worth and tangible net worth. Schedules of Assets and Liabilities for Peabody Investments Corp., Doc.

¹⁰ The only acceptable bond substitutes allowed under the rules are "a corporate surety, cash, governmental securities, or federally insured certificates of deposit, or irrevocable letters of credit." Wyo. Land Quality Rules and Regulations ("LQRR"), Chap. 11 § 5(a).

¹¹ As has been the case with Alpha Natural Resources and Arch Coal, Peabody companies argue that such enforcement actions are prevented because of stay provisions in the federal bankruptcy code. However, enforcement of requirements for financial assurance under environmental laws falls within the police and regulatory exception to the automatic stay. 11 U.S.C. § 362(b)(4); *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 865-66 (4th Cir. 2001). This means DEQ and OSM are not barred from enforcing any compliance orders, including bond substitution demands, during the bankruptcy proceedings.

No. 749-2, Case No. 16-42529, U.S. Bankruptcy Ct., Eastern District of Missouri (July 26, 2016) (hereafter “Financial Schedules”). Based on the information disclosed in the Financial Schedules, the Resource Councils made the following calculations:

Total Assets	\$33,791,823,116.79
Intangibles and intellectual property	\$1,012,326.20
Tangible assets (total assets – intangibles and intellectual property)	\$33,790,810,790.59
Total liabilities	\$46,455,224,423.54
Net worth (total assets – total liabilities)	negative \$12,663,401,306.75
Tangible net worth (total tangible assets – total liabilities)	negative \$12,664,413,632.95
Ratio of total liabilities to net worth (total liabilities divided by net worth)	negative 3.67
Ratio of assets to liabilities (total assets divided by total liabilities)	0.73

Based on this information, PIC no longer qualifies under the regulatory financial test because:

- PIC does not have “tangible net worth” of at least 10 million dollars. In fact, PIC’s tangible net worth is negative \$12.66 billion, a far cry from \$10 million.
- PIC has a negative ratio of total liabilities to net worth. While technically a negative ratio is less than 2.5, it is illogical to assume that the regulatory criteria would allow a company with a negative ratio to qualify as the criteria is based on the assumption that liabilities must not be substantially greater than net worth. PIC would need to have a net worth of at least \$18.58 billion to qualify with a ratio of total liabilities to net worth of 2.5 or less.
- PIC’s ratio of total assets to total liabilities is 0.73, much less than 1.2.¹²

Any one of these factors should disqualify PIC from guaranteeing self-bonds in Wyoming.

In fact, it appears Wyoming has determined that PIC does not meet the criteria for self-bonding due to its total net worth and ratio of assets and liabilities. Wyoming Agreement at ¶ 17. While Wyoming has agreed not to enforce this determination, OSM is free to do so, and under the terms of the SMCRA, must initiate enforcement actions against the company.¹³

¹² The Resource Councils are unable to determine the ratio of “current” assets to “current” liabilities based on PIC’s Financial Schedules. However, we presume such a ratio would also be less than 1.2 given the vast difference between assets and liabilities. We encourage OSM to request additional financial information from the mining companies to verify the current assets to current liabilities ratio.

¹³ See LQRR, Ch. 11 § 5(a) (“The Administrator *shall* require this substitution if the financial information submitted or requested under Section 4(a)(ii) indicates that the operator no longer qualifies under the self-bonding program.”) (emphasis added).

The Mining Companies – and PIC – No Longer Qualify for Self-Bonding Because They Are No Longer Financially Solvent

In addition to the specific financial tests, as a result of the bankruptcy filing, all of the Peabody entities, including PIC and the mining companies, are no longer able to demonstrate a “history of financial solvency.”

Neither the federal nor the state regulations implementing SMCRA and WEQA’s self-bond requirements define “financial solvency.” However, given the protective purposes of the Acts, it is prudent to consider an inclusive definition of “insolvency” that includes both equitable and balance sheet insolvency.¹⁴ PIC is insolvent based on either definition.

As discussed above, PIC’s liabilities exceed its assets making it “balance-sheet” insolvent. Therefore, PIC is no longer able to demonstrate financial solvency for the purpose of guaranteeing self-bonds.

Additionally, Peabody (and its subsidiaries including the mining companies and PIC) are “equitably” insolvent¹⁵ because of an inability to meet financial obligations. As disclosed in Peabody’s March 16, 2016 10-K:

Our current operating plan indicates that we will continue to incur losses from operations and generate negative cash flows from operating activities. These projections and other liquidity risks raise substantial doubt about whether we will meet our obligations as they become due within one year after the date of this report.¹⁶

Likewise, the company disclosed in its 10-K that if “we are unable to meet our debt service obligations when due, we could be required to reorganize our company in its entirety, including through bankruptcy proceedings.”¹⁷

Peabody therefore admitted on March 16, 2016 that it could be required to file for bankruptcy because its negative cash flow would put it in default of its debt service obligations within a year. In fact, Peabody proceeded to file bankruptcy for itself and all of its subsidiaries a month later based on these very reasons. Peabody’s cash flow problems have led to a status of “equitable insolvency” based on an inability to pay all of its debts as they become due.

¹⁴ Courts have considered this inclusive definition of insolvency in regard to fiduciary duties of corporate officers for similar public interest grounds. *See In re Ben Franklin Retail Stores, Inc.*, 225 B.R. 650, 655 (Bankr. N.D. Ill. 1998); *see also Credit Lyonnais*, 1991 WL 277613 at 34 n.55 (holding “vicinity of insolvency” existed where a corporation was balance sheet solvent, but where there was a risk that creditors would not be paid.)

¹⁵ The two types of insolvency are also referred to as “accounting insolvency” and “standard insolvency.” *See* http://www.investopedia.com/terms/a/accounting_insolvency.asp

¹⁶ Peabody Energy Corporation, 2015 Form 10-K at 50. This document was previously provided to OSM as part of the March 21, 2016 citizen complaint filed by the Resource Councils.

¹⁷ *Id.* at 30.

As discussed in the Resource Councils' initial March 21, 2016 Citizen Complaint, PIC's assets are pledged to Peabody as guarantees for its corporate debts, and therefore Peabody's status of insolvency should equally apply to PIC.¹⁸ In other words, if Peabody can't pay its debts, neither can PIC.

Additionally, while we have focused on PIC, given its status as the bond guarantor of the mining companies, there is also concern with the companies themselves, all of whom also filed bankruptcy with their parent corporations PIC and Peabody. The Rawhide and Caballo Mines recently experienced layoffs,¹⁹ confirming that their profitability – and as such “solvency” – is in jeopardy. The layoffs are further indication that the mines with low Btu coal have limited viability in a nation (and world) with reduced coal demand. A recent analysis by the *Casper Star-Tribune* found that:

No major Powder River Basin operation has shed a larger percentage of its workforce than Peabody's 8,500 BTU Caballo mine in the last four years. Caballo has eliminated 268 jobs, or 67 percent of its workforce, since the first quarter of 2011. The 11 million tons of production Caballo recorded in 2015 represents a 53 percent decrease from its 2011 output . . .

. . . Peabody's Rawhide and Alpha's Eagle Butte mines also produce coal near 8,400 BTUs. They recorded employment decreases of 13 percent and 11 percent over the last four years. “I think one of the 8,400 BTU mines will go idle,” said Thompson, the IHS Energy analyst. “Which one? I don't think I can tell you which one.”²⁰

For these reasons, these mines in particular present risks of insolvency that dictate self-bonding should no longer be available for the companies.

The North Antelope Rochelle Mine's profitability may be somewhat better than its Peabody peers, but production is still declining – significantly through the first part of 2016 – and recent layoffs of 15% of the mine's workforce indicate that operating expenses are too high to maintain financial solvency of the mine.²¹ Even with these recent layoffs, economic analysts

¹⁸ Peabody's most recent 10-Q filed with the SEC also discloses: “The Company's Bankruptcy Petitions constituted an event of default under the Company's derivative financial instrument contracts and the counterparties terminated the agreements shortly thereafter in accordance with contractual terms. The terminated positions are first-lien obligations secured by the collateral and all of the property that is subject to liens under the Company's 2013 Credit Facility. An estimate of the net settlement liability resulting from the terminations has not yet been finalized. The net settlement liability will be accounted for as a pre-petition liability subject to compromise without credit valuation adjustments.” Peabody Energy Corporation, Form 10-Q, May 6, 2016, attached.

¹⁹ See Jacob Kirn, *Peabody Energy to lay off workers at mines*, *St. Louis Business Journal*, Mar. 14, 2016, available at http://www.bizjournals.com/stlouis/morning_call/2016/03/peabody-energy-to-lay-off-workers-at-mines.html.

²⁰ Benjamin Storrow, *Casper Star Tribune*, Mar. 7, 2016, available at http://trib.com/business/energy/wyoming-coal-mines-have-largely-resisted-layoffs-but-how-long/article_23804aa4-9d51-59ae-ba61-ae2dfbca3e57.html

²¹ See Peabody Press Release, Mar. 31, 2016, available at <http://www.peabodyenergy.com/investor-news-release-details.aspx?nr=911>

conclude that the mines are still overstaffed based on recent production declines.²² The mine is one of Peabody's most significant assets and may be used for leverage in the bankruptcy proceedings, to the detriment of fulfilling bonding obligations. With over 22,000 acres of *federal* surface lands at the mine, none of which have reached the reclamation stage of final bond release, there is no mine for which it is more important to secure sufficient reclamation bonding.

The Mining Companies – and PIC – No Longer Qualify for Self-Bonding Because the Purposes of the WEQA and SMCRA Are Not Being Met

With the bankruptcy filing, it is clear that the purposes of the WEQA and SMCRA are not being met by allowing the mining companies and PIC to continue to self-bond.

One of SMCRA's fundamental requirements is that reclamation bonds "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." 30 U.S.C. § 1259(a).²³ Here, we know that if PIC and the mining companies default on their obligations, federal and state regulators would likely only obtain pennies on the dollar – or perhaps nothing at all – because of the lower priority of the companies' self-bonds respective to other more senior and secured debt.

This was forewarned by OSM in the promulgation of self-bonding regulations in 1983:

In the event of bankruptcy, the regulatory authority would probably be in the position of an unsecured creditor. Typically, the regulatory authority would have to go through bankruptcy proceedings to secure payment on the indemnity agreement. Bankruptcy proceedings are often lengthy and involved, and the regulatory authority could have to settle on less than 100% payment on the indemnity agreement.²⁴

For these reasons, OSM made it clear that self-bonding is designed to be used only for companies with a small risk of bankruptcy:

The purpose of establishing a self-bond program is to recognize that there are companies that are financially sound enough that the probability of bankruptcy is small. A self-bond is allowed both because there are enough assets to allow reclamation in case of bankruptcy and because there is little probability of bankruptcy.²⁵

²² Greg Johnson, Coal mines could lose another 500 jobs, *Gillette News Record*, Apr. 10, 2016, available at http://www.gilletteneewsrecord.com/news/local/article_6b1a29ff-dd1a-58a4-8e6a-5e91b0b2ec3f.html.

²³ See also W.S. § 35-11-117(a): "The purpose of any bond required to be filed with the administrator by the operator shall be to assure that the operator shall faithfully perform all requirements of this act . . ."

²⁴ See 48 Fed. Reg. 36418 at 36422 (Aug. 10, 1983).

²⁵ *Id.* at 36421.

The very purpose of SMCRA was to provide a clean-up fund for abandoned coal mines and to prevent abandonment for any mines permitted after the Act's passage.²⁶ As such, bonding for reclamation work is a centerpiece of the law.

Therefore, by allowing the mining companies, as guaranteed by PIC, to continue to self-bond, in spite of the companies undergoing bankruptcy proceedings, DEQ is thwarting the very purposes of the Act they are charged with enforcing. Instead, OSM should step in for DEQ and should determine that the mining companies and PIC no longer qualify for self-bonding as a matter of law because under state and federal law, self-bonding programs "shall be consistent with the objectives and purposes of this act." W.S. § 35-11-417(d); 30 U.S.C. § 1259(c).

Peabody's Reclamation Work Does Not Absolve it From Bonding Requirements

Finally, it is important to refute Peabody's (and to some extent DEQ's) argument in the Wyoming Agreement that the company's ongoing reclamation work absolve it from complying with bonding requirements - or at least lessen the need for bonding in the first instance. This is patently problematic as SMCRA has independent requirements for contemporaneous reclamation and reclamation bonding. *Compare* 30 U.S.C. § 1265(b)(16) with 30 U.S.C. § 1259. Merely because a company is carrying out some level of reclamation work does not mean that company does not have to have sufficient reclamation bonding.

For the above stated reasons, OSM should require bond substitution for the Peabody mines in Wyoming and demand that the companies ensure sufficient financing for such bond substitution as part of any restructuring efforts in the bankruptcy proceeding. As discussed above, in the meantime, OSM should instruct DEQ to not approve any permit renewals, modifications, additional increments, or incidental boundary revisions (IBRs) for the mines so long as self-bonds are included in the financial assurance available for the mining operation.

Sincerely,



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On Behalf of Powder River Basin Resource Council and the Western Organization of Resource Councils

²⁶ See *W. Virginia Highlands Conservancy v. Norton*, 161 F. Supp. 2d 676, 684 (S.D.W. Va. 2001) ("With mandated reclamation plans and reclamation bonds required by federal law to be adequate, SMCRA was a promise to remedy the abuses, protect the environment, and yet permit the recovery of mineral reserves with approved practices and regulatory oversight.")

Attachments:

- 1) March 21, 2016 Citizen Complaint submitted to DEQ and OSM
- 2) February 16, 2016 Ten Day Notice from OSM to DEQ
- 3) March 28, 2016 Cover Letter from DEQ to the Resource Councils in response to their Citizen Complaint
- 4) March 28, 2016 Response from DEQ to OSM
- 5) July 26, 2016 Motion from Peabody For Entry of Stipulation and Order Concerning Reclamation Bonding Of Their Surface Coal Mining Operations in Wyoming
- 6) June 13, 2016 Schedules of Assets and Liabilities for Peabody Investments Corp.
- 7) May 6, 2016 Peabody Energy Corporation, Form 10-Q