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## **BANKRUPTCY'S ROLE IN THE GROWING DILEMMA OF SELF-BONDING IN THE COAL INDUSTRY**

### **ABSTRACT**

*The coal industry is experiencing increasing market challenges and many of our nation's largest coal producers are filing for bankruptcy. In the wake of insolvency, coal companies are leaving behind abandoned mines with no one to mitigate the damage. There are long-standing regulations mandating coal companies post bonds for land restoration after mining operations are complete. Coal companies can use financial liquidity to satisfy these bonds, known as self-bonding. Yet, companies are using the fiscal strength of subsidiaries instead of their own accounts to self-bond. Ultimately, a company can appear financially healthy enough to qualify for reclamation bonds, but not have enough cash to cover full clean-up of mining sites. Bankruptcy highlights the insufficiency of such reclamation procedures and the supporting bonding process.*

*This Comment evaluates several ways to cope with the self-bonding problem under the existing bankruptcy framework, including the existing requirements of the good faith and feasibility requirements, and proposes a carved out exception within the Bankruptcy Code disallowing prior coal bankruptcy debtors from self-bonding. The carve-out offers the most effective solution at targeting only the misuse of bankruptcy while still allowing the institution to provide effective relief to innocent debtors. The proposed carve-out states: No coal company seeking relief under or arising from this statute shall: (a) include self-bonding within its reorganization plan, nor (b) qualify for self-bonding in the future under any provision of 30 C.F.R. § 800.23.*

## INTRODUCTION

Coal companies are experiencing various market pressures pushing them toward bankruptcy. Growing insolvency of the mining industry leaves environmental degradation for the government to clean-up. While the current safeguards are meant to protect land previously mined for coal from being abandoned, there remains a loophole. Applicable regulations require an active coal mining site to be able to pay to remediate the land once mining activities have ceased. There are various ways a coal company can post these mandatory “reclamation bonds.” One way, known as self-bonding, allows a company to use its financial strength to show the company does not need to set aside specific funds because it is solvent enough to foot the bill. But coal companies can escape responsibility by falsely reporting the financial ability to pay for the clean-up, and later seek to be absolved of that obligation through bankruptcy.

There are various ways in which bankruptcy can discourage self-bonding by a coal company currently or previously in bankruptcy. This Comment will explore potential remedies offered through bankruptcy procedures, either in the existing Code, an amended Code, or through court discretion. One recommendation is that a court could deny a reorganization plan that includes self-bonding under the reasoning that it does not satisfy all of the plan confirmation requirements.<sup>1</sup> Specifically, self-bonding does not satisfy the good faith and feasibility requirements of 11 U.S.C. § 1129(a)(3) and § 1129(a)(11).<sup>2</sup> The ideal solution will be a court-created, or Code-amended carve out that explicitly prohibits a previous debtor in bankruptcy to avail themselves of self-bonding again. The carve-out would prevent companies with a history of abusing the reclamation bonding scheme while allowing other companies with no such history to continue to self-bond responsibly. Alternatively, bankruptcy courts could suggest changes either in support of the Department of the Interior’s notice and comment process, or for Congress to change the Surface Mining Control and Reclamation Act (“SMCRA”) entirely.

### I. BACKGROUND

Coal played an integral role in the expansion and the success of the United States economy by powering transportation, electricity, and the Industrial

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<sup>1</sup> In order to get an approved reorganization plan in chapter 11, a debtor must satisfy all sixteen separate confirmation requirements under 11 U.S.C. § 1129(a) (2012). *See* 11 U.S.C. § 1129(a) (2012).

<sup>2</sup> *See* 11 U.S.C § 1129(a)(3) (2012).

Revolution.<sup>3</sup> The coal industry gave many Americans employment in a time where the country needed it the most.<sup>4</sup> Unfortunately, the negative effects of the industry on the environment and human health eventually became apparent.<sup>5</sup> A statement given to the Committee on Natural Resources in 2013 recalled the physical destruction caused by coal mining:

During the mid 1970s, most counties in the Appalachian coal fields were dotted with hundreds of small surface mines . . . . From both the small and large operations I saw streams choked with sediment, and spoil and rocks dumped on the downslope in steep terrain. I witnessed the results of unpredictable blasting events and saw the exposed highwalls and abandoned entries that were left behind.<sup>6</sup>

#### A. *The Harms of Coal Mining*

The Environmental Protection Agency (EPA), charged with protecting human health and the environment, attributes the growing consequences of climate change to the greenhouse gas effect, primarily from emissions of carbon dioxide through the burning of fossil fuels.<sup>7</sup> In fact, carbon dioxide (CO<sub>2</sub>), a major byproduct of coal consumption, “is the primary greenhouse gas pollutant, accounting for nearly three-quarters of global greenhouse gas emissions and 84% of U.S. greenhouse gas emissions.”<sup>8</sup> The effects of climate change have become so severe that 2016 was the hottest year in recorded history, beating out 2015.<sup>9</sup> This increase in temperature is also accompanied by

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<sup>3</sup> See *A Brief History of Coal Use*, U.S. DEPARTMENT OF ENERGY, <http://www.fossil.energy.gov/education/energylessons/coal/coalhistory.html> (last visited Sept. 3, 2017). Coal use expanded during the Industrial Revolution to power steamships and steam-powered railroads, the chief forms of transportation, which used coal to fuel their boilers.

<sup>4</sup> See *id.*

<sup>5</sup> See *The Surface Mining Control and Reclamation Act (SMCRA) of 1977: A 30th Anniversary Review, Statement of Earl Bandy, Chief, Applicant Violator System Office, Office of Surface Mining Reclamation and Enforcement (OSM)*, U.S. DEPARTMENT OF THE INTERIOR, COMMITTEE ON NATURAL RESOURCES (July 25, 2007), <https://www.gpo.gov/fdsys/pkg/CHRG-110hrg37013/html/CHRG-110hrg37013.htm>.

<sup>6</sup> *Id.*

<sup>7</sup> See *Causes of Climate Change*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://19january2017snapshot.epa.gov/climate-change-science/causes-climate-change.html> (last visited Sept. 3, 2017).

<sup>8</sup> *Learn About Carbon Pollution From Power Plants*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://19january2017snapshot.epa.gov/cleanpowerplan/learn-about-carbon-pollution-power-plants.html> (last visited Sept. 3, 2017).

<sup>9</sup> See *NASA, NOAA Data Show 2016 Warmest Year on Record Globally*, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, <https://www.nasa.gov/press-release/nasa-noaa-data-show-2016-warmest-year-on-record-globally> (last visited Nov. 8, 2017).

changes in the weather and overall climate of Earth.<sup>10</sup> According to the EPA, “many places have seen changes in rainfall, resulting in more floods, droughts, or intense rain, as well as more frequent and severe heat waves.”<sup>11</sup> The Centers for Disease Control and Prevention (CDC) has also identified various health effects correlated with severe weather, air pollution, water quality degradation, extreme heat, food supply impacts and environmental degradation as a whole.<sup>12</sup>

In an effort to reduce CO<sub>2</sub> emissions and combat the effects of climate change, nations across the globe have signed the Paris Agreement.<sup>13</sup> The United States is the only country to reject the treaty and maintain the status quo of emissions.<sup>14</sup> But American coal is still in danger. While Washington debates climate change, global demand for coal is already declining.<sup>15</sup> American coal companies optimistically relied on the increase in demand for coal by industrializing countries such as China and Australia.<sup>16</sup> However, the line of growth in coal consumption is not quite the predicted straight line.<sup>17</sup> In fact, coal demand for exports has not even remained constant; it has declined.<sup>18</sup> As countries across the world become more aware of environmental degradation, they are demanding less coal use and increasing their own reliance on renewable energy sources instead.<sup>19</sup> The United States is losing export

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<sup>10</sup> See *Climate Change: Basic Information*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://19january2017snapshot.epa.gov/climatechange/climate-change-basic-information.html> (last visited Sept. 3, 2017).

<sup>11</sup> *Id.*

<sup>12</sup> See *id.* (“The health effects of these disruptions include increased respiratory and cardiovascular disease, injuries and premature deaths related to extreme weather events, changes in the prevalence and geographical distribution of food- and water-borne illnesses and other infectious diseases, and threats to mental health.”).

<sup>13</sup> See *Paris Agreement*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/paris\\_agreement\\_english\\_.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf) (last visited Nov. 9, 2017).

<sup>14</sup> See Lisa Friedman, *Syria Joins Paris Climate Accord, Leaving Only U.S. Opposed*, NEW YORK TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/climate/syria-joins-paris-agreement.html>.

<sup>15</sup> See *Coal Production Declines in 2016, With Average Coal Prices Below their 2015 Level*, U.S. ENERGY INFORMATION ADMINISTRATION (Jan. 9, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=29472>.

<sup>16</sup> See *Australia*, PEABODY ENERGY, <http://www.peabodyenergy.com/content/398/austrial-mining> (last visited Sept. 3, 2017).

<sup>17</sup> See *Coal Production Declines*, *supra* note 15.

<sup>18</sup> See *U.S. Coal Exports Declined 23% in 2015, as Coal Imports Remained Steady*, U.S. ENERGY INFORMATION ADMINISTRATION (Mar. 7, 2016), <http://www.eia.gov/todayinenergy/detail.php?id=25252>.

<sup>19</sup> See *Hydroelectric Plants Account for More than 70% of Brazil’s Electric Generation*, U.S. ENERGY INFORMATION ADMINISTRATION (Aug. 11, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=27472>.

business.<sup>20</sup> Recent data shows that in 2014, China not only used more crude oil and natural gas, but also used less coal.<sup>21</sup>

When it comes to the impact of coal mining, perhaps even more troubling are the diseases cited by the CDC that plague individuals who live and work in coal towns and inhale mine dust.<sup>22</sup> These diseases include: pneumoconiosis, silicosis, bronchitis, emphysema, and Black Lung.<sup>23</sup> Combined, these diseases have led to thousands of deaths and left countless others with severely diminished qualities of life.<sup>24</sup> Even in light of the dangers, coal companies have not felt the need to mitigate the damage caused by their industry. The environment and its inhabitants continue to suffer due to coal mining even in an age of environmental consciousness and scientific awareness. One unfortunate consequence of the coal industry's negative externalities is the increase of ghost towns caused by rampant unemployment.

Consider the coal mining town of Lindytown, West Virginia. According to Sierra Club, Appalachian mountaintop-removal mines have destroyed an estimated 1.4 million acres of forested land, buried an estimated 2,000 miles of streams, poisoned drinking water, and wiped whole towns off the map.<sup>25</sup> Lindytown is on its way to being another statistic as it has experienced both the "boom" and "bust" of surface coal mining.<sup>26</sup> Lindytown is located in southwest West Virginia and was surrounded by mountains and forests, until coal mining began.<sup>27</sup> Residents initially thrived off of the introduced industry; families throughout the town had both employment and a purpose.<sup>28</sup> But the labor-intensive underground mining eventually transitioned to machine operated surface mining.<sup>29</sup> Residents were left unemployed while health and safety conditions continued to deteriorate due to daily blasting and visible coal dust.<sup>30</sup>

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<sup>20</sup> See *U.S. Coal Exports Declined*, *supra* note 18.

<sup>21</sup> See *Oil and Natural Gas Import Reliance of Major Economies Projected to Change Rapidly*, U.S. ENERGY INFORMATION ADMINISTRATION (Jan. 22, 2014), <http://www.eia.gov/todayinenergy/detail.php?id=14691>.

<sup>22</sup> See Jay Colinet, *Health Effects of Overexposure to Respirable Silica Dust*, SILICA DUST CONTROL WORKSHOP (Sept. 28, 2010) <https://www.cdc.gov/niosh/mining/UserFiles/workshops/silicaMNM2010/1-Colinet-HealthEffects.pdf>.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> *The Cost of Coal*, SIERRA CLUB, <http://vault.sierraclub.org/sierra/costofcoal/west-virginia/default.aspx> (last visited Sept. 3, 2017).

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See Dan Barry, *As the Mountaintops Fall, a Coal Town Vanishes*, NEW YORK TIMES (Apr. 12, 2011), <http://www.nytimes.com/2011/04/13/us/13lindytown.html>.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

Instead of helping the community, the occupant coal company at the time, Massey Energy, chose to reduce its liability by simply buying out residents that had lived in Lindytown for generations.<sup>31</sup> The large coal company began making offers in December 2008, and by the beginning of 2011, only one or two families remained in the entire town.<sup>32</sup> The holdouts consist of a generation unwilling to leave their family homes, including Alzheimer's sufferer Quinnie Richmond and her son.<sup>33</sup> Yet none of the remaining residents blame the younger generation for getting out. They suggest, "[y]ou might as well take the money and get rid of your torment . . . after they destroyed our place."<sup>34</sup> Clearly, coal mining has immense economic and social externalities.

### *B. Self-Bonding and Bankruptcy*

Lindytown is just one example within one region of coal mining. Lindytown's plight is an unfortunate paradigm found throughout Appalachia and coal mining towns across the nation. If the coal industry remains afloat in the face of such degradation, what protections are available to the remaining employees and residents of coal towns in the instance of coal company bankruptcy? Their only hope rests with decades old legislation. In 1977, President Jimmy Carter signed into law the Surface Mining Control and Reclamation Act of 1977.<sup>35</sup> Under SMCRA regulations, before mining operations begin, a coal company must apply for and pay reclamation performance bonds to guarantee its ability to restore and clean-up mining sites after use.<sup>36</sup> There are several allowable types of bonds, including collateral and surety bonds.<sup>37</sup> Financially stable coal companies, however, are allowed to "self-bond" for these environmental clean-up liabilities by showing they can afford to clean-up mining sites when the time comes.<sup>38</sup> That is, fiscally healthy coal companies are allowed to guarantee reclamation obligations without any type of collateralized financial assurance.<sup>39</sup>

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<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See generally* 30 C.F.R. § 800.12 (2012).

<sup>36</sup> *See generally id.*

<sup>37</sup> *See id.*

<sup>38</sup> *See generally id.* § 800.12(c).

<sup>39</sup> *See id.* § 800.23(b)(3) ("To meet the financial requirement, the Act requires an applicant to either (1) have an "A" or higher rating from Moody's Investor Service or Standard and Poor's Cooperation; (2) a tangible net worth of \$10 million, a ratio of total liabilities to net worth or 2.5 or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or (3) fixed U.S. assets of at least \$20 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ration of current assets to current liabilities of 1.2 times or greater.").

Self-bonding worked well when coal was a booming and resilient business, because companies were financially stable enough to maintain sufficient funds for reclamation. In fact, maintaining liquidity of funds, that otherwise would have been set aside for reclamation bonds, allowed American coal companies to thrive and stay competitive in the global market.<sup>40</sup> Self-bonding has become so popular that there are approximately \$3.86 billion in outstanding self-bond obligations across the United States.<sup>41</sup> From a business perspective, that means billions of dollars are not tied up in reclamation bonds that corporations can use to reinvest and grow.

But growth alone is not the issue. As coal companies expand operations, the effects on the environment and human health will compound, especially if mines are abandoned and land is left un-reclaimed.<sup>42</sup> Environmental harm resulting from growth of the coal industry is twofold. First, coal mining results in severe environmental impact including air pollution from dust, groundwater pollution from mine runoff, and safety concerns associated with abandoned mines.<sup>43</sup> Second, the burning of coal at power plants also creates a myriad of externalities such as an increase of atmospheric CO<sub>2</sub> and other pollutants that impact global and human health.<sup>44</sup>

To make matters worse for the coal industry, it had been experiencing problems with coal demand even before the bad publicity of climate change. Some of the factors contributing to the decline in demand for coal include lower natural gas prices, lower international demand, and reduced domestic energy use due to warming temperatures.<sup>45</sup> Moreover, the United States' final coal production in 2016 projects have been seventeen percent lower than in 2015—the lowest level since 1978.<sup>46</sup> This single year decrease in production is not an isolated event. Coal production has dropped in every major coal region by at least fifteen percent—a continuation of an eight-year decline from peak production in 2008.<sup>47</sup> Additionally, a report by the Carbon Tracker Initiative

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<sup>40</sup> *Australia*, *supra* note 16 (coal companies can use the extra liquidity to invest in foreign markets rather than be tied up by bonds).

<sup>41</sup> Jayni Foley Hein et al., *Self-Bonding in an Era of Coal Bankruptcy: Recommendations for Reform*, INSTITUTE FOR POLICY INTEGRITY, N.Y.U. SCHOOL OF LAW (Aug. 2016), [http://policyintegrity.org/files/publications/Coal\\_Self-Bonding\\_Report.pdf](http://policyintegrity.org/files/publications/Coal_Self-Bonding_Report.pdf) (last visited Sept. 3, 2017).

<sup>42</sup> *See generally Climate Effects on Health*, *supra* note 42.

<sup>43</sup> *See generally id.*

<sup>44</sup> *See Climate Change Decreases Quality of the Air We Breathe*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/climateandhealth/pubs/air-quality-final\\_508.pdf](https://www.cdc.gov/climateandhealth/pubs/air-quality-final_508.pdf) (last visited Nov. 8, 2017).

<sup>45</sup> *See Coal Production Declines*, *supra* note 15.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*

found that more than 260 mines closed between 2001 and 2013, and just since 2009, the market value of the U.S. coal sector has dropped by seventy-six percent.<sup>48</sup>

Competitors like natural gas and renewable energy also have a large impact on coal production. Natural gas, although still a fossil fuel, has a carbon intensity eighty-two percent lower than that of coal.<sup>49</sup> Not only is natural gas a cleaner alternative to coal, it is becoming increasingly cheaper.<sup>50</sup> With lower prices, cleaner emissions, and more efficient extraction,<sup>51</sup> natural gas is simply outcompeting coal. In 2015, natural gas consumption was eighty-one percent higher than coal consumption, and “in 2016, natural gas surpassed coal as the primary fuel used for power generation in the United States, supplying an estimated 34% of the nation’s electricity, compared with 30% for coal.”<sup>52</sup>

Renewable energies are also becoming a more prominent player in the energy market. In 2015, the share of renewable energy consumption in the United States was at almost ten percent, the largest proportion since the 1930s.<sup>53</sup> While almost all renewables have seen an increase, solar and wind generation have seen the greatest growth for electricity generation.<sup>54</sup> The growing percentage of renewables is also not a function of declining sources of fossil fuels; for the third year in a row, more than half of new additions to the power grid are renewable technologies, again with a large increase of wind and

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<sup>48</sup> Andrew Grant & Luke Sussams, *The U.S. Coal Crash: Evidence for Structural Change* (Mar. 2015), <http://www.carbontracker.org/report/the-us-coal-crash/>.

<sup>49</sup> *Energy-related CO2 Emissions From Natural Gas Surpass Coal as Fuel Use Patterns Change*, U.S. ENERGY INFORMATION ADMINISTRATION (Aug. 17, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=27552>.

<sup>50</sup> *Natural Gas Prices in 2016 Were the Lowest in Nearly 20 Years*, U.S. ENERGY INFORMATION ADMINISTRATION (Jan. 13, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=29552> (“Natural gas spot prices in 2016 averaged \$2.49 per million British thermal units (MMBtu) at the national benchmark Henry Hub, the lowest annual average price since 1999.”).

<sup>51</sup> *See Growth In U.S. Hydrocarbon Production From Shale Resources Driven By Drilling Efficiency*, U.S. ENERGY INFORMATION ADMINISTRATION (Mar. 11, 2014), <http://www.eia.gov/todayinenergy/detail.php?id=15351>.

<sup>52</sup> *Natural Gas Prices*, *supra* note 50.

<sup>53</sup> *Id.*

<sup>54</sup> *Fossil Fuels Still Dominate U.S. Energy Consumption Despite Recent Market Share Decline*, U.S. ENERGY INFORMATION ADMINISTRATION (July 1, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=26912> (“Liquid biofuels have also increased in recent years, contributing to the growing renewable share of total energy consumption.”).

solar.<sup>55</sup> Due to a combination of reasons, the value of coal has declined by the “highest annual percentage decrease of any fossil fuel in the past 50 years.”<sup>56</sup>

This decline in coal production poses a substantial threat to coal companies and coal mining towns.<sup>57</sup> As unemployment rates for coal industry employees are continuing to rise, more and more regions of the country are beginning to resemble Lindytown, West Virginia.<sup>58</sup> The crisis became such a national concern that President Donald Trump ran on a platform promising thousands of new jobs to disparaged coal towns.<sup>59</sup> Since in office, President Trump has rolled back President Barack Obama’s moratorium on coal leases on federal lands and vetoed regulations promulgated by the Office of Surface Mining.<sup>60</sup> While these efforts appeal to disparaged coal towns, President Trump cannot “save” coal for multiple reasons.

First, coal is not failing because there are not enough places to mine; coal is struggling because the free market is forcing coal out.<sup>61</sup> Driving up the demand for coal would require direct government intervention mandating consumption—an unlikely option. Second, President Trump’s policies relating to natural gas actually allow other forms of energy to outcompete coal.<sup>62</sup> President Trump supports increased access to natural gas, which will only stabilize prices and continue to drive down demand for coal.<sup>63</sup> The best President Trump can do is to perhaps extend the life of the dying industry, but the evidence suggests coal will never return to what it once was.<sup>64</sup>

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<sup>55</sup> See *Renewable Generation Capacity Expected To Account For Most 2016 Capacity Additions*, U.S. ENERGY INFORMATION ADMINISTRATION (Jan. 10, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=29492>.

<sup>56</sup> *Fossil Fuels Still Dominate*, *supra* note 54 (“The most significant decline in recent years has been coal: U.S. coal consumption fell 13% in 2015, the highest annual percentage decrease of any fossil fuel in the past 50 years. The only similar declines were in 2009 and 2012, when coal fell 12% below the level in the previous year.”).

<sup>57</sup> *Assault On Coal Brings High Unemployment To Eastern Kentucky*, INSTITUTE FOR ENERGY RESEARCH (Dec. 5, 2013), <http://instituteforenergyresearch.org/analysis/federal-governments-assault-on-coal-brings-high-unemployment-to-eastern-kentucky/> (stating unemployment rates increasing up to the highest rate in Wyoming of twenty percent for surface coal mining between 2010 and 2011).

<sup>58</sup> *Id.* (unemployment rates increasing up to the highest rate in Wyoming of twenty percent for surface coal mining between 2010 and 2011).

<sup>59</sup> *An America First Energy Plan*, THE WHITE HOUSE, <https://www.whitehouse.gov/america-first-energy/> (last visited Jan. 22, 2017).

<sup>60</sup> See Eric Lipton and Barry Meier, *Under Trump, Coal Mining Gets New Life on U.S. Lands*, NEW YORK TIMES, (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/us/politics/under-trump-coal-mining-gets-new-life-on-us-lands.html>; Stream Protection Rule, Pub. L. No. 115-5, 131 Stat. 10 (2017).

<sup>61</sup> *Renewable Generation Capacity*, *supra* note 55.

<sup>62</sup> *An America First Energy Plan*, *supra* note 59.

<sup>63</sup> *Natural Gas Prices*, *supra* note 50.

<sup>64</sup> See *Renewable Generation Capacity*, *supra* note 55; *Natural Gas Prices*, *supra* note 50.

As demand for coal declines, there is a higher risk of financial problems, and the question of coal companies filing for bankruptcy becomes a matter of *when*, not *if*. Current legislation regulating coal operations includes safeguards for the environment in times of financial hardship. It is recognized that “a bedrock principle of environmental law and regulation is that pollution costs should be borne by their creators.”<sup>65</sup> Thus, requiring a company to bond for their environmental reclamation shifts the risk of default from the public to the private sector.<sup>66</sup> But the system fails when those bonding safeguards allow companies to skirt their responsibilities.

The SMCRA sets certain minimum requirements to ensure coal companies restore mined land.<sup>67</sup> Under SMCRA, a person must post an adequate reclamation bond before receiving a permit to conduct surface coal mining operations.<sup>68</sup> The reclamation bonds required by SMCRA must be “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.”<sup>69</sup> A permittee must provide and maintain an adequate reclamation bond from the initial day of mining operation throughout the life of the authorized mining operation.<sup>70</sup>

In certain limited circumstances, regulators may allow a permittee to meet the reclamation bonding requirements by providing a “self-bond.”<sup>71</sup> Self-bonds were created to allow coal companies to avoid setting aside reclamation funds when they are liquid enough to pay for entire reclamation projects.<sup>72</sup> A state with a permitting agency may or may not allow self-bonding.<sup>73</sup> Any state program authorizing the use of self-bonding 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” and “must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.”<sup>74</sup> In order to qualify, the filing company must have a ratio of total

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<sup>65</sup> James Boyd, *Financial Responsibility for Environmental Obligations: An Analysis of Environmental Bonding and Assurance Rules* (Aug. 2001), <http://www.ucl.ac.uk.cserge/Boyd.pdf>.

<sup>66</sup> David Gerard, *The Law and Economics of Reclamation Bonds*, 26 *RESOURCES POLICY* 189, 190 (2000).

<sup>67</sup> 30 U.S.C. § 1201 (2012).

<sup>68</sup> 30 C.F.R. § 800.11 (2012).

<sup>69</sup> 30 U.S.C. § 1259(a) (2012).

<sup>70</sup> 62 Ill. Adm. Code 1800.13 (2012).

<sup>71</sup> 30 C.F.R. § 800.23 (2012).

<sup>72</sup> See 30 U.S.C. § 1259(c) (2012).

<sup>73</sup> 30 C.F.R. § 800.11(e) (2012).

<sup>74</sup> *Id.*; see Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations Under Regulatory Programs; Self-Bonding, 48 Fed. Reg. 36418-01 (Sept. 9, 1983). The summary stated:

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.<sup>75</sup>

If, after a permit is issued, it becomes clear that a company's financial situation no longer meets the established standards, the permittee must either replace the bond within a limited period of time or must "cease coal extraction and . . . immediately begin to conduct reclamation operations in accordance with the reclamation plan."<sup>76</sup> But companies that are not financially healthy enough to self-bond can use a loophole: self-bond through wholly-owned subsidiaries that look healthy on paper, but in reality are no more solvent than their parent companies.<sup>77</sup> The language of the self-bonding rules allows for financial requirements to be met by "the applicant or its parent corporation guarantor."<sup>78</sup>

In 1988, the Office of Surface Mining Reclamation and Enforcement amended C.F.R. § 800, allowing third parties to guarantee a self-bond.<sup>79</sup> Courts

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The Office of Surface Mining Reclamation and Enforcement (OSM) is promulgating new rules on self-bonding pursuant to the Surface Mining Control and Reclamation Act of 1977. States are not required to adopt self-bonding rules. This rule establishes the minimum standards of financial eligibility to self-bond for States that wish to allow self-bonding. The applicant for a self-bond is required to demonstrate at least 5 years of continuous operation and: financial solvency demonstrated by an "A" or higher bond rating; or, a tangible net worth of at least \$10 million, plus certain financial ratios; or, ownership of at least \$20 million of tangible fixed assets, plus certain financial ratios. The amount of all self-bonds that regulatory authorities may accept would be limited to 25 percent of the applicant's tangible net worth. Several other criteria for self-bonding also are established. A regulatory authority may accept the guarantee of a qualifying parent corporation for its subsidiaries. These rules replace the previous rules which were suspended.

<sup>75</sup> 30 C.F.R. § 800.23(b)(3) (2012).

<sup>76</sup> *Id.* § 800.16(e).

<sup>77</sup> *See id.* § 800.23(c)(1).

<sup>78</sup> *Id.*

<sup>79</sup> Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Performance Bonds; Bond Release Application, 53 Fed. Reg. 994-01 (Jan. 14, 1988). The summary stated:

The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) is amending the rules that govern the information required in an application to release a performance bond to include the name of the permittee and amending the bonding rules to allow third parties to guarantee a self-bond. These revisions are in accordance with the Secretary's brief of March 5, 1984, in which the Secretary addressed the National Wildlife Federation's challenge to the omission of the permittee's name in the published notice of bond release and in response to a June 16, 1986, petition for rulemaking from the National Coal Association/American Mining Congress (NCA/AMC) Joint Committee on Surface Mining Regulations requesting that OSMRE amend its rules to allow third parties to guarantee a self-bond. The rules were proposed on November 26, 1986, with a comment period that closed on February 5, 1987. Six parties commented on this proposal. These final rules are adopted for the permanent regulatory program.

have recently read this provision as permitting a struggling parent to lean on its affiliate companies.<sup>80</sup> Two of the country's largest coal companies, Arch Coal and Alpha Natural Resources, are among those that used the financials of their subsidiaries to qualify for self-bonding.<sup>81</sup> The practice of essentially using another company's financials to qualify for self-bonding violates the trust that permitting agencies give to coal companies.<sup>82</sup> While using an affiliate to maintain self-bonding qualifications may have worked in an era when the coal market was more resilient, the current volatile market has sent some of the country's largest coal companies into bankruptcy. Exacerbating the problem, "energy companies who self-bond lack a diversified business and participate in a rapidly changing commodity market; they are therefore at a higher risk of default."<sup>83</sup>

Although this issue has been brought to the attention of the U.S. Department of the Interior, the agency charged with managing self-bonds, its current guidelines are merely suggestions.<sup>84</sup> Meanwhile, three of the country's largest coal companies have filed for chapter 11 bankruptcy, and there are likely more self-bonded coal companies following in their footsteps. Examining patterns of past coal bankruptcies will demonstrate the problem of self-bonding in an unstable industry and highlight the areas in which the institution of bankruptcy can improve.

### *C. Case Studies: Recent Coal Bankruptcies*

Chapter 11 bankruptcy is appealing to coal companies because it allows them to stay in business while they sell off assets and reorganize.<sup>85</sup> But shutting down entire mining operations and communities could have major negative ramifications. A coal company may also seek additional benefits from a chapter 11 reorganization, including the sale of assets "free and clear of

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<sup>80</sup> See 30 C.F.R. § 800.23(c)(1) (2012).

<sup>81</sup> Letter from Maria Cantwell & Richard J. Durbin, U.S. Senators, to Hon. Gene L. Dodaro, Comptroller Gen. of U.S. (Mar. 8, 2016).

<sup>82</sup> 30 C.F.R. § 800.23(g) (2012).

<sup>83</sup> Dion W. Hayes & Sarah Link Schultz, *Light Out! Hot Topics and Recent Developments in Energy-Related Chapter 11 Cases*, Am. Bankr. Inst. 259 (June 2016).

<sup>84</sup> Press Release, U.S. Dept. of Interior, Office of Surface Mining Reclamation and Enforcement to Initiate Rulemaking on Self-Bonding for Coal Mines (Aug. 16, 2016) (Proposing goals for a new rulemaking process that would modify self-bonding eligibility standards, provide for third-party review, collateralize a certain percentage of self-bonds, make replacement bonds more attainable, and minimize risks associated with corporate sureties that rely on cash flow basis to cover reclamation costs when bonds are forfeited; however, the notice and comment rulemaking process may take a while and may not even be binding on all states).

<sup>85</sup> Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 875–876 (Jan. 2014).

encumbrances” which then turn to proceeds.<sup>86</sup> Therefore, by going through a chapter 11 proceeding, a coal company can avoid posting reclamation bonds, continue to operate its business, and make money from any assets sold. These incentives to file for bankruptcy, rather than posting collateral reclamation bonds, are in conflict with the fundamental purpose of reorganization, which “is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”<sup>87</sup> It is a “misuse of economic resources” in multiple senses for a company to avoid posting the legally required reclamation bond by first self-bonding through a subsidiary and then file for bankruptcy.<sup>88</sup> The following are examples of major coal companies that have filed for chapter 11 bankruptcy in similar fashions.

### *I. Arch Coal*

Arch Coal self-bonded through a subsidiary, Arch Western Resources, and owed \$458 million in self-bonded claims.<sup>89</sup> Arch Coal was allowed to continue operations while in bankruptcy, with a majority of its reclamation liabilities un-bonded.<sup>90</sup> While the reemerged Arch Coal was required to post substitute bonds, the Wyoming Department of Environmental Quality stated in a letter in March of 2016 that its subsidiary, Arch Western Resources, still qualified for self-bonding.<sup>91</sup> This means that there are no restrictions on using the subsidiary to self-bond in the future. The letter from the Wyoming Department of Environmental Quality suggests that they will continue to allow Arch’s subsidiaries to benefit from self-bonding, and potentially allow Arch to self-bond through them or on their own in the future.<sup>92</sup>

Although Wyoming requires companies to provide reclamation bonds, they also have an incentive to allow the practice of self-bonding to continue because self-bonding means more money in a company’s pocket.<sup>93</sup> Consequently, states that allow self-bonding have an automatic advantage of attracting coal companies (and their tax money) over states that do not offer self-bonding. Even after a state permits a self-bond, it is incentivized to help the company

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<sup>86</sup> *Id.*

<sup>87</sup> *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

<sup>88</sup> *Id.*

<sup>89</sup> *Arch Coal Asks U.S. Bankruptcy Court to Ease its Cleanup Costs*, REUTERS (Jan. 11, 2016), <http://www.reuters.com/article/us-usa-arch-coal-cleanup-idUSKCN0UP2GT20160111>.

<sup>90</sup> *Restructuring Information*, ARCH COAL, <http://www.archcoal.com/restructuring/> (last visited Feb. 10, 2017).

<sup>91</sup> Letter, *supra* note 81.

<sup>92</sup> *Id.*

<sup>93</sup> *See id.*

flourish—coal mining continues to fund communities across the country, and halting operations due to a violation of a reclamation bond could bring hardship to thousands of Americans.<sup>94</sup>

Minor cyclical downturns in the coal market are a trend of the past, and allowing a coal company to go bankrupt without sufficient reclamation bonds could mean that the government, and in turn taxpayers, are responsible for the cleanup costs.<sup>95</sup> Despite the incentives that both the state and the coal company have to continue to self-bond, Wyoming should not have left open the possibility for a prior bankruptcy debtor. Unfortunately, this trend continued with the bankruptcy of Alpha Natural Resources.<sup>96</sup>

## 2. *Alpha Natural Resources*

Alpha Natural Resources, with a total of \$676 million in self-bonds throughout the country, of which \$411 million is for bonds in Wyoming alone, filed for bankruptcy in multiple states in 2015.<sup>97</sup> The company self-bonded with a subsidiary's financials, claiming the subsidiary could cover the cost of the bonds.<sup>98</sup> Yet, the subsidiary did not have enough assets to cover \$676 million in bonds, leaving Alpha in violation of their mining permit.<sup>99</sup> The court was faced with two options: suspend mining licenses for violating bond requirements or look past the illegality of Alpha's actions and allow operations to continue. Suspending a mining license would effectively stop all function of Alpha's mines, causing income streams to stop and leave many citizens unemployed. Repealing a license would also push Alpha further into financial distress, causing it to be even less likely to pay to reclaim mined property. At the risk of exacerbating the issue, Wyoming allowed Alpha to continue to operate in exchange for a small percentage of their bond responsibility during the bankruptcy process.<sup>100</sup>

Alpha's problems, however, continued. Alpha purchased Massey Energy, the coal company that bought Lindytown, and later filed for bankruptcy in

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<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *Id.*

<sup>97</sup> *In re Alpha Nat. Res., Inc.*, 544 B.R. 848 (Bankr. E.D. Va. 2016).

<sup>98</sup> *See* Casper Star Tribune, *Uncharted Territory: What do Alpha Natural Resources Self-Bonding Woes Mean?* (June 4, 2015), [http://trib.com/business/energy/uncharted-territory-what-do-alpha-natural-resources-self-bonding-woes/article\\_407af6fe-0244-530c-a8fc-cd53cc0a5e83.html](http://trib.com/business/energy/uncharted-territory-what-do-alpha-natural-resources-self-bonding-woes/article_407af6fe-0244-530c-a8fc-cd53cc0a5e83.html).

<sup>99</sup> *In re Alpha Nat. Res., Inc.*, 544 B.R. 848.

<sup>100</sup> *See* Letter, *supra* note 81.

West Virginia.<sup>101</sup> The court acknowledged that if the state did not approve the coal company's reorganization plan, Alpha "would be required to immediately post over \$244 million in substitute bonds in order to continue mining in West Virginia."<sup>102</sup> The court approved the settlement with West Virginia because "given the Debtors' limited liquidity, this could be a substantial hurdle that could impair the Debtors' reorganization efforts."<sup>103</sup> Although in this instance, Alpha was allowed to "gradually transition away from the self-bonding problem" after successfully reorganizing, there was no agreement that Alpha would be unable to self-bond in the future.<sup>104</sup>

In the end, Alpha was able to avoid paying full price for reclamation bonds by first using subsidiaries that could not foot the bill to self-bond, then turning to bankruptcy to escape paying collateral bonds, and finally restructuring through bankruptcy without becoming precluded from repeating the same pattern. So how does a company become so financially unstable that a bankruptcy court confirms a plan in order to avoid liability that could be incurred by the state?

An impending bankruptcy should be foreseeable to a devaluing coal company, triggering the requirement to notify their permitting agency when it falls out of self-bond eligibility and post another approved bond method within ninety days.<sup>105</sup> In the case of Alpha's bankruptcy, the company had notified the Wyoming Department of Environmental Quality that it was no longer eligible for its outstanding self-bonds, yet it filed for bankruptcy before the end of the ninety day requirement to post other bonds.<sup>106</sup> Alpha likely filed for bankruptcy at the last minute, right before having to pay millions in a required bond, because it was experiencing a "melting ice cube"<sup>107</sup> effect. Essentially, a company is considered a "melting ice cube" if its assets are rapidly declining in value.<sup>108</sup> Companies that are showing "ice cube" characteristics frequently rely on bankruptcy for a quick sale of their property.<sup>109</sup> Alpha turned to bankruptcy for relief because it experienced a decline in assets, so much so that neither self-bonding nor collateral bonding requirements could be met.

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<sup>101</sup> *In re Alpha Nat. Res., Inc.*, 544 B.R. at 857.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 30 C.F.R. § 800.23(g) (2012).

<sup>106</sup> *Id.*

<sup>107</sup> Jacoby, *supra* note 85, at 875–76.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Under SMCRA, a coal company is in violation of its permit if it does not have a reclamation bond of any sort, which can result in consequences such as a suspended permit.<sup>110</sup> Yet during the bankruptcy, Wyoming stayed enforcement action on the unmet reclamation bond requirements and allowed the companies to pledge a “supermajority claim” to the state based on the chance that the company did not exit chapter 11.<sup>111</sup> The claim, approved by the bankruptcy court, was for \$61 million, and nowhere near the necessary \$411 million pledged for reclamation costs.<sup>112</sup> Alpha was fortunate enough to regain financial strength and replace all its prior self-bonds. The final restructuring and approved plan designated for Alpha required them to transfer all \$411 million to secured bonds, but did not specify that Alpha could not avail themselves to self-bonding further down the road.<sup>113</sup> Moreover, the actions taken by Wyoming do not stop other states from issuing self-bonds and exacerbating the problem of \$3.86 billion in outstanding self-bonded obligations.

### 3. *Peabody Coal*

Most recently, Peabody Coal, another one of the United States’ major coal companies, and the world’s largest publicly owned coal producer, filed for bankruptcy in April 2016.<sup>114</sup> Although federal requirements demand that a self-bonding applicant “has a ratio of liabilities to net worth of 2.5 or less and a ratio of current assets to liabilities of 1.2 or greater,” Peabody had a ratio of liabilities to net worth of 11.6 and a ratio of current assets to liabilities of 0.84.<sup>115</sup> Peabody filed with debt of \$10.1 billion total, and \$1.1 billion in self-bonding across four states, with \$727 million in liabilities located within Wyoming alone.<sup>116</sup> Unlike the two previous major coal bankruptcies, Peabody did not file a plan for reorganization contemporaneously with its bankruptcy filing.<sup>117</sup> Therefore, it is still unknown if they will propose self-bonding or if Wyoming would object.<sup>118</sup>

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<sup>110</sup> 30 U.S.C. § 1232(d) (2012).

<sup>111</sup> See Letter, *supra* note 81.

<sup>112</sup> *In re Alpha Nat. Res. Inc.*, 544 B.R. at 853.

<sup>113</sup> *Id.*

<sup>114</sup> Tracy Rucinski & Tom Hals, *Leading Global Coal Miner Files for Bankruptcy*, REUTERS (Apr. 2016), <http://www.reuters.com/article/us-peabody-energy-bankruptcy-idUSKCN0XA0E7>.

<sup>115</sup> 30 C.F.R. § 800.23(3)(11) (2012); see Rucinski, *supra* note 114.

<sup>116</sup> Rucinski, *supra* note 114.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Peabody is also facing issues in Illinois. Peabody's Illinois Basin self-bonding is done through a wholly-owned subsidiary of Peabody Energy, Peabody Investments Corporation.<sup>119</sup> Peabody has nationwide issues with self-bonding, and worldwide financial problems; as such, an issue arises if Peabody takes a substantial hit in bankruptcy. In order to protect American jobs and allow Peabody to have its "fresh start," bankruptcy courts may be tempted to approve a plan that allows Peabody to continue to self-bond or return to it shortly after.

The goal of bankruptcy to provide a debtor with a "fresh start"<sup>120</sup> is at odds with the public policy driving reclamation bonds.<sup>121</sup> Not all companies filing for bankruptcy deserve a fresh start, especially if they are attempting to avoid their reclamation liabilities. In the cases of Alpha and Arch, who both posted self-bonds through the financials of affiliate companies, filing for bankruptcy forced the court to choose between allowing reorganization or shutting down operations and ensuring non-compliance with reclamation liabilities. But a major problem arises when a company cannot survive reorganization, or when emerging companies from reorganizations, such as Alpha's phoenix company Contura Energy, begin the same pattern of self-bonding in five years.<sup>122</sup> Or, in the case of Patriot Coal, file for bankruptcy twice.<sup>123</sup> In such situations, bankruptcy would effectively have had no deterring force at all in stopping the coal company from engaging in irresponsible self-bonding practices.

#### D. *Litigation Tactic Cases*

The stories of Alpha and Arch Coal are illustrative of what is known as the "litigation tactic case."<sup>124</sup> Cases that fall under this category typically occur when pressures mount from an external dispute that incentivizes a bankruptcy

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<sup>119</sup> *Id.*

<sup>120</sup> *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (the court noted the purpose of bankruptcy was to give "the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.").

<sup>121</sup> OSMRE created reclamation bonds to clean up the environmental damage done to land and water systems by mining operations. The goal of reclamation is to return the land to pre-mining quality and avail it to the same uses. *Reclamation Performance Bonds*, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, <https://www.osmre.gov/resources/bonds/bondsoverview.shtm> (last visited Sept. 10, 2017).

<sup>122</sup> New coal companies, including newly formed reorganized companies, cannot qualify for self-bonding until they have operated for five years.

<sup>123</sup> Matt Jarzemsky & Peg Brickley, *Patriot Coal Again Files for Chapter 11 Bankruptcy*, NEW YORK TIMES (May 12, 2015), <http://www.wsj.com/articles/patriot-coal-files-for-chapter-11-bankruptcyagain-1431435830>.

<sup>124</sup> F. Stephen Knippenberg & Lawrence Ponoroff, *Legal Theory: The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U.L. REV. 919, 938 (1991).

filing.<sup>125</sup> These disputes can include “evident intention to circumvent state law requirements regarding the posting of a . . . bond as a condition to appealing an adverse judgment.”<sup>126</sup> The bankruptcy court has discretion to consider intent when allowing a bankruptcy case to proceed.<sup>127</sup> The court should use this discretion to take the current energy market, and purpose for filing for bankruptcy into consideration.

Current projections for the energy market predict coal consumption inevitably declining with no rebound in sight.<sup>128</sup> Unfortunately, as the coal market continues to fall, more companies are likely on the same path to bankruptcy. The chances of a coal company recovering, even if being allowed to restructure, are slimming. While a coal company loses its grasp on the market, it may not be focused on cleaning up after itself. Such a shift in focus negatively affects places like Lindytown. The problem is compounding because the law is letting it. Yet the shelter that coal companies seek in bankruptcy during times of financial distress can change the course of harm left in the wake of the dying coal industry.

## II. ANALYSIS

The institution of bankruptcy has two main instruments that operate to carry out its intended purposes of proving debtors with a fresh start and fair treatment to creditors.<sup>129</sup> Both of these tools, the Code and the bankruptcy court, can be used to illicit change. Bankruptcy courts are more commonly dealing with business issues “related only incidentally, if at all, to the problems of default and immediate financial ruin.”<sup>130</sup> The expansion of the bankruptcy court’s scope, for better or for worse, has caused an increase of debtors turning to the court to avoid or decrease their bond requirements.<sup>131</sup> As a result, coal companies are increasingly looking for relief in the bankruptcy system.

Bankruptcy as an institution has gradually become a forum to which parties have turned to resolve basic business and economic problems that are not

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> 11 U.S.C. § 1129(a)(3) (2012).

<sup>128</sup> *Fossil Fuels Still Dominate*, *supra* note 54 (“U.S. coal has seen as significant decline: consumption fell 13% in 2015, the highest annual percentage decrease of any fossil fuel in the past 50 years”).

<sup>129</sup> *Local Loan*, 292 U.S. at 244 (1934).

<sup>130</sup> Knippenberg, *supra* note 124, at 966.

<sup>131</sup> *Id.* at 938 (“Commercial debtors have shown an increased willingness to use the bankruptcy law both as a tactic in business litigation and as an instrument of business planning.”).

satisfactorily addressed elsewhere.<sup>132</sup> Coal companies are misusing bankruptcy courts as a forum for escaping traditional requirements of reclamation bonding.<sup>133</sup> In turn, the courts have to bear the costs of a company abusing the aims of bankruptcy.<sup>134</sup> While abuse of bankruptcy is not recommended, the capacity to institute change on a federal level suggests that the bankruptcy system is perhaps the best place to address the issue of inappropriate self-bonding in the coal industry.<sup>135</sup> There are three main areas in which bankruptcy can become a tool to combat the increasing probability of un-reclaimed coal mines: the existing Code, a proposed carve-out to the Code, and the role of bankruptcy judges to steer the use of bankruptcy in the right direction.

#### *A. Evaluating Tools Within the Existing Code to Discourage Inadequate Self-Bonding*

The Code provides two main provisions that can act as a backstop against debtors filing for relief to avoid fulfilling required bond amounts covering reclamation costs of mining property: the good faith and feasibility requirements.

##### *1. Good Faith*

First, the Code provides a “good faith” provision to discourage inadequate self-bonding. If a coal company were to have filed for bankruptcy for the sole purpose of using the procedural incidents of bankruptcy to secure a tactical advantage, the good faith requirement may provide an existing stop within the Code.<sup>136</sup> Section 1129(a)(3) requires that: “[t]he plan has been proposed in good faith and not by any means forbidden by law.”<sup>137</sup> Some courts focus on the debtor’s pre-petition conduct, similar to the good faith requirement under § 362(d)(1) and § 1112(b).<sup>138</sup> The Code does not define “good faith,” for purposes of determining good faith under § 1129(a)(3), and the most common point of inquiry by the court is the plan itself and whether such a plan will

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<sup>132</sup> *Id.* at 966.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 92 (Erwin Chemerinsky et al. eds., 7th ed. 2015) (preferring federal environmental policy over state policy, one reason being that federal regulation promotes a uniform approach).

<sup>136</sup> 11 U.S.C. § 1129(a)(3) (2012).

<sup>137</sup> *Id.*

<sup>138</sup> DAVID G. EPSTEIN ET AL., BANKRUPTCY: DEALING WITH FINANCIAL FAILURE FOR INDIVIDUALS AND BUSINESSES 372 (6th ed. 2006).

fairly achieve a result consistent with the objectives and purposes of the Code.<sup>139</sup>

The good faith requirement provides an additional check on a debtor's intentional impairment of claims. Good faith is evaluated on a case-by-case basis,<sup>140</sup> but it serves as a condition to securing chapter 11 relief. Failure to satisfy the good faith requirement constitutes "cause," sufficient for dismissal under § 1112(b).<sup>141</sup> Specifically, a proposed plan: "must be 'viewed in light of the totality of the circumstances surrounding confection' of the plan [and] . . . the bankruptcy judge is in the best position to assess the good faith of the parties' proposals."<sup>142</sup> The totality of the circumstances that may be considered includes a myriad of factors depending on the circuit. Subjective intent is not wholly determinative.<sup>143</sup> The most common test requires "a demonstration of both the inability to formulate an effective reorganization plan and improper motivation in filing"<sup>144</sup> in order to serve the "various and conflicting interests of debtors, creditors and the courts."<sup>145</sup>

Bankruptcy courts have a great deal of discretion regarding rulings on a "good faith" challenge.<sup>146</sup> One court even expressed the discretion as a mechanism to "allow courts to utilize their gut feeling about a plans effects."<sup>147</sup> A judge should take all situational factors into consideration and "the reading of the law should be tempered by the judge's sense of equity—what is just in the circumstances of the case. If there are objective facts to support this feeling, perhaps the plan should not be confirmed."<sup>148</sup> Moreover, by using "common sense" logic, even though a coal company has a plan that it can afford, if it self-bonded through a subsidiary it may not automatically pass the good faith test. Arguably in some instances, it should not.

A company could easily have prior bad actions and still propose a plan that will achieve the goals of bankruptcy with fairness. However, in a situation similar to that of Arch Coal, who filed for bankruptcy at the end of their ninety-day period to post a bond, lack of good faith may be relevant. In

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<sup>139</sup> 11 U.S.C. § 1112(b) (2012); 11 U.S.C. § 362(d) (2012).

<sup>140</sup> *Jorgensen v. Federal Land Bank (In re Jorgensen)*, 66 B.R. 104, 108–09 (9th Cir. B.A.P. 1986).

<sup>141</sup> *In re Madison Hotel Assocs.*, 749 F.2d 410, 426 (7th Cir. 1984).

<sup>142</sup> *Id.* at 424–25 (quoting *In re Jasik*, 727 F.2d 1379, 1383 (5th Cir. 1984)).

<sup>143</sup> *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 828 (9th Cir. 1994).

<sup>144</sup> *Knippenberg*, *supra* note 124, at 926.

<sup>145</sup> *Id.* (quoting *Carolin Corp. v. Miller*, 886 F.2d 693, 701 (4th Cir. 1989)).

<sup>146</sup> 11 U.S.C. § 362(d) (2012).

<sup>147</sup> *In re John P. Timko et al.*, No. 87-09318 (unpublished) (Bankr. E.D. Mich. July 1988).

<sup>148</sup> *Id.*

*Marsch v. Marsch*, the debtor filed for chapter 11 in order to avoid posting an appeal bond in regard to a legal judgment.<sup>149</sup> The court found that using bankruptcy to delay or avoid judgments, or as a litigation strategy, is an act in bad faith.<sup>150</sup> The court dismissed the case, reasoning that the filing had objectives outside the legitimate scope of the bankruptcy laws.<sup>151</sup> Although there may be an exception for when a bond could disrupt a debtor's business, in the case of a coal company a bond that is required for business is not likely one that would "disrupt" it.<sup>152</sup> Applying the policy behind the holding in *Marsch*, a coal company that chooses to file for bankruptcy, when it has the ability to post alternative bonds, within ninety days of losing self-bonding eligibility would arguably be acting in bad faith.

Unfortunately, there are varying opinions regarding the meaning of "good faith." The discrepancy between the views on the underlying purposes of bankruptcy can alter the outcome of bankruptcy filings, and in particular the satisfaction of a successful plan.<sup>153</sup> On one hand, if the primary goal, and the only factor in a good faith analysis, were that a debtor could successfully complete their reorganization plan, "the implicit good faith filing requirement will never stand in the way of Chapter 11 filings by large, resource-rich business enterprises."<sup>154</sup> This definition of good faith would seemingly always favor a debtor coal company as they are traditionally known as "resource-rich." Yet with the current changes to the energy sector, a court should more critically examine the company's ability to reorganize. On the other hand, if the purpose of bankruptcy is to protect the integrity of the process, then each case will be determined based on whether its continuance would compromise the purposes of bankruptcy. The court's inquiry may be influenced, but not controlled, by the size of the debtor.<sup>155</sup> This understanding is more in line with *Marsch*, as it looks to whether the case was filed in line with the purposes and goals of bankruptcy.

Outside of the two purposes for the good faith requirement, there are two general opinions of bankruptcy goals: Traditional or Collectivist.<sup>156</sup> The

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<sup>149</sup> *In re Marsch*, 36 F.3d at 825.

<sup>150</sup> *Id.* at 828 (finding that a debtor using bankruptcy to avoid judgment of the law when they could likely afford the judgment is not entitled to the protection of bankruptcy).

<sup>151</sup> *Id.*; see also Knippenberg, *supra* note 124, at 946–47.

<sup>152</sup> *In re Marsch*, 36 F.3d at 828–29; see also *In re Sparklet Devices, Inc.*, 154 B.R. 544, 548–49 (Bankr. E.D. Mo. 1993).

<sup>153</sup> Knippenberg, *supra* note 124, at 947.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

Traditional view holds that debt collection is always relevant, but it can be sacrificed when necessary to achieve other goals of bankruptcy.<sup>157</sup> Conversely, for Collectivists, bankruptcy is merely a means of federal debt collection.<sup>158</sup> The paradigm that arises with coal companies filing for bankruptcy with self-bonds is that neither goal of bankruptcy would be met, as it is possible for both bad faith and insufficient debt collection to be involved. Therefore, a coal company with a reorganization plan that approves or allows room for an inadequate reclamation self-bond, especially by a subsidiary, would be in violation of “good faith” and violation of the public policy interest in reclaiming mined lands.

## 2. *The Feasibility Requirement*

Second, the Code provides a “feasibility requirement” that discourages inadequate self-bonding. Section 1129(a)(11) could provide additional support that a proposed or potential future self-bond could not be included in a sufficient reorganization plan. Section 1129(a)(11) establishes the financial feasibility requirement: “Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.”<sup>159</sup> In determining whether a plan meets the requirements of § 1129(a)(11), the bankruptcy court must take a close look at the plan to ensure that there is a reasonable chance of success.<sup>160</sup> Several courts have considered the following factors when determining if a plan is feasible:

- (1) the adequacy of the debtor’s capital structure;
- (2) the earning power of its business;
- (3) economic conditions;
- (4) the ability of the debtor’s management;
- (5) the probability of the continuation of the same management; and
- (6) any other related matters which determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan<sup>161</sup>

The feasibility test and the good faith requirement are not mutually exclusive, yet they are loosely linked. For example, if the court is within a jurisdiction that takes pre-bankruptcy behavior into consideration for evaluating the good faith requirement, a coal company using bankruptcy to

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<sup>157</sup> *Id.* at 959.

<sup>158</sup> *Id.* at 949–50.

<sup>159</sup> 11 U.S.C. § 1129(a)(11) (2012).

<sup>160</sup> 7 COLLIER ON BANKRUPTCY ¶ 1100.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

<sup>161</sup> *Id.*

avoid posting full collateral bonds will likely fail the feasibility requirement of plan confirmation.<sup>162</sup> In this situation, the feasibility requirement serves as a second check on the integrity of the debtor. Unfortunately, that will not always be the case.

If a coal company filed for bankruptcy in a jurisdiction that looks at the probability of plan success as a factor in the good faith analysis, then the plan would automatically pass the feasibility test as well. In other words, if a plan is feasible, and treats all creditors fairly, it follows that it would also be made in good faith to carry out the purposes of bankruptcy. Under the current Code, being able to successfully complete a reorganization plan, despite using the proceedings to avoid full collateral bonds, does not forbid a coal company from self-bonding in the future.

In the case of coal companies, the unique nature of a debtor satisfying legally required bonds through a subsidiary may provide a new problem for the bankruptcy court. Plan confirmation does not typically require the court to look at how other companies could affect the feasibility of the plan.<sup>163</sup> Yet, the relationship between parent and subsidiary company in the context of self-bonding may create an exception in which a third-party company could affect the feasibility of a debtor's reorganization plan. Normally, if a plan meets § 1129 (a)(11), that does not mean the court looked to the financial strength of the debtor company's subsidiaries.<sup>164</sup> This is a potentially huge oversight, especially if the company has the ability to use subsidiaries to self-bond in the future. A bankruptcy court faced with this situation should use their discretionary powers to consider both the parent company's financial strength as well as that of its subsidiaries. The broad discretionary powers given to the bankruptcy courts allow judges to make decisions based on fairness.

Overall, the Code as it stands may not be the ideal tool to combat insufficient reclamation bonds. But the flexibility that the Code offers may allow a court to consider and weigh multiple factors to deal with the case equitably. Some of these factors, like the good faith and feasibility requirements, are not new to bankruptcy courts. Other factors also arise out of the unique circumstance of a "litigation tactic case" by coal companies. For example, courts may have to inquire into the financial stability of subsidiary companies to accurately predict the success of a plan under both the good faith

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<sup>162</sup> See generally *id.*

<sup>163</sup> 11 U.S.C. § 1129 (a)(11) (2012).

<sup>164</sup> *Id.*

and feasibility requirements. Most of these factors will guide the court to dismiss a case for bad faith or lack of plan feasibility.

However, there are factors pushing in the direction of allowing such a case to proceed. In some situations, the driving force behind giving debtors a fresh start may override any suspicious acts a company has engaged in in the past or any dishonest intentions it had for filing for bankruptcy. Even if the Code were equipped to punish companies for skimping on self-bonds, the bankruptcy court would still face policy issues. Dismissal of a case could lead to permit violations, worsening a company's financial situation along with the hope of full mining reclamation. These implications exacerbate the problems faced by coal companies and why many seek shelter in bankruptcy. So why not try to stop coal companies from self-bonding in the first place?

*B. Potential Changes: Create a Carved Out Exception Within the Bankruptcy Code*

Currently, under the SMCRA, a company can requalify for self-bonding five years after they come out of bankruptcy and can financially qualify.<sup>165</sup> This scheme opens the possibility of creating even more problems in the future as the coal market continues to act unpredictably. This Comment proposes a carved-out exception to the current Code explicitly disallowing a coal company, including any company that arises from the reorganization, from either proposing self-bonding in its reorganization plan or later entering bankruptcy with self-bonds. The proposed carve-out states:<sup>166</sup>

No coal company seeking relief under or arising from this Title shall:

- (a) include self-bonding within its reorganization plan, nor
- (b) qualify for self-bonding in the future under any provision of 30 C.F.R. § 800.23.

The proposed carve-out would have several characteristics. First, the carve-out would be applicable no matter how many years a company had been out of bankruptcy and would provide multiple benefits. It would promote the purpose of self-bonding, allowing financially stable companies to have the option to use that to their advantage, and retain more of their liquid assets. Second, the carve-out would not ban self-bonding entirely. Self-bonding would still be available for smaller coal companies with a smaller fraction of their reclamation bonds in self-bonding or for companies that are diverse with assets

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<sup>165</sup> 30 C.F.R. §§ 800.23 (b)(2)–(3) (2012).

<sup>166</sup> This use of “carve-out” differs from the phrase’s other use in setting aside funds in a financing order for a debtor in possession.

outside of the coal market. Lastly, the carve-out allows for easy enforcement for both the permitting agency and the bankruptcy court by avoiding judgment calls required under the current state of § 1129(a).

Having a clear rule stating no coal company that filed for bankruptcy or received a discharge can apply for self-bonding would cut down on both the initial research costs as well as costs associated with monitoring compliance throughout the life of the bond.<sup>167</sup> By knowing what to expect throughout the bonding process, the rule would also incentivize current self-bond holders to manage their bonds properly. In many ways, this carve-out will provide a check on the purposes of bankruptcy. Instead of providing a safe-haven and a “fresh start” for companies that are trying to avoid bond requirements, companies will only turn to bankruptcy when they need it the most. The benefits to self-bonding are great enough to induce companies to choose to reduce the percentage of its self-bonds rather than file for bankruptcy. The risk of losing self-bonding altogether by filing for bankruptcy will lead to a reduction in bankruptcy filings.

A carve-out would also have certain costs. If the Code explicitly disallowed a type of permit from being issued, through an exception, it could conflict with § 525. Section 525(a) stipulates:

a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act.<sup>168</sup>

An outright denial of a bond, by a permitting agency, to a previous bankruptcy debtor would fall under the definition of “refuse to renew a . . . permit.”<sup>169</sup> This requirement is consistent with one of the aims of bankruptcy that provides a fresh start in which the reorganized entity is treated as a new company in the eyes of the law.<sup>170</sup> The section is intended to allow a struggling company to

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<sup>167</sup> Gerard, *supra* note 66, at 190.

<sup>168</sup> 11 U.S.C. § 525(a) (2012).

<sup>169</sup> Blue Diamond Coal Co. v. Angelucci, 145 B.R. 895, 900 (Bankr. E.D. Tenn. 1992) (alluding in dicta that if the Workers’ Compensation Board revoked the Certificate of Self Insurance for the sole purpose of debtors’ affiliation with bankruptcy it would be discrimination in violation of § 525(a)).

<sup>170</sup> *In re A.J. Lane & Co.*, 133 B.R. 264, 274 (Bankr. D. Mass. 1991) (“A bankruptcy statute . . . is to be interpreted with basic bankruptcy policies in mind, including the policy of promoting a “fresh start” for the debtor.”).

recover without additional hardship via discrimination.<sup>171</sup> A “fresh start,” however, may not be in line with the public policy behind requiring a company to take responsibility for their environmental liabilities.<sup>172</sup>

Under § 525, there are serious implications to allowing a coal company to turn to bankruptcy at the first sign of financial trouble without placing any long-term punishment on it for shifting the environmental risk to the public. Places such as Lindytown cannot afford to bear the costs of cleaning up if the coal company were to file for bankruptcy and leave reclamation bonds unfulfilled. Bankruptcy proceedings will not reduce the damage to coal towns across the nation. The weight of the public policy toward a clean and healthy environment suggest that the benefits of the carve-out should outweigh the strictness of § 525. There are two potential ways to remedy the conflict between the proposed carve-out and § 525: an explicit exception or invocation of constitutional avoidance.

### 1. *Create an Exception Under 11 U.S.C. § 525*

Congress could simultaneously pass an explicit exception under § 525 along with the carve-out. The exception would acknowledge that although barring a debtor from permits would normally be a violation of § 525, doing so in the context of a coal company in self-bonding would not produce such a violation. Without a violation of § 525, the carve-out would effectively protect human health and the environment from the potential consequences of bankruptcy.

The idea of creating a carve-out with an exception in § 525(a) is not new. Section 525(a) carves out three federal statutory exceptions to the general ban against discrimination by governmental units: the Perishable Agricultural Commodities Act, 1930,<sup>173</sup> the Packers and Stockyard Act, 1921,<sup>174</sup> and section 1 of the Act entitled “An Act for Making Appropriations for the Department of Agriculture for the Fiscal Year Ending June 30, 1944 and for Other Purposes.”<sup>175</sup> These existing exclusions show that Congress can make exceptions favoring public policy under the correct circumstances. An explicit

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<sup>171</sup> See generally John C. Chobot, *Anti-Discrimination Under the Bankruptcy Laws*, 60 AM. BANKR. L.J. 185 (1986)

<sup>172</sup> See generally Boyd, *supra* note 65.

<sup>173</sup> 7 U.S.C. §§ 499a–499s (2012).

<sup>174</sup> *Id.* §§ 181–299.

<sup>175</sup> *Id.* § 204 (2012).

exclusion from the reach of § 525 would bar any argument that the carve-out was unlawful discrimination against a debtor.

## 2. *Approve the Carve-Out Through the Canon of Constitutional Avoidance*

Assuming the carve-out passed, the court could side-step the conflicting policies by using the canon of constitutional avoidance. Invoking the canon would allow the court to assume that Congress did not intend to violate § 525 through the sole act of affirming the carve-out. Essentially, the court is allowed to extrapolate that Congress would not pass any legislation that would be contradictory.<sup>176</sup> Constitutional avoidance would likely be deferred to as it is widely accepted to have become a “cardinal principle” of statutory interpretation.<sup>177</sup> In *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, the court stated that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”<sup>178</sup> In other words, a court will assume that Congress did not intend to create a conflict between statutory provisions because finding otherwise would mean Congress had violated the Constitution.

Even though a carve-out would likely prove to be effective in bankruptcy proceedings, the current political climate is an important factor weighing against the timely enactment of a carve-out. The 114<sup>th</sup> Congress is in a state of extreme partisanship and legislative standstill, and matters regarding energy are at a particular point of contention.<sup>179</sup>

A major energy bill is currently before Congress.<sup>180</sup> The North American Energy Security and Infrastructure Act of 2016 passed the Senate and House but is still before Congress resolving issues.<sup>181</sup> The bipartisan bill purports to boost oil and natural gas production, yet encourage renewable energy sources,

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<sup>176</sup> See *Massachusetts Trustees of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 242 (1964).

<sup>177</sup> *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

<sup>178</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); see also *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corp of Eng'rs*, 531 U.S. 159, 172 (2001) (“[A]ssumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”).

<sup>179</sup> Chris Mooney, *The Senate Just Passed-Overwhelmingly-an Actually Bipartisan Energy Bill*, THE WASHINGTON POST (April 20, 2016), [https://www.washingtonpost.com/news/energy-environment/wp/2016/04/20/the-senate-just-passed-overwhelmingly-an-actually-bipartisan-energy-bill/?utm\\_term=.8db223be66ea](https://www.washingtonpost.com/news/energy-environment/wp/2016/04/20/the-senate-just-passed-overwhelmingly-an-actually-bipartisan-energy-bill/?utm_term=.8db223be66ea).

<sup>180</sup> North American Energy Security and Infrastructure Act of 2016, S. 2012, 114th Cong. (2016).

<sup>181</sup> *Id.*

such as wind and solar power, and increased energy efficiency.<sup>182</sup> Although the bill has passed both the House and Senate, it was not without hurdles and it has still not made it out of Congress. The House Minority Leader Nancy Pelosi referred to the bill as “a partisan, special interest package that fails to invest in infrastructure, leads to more energy consumption and carbon pollution, stacks the deck against the environment and . . . undermines protections for our public lands and wildlife.”<sup>183</sup>

Meanwhile, House Speaker Paul Ryan, believes the bill “modernizes our energy infrastructure so we can address urgent priorities for the country, from tackling California’s drought crisis to healing our forests in order to prevent wildfires.”<sup>184</sup> The difference of opinions regarding the current energy bill combined with the political uncertainty arising from the Trump administration demonstrates the difficulty that a bankruptcy carve-out regarding coal mining would face in being passed. A delayed or stalled enactment of the carve-out would do little to the current and ongoing environmental harm, especially considering the coal market is in decline. Also standing in the way of a quick adoption of a carve-out to the Code are lobbyists. Creating such a blanket barrier to self-bonding would not go unnoticed in Washington.

Adopting a carve-out would likely be the best way that bankruptcy could improve insufficient self-bonding to reclaim coal mines. The carve-out within the Code would not require judges to use discretion to evaluate whether cases are feasible or brought in good faith. It would allow a clear policy to apply to all debtor coal companies and would reduce uncertainty. Moreover, the carve-out would incentivize companies to comply with the self-bonding regulations at the outset, likely reducing the bankruptcy court’s docket.

But the carve-out will face resistance. Unfortunately, because of the current Congressional climate, the biggest opposing force against passing the carve-out is time—the one thing that the citizens of coal regions cannot afford. Realistically, solutions outside of the current Code may provide for a faster solution to the issue of irresponsible self-bonding through subsidiaries.

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<sup>182</sup> *Congressional Energy Bill at Standstill Over Drilling*, THE INTELLIGENCER (June 7, 2016), <http://www.theintelligencer.net/news/top-headlines/2016/06/congressional-energy-bill-at-standstill-over-drilling/>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

### *C. Solutions Outside of the Bankruptcy Code*

Although the bankruptcy court and judges must work within the confines of the Code, they still have the ability to influence change. Judges are often the first to identify flaws within the system and encourage reform. Following in Justice O'Connor's footsteps, the bankruptcy court could make a call to the federal government to incentivize change.<sup>185</sup> With Peabody nearing the end of its bankruptcy proceedings and the inevitability of more coal bankruptcies becomes apparent, the court has the perfect opportunity to instill a sense of urgency to improve. The court can encourage three major changes; a bill amending SMCRA; amendments to the Office of Surface Mining Reclamation and Enforcement's permitting regulations; and amending the Code to disincentivize misuse of the institution, such as the proposed carve-out in this Comment.

#### *1. Encourage a Bill Amending the Surface Mining Control and Reclamation Act*

The bankruptcy court could express support for Congress to pass a bill amending SMCRA.<sup>186</sup> There is currently a bill introduced to the House that proposes to amend 30 U.S.C. § 1259 to entirely disallow self-bonds from being approved and requiring all outstanding bonds to be replaced by otherwise acceptable bonds under SMCRA.<sup>187</sup> An amendment to SMCRA would rid reclamation costs of uncertainty and eliminate all monitoring costs for the permitting agency, which is required when the agency certifying a coal company qualifies for self-bonding, whether it be a state or the Office of Surface Mining and Reclamation Enforcement.<sup>188</sup> The outcome of the bill depends on the climate of Congress. While there is a split between the House and Senate on the energy bill, there may be hope for regulation regarding environmental enforcement.<sup>189</sup> On June 22, 2016, former President Obama signed a bill reforming the Toxic Substance Control Act of 1976, the first

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<sup>185</sup> *Ohio v. Kovacs*, 469 U.S. 274, 286 (1985) (O'Connor, J., concurring) (stressing the importance in protecting environmental policy interest).

<sup>186</sup> H.R. 5500, 114th Cong. (2016) ("To protect taxpayers from liability associated with the reclamation of surface coal mining operations, and for other purposes.").

<sup>187</sup> *Id.*

<sup>188</sup> See David Gerard, *The Law and Economics of Reclamation Bonds*, 26 RESOURCES POLICY 189, 191 (2000), <http://faculty.lawrence.edu/gerard/wp-content/uploads/sites/9/2014/02/22-RP-Gerard-bonding.pdf>.

<sup>189</sup> *Congressional Energy Bill*, *supra* note 177.

substantial change to an environmental statute in twenty years.<sup>190</sup> This willingness to pass an amendment to an environmental statute by both political parties suggests that Congress may be willing to put aside differences in a changing world with increasing environmental risks. However, as with an amendment to the Code, the uncertainty of Congress's timeliness presents a problem. Time is of the essence when families and communities are being affected now.

People across the nation are being impacted by the coal industry. Environmental justice, the concept that certain people are disproportionately affected by environmental harms, is a movement that tries to bring awareness to and mitigate the issue. Moreover, the people that are most affected are those that are linguistically, racially, or economically isolated.<sup>191</sup> Unfortunately, situations like Lindytown are common across the country, as citizens who cannot afford to go head-to-head with large companies are forced to live in unhealthy environments. In that sense, the communities that were able to relocate were the fortunate ones.<sup>192</sup> Yet, if operating mines are already disproportionately affecting families that cannot afford to move or speak out, abandoned mines that do not have adequate bonds to reclaim them will only exacerbate the environmental justice issue.

The United States Department of Interior, and in turn the Office of Surface Mining and Reclamation Enforcement, is required to take environmental justice into consideration when making decisions.<sup>193</sup> In 1994, former President Clinton signed an Executive Order ensuring that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health

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<sup>190</sup> Gina McCarthy, *TSCA Reform: A Bipartisan Milestone to Protect Our Health from Dangerous Chemicals*, EPA (June 2016), <https://blog.epa.gov/blog/2016/06/tscareform-a-bipartisan-milestone-to-protect-our-health-from-dangerous-chemicals/>.

<sup>191</sup> See David Deganian & Justine Thompson, *The Patterns of Pollution: A Report on Demographics and Pollution in Metro Atlanta* 3 (Mar. 2012), <https://greenlaw.org/pdf/PatternsofPollutionFINALGreenLaw3-26-2012.pdf>.

<sup>192</sup> A study from The Mountain Association for Community Economic Development found that:

While coal employment has brought decent jobs and wages to a region in desperate need of employment opportunities, eastern Kentucky remains one of the most economically distressed regions in the country. The poverty rate in Appalachian Kentucky was nearly double that of the nation in 2000. Even within eastern Kentucky, coal-producing counties are among the most economically distressed counties. The top coal-producing counties have some of the highest poverty rates in the region.

*Economic Status of Coal Producing Counties*, MOUNTAIN ASSOCIATION FOR COMMUNITY ECONOMIC DEVELOPMENT, <http://www.maced.org/coal/coal-counties.htm> (last visited Oct. 1, 2017).

<sup>193</sup> Exec. Order No. 12,898, 59 C.F.R. § 32 (Feb. 1994).

or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>194</sup> Each federal agency is required to have an Environmental Justice Strategic Plan in which they outline how they will fight for Environmental Justice.<sup>195</sup> The Department of the Interior is charged with SMCRA permits and is not excepted from the scope of the Environmental Justice Executive Order.<sup>196</sup> The Office of Surface Mining and Reclamation, allowing coal companies to self-bond their environmental reclamation liabilities, is not in line with preventing “adverse environmental impacts . . . through integration into its programs [and] policies.”<sup>197</sup> Unfortunately, the Executive Order’s permissive language does not provide a strong enforcement mechanism and is commonly skirted by agencies.<sup>198</sup>

A bill amending SMCRA, disallowing self-bonding, would assume the policy behind the Executive Order and force coal companies to internalize clean-up costs. The benefits of factoring in environmental justice when considering the proposed bill extend beyond remediating current harms, but it will work to prevent future inequality as well. While not mandated, Congress should consider the environmental justice implications when deciding on the proposed bill to eliminate self-bonding. The bill would both relieve the government from the risk of incurring environmental liabilities while protecting the people that live in mining communities, who are susceptible to environmental injustice.

Unfortunately, there are drawbacks to passing a complete ban on self-bonding. Because the ban on self-bonding would arise from the bankruptcy context, the action may run afoul of § 525. The bill would be comparable to the carve-out in the Code in denying a previous debtor of a mining permit.<sup>199</sup>

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Environmental Justice*, U.S. DEPT. OF THE INTERIOR, <https://www.doi.gov/oepc/resources/environmental-justice> (last visited Nov. 1, 2016). The Department of the Interior takes the stance on Environmental Justice that:

While the Department is committed to protecting the environment and health of all communities, the Department’s environmental justice strategy is particularly focused on ensuring that minority and low-income communities do not suffer from disproportionate adverse environmental impacts. Ultimately, the Department strives to achieve its environmental justice goals through integration into its programs, policies, and activities to help ensure all people—including minority and low-income populations—receive fair treatment and the opportunity to engage and meaningfully inform the Department’s decision-making processes.

<sup>197</sup> *Id.*

<sup>198</sup> Exec. Order No. 12,898, 59 C.F.R. § 7629 (Feb. 1994).

<sup>199</sup> 11 U.S.C. § 525(a) (2012).

Policy concerns also arise from removing self-bonding entirely. Complete removal of self-bonds will force financially stable companies to put aside assets that were previously liquid. The declining coal market is one of the major reasons financially unstable companies should set aside sufficient reclamation bonds; yet, in light of the current health of the coal market, now is the worst time for a stable coal company to lose liquidity.

The court must weigh the policies between remediating the environmental harm and justice concerns, with market projections and impacts, when evaluating whether to support the bill amending SMCRA. Like any balancing test, it is difficult to weigh human injustices against economic factors. The trends show that while the coal market is beginning to be out-competed, environmental justice concerns are on the rise. It is not likely that the court can save the coal industry any more than President Trump can, but it can support the SMCRA amendments in an effort to right the wrongs occurring to American citizens and their homes.

## 2. *Endorse Amendment to Permitting Regulations*

Similar to supporting the SMCRA amendments, the bankruptcy court could advocate for the Department of the Interior and the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) to change the regulations regarding the issuance of self-bonding permits. The OSMRE has already undergone notice and comment rulemaking and promulgated an amendment to its regulations for reclamation bonds.<sup>200</sup> The stated goals of rulemaking would in fact improve the self-bonding situation by making qualifications stricter rather than a blanket ban.<sup>201</sup> But just recently, Congress has invoked the

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<sup>200</sup> Press Release, *supra* note 84. For the notice and comment rulemaking period, OSMRE has set the goal to:

- (1) Modify self-bonding eligibility standards, including for parent and other corporate guarantors, to include criteria that are more forward looking, instead of only focusing narrowly on past performance;
- (2) Provide for an independent third party review of self-bonded entities’ annual financial reports and certification of the current and future financial health of self-bonded entities;
- (3) Establish the percentage of all self-bonds to be supported by collateral that is not subject to any other lien or used as collateral for any other liability;
- (4) Provide diversification for financial assurance/reclamation bonds for each mine to prevent a single entity from providing 100% of the bond for a mine (except for cash bonds);
- (5) Provide regulatory authorities with better tools for obtaining replacement bonds when a self-bonding entity no longer meets the self-bonding eligibility criteria; and
- (6) Minimize the risks associated with corporate sureties that rely on a cash flow basis to cover the cost of reclamation when its bonds are forfeited.

<sup>201</sup> *Id.*

Congressional Review Act and rejected the OSMRE's amended regulation, thus leaving the previous and weaker regulations still in force.<sup>202</sup> OSMRE's action proves the deficiency of the self-bonding regulations. Additionally, Congress's subsequent attempt to veto stronger rules reinforces the need for bankruptcy to play a role in the implementation of self-bonds. The status of the new regulations remains unclear, but if they are vetoed under the current administration, the need for stricter regulations in the future will be even stronger.

### 3. *Endorse the Carve-Out Proposed Herein*

Perhaps the most effective change the bankruptcy court could endorse is the carve-out proposed in this Comment to the Code regarding self-bonding. Creating a carve-out would provide the best of both worlds. It would allow financially responsible, resilient, and diverse companies to benefit from not having to set aside specific reclamation funds while also reducing the risk of a company that misused the bonds from availing themselves of it again. Suggesting or even holding that a previous bankruptcy debtor could never refile for a self-bond could be a step in the right direction. Moreover, making a call to Congress to amend the Code may be the option most within the scope of a bankruptcy court's powers. Support for a change in the Code from bankruptcy judges—those that deal with the Code the most—would have a persuasive impact on Congress to enact a carve-out for irresponsible self-bonding.

The existing framework of the Code as well as SMCRA are insufficient to tame the nation's billion-dollar problem of self-bonding. Bankruptcy courts should use their influence and expertise to call on Congress to change the future of human health and environmental degradation caused by under-funded mine reclamations. In doing so, the court will have to weigh policies such as efficiency of Congressional action, environmental justice, energy market economics, and feasibility of proposed actions and rulemaking. Forming a position on how bankruptcy can affect the uncertainty and harms arising from self-bonding and tactical litigation could go a long way in moving the practice in the right direction.

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<sup>202</sup> See Stream Protection Rule, *supra* note 60.

## CONCLUSION

Coal mining companies are self-bonding, declaring bankruptcy, and leaving an environmental mess with no one responsible for clean-up. Families in coal mining regions, like Lindytown, West Virginia, are forced to stay and deal with the hazards of coal mining, or become displaced from their homes. Coal is becoming a less popular source of power, and an industry that used to employ American citizens is relying less and less on human labor.

As the global and domestic markets shift, the current regulations are no longer effective at protecting people and the environment. SMCRA is too lenient because it allows too many companies to self-bond, either before or after bankruptcy, and it allows companies to inappropriately rely upon their subsidiaries. SMCRA does not sufficiently disincentivize abuse of its limited requirements, especially when it comes to self-reporting. This problem is on a fast track to becoming an epidemic. As more coal companies go under, more mines will be abandoned without the necessary environmental clean-up, leaving surrounding communities to suffer the harms of dirty air and water for generations to come.

Bankruptcy highlights a major predicament that self-bonding can place both a coal company and a permitting agency in. The policy behind self-bonding in support of allowing coal companies to not set aside reclamation funds because they are sufficiently solvent is backfiring. The code regulating the requirements for self-bonding makes it clear that a financially troubled company headed toward bankruptcy must provide alternate bonds with sufficient collateral. But the act of replacing self-bonds is not working in practice, as demonstrated by the bankruptcy proceedings of some of the country's largest coal companies.

There could be various reasons why a coal company, such as Alpha Natural Resources, has to file for bankruptcy before having the opportunity to replace its self-bonded environmental liabilities. Allowing companies to self-bond through their subsidiaries seems to be the start of the financial issues surrounding reclamation bonds. Historical patterns of the coal market show that the market was resilient, and temporarily self-bonding through an affiliate was more cost effective than replacing self-bonds until financially qualifying again.<sup>203</sup> Due to various market pressures (including an increase of renewable resources, federal response to climate change, and a decrease in international

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<sup>203</sup> *Renewable Generation Capacity*, *supra* note 55; *Natural Gas Prices*, *supra* note 50.

demand), the coal industry may not rebound like it has in the past.<sup>204</sup> Companies that have out self-bonded their liabilities, either in good faith that the market would recover, or in an attempt to avoid incurring costs or bankruptcy, are finding themselves in real trouble and unable to remain financially stable.

Just as bankruptcy brings the problem to light, the process can play multiple roles when a coal company files for chapter 11 and either has inadequate reclamation self-bonds or could potentially post them in the future. The Code could provide some relief as it stands. Under the bankruptcy requirements of reorganization plan approval, a debtor must have a plan that will “in good faith” accomplish the interests of creditors feasibly.<sup>205</sup>

In the case of a coal company that could requalify for self-bonds, or achieve self-bonding status through a subsidiary, there may be questions of the feasibility of the plan in the long run and raise issues of good faith. The safeguard of § 1129(a)(11) could likely bolster the potential to use § 1129(a)(3) against inadequate self-bonding. Section 1129(a)(11) sets a feasibility standard that requires a plan offer reasonable assurance, probability, or prospect of success.<sup>206</sup> Under that definition, either the current or potential self-bonding comports with § 1129(a)(3), or the plan is not financially feasible and therefore could not have been made in good faith.<sup>207</sup> If, however, it cut the other way and a court found a plan to be feasible, it in no way could be stopped by allegations of bad faith.

A revision to the Code could strengthen the policy behind preventing dangerous self-bonds. If the Code prevented companies with a history of financial troubles and bankruptcy from receiving a permit under a self-bond, it would provide financially stable coal companies with the benefit of a self-bond, while protecting the public from the possibility of having to pick up the slack from a financially unstable company with inadequate reclamation self-bonds. The proposed carve-out would balance avoiding the shutdown of the coal industry in the United States, with disallowing abuse of the bankruptcy system to avoid reclamation liabilities.

The bankruptcy court could also play a role in resolving the issue by making a call to Congress. The problem would be best solved at the source, by

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<sup>204</sup> *Renewable Generation Capacity*, *supra* note 55; *Natural Gas Prices*, *supra* note 50.

<sup>205</sup> 11 U.S.C. § 1129(a)(3) (2012).

<sup>206</sup> *Id.* § 1129(a)(11).

<sup>207</sup> *Id.* § 1129(a)(3).

amending SMCRA to ban self-bonding all together, yet the current political situation in Congress may pose a barrier to change in a timely manner. Taking a page from Justice O'Connor, the most effective thing a bankruptcy court could do is to promote change to the Code. Although this would also require action by Congress, recognition of the issue as specific to bankruptcy may push change along. A change to the Code to provide for an exception to self-bonding would be favorable to an outright ban under SMCRA. Allowing flexibility would uphold the policies behind self-bonding as well as prevent abuse.

Lastly, the court could support the rulemaking process underway by the OSMRE.<sup>208</sup> This option may be the quickest and politically safest option, but not likely the most effective way to combat the nationwide issue. The issues arising from the current energy market and longstanding environmental justice concerns call for action to be taken to assure sufficient clean-up of used coal mines.

No matter the mechanism used, bankruptcy can play a vital role in resolving current and future harms to both the environment and people. As the energy market changes in response to pressure from consumers and competing energy sources, the way the coal industry operates needs to adjust to handle operations more responsibly. Bankruptcy has increasingly become a forum for coal companies to regroup and restructure; making the institution a ripe place to make business practices more responsible.

Environmental degradation and harm to human health are not limited to the coal industry. At a broader level, the analysis could be used outside the context of coal companies and self-bonding. A large amount of environmental burdens that fall within the hands of the government arise from bankruptcy.<sup>209</sup> The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), for example, gives the Environmental Protection Agency the authority to mandate clean-up of hazardous waste sites.<sup>210</sup> CERCLA has an

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<sup>208</sup> Press Release, *supra* note 84.

<sup>209</sup> Kevin Bogardus, *Bankrupt Companies Avoid More Than \$700 Million In Cleanup Costs*, THE CENTER FOR PUBLIC INTEGRITY (May 2014), <https://www.publicintegrity.org/2007/05/03/5620/bankrupt-companies-avoid-more-700-million-cleanup-costs> (“In the context of CERCLA, the environmental statute demanding cleanup of hazardous waste sites, companies often use bankruptcy to get rid of or dramatically decrease their liability. A study by the Center for Public Integrity found that out of hundreds of contaminated site, four companies alone owed \$750 million in cleanup costs. These companies filed for bankruptcy and the Environmental Protection Agency got pennies on the dollar to put toward cleanup, meaning they had to reach into their budget from the federal registrar to clean them up.”).

<sup>210</sup> 42 U.S.C §§ 9601–9675 (2012).

established fund from the government to take care of clean-up costs of sites contaminated with dangerous pollutants. CERCLA has a limited budget and a growing number of sites obtained through bankruptcy and abandonment.<sup>211</sup> And in the face of the recent election, the EPA may have even less support for site clean-up.<sup>212</sup> The degrading process could look to the Code for help.

In a manner similar to how bankruptcy could alleviate some pressure from the rising problem of self-bonding for coal companies, looking at how gaps can be filled in the Code can provide a blueprint for reducing the American taxpayer's share of the abandoned environmental liabilities from other federal statutes as well.

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<sup>211</sup> See generally Knippenberg, *supra* note 124.

<sup>212</sup> *An America First Energy Plan*, *supra* note 59.

\* Notes and Comments Editor, *Emory Bankruptcy Developments Journal*; J.D. Candidate, Emory University School of Law (2018); B.S.E.S., *magna cum laude*, University of Georgia (2014). I would like to express my gratitude for all the hard work and patience every staff member and editor of the *Emory Bankruptcy Developments Journal* dedicated to me and this comment—there are far too many to list. I would also like to thank my parents, Joey and Georgia Heard, for their unwavering love and support. Lastly, thank you to Cameron Murphy, my siblings, and my friends for all the comic relief life requires.