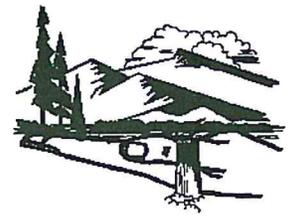




# Department of Environmental Quality

*To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.*



Todd Parfitt, Director

Matthew H. Mead, Governor

March 28, 2016

SENT VIA EMAIL AND US MAIL

Jeffrey Fleischman  
Chief, Denver Field Division  
150 East B St. RM 1018  
Casper, WY 82601

RE: Ten Day Notice related to Peabody Energy and its Subsidiaries' Mining Operations in Wyoming

Dear Mr. Fleischman,

On February 16, 2016, you sent the Wyoming Department of Environmental Quality (DEQ) a ten-day notice (TDN) related to the Wyoming operations of Peabody Energy Corporation (Peabody Energy), and its subsidiaries. In that correspondence you stated that the Office of Surface Mining Reclamation and Enforcement (OSMRE) has reason to believe DEQ may be allowing Peabody Caballo Mining, LLC, Caballo Coal Company, Peabody Powder River Resources, LLC, and Peabody School Creek Mining, LLC (collectively Peabody) to operate in violation of the Wyoming Approved State Program. TDN at 3. You stated that OSMRE was responding to a Citizen's Complaint from WildEarth Guardians, and that OSMRE

believes it is most appropriate to forward the Citizen's Complaint to your office via the TDN process in order to provide the opportunity for you to respond to the allegations that the self-bonding requirements of the approved State Program are violated because the guarantor's assets are being used by the parent company as collateral for debt, and that Peabody Energy failed to notify you that they no longer qualified for self-bonding and post an alternative bond within 90-days.

TDN at 1.

In response, DEQ will show that the Citizen's Complaint fails to establish a violation, because Peabody Investments Corporation, the guarantor of Peabody's self-bonds in Wyoming, remains eligible for self-bonding. This result is consistent with OSMRE's previous finding that subsidiary companies can meet the requirements for self-bonding irrespective of the financial condition of their parent corporation. In fact, OSMRE recently pronounced that DEQ's treatment of subsidiaries, including specifically

Peabody's subsidiaries, complied with Federal and state laws. OSMRE, like DEQ, was fully aware of the financial arrangements outlined in the Citizen's Complaint when it made that pronouncement. DEQ's determinations that Peabody Investments Corporation qualified and continues to qualify for self-bonding complies with Chapter 11 of the DEQ Land Quality Division Coal Rules, and the Citizen's Complaint does not provide a reason to believe that there is a violation of Wyoming's approved program.

### BACKGROUND

DEQ and OSMRE have been reviewing on and off balance sheet contingent liabilities and the relevance of parent subsidiary relationships well in advance of the Citizen's Complaint at issue. In fact, on February 9, 2015, OSMRE issued a "Self-Bonding Fact Sheet" describing its recently completed review of self-bonding amounts and the eligibility of several mining companies operating in Wyoming. In that Fact Sheet, OSMRE stated that "The pertinent Regulatory Authority (OSMRE for Federal Programs or States), evaluate qualifications for self-bonding on a regular basis—normally annually. OSMRE also periodically reviews self-bonding as a topic in the oversight process." OSMRE Self-Bonding Fact Sheet (Feb. 9, 2015). OSMRE went on to state:

- OSMRE reviewed the aggregate self-bond amounts for Peabody's mines in the West and Nationally. **The self-bond guarantor is Peabody Investments Corporation, and they meet requirements for self-bonding.**
- OSMRE reviewed the aggregate self-bond amounts for Arch Coal mine operations nationally. Wyoming's review determined that Arch Coal mines are only self-bond in Wyoming. The self-bond guarantor is Arch Western Resources, LLC, and they meet requirements for self-bonding.
- **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. This practice is in full compliance with Federal and State laws.**

OSMRE Self-Bonding Fact Sheet (Feb. 9, 2015) (emphasis and underline added).

As detailed by the fact sheet, OSMRE, like DEQ, took the position that only the financial condition of the operator or guarantor matters for purposes of determining eligibility for self-bonding. OSMRE also specifically concluded that Peabody Investments Corporation met the requirements for self-bonding. This was true despite the fact that Peabody Investments Corporation had guaranteed certain obligations of Peabody Energy more than a year before, on September 24, 2013, as set forth in a Form 8-K filed with the Securities and Exchange Commission by Peabody Energy on September 30, 2013.

Even after concluding that Peabody Investments Corporation was eligible for self-bonding, OSMRE conducted an audit of DEQ's self-bonding program on February 10, 2015. Representatives from OSMRE met with Deanna Hill and Kimber Wichmann from DEQ. They reviewed DEQ's self-bond files and calculations for Arch Western Resources, Alpha Natural Resources, Peabody Investments Corporation, and Cloud Peak Energy. They spent most of their time reviewing DEQ's calculations, ratios, and spreadsheets. The OSMRE representatives commented positively on the expertise of the people conducting the bond reviews in Wyoming. They said that Wyoming was far ahead of other states and that the self-bonding program was on track. While OSMRE refused to issue specific written findings and conclusions from the audit, in late February 2015, an OSMRE representative advised Alan Edwards, Deputy Director of DEQ, that OSMRE had no issue with the way Wyoming calculated, documented, and ran its self-bonding program.

In March of 2015, DEQ reviewed Peabody Investments Corporation's self-bonding eligibility again. As part of that annual review, Ms. Wichmann reached out to Stephanie Varvell from OSMRE on June 9, 2015, to inquire about attending an upcoming call with OSMRE personnel where self-bonding by subsidiary corporations would be discussed. That call was scheduled to take place on June 17, 2015, and in advance of the call, Ms. Wichmann sent Ms. Varvell an email asking for guidance on a number of self-bonding issues. Ms. Wichmann wrote:

I am wondering if there has been discussion of how financial subsidiaries as guarantors are viewed by OSM in relation to self-bonding. Listed below is a summary of the issues I am seeking guidance upon.

- **Is there any OSM guidance regarding consideration of a subsidiary's legal commitments/obligations that do not appear on the subsidiary's financial statements such as the balance sheet?**
- Is there OSM guidance on how OSM provision CFR 30 Ch. VII Statute 800.23 (b)(4) that allows unaudited data and how that provision interacts

with CFR 30 Ch. VII Statute 800.23 (g) that states if at any time the criteria if not satisfied an alternate form of bond is necessary?

- **Is there OSM guidance on what, if any, consideration needs to be made of the parent entity's financial status when evaluating a subsidiary's qualifications to be a self-bond guarantor?**
- Is there OSM guidance on the recovery position of a self-bond that has a subsidiary as the guarantor should the parent entity declare bankruptcy?

Email from Wichmann to Varvell (June 12, 2015) (emphasis added).

The call with OSMRE occurred on June 17<sup>th</sup> as scheduled, but OSMRE's representatives were not prepared to provide answers to Ms. Wichmann's questions. Instead, on June 24, 2015, Ms. Varvell wrote to Ms. Wichmann:

Thanks again for the excellent information you provided the team last week. We have shared the final product Karen put together based on your input. We are scheduled to meet internally next Wednesday and a discussion of responses to your issues is number one on the agenda. The plan is to formulate a final response at that meeting. Please be patient with us a bit longer and we'll give you feedback as soon as possible.

Email from Varvell to Wichmann (June 24, 2015).

Unfortunately, no answers were forthcoming from OSMRE, and after Ms. Wichmann inquired about the status of OSMRE's response, Ms. Varvell responded:

We most certainly haven't forgotten you. I have been away from my office all week. Many of the things you are asking about are novel and firsts. I wish we had quicker responses but we are trying to come to a national consensus on some of the aspects and that is proving to be very challenging. I'll be talking with Jeff F. of our office several times next week and will ask him about sending some of our responses to your original questions out to you. Meanwhile if you will hang in there with me a bit longer I'd be happy to seek answers or refer any other questions you might have as best I can.

Email from Varvell to Wichmann (Aug. 21, 2015).

In the meantime, Alpha Natural Resources, Inc., Alpha Coal West, Inc., and other related entities (collectively Alpha) filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Eastern District of Virginia. For no apparent reason, this bankruptcy filing caused OSMRE to disengage from discussions with DEQ related to the self-bonding issues Ms. Wichmann had raised. On August 27, 2015, Ms. Varvell informed Ms. Wichmann that because “Wyoming is in litigation on self-bonding and since her boss and [Ms. Wichmann’s] bosses are involved with the litigation that OSM cannot supply a reply or guidance to [Ms. Wichmann’s] questions at this time.” Email from Wichmann to Wendtland (August 27, 2015).

While no longer willing to work collaboratively on questions related to self-bonding, OSMRE did issue its Annual Evaluation Report for the Regulatory Program Administered by the Department of Environmental Quality – Land Quality Division of Wyoming in August 2015. That report stated that, “The [Land Quality Division] continues to administer a rigorous and effective Title V reclamation program for the largest coal producing region in the country. The [Land Quality Division]’s permitting, compliance and inspection and enforcement programs are meeting all requirements expected of it by the [OSMRE].” 2015 Annual Evaluation at 1. With regard to self-bonding in particular, the report went on to state that:

During the Evaluation Year, the OSMRE conducted a formal review of [the Land Quality Division’s] implementation of their self-bonding program, to determine compliance [with] the requirements set forth in the Wyoming Coal Rules and Regulations, at Chapter 11. The OSMRE found that the [Land Quality Division] implements their self-bonding program in full compliance with their self-bonding rules.

*Id.* at 6. It is not clear whether this statement of full approval of DEQ’s implementation of its self-bonding program constitutes the written findings from the February audit, but nevertheless, as of August 2015, this statement confirmed that OSMRE had no concerns with DEQ’s implementation of Wyoming’s approved program.

OSMRE made it clear on August 27, 2015, that they had no intent in a discussion or evaluation of questions on self-bonding or collaboratively working with Wyoming. Therefore, DEQ continued to evaluate annual self-bond renewal applications from various operators and Peabody Investments Corporation based on its regulatory requirements.

DEQ adhered strictly to its approved regulations and acted in conformity with its approved and established review process. This meant that on July 6, 2015, DEQ approved renewal applications for self-bonds for Permit #433 (Caballo Mine), Permit #764 (School Creek Mine), and Permit #477 (Shoshone #1 Mine). With those renewals, DEQ also requested quarterly financial statements and the audited 2015 financial statement of Peabody Investments Corporation upon its completion and filing.

DEQ's action conformed to its regulations and prior practice in all respects. And, not surprising, OSMRE had previously found DEQ's practice to be "in full compliance with Federal and State laws" and "in full compliance with their self-bonding rules." In particular, DEQ based these renewal decisions on the 2014 year-end audited financial statements of Peabody Investments Corporation, as is required by Chapter 11 of the Land Quality Division Coal Rules. Those audited financial statements indicated that the guarantor had a net worth in excess of \$10 billion, which was more than adequate, given its liabilities, to meet the financial requirements set forth in Chapter 11 of the Land Quality Division Coal Rules.

Even though Peabody Investments Corporation qualified for self-bonding based on its 2014 year-end financials, neither DEQ nor OSMRE was ignorant of the financial condition of the parent company, Peabody Energy, or of the existence of Peabody Investments Corporation's guarantees in favor of Peabody Energy. On July 17, 2015, DEQ followed the annual renewal with a letter containing four individual requests to Peabody Investments Corporation for information during the interim between annual renewals. Letter from Wendtland to Dinsmoor (July 17, 2015). First, DEQ acknowledged that there were assets of Peabody Investments Corporation that were obligated to Peabody Energy but not listed on Peabody Investments Corporation's balance sheet, including a revolving account. *Id.* DEQ requested to be notified of any changes in these obligations within fifteen days. *Id.* Second, DEQ requested to be notified within fifteen days if Peabody Investments Corporation became responsible for or actually paid anything related to its obligations to Peabody Energy. *Id.* Third, DEQ requested that in its next annual renewal application, Peabody Investments Corporation specifically identify its off balance sheet contingent obligations. *Id.* Finally, DEQ requested that in the next annual renewal Peabody Investments Corporation and the operator list assets that are protected by state or federal statute or regulation, such as pension funds.

While Peabody Energy's financial condition deteriorated after July 2015, the guarantor, Peabody Investments Corporation (PIC), continued to demonstrate that it qualified to self-bond. In conformity with its regulations, DEQ reviewed two renewal

applications submitted by PIC based on the 2014 year end audited annual financial statements prepared in compliance with generally accepted accounting principles. As a result of that review, on December 18, 2015, DEQ approved the renewal applications for self-bonds for Permit #240 (Rawhide Mine) and Permit #569 (North Antelope Rochelle Mine) as required by Chapter 11 of the Land Quality Division Coal Rules. Peabody Investments Corporation continues to be eligible for self-bonding under the Wyoming and OSMRE self-bonding regulations at least until the next review period, which will occur when the 2015 annual audited financial reports are received by DEQ.

On February 8, 2016, WildEarth Guardians submitted a Citizen's Complaint to OSMRE asserting that it believed that Peabody Energy, no longer qualified to self-bond its reclamation obligations. Complaint at 1. Thus, the Citizen's Complaint relates to the financial condition of an entity that is not an operator of any mine in Wyoming nor a guarantor of any self-bond in Wyoming. In addition, WildEarth Guardians failed to submit any information demonstrating that Peabody Investments Corporation is no longer eligible to serve as a guarantor, and in fact, WildEarth Guardians admitted that it cannot verify whether Peabody Investments Corporation remains eligible to serve as a guarantor.<sup>1</sup> *Id.* at 3-4. In addition, supporting documents provided referenced in the February 8, 2016 complaint filed by WildEarth Guardians were unsigned non executed versions. DEQ can only review or consider properly executed versions of these documents.

DEQ continues to monitor the financial condition of Peabody Investments Corporation, and anticipates receiving the company's audited 2015 financial statement in the near future. When DEQ receives that statement, DEQ will reassess Peabody Investments Corporation's continuing eligibility to guarantee self-bonds in Wyoming in conformity with the express requirements of Chapter 11 of the Land Quality Division Coal Rules.

### **OSMRE'S LIMITED AUTHORITY**

The Surface Mining Reclamation and Control Act of 1977 (SMCRA), struck "a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). In enacting SMCRA, Congress found it "essential to the national interest to insure the existence of an

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<sup>1</sup> It should be noted that the documents attached to WildEarth Guardians' Complaint were unsigned. DEQ reviewed only the final executed versions of these documents.

expanding and economically healthy underground coal mining industry,” and also provided that “the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations . . . should rest with the States.” 30 U.S.C. § 1201(f). To achieve this goal, the statute established “a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.” *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981).

SMCRA adopted a two-step approach. First, the Secretary of the Interior was required to implement a federal regulatory program setting minimum standards for surface coal-mining operations within six months of August 3, 1977. 30 U.S.C. § 1252(e). Second, the states were authorized to propose and receive approval for their own individual programs. 30 U.S.C. § 1253. The Secretary introduced an initial regulatory program on December 17, 1977. 42 Fed. Reg. 62639. Wyoming received approval to implement its own program effective November 26, 1980. 30 C.F.R. § 950.10.

States with approved regulatory programs exercise exclusive jurisdiction over surface coal-mining operations, while the Secretary exercises exclusive jurisdiction in States with federal plans. 30 U.S.C. §§ 1253(a), 1254(a). A State with an approved program maintains exclusive authority except in certain limited situations, such as if the State fails to enforce its program. 30 U.S.C. § 1271. As the Fourth Circuit has noted, “SMCRA provides for *either* State regulation of surface coal mining within its borders *or* federal regulation, but not both.” *Bragg v. West Virginia Coal Ass’n*, 248 F.3d 275, 289 (4th Cir. 2001) (emphasis in original). “Under this arrangement, . . . the Secretary retains a limited and ordered federal oversight role to ensure that the minimum requirements of SMCRA are being satisfied[.]” *Pennsylvania Fed’n of Sportsmen’s Clubs, Inc. v. Hess*, 297 F.3d 310, 317 (3d Cir. 2002) (internal citation omitted).

OSMRE’s oversight authority is authorized and limited by 30 U.S.C. § 1271. Subsection (a) of that statute addresses individual violations by a specific permittee, and authorizes OSMRE to issue a notice to a state regulatory authority if it “has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter.” 30 U.S.C. § 1271(a)(1). Once such a notice is issued, the state regulatory authority has ten days “to take appropriate action to cause said violation to be corrected or to show good cause for such failure[.]” *Id.* “Good cause” for failing to correct a violation includes circumstances in which “[u]nder the State program, the possible violation does not exist.” 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i).

OSMRE considers appropriate action to cause a violation to be corrected or good cause for failure to do so to be “an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program. 30 C.F.R. § 842.11 (b)(1)(ii)(B)(2). OSMRE internally defines “arbitrary, capricious, or an abuse of discretion” as essentially irrationality or the failure to follow correct procedures or applicable law. OSMRE Directive INE-35 § 3.b. (Jan. 31, 2011). “In general, OSM[RE] will make a finding of appropriate action or good cause if the [regulatory authority] presents a rational basis for its decision, even if OSM[RE] might have decided it differently.” *Id.* at § 4.d.

### THE CITIZEN COMPLAINT PRESENTS NO VIOLATION

The gravamen of the Citizen’s Complaint is that DEQ is improperly allowing Peabody Energy subsidiary companies to continue mining because the parent company is not eligible to self-bond and because Peabody Investments Corporation has off balance sheet contingent liabilities in favor of Peabody Energy. Neither of these assertions demonstrates a violation of Wyoming’s approved program. Instead, DEQ is strictly following the applicable rules governing eligibility, generally accepted accounting principles, and prior practice that has been reviewed and approved by OSMRE.

Chapter 11 of the Land Quality Division Coal Rules governs eligibility for self-bonding in Wyoming. Section 2 of those rules sets out the requirements for an initial application to self-bond, and provides in pertinent part that the application shall contain:

(vi) A statement, in detail, so as to show a history of financial solvency. For an initial bond, each operator must provide:

(A) Audited financial statements supporting the following comparative documents, prepared and certified by an independent Certified Public Accountant who, by reason of education, experience or special training, and disinterest, is competent to analyze and interpret the operator's financial solvency. **All statements shall be prepared following generally accepted principles of accounting:**

(I) A comparative balance sheet which shows assets, **liabilities** and owner equity for five years. The operator may provide common size documents for confidentiality.

(II) A comparative income statement which shows all revenues and expenses for five years. The operator may provide common size documents for confidentiality.

(III) A report for the most recently completed fiscal year containing the accountant's audit opinion or review opinion of the balance sheet and income statement with no adverse opinion.

(IV) Notwithstanding the language in (A) above, unaudited financial statements may be submitted to support the comparative documents where current fiscal year quarters have ended but a CPA opinion has not yet been obtained because the fiscal year has not yet ended.

Chapter 11, Section 2(a)(vi)(A)(I)-(IV) (emphasis added). For subsequent renewals, the “Administrator may request financial statements for the most recently completed fiscal year together with an independent certified public accountant’s audit opinion or review opinion of the financial statements with no adverse opinion. Additional unaudited information may be requested by the Administrator”. Chapter 11, Section 4(a)(ii).

The operator submits the audited financial statements to DEQ who compares them to the following criteria to determine if the company is eligible for self-bonding:

(vii) For coal mining operations, financial information in sufficient detail to show that the operator meets one<sup>2</sup> of the following criteria (the specific criterion relied upon shall be identified):

(A) The operator has a rating for all bond issuance actions over the past five years of “A” or higher as issued by Moody’s Investor Service, Standard and Poor’s Corporation or any other nationally recognized rating organization that is acceptable to the regulatory authority. Any additional rating organization must be a “nationally recognized statistical rating organization” as approved by the

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<sup>2</sup> WildEarth Guardians mistakenly asserts on page two of its complaint that the operator must meet all three of these criteria.

Securities and Exchange Commission. If the additional rating organization uses a different rating system, only ratings that are equivalent to a rating of “A” or higher by either Moody’s Investor Service or Standard and Poor’s Corporation will qualify (the rating organization should be identified together with any further breakdown of specific ratings).

(B) The operator has a tangible net worth of at least 10 million dollars, and 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. The two ratio requirements must be met for the past year, and documented for the four years preceding the past year. Explanations should be included for any year where the ratios fall below the stated limits.

(C) The operator's fixed assets in the United States total at least 20 million dollars, and the operator has 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. The two ratio requirements must be met for the past year and documented for the four years preceding the past year. Explanations should be included for any year where the ratios fall below the stated limits.

(D) If the operator chooses (B) or (C), the two ratios shall be calculated with the proposed self-bond amount added to the current or total liabilities for the current year. The operator may deduct the costs currently accrued for reclamation which appear on the balance sheet.

Chapter 11, Section 2(a)(vii) (emphasis added).

Rather than rely on its own financial condition, the operator may choose to submit either a parent or non-parent corporate guaranty instead. Chapter 11, Section 2(a)(x),(xi), and (xii). The Administrator can accept a parent or non-parent guaranty if the guarantor meets all of the same criteria required of the operator, and the guarantor agrees to complete the reclamation plan or provide the funds for the state to do so in the event the operator fails to do so. *Id.*

As is apparent from the foregoing, the focus of DEQ's inquiry is on the operator, and where applicable, the guarantor. The regulations, which have been approved by OSMRE, do not require DEQ to consider the financial condition of other related entities as it determines whether the operator or guarantor is eligible to self-bond. OSMRE recognized as much in its Fact Sheet when it noted that neither Peabody Energy nor Arch Coal were the guarantors of the self-bonds, and therefore, the fact that they were not eligible to self-bond was irrelevant. Accordingly, the citizens' complaint regarding the financial condition of Peabody Energy fails to identify any violation of DEQ's rules. Absent a violation, there is no basis for either DEQ or OSMRE to issue a notice of violation to the operator at this time.

Turning to the citizen's second concern, DEQ does not disagree that Peabody Investments Corporation's off balance sheet contingent liabilities in favor of Peabody Energy are concerning. In fact, DEQ sought to collaborate with OSMRE about this very issue to develop an appropriate response to the situation throughout the summer of 2015 until OSMRE chose to disengage from those discussions. Regardless, Peabody Investments Corporation's obligations to Peabody Energy have been properly excluded from Peabody Investments Corporation's financial statements. This is true, for the 2014 year-end audited financial statements and for any other interim or uncertified financial statements DEQ could have considered in evaluating the 2015 annual renewals.

When making determinations of eligibility, DEQ's rules require it to follow generally accepted accounting principles and to consider, among other variables, "liabilities" as reported on the operator or guarantor's audited financial statements. Generally accepted accounting principles do not require Peabody Investments Corporation to accrue these contingent liabilities to Peabody Energy on its financial statements. *See, generally*, Financial Accounting Standards Board Accounting Standards Codification (FASB ASC) 450-20. Those accounting standards provide:

When a **loss contingency** exists, the likelihood that the future event or events will confirm the loss or impairment of an asset or the incurrence of a liability can range from **probable** to **remote**. As indicated in the definition of **contingency**, the term *loss* is used for convenience to include many charges against income that are commonly referred to as expenses and others that are commonly referred to as losses. The Contingencies Topic uses the terms *probable*, **reasonably possible**, and *remote* to identify three areas within that range.

FASB ASC 450-20-25-1 (2011) (emphasis in original).

An estimated loss from a loss contingency shall be accrued by a charge to income if both of the following conditions are met:

- a. Information available before the financial statements are issued or are available to be issued (as discussed in Section 855-10-25) indicates that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements. Date of the financial statements means the end of the most recent accounting period for which financial statements are being presented. It is implicit in this condition that it must be probable that one or more future events will occur confirming the fact of the loss.
- b. The amount of loss can be reasonably estimated.

The purpose of those conditions is to require accrual of losses when they are reasonably estimable and relate to the current or a prior period.

FASB ASC 450-20-25-2 (2011).

Thus, if a loss contingency such as a guarantee is probable and can be reasonably estimated before a financial statement is issued, it should be identified as a liability in that statement. However, not all guarantees have to be identified as a liability, even if they are probable to occur before the financial statement is issued and reasonably estimable.

The following types of guarantees are not subject to the recognition provisions of this Subsection:

- f. A guarantee issued either between parents and their subsidiaries or between corporations under common control.
- h. A subsidiary's guarantee of the debt owed to a third party by either its parent or another subsidiary of that parent.

FASB ASC 460-10-25-1 (2011). Instead, such guarantees by subsidiaries must be disclosed by the company, but need not be identified as a liability on its balance sheet. *See* FASB Interpretation No. 45.

Here, in approving the 2015 renewals, DEQ relied on the most recent audited financial statements available for Peabody Investments Corporation. Those statements did not and were not required to list guarantees in favor of Peabody Energy as liabilities, whether or not the loss was probable before the statements were issued. Of course, the loss was not probable during the period covered by those statements. DEQ's reliance on those audited statements was proper under Chapter 11, Section 4(a)(ii) of its rules. In addition, DEQ requested additional unaudited information, pursuant to the same section of its rules. However, Peabody Investments Corporation still would not have been required to identify its guarantees as liabilities in those unaudited statements, and therefore, those additional financial statements would not have affected the renewals. Again, absent a violation, there is no basis for either DEQ or OSMRE to issue a notice of violation to the operator at this time.

Turning to 2016, the same generally accepted accounting principles govern. As a result, based on the information currently available, Peabody Investments Corporation remains eligible to guarantee self-bonds in Wyoming. Their eligibility will be reevaluated following receipt of the company's 2015 annual audited financial statements. Moreover, DEQ is not aware of any information that Peabody Investments Corporation should have disclosed to DEQ related to its eligibility that it has not provided, and WildEarth Guardians has not provided any such information either.

Accordingly, the assertion in the Citizen's Complaint that the financial condition of Peabody Energy controls Peabody Investments Corporation's eligibility is unsupported by either DEQ's regulations or generally accepted accounting principles. Whether DEQ and OSMRE should deviate from generally accepted accounting principles and require operators and guarantors to treat off-balance sheet contingent liabilities differently in the future is an important question, and one DEQ hoped to address before OSMRE disengaged. At this juncture, however, the evidence clearly demonstrates that DEQ is complying with its approved regulations and OSMRE should withdraw the TDN.

## CONCLUSION

DEQ has consistently and properly applied its approved regulations using generally accepted accounting principles to Peabody Investments Corporation. WildEarth Guardians offers no facts and no law demonstrating that this corporation is ineligible to continue serving as a guarantor in Wyoming.

Mr. Jeffrey Fleischman  
Peabody Energy Ten Day Notice

The regulatory framework utilized by OSMRE and WDEQ leaves open the possibility that off-balance sheet contingent liabilities will manifest themselves in timeframes that make it difficult for DEQ or OSMRE to respond. However, DEQ and OSMRE are required to follow the regulations as written. DEQ's informed decision not to issue a notice of violation in response to the Citizen's Complaint is both rational and lawful, and complied with the regulations governing DEQs approved program in all respects.

Accordingly, DEQ requests that OSMRE respond to this response to the TDN by finding that DEQ has good cause for not taking enforcement action against Peabody Investments Corporation related to its self-bonding status. Please let me know if you have questions or concerns about anything in this response. We believe that both parties would benefit from a meeting to discuss the issues raised in the TDN and this response before OSMRE responds. Accordingly, DEQ hereby requests to meet at a time that is mutually convenient for OSMRE and DEQ.

Sincerely,



Kyle Wendtland  
Administrator, Land Quality Division

c: Matthew H. Mead  
Michael Enzi  
John Barrasso  
Cynthia Lummis  
Peter K. Michael  
Janice M. Schnieder  
Todd Parfitt