



April 21, 2016

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Fernando Martinez
Mining and Minerals Division Director
New Mexico Energy, Minerals and Natural Resources Department
Wendell Chino Bldg., Third Floor
1220 South St. Francis Dr.
Santa Fe, NM 87505

**Re: Notice of Intent to File Suit Over Violations of the New Mexico Surface Mining Act
Over Peabody Energy Self-Bonding**

Dear Mr. Martinez:

Pursuant to the New Mexico Surface Mining Act, NMSA 1978, Section 69-25A-24 (1979), WildEarth Guardians hereby notifies you that we intend to file suit in state court against the Mining and Minerals Division (“MMD”) over your failure to ensure Peabody Energy Corporation posts adequate reclamation bonds for its coal mining operations in the State of New Mexico. Specifically, MMD has failed to determine that Peabody Energy no longer qualifies for self-bonding and to take steps to secure adequate replacement bonds pursuant to the New Mexico Surface Mining Act and New Mexico Administrative Code. *See* NMSA 1978, § 69-25A-13 and 19.8.14 NMAC.

In New Mexico, Peabody Energy currently self-bonds at its El Segundo and Lee Ranch mining operations in the amount of approximately \$181 million. This amount of self-bonding has been guaranteed by Peabody Investments Corporation, a subsidiary of Peabody Energy. On March 30, 2016, MMD determined that Peabody Energy qualifies for self-bonding by deeming Peabody Investments Corp. financially solvent. However, on April 13, 2016, Peabody, as well as its direct and indirect domestic subsidiaries, including Peabody Investments Corp., filed for reorganization pursuant to chapter 11 of the U.S. bankruptcy code. By virtue of this bankruptcy filing, Peabody Investments Corp. is no longer financially solvent and no longer qualifies to guarantee self-bonds pursuant to the financial criteria set forth under New Mexico Administrative Code. *See* 19.8.14.1410 NMAC. Peabody Energy Corporation must therefore be “deemed to be without bond coverage” and must be ordered by MMD to replace bond coverage or “cease coal extraction.” 19.8.14.1406(E) NMAC. To date, MMD has taken no such actions.

The New Mexico Surface Mining Act provides that, “[A]ny person having an interest which is or may be adversely affected may commence a civil action [] to compel compliance [] against the [MMD] director [over] violation[s] of the Surface Mining Act or of any rule, regulation, order or permit issued pursuant thereto[.]” NMSA 1978, § 69-25A-24(A)(1). A civil action may not be commenced prior to “sixty days” after notice of the violations has been provided to the MMD Director, the New Mexico Coal Surface Mining Commission, and the New Mexico Attorney General. *See* NMSA 1978, § 69-25A-24(B). With this letter, WildEarth Guardians is notifying you and other officials that if the violations documented herein are not resolved in 60 days, we intend to file suit in state court to compel compliance. Below, we detail MMD’s violations.

I. BACKGROUND

Under the New Mexico Surface Mining Act and New Mexico Administrative Code, before a company can mine coal, they are required to post bonds covering the full cost of reclamation in case mining operations are abandoned prior to the completion of reclamation. *See* NMSA 1978, § 69-25A-13 (1979) and 19.8.14 NMAC. Although normally, companies post surety bonds or offer collateral to ensure the costs of reclamation can be covered, the law allows, but does not require, MMD to accept self-bonds, or corporate guarantees. *See* NMSA 1978, § 69-25A-13(C) and 19.8.14.1410 NMAC. Self-bonds are essentially agreements between companies and regulatory authorities where the mining companies guarantee to cover the costs of reclamation, but do not actually provide direct funds, collateral, or third-party guarantees to cover such costs. *See* 19.8.1(S)(3) NMAC (defining a self-bond as an “indemnity agreement” offered by the coal mine permittee applicant and any corporate guarantor).

Self-bonding is only allowed where a company has “a history of financial solvency.” NMSA 1978, § 69-25A-13(C)(1). According to New Mexico regulations, a company is only allowed to self-bond where it meets all of the criteria set forth at 19.8.14.1410. Among other things, certain financial conditions must all be met, including that the company seeking to be self-bonded must:

- Have an “A” rating or higher for its most recent bond issuance, as issued by Moody’s Investor Service or Standard and Poor’s Corporation;
- Have a net worth of at least \$10 million or fixed assets in the U.S. of at least \$20 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; and
- Ensure that the total amount of self-bonds do not exceed 25% of the company’s, or guarantor’s, net worth in the United States.

19.8.14.1410(A)(3) and (C) NMAC. If the permit applicant or the self-bond guarantor does not meet any one of these criteria, the MMD Director is not allowed to accept a company’s self-bond.

Upon bankruptcy or insolvency of a guarantor, a self-bonded company “shall be deemed to be without bond coverage and shall promptly notify the director.” 19.8.14.1406(E)(2) NMAC. To this end, if financial conditions change such that a self-bonded company no longer satisfies the criteria set forth at 19.8.14.1410(A)(3) and (C), the company has a duty to “immediately” notify the Director and post an alternative bond. 19.8.14.1410(F) NMAC. Within 90 days of this notification, the permittee must post an alternate bond in the “same amount as the self-bond.” *Id.* If the company fails to do so, it must “cease coal extraction” and “shall immediately begin to conduct reclamation operations[.]” 19.8.14.1406(E)(2) NMAC.

II. PEABODY ENERGY AND SELF-BONDING IN NEW MEXICO

Peabody Energy most recently reports the company self-bonds its New Mexico mining operations in the amount of approximately \$181,000,000.¹ *See* Table below.² The company’s mining operations include the El Segundo (Permit No. 2015-01) and Lee Ranch (Permit No. 19-2P) mines. Although the Lee Ranch mine is currently idled, the El Segundo mine produced nearly 7.5 million tons of coal in 2015 and so far in 2016 has produced nearly 1.5 million tons of coal.

Self-bonds Approved by New Mexico MMD for Peabody

Mine	Self-bond No.	Amount
Lee Ranch	2012-01	\$118,737,953
El Segundo	2012-02	\$62,223,730

At the end of March, MMD determined that Peabody Energy qualified to self-bond its New Mexico operations on the basis that Peabody Investments Corp., the guarantor of Peabody’s self-bonds, met the criteria for self-bonding set forth at 19.8.14.1410 NMAC.³ Although this determination was conclusory and not supported by information or analysis, since that time both Peabody Energy and its subsidiary Peabody Investments Corp. have filed for bankruptcy, clearly indicating that MMD’s prior determination is no longer supported.

In fact, based on the April 13, 2016 bankruptcy filing of Peabody Investments Corp., the company no longer has a history of financial solvency, a critical statutory prerequisite for self-bonding approval. *See* NMSA 1978, § 69-25A-13(C)(1). By virtue of filing for bankruptcy, Peabody Investments Corp. is, by extension, insolvent. Indeed, the company filed its own voluntary chapter 11 petition on April 13, 2016, a petition that would not have been filed but for the company’s insolvency.⁴

¹ *See* Exhibit 1, Declaration of Peabody Energy Corporation Executive Vice President and Chief Financial Officer, Amy Schwetz (April 13, 2016) at 23. *See also*, Exhibit 2, Peabody Energy Corp., Schedule of Surety Bonds as of April 12, 2016 at 7.

² In total, Peabody has \$1.148 billion in self-bonds in Illinois, Indiana, New Mexico, and Wyoming. *See* Exhibit 1 at 22.

³ *See* Exhibit 3, Letter from MMD to U.S. Office of Surface Mining Reclamation and Enforcement (March 30, 2016).

⁴ *See* Exhibit 4, Peabody Investments Corp., Voluntary Petition for Chapter 11 Bankruptcy (April 13, 2016).

Further, based on the company's chapter 11 filing, as well as that of its parent corporation, Peabody Energy, it very clearly appears the company no longer meets the financial criteria for self-bonding set forth under New Mexico Administrative Code. In its chapter 11 petition, Peabody Investments Corp. reported its total assets and liabilities were between \$10.01 and \$50 billion.⁵ Peabody Energy reported in its chapter 11 petition that its assets totaled \$11.02 billion and liabilities totaled \$10.10 billion.⁶ As a practical matter, this has to mean that Peabody Investment Corp.'s assets are somewhere between \$10.01 billion and \$11.02 billion and liabilities are somewhere between \$10.01 and \$10.10 billion. This means Peabody Investment Corp.'s net worth is between \$1.01 billion and -\$90 million. Given that the company guarantees \$1.148 billion in self-bonds, the total amount of self-bonding clearly exceeds 25% of the company's net worth, making the company ineligible to guarantee self-bonds pursuant to 19.8.14.1410(C) NMAC. It also indicates the financial criteria set forth at 19.8.14.1410(A)(3) are not being met by Peabody Investments Corp.⁷

III. VIOLATIONS OF SURFACE MINING ACT

While Peabody Investments Corp. clearly no longer qualifies for self-bonding in New Mexico, MMD has not taken legally required steps to remedy this situation. As of the date of this letter, MMD continues to accept self-bonds from Peabody Energy for the company's El Segundo and Lee Ranch mines, and has not taken legally required steps to secure replacement bonds. These steps include notifying Peabody Investments Corp. that the company no longer qualifies for self-bonding and ensuring the company posts replacement bonds within 90 days. As the Director of MMD, you are therefore in violation of NMSA 1978, § 69-25A-13(C), and 19.8.14.1406(E)(2) and 19.8.14.1410 NMAC.

The fact that Peabody Energy Corporation, as well as its subsidiaries, including Peabody Investments Corporation, have filed chapter 11 petitions has no effect on MMD's authority and duty to enforce the law. To the extent that a bankruptcy petition serves as an automatic stay of proceedings against a debtor, this automatic stay does not affect a governmental entity's "police or regulatory power." 11 U.S.C. § 362(b)(4). Although this exception does not apply when a governmental entity seeks to enforce a "money judgment," ordering adequate bonding is not enforcing a money judgment. For one thing, there is no judgment. For another, MMD would not be seeking money, but rather a financial assurance. To the extent this may require Peabody to spend money does not make the remedy a "money judgment" as the state would receive no money. If, however, the automatic stay is read to prevent Peabody from posting an adequate bond, then MMD would have no choice but to order cessation of coal mining at the company's mines.⁸

⁵ Exhibit 4 at 3-4.

⁶ See Exhibit 5, Peabody Energy Corporation, Voluntary Petition for Chapter 11 Bankruptcy (April 13, 2016) at 5.

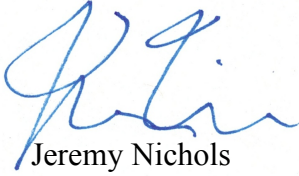
⁷ While the numbers indicate Peabody Investments Corp.'s liabilities to net worth and assets to liabilities ratios exceed the limits set forth at 19.8.14.1410(A)(3)(b) and (c), the company's credit rating is certainly not an "A" rating or higher, also rendering it ineligible to self-bond in accordance with 19.8.14.1410(A)(3)(a).

⁸ New Mexico could also file as a party of interest in Peabody's bankruptcy proceedings and request the court provide relief from the stay with regards to securing adequate bonds. See 11 U.S.C. § 362(d)-(f). However, obtaining such relief is subject to the discretion of the bankruptcy court.

We would prefer to resolve this matter without litigation and to this end, we strongly encourage you to resolve Peabody's self-bonding issues quickly and effectively, and to keep us informed as you do so. However, if the aforementioned violations are not resolved within sixty days, WildEarth Guardians intends to file suit in state court against you and MMD in accordance with NMSA 1978, Section 69-25A-24.

If there are any questions or concerns, or if you wish to discuss the matters set forth in this notice letter, please contact WildEarth Guardians at the information below.

Sincerely,



Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
2590 Walnut St.
Denver, CO 80205
(303) 437-7663
jnichols@wildearthguardians.org

cc via certified mail, return receipt requested:

Hector Balderas
New Mexico Attorney General
408 Galisteo St.
Villagra Building
Santa Fe, NM 87501

New Mexico Coal Surface Mining Commission
1220 South St. Francis Drive
Santa Fe, NM 87505

Sally Jewell
Secretary
U.S. Department of the Interior
1849 C St. NW
Washington, D.C. 20240

Joe Pizarchik
Director
U.S. Office of Surface Mining Reclamation and
Enforcement
1951 Constitution Ave.
Washington, D.C. 20240

(w/o exhibits)
Glenn Kellow
President and Chief Executive Officer
Peabody Energy
Peabody Plaza
701 Market St.
St. Louis, MO 63101

