

### **PADEP Response to MRAB Information Request**

The MRAB Regulation, Legislation and Technical Committee met at the RCSOB on October 12, 2007, to discuss, among other things, options for funding the long term treatment of discharges on primacy sites forfeited under the former Alternate Bonding System (ABS)—the ABS Legacy. The ABS Legacy consists of discharges on primacy ABS sites already forfeited and discharges on ABS sites that forfeit before they are converted to full cost conventional bonding. The Committee requested that PADEP provide information about special funds in existence in certain programs and the possibility of using the existing money for the ABS Legacy. The Committee request pertained to the following program funds:

- Moneys in the SMCR Fund.
- The Conversion Assistance Appropriation.
- The ABS Deficit Closeout Land Reclamation Appropriation.
- The Growing Greener Funds.
- The 30% Set-aside.
- General Fund Appropriations.

The Committee also requested that PADEP provide an explanation of the negative effects on these existing programs that would result from diverting money from these sources to fund the ABS Legacy. Finally, PADEP was asked to analyze the merits of merely resubmitting the "Program Enhancement Document" to the Office of Surface Mining

Reclamation and Enforcement (OSM) as a formal program amendment in order to satisfy the Third Circuit decision reinstating the 732 Letter and program condition pertaining to the former ABS.

#### **A. SMCRA Fund Summary**

The SMCRA Fund is comprised of several accounts containing money that are specified to be used for certain purposes. The various accounts are identified as Restricted Bond, Released Bond, Mine Reclamation Fee, General Operations, Conversion Assistance, and ABS Deficit Closeout.

1. The Restricted Bond Account contains approximately \$19,997,000, of which approximately \$7,898,000 is for ABS primacy sites and the balance is for preprimacy sites. This money is collected forfeited bonds. The law limits use of the funds to reclamation of the area affected by the operation upon which liability was charged to the bond. Reclamation includes mine-drainage treatment. Funds that are not needed because reclamation is complete, impossible, or unnecessary can be released and are placed in the Released Bond Account. Earlier this year PADEP began preserving the funds collected on ABS discharge bond forfeiture sites and the interest they generate as income for O&M costs for the specific ABS discharge site. About \$4,862,000 of the Restricted Bond is held on ABS primacy discharge sites. The balance of ABS primacy Restricted Bond, about \$3,036,000, is for land reclamation only sites.

2. The Released Bond Account contains approximately \$2,522,000, of which about \$377,000 is committed to preprimacy reclamation, leaving a balance of about \$2,145,000. All revenue in this account is from transfers from the Restricted Bond Account. The regulations limit the use of this money to reclamation of land or restoration of water supplies related to permits for which PADEP has forfeited bonds. Decisions on the use of these funds are made based on the overall reclamation and treatment priorities (which includes primacy and pre-primacy bond forfeitures).

3. The Mine Reclamation Fee Account contains about \$3,583,000. This is the amount PADEP currently has in hand from the \$100-per-acre reclamation fee. The law limits the use of this money to supplement forfeited bonds from ABS permitted sites. Use of this money for the ABS Legacy is within the use limits specified in the law.

4. The ABS Deficit Closeout Account contains an uncommitted balance of \$4,369,407. The ABS Deficit Closeout funds are from a one-time appropriation of \$5.5 million provided as part of the conversion to full-cost conventional bonding. The \$5.5 million appropriation was restricted by law to be used for land reclamation only on ABS primacy bond forfeiture sites.

PADEP estimates that it will cost approximately \$7,814,000 to complete the land reclamation on ABS primacy land forfeiture sites. This estimate does not include several coal-refuse reprocessing sites that PADEP expects will be used for fuel at a cogeneration

power plant and does not include four sites for which reclamation cost estimates have not been completed.

The land reclamation estimate of \$7,314,000 will be covered by the \$3,036,000 ABS Primacy Restricted Bond money plus the \$4,369,407 ABS Deficit Closeout funds, leaving a balance of about \$408,593 of additional funds needed (plus whatever is needed to reclaim the four sites for which estimates have not yet been completed).

5. The General Operations Account contains about \$6,445,000. These funds are derived from license fees, civil penalties, and interest earned on the SMCR Fund. These funds are used to pay the costs of preparing and administering bond forfeiture contract reclamation work, attorney salaries, expert witness fees, attorney fees assessed against PADEP, project equipment, and reclamation costs. Annual expenditures range about \$2-\$3 million dollars.

Over the last ten years, civil penalties ranged from a low of \$165,529 to a high of \$554,591 for an average of \$294,232 per year.

6. The Conversion Assistance Account contains about \$11.2 million. The funds are from a one-time \$7-million appropriation and annual premiums paid by operators holding the financial guarantees. The money is statutorily limited to underwrite land-reclamation financial guarantees (LRFG) to assist the mine operators who converted from the former ABS to the new conventional bonding system and to pay for reclamation in

the event of forfeiture. There are about \$34 million in outstanding LRFGs. About \$300,000 of the \$11.2 million is committed for reclamation of a forfeited site leaving \$10.9 million underwriting the \$34 million in LRFGs. The other LRFG sites forfeited have, through PADEP efforts, been re-permitted, eliminating the need to spend conversion assistance funds to reclaim the sites.

### **Analysis of Impacts of Diverting Conversion Assistance Funds**

The Conversion Assistance funds are presently at risk at a ratio of about 3 to 1. This lower risk ratio should be maintained in part because the rate of release of the financial guarantees has been slower than expected and because the percentage of forfeitures has been less than the historical average. The historical average rate of bond forfeitures was based on periods of high percentages of forfeitures and periods of low rates of forfeiture. A period of a low percentage of forfeitures has just occurred. The future may hold a high rate of forfeitures. To divert funds underwriting the risk could result in insufficient funds to reclaim forfeited LRFG sites. There are a few operators who have large amounts of LRFGs and these operators are not on sound financial footing. Should these companies fail, about one-half of the principal will be needed to complete reclamation. In addition, a significant number of outstanding LRFGs are at or close to the maximum single-permit limit of \$2.1 M. Until these maximum-level LRFGs can be substantially reduced or

released, the prudent actuarial course under the circumstances is to maintain a low risk ratio for the Conversion Assistance Account.

If a portion of the Conversion Assistance Account was diverted to fund reclamation of the ABS Legacy, this would, at a minimum, necessitate a concurrent reduction of the existing high-dollar financial guarantees. At the inception of the program, a single-risk limit was established of \$2.1 M—this is the single-permit limit for a LRFG. There are currently two LRFGs at this limit and several others that are close to this amount. The upper single-risk limit would have to be adjusted downward significantly if the pool of Conversion Assistance Funds were to be reduced through diversion to the ABS Legacy. Adjusting these maximum limits down would adversely affect these operators and could have the unintended consequence of forfeiture, exactly what the conversion assistance was designed to prohibit.

Moreover, PADEP must identify an ongoing source of revenue to fund the long-term treatment of the ABS Legacy. Raiding part of the principal of the Conversion Assistance Account will not address the need for a long-term steady source of revenue for the O&M costs of discharge-treatment facilities at ABS Legacy sites, but reducing the principal will increase the risk that the Conversion Assistance Fund will ultimately not be able to cover liabilities for which it is intended.

Currently, the interest on the Conversion Assistance Funds accrues to the General Operations Account.

### **B. Growing Greener Funds and Analysis**

The allocation process for Growing Greener (GG) funds does not authorize PADEP to obligate the GG money through a regulation. A regulation cannot change the statutorily prescribed use of the funds. The GG funds specified for abandoned mine-land reclamation are already obligated. Moreover, O&M costs are not eligible for GG funding under the Environmental Stewardship and Watershed Protection Act. While there are plans to use GG funds judiciously in order to retain bond funds to cover O&M costs, this cannot be made an enforceable part of a program amendment because of the funding approval process. It should be noted that the GG funds are also somewhat limited. Any other spending would take away money from reclamation of AML. Finally, GG funds are only available for a few more years and would not be available to provide the type of long-term revenue stream needed to meet the recent court ruling.

### **C. 30% Set-aside and Analysis**

At this point, a determination has not been made as to whether Pennsylvania will elect to set aside 30%, or some lesser amount, of these future AML funds. The process to make

this determination is ongoing and will involve input from focus groups. There will only be enough funds to address existing Priority 1 and Priority 2 sites. Diverting a portion of these funds to AML drainage will reduce the number of Priority 1 and 2 sites that will be reclaimed. To use some of the set-aside funds for the ABS Legacy would reduce the number of Priority 1 and 2 sites reclaimed and the amount of AML discharges treated. If it would be decided to opt for the full 30% set-aside, these funds could not be obligated through a regulation to meet the legal enforceability standard outlined by the court. There will be limitations on the use of these funds. The federal rulemaking on these future AML funds is not in place yet, so a full analysis cannot be completed. However, it is likely that the use of the funds will be limited to areas that meet the criteria as a Qualified Hydrologic Unit. The Office of Surface Mining, Reclamation and Enforcement, has indicated in response to a question from the MRAB that the interest earned on 30% set-aside funds is to be used for the same purposes as the set-aside funds can be used.

#### **D. General Fund Appropriation and Analysis**

The Legislature appropriates money from the General Fund on an annual basis. Decisions on appropriations are made by the General Assembly and the Governor's office. PADEP does not have the authority to obligate General Fund appropriations through regulation. If a General Fund appropriation was made for use for the ABS Legacy, then adjustments to other funding streams could be made.

### **E. Program Enhancement Document as a Program Amendment**

The Program Enhancement Document (PED) was provided to OSM in June 2003 in order to document the bonding program changes made to address the Section 732 letter from October 1991. The PED provided a summary of the conversion to conventional bonding for the active sites and the process of calculating and providing bonds (or a trust) for those sites with post-mining discharges. The PED included a strategy for managing all abandoned discharges in Pennsylvania (including all forfeitures and AML) on a watershed basis. It listed the following as possible resources:

- Bonds forfeited and collected from the site.
- Excess funds from the ABS.
- Title IV 10% Set-aside funding for sites within Qualified Hydrologic Units.
- Title IV AML funding available for cases involving insolvent surety companies.
- Additional Pennsylvania funding, such as Growing Greener.
- Remining.
- Reclamation-in-lieu of civil penalty agreements with active operators.
- Other site reclamation activities consistent with the approved Title IV or Title V programs.
- Support and encourage community-based watershed organizations in their efforts to obtain funding from private and nontraditional government sources to abate or treat mine discharges as part of their comprehensive watershed restoration efforts.

- Economic development and improvement projects which treat and or utilize the discharge.

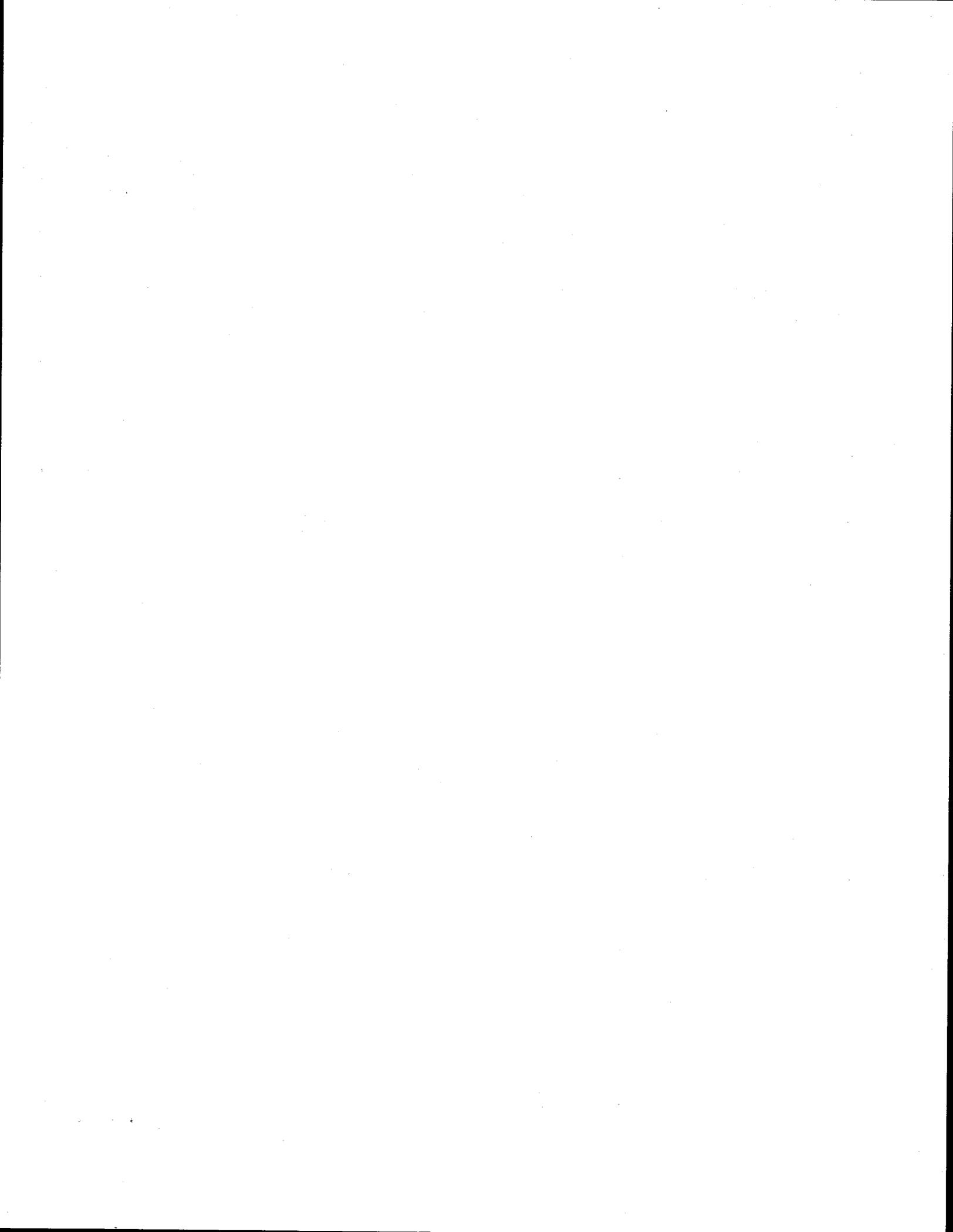
The PED also included (as Appendix 4) a list of ABS Primacy Forfeitures with Long-term Discharges. This list includes about 100 discharges. PADEP has been working with OSM to update this list. The agencies have found that the inventory is dynamic and will require continuous updates. For example, while there are still about 100 discharges on the current inventory, about 50 of these are not on the 2003 list.

The program amendment to be submitted in accordance with the Third Circuit decision must be more specific to the ABS Legacy than the PED, and must have *enforceable* methods for addressing the ABS Legacy. The PED did not contain any enforceable regulatory requirements.

The PED set forth a comprehensive approach to managing abandoned discharges. In order to be responsive to the decision of the Third Circuit, the formal program amendment must focus specifically on the ABS Primacy Bond Forfeiture discharges and the specific means for assuring that money is available to complete reclamation of the ABS Legacy. While PADEP does not intend to abandon the watershed approach strategy (because this approach is the most environmentally responsible), concentrating on the ABS Primacy Bond Forfeiture discharges in the program amendment will be responsive to the issues raised by the Third Circuit decision. PADEP will likely provide much more

specificity related to the accounting. Due to the dynamic nature of the ABS Legacy, it may be necessary to calculate and evaluate the funding needs on a routine basis. Funding sources specifically obligated for reclamation of the ABS Legacy will have to be

identified and the amount of revenue generated by these sources correlated with the amount of outstanding reclamation obligations at the ABS Legacy. To be enforceable, the program amendment will also need to include regulatory requirements. The PED generally identified potential sources of funding for discharge sites in the Commonwealth, but the PED did not contain enforceable regulatory requirements. OSM has provided a letter regarding the PED and the 732 Letter in light of the recent court decision. A copy is attached.





# United States Department of the Interior



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November 6, 2007

Joseph G. Pizarchik, Esq., Director  
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Dear Mr. Pizarchik:

During the October 12, Mine Reclamation Advisory Board meeting, a discussion entailed regarding the content requirements for submitting a bonding program amendment to OSM to address the 1991 Part 732 notice and the May 31, 1991, required amendment at 30 CFR 938.16(h), both of which were reinstated by the August 2, 2007, decision of the 3<sup>rd</sup> Circuit. One suggestion generating discussion among group members was to resubmit the Pennsylvania Bonding System Program Enhancements document (PED) as a formal amendment. Subsequent discussions with you resulted in a request for OSM to provide a review of the PED in relation to the court's instruction to PA to submit a program amendment to satisfy bonding program requirements. This letter is in response to that request and is intended to provide some thoughts as to what a formal amendment should include.

The PED, as submitted to OSM in June 2005, was a description of the process PADEP used to transfer active mine sites from the alternative bonding system (ABS) to a system of full cost bonding for land reclamation and the treatment of pollution discharges. In addition, the PED outlined the types of activities the Commonwealth was prepared to undertake to address its programmatic commitment to cover the outstanding costs associated with bond forfeiture sites, including costs for both land reclamation and water treatment. Although we approved your transition to full cost bonding as a solution to the 1991 Part 732 notice, and we agreed with your short and long-term proposals to address land and water reclamation needs left behind by the transition, the 3<sup>rd</sup> Circuit has determined those actions to be inadequate.

Mr. Joseph G. Pizarchik, Esq., Director

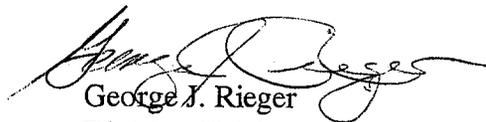
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Because amendments to State programs are processed under 30 CFR 732.17 and potential inadequacies of submissions are determined through internal review and from public comments, it is not appropriate for me to formally declare a list of potential inadequacies in the PED. It is, however, appropriate to point out that the 3<sup>rd</sup> Circuit decision viewed the PED as no more than a policy directive and not an enforceable guarantee with sufficient funding to satisfy the bonding requirements of 30 CFR Part 800. The PADEP has discretion to develop the kind of program amendment it believes will resolve the outstanding program deficiencies, and my staff and I remain available to discuss alternative approaches. At this time, I am not confident that simply resubmitting the PED with its range of reclamation mechanisms and non-program funding sources is a viable approach to solving a bonding problem. Rather, PADEP is better served in developing an amendment that provides enforceable guarantees that satisfy the financial obligations prescribed by § 800.11(e) for those reclamation obligations not covered by full cost bonds. In addition, the amendment needs to identify the specific revenue sources to be used, and include a requirement that the revenue generated be directed towards the reclamation of mine sites that were permitted after Pennsylvania obtained programmatic "primacy" in 1982.

If you have questions or wish to discuss this matter further, please give me a call at 717-782-4849, ext 11.

Sincerely,



George J. Rieger  
Division Chief  
Pittsburgh Field Division

Copy to: Tom Shope