Powder River Basin Resource Council * Sierra Club
Western Organization of Resource Councils * Environmental Law & Policy Center
Natural Resources Defense Council * National Wildlife Federation
Alliance for Appalachia * Appalachian Citizens' Law Center * Appalachian Voices
Southern Appalachian Mountain Stewards of Southwest Virginia * Citizens Coal Council
West Virginia Highlands Conservancy * West Virginia Rivers Coalition
Coal River Mountain Watch * Eco-Justice Collaborative
Canton Area Citizens for Environmental Issues, Canton Lake and Its Watershed
Southern Illinoisans Against Fracturing Our Environment
Earthworks * Sightline Institute * Clean Energy Action * Greenpeace
NextGen Climate America * Statewide Organizing for Community eMpowerment
New Mexico Environmental Law Center * San Juan Citizens Alliance
Western Colorado Congress * Progressive Leadership Alliance of Nevada
Okanogan Highlands Alliance * Clean Water Alliance * Northern Plains Resource Council
Kentuckians For The Commonwealth * Southern Environmental Law Center

July 14, 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: Comments on Proposed Self-Bonding Rule Changes, Docket ID: OSM-2016-0006

Dear Director Pizarchik,

On behalf of our millions of members across the United States, the undersigned organizations thank the Office of Surface Mining Reclamation and Enforcement ("OSMRE") for your timely and important review of the self-bond regulations under the Surface Mining Control and Reclamation Act ("SMCRA"). The coal industry is undergoing significant structural decline, resulting in over fifty coal companies filing for bankruptcy in the past few years. Even the largest are no longer "too big to fail," and taxpayers and communities must be protected in the case of bond forfeiture.

With these concerns in mind, we ask you to take strong action to protect the interests of taxpayers and coal-impacted communities by (1) using your existing regulatory authority to prohibit violations and require bond replacement for financially vulnerable coal companies; (2) supporting states that want to transition away from self-bonding and encouraging others to do so; and (3) revising your regulations to close risky loopholes that might allow companies to walk away from their reclamation liabilities.

Use Your Existing Authority

While our organizations agree that the OSMRE self-bonding regulations should be clarified and improved as discussed below, we also believe that the existing regulations provide OSMRE ample authority to take immediate action to prohibit existing violations. Rulemaking is not required in order to enable OSMRE to take immediate action to prohibit self-bonding practices that violate SMCRA, and waiting for such a rulemaking to be finalized will unnecessarily delay urgently needed action to address problems with implementation and enforcement of the self-bonding program. Therefore, first and foremost, we call on OSMRE to use your existing authority to protect the public interest by immediately requiring bond substitution by any company that is in violation of the current rules. In doing so, OSMRE should work with and provide guidance to the states, but should also be prepared to step in if states fail to promptly enforce these important legal requirements.

OSMRE has already taken action to identify violations of the current self-bonding regulations and has issued "Ten Day Notice" letters to Wyoming, Illinois, Indiana, and New Mexico for Alpha Natural Resources, Arch Coal, and Peabody Energy, asking the states to explain how these companies could be compliant with SMCRA self-bonding requirements. All three companies are currently undergoing restructuring through Chapter 11 bankruptcy proceedings, yet they continue to operate mines in Wyoming, West Virginia, Illinois, Indiana, and New Mexico with only self-bonds to cover reclamation liabilities.[1] OSMRE already has the authority under current regulations to act on the issues identified in the Ten Day Notices, and we call on the agency to do so now.

Importantly, the subject of the rulemaking proposal – clarifying the relationship between a mining subsidiary, a bond guarantor parent company, and the ultimate parent entity – can be immediately undertaken through guidance or directives *without* rulemaking. OSMRE should promptly issue guidance to:

- **<u>Clarify that only unencumbered assets can be used to qualify for self-bonds</u>.** OSMRE should clarify that regulators must consider the financial status of the ultimate parent entity of an entity that guarantees a self-bond.[2] In many cases, indebted parent coal companies have pledged the assets of virtually all of their subsidiaries – including self-bond guarantors and mining operators – as collateral for debt, such as loans, bonds, and lines of credit. Because subsidiaries' assets are likely to be pledged as collateral, those subsidiaries are nearly guaranteed to file for bankruptcy along with their parent companies. That means that the financial health of the subsidiary is inextricably tied to

[1] Alpha Natural Resources' reorganization and sale of assets plans were confirmed by the bankruptcy court on July 7, 2016, splitting the company into two parts. While the bankruptcy plans included some commitments for bond substitution, at the time of filing these comments, neither the reorganized entity nor the new company has posted replacement bonds for the self-bonds.

[2] The term "ultimate parent *entity*" is preferable to "ultimate parent *corporation*" because it does not specify the legal form of the ultimate parent, which could also be a partnership, limited liability company (LLC), or another business entity. It is also consistent with OSMRE's ownership and control regulations that already use the phrase. *See*, *e.g.* 30 C.F.R. § 778.11(b).

the financial health of the ultimate parent entity. OSMRE should clarify that only assets unencumbered by ultimate parent entity debt can be used to qualify for self-bond status. Assets should be "free and clear" and available to regulators to fund mine reclamation work if they are to guarantee a company's self-bonds.

- **Clarify that any company emerging from bankruptcy must post substitute bonds to cover the full costs of reclamation**. OSMRE must make it clear that a company emerging from bankruptcy – no matter who the bond guarantor is – does not qualify for self-bond status because that company cannot demonstrate a history of financial solvency and continuous operation for the statutorily required five-year period. It is immaterial whether the operator reorganizes as a new business entity or continues under its existing name. Nor can subsidiary companies who are transferred to a new or reorganized parent entity qualify for self-bonding. Preventing recently bankrupt companies from using self-bonds is fully consistent with the current regulations' requirements for a proven history of financial solvency. In fact, Texas's regulations already include the criterion that the company "has not been subject to bankruptcy proceedings" during the five year period prior to the bond application as part of its regulations. Clarification that recently bankrupt companies cannot self-bond is particularly important because coal markets are not likely to recover in the future and the same financial stress factors will be present for any company emerging from bankruptcy. This is why some mine operators, like Patriot Coal, have had to file for bankruptcy a second time within just a few years of their first bankruptcy.

- **Clarify that regulators can review self-bond qualification status at any time**. Financial tests should only be relied upon by regulators if they "allow the regulatory authority sufficient warning so that the self-bonded entity can be required to find a suitable replacement bond while its financial condition is still strong enough to qualify the entity for a surety or other type of bond." 48 Fed. Reg. at 36422. Given the pace at which the financial conditions of coal companies change, regulators are unable to adapt fast enough to require bond substitution prior to financial collapse of a company if they are only reviewing the financial status of the company quarterly or annually, based on the official financial statements of companies. OSMRE should clarify (1) that the financial tests should only be relied upon by regulators if they accurately assess the current – and likely future – financial soundness of the company and (2) a regulator's decision about self-bond qualifications can be re-evaluated at any time.

Our organizations believe that these clarifications are fully consistent with existing law and regulations that require a company to have a proven history of financial solvency in order to qualify for self-bonding.

Support States That Are Doing the Right Thing and Encourage Other States to Do So

We also call on OSMRE to assist state regulatory authorities that wish to phase out self-bonding by clarifying that regulators retain the authority to deny applications for self-bonds even where all enumerated criteria are satisfied. This clarification will reinforce the existing discretion of state regulators to deny new or renewal applications for self-bonding. The current

regulations are clear that *even if* financial tests are met, regulators can deny applications if self-bonding will not fulfill the purpose of SMCRA and state implementing laws. OSMRE underscored this point in the Federal Register notice describing the final federal self-bonding regulations, stating that "[t]he regulatory authority needs case-by-case discretion to consider factors particular to a case which may indicate, for instance, that even though the applicant meets the general qualifications of the self-bonding rules, past behavior tending to undercut the soundness of the applicant, or other factors, may dictate refusal." 48 Fed. Reg. at 36420. OSMRE later emphasized that "regulatory authority discretion to allow or disapprove a self-bond application on a case-by-case basis is an important part of the self-bonding program." *Id*. at 36428. With these descriptions, it is clear that the existing regulations provide ample authority for a regulator to deny self-bonding even if financial tests are met. OSMRE should issue guidance to affirm that discretion and support states who choose to exercise that authority.

OSMRE should also support states that may not have yet transitioned away from self-bonds but are working to do so. In today's market conditions, no coal operator is "too big to fail" and all companies have risk of financial collapse. OSMRE should support states that recognize the risks of these market conditions and are working to proactively protect taxpayers.

Colorado, for example, has begun moving away from self-bonding, despite repeated requests from mine operators to self-bond. After signing a purchase agreement with Peabody Energy for the Twentymile Coal Mine in Colorado, Bowie Resource Partners sought approval from the Colorado Division of Reclamation Mining and Safety to continue Peabody's practice of relying on self-bonds to satisfy its reclamation bonding obligations. Colorado regulators expressed uneasiness with allowing Bowie to rely on self-bonding and informed Bowie that the agency would deny any application to self-bond.[3] Later, just before it filed for bankruptcy, Peabody Energy replaced its $27 million in self-bonding in Colorado with surety bonds. Colorado's wisdom in requiring more reliable third-party bonding should serve as a model for other regulators. Colorado's decision demonstrates that regulators can and should consider all available information, including the pervasive market forces that are keeping the price of coal low and placing mine operators in distress. OSMRE must help other states follow Colorado's example.

Close the Loopholes

Unfortunately, the current regulations contain loopholes that leave the public at risk. In addition to the immediate actions described above, OSMRE should undertake a rulemaking to close these loopholes.

The central premise of OSMRE's self-bonding regulations – that the eligibility criteria would be stringent enough to avoid a self-bonded operator entering into bankruptcy[4] – has

[3] Patrick Rucker, "Coal Firm Bowie Wants Government Guarantee for Cleanup Costs," REUTERS, Dec. 17, 2015, available at: http://www.reuters.com/article/us-usa-coal-cleanup-idUSKBN0U02SV20151217.

[4] In the Federal Register notice announcing OSMRE's final self-bonding rule, the agency stated that "[t]he 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," and that the criteria in the final rule "are intended to avoid, to the extent

proven to be wildly off the mark. The regulations should be revised to ensure that only companies that are financially sound *and are likely to continue to be financially sound into the future* should be allowed to self-bond.

The rulemaking petition you are considering proposes to close one of these loopholes, and our organizations support that change, but others must be closed as well. Our organizations propose updating your regulations to do the following:

- **Better Define Financial Solvency.** The regulations require a history of continuous operation for a five-year period to qualify for self-bonds. In addition, the regulations should also require a history of financial solvency for this five-year period, as is currently required by some states.[5] In doing so, the regulations should add a definition of financial solvency, taking a broad view to include not only balance sheet solvency (whether a company's assets are greater than their liabilities) but also equitable solvency (whether a company is able to pay debts as they are due). For instance, both Peabody and Arch failed to make interest payments and a short while later filed for bankruptcy, demonstrating they are equitably insolvent. In any event, as discussed above, a company that has been in bankruptcy proceedings over the five-year period should not qualify. We encourage OSMRE to adopt language similar to Texas, such as: "The Regulatory Authority may accept a self-bond from an applicant if all of the following conditions are met by the applicant . . . the applicant has been in continuous operation for a period of not less than 5 years immediately preceding the date of application and has demonstrated a proven history of financial solvency during that time. If an applicant has been subject to bankruptcy proceedings during that time, it does not meet these requirements."

- **Revise the financial fitness metrics to qualify for self-bonds.** As recent history clearly demonstrates, the financial fitness metrics in the current regulations do not properly ensure that only healthy, stable companies with low risk of bankruptcy can self-bond. The regulatory financial fitness tests should be thoroughly rewritten to ensure that self-bonded companies are financially sound enough to live up to their cleanup commitments.

- **Reduce the time for bond replacement**. The current regulations allow up to ninety days to replace bonds once a bond substitution demand is issued from a regulator. This time period is unnecessarily long and does not properly balance the need of the regulator to manage risk with the need for the company to obtain financing necessary for bond replacement. We suggest closing this loophole by requiring bond replacement within thirty days.

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reasonably possible, the acceptance of a self-bond from a company that would enter bankruptcy." 48 Fed. Reg. 36418, 36421-22 (Aug. 10, 1983).

[5] The statute refers to a "history of financial solvency and continuous operation" but it is important to note that these are two independent requirements as a company can be financially insolvent and still operating (like in a Chapter 11 bankruptcy proceeding).

Thank you for your actions on behalf of the American public. As the coal industry experiences significant declines, it is important that OSMRE proactively adapts its regulatory approaches to best protect the public interest.

Sincerely,

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