

October 3, 2016

Submitted Via eComment System

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**Re: "Reclamation Fee Fiscal-Year Draft Report, 2016"
46 Pa. Bull. 5779 (Sept. 3, 2016)**

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

Dear Ms. Shirley:

On behalf of the six organizations listed above and their members, PennFuture submits these comments on the "Reclamation Fee Fiscal-Year Draft Report, 2016" (2016 Draft Report) prepared by the Pennsylvania Department of Environmental Protection (DEP).

Table 8, immediately below, is the latest in a series of similar tables appearing in comment letters submitted by our coalition over the last seven years. Specifically, it is an updated version of the same table that appeared on page 3 of our September 14, 2015 comment letter concerning DEP's draft report for Fiscal Year (FY) 2015-2016. The updated table below fills in the Actual Expenditures column with the data reported in the 2016 Draft Report, and adds the percentage figures appearing in the fourth column.

TABLE 8: Fiscal Year 2015-2016 (July 1, 2015 through June 30, 2016)

Cost Categories	Projected Expenditures FY 2015-2016 (2015 Final Report)	Actual Expenditures FY 2015-2016 (2016 Draft Report)	Actual Expenditures as Percentage of Projected Expenditures
Personnel	\$14,000.00	\$19,609.50	
Laboratory	\$12,000.00	\$852.57	
Grants	\$199,973.00	\$223,470.46	
Contracts	\$723,812.00	\$256,999.45	
Electricity		\$426.41	
TOTAL	\$949,785.00	\$501,358.39	52.8%
	59.4%	vs. projected costs for all ABS Legacy Sites of \$1.6 million per year	31.3%

The figure of 31.3% found at the end of Table 8 shows that the \$501,358.39 in actual expenditures from the Reclamation Fee O & M Trust Account during FY 2015-2016 was less than one-third the amount (\$1.6 million) that DEP's 2008 "ABS Program Amendment" estimated would be needed to cover the annual recapitalization and operation and maintenance costs for treatment systems at all ABS Legacy Sites.

The table immediately below presents the actual expenditures from the Reclamation Fee O & M Trust Account as reported by the Department in its seven annual reports.

Reclamation Fee O&M Trust Account	
Fiscal Year	Actual Expenditures
2008-2009	\$9,957.52
2009-2010	\$84,625.16
2010-2011	\$107,243.05
2011-2012	\$168,603.22
2012-2013	\$821,213.13
2013-2014	\$499,122.48
2014-2015	\$369,197.98
2015-2016	\$501,358.39

Table 9 at the top of the next page presents data from the "Financial Summary" at the end of the 2016 Draft Report. It projects that the expenditures from the Reclamation Fee O & M Trust Account, which were \$501,358.39 in FY 2015-2016, will nearly double during the current fiscal year, to a new high of \$980,499.00. That projection properly includes the cost of treating discharges from eight primacy sites formerly operated by Al Hamilton Contracting Company that are covered by a mine drainage treatment trust account established in 2003 (Al Hamilton Trust). The Al Hamilton Trust included 2.34 million tons of coal reserves that DEP expected to generate more than \$3 million in revenue for the trust. However, the expectation that the trust would become fully funded through the sale or leasing of the coal reserves was frustrated by the inability to market the reserves. As a result, the Al Hamilton Trust never became fully funded, and the eight primacy surface mines covered by the Al Hamilton Trust that are listed on page 5 of the 2016 Draft Report are properly considered "ABS Legacy Sites" as defined at 25 Pa. Code § 86.1. This conclusion is confirmed by the discussion of the "LCN Site" in OSM's September 17, 2015 final rule approving the October 1, 2010 amendment to Pennsylvania's approved state regulatory program under SMCRA. *See* 80 Fed. Reg. 55746, 55748-49 (Sept. 17, 2015).

The projected expenditures in Table 9 of \$980,499.00 during FY 2016-2017 reflect DEP's commitment to making progress on completing the installation of treatment systems at all ABS Legacy Sites. That figure, however, is only 61.3% of DEP's 2008 estimate of \$1.6M per year in treatment costs for the ABS Legacy Sites. Thus, even if DEP's 2008 estimate was conservative (high), the projection for FY 2016-2017 suggests that a considerable amount of treatment system installation work remains to be completed at ABS Legacy Sites.

TABLE 9: Fiscal Year 2016-2017 (July 1, 2016 through June 30, 2017)

Cost Categories	Projected Expenditures FY 2016-2017 (2016 Draft Report)	Actual Expenditures FY 2016-2017 (to be determined)	Actual Expenditures as Percentage of Projected Expenditures
Personnel	\$17,000.00		
Laboratory	\$10,000.00		
Grants	\$157,414.00		
Contracts	\$796,085.00		
TOTAL	\$980,499.00		
		vs. projected costs for all ABS Legacy Sites of \$1.6 million per year	
	61.3%		

Reclamation Fee Rate

Like last year's draft report, the 2016 Draft Report states that "DEP has determined that a reclamation fee amount of \$100 per acre is needed" for the upcoming calendar year. (2016 Draft Report, p. 7). That figure is based on an assumption that after falling steadily from 3,107 acres in calendar year 2013 to a projected 736 acres in 2016,¹ the number of newly-permitted acres of coal mining operations subject to the reclamation fee will nearly double to 1,500 acres in 2017. (2016 Draft Report, p. 3).

Without more, this optimistic acreage projection would be problematic. DEP appears to have adequately covered the risk that the acreage actually permitted in 2017 will fall short of the projection, however, by having "obtained the appropriate authorizations in the spend plan to transfer \$300,000 from LRFG premiums for fiscal year 2016-2017. This provides a contingency for unexpected expenses or if revenue falls short of projections. . . . Having this money available for transfer provides assurance that the Reclamation Fee O & M Trust Account will be able to be maintained above the required \$3,000,000 minimum balance." (2016 Draft Report, p. 4). If at least \$300,000 in additional funding is readily available,² it would appear to be adequate to cover the relevant contingencies for the upcoming fiscal year.

¹ This projection is simply a doubling of the 368 acres actually permitted during the first half of 2016. (2016 Draft Report, pp. 1, 3)

² DEP should clarify, however, as we assume, that this \$300,000 in available LRFG premiums, which is discussed in the "Projected Revenue" section of the 2016 Draft Report, is in addition to the authorized contingencies of \$50,000 for "unexpected grants" (*Id.*, p. 5), and \$50,000 for "unexpected contracts" (*Id.*, p. 6), which are discussed in the "Projected Expenditures" section. *See also id.*, p. 7 (DEP "did not include the authorized contingency of \$100,000 for contracts and grants in the calculation" of the reclamation fee amount.).

2018 Projection

DEP's preliminary estimate is that a reclamation fee of \$300 per acre will be needed in calendar year 2018 to generate the \$420,000 needed to maintain the required minimum balance of \$3 million in the Reclamation Fee O & M Trust Account during FY 2016-2017. (2016 Draft Report, p. 8). The similar increase DEP projected last year was avoided by the fact that "the final budget for FY 2016-2017 included \$500,000 in the Environmental Program Management appropriation to be transferred to the Reclamation Fee O & M Trust Account." (2016 Draft Report, p. 4). Like the 2015 Final Report, the 2016 Draft Report notes that an appropriation and transfer of at least another \$500,000 in gross receipts tax revenue could fully offset the revenue otherwise needed from the reclamation fee in calendar year 2018. Likewise echoing the 2015 Final Report, the 2016 Draft Report asserts that "[t]he need for supplemental funding to assure the long-term operations for the ABS Legacy Sites warrants the maximum appropriation of \$2,000,000 from the Gross Receipts Tax." (2016 Draft Report, p. 8). See 52 P.S. § 1396.19b(b)(7) (authorizing up to \$2 million collected from the gross receipts tax on sales of electric energy to be appropriated each fiscal year, through June 30, 2039, for transfer to the Reclamation Fee O & M Trust Account).

In light of the sharp decline in the number of permitted acres subject to the reclamation fee, DEP is correct to highlight the need for additional sources of funding going forward. No matter which specific sources of revenue are relied upon in 2018 and beyond, however, DEP's *immediate* imperative must be to provide adequate treatment for *all* discharges from the ABS Legacy Sites by completing the installation or rehabilitation of the necessary treatment systems, which is one of the prerequisites to finding that the ABS Legacy Sites Trust Account is "actuarially sound." See 25 Pa. Code §§ 86.17(e)(6)(ii), 86.187(a)(2)(iii)(B).

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: (by electronic mail only)
Ben Owens, Director, Pittsburgh Field Division, OSM