

## Reclamation Fee Fiscal-year Report 2010-2011

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.

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's revenue
  - Reclamation Fee
  - Interest
  - Civil Penalties
  - Other sources
- Previous year's O & M Costs
- Projected number of acres subject to the Reclamation Fee
- Projected Revenue
  - Reclamation Fee
  - Interest
  - Civil Penalties
  - Other sources
- Projected expenditures

### CURRENT BALANCE

The balance in the Reclamation Fee O & M Trust Account as of June 30, 2011 was \$3,669,287.26. This balance does not include civil penalties collected during FY 2010-2011.

### PREVIOUS YEAR REVENUE

The Reclamation Fee for the FY 2010-2011 was \$0. Therefore there was no revenue from this source.

### **Interest**

Interest was credited to the Reclamation Fee O & M Trust Account for FY 2010-2011 in the amount of -\$21,738.46. This negative total was the result of a debit made in February 2011 of \$32,510.75 for excess interest credited in FY 2009-2010. For May 2009, \$20,537.11 was credited, while the actual interest earned was \$2,053.71. For June 2009, \$15,585.94 was credited, while the actual interest earned was \$1,558.59. The actual interest earned on the principal in the Reclamation Fee O & M Trust Account for FY 2010-2011 totaled \$10,772.29. Combining this income with the May and June adjustments results in the net total of -\$21,738.46.

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### 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 for FY 2010-2011 is listed below:

Month	Coal Civil Penalties
Jul-10	\$22,188.00
Aug-10	\$18,450.00
Sep-10	\$71,771.00
Oct-10	\$11,645.00
Nov-10	\$11,105.00
Dec-10	\$43,560.00
Jan-11	\$27,200.00
Feb-11	\$7,453.00
Mar-11	\$42,743.50
Apr-11	\$10,340.00
May-11	\$17,880.00
Jun-11	\$12,719.25
<b>Total</b>	<b>\$297,054.75</b>

The net amount to be transferred to the Reclamation Fee O & M Trust Account is \$282,202.01. 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 FY 2010-2011.

### O & M COSTS FOR FY 2010-2011

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

### Personnel Costs

The total cost to the Reclamation Fee O & M Trust Account for personnel for FY 2010-2011 is \$14,260.25. This is for labor for the monitoring that is needed for several ABS (Alternate Bonding System) Primacy Bond Forfeiture 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 Bond Forfeiture work.

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### **Lab Costs**

The total cost to the Reclamation Fee O & M Trust account for the samples collected at the ABS BF sites for FY 2010-2011 is \$609.28. This is the cost for the analysis of the samples collected and analyzed by DEP for monitoring the ABS Primacy BF sites.

### **Grants**

Grants were awarded in the amount of \$26,225.46 during FY 2010-2011. These were for the REM Orcutt-Smail and the C & K Sites.

### **Contracts**

Contract costs for operation and maintenance of the existing ABS treatment facilities for FY 2010-2011 totaled \$66,148.06.

### **PROJECTED NUMBER OF ACRES SUBJECT TO THE RECLAMATION FEE**

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 2012.

### **PROJECTED REVENUE FY 2011-2012**

#### **Reclamation Fee**

The projected revenue from the reclamation fee is \$0.

#### **Interest**

Due to the recent turbulence in interest rates and returns from the state treasury, the rounded off interest from the previous fiscal year was used to project the revenue from interest for the upcoming year. This results in about \$10,000 in income from interest for the FY 2011-2012.

#### **Civil Penalties**

For purposes of the projection, it is estimated that about \$250,000 will be available from civil penalty revenue for the FY 2011-2012.

#### **Other Revenue**

There is no other revenue stream in place. For the purpose of the projection, no other revenue is anticipated.

**PROJECTED EXPENDITURES FOR FY 2011-2012**

The total projected expenditures for FY 2011-2012, as explained in further detail below, is \$581,872.

**Personnel Costs**

The total projected expenditures for DEP personnel costs from the Reclamation Fee O & M Trust Account for FY 2011-2012 is \$15,000. The amount is for labor for the monitoring that the DEP is doing for the ABS Primacy BF sites.

**Lab Costs**

The total projected laboratory-related expenditures from the Reclamation Fee O & M Trust account for FY2011-2012 is \$6,000. This is the expected cost for the analysis of the samples collected and analyzed by the DEP while monitoring the ABS Primacy BF sites.

**Grants**

Grants are expected to be awarded in the amount of \$91,500 during FY 2011-2012. These grants are for the operation and maintenance of the following C & K sites where the Clean Streams Foundation is the trustee:

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 for FY 2011-2012 are expected to total \$490,372. The sites covered by these contracts include the following:

<b>Company</b>	<b>Site Name</b>	<b>Contract Amount</b>
K & J Coal Co. Inc.	Westover	\$21,380
K & J Coal Co. Inc.	Gaber Brown	\$17,440
Acme Drilling	Broom Strip	\$20,440
Windber High Std. Coal Co.	Brant Strip	\$22,822
H & H Coal Co.	James E Long	\$16,442
Delta Mining Inc.	Maust Mine	\$15,908
Met Co Mining & Minerals Inc.	Ankey Mine	\$9,706
Big J Mining Inc.	Sorber Mine	\$22,000
PA Energy Corp.	Horse Hill Strip	\$26,272
D & E Construction	Moore	\$21,500
Delta Mining Inc	Bashore	\$15,000
American Development	Job 33	\$15,000
Delta Mining Inc	Hay 2	\$23,162

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L & L Mining	Berkey	\$25,800
L & B Coal Co	No 5	\$15,000
Gurosik Coal Co	King	\$1,250
H & D	Merola	\$1,250
Additional Possible Contracts		\$200,000

Note: The C & K sites may be covered by either the grant listed in the previous section or under contract for O & M. Consequently, the operation and maintenance costs are included under both the grant and contract section where it is included in the Additional Possible Contracts.

### Financial Summary

Income	FY 2010-2011	FY 2011-2012 (Projected)
Interest	-\$21,738.46	\$10,000
Reclamation Fee	\$0	\$0
Civil Penalties	\$282,202.01	\$250,000
Other	\$0	\$0
Total	\$260,463.55	\$260,000

Expenses	FY 2010-2011	FY 2011-2012(Projected)
DEP Lab Costs	\$609.28	\$6,000
DEP Personnel	\$14,260.25	\$15,000
Contracts	\$65,538.78	\$490,372
Grants	\$26,225.46	\$91,500
Total	\$106,633.77	\$602,872

In addition, upon the recommendation of the Mining and Reclamation Advisory Board (MRAB), \$300,000 was transferred from the Reclamation Fee O & M Trust Account to the ABS Legacy Account during FY 2010-2011.

### Reclamation Fee Calculation

Based on the existing balance in the Reclamation Fee O & M Account (\$3,669,287.26), the un-transferred civil penalties (\$282,202.01), the projected revenue (\$260,000) and expenses (\$602,872), the Department has determined that the reclamation fee amount can remain at \$0 for calendar year 2012. This will maintain the balance in the Reclamation Fee O & M Account of \$3,000,000 as required under 25 Pa. Code § 86.17(e)(3).

Also, the total of additional projected expenses through the end of FY 2012-2013 (about \$950,000) is less than the "cushion" available in the Reclamation Fee O & M Trust Account. It is unlikely that this cushion will be eliminated prior to the next opportunity to generate revenue from the reclamation fee at the beginning of 2013.

## ABS Legacy Sites Trust Account

The ABS Legacy Sites Trust Account was established by regulation at 25 Pa. Code § 86.187(a)(2)(i), effective August 30, 2008. As of June 30, 2010, the balance in the ABS Legacy Sites Trust Account was \$5,363,085.16. The June 30, 2011 balance was \$5,660,006.82. This balance reflects the debit during the FY 2010-2011 of interest (\$3,078.34), and the \$300,000 excess funds transfer from the Reclamation Fee O & M trust account.

The negative interest total was the result of a debit made in February 2011 of \$17,640.73 for excess interest credited in FY 2009-2010. For May 2009, \$50.67 was credited, while the actual interest earned was \$5.07. For June 2009, \$19,550.14 was credited, while the actual interest earned was \$1,955.01. The account earned interest in the amount of \$14,562.39, with the debit of \$17,640.73 resulting in the net interest of -\$3,078.34 for the fiscal year.

### Report Process

On July 28, 2011, the draft report was posted on the Department's website.

On August 13, 2011, notice of availability of the draft report was published in the *Pa. Bulletin*.

On August 15, 2011, the Department notified the members of the MRAB that the draft report was posted on the website.

By a letter dated September 12, 2011, comments were received from PennFuture. These comments are incorporated in this report as an attachment.

On October 27, 2011, the draft report was reviewed at the MRAB meeting.

September 12, 2011



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**Re: Draft "Reclamation Fee Fiscal-year Report, 2010-2011"  
41 Pa. Bull. 4501 (August 13, 2011)**

**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, 2010-2011" (Draft Report) prepared by the Pennsylvania Department of Environmental Protection (PADEP). This letter reiterates, with updated data, Comment No. 2 in the same parties' October 23, 2009 comment letter addressing the draft of the same report for Fiscal Year (FY) 2008-2009.

**Comment: PADEP must expedite the completion of treatment systems at all ABS Legacy Sites.**

For the third year in a row, the Draft Report reveals that PADEP's expenditures on mine drainage treatment at "ABS Legacy Sites"<sup>1</sup> 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. As shown in Tables 1-3, immediately below, PADEP's actual expenditures never have exceeded 30% of its year-ahead projected expenditures, and never have exceeded 7% of the \$1.6 million per year

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<sup>1</sup> "ABS Legacy Sites" are mines with post-mining discharges that were bonded under Pennsylvania's Alternative (or "Alternate") Bonding System and suffered bond forfeiture without having posted full-cost treatment guarantees under the Conventional Bonding System. See 25 Pa. Code § 86.1.

estimate PADEP provided in the August 1, 2008 "ABS Program Amendment" for the total costs of treating all discharges at the then-existing ABS Legacy Sites.<sup>2</sup>

**TABLE 1: Fiscal Year 2008-2009 (July 1, 2008 through June 30, 2009)**

Cost Categories	Projected Expenditures FY 2008-2009 (2008 ABS Program Amendment) <sup>3</sup>	Actual Expenditures FY 2008-2009 (2009 Report)	Actual Expenditures as Percentage of Projected Expenditures
Personnel		\$5,675.60	
Laboratory		\$4,281.92	
Grants		\$0.00	
Contracts		\$0.00	
<b>TOTAL</b>	<b>\$700,000.00</b>	<b>\$9,957.52</b>	<b>1.42%</b>
		vs. projected costs for all ABS Legacy Sites of <b>\$1.6 million per year</b>	<b>0.62%</b>

**TABLE 2: Fiscal Year 2009-2010 (July 1, 2009 through June 30, 2010)**

Cost Categories	Projected Expenditures FY 2009-2010 (2009 Report)	Actual Expenditures FY 2009-2010 (2010 Report)	Actual Expenditures as Percentage of Projected Expenditures
Personnel	\$16,000.00	\$4,412.35	
Laboratory	\$6,000.00	\$1,860.59	
Grants	\$500,200.00	\$64,146.22	
Contracts	\$240,000.00	\$14,206.00	
<b>TOTAL</b>	<b>\$762,200.00</b>	<b>\$84,625.16</b>	<b>11.10%</b>
		vs. projected costs for all ABS Legacy Sites of <b>\$1.6 million per year</b>	<b>5.29%</b>

<sup>2</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 spreadsheet titled "RecalcDec10" posted on PADEP's "Primacy ABS Bond Forfeiture Update January 2011" web page, which list a total of \$1,347,999 in the column titled "Annual O&M costs - Dec. 2010," and provides a figure of \$5,194,330 for the non-annualized, total present value of the recapitalization costs for the treatment systems at the ABS Legacy Sites. The corresponding figures in the 2008 ABS Program Amendment submission were \$1,351,206 (annual O&M) and \$5,610,224 (recapitalization). (ABS Program Amendment, App. 10, p. 4)

<sup>3</sup> "The Department expects to spend approximately \$700,000 for O&M and recapitalization costs next year." (ABS Program Amendment (8/1/2008), p. 42)

**TABLE 3: Fiscal Year 2010-2011 (July 1, 2010 through June 30, 2011)**

Cost Categories	Projected Expenditures FY 2010-2011 (2010 Report)	Actual Expenditures FY 2010-2011 (2011 Report)	Actual Expenditures as Percentage of Projected Expenditures
Personnel	\$15,000.00	\$14,260.25	
Laboratory	\$6,000.00	\$609.28	
Grants	\$125,000.00	\$26,225.46	
Contracts	\$220,500.00	\$66,148.06	
<b>TOTAL</b>	<b>\$366,500.00</b>	<b>\$107,243.05</b>	<b>29.26%</b>
		vs. projected costs for all ABS Legacy Sites of \$1.6 million per year	<b>6.70%</b>

The three preceding tables demonstrate that PADEP has consistently fallen short of its own one-year projections of upcoming expenditures by huge margins. Even after cutting its projection by more than half, from \$762,200 for FY 2009-2010 to \$366,500 for FY 2010-2011, PADEP did not get one-third of the way to its anticipated annual expenditures on discharge treatment at the ABS Legacy Sites. More troubling, the 6.70% figure in the last cell of Table 3 shows that four years after the decision in *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337 (3d Cir. 2007) and three years after the submission of the ABS Program Amendment, PADEP is spending a mere one fifteenth of the \$1.6 million per year it estimated as the cost of treating all discharges at the 101 ABS Legacy Sites listed as of June 30, 2008. In turn, the figures suggest that PADEP currently is providing treatment for a similarly small fraction of the mine drainage flowing from the ABS Legacy Sites – obviously not the result the *Kempthorne* Court expected.

Table 4, immediately below, uses figures derived from page 4 of the 2011 Draft Report. The total projected expenditures of \$602,872 shown in Table 4 exceeds the Draft Report's total figure of \$581,872 by exactly \$21,000, so it appears that PADEP inadvertently omitted the first two cost categories – Personnel and Laboratory – when calculating its total figure.

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

Cost Categories	Projected Expenditures FY 2011-2012 (2011 Draft Report)	Actual Expenditures FY 2011-2012 (to be determined)	Actual Expenditures as Percentage of Projected Expenditures
Personnel	\$15,000.00		
Laboratory	\$6,000.00		
Grants	\$91,500.00		
Contracts	\$490,372.00		
<b>TOTAL</b>	<b>\$602,872.00</b>		
	<b>37.68%</b>	vs. projected costs for all ABS Legacy Sites of \$1.6 million per year	

The figure of 37.68% at the bottom of the second column in Table 4 shows that even if PADEP – contrary to the track record revealed by Tables 1-3 – actually reaches its projected treatment expenditures at the ABS legacy Sites in FY 2011-2012, it still will be spending only three eighths of \$1.6 million per year estimated total cost for recapitalization and operation and maintenance at ABS Legacy Sites.

After highlighting the \$690,000 difference between PADEP's projected and actual expenditures shown in Table 1, above, our October 23, 2009 comments on the July 2009 draft of the reclamation fee report encouraged PADEP to catch up by using the \$690,000 in "savings" to expedite the completion of treatment systems at the relevant mine sites:

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.

(October 23, 2009 comment letter, p. 4) (emphasis in original)

Two years later, PADEP has revealed that it has completed treatment systems at only about one-third of the ABS Legacy Sites. It explains that while more systems have been designed, the mining program staff's lack of familiarity with the public contracting process has delayed construction of the needed treatment systems. PADEP also asserts that things are improving on this score, which is consistent with its projection that the actual treatment expenditures of \$107,243.05 in FY 2010-2011 will increase by more than 450% to \$602,872 in FY 2011-2012. Tables 1-3, however, suggest that projection should be taken with more than a grain of salt.

It often takes a hard deadline to get the government to act. That is why our coalition requested that OSM establish an enforceable, overall deadline for the construction of treatment systems at all of the ABS Legacy Sites. Although OSM rejected that specific request in its final rule on the 2008 ABS Program Amendment, it made clear that PADEP's progress toward

completing those treatment systems would be subject to review as part of OSM's rejuvenated state program oversight activities. See 75 Fed. Reg. 48526, 48541 (col. 1-2) (Aug. 10, 2010).

The pattern of lagging behind expectations revealed by the tables presented above demands both heightened efforts by PADEP and oversight by OSM. This is the third consecutive calendar year that no reclamation fee will be charged under 25 Pa. Code § 86.17(e), and the fourth consecutive fiscal year since the *Kemphorne* decision during which (judging by the estimate of \$1.6 million per year) less than half of the mine drainage from ABS Legacy Sites will receive proper treatment. To abide by the *Kemphorne* decision, and to fulfill 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, PADEP must meet or exceed its expenditure projection for FY 2011-2012 while substantially completing the installation of treatment systems at the remaining two-thirds of the 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: Ben Owens, Acting Director, OSM Pittsburgh Field Division

