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**U.S. House of Representatives**  
**Committee on Natural Resources**  
**Washington, DC 20515**

June 10, 2016

The Honorable Sally Jewell  
Secretary  
Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

Dear Secretary Jewell:

On April 13, 2016, Peabody Energy, the country's top coal producer, became the latest and largest of the major American coal companies to file for bankruptcy. Like Arch Coal, Inc. and Alpha Natural Resources before it, Peabody chose to meet some of its reclamation obligations under the Surface Mining Control and Reclamation Act (SMCRA) by self-bonding instead of buying corporate surety bonds or collateral bonds. Because self-bonding requirements fail to consistently ensure all reclamation costs are covered, we urge you to take immediate action to prevent major coal companies from further offloading billions of dollars of self-bonded reclamation obligations onto taxpayers.

There has not been a more urgent time to act since the enactment of SMCRA in 1977. There have been nearly 50 bankruptcies by coal companies in the last 4 years.<sup>1</sup> In the last nine months, four coal companies worth over \$1 billion each filed for bankruptcy.<sup>2</sup> Peabody alone had \$1.47 billion dollars in self-bonding obligations in Wyoming, Illinois, Indiana, Colorado and New Mexico.<sup>3</sup>

<sup>1</sup> Kuykendall, Taylor. "UPDATE: 'End of an Era': Arch joins list of nearly 50 coal bankruptcies since 2012." *SNL*. SNL Financial, 11 Jan. 2016. Web. 2016. <<https://www.snl.com/InteractiveX/Article.aspx?cdid=A-35032322-14387>>.

<sup>2</sup> Ibid

<sup>3</sup> [United](#) States Bankruptcy Court Eastern Division of Missouri Eastern Division, *Case No. 16-42529*. Missouri. 2016. Web. 2016. <<https://mscuspegrs01.blob.core.windows.net/mmfiles/sitemedia/ch11/first%20day%20declaration.pdf>>

At the same time, clear evidence has emerged that self-bonds are not covering those costs. Arch Coal, Inc. had \$485 million in self-bonds in Wyoming when it declared bankruptcy.<sup>4</sup> The Wyoming Department of Environmental Quality's Land Division (LQD) entered into an agreement with Arch to assign superpriority status to only \$75 million plus another \$17 million in collateral bonds to replace the self-bonds.<sup>5</sup> Alpha Natural Resources had \$411 million in self-bonds in Wyoming.<sup>6</sup> The LQD entered into an agreement with Alpha to assign superpriority status to only \$61 million.<sup>7</sup> Alpha Natural Resources had over \$244 million in self-bond obligations in West Virginia. After bankruptcy, West Virginia Department of Environmental Protection entered into an agreement in which they secured only \$39 million in a letter of credit and priority rights.<sup>8</sup>

The shrinking market for coal will do little to shrink the demand for self-bonds. The four companies that declared bankruptcy in the last 9 months represented over 40% of US coal production,<sup>9</sup> leaving the remaining companies trying to survive in a market in which low natural gas prices continue to erode demand for coal. More bankruptcies can be expected. Those with self-bonds that have already declared bankruptcy have also sought to continue to self-bond.<sup>10,11,12</sup> Some have already been granted that privilege.<sup>13</sup>

The decision to allow a coal mining company to self-bond and the methods used to support those decisions involve substantial discretion on the part of the state regulators. As the agency that provides oversight of the states, the Office of Surface Mining Reclamation and Enforcement (OSMRE) can prohibit the practice of self-bonding. We encourage you to pursue that option. As interim steps to help provide a more level playing field between states and coal companies, and dramatically reduce taxpayer exposure by providing clear guidance in the following areas:

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<sup>4</sup> [United States Bankruptcy Court, Eastern Division of Missouri, Eastern Division, Case No. 16-40120](https://cases.primeclerk.com/archcoal/Home-DownloadPDF?id1=MjU1MDk5&id2=0). Missouri. 2016. Web. 2016. <<https://cases.primeclerk.com/archcoal/Home-DownloadPDF?id1=MjU1MDk5&id2=0>>

<sup>5</sup> Fitch: US Coal Defaults Herald Tighter Rules for Self-Bonding. New York: Fitch, 5 Apr. 2016. Web. <<https://www.fitchratings.com/site/fitch-home/pressrelease?id=1002010>>.

<sup>6</sup> [United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, Case No. 15-33896](http://www.kccllc.net/alpharestructuring/document/1533896160307000000000023). Virginia. 2016. Web. 2016. <<http://www.kccllc.net/alpharestructuring/document/1533896160307000000000023>>

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> "Table 10. Major U.S. Coal Producers, 2014." *Annual Coal Report 2014*. U.S. Energy Information Administration, n.d. Web. 2016. <<https://www.eia.gov/coal/annual/pdf/table10.pdf>>.

<sup>10</sup> [United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, Case No. 15-33896](http://www.kccllc.net/alpharestructuring/document/1533896160307000000000023). Virginia. 2016. Web. 2016. <<http://www.kccllc.net/alpharestructuring/document/1533896160307000000000023>>

<sup>11</sup> Storrow, Benjamin. "Wyoming and Arch Coal reach self-bonding deal." *Casper Star Tribune* 10 Feb. 2016. Web. 2016. <[http://trib.com/business/energy/wyoming-and-arch-coal-reach-self-bonding-deal/article\\_dc42390d-8b72-5348-a24e-13d95aa1bc0a.html](http://trib.com/business/energy/wyoming-and-arch-coal-reach-self-bonding-deal/article_dc42390d-8b72-5348-a24e-13d95aa1bc0a.html)>.

<sup>12</sup> [United States Bankruptcy Court Eastern Division of Missouri Eastern Division, Case No. 16-42529](https://cases.primeclerk.com/archcoal/Home-DownloadPDF?id1=MjU1MDk5&id2=0). Missouri. 2016. Web.

2016. <<https://mcsusppegrs01.blob.core.windows.net/mmfiles/sitemedia/ch11/first%20day%20declaration.pdf>>

<sup>13</sup> Wendtland, Kyle. Letter to Jeffrey Fleischman. 12 February 2016. TS.

<http://deq.wyoming.gov/media/attachments/Land%20Quality/Bonding/DEQ-Alpha-Natural-Resources-Ten-Day-Notice-Response.pdf>

## **Use common sense indicators of financial health**

Section 1259(c) of SMCRA says the state coal mining regulator “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.” OSMRE can clarify the application of this section in common sense ways.

### **1. Companies that recently declared bankruptcy should not qualify for self-bonding**

A company that has recently declared bankruptcy does not have a history of financial solvency and therefore should not qualify for self-bonding. As discussed below, recent bankruptcies of the guarantor company’s ultimate parent company, and the parent company’s subsidiaries should bear equal weight in the regulator’s decision to allow self-bonding since their financial health is closely linked.

### **2. State regulators should look beyond the minimum required examination of financial health when determining financial solvency**

Regulators should not rely exclusively on the financial tests prescribed in SMCRA and in implementing rules to determine whether a company can self-bond. In a statement on February 11, 2016, Peabody confirmed that it still qualified for self-bonding, roughly two months before declaring bankruptcy.<sup>14</sup> In the case of Peabody, as well as Alpha and Arch, articles in popular and trade press telegraphed the bankruptcy well ahead of time. The imminence of bankruptcy was widely reported, and therefore easily knowable by state regulators. In fact, Colorado anticipated Peabody’s financial difficulties and requested that they replace their self-bonds.<sup>15</sup> A company that is known to be headed toward bankruptcy should not be considered financially solvent.

Similarly, annual tests of financial health should be the minimum frequency, not the maximum when there is reason to believe more frequent updates or even on-off updates would yield a different result. In the implementing regulations for SMCRA, the Federal Register notice pointed out the risk of the regulator being deprived of the full amount of the self-bond if the mining company declared bankruptcy and concluded that “it is important for the regulatory authority to

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<sup>14</sup> Loh, Tim. "The \$1.47 Billion Problem Threatening Peabody's Finances." *Bloomberg* 17 Feb. 2016. Web. 2016. <<http://www.bloomberg.com/news/articles/2016-02-17/the-1-47-billion-problem-threatening-peabody-s-balance-sheet>>.

<sup>15</sup> Webb, Dennis. "Peabody switched from self-bonding for state mine cleanups before bankruptcy filing." *The Daily Sentinel* 18 Apr. 2016. Web. 2016. <<http://www.gjsentinel.com/news/articles/peabody-switched-from-selfbonding-for-state-mine-c>>.



monitor the self-bonded entity closely, examining financial statements as necessary and requiring replacement bond when any of the conditions of self-bonding no longer hold.”<sup>16</sup>

**3. The financial health of the ultimate parent cannot be separated from the health of any of its subsidiary companies that may carry the self-bond.**

The subsidiary loophole allows a parent company to move assets and liabilities among subsidiary companies in a way that allows one of the subsidiaries to bear the financial risk on paper, which allows the subsidiary conducting the mining operations to meet the self-bonding test. However, when one coal mining subsidiary declares bankruptcy, it is not uncommon for the other subsidiaries and parent company to enter bankruptcy as well. Simultaneous collapse is not surprising because the ultimate parent company frequently pledges the assets of all its subsidiaries as collateral for debt. The parent company and all of its wholly owned affiliates entered bankruptcy at the same time in the cases of Patriot Coal Corporation (Dec 2013 and again in May 2015), James River Coal Company (April 2014), Xinerger (April 2015), and Trinity Coal (February 2013). The financial health of the ultimate parent, including the collective health of all of its subsidiaries, must be considered when evaluating the financial health of a proposed subsidiary bond guarantor.

**Ensure the bonds work as intended**

**4. Require financial instruments that will legally hold a company to cover reclamation expenses in the case of bankruptcy.**

The Federal Register Notice for the rule governing self-bonding explains how self-bonds may not guarantee cleanup costs are covered. “In the event of bankruptcy, the regulatory authority would probably be in the position of 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. The regulatory authority may be left with insufficient funds to complete the reclamation plan and may have to obtain funds elsewhere to do so.”<sup>17</sup> If the indemnity agreement does not protect the self-bonds through the bankruptcy process, it should either be modified or substituted with a binding financial instrument that will.

**5. Calculations that support self-bonding status should be independently verified.**

A coal mining company’s assets are a critical part of the calculations used to demonstrate sufficient financial health to qualify for self-bonding. If the value and availability of those assets were inflated to increase the chance of being able to self-bond, less of the promised assets would

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<sup>16</sup> Federal Register: 48 FR 36418 (August 10, 1983)

<sup>17</sup> Federal Register: 48 FR 36418 (August 10, 1983)

actually be available to cover the costs of reclamation after bankruptcy. States frequently rely on the coal company's self-reported financial statements, which are allowed under the rules of the Financial Accounting Standards Board to make clear which assets have already been pledged for another purpose, like collateral for a loan. Concern has been raised about pledging encumbered assets for self-bonds based on precedents with Arch Coal, Inc. and Luminant Mining.<sup>18</sup>

Assets pledged for self-bonds could also be drastically undervalued if they rely on the book value of those assets. The fair market value would more accurately reflect the asset devaluation that happens when an entire industry is contracting under market competition.

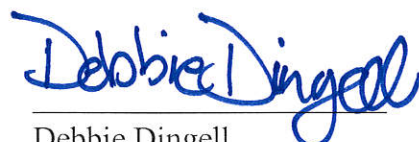

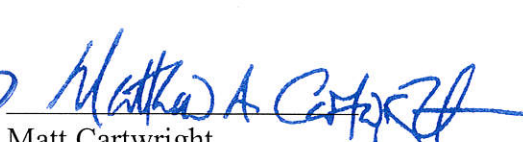
State regulators should require verification by an independent accountants that all assets pledged for self-bonds are completely unencumbered and are valued using fair market value.

#### **6. Support states that opt to discontinue self-bonding.**

On January 5, 2016, the Colorado Department of Natural Resources announced it would be joining five other coal mining states in avoiding coal self-bonding when they wrote "We are moving away from self-bonding because we think it is less secure than other forms of financial assurances such as corporate sureties or cash bonds."<sup>19</sup> As other state administrations come to understand the nature, number and magnitude of the risks to their constituents posed by self-bonding and transition away from it, they may need technical assistance or other kinds of support. OSMRE, who is uniquely equipped to provide it, should stand ready.

Taxpayer exposure to billions of dollars in coal self-bonds is real and present. OSMRE has the discretion to take concrete steps that would limit the exposure. As members of the committee of jurisdiction, we stand ready to work with you.

Sincerely,

		
Debbie Dingell Ranking Member Subcommittee on Oversight & Investigations	Raúl M. Grijalva Ranking Member Committee on Natural Resources	Matt Cartwright Member of Congress

<sup>18</sup> Bonogofsky, Alexis and Et. Al. "Undermined Promise II." *Undermined Promise II*. NWF, NRDC, and WORC, 18 Apr. 2016. Web. 2016. <<http://www.underminedpromise.org/UnderminedPromiseII.pdf>>.

<sup>19</sup> Paterson, Leigh. "CO 'Moves Away' From Self-Bonding." *Wyoming Public Media Statewide Network* 5 Jan. 2016. Web. 25 Apr. 2016. <<http://wyomingpublicmedia.org/post/co-moves-away-self-bonding>>.


  
Donald S. Beyer Jr.  
Member of Congress

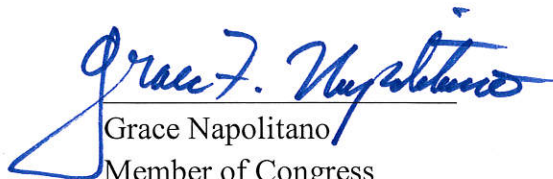
  
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