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

August 4, 2016

VIA E-MAIL AND CERTIFIED MAIL

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Chief, Alton Field Division
Mid-Continent Region
Office of Surface Mining Reclamation and Enforcement
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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 Indiana

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 Indiana by Peabody Energy Company ("Peabody Energy") and its subsidiary Peabody Midwest Mining, LLC (the "Operating Subsidiary" and, collectively with Peabody Energy, "Peabody") that violate both SMCRA and Indiana law implementing 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 Indiana law 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 Indiana because the State's response has been insufficient.

On February 12, 2016, ELPC submitted a Citizen Complaint pursuant to sections 517(h) and 521(a) of the federal SMCRA.[1] On February 18, 2016, OSMRE's Alton Field Office issued

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a Ten Day Notice letter to the Division of Reclamation of the Indiana Department of Natural Resources ("Indiana DNR").[2] On March 2, 2016, ELPC submitted an Emergency Request for Reconsideration of its February 12 Citizen Complaint.[3] The Division of Reclamation sent a letter dated March 2, 2016, in response to the Ten Day Notice letter.[4] This letter failed to adequately investigate and address ELPC's Citizen Complaint. On March 28, 2016, ELPC sent a letter to OSMRE's Alton Field Office requesting an immediate inspection by OSMRE.[5]

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 Indiana Law. On July 20, 2016, the Court entered an order granting ELPC's Motion for Relief from the Automatic Stay, specifically concluding that ELPC is a party in interest in the bankruptcy and ordering that ELPC may advocate its position regarding Peabody's timely satisfying of self-bonding requirements in Indiana.[6]

By this Amended Citizen Complaint, ELPC provides information to OSMRE 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 Indiana Law. 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 28, 2016 Request for Immediate Inspection, the Division of Reclamation 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 Indiana 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 Corporation's balance sheet, the issue is even more significant. The State of Indiana has

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[1] Attachment 1, February 12, 2016, Citizen Complaint.
[2] Attachment 2, February 18, 2016,Ten Day Notice Letter.
[3] Attachment 3, March 2, 2016, Emergency Request for Reconsideration.
[4] Attachment 4, March 2, 2016, IDNR Response to Ten Day Notice Letter.
[5] Attachment 5, March 28, 2016, ELPC Request for Immediate Inspection.
[6] *See In re Peabody Energy Corporation, et al.,* Case No. 16-42529, Dkt. #946 (Bankr. E.D.Mo. July 20, 2016); Transcript of July 20, 2016 Oral Argument at 44:13-15 ("I believe that the movants are parties-in-interest, as that term is widely known in bankruptcy, even though they're not a claim holder.").

requested that the bankruptcy court approve a settlement agreement with Peabody that acknowledges the State's authority to require bond substitution, indicates noncompliance with SMCRA, and also permits Peabody to continue self-bonding approximately $119 million in reclamation liabilities in Indiana.[7] Peabody has also filed with the bankruptcy court proposed settlements with New Mexico and Wyoming regarding self-bonding, but Illinois has not yet filed any proposed settlement agreement.

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

(1) That OSMRE 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 OSMRE 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 Indiana as a condition of continued mining operations in Indiana;

(3) That pursuant to 30 C.F.R. § 842.12(d) OSMRE 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 OSMRE 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

[7] *See In re Peabody Energy Corporation, et al.*, Case No. 16-42529, Dkt. #966 (Bankr. E.D.Mo. July 26, 2016), at Ex. A, Stipulation and Order Concerning Debtors' Reclamation Bonding of Their Surface Coal Mining Operations in Indiana ("Proposed Stipulation"). The Proposed Stipulation identifies $145.2 million as the Indiana Reclamation Bond Amount on page 3. The Proposed Stipulation then identifies that of that total reclamation bonding amount, Peabody already holds $0.9 million as surety bonds, that Peabody will obtain a Superpriority Claim of $17.9 million (¶ 1) and will also obtain other third party collateral assurance of $7.4 million (¶ 2). After reducing the Indiana Reclamation Bond Amount by the Superpriority Claim and the third-party surety bonds, there is still a remaining $119 million of the Indiana Reclamation Bond Amount that will continue to be secured only by self-bonds.

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.

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 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.[8] Reclamation is only guaranteed to occur if there are sufficient funds available for that reclamation work.[9] 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.[10]

B. Peabody Energy Is Violating SMCRA'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.[11] SMCRA permits self-bonding only when the applicant demonstrates a "history of financial solvency." Having filed for bankruptcy on April 13, 2016, Peabody can demonstrate neither a history of financial solvency nor current financial soundness sufficient to bond $145 million in reclamation obligations in Indiana.

Peabody Energy conducts mining operations in Indiana through a wholly-owned operating subsidiary that currently self-bonds over $140 million dollars of reclamation obligations in the state of Indiana. In support of their self-bonding applications, the Operating Subsidiary did not submit its own financial information or the financial information of the ultimate parent company, Peabody Energy. Instead, Peabody Energy's Operating Subsidiary 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, PIC and the Operating Subsidiary each filed for

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[8] *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.

[9] 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).

[10] *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).

[11] *See* SMCRA § 509, 30 U.S.C. § 1259(a).

bankruptcy on April 13, 2016, and all filings were consolidated with the Peabody Energy bankruptcy docket.[12]

When OSMRE promulgated self-bonding regulations in 1983, it recognized the risks posed by self-bonded companies that filed for bankruptcy. In these situations, OSMRE 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.[13] OSMRE 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.[14]

Peabody Energy, its Operating Subsidiary, 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 over $140 million in reclamation obligations. Allowing Peabody to self-bond is a violation of SMCRA, and to come in compliance with the law Peabody must be required to substitute all of its Indiana 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 has a slightly greater amount of assets than liabilities and the company is therefore technically

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[12] See Attachment 6, Voluntary Petition for Non-Individuals Filing for Bankruptcy, at Schedule 1, April 13, 2016.
[13] 48 Fed. Reg. 36418 at 36422 (Aug. 10, 1983).
[14] *Id*. at 36421.

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's self-bond requirements define "financial solvency." However, given the protective purposes of the Act, it is prudent to consider an inclusive definition of "insolvency" that includes both equitable and balance sheet insolvency.

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.

30 CFR 800.23(b). The State of Indiana has adopted that same test. IC 14-34-7-4 (c)(7). 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 to meet the threshold test for self-bonding, and Indiana

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, 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. Indiana was explicit about its failure to consider this financial relationship, explicitly stating that "[w]hether Peabody has placed all assets in [PIC] and all debts in another, which is the crux of the argument from ELPC, is not a matter for Indiana to decide."[15]

There is no question now that PIC does not meet the minimum threshold requirements and that self-bonding by PIC violates SMCRA and Indiana law. 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

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)	-$12,663,401,306.75
Tangible Net Worth (Tangible Assets - Total Liabilities)	-$12,664,413,632.95
Ratio of Total Liabilities to Net Worth (Total Liabilities / Net Worth)	-3.67

[15] See March 2, 2012 letter from to B. Mayes (Indiana DNR) to L. Meier (OSMRE) at 2.

Ratio of Assets to Liabilities **(Total Assets / Total Liabilities)**	0.73

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.[16] 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, well below the required ratio of 1.2.[17]

Any one of these factors disqualifies PIC from guaranteeing self-bonds in Indiana. 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.

According to Indiana, Peabody has never made available to the state its required 2015 audited financial statement for PIC, which is itself a violation of the self-bonding regulations. Furthermore, in its proposed settlement agreement with Peabody, Indiana acknowledges that absent approval of the agreement "it could issue a substitution demand" to Peabody under Indiana Law, through a Notice of Violation at the appropriate time. Dkt. #966-1 at page 4.

While the settlement suggests that Peabody is in violation of federal and state self-bonding regulations, it does not require Peabody to provide substitute bonds within 90 days, as required by law. Rather, the settlement agreement requires Peabody to provide Indiana DNR with a "plan outlining a process whereby [Peabody] will reevaluate their bonding liability" in Indiana. This vague, aspirational "plan" is not an effective or adequate bonding instrument as required by law. To the extent that Indiana argues that this settlement agreement serves to abate the violation in some reasonable timeframe, Indiana's actions are an abuse of discretion. In fact, the only quantified reduction in Peabody's self-bonded obligations is that Peabody shall, within 18 months of entry of the stipulation, use "reasonable best efforts" to reduce the total amount of self-bonds in Indiana by $10 million. This aspirational goal will not lead to abatement of the violation within a reasonable time, is not appropriate action, and is therefore arbitrary,

[16] 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 ration 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.

[17] 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.

capricious, and an abuse of discretion.[18] OSMRE has specifically found that even an approved settlement between a State and a mining operation does not obviate a violation of SMCRA's self-bonding requirements, nor does it necessarily amount to appropriate action to abate a violation. Regarding violations by Alpha Natural Resources, Inc. and Alpha Coal West, Inc. ("Alpha") in Wyoming, OSMRE concluded that, while it would take the bankruptcy proceedings into account, Alpha's ongoing violations of SMCRA and Wyoming's failure to take appropriate action to correct the violation or show good cause to do so **required** OSMRE to determine that a violation of Wyoming's approved program existed.[19] Indiana's proposed settlement is not an appropriate action to correct the violation, and OSMRE should undertake a federal inspection and find that Indiana's response to Peabody's continuing violations is arbitrary, capricious, and an abuse of discretion.

II. CONCLUSION

Based on the information provided above, it is clear that Peabody Energy and its Operating Subsidiaries are in violation of SMCRA because neither they nor PIC can demonstrate a history of financial solvency as required under SMCRA 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:

(1) That OSMRE 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 OSMRE order Peabody to, within 90 days, post financial assurances other than self-bonds for the full amount of its reclamation obligations in Indiana as a condition of continued mining operations in Indiana;

(3) That pursuant to 30 C.F.R. § 842.12(d) OSMRE 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;

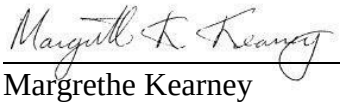
(4) That this Citizen Complaint be given immediate and emergency consideration in light of Peabody's ongoing bankruptcy proceedings; and

(5) That OSMRE grant any other relief as is appropriate.

[18]While Indiana purports that, under this very same settlement agreement, "any proceedings by Indiana relating to the Debtors' self-bonding status shall be stayed," Indiana is clearly without authority to agree to a "stay" in OSMRE's performance of its obligations under SMCRA.

[19] *See* Attachment 7, July 11, 2016, ltr. fr. J. Fleischman (OSMRE) to K. Wendtland (WYDEQ).

Respectfully submitted,



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