



**ENVIRONMENTAL LAW & POLICY CENTER**  
Protecting the Midwest's Environment and Natural Heritage

August 4, 2016

*VIA E-MAIL AND CERTIFIED MAIL*

Mr. Len Meier  
Chief, Alton Field Division  
Mid-Continent Region  
Office of Surface Mining Reclamation and  
Enforcement  
William L. Beatty Federal Building  
501 Belle Street, Room 216  
Alton, Illinois 62002  
[lmeier@osmre.gov](mailto:lmeier@osmre.gov)

RE: Amended Citizen Complaint and Request for Immediate Inspection by Office of Surface Mining Reclamation and Enforcement Regarding Peabody Energy Corporation's Mining Operations in Illinois

Mr. Meier:

Pursuant to sections 517(h) and 521(a) of the federal Surface Mining Control and Reclamation Act ("SMCRA"), the Environmental Law & Policy Center ("ELPC") submits this Amended Citizen Complaint requesting inspection and enforcement action regarding ongoing coal mining operations in Illinois by Peabody Energy Corporation ("Peabody Energy") and its subsidiaries Peabody Coulterville Mining LLC, Peabody Gateway North Mining, LLC, Peabody Arclar Mining, LLC, and Peabody Midwest Mining, LLC (the "Operating Subsidiaries" and, collectively with Peabody Energy, "Peabody") that violate both SMCRA and the Illinois Surface Coal Mining Land Conservation and Reclamation Act (the "Illinois Reclamation Act"), which secures state implementation of the federal SMCRA requirements. ELPC here amends its previously submitted Citizen Complaints to the federal Office of Surface Mining Reclamation and Enforcement ("OSMRE") to provide additional information documenting Peabody's violation of SMCRA and the Illinois Reclamation Act and, pursuant to 30 U.S.C. § 1271(a)(1) and 30 CFR §§ 842.11(b) and 842.12(a), requesting an immediate inspection of Peabody Energy Corporation's self-bonding for mine reclamation obligations in Illinois because the State's response has been insufficient.

35 E. Wacker Drive, Suite 1600 • Chicago, Illinois 60601  
(312) 673-6500 • [www.ELPC.org](http://www.ELPC.org)

David C. Wilhelm, Chairperson • Howard A. Learner, Executive Director  
Columbus, OH • Des Moines, IA • Duluth, MN • Grand Rapids, MI • Jamestown, ND  
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On February 12, 2016, ELPC submitted a Citizen Complaint pursuant to sections 517(h) and 521(a) of the SMCRA.<sup>1</sup> On February 18, 2016, OSM's Alton Field Office issued a Ten Day Notice letter to the Land Reclamation Division of IDNR.<sup>2</sup> On March 2, 2016, ELPC provided updated information in support of its February 12 Citizen Complaint.<sup>3</sup> The Land Reclamation Division of the Illinois Department of Natural Resources ("IDNR") sent a letter dated March 4, 2016, in response to the Ten Day Notice letter.<sup>4</sup> This letter failed to adequately investigate and address ELPC's Citizen Complaint. On March 24, 2016, ELPC sent a letter to OSM's Alton Field Office requesting an immediate inspection by OSM.<sup>5</sup>

In the February 12, 2016, Citizen Complaint and in the updated submissions described above, ELPC provided information that related to Peabody's self-bonding guarantor Peabody Investments Corporation ("PIC") and the relationship between PIC and its ultimate parent corporation Peabody Energy. Among other things, ELPC provided information regarding the extent to which PIC's assets were pledged as collateral for the debt of parent Peabody Energy, whose financial condition was rapidly deteriorating.

On April 13, 2016, Peabody Energy and all of Peabody's other wholly-owned subsidiaries, including PIC, filed for bankruptcy protection under Chapter 11. This August 4, 2016 Amended Citizen Complaint is updated with additional information related to Peabody's bankruptcy filing, further confirming that Peabody is not eligible for self-bonding under SMCRA or the Illinois Reclamation Act.

By this Amended Citizen Complaint, ELPC provides information to OSM and the Secretary of Interior sufficient to establish a reason for these recipients to believe that Peabody Energy and its Operating Subsidiaries are in violation of SMCRA and the Illinois Reclamation Act. First, having filed for bankruptcy on April 13, 2016, Peabody cannot demonstrate a "history of financial solvency" as required under SMCRA § 509(c) and 225 ILCS 720/6.01(b) and cannot demonstrate "current financial soundness sufficient for authorization to self-insure or bond the required amount" as required under 225 ILCS 720/6.01(b). Second, information provided during the bankruptcy proceeding demonstrates that PIC no longer qualifies under the federal and state requirements for self-bonding.

As documented in ELPC's March 24, 2016 Request for Immediate Inspection, the Land Reclamation Division of the Illinois Department of Natural Resources has failed to take appropriate action or provide good cause for its failure to do so, concluding instead that Peabody Energy Corporation's continued self-bonding in Illinois does not violate federal and state law. Now that Peabody has filed for bankruptcy and additional information has been provided regarding self-bond guarantor Peabody Investment Corporations' balance sheet, the issue is even more significant.

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<sup>1</sup> Attachment 1, February 12, 2016, Citizen Complaint.

<sup>2</sup> Attachment 2, February 18, 2016, Ten Day Notice Letter.

<sup>3</sup> Attachment 3, March 2, 2016, Notice of Additional Information.

<sup>4</sup> Attachment 4, March 4, 2016, IDNR Response to Ten Day Notice Letter.

<sup>5</sup> Attachment 5, March 24, 2016, ELPC Request for Immediate Inspection.

Having provided such sufficient information, through this Amended Citizen Complaint ELPC respectfully requests that OSM immediately initiate a proper investigation into Peabody Energy's self-bonding in Illinois and demands:

- (1) That OSM issue a finding that Peabody no longer meets the self-bonding requirements under SMCRA, and has not met the requirements since at least April 12, 2016;
- (2) That OSM order Peabody to, within 90 days of failing to meet those requirements, post financial assurances other than self-bonds for the full amount of its reclamation obligations in Illinois as a condition of continued mining operations in Illinois;
- (3) That pursuant to 30 C.F.R. § 842.12(d) OSM report the results of any inspection within 10 days from the date of the inspection, or if there is no inspection, a written explanation of the reasons for that decision within 15 days from the date that this letter is received;
- (4) That this Citizen Complaint be given immediate and emergency consideration in light of Peabody's ongoing bankruptcy proceedings; and
- (5) That OSM grant any other relief as is appropriate.

ELPC waives its rights to confidentiality and requests the right to accompany the inspector on any inspection of the mine site if such a field inspection is held.

## **I. ARGUMENT**

### **A. ELPC And Its Members Have An Interest That May Be Adversely Affected By Peabody's Failure To Post Sufficient Financial Assurance For Reclamation.**

ELPC and its members' interests are adversely affected by Peabody's continued failure to post sufficient reclamation bonds in violation of SMCRA. ELPC's organizational interests in improving environmental quality, promoting clean water and protecting natural resources may be adversely affected, and ELPC's members' interests in living and recreating in a healthful environment are harmed when financial assurances for mine reclamation are inadequate. Furthermore, the right of all persons in the State of Illinois – including organizations such as ELPC – to enforce their right to a healthful environment is provided by Article XI of the Constitution of the State of Illinois.<sup>6</sup>

ELPC is a public interest environmental legal advocacy and eco-business innovation organization, headquartered in Chicago, and works throughout the Midwest states. ELPC works to improve environmental quality and protect natural resources in the Midwest on behalf of our

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<sup>6</sup> Section 2 of Article XI of the Constitution of the State of Illinois provides that:

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

organization, members and clients. ELPC works to avoid risks and injuries to public health, clean water, clean air, and landscapes in ways that are good for the environment and good for the economy. ELPC's organizational interests are adversely affected by Peabody's continued violation of SMCRA, and failure to post adequate reclamation bonds makes all of these risks and injuries significantly more probable.<sup>7</sup> Reclamation is only guaranteed to occur if there are sufficient funds available for that reclamation work.<sup>8</sup> Requiring third-party financial assurance will provide an increased incentive for reclamation work to occur in a timely manner, and will in turn reduce impacts for ELPC members.<sup>9</sup>

### **B. Peabody Energy Is Violating SMCRA and the Illinois Reclamation Act's Bonding Requirements Because It Is Not Financially Solvent And Cannot Demonstrate Current Financial Soundness.**

As a condition of a coal-mining permit, SMCRA requires that an applicant file a bond to cover costs of reclamation at the mining site.<sup>10</sup> SMCRA permits self-bonding only when the applicant demonstrates a "history of financial solvency." The Illinois Reclamation Act also allows self-bonding, but requires that a self-bonding applicant demonstrate both a history of financial solvency and "a current financial soundness sufficient for authorization to self-insure or bond the required amount." Having filed for bankruptcy on April 13, 2016, Peabody can demonstrate neither a history of financial solvency nor current financial soundness sufficient to bond \$80 million in reclamation obligations in Illinois.

Peabody Energy conducts mining operations in Illinois through a series of wholly-owned operating subsidiaries. Peabody Energy's Operating Subsidiaries currently self-bond approximately \$80 million dollars of reclamation obligations in the state of Illinois.<sup>11</sup> In support of their self-bonding applications, the Operating Subsidiaries did not submit their own financial information or the financial information of the ultimate parent company, Peabody Energy. Instead, Peabody Energy's Operating Subsidiaries applied for self-bonding using the financial information of intermediate subsidiary PIC. PIC is a wholly-owned, privately held subsidiary of Peabody Energy, and is the parent corporation to the Operating Subsidiaries. Peabody Energy,

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<sup>7</sup> See, e.g., discussion of discontinuance of self-bonding for hardrock mining in the wake of bankruptcy proceedings, March 8, 2016, Letter from Sen. Maria Cantwell and Sen. Richard J. Durbin to Hon. Gene L. Dodaro (GAO), at p. 4.

<sup>8</sup> It should be noted that similar to showing whether a party is "adversely affected" under SMCRA, Article III standing "does not demand a demonstration that victory in court will without doubt cure the identified 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).

<sup>9</sup> 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).

<sup>10</sup> See SMCRA § 509, 30 U.S.C. § 1259(a).

<sup>11</sup> ELPC understands, based on conversations with Peabody and IDNR, that the company has reduced its outstanding self-bonded reclamation obligations in the state by between \$10 and \$15 million since ELPC last was provided with a list of self-bonded obligations. As of December 2015, the outstanding amount was more than \$92 million. See Attachment 6, List of Peabody Energy self-bonding in Illinois, received via e-mail on December 4, 2015, from Dean Spindler (Illinois Office of Mines and Minerals) to Margrethe Kearney (ELPC).

PIC and the Operating Subsidiaries each filed for bankruptcy on April 13, 2016, and all filings were consolidated with the Peabody Energy bankruptcy docket.<sup>12</sup>

When OSM promulgated self-bonding regulations in 1983, it recognized the risks posed by self-bonded companies that filed for bankruptcy. In these situations, OSM admitted that “[b]ankruptcy proceedings are often lengthy and involved, and the regulatory authority could have to settle on less than 100% payment on the indemnity agreement” entered into by the regulatory authority with a self-bonding entity.<sup>13</sup> OSM made it clear that self-bonding should not be allowed for a company with anything more than a small probability 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.<sup>14</sup>

Peabody Energy, its Operating Subsidiaries, and its corporate guarantor PIC have now filed for bankruptcy. That means that Peabody could not make good on the debts it owed to its creditors, and determined that it must seek the protection of the bankruptcy courts in an effort to reorganize. None of these entities can demonstrate a history of financial solvency. None of these entities are financially sound enough to cover \$80 million in reclamation obligations. Allowing Peabody to self-bond is a violation of SMCRA and of the Illinois Reclamation Act, and to come in compliance with the law Peabody must be required to substitute all of its Illinois self-bonds with another form of financial assurance.

Peabody (and its subsidiaries including the mining companies and PIC) filed for bankruptcy 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.

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.”

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. While Peabody’s initial bankruptcy filings represent that the collective enterprise

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<sup>12</sup> See Attachment 7, Voluntary Petition for Non-Individuals Filing for Bankruptcy, at Schedule 1, April 13, 2016.

<sup>13</sup> 48 Fed. Reg. 36418 at 36422 (Aug. 10, 1983).

<sup>14</sup> *Id.* at 36421.

has a slightly greater amount of assets than liabilities and the company is therefore technically solvent on a balance sheet basis, its 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. Neither the federal nor the state regulations implementing SMCRA and the Illinois Reclamation Act’s self-bond requirements define “financial solvency.” 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. As described below, PIC is balance sheet insolvent and parent company Peabody Energy is equitably insolvent. Given current market conditions, the outlook for coal is not improving. Gateway Mine, near Coulterville, Illinois, for example, has shown a steady cyclical decrease in sales since in or around March 2014.<sup>15</sup> The Department should give serious consideration to the possibility that this is not merely a “bump in the road” for Peabody.

By allowing Peabody, as guaranteed by PIC, to continue to self-bond in spite of the companies’ undergoing bankruptcy proceedings, regulators are thwarting the very purposes of the Act they are charged with enforcing. Instead, regulators 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.” 30 U.S.C. § 1259(c).

### **C. Peabody is Violating SMCRA because PIC No Longer Meets the Self-Bonding Financial Tests**

In an effort to ensure that only financially solvent parties could self-bond, OSMRE promulgated regulations describing minimum requirements for self-bonding. Meeting these minimum requirements does not entitle a company to self-bond. Rather, if the minimum requirements are not met, neither the states nor OSMRE has the discretion to allow bonding. Under federal regulations, a State has the discretion to allow self-bonding only if the applicant or its parent corporation guarantor designates a suitable agent, has been in continuous operation as a business entity for at least 5 years, and the applicant can show that:

- (i) The applicant has a current rating for its most recent bond issuance of “A” or higher as issued by either Moody's Investor Service or Standard and Poor's Corporation;
- (ii) The applicant has a tangible net worth of at least \$10 million, 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; or
- (iii) The applicant's fixed assets in the United States total at least \$20 million, and the applicant has 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.

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<sup>15</sup> Form EIA-923 detailed data, 2014-2016

30 CFR 800.23(b). The State of Illinois has adopted that same test. 17 Ill. Admin. Code 1800.23(b). If a company does not meet these minimum requirements, it must immediately notify the regulatory authority and within 90 days post an alternative form of bond in the same amount as the self-bond. 30 CFR 800.23(g). If an alternative bond is not posted within 90 days, the operator must cease coal extraction and immediately begin reclamation. 30 CFR 800.16(e).

Before entering into bankruptcy, Debtor self-bonded through its privately-held, wholly owned subsidiary PIC. Regulators had no discretion to allow Peabody Energy (the ultimate parent corporation) to self-bond, because Peabody Energy did not meet the minimum requirements. However, PIC did appear meet the threshold test for self-bonding, and Illinois did exercise its discretion to allow PIC to self-bond. As documented in citizen complaints sent by Petitioners to OSMRE, and as explained more fully above, this was an abuse of discretion and a violation of SMCRA. It was an abuse of discretion because regulators failed to consider the relationship of PIC to its parent Peabody Energy and the profoundly salient fact that PIC's assets were pledged in their entirety as collateral for the debt of Peabody Energy, which, although just shy of being technically insolvent was equitably insolvent.

There is no question now that PIC does not meet the minimum threshold requirements and that self-bonding by PIC violates SMCRA and the Illinois Reclamation Act. 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. 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, ELPC has made the following calculations:

*Table 1 – Summary of PIC Financial Schedules*

<b>Total Assets</b>	<b>\$33,791,823,116.79</b>
<b>Intangibles and Intellectual Property</b>	\$1,012,326.20
<b>Tangible Assets</b>	
<b>(Total Assets - Intangibles and Intellectual Property)</b>	\$33,790,810,790.59
<b>Total Liabilities</b>	\$46,455,224,423.54
<b>Net worth</b>	<b>-\$12,663,401,306.75</b>
<b>(Total Assets - Total Liabilities)</b>	
<b>Tangible Net Worth</b>	<b>-\$12,664,413,632.95</b>

<b>(Tangible Assets - Total Liabilities)</b>	
<b>Ratio of Total Liabilities to Net Worth</b>	<b>-3.67</b>
<b>(Total Liabilities / Net Worth)</b>	
<b>Ratio of Assets to Liabilities</b>	<b>0.73</b>
<b>(Total Assets / Total Liabilities)</b>	

Based on the information summarized in Table 1 and detailed in filings before the bankruptcy court, 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 \$12.67 billion.
- PIC has a negative ratio of total liabilities to net worth.<sup>16</sup> PIC would need to either reduce its liabilities substantially or increase its net worth to achieve a ratio with an absolute value of between zero and 2.5.
- PIC’s ratio of total assets to total liabilities is 0.73, well below the required ratio of 1.2.<sup>17</sup>

PIC is disqualified from guaranteeing self-bonds in Illinois. Even if PIC did qualify for self-bonding, as described above, it would be an abuse of discretion and a violation of SMCRA for the states to allow Peabody to self-bond during bankruptcy.

## II. CONCLUSION

Based on the information provided above, it is clear that Peabody Energy and its Operating Subsidiaries are in violation of SMCRA and the Illinois Reclamation Act because neither they nor PIC can demonstrate a history of financial solvency or current financial strength as required under SMCRA and the Illinois Reclamation Act and because PIC no longer meets the threshold criteria to qualify for self-bonding.

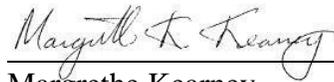
Having provided such sufficient information, through this Citizen Complaint ELPC demands:

<sup>16</sup> While technically a negative ratio is less than 2.5, it would be an impermissible interpretation of the statute and regulations to allow a company with a negative ratio to qualify. All of the financial criteria are based on the assumption that liabilities must not be greater than net worth. To interpret a negative ratio as “less than 2.5” would create the anomalous situation where, as a company’s financial health improved, its ratio would convert from a negative number to a number higher than 2.5.

<sup>17</sup> ELPC is 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.

- (1) That OSM issue a finding that Peabody no longer meets the self-bonding requirements under SMCRA, and has not met the requirements since at least April 12, 2016;
- (2) That OSM order Peabody to, within 90 days, post financial assurances other than self-bonds for the full amount of its reclamation obligations in Illinois as a condition of continued mining operations in Illinois;
- (3) That pursuant to 30 C.F.R. § 842.12(d) OSM report the results of any inspection within 10 days from the date of the inspection, or if there is no inspection, a written explanation of the reasons for that decision within 15 days from the date that this letter is received;
- (4) That this Citizen Complaint be given immediate and emergency consideration in light of Peabody's ongoing bankruptcy proceedings; and
- (5) That OSM grant any other relief as is appropriate.

Respectfully submitted,



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Margrethe Kearney  
Howard A. Learner  
Attorneys for the  
Environmental Law & Policy  
Center  
35 E. Wacker Drive, Ste. 1600  
Chicago, IL 60601  
P: (312) 673-6500  
mkearney@elpc.org