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**From:** Schalles, Scott R.
**Sent:** Monday, June 23, 2008 7:44 AM
**To:** Gelnett, Wanda B.
**Cc:** Wilmarth, Fiona E.
**Subject:** FW: IRRC Comments

Comments on f/f 2557

-----Original Message-----
**From:** Pacoal1@aol.com [mailto:Pacoal1@aol.com]
**Sent:** Friday, June 20, 2008 3:18 PM
**To:** Irrc@state.pa.us; Kaufman, Kim; Schalles, Scott R.
**Subject:** IRRC Comments

Attached are comments of the Pennsylvania Coal Association regarding the above final-form regulation. Thank you for your consideration of our concerns.

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INDEPENDENT REGULATORY
REVIEW COMMISSION

June 20, 2008

Hon. Arthur Coccodrilli, Chairman
Hon. Alvin C. Bush, Vice Chairman
and Honorable Members:
David J. Devries, Esq.,
John F. Mizner, Esq.
Independent Regulatory Review Commission
333 Market Street (14Th Floor)
Harrisburg, PA 17101

**RE: Regulation 7-401**
**IRRC# 2557**
**Coal Mine Reclamation Fees**

Gentlemen:

The purpose of this letter is to provide comments regarding the above-referenced final-form rulemaking on behalf of members of the Pennsylvania Coal Association (PCA), who are surface mine operators obligated to pay a $100 per acre reclamation fee in addition to a site-specific bond.

On August 1, 1981, the Department of Environmental Protection (DEP) instituted an Alternative Bonding System (ABS) as a means to guarantee that sufficient money is available to cover the cost of reclamation in the event an operator defaults on his obligation, and the Commonwealth must do the work.

Essentially, the ABS required a site-specific bond (based on a graduated per-acre fee) set below the cost of reclamation but supplemented by a per-acre reclamation fee paid by surface coal operators (initially, the fee was $50/acre but was increased to $100/acre in 1993).

In 2001, DEP converted its bonding program to a "full cost" or conventional bonding system (CBS). Under this system, an operator must post a bond in an amount needed to complete reclamation in the event of forfeiture.

Consequently, because of the conversion, an operator's site-specific bond guarantees the full cost of reclamation, making a supplemental revenue source, like the per-acre reclamation fee, unnecessary.

As a result, Regulation 7-401 was originally published as a proposed rulemaking on August 5, 2006 (Pa. Bull. 4200) to terminate the $100 per-acre reclamation fee.

Due to a decision of the District Court to the U.S. Court of Appeals for the Third Circuit, in response to litigation which included discussion regarding the inadequacy of DEP's defunct ABS system; objections to actions taken by DEP and OSM in converting from the ABS to the CBS system; and a contention that repeal of § 86.17(e) (the $100 per acre reclamation fee) would violate federal law, DEP determined that, among other things, it would revise the proposed rule to continue the per-acre reclamation fee, although it is not required to do so by federal law, which law only requires an operator to post a bond sufficient to assure completion of reclamation if the work must be performed by the regulatory authority.

The Court ruled that Pennsylvania must assure that it will have sufficient money available at any time to complete the reclamation of all ABS Legacy Sites, including treatment of any post-mining pollutional discharges, which is a substantial undertaking. Recognizing the Department's dilemma, PCA, as a member of DEP's Mining and Reclamation Advisory Board (MRAB), agreed that Regulation 7-401, could be revised as a final-form ruling, provided the following are included within the regulation:

1. The $100 per acre reclamation fee would be maintained at its current rate for two years, rather than being eliminated. If alternative permanent funding is in place after two years to cover Operation and Maintenance (O&M) costs at ABS forfeiture sites, then the reclamation fee would be eliminated. If there is no alternative, permanent funding, then the fee could be maintained as supplementary funding;

2. Dedicate a portion of the interest generated by the Surface Mine Fund to cover the balance of costs not covered by the reclamation fee;

The MRAB further amended this recommendation to include the following as sources for funding ABS-associated O&M costs:

3. Money collected from civil penalties;

4. Other monies that may become available in the future, and

5. Allow DEP to increase or reduce the reclamation fee after the two-year period,

depending on projected O&M costs. Any fee change would be reviewed for approval by the MRAB and deemed a final determination of the department subject to appeal to the EHB.

The Department drafted language for the above sections and added a section establishing two funds:

6. One fund to hold/use reclamation fees that exceed a stipulated "cushion" amount, plus interest generated by the total amount of collected reclamation fees; and

7. A second fund, the "ABS Legacy Fund," initially funded with $4.6 million from ABS discharge bonds, and into which interest generated by this fund and "other money that may become available in the future (see No. 4 above), would be deposited.

The MRAB agreed with this language and also recommended that legislation be introduced to allow premiums paid on conversion assistance bonds to be used to offset ABS-related O&M costs.

Further, the MRAB voted to eliminate a provision included by DEP in the regulation providing for a minimum $50 reclamation fee, especially because the Board had already recommended that, if an alternative source of funding is established, then the reclamation fee will not be adjusted or continue to be collected. **PCA specifically recalls that, included in this conversation, was a recommendation that, should no alternative source of funding be established, adjustments to the fee after the initial two-year period would NOT be in $50 increments. Rather, the fee would be adjusted by the amount needed upon review of the department's projected costs for O&M expenditures at ABS Legacy Sites.**

Finally, the MRAB recommended that the department's authority to transfer "excess" money from the Reclamation Fee O&M account into the ABS Legacy account be modified to limit such transfers, in order that collected reclamation fee monies are available for imminent or unexpected reclamation or O&M expenses. If "excess" monies in the Reclamation Fee O&M account are transferred in total to the ABS Legacy fund, those funds could not be used until the Legacy Fund is actuarially sound; thus, making it possible that the fee may require adjustment to compensate for shortages in the Reclamation Fee O&M Account.

To simplify our objection to the proposed final-form ruling, PCA submits the following observations regarding the rulemaking:

> § 86.17 (3) states that, commencing January 1, 2010 and continuing until either a permanent alternative funding source is established or the ABS Legacy Sites Trust Account is actuarially sound, the reclamation fee will be adjusted as necessary to ensure that there are sufficient revenues to maintain a balance in the Reclamation Fee O&M Trust Account of at least $3,000,000.
>
> (i) The reclamation fee will be used until the ABS Legacy sites Trust Account is actuarially sound unless an alternative permanent funding source in lieu of the reclamation fee is used to fund the Reclamation Fee O&M Trust Account. . .

PCA is in agreement with these provisions. However, PCA objects to the following portion of the final-form ruling, which appears to provide an alternative scenario, as follows:

> § 86.17 (4) states that, commencing January 1, 2010 and continuing until the ABS Legacy Sites Trust Account is actuarially sound, the amount of the reclamation fee will be annually calculated and, if necessary, will be adjusted in **multiples of $50**, (based on a list of factors and following a department review of its calculations at a public meeting of the MRAB) . . . (emphasis added).

This alternative language requires that the reclamation fee be adjusted (upward or downward?) in multiples of $50, rather than simply by the amount necessary to meet the needs of the department. Obviously, it only makes sense if you are "increasing" the fee to use a $50 increment. Further, subsection (4) leaves out the possibility that an alternative permanent funding source might be established; and, instead, intends to continue the fee until the Legacy Trust Fund is actuarially sound. This, of course, leaves a loophole through which the department could continue the fee AND take advantage of any alternative funding source until the Legacy Trust Fund is actuarially sound. Whether or not this is the department's intention, it is a possibility to be avoided.

PCA is proud that its surface mining members have agreed to continue the reclamation fee for two years, in order to help the department comply with the U.S. District Court decision, and to allow time within which to seek an alternative permanent source of funding to address O&M costs at sites for which they, personally, caused no damage and have no liability. Under the new full-cost bonding (CBS) system, reclamation and abatement at their sites is guaranteed in the event of forfeiture. In

addition, our members continue to pay a per-ton fee for reclamation and abatement at pre-SMCRA abandoned mine sites through the Abandoned Mine Lands Program.

While the public may believe that the modern coal industry should pay for the sins of historic operators, who mined under less stringent regulations and many at government's behest to support national energy requirements, especially during wartime, it would be more realistic to recognize that today's industry is strictly regulated and remains crucial to satisfying Pennsylvanians' demand for adequate energy at competitive rates.

PCA must object to Rulemaking 7-401, because of a single paragraph, § 86.17(4), which is redundant and would force operators to pay more, through $50 increments, than is required to meet the department's need, as already provided for in § 86.17(3).

We have no objection to subparagraphs (i) through (vi) beneath § 86.17(4), which set forth the factors to be considered should the reclamation fee require adjustment; but these factors could easily be listed under § 86.17(3), which simply allows the fee to be adjusted as necessary to meet the department's requirements for ABS O&M costs.

Thank you for the opportunity to submit these comments. Please keep in mind that this letter should not be construed as a waiver of any right of PCA or its member companies to contest any adverse decision or findings that may be applicable to them.

Please feel free to call me if you have any questions.

Sincerely yours,

George Ellis, President
Pennsylvania Coal Association

GE:sg
cc: Mr. Kim Kauffman, Executive Director
Mr. Scott Schalles, Regulatory Analyst
PCA Surface Policy Committee