Sierra Club – Earthjustice

Appalachian Citizens Law Center – Appalachian Voices – Coal River Mountain Watch

Ohio Valley Environmental Coalition – Southern Appalachian Mountain Stewards

Statewide Organizing for Community eMpowerment – Tennessee Clean Water Network

West Virginia Highlands Conservancy – West Virginia Rivers Coalition

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

Dear Director Pizarchik,

The Office of Surface Mining, Reclamation, and Enforcement (OSMRE) must take immediate action under its abundant existing authority to curtail the practice of self-bonding and thereby to minimize the risks to communities in Appalachia and the rest of the country who live, work, and recreate near self-bonded mine sites. Specifically, OSMRE must immediately issue guidance to state regulators clarifying that due to the extremely high risk of insolvency within the coal mining industry at this time, self-bonding is not appropriate, even for companies that satisfy the enumerated financial criteria in the existing regulations. The Surface Mining Control and Reclamation Act (SMCRA) statute, regulations, and prior statements from OSMRE all make clear that regulators retain the discretion to deny self-bonding even where applicants ostensibly satisfy these criteria. In order to avoid further exposing communities to the threat of unfunded reclamation obligations, OSMRE must issue this guidance as soon as possible.

We are specifically requesting that OSMRE issue immediate guidance under its existing authority because the process for further strengthening the SMCRA regulations via rulemaking will take too long and will therefore not address the current crisis. Changes to the SMCRA reclamation bonding regulations, including in particular the provisions authorizing self-bonding, are necessary to address dramatic changes to the industry that have occurred over the more than thirty years since those regulations were finalized. However, the need for significant changes to the self-bonding regulations in no way obviates the need for immediate action to curtail the current and continuing reckless use of self-bonding which threatens to undermine the very purpose of SMCRA.

The need for strong action and guidance from OSMRE is particularly acute in Appalachia, which has experienced the most dramatic declines in coal production and where unreclaimed surface coal mines present significant environmental liabilities. Thousands of acres in Appalachia that have been heavily disturbed by coal mining remain unreclaimed with only the unenforceable promises of the self-bonded permittees serving as a backstop. Self-bonded operators continue to disturb new acres every day, adding to the threat. Neighboring communities and the nearby environment therefore remain exposed to significant sources of pollution and other harms, with a high risk that this exposure will continue far into the future should the permittees fail to complete reclamation. These hazards include exposed highwalls, increased risk of flooding, and ongoing water pollution that destroys stream ecosystems. The risk is greatly exacerbated in states like West Virginia and Virginia that further rely on inadequately funded bond pools to fund reclamation in the case of default. Failure by OSMRE to immediately address the self-bonding crisis in Appalachia will expose communities to the

threat of unreclaimed or under-reclaimed mine sites and the attendant hazards. OSMRE must therefore act now, under its existing authority, to issue guidance requiring state regulators to stop issuing or allowing self-bonds.

According to OSMRE's own calculations, outstanding self-bond obligations currently total $3.86 billion nationwide, of which $2.4 billion is held by coal companies currently in bankruptcy. 81 Fed. Reg. 31,880 (May 20, 2016). This is an outrageous and dangerous situation. Because coal companies have been allowed to self-bond so many acres of disturbed land, they have acquired significant leverage over state regulators desperate to avoid permit forfeitures and the associated transfer of reclamation liability to the state. OSMRE must step in to correct this situation by taking immediate action under the existing regulations to transition self-bonded mine operators towards surety bonds or other financial instruments held by third parties.

The undersigned organizations represent members of communities in Appalachia who are extremely concerned that the continued practice of self-bonding in today's significantly distressed coal market is counter to the spirit and letter of the existing SMCRA statute and regulations, and poses a serious ongoing threat to their health, welfare, and livelihoods. The comments below:

- Clarify that OSMRE's existing regulations provide the authority and responsibility to deny self-bonding to any mine operator with more than a minimal risk of insolvency;
- Describe the conditions in the global coal market that have rendered the entire industry effectively insolvent and therefore ineligible for self-bonding;

- Describe the particularly urgent need for the end of self-bonding in Appalachia where unreclaimed mines pose an ongoing threat to people and the environment; and
- Explain the particular threat posed by the combination of self-bonding and pool bonding.

I. The SMCRA statute and regulations do not mandate the use of self-bonding but do require that bonds be sufficient to assure the completion of all reclamation.

SMCRA primarily operates via federally approved state regulatory programs that must meet specific requirements established at 30 U.S.C. § 1253(a). Among the SMCRA requirements with which state programs must comply is the requirement that each permittee file a performance bond in an amount "sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture." 30 U.S.C. § 1259(a).

The federal SMCRA statute authorizes state regulators to accept the bond of certain permit applicants without surety – i.e., to self-bond – but it does not require regulatory authorities to do so. 30 U.S.C. § 1259(c). SMCRA also authorizes the Secretary of the Interior to approve as part of any state regulatory program "an alternative system that will achieve the objectives and purposes of the bonding program pursuant to [30 U.S.C. § 1259]," but vests with the Secretary (and by extension OSMRE) the right to disapprove programs that fail to achieve these objectives and purposes. 30 U.S.C. § 1259(c).

The regulations issued by the Secretary of the Interior pursuant to SMCRA reiterate and expand on both the general statutory requirement that each permittee file a sufficient performance bond, see 30 C.F.R. §§ 800.11-800.50, and the option to disapprove alternative

bonding systems submitted as part of any state program, 30 C.F.R. §800.11(e). To merit federal approval, a State's proposed alternative bonding system must (1) assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time and (2) provide a substantial economic incentive for the permittee to comply with all reclamation provisions. *Id.*

It is within this framework that OSMRE must review the current practice of self-bonding. OSMRE's review must ensure that regulators are not exposing themselves, and their citizens, to the risk that there will be insufficient funds to reclaim authorized coal mines. OSMRE must also ensure that state regulators, and OSMRE itself, properly exercise their discretion by denying or revoking self-bonding for operations where there is an unacceptable risk of default.

II. Current coal market conditions render self-bonding inappropriate for all mine operators under the existing regulations, and OSMRE must issue guidance to this effect.

OSMRE has stated that its existing self-bonding regulations "establish national standards which allow only well-established, financially sound companies to qualify for self-bonding." 48 Fed. Reg. 36,418 at 36,427 (August 10, 1983). Today's volatile and extremely weak coal market means that no coal mine operator can be considered "financially sound." As a result, OSMRE must use its existing authority to require state regulators to transition all self-bonded permittees to surety bonds or other more reliable bonding instruments.

A. OSMRE's existing regulations provide the authority and responsibility to deny self-bonding to any mine operator with more than a minimal risk of insolvency.

When OSMRE finalized the existing rules regulating self-bonding under SMCRA in 1983, it 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." 48 Fed. Reg. 36,418 at 36,421 (August 10, 1983). OSMRE therefore made clear that self-bonding should not be available for companies for whom the probability of bankruptcy is significant. OSMRE retains the authority and responsibility under its existing rules to limit self-bonding only to permittees who have demonstrated a minimal risk of financial insolvency. OSMRE's priority at this time should be on ensuring that the existing regulations are interpreted and implemented in a way that gives effect to this overriding purpose. This includes ensuring that all regulators consider broader economic trends that have rendered all coal companies insolvent or effectively insolvent.

The federal SMCRA statute authorizes self-bonds, but only where the regulator determines that there is "a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount." 30 U.S.C. § 1259(c). The statute's emphasis on the regulator's discretion means that self-bonding may be authorized, but it is not mandatory. Furthermore, self-bonding should be available only in limited circumstances. The federal bonding regulations underscore this point by emphasizing that a "regulatory authority may accept a self-bond from an applicant for a permit if all of the [specified] conditions are met by the applicant or its parent corporation guarantor." 30 C.F.R. § 800.23 (emphasis added). Like the enabling statute, the regulations are clear that even where a mine operator or its guarantor satisfies all of the enumerated financial conditions, the regulator nonetheless retains the discretion to deny an application for a new or renewed self-bond and require the use of a different form of bond.

State SMCRA programs must be "no less stringent" than the federal statute, and "no less effective" than federal regulations. 30 C.F.R. § 730.5. Accordingly, because OSMRE has taken the explicit position that "under the Act a State regulatory authority is not required to accept self-bonds at all" (48 Fed. Reg. at 36,420), a state program would be "less stringent" than the federal statute if it removed the regulator's discretion. This is true whether the removal of discretion is explicit in the state statute or regulation, or whether it is de facto through the pattern and practice of the regulator.

OSMRE stated in the 1983 final rulemaking that "[t]he criteria in final § 800.23(b)(3)(i)-(iii) are intended to avoid, to the extent reasonably possible, the acceptance of a self-bond from a company that would enter bankruptcy." 48 Fed. Reg. at 36,422. The regulations at 30 C.F.R. §§ 800.23(b)(3)(i)-(iii) provide financial criteria that a permittee must satisfy in order to qualify for self-bonding. Crucially, however, OSMRE has already made clear that a regulator's decision of whether or not to issue a self-bond is not limited to consideration of the criteria at 30 C.F.R. §§ 800.23(b)(3)(i)-(iii). The existing rules provide OSMRE and state regulators discretion to deny self-bonds even to operators who meet those criteria. OSMRE has previously recognized that "the language of the Act gives discretion to the regulatory authority on this matter." 48 Fed. Reg. at 36,420. The SMCRA statute and existing regulations provide the regulatory authority with "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 36,420. Indeed, OSMRE has previously recognized that "under

the Act a State regulatory authority is not required to accept self-bonds at all." 48 Fed. Reg. at 36,420.

In order to avoid any confusion on this point, OSMRE should immediately release additional guidance to state regulators clarifying that due to the extremely high risk of insolvency within the coal mining industry at this time, self-bonding is not appropriate, even for companies that satisfy the 800.23(b)(3) criteria. In particular, OSMRE should emphasize that operators who have emerged from bankruptcy within the last five years are not eligible for self-bonding, even if they – or a separate guarantor – otherwise satisfy the specified criteria. Insolvency and bankruptcy represent precisely the sort of "past behavior" that OSMRE has determined should render an operator ineligible for self-bonding.

B. Plummeting demand for coal for both domestic consumption and export has rendered the entire industry effectively insolvent and therefore ineligible for self-bonding.

The overall demand for coal – and therefore overall coal production – is at its lowest point in more than thirty years. A recent report from the U.S. Energy Information Administration stated that: "Coal production in the first three months of 2016 was 173 million short tons (MMst), the lowest quarterly level in the United States since a major coal strike in the second quarter of 1981."[1] Month-over-month demand for coal continues to plummet at a dramatic rate. The EIA has reported that a "17% decrease in coal production from the previous quarter marked the largest quarter-over-quarter decline since the fourth quarter of 1984."[2]

OSMRE has itself acknowledged the severe financial difficulties currently facing the entire mining industry. In the Federal Register notice announcing the opening of this comment

[1] http://www.eia.gov/todayinenergy/detail.cfm?id=26612 (last visited June 14, 2016).
[2] *Id*.

period, OSMRE stated that "[l]ow domestic and global demand for coal, plentiful low-cost shale gas and fuel switching and coal power plant retirements by utilities, the highest coal stockpile inventories in 25 years, unsuccessful business decisions, and projections of declining coal demand have created significant challenges for the coal industry." 81 Fed. Reg. 31,880. OSMRE must act on this information by eliminating the use of self-bonding during the current financial crisis affecting the industry.

The EIA also projects that decreasing demand will continue into the future. In its June 2016 "Short-Term Energy Outlook," EIA projects that "[f]orecast coal production is expected to decrease by 155 MMst (17%) in 2016, which would be the largest decline in terms of both tons and percentage since data collection started in 1949."[3] This decreased coal production is a response to decreased demand in both domestic and international markets. EIA projects that "[c]oal consumption in the electric power sector, which accounts for more than 90% of total U.S. coal consumption, is forecast to decline by 72 MMst (10%) in 2016," and that "EIA forecasts U.S. coal exports to decline by 8 MMst (10%) in 2016 and by 8 MMst (12%) in 2017."[4] The reduced demand in the export market is because "[l]ower mining costs, cheaper transportation costs, and favorable exchange rates are expected to continue to provide an advantage to mines in other major coal-exporting countries compared with U.S. producers."[5] EIA projects decreased coal production and decreased coal exports through 2017.[6]

A recent report by McKinsey & Company echoes this assessment, and further finds that the entire industry is essentially insolvent because "[e]ven if industry capacity is cut enough to

[3] EIA, Short Term Energy Outlook, June 2016, at p. 9 (https://www.eia.gov/forecasts/steo/pdf/steo_full.pdf (last visited June 14, 2016)).
[4] *Id*. at pp. 9-10.
[5] *Id*. at p. 10.
[6] *Id*. at p. 39, Table 6.

balance supply and demand in 2020, coal producers would still be unable to service most of their approximately $70 billion of remaining debt and liabilities." [7] The McKinsey report finds that "[t]he massive contraction in domestic thermal-coal demand is at the root of the industry's problems."[8] After first noting that "the full extent of the industry's financial difficulties is poorly understood, inside and outside the sector, even though several US coal companies have already filed for Chapter 11 bankruptcy," the McKinsey Report ultimately concludes that "[t]he industry's liabilities are more than it can carry."[9] McKinsey sees very little hope for an industry turn-around, observing that "[e]ven after closing enough capacity to restore a supply-demand balance in 2020, the US coal industry would have remaining liabilities of about $70 billion. These would far outweigh the industry's profit-making ability and therefore condemn it to potentially decades of lossmaking operations."[10] Indeed, McKinsey estimates that "[t]he US coal industry is still in the early stages of what could be decades of financial difficulty."[11]

Given the stark assessments in OSMRE's own statement, the EIA outlook, and the McKinsey report, OSMRE must conclude that all mine operators in the United States face a significant risk of insolvency and therefore are ineligible for self-bonding under the existing regulations.

C. Unreclaimed coal mines in Appalachia pose a significant threat to neighboring communities and the environment.

[7] "Downsizing the US coal industry: Can a slow-motion train wreck be avoided?" November 2015, at p. 3 (http://www.mckinsey.com/~/media/McKinsey/Industries/Metals%20and%20Mining/Our%20Insights/Downsizing%20the%20US%20coal%20industry/Downsizing%20the%20US%20coal%20industry.ashx).
[8] *Id*.
[9] *Id*. at 9.
[10] *Id*.
[11] *Id*. at 12.

The urgent need to transition all mine operators away from self-bonds and into enforceable third party bonds is not just about securing compliance with the law. Unreclaimed and under-reclaimed mine sites pose a definite and ongoing threat to nearby communities and the environment. Should coal companies forfeit even a fraction of the mines where reclamation is secured only by the over $3 billion of self-bonds, state regulators will be overwhelmed and mine reclamation will be significantly delayed – if it even occurs at all.

This threat is particularly acute in Appalachia where a growing body of peer-reviewed science has established a clear connection between proximity to surface mines and significant negative health outcomes. Leaving mine sites unreclaimed prolongs the period of time when nearby communities are exposed to the full brunt of impacts from these operations.

A paper published in the preeminent scientific journal *Science* highlights the emerging understanding of the negative effects of surface coal mining in Appalachia on human health:

> Even after mine-site reclamation (attempts to return site to premined conditions), groundwater samples from domestic supply wells have higher levels of mine-derived chemical constituents than well water from unmined areas. Human health impacts may come from contact with streams or exposure to airborne toxins and dust. State advisories are in effect for excessive human consumption of Se in fish from MTM/ VF affected waters. Elevated levels of airborne, hazardous dust have been documented around surface mining operations. Adult hospitalizations for chronic pulmonary disorders and hypertension are elevated as a function of county-level coal production, as are rates of mortality; lung cancer; and chronic heart, lung, and kidney disease; health problems are for women and men, so effects are not simply a result of direct occupational exposure of predominantly male coal miners.

Palmer, M.A.; et al. "Mountaintop Mining Consequences," *Science*, January 2010, Vol. 327, No. 5962, 148-149 (internal citations omitted). This study highlights how, even after reclamation, coal mines in Appalachia retain the potential to produce harmful pollutants. This risk is greatly increased at mines that have not even been reclaimed.

EPA has also recognized the human health threat posed by surface coal mines in Appalachia. In its final action on the Spruce No. 1 Mine, EPA noted that "[a] growing body of research suggests that health disparities are not uniformly distributed across the Appalachian region, but instead are concentrated in areas where surface coal mining activity takes place (Hendryx et al. 2007, 2008, Hendryx 2008, Hitt and Hendryx 2010, Hendryx and Zullig 2009)." EPA, *Spruce No. 1 Mine Final Determination*, (Jan. 2011) at p. 96. EPA specifically recognized that these studies "indicate that mortality rates in Appalachian coal mining regions for chronic respiratory, cardiovascular, and kidney disease, and for some forms of cancer including lung cancer are disproportionately elevated when compared to other regions (Hendryx 2008, Hendryx et al. 2007, 2008, Hendryx and Zullig 2009)." *Id*. Allowing surface coal mines in Appalachia to remain unreclaimed only exacerbates this serious threat to communities.

Unreclaimed coal mines in Appalachia also produce pollution – particularly elevated conductivity and selenium – that cause significant harm to stream ecosystems. Researchers have determined that "surface coal mines degrade water quality and substantially alter stream biota well downstream of their permit boundaries and that the extent and severity of these impacts within river systems are proportional to the areal extent of surface coal mining in the contributing catchment." ES Bernhardt, et al. "How many mountains can we mine? Assessing the regional degradation of central Appalachian rivers by surface coal mining," Environmental Science & Technology, 2012, 46 (15), 8115-8122. Specifically, "[c]onductivity, and concentrations of SO4, and other pollutants associated with mine runoff can directly cause environmental degradation, including disruption of water and ion balance of aquatic biota." Palmer, M.A.; et al. "Mountaintop Mining Consequences," Science, January 2010, Vol. 327, No.

5962, 148-149 (internal citations omitted). In addition, "[i]n some freshwater food webs, Se [selenium] has bioaccumulated to 4x the toxic level; this can cause teratogenic deformities in larval fish, leave fish with Se concentrations above the threshold for reproductive failure (4 ppm), and expose birds to reproductive failure when they eat fish with Se >7 ppm." *Id*.

Although traditional mine reclamation cannot entirely eliminate the pollution generating capacity of these sites, it can reduce those levels and therefore reduce the risk to nearby human communities and the streams on which they depend. OSMRE must therefore do everything in its power to transition coal mines away from self-bonds and therefore ensure that complete and timely reclamation will occur.

D. It is critical that OSMRE act now to transition mine operators away from self-bonding.

Coal companies, certain state regulators, and OSMRE itself have responded to the current crisis of bankruptcies among self-bonded operators by claiming that the current situation couldn't have been anticipated or foreseen. There is no basis for that argument; it ignores the plain fact that there have been obvious signals of a weak coal market for at least the last four years. By as late as 2012, when Patriot Coal entered its first bankruptcy, regulators and mine operators were on notice that coal companies are more financially vulnerable than previously thought. If OSMRE and state regulators had appropriately heeded that warning, there would have been time to transition more permittees – including all of the self-bonded operators currently in bankruptcy – away from self-bonds and into surety bonds or other reliable third-party financial instruments. OSMRE cannot now use its earlier failure to act as a pretext for continuing to abdicate its responsibility to ensure that all coal mining operations in the country are adequately bonded.

The urgent need for immediate action from OSMRE grows every day as more companies enter bankruptcy and as more acres of land are disturbed by self-bonded companies who lack the resources to ensure the full and complete reclamation that is required by law. The requirement that mine operators maintain adequate reclamation bonds at all times is at the core of SMCRA, which was created to prevent the return of dangerous and wasteful mining practices:

> SMCRA was passed, in part, to address known results of unregulated surface mining: disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources. 30 U.S.C. § 1201(c). *With mandated reclamation plans and reclamation bonds required by federal law to be adequate*, SMCRA was a promise to remedy the abuses, protect the environment, and yet permit the recovery of mineral reserves with approved practices and regulatory oversight.

W. Virginia Highlands Conservancy v. Norton, 161 F. Supp. 2d 676, 684 (S.D.W. Va. 2001) (emphasis added). OSMRE must ensure that the promise of SMCRA is fully met by requiring that all permitted operations maintain complete and adequate reclamation bonds.

III. In reviewing the self-bonding regulations and considering additional immediate action, OSMRE must pay particular attention to the threat posed by reclamation bonding programs that combine self-bonding and pool bonding.

The intersection of self-bonding with alternative bonding programs that utilize bond pools poses a unique and particular threat. States including Virginia and West Virginia currently maintain programs that allow this risky combination, although Virginia is in the process of amending its program to eliminate self-bonding. As OSMRE reviews the existing reclamation

bonding regulations and considers additional immediate actions, it must pay particular attention to identifying ways to permanently eliminate self-bonding in programs that utilize pool bonding.

A. Virginia's alternative bonding program

An actuarial report commissioned by Virginia to assess the financial health of its pool bonding system specifically identified the use of self-bonding as a significant threat to the program. In May 2012, Pinnacle Actuarial Resources, Inc. delivered its actuarial report which found, among other things, that Virginia's pool bond system had sufficient resources to withstand the forfeiture of only one or two smaller permits; that forfeiture of the 19 pool bond permits whose reclamation funding at the time included some form of self-bonding would leave the pool bond fund responsible for an estimated additional $26.6 million over and above the amounts that the fund would normally be requested to cover; and that the pool bond program was not structured in a way that would adequately cover the increased risk posed by self-bonded participants.

In response to the Pinnacle actuarial report, the Virginia General Assembly enacted legislation to repeal the self-bonding option (at least for new permittees). However, Virginia has not taken action to compel existing self-bonded permittees either to reclaim their permits fully or to replace all existing self-bonds with surety bonds, sufficient deposits of cash, government securities, or qualified banking instruments. As a result there apparently are at least 20 existing self-bonded Virginia permits remaining as of November 15, 2015. Collectively,

the bonded amounts of these permits total more than $24 million. Their collective permitted areas apparently exceed 15,000 acres.

OSMRE should approve Virginia's proposed changes that eliminate self-bonding for new permittees, but should also compel the state to address the issues posed by the remaining self-bonds.

B. West Virginia's alternative bonding program

West Virginia also maintains an alternative bonding program that allows both pool bonding and self-bonding. Bonding in West Virginia involves two tiers: (1) a flat-rate penal bond for which the permittee is responsible; and (2) the Special Reclamation Fund (SRF) bond pool. W.Va. Code § 22-3-11. Should the permittee's penal bond prove insufficient to cover the full cost of reclamation, West Virginia must withdraw funds from the SRF to pay for reclamation. W.Va. Code § 22-3-11(g). West Virginia allows some permittees to use self-bonds to satisfy the penal bonding requirement. For those permits, the only funds available to pay for reclamation in the event of forfeiture are the funds in the SRF. W.Va. Code § 22-3-11(d).

Unfortunately, the West Virginia SRF currently contains only a very small fraction of the unfunded, self-bonded reclamation liability. As of December 31, 2015, the total assets in the SRF were $78.4 million. 2015 SRF Advisory Council Annual Report at 5. Alpha Natural Resources alone has over $200 million in self-bonded reclamation liability in West Virginia. Accordingly, forfeiture by the now-bankrupt Alpha could, by itself, completely wipe out the SRF, leaving West Virginia with inadequate resources to cover the cost of reclamation at all Alpha sites, let alone any mines forfeited by other operators in the state.

As a result of this huge unfunded liability, West Virginia has exposed its alternative bonding system to a huge new risk. SMCRA requires that an alternative bonding system "must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time." 30 C.F.R. § 800.11(e). Thus, West Virginia must fund the SRF at a level that is sufficient to cover any unfunded reclamation liability, or must modify its bonding program. It will not be possible for West Virginia to generate sufficient funds in the current coal market. Accordingly, OSMRE must take immediate action to compel the state to modify its reclamation bonding program.

C. OSMRE must also modify the existing bonding regulations to prohibit the use of self-bonding in alternative bonding programs that utilize pool bonds.

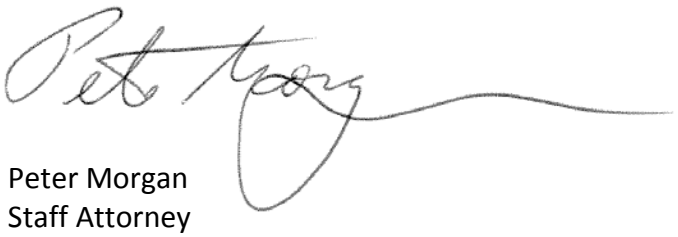
In addition to these immediate actions pertaining to the Virginia and West Virginia programs, OSMRE must also make changes to the SMCRA regulations to permanently prohibit the use of self-bonding in conjunction with other alternative bonding programs such as pool bonding. As the Pinnacle actuarial report from Virginia demonstrates, the combined risk of self-bonding and pool bonding is inconsistent with the purpose of SMCRA to ensure adequate and timely reclamation for all land disturbed under permit.

Conclusion

OSMRE must take immediate action to address the self-bonding crisis it has allowed to unfold. Despite clear indications that the coal mining industry was heading for severe financial distress, OSMRE allowed state regulators to authorize over $3.8 billion in unenforceable self-bonds. The majority of these self-bonds are now held by companies in bankruptcy. OSMRE must now use its existing authority to rein in this unsustainable practice. OSMRE must also consider the dangerous interplay between self-bonding and bond pools, and must compel state

regulators to modify their programs to avoid this risk. This is a critical time for OSMRE to exercise much-needed leadership on these issues, most urgently by completing new guidance in the coming weeks.

Sincerely,



Peter Morgan
Staff Attorney
Sierra Club Environmental Law Program

On behalf of:

Sierra Club
Earthjustice
Appalachian Citizens Law Center
Appalachian Voices
Coal River Mountain Watch
Ohio Valley Environmental Coalition
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