

Reclamation Fee Fiscal-year Report 2009

The regulations at 25 Pa. Code 86.17(e)(2) require the Department to prepare a fiscal-year report containing a financial analysis of the revenue and expenditures of the Reclamation Fee O & M Trust Account.

Pursuant to 25 Pa. Code 86.17(e)(4), the following factors are to be used to determine the amount of the Reclamation Fee:

- Current Balance in the Reclamation Fee O & M Trust Account
- Previous year revenue
 - Reclamation Fee
 - Interest
 - Civil Penalties
 - Other sources
- Previous year O & M Costs
- Projected number of acres subject to the Reclamation Fee
- Projected Revenue
 - Reclamation Fee
 - Interest
 - Civil Penalties
 - Other sources
- Projected expenditures

The regulation was effective August 30, 2008. Therefore, the revenue from coal civil penalties and interest beginning with September 2008 is to be transferred to the Reclamation Fee O & M Trust Account.

Current Balance

The balance in the Reclamation Fee O & M Trust Account as of June 30, 2009 is \$4,069,615.16. Note: this balance does not include the interest accrued since September 2008, to be deposited after the end of the fiscal year (estimated to be \$35,000), or the civil penalty amount (estimated to be \$240,000) to be transferred after the close of the fiscal year.

PREVIOUS YEAR REVENUE

Reclamation Fee Revenue July 2008 through June 2009

Jul-08	\$11,029.00
Aug-08	\$122,054.22
Sep-08	\$8,897.00
Oct-08	\$29,883.00
Nov-08	\$74,434.00
Dec-08	\$18,120.00

Final Report 2009

Jan-09	\$16,511.00
Feb-09	\$46,568.96
Mar-09	\$1,830.00
Apr-09	\$5,870.00
May-09	\$26,540.00
Jun-09	\$18,889.00
Total	\$380,626.18

Note: The May revenue does not match the Revenue Report because of a transfer of \$2,550 in May from the old account to the new one.

Interest

Interest will be calculated and credited to the Reclamation Fee O & M Trust Account from September 2008 through June 30, 2009.

Civil Penalties

Civil penalties (less the 5% due to the Environmental Education Fund) will be transferred into the Reclamation Fee O & M Trust Account each year. The total revenue from civil penalties from September 2008 through June 2009 is listed below:

Sep-08	\$27,722.00
Oct-08	\$6,215.00
Nov-08	\$34,975.00
Dec-08	\$12,235.00
Jan-09	\$10,325.00
Feb-09	\$31,921.00
Mar-09	\$21,600.00
Apr-09	\$16,835.00
May-09	\$25,357.50
Jun-09	\$21,140.00
Total	\$269,940.50

The net amount to transfer to the Reclamation Fee O & M Trust Account is \$256,443.48. This is 95% of the collected civil penalties. The remaining 5% is required by statute to be transferred to the Environmental Education Fund.

Other Sources

There was no income from other sources during fiscal year 2008-2009.

O & M Costs

O & M costs were incurred in four categories, personnel costs, lab costs, grants and contracts.

Personnel Costs

Final Report 2009

The total debit from the Reclamation Fee O & M Trust Account from September 2008 through June 2009 is \$5,675.60. This amount is for labor for the monitoring that is needed for several ABS Primacy BF sites where it is more efficient for DEP to do this work. Note that this does not include the costs for arranging and managing contracts or grants. This activity is funded through the General Operations Account along with the other (non-ABS) Primacy BF work.

Lab Costs

The total debit from the Reclamation Fee O & M Trust account from September 2008 through June 2009 is \$4,281.92. This is the cost for the analysis of the samples collected by the Department while monitoring the ABS Primacy BF sites.

Grants

Grants were awarded in the amount of \$0 through June 30, 2009.

Contracts

Contract costs through June 30, 2009 totaled \$0.

Projected number of acres subject to the Reclamation Fee

The number of acres for which the reclamation fee was collected for fiscal year 2008-2009 was 3,800. This exceeded previous year's numbers by about 50%. The five-year average for the number of acres is 2,300. This is the projected number of acres subject to the reclamation fee for 2010.

PROJECTED REVENUE

Reclamation Fee

The reclamation fee from July 1, 2009 through the end of the calendar year is expected to produce about \$50,000 in additional revenue. This estimate is lower than the recent trend because activity is expected to wane. This figure also takes into account an anticipated deferral of finalizing applications until 2010 by some applicants in order to avoid payment of the reclamation fee.

Interest

Due to the recent turbulence in interest rates and returns from the state treasury a rate of 1% was used to project the revenue from interest for the upcoming year. This results in about \$40,000 in income for the 2009-2010 fiscal year.

Civil Penalties

For purposes of the projection, it is estimated that about \$200,000 will be available from civil penalty revenue for the 2009-2010 fiscal year.

Other Revenue

There is no other revenue stream in place. However, it is possible that legislative action will allow premium payments from Land Reclamation Financial Guarantee (Conversion Assistance) to be deposited into the Reclamation Fee O & M Account. For the purpose of the projection, no other revenue is anticipated.

Projected Expenditures

The total projected expenditures for fiscal year 2009-2010, as explained in further detail below is \$762,000.

Personnel Costs

The total projected debit for DEP personnel costs from the Reclamation Fee O & M Trust Account from July 2009 through June 2010 is \$16,000. The amount is for labor for the monitoring that the DEP is doing for the ABS Primacy BF sites.

Lab Costs

The total projected debit from the Reclamation Fee O & M Trust account from July 2009 through June 2010 is \$6000. This is the expected cost for the analysis of the samples collected by the Department while monitoring the ABS Primacy BF sites.

Grants

Grants are expected to be awarded in the amount of \$500,200 from July 2009 through June 2010. These grants are for the O & M for the following sites:

C & K Coal Co. (Clean Streams Foundation)	Multiple sites*	\$310,000
REM Coal Co Inc. (Headwaters Charitable Trust)	Orcutt/Smal Mine	\$8,200
Ed Hanslovan Coal Co, Inc	Keating	\$182,000

*Sites eligible for coverage under the C & K Grant include: Bell Woodcock (Permit No. 11783035), Stroud (Permit No. 11823002), Cambria 51 (Permit No. 11850106), Snyder-Sertik (Permit No. 10860118), Hill Estate (Permit No. 16713004), Smith-Heasley (Permit No. 16803030), Tremba-Horner (Permit No. 16830114), Kriebel (Permit No. 16840103), Racic (Permit No. 61783001)

Contracts

Contract costs from July 2009 through June 2010 are expected to total \$240,000. The sites covered by these contracts included the following:

C & K Coal Co.	Cambria 51 Mine	\$115,000
C & K Coal Co.	Stroud	\$9,000

Final Report 2009

K & J Coal Co. Inc.	Westover	\$13,000
K & J Coal Co. Inc.	Gaber Brown	\$8,000
Acme Drilling	Broom Strip	\$12,000
Windber High Std. Coal Co.	Brant Strip	\$12,000
H & H Coal Co.	James E Long	\$7,000
Delta Mining Inc.	Maust Mine	\$4,000
Met Co Mining & Minerals Inc.	Ankey Mine	\$4,000
Big J Mining Inc.	Sorber Mine	\$50,000
PA Energy Corp.	Horse Hill Strip	\$6,000

Note: The C & K Coal Co sites may be covered by either the grant listed in the previous section or under contract for O & M. The amount is included under both the grant and contract section to provide for contingencies (e.g. unanticipated projects).

Reclamation Fee Calculation

Based on the existing balance in the Reclamation Fee O & M Account (\$4,071,031.03), the untransferred civil penalties (\$256,443.48) and interest due (~\$25,000), the projected revenue (\$290,000) and expenses (\$762,200), the Department has determined that the reclamation fee amount can be reduced to \$0 for calendar year 2010. This will maintain the balance in the Reclamation Fee O & M Account of \$3 M as required under 25 Pa. Code 86.17(e)(3).

Also, the total of projected expenses through the end of calendar year 2010 (About \$1 M), when the next opportunity to generate revenue from the reclamation fee will arise, is less than the "cushion" available in the Reclamation Fee O & M Trust Account.

ABS Legacy Sites Trust Account

The ABS Legacy Sites Trust Account was established by regulation (86.187(a)(2)(i)), effective August 30, 2008. As of June 30, 2009, the balance in the ABS Legacy Sites Trust Account was \$5,020,003.58.

Report Administrative Summary

On July 23, 2009, the draft report was sent to the members of the Mining and Reclamation Advisory Board (MRAB) for their review and comment. The draft report was also posted on the Department's website. On August 15, 2009, a notice was published in the *PA Bulletin* announcing the availability of the draft report for public comment. This notice indicated that comments would be accepted through October 23, 2009. On October 22, 2009, the draft report was reviewed at the meeting of the MRAB. On October 23, comments were received from Citizens for Pennsylvania's Future (PennFuture) on behalf of the Pennsylvania Federation of Sportsmen's Clubs,

Final Report 2009

Pennsylvania Chapter Sierra Club, Pennsylvania Trout, Inc., Mountain Watershed Association, Inc., the Center for Coalfield Justice, and PennFuture.

A copy of the comment letter is included with this report.

Comments

October 23, 2009



Citizens for Pennsylvania's Future
610 North Third Street
Harrisburg, PA 17101-1113
P 717.214.7920 / 800.321.7775
F 717.214.7927
info@pennfuture.org
www.pennfuture.org

RECEIVED AND
BUR. OF MINING AND
RECLAMATION
09 OCT 26 PM 4:08
DEPT. OF ENVIRONMENTAL
PROTECTION

Sent Via Electronic Mail: wallen@state.pa.us
(Hard Copy to Follow)

Mr. William S. Allen, Jr.
Pennsylvania Department of Environmental Protection
Bureau of Mining and Reclamation
P.O. Box 8461
Harrisburg, PA 17105-8461

**Re: Draft "Reclamation Fee Fiscal-year Report, July 2009"
39 Pa. Bull. 4954 (August 15, 2009)**

**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**

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, July 2009" (Draft Report) prepared by the Pennsylvania Department of Environmental Protection (PADEP). The Draft Report provides information on the current status and of the "Reclamation Fee O & M Trust Account," projections of the account's revenues and expenditures for the 2009-2010 fiscal year (July 1, 2009 through June 30, 2010), and an explanation of the projected reclamation fee for calendar year 2010.

- 1. The reclamation fee must remain at \$100 per acre until OSM approves an amendment to 25 Pa. Code § 86.17(e) as part of the approved state regulatory program under SMCRA.**

The Draft Report projects a reclamation fee of \$0 per acre for calendar year 2010. (Draft Report, p. 5) The approved Pennsylvania regulatory program under the federal Surface Mining Control and Reclamation Act (SMCRA), however, specifies a fixed rate of \$100 per acre for the reclamation fee. Unless and until the federal Office of Surface Mining Reclamation and Enforcement (OSM) approves an amendment to the Pennsylvania regulatory program, PADEP must continue to collect the reclamation fee at the OSM-approved rate of \$100 per acre.

OSM's regulations provide that "[s]tates with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act, this chapter [30 C.F.R. Ch. VII (Parts 700-955)] and the provisions of the approved State program." 30 C.F.R. § 733.11. OSM's regulations make clear that a state may not implement changes to its approved state regulatory program under SMCRA until the Director of OSM approves them as a program amendment:

(g) Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the Director as an amendment. No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.

30 C.F.R. § 732.17(g). In a recent ruling on a program amendment proposed by the State of Wyoming, OSM explained that "[c]onsistent with the state program amendment process outlined at 30 CFR 732.17, an alternative method of financial assurance (i.e., an alternate bonding system) must be approved by OSM as part of a state program before it can be implemented." 74 Fed. Reg. 52677, 52679 (col. 1) (October 14, 2009). See also id. at 52679 (col. 1-2), 52684 (col. 2) (deferring action on portion of state rule defining "bond" to include alternative methods of financial assurance and explaining that "if and when Wyoming submits a specific alternative method of financial assurance (i.e., an alternate bonding system) to us, we will review that submittal as a proposed state program amendment to ensure that it meets the criteria in 30 CFR 800.11(e)") (emphasis added).

OSM last approved an amendment to Pennsylvania's reclamation fee regulation, 25 Pa. Code § 86.17(e), in 1993, when the fixed rate of the reclamation fee was increased from \$50 per acre to \$100 per acre. Consistent with 30 C.F.R. § 732.17(g), the Pennsylvania rule increasing the fee rate from \$50 per acre to \$100 per acre did not take effect until OSM had approved the amendment as part of the state regulatory program under SMCRA. See 58 Fed. Reg. 36139, 36141 (July 6, 1993) (OSM final rule approving reclamation fee increase as amendment to Pennsylvania regulatory program under SMCRA); 32 Pa. Bull. 3685, 3686 (August 7, 1993) (putting into effect amendment to § 86.17(e) increasing reclamation fee from \$50 per acre to \$100 per acre). As approved by OSM in 1993, § 86.17(e) provides:

(e) In addition to the bond established under §§ 86.145, 86.149 and 86.150 (relating to Department responsibilities; determination of bond amount; and minimum amount), there is a \$100 per acre reclamation fee for surface mining activities except for the surface effects of underground mining. This reclamation fee may be paid as acreage within an approved surface mining permit is authorized for mining. The reclamation fee will be deposited in the Surface Mining Conservation and Reclamation Fund as a supplement to forfeited bonds. The reclamation fee shall only be used for reclaiming mining operations which have defaulted on their obligation to reclaim.

32 Pa. Bull. at 3687 (emphasis added).

The "ABS Program Amendment" that Pennsylvania submitted to OSM on August 1, 2008 proposes to add several new subsections to 25 Pa. Code § 86.17(e), including three provisions – subsections (e)(3) through (e)(5) – that would grant PADEP the authority to adjust the rate of the reclamation fee each calendar year beginning in 2010. See 74 Fed. Reg. 2005, 2008-09 (January 14, 2009). To date, however, OSM has taken no action on the ABS Program Amendment submission. Under 30 C.F.R. § 733.11, PADEP must continue to implement the provisions of the state regulatory program under SMCRA as approved by the Secretary of the Interior and OSM. Conversely, PADEP may not begin to implement proposed revisions to the approved state program unless and until they are approved through the program amendment process under 30 C.F.R. § 732.17. See 30 C.F.R. § 732.17(g); 74 Fed. Reg. at 52679 (col. 1) (quoted above). Thus, PADEP must continue to collect the fixed-rate, \$100 per acre reclamation fee in the approved version of § 86.17(e) until the ABS Program Amendment (or another program amendment deleting or revising § 86.17(e)) is approved by OSM and takes effect pursuant to 30 C.F.R. § 732.17(g).¹

2. PADEP must use the money it failed to spend on treatment in fiscal year 2008-2009 to expedite the completion of treatment systems at all ABS Legacy Sites.

Both the August 1, 2008 ABS Program Amendment and the July 20, 2009 Draft Report estimate that when treatment systems are installed at all of the ABS Legacy Sites, the total operation and maintenance (O&M) and recapitalization costs will be about \$1.35 million per year. The ABS Program Amendment, which generally uses data available for Fiscal Year 2007-2008 (ending June 30, 2008), states that "[t]he Department expects to spend approximately \$700,000 for O&M and recapitalization costs [at ABS Legacy Sites] next year," presumably

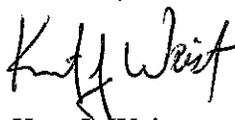
¹ Similarly, as provided in the current, OSM-approved version 25 Pa. Code § 86.17(e) quoted on the preceding page of this letter, PADEP must deposit the reclamation fees it collects into the reclamation fee account in the Pennsylvania Surface Mining Conservation and Reclamation Fund (SMCR Fund) rather than the Reclamation Fee O&M Trust Account. The regulations that would create the Reclamation Fee O&M Trust Account and the ABS Legacy Sites Trust Account are part of the ABS Program Amendment submission, and thus are not part of the approved Pennsylvania regulatory program under SMCRA. As a result, PADEP had no authority to transfer the funds in the SMCR Fund's reclamation fee account to the Reclamation Fee O&M Trust Account. Sections 8 and 9.B.2 of our coalition's February 27, 2009 comment letter to OSM on the ABS Program Amendment, a copy of which was sent to PADEP, provide additional reasons why the money in the SMCR Fund's reclamation fee account should have remained in that account, including the fact that Reclamation Fee O&M Trust Account cannot be used to cover the enormous, unguaranteed land reclamation liabilities at the Lehigh Coal and Navigation mine and another open pit anthracite mine. In accordance with 30 C.F.R. §§ 732.17(g), 733.11, until OSM acts on the pending ABS Program Amendment, OSM should require Pennsylvania to reopen the SMCR Fund's reclamation fee account and return to it the money transferred to the Reclamation Fee O&M Trust Account in March of this year. This restitution of the funds to the only OSM-approved account would not adversely affect the treatment of mine drainage at ABS Legacy Sites, because PADEP may use the money in the SCMR Fund's reclamation fee account for the purposes of both mine drainage treatment and land reclamation at ABS bond forfeiture sites.

meaning Fiscal Year 2008-2009. The Draft Report, however, shows that the actual expenditures for the ABS Legacy Sites during Fiscal Year 2008-2009 were only about \$10,000, or 98.6% below the \$700,000 estimate presented in the ABS Program Amendment. The Draft Report now projects expenditures of \$762,000 at the ABS Legacy Sites during Fiscal Year 2009-2010, which suggests that the completion of treatment systems at ABS Legacy Sites has fallen nearly a year behind schedule.

In essence, the Reclamation Fee O&M Trust Account was able to “save” \$690,000 during Fiscal Year 2009-2010 that it expected to spend, so it is not surprising that, notwithstanding the recent and severe downturn in the economy, the account contains more money than expected. PADEP has explained that the miniscule expenditures during Fiscal year 2008-2009 (and thus the “savings” realized by the Reclamation Fee O&M Trust Account) resulted principally from administrative delays associated with the public contracting process. These delays undoubtedly imposed costs on others, whether in the form of missing or inadequate treatment, or in the form of volunteers doing work that should have been provided by the Reclamation Fee O&M Trust Account. (That is to say, the “savings” to the Reclamation Fee O&M Trust Account were not free. They represent costs that were improperly externalized.) No matter what the reason for the unexpected windfall to the Reclamation Fee O&M Account, however, PADEP should not “bank” the Fiscal Year 2008-2009 “savings” and pass them along to the mining industry by eliminating the reclamation fee for calendar year 2010, but instead should use the “extra” \$690,000 by spending it to expedite the completion of the treatment systems at all ABS Legacy Sites.

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: George Rieger, OSM (by electronic mail and first class mail)