



United States Department of the Interior

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

Appalachian Region
Three Parkway Center
Pittsburgh, Pennsylvania 15220

July 8, 2008

Kathleen McGinty, Secretary
Department of Environmental Protection
Rachel Carson State Office Building, 16th Floor
P.O. Box 2063
Harrisburg, Pennsylvania 17105-2063

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SECRETARY'S OFFICE

Dear Ms. McGinty:

As part of its oversight responsibilities under the Surface Mining Control and Reclamation Act (SMCRA), the Office of Surface Mining Reclamation and Enforcement (OSM) monitors and evaluates conditions and events affecting each State's coal mining regulatory program and the regulatory authority's ability to implement this program. If, in accordance with 30 CFR 732.17, OSM determines that an approved State program no longer meets all Federal requirements, it may require amendment of that program. For the reasons set forth below, I have concluded that the Pennsylvania program now falls within this category and that the Commonwealth must amend its program to restore consistency with SMCRA.

In 1991, our oversight activities determined that Pennsylvania's Alternative Bonding System (ABS) contained unfunded reclamation liabilities for backfilling, grading, and revegetation; and we determined that the ABS was financially incapable of abating or treating pollutional discharges from bond forfeiture sites under its purview. On October 1, 1991, OSM issued Pennsylvania a Notice under 30 CFR 732.17 (732 Notice) concluding that Pennsylvania's ABS, and hence the approved Pennsylvania program, were no longer in conformance with Federal law and regulations, in particular, the requirements for maintaining an ABS found at 30 CFR 800.11(e). As a result, the 732 Notice required the Commonwealth to submit either proposed amendments or a description of amendments to be proposed to remedy these deficiencies.

Since 1991, various actions have taken place, including legislative and regulatory changes (previously approved by OSM where approval was required) that were intended to address the funding shortfall in the ABS. These actions include actuarial and other studies as well as significant administrative changes within Pennsylvania's existing

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approved program. Foremost among these actions was Pennsylvania's decision, effective August 5, 2001, to stop allowing any new permits to be covered by the ABS and to transition existing and inactive permits covered by the ABS to conventional bonds. In response to these changes, OSM issued a letter on June 12, 2003, terminating the 732 Notice. OSM's action was based on the notion that the conversion from an ABS to a Conventional Bonding System (CBS) rendered the requirement to comply with 30 CFR 800.11(e) moot. Subsequent to these OSM actions, a lawsuit was filed in the U.S. District Court for the Middle District Court of Pennsylvania, *Pennsylvania Federation of Sportsmen's Clubs Inc. et. al. v. Norton No. 1:03-CV-2220*. It was that case, while initially dismissed by the district court, that ultimately led to the August 2, 2007, Third Circuit decision that brings us to the need for this notification.

At issue before the Third Circuit, *inter alia*, was whether OSM properly terminated the requirement that Pennsylvania demonstrate that its Surface Mining Conservation and Reclamation Fund was in compliance with 30 CFR 800.11(e). The Third Circuit concluded: "while it is true that the 'ABS Fund' continues to exist in name, it no longer operates as an ABS, that is, as a bond pool, to provide liability coverage for new and existing mining sites." *Pennsylvania Federation of Sportsmen's Clubs Inc. et. al. v. Kempthorne, 497 F.3d 337, 349 (3rd Cir. 2007)*. However, the Court went on to "conclude that 800.11(e) continues to apply to sites forfeited prior to the CBS conversion." *Id.* at 353. In commenting further on 30 CFR 800.11(e), the Court stated, "The plain language of this provision requires that Pennsylvania demonstrate adequate funding for mine discharge abatement and treatment at all ABS forfeiture sites." *Id.* at 354. The Court then set aside both our termination of our 732 Notice, and the removal of a required amendment pertaining to Pennsylvania's former ABS.


As the Court has set aside our termination of the October 1, 1991, 732 Notice, we are hereby revising that notice and reissuing it under 30 CFR 732.17, to be consistent with the Court's opinion. In accordance with the requirements of 30 CFR 732.17, within 60 days of this letter, Pennsylvania must either submit information sufficient to demonstrate that revenues to the Surface Mining Conservation and Reclamation Fund (Fund) are adequate to fulfill outstanding reclamation obligations at forfeited sites for which the Fund provides partial bond coverage under 30 CFR 800.11(e), a proposed amendment to its program to otherwise meet those outstanding financial obligations at these forfeited sites, or a description of amendments to be proposed together with a timetable for adoption and implementation consistent with established administrative procedures in Pennsylvania.

Kathleen McGinty, Secretary

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We look forward to working together with you and your staff to cooperatively resolve these remaining issues related to the former ABS. Please contact me at 412-937-2828, if you have any questions or comments.

Sincerely,

A handwritten signature in cursive script that reads "Thomas D. Shope". The signature is written in black ink and is positioned above the printed name and title.

Thomas D. Shope
Regional Director