July 20, 2016

Office of Surface Mining Reclamation and Enforcement
Administrative Record
Room 252 SIB
1951 Constitution Avenue NW
Washington, DC 20240
Submitted online via www.regulations.gov

RE: Docket ID: OSM-2016-0006, Comments on Petition to Initiate Self-Bonding Rulemaking

Dear Director Pizarchik,

Natural Resources Defense Council submits the following comments in response to the Office of Surface Mining Reclamation and Enforcement's (OSMRE) request for comments regarding the recent petition submitted by WildEarth Guardians.[1] We urge OSMRE to take immediate action to address the self-bonding crisis using its authority under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

The petition at issue seeks to ensure that companies with a history of financial insolvency, and their subsidiaries, are no longer allowed to self-bond coal mining operations. We support WildEarth Guardian's diagnosis that the current collapse of the coal industry has exposed deep flaws in the process used by state regulators to allow self-bonding. If coal companies wish to keep operating, they must offer solid reclamation guarantees so that the required cleanup can take place without the help of taxpayer funding. The petition identified two specific loopholes in existing law, and we agree that OSMRE must revise and strengthen the applicable regulations to ensure their closure.

However, we believe OSMRE must act quickly under its existing authority even while the formal regulatory procedure WildEarth Guardians requests plays out in parallel. The harm occurring now cannot wait for rule changes. When states neglect to implement and enforce their own self-bonding programs in accordance with federally-mandated minimum standards, OSMRE has the responsibility to substitute its own enforcement under SMCRA. OSMRE also has existing authority to issue guidance now to prevent states and operators from exploiting the loopholes WildEarth Guardians identifies in its petition.

I. The current self-bonding crisis demands immediate and decisive action.

Coal companies today find themselves in or near bankruptcy at unprecedented rates. Over the five-year period leading up to Peabody Energy's April bankruptcy filing, producers who account

[1] 81 Fed. Reg. 31880 (May 20, 2016).

for about 45% of American coal production declared bankruptcy,[2] while the combined market capitalization of U.S. coal producers fell from $62.5 to just over $4.5 billion.[3] According to the Department of Energy, American coal production recently hit its lowest level in 35 years.[4]

Several structural challenges have contributed to the coal industry's dramatic collapse, including competition with alternate sources of energy and a drop in international demand for coal exports. Accordingly, the U.S. Energy Information Administration's Annual Energy Outlook 2016 Early Release predicted a slow, ongoing decline in demand for coal over the coming decades.[5] Private sector assessments generally match this prognosis. A recent McKinsey report concluded that the U.S. coal industry "is still in the early stages of what could be decades of financial difficulty."[6]

That decline is bad news for the eleven states that have allowed large coal companies to engage in the practice of self-bonding. When they eventually declare bankruptcy, there is no guarantee those states will be able to recover the funds necessary to fulfill coal's outstanding reclamation obligations. According to OSMRE's own data, companies that have already declared bankruptcy carry over $2.4 billion in unsupported self-bonding liabilities,[7] and that amount is expected to climb further. Taxpayers are in considerable danger of getting stuck with the bill.

The coal industry's precarious financial situation incentivizes operators to prefer self-bonding – it is cheaper than the cost of securing a third-party guarantor. But any new self-bonding further exposes taxpayers to the risk that they will be asked to fill holes left by bankrupt coal companies. OSMRE must not allow operators to dig themselves any deeper without receiving real bonds in exchange. WildEarth Guardian's proposed rulemaking would be a positive step in this direction, but the scope of the present crisis demands immediate and decisive action.

II. OSMRE has existing legal authority to address the self-bonding crisis immediately.

OSMRE possesses existing legal authority to immediately protect the public from the threat of self-bonding. Most critically, OSMRE must ensure that states implement and enforce their own self-bonding programs in accordance with federal minimum standards. Therefore, when a state allows bankrupt coal operators to carry on self-bonding, OSMRE should act to curtail further extraction. *See* 30 U.S.C. §§ 1254,1271. Second, OSMRE should issue guidance to close the specific loopholes WildEarth Guardians identifies in its petition.

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[2] Tracy Rucinski & Tom Hals, Leading global coal miner Peabody files for bankruptcy, Reuters (Apr. 13, 2016), http://www.reuters.com/article/us-peabody-energy-bankruptcy-idUSKCN0XA0E7.
[3] Christopher Coats, Market Cap of U.S. Coal Companies Continues to Fall, Institute for Energy Economics & Financial Analysis (Mar. 23, 2016), http://ieefa.org/market-cap-u-s-coal-companies-continues-fall/.
[4] Clifford Krauss, Coal Production Plummets to Lowest Level in 35 Years, N.Y. Times (June 10, 2016), http://nytimes.com/2016/06/11/business/energy-environment/coal-production-decline.html.
[5] U.S. Energy Information Administration, Annual Energy Outlook 2016 Early Release: Annotated Summary of Two Cases (May 17, 2016), http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2016).pdf.
[6] Stefan Rehbach & Robert Samek, Downsizing the US coal industry: Can a slow-motion train wreck be avoided? 11, McKinsey&Company (Nov. 2015), http://www.mckinsey.com/~/media/McKinsey/Industries/Metals%20and%20Mining/Our%20Insights/Downsizing%20the%20US%20coal%20industry/Downsizing%20the%20US%20coal%20industry.ashx.
[7] 81 Fed. Reg. 31880, 31881 (May 20, 2016).

A. OSMRE must ensure primacy states implement and enforce their own self-bonding programs in accordance with federal minimum standards.

Although primacy states may administer SMCRA directly, OSMRE has an obligation to ensure that state agencies effectively enforce federal minimum standards. Before approving a state's coal regulatory program, OSMRE must determine that the proposed regulations are "consistent with"[8] SMCRA, and are "no less effective than"[9] the agency's own regulations. OSMRE's responsibility does not end with approval of the state program. The agency has a mandatory ongoing duty to ensure that states enforce their programs in a way consistent with SMRCA. Whenever the Secretary learns that a state does not, depending on the occurrence of certain procedural requirements enumerated in 30 U.S.C. § 1271, he or she "may provide for the Federal enforcement . . . of that part of the State program not being enforced by such State."[10] Once those procedural requirements have been met, the Secretary "shall enforce . . . any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith."[11] In short, OSMRE must step in whenever a state fails to enforce its approved program and ensure that all mining complies with both state and federal minimum standards.

Similarly, a coal operator cannot begin surface mining without having first secured "acceptance by the regulatory authority of the required performance bond."[12] This reclamation bond must be maintained throughout the life of the permit and the mining it authorizes.[13] There are several ways for an operator to fail this test and accordingly lose the ability to continue operating. Most relevant for our purposes, an operator that has filed for "bankruptcy . . . shall be deemed to be without bond coverage" under 30 C.F.R. § 800.16(e)(2). The consequences of failing to maintain adequate bonding are straightforward: First, the operator is ineligible to receive additional permits for new mining plans.[14] Second, if the coal operator is unable to provide alternate coverage "within 90 days,"[15] he or she "shall cease coal extraction and . . . immediately begin to conduct reclamation operations in accordance with the reclamation plan."[16]

During the current rash of bankruptcies, state regulators have frequently chosen to look the other way as operators lose their eligibility for self-bonding. One particularly unsettling example is the recent settlement agreement between Arch Western Resources and Wyoming. In exchange for stronger assurances covering less than $100 million of Arch's self-bonds, Wyoming agreed not to recoup the overall balance of $485 million in self-bonded obligations.[17] Permissive oversight of the sort that forced Wyoming into this compromised position is precisely what the federal enforcement provisions of SMCRA are meant to address.

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[8] 30 U.S.C. § 1253(a)(7).
[9] 30 C.F.R. § 730.5.
[10] 30 U.S.C. § 1254(b).
[11] 30 U.S.C. § 1271(b).
[12] 30 C.F.R. § 800.11(c).
[13] 30 U.S.C. 1259(b).
[14] 30 C.F.R. § 773.12(a).
[15] 30 C.F.R. § 800.23(g).
[16] 30 C.F.R. § 800.16(e).
[17] Disclosure statement for debtors' amended joint plan of reorganization under Chapter 11 of the Bankruptcy Code, In re: Arch Coal, Inc., et al., No. 16-40120-705 (Bankr. E.D. Mo. June 14, 2016), https://cases.primeclerk.com/archcoal/Home-DownloadPDF?id1=MzY5NDIz&id2=0.

OSMRE has taken tentative steps toward the necessary direct enforcement in primacy states. The agency recently issued several so-called "Ten Day Notice" letters, which stated it had reason to believe continued extraction of coal "while failing to meet the criteria to qualify for self-bonding"[18] constituted "a violation of SMCRA, its implementing regulations, and corresponding state laws and regulations."[19] Although OSMRE did not conduct its own inspection, its admission that continued mining despite inadequate self-bonding constitutes a clear violation of SMCRA indicates that the agency acknowledges the urgent need to act. If states continue to provide unsatisfactory oversight, OSMRE must follow through on the threat of its Ten Day Notice letters and carry out enforcement directly.

B. OSMRE can and should achieve WildEarth Guardian's recommendations by issuing guidance.

WildEarth Guardian's petition proposes two specific regulatory changes to clarify existing regulations. Even as OSMRE works to revise its regulations accordingly, it should also issue guidance to immediately address these issues. Although formal regulatory changes must follow 5 U.S.C. § 553's so-called "notice and comment" procedures, part (b)(A) of that statute explicitly exempts "interpretative rules" from these requirements. Such guidance does not make new legal requirements or modify existing ones. Instead, it allows an agency to merely "clarify or explain existing law or regulations."[20] Guidance admittedly carries less legal weight than does a formal amendment, which is why we encourage OSMRE to initiate the requested rule changes as well as issue immediate guidance.

The first of WildEarth Guardian's proposed amendments would "ensure that regulatory authorities focus financial scrutiny on parent corporations that are not subsidiaries to other parents, but rather represent the top of an applicant's corporate structure."[21] Under § 800.23(f), "self-bonded applicants, parent and non-parent corporate guarantors" must submit financial information to the relevant regulatory authority. And under § 800.23(g), any change in the financial conditions of those listed entities may trigger § 800.16(e)'s requirement to cease coal mining operations.

But states that wish to enable dangerous self-bonding rely on the fact that the regulations do not explicitly direct them to inquire whether a subsidiary's assets have been pledged as collateral on behalf of a parent and are therefore riskier than they might otherwise appear. WildEarth Guardians points out that this narrow interpretation has directly enabled subsidiaries to qualify for self-bonding in "actual—not hypothetical—situations where the parent company is insolvent or nearing insolvency"[22] and would not itself be eligible for self-bonding. Its petition states that

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[18] Letter from Jeff Fleischman, Chief, Denver Field Division – Casper Area Office, OSMRE, to Kyle Wendtland, Administrator, Wyoming Department of Environmental Quality – Land Quality Division (February 16, 2016), *available at* https://assets.documentcloud.org/documents/2714626/Peabody-TDN-Package-02162016.pdf.

[19] Motion of the Environmental Law & Policy Center and the Western Organization Of Resource Councils for relief from the automatic stay, In Re: Peabody Energy Corporation et al., No. 16-42529-399 at 6 (Bankr. E.D. Mo. May 16, 2016), https://www.kccllc.net/peabody/document/1642529160516000000000026.

[20] Paralyzed Veterans of Am. v. West, 138 F.3d 1434 (Fed. Cir. 1998).

[21] Jeremy Nichols, Petition for Rulemaking Under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1211(g), WildEarth Guardians 8 (Mar. 3, 2016) (hereinafter "WildEarth Guardians Petition"), https://www.regulations.gov/contentStreamer?documentId=OSM-2016-0006-0002&disposition=attachment&contentType=pdf.

[22] WildEarth Guardians Petition, supra at 6.

"it appears that the regulations have been interpreted and implemented in such a way as to allow regulatory authorities to remain willfully ignorant."[23] When Arch, Peabody, and other operators retain the ability to self-bond right up until bankruptcy,[24] something is clearly broken.

OSMRE and state regulators must begin to apply comprehensive financial scrutiny to every guarantor's balance sheet and to the totality of its collateral obligations. The most straightforward way to achieve this result is by mandating that regulators thoroughly review the subsidiary's finances, as well as those of its parent. Accordingly, the petition asks OSMRE to define and incorporate the term "Ultimate parent corporation" throughout 30 C.F.R. § 800.23 to ensure "that regulatory authorities are explicitly directed to assess the financial status of ultimate parent corporations"[25] so that they no longer "overlook obvious signs that non-parent corporate guarantors are not financially solvent based on the financial health of their parent corporations."[26]

But guidance outlining a commonsense interpretation of 30 C.F.R. § 800.23 would help ensure that state regulators apply proper scrutiny to applicants for self-bonding. Though OSMRE has heretofore read 30 C.F.R. § 800.23 in such a way that benefits coal operators,[27] it is under no obligation to continue doing so.[28] Demanding that regulators detect whether a subsidiary's assets have already been pledged as collateral takes the regulation's implicit call for due diligence and makes it explicit. Even the most cursory examination of the non-parent corporate guarantor's finances should reveal the intricate webs of indemnification that tie various entities together, and help ensure parent operators can no longer use subsidiaries to mask their own risk of insolvency. OSMRE must intervene immediately to ensure states properly verify that all offered self-bonds will actually be available to cover the cost of reclamation in the event of an operator's default.

WildEarth Guardian's second proposed amendment seeks "to ensure that companies that do not have a history of financial solvency are not allowed to self-bond."[29] This suggestion may appear curious on its face, especially in light of 30 U.S.C. § 1259(c)'s explicit requirement that an operator wishing to self-bond must demonstrate a "history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount." But states far too often rely on an arguable loophole to permit bankrupt corporations to self-bond: although SMCRA

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[23] WildEarth Guardians Petition, supra at 7.
[24] Benjamin Storrow, Concerned about self-bonding, top federal mining regulator wonders about collusion, Casper Star Tribune (May 18, 2016), http://trib.com/business/energy/concerned-about-self-bonding-top-federal-mining-regulator-wonders-about/article_f5f5565a-2a8b-52e9-8d4f-c68d28f76c39.html.
[25] WildEarth Guardians Petition, supra at 9.
[26] *Id.* at 7.
[27] As when OSMRE justified its 2014 decision to allow Peabody Investments Corporation and Arch Western Resources LLC, subsidiaries of Peabody Energy and Arch Coal respectively, to self-bond (despite their parent corporations' inability to qualify for the same privilege) as follows: "While it may be true that both Peabody Energy Company and Arch Coal, Inc. do not meet the requirements for self-bonding, they are not the guarantors for their mines' self-bonds. There are subsidiary companies in both instances that do meet the requirements for self-bonds, and are the guarantors." OSMRE, OSMRE Self-bonding Fact Sheet (2015), http://eelegal.org/wp-content/uploads/2015/07/OSMRE-Self-Bond-Fact-Sheet-2-9-15-2.pdf.
[28] Under *Paralyzed Veterans*, supra fn. 20, an agency wishing to reverse its previous position was required to follow notice and comment procedures. This requirement was overturned in *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015), when the Supreme Court ruled that because "an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule."
[29] WildEarth Guardians Petition, supra at 8.

explicitly demands that guarantors demonstrate a recent "history of financial solvency", this requirement is echoed only imperfectly in the implementing regulations. 30 C.F.R. § 800.23(b) delineates the conditions guarantors must meet before any regulatory authority can authorize them to self-bond. Although OSMRE itself has referred to those four provisions as "the requirements of solvency and continuous operation,"[30] not even one explicitly disallows recently-bankrupt companies from self-bonding.

The obvious way to address this apparent shortcoming is by treating the loophole as a genuine loophole, and working to ensure that the regulation in question better reflects SMCRA's mandate that operators demonstrate a history of financial solvency. Accordingly, WildEarth Guardians asks OSMRE to amend the relevant regulation so as to require that any company wishing to self-bond must "have not filed for bankruptcy in the last 5 years."[31]

But even while OSMRE works to revise its regulations in order to add the requested fifth requirement to 30 C.F.R. § 800.23(b), it should also issue clarifying guidance. More specifically, OSMRE should explain that the loophole is not really a loophole. In fact, SMCRA's statutory language is clear enough for the agency to enforce directly whenever coal operators unambiguously lack the requisite "history of financial solvency and continuous operation." Moreover, OSMRE should explain that the tests of 30 C.F.R. § 800.23(b) are not intended to clarify SMCRA's "history of financial solvency" requirement, but to augment the statutory language by ensuring corporations within reach of bankruptcy are not permitted to self-bond.

This reading of the statutory language makes a good deal of sense. After all, there is no indication that the applicable regulations were intended to cover a corporation that has *already* entered bankruptcy proceedings. In its 1983 final rulemaking, the agency noted that these four tests "are intended to avoid, to the extent reasonably possible, the acceptance of a self-bond from a company that *would* enter bankruptcy."[32] In other words, the tests of 30 C.F.R. § 800.23(b) are meant only for corporations on the *verge* of bankruptcy, not those that have already crossed the threshold. And there is good reason for the regulation's failure to address the already-bankrupt: SMCRA itself could not have been clearer about whether coal operators that lack a "history of financial solvency" are eligible for self-bonding. They are not.

Although regulatory authorities admittedly enjoy broad discretion while deciding whether or not to accept a self-bond under 30 U.S.C. § 1259(c),[33] no agency could plausibly suggest that an operator who has recently declared bankruptcy could demonstrate anything that remotely resembles "a history of financial solvency." Indeed, once an operator has filed a petition for reorganization, it has prima facie failed to demonstrate the existence of such a history. Moreover, because coal companies that reorganize under Chapter 11 emerge under brand new corporate identities,[34] they also fail the accompanying requirement of "continuous operation." OSMRE

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[30] Office of Surface Mining Reclamation and Enforcement, Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Performance Bonds; Bond Release Application, 53 FR 994 (Jan. 14, 1988), http://www.osmre.gov/lrg/FEDREG/53fr994.pdf.

[31] WildEarth Guardians Petition, supra at 9.

[32] 48 Fed. Reg. 36,418 at 36,422 (August 10, 1983) (emphasis added).

[33] "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* . . . a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount." (emphasis added)

[34] Coal companies that have declared bankruptcy thus far, including Patriot, Walter Energy, Alpha, Arch, and Peabody, have all done so under the provisions of Chapter 11. *See*, Matt Jarzemsky & Peg Brickley,

must intervene with all due haste to prevent states from allowing companies that have recently gone through the bankruptcy process to self-bond in clear violation of SMCRA.

Mordechai Treiger
Natural Resources Defense Council
Washington, DC

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