

September 12, 2012



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Mr. William S. Allen, Jr.  
Pennsylvania Department of Environmental Protection  
Bureau of Mining Programs  
Rachel Carson State Office Building, 5th Floor  
P.O. Box 8461  
Harrisburg, PA 17105-8461

**Re: Draft "Reclamation Fee Fiscal-year Report, 2012"  
42 Pa. Bull. 5293 (August 11, 2012)**

**Comments of Pennsylvania Federation of Sportsmen's Clubs, Inc.,  
Pennsylvania Chapter Sierra Club, Pennsylvania Trout, Inc., Mountain  
Watershed Association, Inc., Center for Coalfield Justice, and Citizens for  
Pennsylvania's Future**

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Dear Mr. Allen:

On behalf of the Pennsylvania Federation of Sportsmen's Clubs, Inc., Pennsylvania Chapter Sierra Club, Pennsylvania Trout, Inc., Mountain Watershed Association, Inc., the Center for Coalfield Justice, Citizens for Pennsylvania's Future (PennFuture) and their members, PennFuture submits these comments on the draft "Reclamation Fee Fiscal-year Report, 2012" (Draft Report) prepared by the Pennsylvania Department of Environmental Protection (PADEP). This letter updates the comment letter submitted by these same organizations exactly one year ago concerning the draft report for Fiscal Year (FY) 2010-2011.

**Comment: PADEP has failed to fulfill its duty to complete the construction or replacement of treatment systems at ABS Legacy Sites.**

For the fourth year in a row, the Draft Report reveals that PADEP's expenditures on mine drainage treatment at "ABS Legacy Sites" have fallen far short of: a) the projection made by PADEP just one year earlier; and b) by an even greater margin, the estimated total cost of roughly \$1.6 million per year for treating all discharges from all ABS Legacy Sites.<sup>1</sup> We will

<sup>1</sup> "The annual amount for O&M costs will increase gradually over the next few years until it reaches the \$1.4 million total; when combined with recapitalization costs of about \$200,000 the Department will need approximately \$1.6 million annually to cover O&M and recapitalization costs for all the [existing] primacy ABS forfeiture discharge sites." (ABS Program Amendment (8/1/2008), p. 43) Those 2008 estimates are generally consistent with the data provided in PADEP's most recent (January 2012) update of its "Primacy ABS Bond Forfeitures" report, which covers calendar year 2011. The spreadsheet titled "Item 6 Discharge List 2011" in that report lists the total "Annual O&M costs—Dec 2011" for the ABS Legacy sites as \$1,484,037. It also lists a total "Recap cost" of \$5,194,330, but does not contain an annualized recapitalization cost. These cost figures do not include any amounts for the Purco Coal Company's Watkiss Mine (SMP No. 26753065) and Spruell Mine (SMP No. 26663023), which were added to the list of ABS Legacy Sites within the last few weeks.

pick up where we left off last year by filling in the last two columns in Table 4, which originally appeared on page 3 of our September 12, 2011 comment letter.

**TABLE 4: Fiscal Year 2011-2012 (July 1, 2011 through June 30, 2012)**

| Cost Categories | Projected Expenditures<br>FY 2011-2012<br>(2011 Draft Report) | Actual Expenditures<br>FY 2011-2012<br>(2012 Draft Report)                          | Actual Expenditures as<br>Percentage of<br>Projected Expenditures |
|-----------------|---|---|---|
| Personnel       | \$15,000.00   | \$7,779.68  |   |
| Laboratory      | \$6,000.00  | \$6,789.02  |   |
| Grants          | \$91,500.00   | \$50,530.80   |   |
| Contracts       | \$490,372.00  | \$103,503.72  |   |
| <b>TOTAL</b>    | <b>\$602,872.00</b>   | <b>\$168,603.22</b>   | <b>27.97%</b>   |
|                 |   | vs. projected costs for<br>all ABS Legacy Sites of<br><b>\$1.6 million per year</b> | <b>10.54%</b>   |
|                 | <b>37.68%</b>   |   |   |

As completed, Table 4 confirms the observation we made in last year's comment letter that PADEP's projection of the FY 2011-12 expenditures "should be taken with more than a grain of salt." The actual expenditures from the Reclamation Fee O&M Account (Account) in FY 2011-12 were about 28% of the amount PADEP projected in August 2011. Obviously it is prudent for PADEP to err on the side of caution in projecting the Account's annual expenditures. After four fiscal years, however, the Account's expenditures never have reached as high as 30% of the beginning-of-fiscal-year projection. This might be welcome news if it resulted from PADEP repeatedly being at least 70% more efficient than expected. Unfortunately, however, the explanation for most of the discrepancy appears to be the same old story, namely the failure to live up to the projected pace of installing and starting the operation of treatment systems on ABS Legacy Sites.

Table 4 shows that four years after the 2008 ABS Program Amendment projected that the Account would need \$1.6 million per year to treat the discharges from the ABS Legacy Sites, only about one tenth that amount is being spent from the Account. PADEP's January 2012 "Primacy ABS Bond Forfeitures" report reveals that as of the end of calendar year 2011, nearly half of the 60 ABS Legacy Sites on the "Item 6 Discharge List 2011"<sup>2</sup> were awaiting initial construction, replacement, or reconstruction/rehabilitation of their mine drainage treatment systems. PADEP's report identifies fewer than ten of those sites as being slated for construction in 2012, which suggests that roughly one-third of the ABS Legacy Sites will still have inadequate treatment systems, and in some instances, entirely untreated discharges, at the end of the current construction season. Clearly, neither the Court of Appeals, when requiring the program amendment five years ago, see *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337 (3d Cir. 2007), nor OSM, in partially approving it, 75 Fed. Reg. 48526 (Aug. 10, 2010), contemplated that adequate treatment would be delayed so long.

<sup>2</sup> Again, the "Item 6 Discharge List" does not include Purco Coal Company's Watkiss and Spruell Mines, which were classified as "ABS Legacy Sites" within the last few weeks. See footnote 1, above.

Table 5, immediately below, sets the stage for next year.

**TABLE 5: Fiscal Year 2012-2013 (July 1, 2012 through June 30, 2013)**

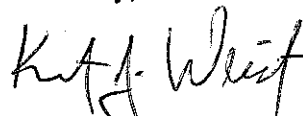
| Cost Categories | Projected Expenditures<br>FY 2011-2012<br>(2012 Draft Report) | Actual Expenditures<br>FY 2011-2012<br>(to be determined)                           | Actual Expenditures as<br>Percentage of<br>Projected Expenditures |
|-----------------|---|---|---|
| Personnel       | \$15,400.00   |   |   |
| Laboratory      | \$12,000.00   |   |   |
| Grants          | \$214,412.00  |   |   |
| Contracts       | \$568,680.00  |   |   |
| <b>TOTAL</b>    | <b>\$810,492.00</b>   |   |   |
|                 |   | vs. projected costs for<br>all ABS Legacy Sites of<br><b>\$1.6 million per year</b> |   |
|                 | <b>50.66%</b>   |   |   |

The figure of 50.66% at the bottom of the second column in Table 5 shows that even if PADEP – contrary to its track record – actually reaches its projected treatment expenditures at the ABS legacy Sites in FY 2012-2013, it still will be spending just slightly more than half of the estimated \$1.6 million per year total cost for recapitalization and operation and maintenance of treatment systems at ABS Legacy Sites.

In its final rule approving the reclamation fee adjustment mechanism in the 2008 ABS Program Amendment, OSM made clear that PADEP's progress toward completing the ABS Legacy Site treatment systems would be subject to review as part of OSM's reinvigorated state program oversight activities. *See* 75 Fed. Reg. at 48541 (col. 1-2). Largely because the actual expenditures from the Account have lagged so far behind the projections, however, for the fourth year in a row, no reclamation fee will be charged under 25 Pa. Code § 86.17(e) during calendar year 2013. PADEP's protracted failure to complete all of the ABS Legacy Site treatment systems required by the *Kempthorne* decision demands a more aggressive schedule from PADEP and more aggressive oversight by OSM, which must ensure that PADEP fulfills its duty to faithfully implement Pennsylvania's approved state regulatory program under the Surface Mining Control and Reclamation Act. *See* 30 C.F.R. § 733.11.

Thank you for your consideration of these comments. Please feel free to contact me at 717-214-7925 if you have any questions.

Sincerely,



Kurt J. Weist  
Senior Attorney

cc: Ben Owens, Director, Pittsburgh Field Division, OSM  
Andrew J. Jenkins, Assistant Counsel, Bureau of Regulatory Counsel, PADEP