

**Rulemaking on Coal Mine Reclamation Fees
and Reclamation of Bond Forfeiture Sites (#7-401)**

Advanced Notice of Final Rulemaking Comment/Response Document

This document presents comments submitted in regard to the Department's Advanced Notice of Final Rulemaking on Coal Mine Reclamation Fees and Reclamation of Bond Forfeiture Sites and the Department's responses to those comments. The Advanced Notice of Final Rulemaking was published in the *Pa. Bulletin* on January 5, 2008. Public comments were accepted from January 5, 2008 to February 4, 2008.

List of Commenters

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3. Mine Reclamation Advisory Board
(Comments were made at the January 10, 2008 Mine Reclamation Advisory Board meeting during discussion of the Advance Notice of Final Rulemaking and through a motion of the Board.)

¹ Mr. Wiest, representing Citizens for Pennsylvania's Future, submitted comments on behalf of a group of six organizations. The group of commenters included the Pennsylvania Federation of Sportsmen's Clubs, Inc., Pennsylvania Chapter Sierra Club, Pennsylvania Trout, Inc., Tri-State Citizens Mining Network, Inc., Mountain Watershed Association, Inc. and Citizens for Pennsylvania's Future.

Comments and Responses

Comment: The active mining industry is in no way responsible for any of the sites forfeited under the ABS. Therefore it is unfair that the mining industry is forced to pay the reclamation fee. (2)

Response: The final-form rulemaking spreads out the financial burden by incorporating a variety of funding sources. It also provides for the elimination of the reclamation fee when the supplemental funds are no longer needed.

Comment: The amendments proposed with the ANFR do not do enough to ensure that the money that will be deposited into the Reclamation Fee O&M Account and the ABS Legacy Sites Account is not used for some other purpose. The final rulemaking should provide more protection to ensure the reclamation fee money is used for its intended purpose—treatment of mine drainage on ABS legacy sites. (3)

Response: The Department revised the final rulemaking to address this concern. The final rulemaking now follows the examples set by the General Assembly when it specified in the Surface Mining Conservation and Reclamation Act and in the Clean Streams Law that certain types of collateral bonds posted by surface mine operators were to be held in trust. The final rulemaking creates two trust accounts. This final rulemaking serves as a declaration of trust which provides that funds held in the Reclamation Fee O&M Trust Account and in the ABS Legacy Sites Trust Account are held in trust by the Commonwealth. The Commonwealth includes the Department, other offices of the executive branch, the General Assembly and the state Treasurer. The money that is held in these two trusts is being held for the benefit of all of the people to effectuate their right to pure water and the preservation of natural and esthetic values of the environment as specified in Article 1, Section 27 of the Pennsylvania Constitution. The Commonwealth, collectively, will have a fiduciary duty to manage and use the moneys in the Reclamation Fee O&M Trust Account and in the ABS Legacy Sites Trust Account to treat pollutional mine drainage emanating from ABS legacy sites. Should the Commonwealth ever violate this fiduciary duty by using or attempting to use the moneys for another purpose, any resident of Pennsylvania with an interest in pure water could initiate proceedings in the appropriate forum to enforce the terms of the trust.

Comment: The minimum of \$50.00 should be deleted from § 86.17(e)(2). (2), (3)

Response: The Department has deleted the \$50.00 minimum reclamation fee provision. The final rulemaking now provides the fee will be adjusted annually based upon need and can be zero if the funding is not needed for that years projected operation and maintenance costs.

Comment: If, instead of the reclamation fee, an alternative source of funding to pay all of the annual costs covered by the Reclamation Fee O&M Account is established, then the \$100.00 reclamation fee should not be adjusted up or continue to be collected. (2)

Response: Section 86.17(e)(3) of the final rulemaking now contains express language that provides for the reclamation fee to be used until an alternative funding source in lieu of the reclamation fee is established to pay all of the costs covered by the Reclamation Fee O&M Trust Account.

Comment: If the legislature approves the use of premiums from the Bond Conversion Assistance Fund for O & M costs at ABS sites, then those funds should be deposited into the Reclamation Fee O & M account and considered during the annual review of the reclamation fee amount. (2)

Response: The final regulation provides for this by explicitly allowing for the deposit of the “fees collected for sum-certain financial guarantees needed to facilitate full-cost bonding.” 86.187 (a)(1)(iii). This is further addressed in 86.187 (a)(1)(iv), which limits the use of the money.

Comment: If a permanent alternate funding stream is approved, then that funding must be dedicated to cover the O & M costs at the ABS Legacy sites. (2)

Response: The final rulemaking specifies that an alternate funding source must provide “sufficient revenues to maintain a balance in the Reclamation Fee O&M Trust Account of at least \$3,000,000 and to pay the annual operation and maintenance costs for treating post-mining polluttional discharges at all ABS Legacy Sites.” 86.17 (e)(3)(ii)

Comment: Revise § 86.187(a)(2)(i) to limit the Department’s authority to transfer funds from the Reclamation Fee O&M Account into the ABS Legacy Sites Account. The regulation should specify that only excess funds could be transferred. (2), (3)

Response: Section 86.187(a)(2)(i) of the final rule has been revised to provide that the Department may, upon review and recommendation of the MRAB, transfer excess moneys from the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account.

Comment: The regulation should be revised to provide that the ABS Legacy Sites Account will be actuarially sound when the money in it, together with the money in the Reclamation Fee O&M Account, will generate enough interest to pay all ABS Legacy Sites treatment costs forever. At this point, the money in the Reclamation Fee O&M Account should be transferred into the ABS Legacy Sites Account, the Reclamation Fee O&M Account be closed, and, the reclamation fee be terminated. (3)

Response: A new subsection has been added as Section 86.187(a)(2)(iv) which provides for the transfer of the money from the Reclamation O&M Fee Trust Account into the ABS Legacy Sites Trust Account, termination of the Reclamation Fee O&M Trust Account, cessation of the reclamation fee, and, cessation of the transfer of civil penalties into the Reclamation Fee O&M Trust Account.

Comment: The draft final-form regulations fail to guarantee that all discharges from all ABS Legacy Site will be treated in perpetuity. (1)

Response: The regulations are designed to address the requirement of the federal regulations at 30 CFR 800.11(e). The requirement is for the Department to have available sufficient money to complete reclamation for the ABS Legacy Sites at any time. *See* 30 CFR § 800.11(e)(1). This rulemaking will provide sufficient funds to treat the discharges. The regulations establish a mandatory process to adjust the revenue stream to pay the cost of reclamation that could become due at any time. The Department does not have the authority to commit the full faith and credit of the Commonwealth to “guarantee” funding.

Comment: The short-term, pay-as-you-go system of the Reclamation Fee O & M Account does not provide a guarantee of perpetual discharge treatment at all ABS Legacy Sites. (1)

Response: The Department disagrees. The regulations will provide the Department with the money needed to address the requirement of the federal regulations at 30 CFR 800.11(e) - sufficient money to complete reclamation for these sites at any time. *See* 30 CFR § 800.11(e)(1). The regulation also requires the revenue stream to be annually adjusted to pay the cost of treatment. Furthermore, the regulation requires a financial reserve to be maintained to ensure the Department has sufficient money to pay unexpected treatment costs. The Department does not have the authority to commit the full faith and credit of the Commonwealth to “guarantee” funding.

Comment: The draft final-form rule does not guarantee that the ABS Legacy Account will ever contain sufficient funds to be actuarially sound, or that it will remain solvent in perpetuity. (1)

Response: The federal regulations do not require a “guarantee” that the ABS Legacy Account will become actuarially sound. The standard is that the Department has available sufficient money to complete reclamation for these sites at any time. *See* 30 CFR § 800.11(e)(1). The regulations do provide for the Department to have the needed funds as discussed above. The ABS Legacy Sites Trust Account is a tool that, once it contains sufficient money, can replace the pay-as-you-go approach specified in the reclamation fee provisions. The Department does not have the authority to commit the full faith and credit of the Commonwealth to “guarantee” funding.

Comment: The funding for the Reclamation Fee O & M Account and the ABS Legacy Account must come from the coal mining industry. (1)

Response: The Department disagrees. West Virginia was faced with a similar problem of how to fund the treatment for forfeited discharges. In the preamble for OSM’s approval of their program amendment addressing this matter, OSM stated:

Congress was not specific on how alternative bonding programs such as West Virginia’s should be financed. The only test applicable is whether the proposed alternative system achieves the objectives and purposes of a conventional bonding system as expressed in section 509 of SMCRA and as implemented by

30 CFR 800.11 (e). (60 FR 51901, October 4, 1995)

The regulation meets this standard.

Comment: The final regulations must include an enforceable commitment for timely construction of adequate treatment system at all ABS Legacy Sites currently lacking them. (1)

Response: The regulations address the requirement of the federal regulations at 30 CFR 800.11(e). The standard is that the Department has available sufficient money to complete reclamation for these sites at any time. See 30 CFR § 800.11(e)(1). Section 102 of SMCRA lists the purposes of the act. One of these is to “assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations.” This is the only standard by which OSM can conduct its oversight of the implementation of abatement and treatment of the ABS discharges.

Comment: The regulation must specify in greater detail the standard for determining whether the ABS Legacy Account contains sufficient funds to be actuarially sound. (1)

Response: The Department disagrees. The regulation provides a complete description of the concept of being actuarially sound. There is no need to specify in the regulation additional standards such as the suggestion to require an actuary with specific qualifications.

Comment: The regulations must require, as a fourth condition for finding the ABS Legacy Account is “actuarially sound,” that all construction, recapitalization, and operation and maintenance costs at ABS Legacy Sites paid by Non SMCRA government funding programs have been refunded from the Reclamation Fee O & M Account. (1)

Response: The Department disagrees. The primary approach that the Department has taken to managing the treatment of abandoned and forfeited discharges is to utilize all available resources. The approach of this rulemaking is to protect the environment while meeting the requirements of the federal regulation.

Comment: PADEP should delete the provision of the draft final-form regulations purporting to declare PADEP’s annual determination of the required amount of the reclamation fee to be appealable to the Environmental Hearing Board. (1)

Response: The Department disagrees. The Department is confident that the Environmental Hearing Board will find that the determination of the reclamation fee amount is a final action of the Department as defined at 25 Pa. Code § 1021.2.

Comment: Where possible, the final-form regulations should use the active voice and the word “will” to express duties. (1)

Response: The Department agrees and has made this change in various places in the final-form regulations.

Comment: The definition of “ABS Legacy Sites” should be revised to delete the phrase “and is sufficient to cover the cost of treating the discharge.” (1)

Response: The Department disagrees with this comment. The entire definition is needed to be consistent with the concept of full cost conventional bonding. Once a mine is covered by a full cost bond or a fully funded trust, that site will not be eligible to become an ABS Legacy Site. The deletion of the phrase as recommended by the commentator would introduce ambiguity into the regulations.

Comment: Definitions of “Operation and Maintenance Costs” and “OM & R” should be added. (1)

Response: The Department agrees, in part, and has added a definition for “Operation and Maintenance Costs.” A definition of “operation, maintenance and recapitalization” costs is not needed because there already is a definition of “recapitalization costs.”

Comment: The specific date (August 4, 2001) should be added to the definition of the “Primacy Alternate Bonding System.” (1)

Response: The Department agrees and has made this change.

Comment: The reclamation fee should apply to the entire permit area, not just the operational area, and should apply to permit transfers. (1)

Response: The final rule addresses the application of the reclamation fee in a manner that is consistent with conventional bonding. Furthermore, it would be against the public interest to apply the fee to permit transfers because it could discourage a mine operator from accepting a transfer from a troubled firm which could then lead to bond forfeiture instead of the reclamation being completed in a more timely manner by the transferee.

Comment: PADEP should retain the minimum reclamation fee rate in Section 86.17 (3) of the regulations, but should set the minimum rate at \$100 per acre. (1)

Response: Based upon the advice of the MRAB, the Department decided to eliminate the minimum fee amount. The fee amount will be determined based upon the procedures established in the regulations.

Comment: PADEP should make clear that the \$3 million minimum balance target for the reclamation fee O & M Account would have no effect on authorized expenditures for discharge treatment. (1)

Response: The Department has concluded it is clear that there is no spending restriction in the regulation as it is written.

Comment: The regulation does not account for inflation. Therefore, it is questionable whether the \$3 million cushion and the Reclamation Fee O&M Account will cover the cost of treatment in the long term. (1)

Response: The Department disagrees. The regulation contains provisions that require the revenue stream to be adjusted annually to provide the Department with sufficient money to pay for treatment at the ABS Legacy Sites. The annual adjustment will enable the needed revenue to keep pace with inflation. Additionally, it is not necessary for the \$3 million emergency reserve to be adjusted for inflation over the long term. The \$3 million reserve is needed most for the short term to address unexpected operation and maintenance costs that might be incurred before the reclamation fee can be adjusted. It is also needed to pay the cost of maintaining treatment at ABS sites that may be forfeited in the near future.

Comment: The provisions that authorize the Department to deposit “other moneys, including appropriations” into the Reclamation Fee O&M Account and into the ABS Legacy Account go beyond the scope of the proposed rulemaking and should not appear in the regulations in order to help steer clear of a legal challenge that might unnecessarily interfere with the approval and implementation of the regulation as the costs should be borne by the industry. (1)

Response: The Department disagrees. The final regulation is within the scope of the proposed regulation as it encompassed the funding mechanism for the former alternate bonding system. The final regulation addresses the concerns raised by the commentators in comments submitted on the proposed rulemaking. The Department understands the commentators’ view that the industry should pay for completing reclamation on sites forfeited many years ago under the former alternate bonding system. The federal regulation, 30 CFR § 800.11(e), does not specify the source of money needed to address the legacy of the former alternate bonding system.