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

**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"¹ 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

¹ "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.²

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

Cost Categories	Projected Expenditures FY 2008-2009 (2008 ABS Program Amendment) ³	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	
TOTAL	\$700,000.00	\$9,957.52	1.42%
		vs. projected costs for all ABS Legacy Sites of \$1.6 million per year	0.62%

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	
TOTAL	\$762,200.00	\$84,625.16	11.10%
		vs. projected costs for all ABS Legacy Sites of \$1.6 million per year	5.29%

² "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)

³ "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	
TOTAL	\$366,500.00	\$107,243.05	29.26%
		vs. projected costs for all ABS Legacy Sites of \$1.6 million per year	6.70%

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		
TOTAL	\$602,872.00		
	37.68%	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