September 5, 2006

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Pennsylvania Environmental Quality Board
15th Floor, Rachel Carson State Office Building
P.O. Box 8477
Harrisburg, PA 17105-8477

Re: Proposed Rule, "Coal Mine Reclamation Fees and Reclamation of Bond Forfeiture Sites," 36 Pa. Bull. 4200 (August 5, 2006)

Comments of 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

To Whom It May Concern:

The first five organizations listed above are the Appellants in the appeal that is currently pending before the United States Court of Appeals for the Third Circuit in Pennsylvania Federation of Sportsmen's Clubs, Inc., et al v. Norton, et al., No. 06-1780 (PFSC v. Norton). That appeal focuses on the inadequacy of the funding available in the Pennsylvania Surface Mining Conservation and Reclamation Fund (PA SMCRA Fund) to reclaim the land and treat post-mining discharges at all of the coal mining operations in Pennsylvania that obtained bond coverage under the state's alternative bonding system by paying the $100 per acre "reclamation fee" under 25 Pa. Code § 86.17(e). The referenced proposed rule would eliminate the collection of that fee. The same five organizations are the Plaintiffs in the matter of Pennsylvania Federation of Sportsmen's Clubs, Inc., et al v. McGinty, et al., No. 99-cv-1791 (M.D. Pa.), a 1999 lawsuit concerning inadequacies of Pennsylvania's bonding program that has been stayed by the United States District Court for the Middle District of Pennsylvania pending the resolution of the PFSC v. Norton appeal. In both of those court cases, the five conservation organizations are represented by Citizens for Pennsylvania's Future (PennFuture). On behalf of these same five organizations and its own members, PennFuture submits these comments on the proposal to discontinue collection of the $100 per acre reclamation fee currently required by 25 Pa. Code § 86.17(e).

PennFuture also is submitting a one-page summary of these comments for distribution to the members of the Environmental Quality Board (Board or EQB).

1. **Discontinuing the collection of the reclamation fee would violate federal law for the reasons presented in the Brief of the Appellants, the Pennsylvania Federation of Sportsmen's Clubs, Inc., et al., submitted to the United States Court of Appeals for the Third Circuit in the PFSC v. Norton case.**

We fully incorporate into these comments the arguments set forth in the text of the Brief of Appellants, the Pennsylvania Federation of Sportsmen's Clubs, Inc., et al., filed before the U.S. Court of Appeals for the Third Circuit in the PFSC v. Norton case, Docket No. 06-1780, on May 12, 2006, which is attached to these comments as Attachment 1. That brief recounts the history of proceedings relating to Pennsylvania's bonding program, including aspects that are omitted from the accounts provided by PADEP to the members of the EQB. Among other things, the arguments presented and authorities cited in that brief demonstrate:

- Through the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), the nation made a promise to the coalfield residents who had long endured the burdens of supplying its energy needs that no more mines would be abandoned without proper restoration of the land and proper treatment of any polluting discharges. To that end, SMCRA requires that reclamation of all permitted mines be prompt, complete, and guaranteed. See 30 U.S.C. §§ 1202(a), 1202(e).

- Section 509 of SMCRA, 30 U.S.C. § 1259, requires that state bonding programs provide financial guarantees that are sufficient to ensure the timely completion of the reclamation plan for every permitted mine.

- Under 30 U.S.C. § 1259 and 30 C.F.R. § 800.11(e)(1), Pennsylvania has an ongoing obligation to adjust its alternative bonding system (ABS) so that the ABS bond pool fund (the PA SMCRA Fund) contains sufficient money to guarantee complete reclamation of all mines that were bonded under the ABS and either:

  a) suffered bond forfeiture before August 4, 2001, when Pennsylvania began to require mines to replace their ABS bond coverage with conventional bonds or other approved reclamation guarantees; or

  b) have not fully replaced their ABS bond coverage (and thus have not fully converted to conventional bonding) because they have not posted conventional bonds (or other approved financial guarantees) covering the full cost of reclamation, including, where necessary, perpetual mine drainage treatment.

- The conversion from an ABS to a conventional bonding system (CBS) will not be complete until every site that was bonded under the ABS that remained permitted as of August 4, 2001 and has one or more post-mining discharges has posted reclamation guarantees covering the full cost of the remaining reclamation, including perpetual mine drainage treatment. And even if every such site had posted a full cost guarantee of perpetual treatment, the ABS would still be responsible for providing perpetual treatment for the dozens of additional discharges from ABS mines that suffered bond forfeiture before August 4, 2001.

Because Pennsylvania has an ongoing obligation under federal law (30 U.S.C. § 1259 and 30 C.F.R. § 800.11(e)(1)) to make its ABS generate more money, any action that would discontinue the generation of revenue for the ABS would violate that legal duty. The portion of the proposed rule that would terminate the collection of the reclamation fee under 25 Pa. Code § 86.17(e)(1) would do just that. As a result, federal law forbids this Board from adopting the portion of the proposed rule that would discontinue the collection of the reclamation fee by amending § 86.17(e).

2. Discontinuing the collection of the reclamation fee would be both unlawful and unwise for the reasons explained in the June 12, 2001 comments of the Pennsylvania Federation of Sportsmen's Clubs, Inc., et al., on PADEP's Technical Guidance Document on Conventional Bonding.

In May 2001, the Pennsylvania Department of Environmental Protection (PADEP) released a draft of Technical Guidance Document No. 563-2504-001, "Conventional Bonding for Land Reclamation – Coal" (hereinafter, "Conventional Bonding TGD"). On behalf of the other five conservation organizations listed above, PennFuture submitted comments to PADEP on the draft Conventional Boding TGD on June 12, 2001. Sections I and II of those comments are attached hereto as Attachment 2. In Section II (pp. 4-8), we explained why it would be both unlawful (subsection II.A) and unwise (subsection II.B) for Pennsylvania to abandon its alternative bonding system. We incorporate those arguments herein as if fully set forth, supplemented by the following updates and observations.

A. Since January 1, 2002, the West Virginia ABS has raised $94 million for reclamation and mine drainage treatment at ABS bond forfeiture sites.

Because of the passage of time, some of the information in Section II of the June 12, 2001 comments is no longer accurate. For example, as indicated in footnote 1 on page 7 of those comments, the Special Reclamation Tax that funds West Virginia's ABS stood at three cents per ton of coal extracted in June 2001. Later that same year, however, West Virginia adopted the "7-Up Plan," which increased the base Special Reclamation Tax from three cents to seven cents per ton, imposed a temporary surcharge of seven cents per ton that raised the tax to fourteen cents per ton for a period of 39 months, and established an advisory council that was given the responsibility of making annual recommendations to the Governor and Legislature "as to whether or not any adjustments to the special reclamation tax should be made." W. Va. Code 22-1-17(g). See 66 Fed. Reg. 67446, 67447 (col. 1-2) (December 28, 2001). In December 2001, the federal Office of Surface Mining issued a final rule approving an amendment to the West Virginia regulatory program under SMCRA that allowed the "7-Up Plan" and its increased Special Reclamation Tax to take effect on January 1, 2002. 66 Fed. Reg. 67446. In a related final rule approving the "7-Up Plan" as fully satisfying a program amendment requirement OSM had imposed years earlier, OSM projected that the plan would eliminate a $47.9 million deficit in the West Virginia ABS bond pool in 39 months. 67 Fed. Reg. 37610, 37613 (col. 1) (May 29, 2002).

When a subsequent actuarial analysis showed a continuing deficit and projected that future revenues would be insufficient to cover projected reclamation expenses, the advisory council recommended extending the seven cents per ton surcharge for one year. West Virginia's Legislature and Governor went farther, enacting legislation in 2005 that extended the surcharge for an additional eighteen months, through the end of September 2006. 71 Fed. Reg. 10764, 10764 (col. 3) (March 2, 2006).[1] Since the "7-Up Plan" went into effect in January, 2002, West Virginia's increased Special Reclamation Tax has generated approximately $94 million for the reclamation of ABS bond forfeiture sites in that state.[2] Even when the surcharge expires on September 30 of this year, the seven cent per ton tax will continue to generate more than $10 million each year for reclamation and mine drainage treatment at ABS bond forfeiture sites in West Virginia.

B. The reasons explained in our June 12, 2001 comments for enhancing the revenues to Pennsylvania's ABS remain valid and show that discontinuing the collection of the reclamation fee would be a step in the wrong direction.

In our June 12, 2001 comments, we urged continued "reliance on the ABS to address several important problems that the site-specific mechanisms are incapable of handling alone," (p. 4), in particular "certain sites with mine drainage discharges (those with long-term mine drainage liability that greatly exceeds the amount of the bond) and certain sites with large land reclamation liabilities [for which] DEP [did] not expect that operators [would] post site-specific financial guarantees covering the full costs of reclamation and abatement." (p. 6) In this regard, we note that PADEP has recently reported that the enormous Lehigh Coal & Navigation Company (LC&N) mine in Schuylkill and Carbon counties remains under-bonded by roughly $6 million for land reclamation alone. In addition, to our knowledge, LC&N still has not posted any financial guarantee for the construction, operation, maintenance/replenishment, or replacement of the new treatment system required to treat the "Route 309 Discharge" to whatever standards are dictated by the pending Total Maximum Daily Load (TMDL) for the Little Schuylkill River. Additional revenues from continued collection of the reclamation fee could be used to address both of those potential reclamation problems in the event LC&N defaults. More generally, as our May 2006 opening brief in the PFSC v. Norton case shows, untreated discharges from ABS bond forfeiture sites are a persistent and ugly reminder that Pennsylvania's implementation of SMCRA has not lived up to the promise of timely, complete, and guaranteed reclamation SMCRA made to the nation, and in particular to the residents of the coalfields, in 1977. Continued collection of the reclamation fee would contribute to fulfilling that promise. Terminating its collection would be a step in the wrong direction.

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[1] Another statute enacted in 2005 increased the amount of coal subject to the Special Reclamation Tax by applying it to thin seam coal. 71 Fed. Reg. at 10765 (col. 1) (describing W. Va. Code § 22-3-11a).

[2] West Virginia officials report that the Special Reclamation Tax generated a little more than $88.5 million in revenue from the advent of the "7-Up Plan" in January 2002 through June 30, 2006. The revenues were approximately $21 million in each of 2004 and 2005 and an average of $5.3 million per quarter for the first quarter ($5.17M) and second quarter ($5.41M) of 2006. Using the figure of $5.3 million for the third quarter of 2006 yields a projected total of roughly $93.8 million through the end of September 2006.

3. **The Board should reject the proposal to discontinue the collection of the reclamation fee regardless of the outcome of the PFSC v. Norton case.**

A. **Pennsylvania should not forsake several hundred thousand dollars per year in reclamation funds when dozens of operations that paid the reclamation fee but later suffered bond forfeiture are not fully reclaimed because they have untreated post-mining discharges.**

The rulemaking package presented to the members of this Board was missing two critical facts:

1. Today, there are untreated, post-mining discharges flowing from dozens of mines that suffered bond forfeiture while relying on Pennsylvania's alternative bonding system (ABS) for bond coverage, which they had obtained by paying the reclamation fee required by 25 Pa. Code § 86.17(e) or its predecessors. In the regulatory vernacular, these mines are termed "ABS bond forfeiture discharge sites."

2. The roughly $600,000 to $800,000 per year in funding that could be generated by the continued collection of the reclamation fee under 25 Pa. Code § 86.17(e) could contribute to providing treatment for the post-mining discharges from the ABS bond forfeiture discharge sites.

Though there is more to our argument, based on those facts alone, we submit that this Board should reject the proposed amendment to 25 Pa. Code § 86.17(e) that would discontinue the collection of the Pennsylvania's reclamation fee.

Although inexplicably deleted from the published version of the preamble, see 36 Pa. Bull. 4200, 4201 (col. 2) (August 5, 2006), a sentence in the preamble to the proposed rule as presented to this Board at its May 17, 2006 meeting correctly stated that "Executive Order 1996-1 requires a cost/benefit analysis of the proposed regulation." The entire "cost-benefit analysis" presented to the Board, however, consists of just one sentence: "The proposed rulemaking will reduce compliance costs on the regulated community by eliminating the $100 per acre reclamation fee." 36 Pa. Bull. at 4201 (col. 2).[3] That elementary deduction, which is limited to one set of interested parties and one side of the ledger, does not begin to qualify as a cost-benefit analysis. See, e.g., U.S. EPA, Guidelines for Preparing Economic Analyses, EPA 240-R-00-003 (September 2000). Cf. Rapanos v. United States, 126 S. Ct. 2208, 2258-59 (Stevens, J., dissenting) (plurality opinion's "omission of any discussion of the benefits that the [wetland protection] regulations at issue have produced sheds a revelatory light on the quality (and indeed the impartiality) of its cost-benefit analysis").

More generally, the proposed rule fails to discuss the practical impacts of terminating the collection of the reclamation fee. How much money would be foregone? The preamble to the proposed rule does not say. What would be the benefits (and the value of those benefits) of

[3] The preamble presented at the Board's May 17, 2006 meeting used the word "changes" in place of the word "rulemaking" in the quoted sentence.

using that money for mine drainage treatment projects? Again, the preamble neither discusses nor makes any attempt to quantify the environmental, economic, esthetic, recreational, social, or other benefits of using those funds as part of Pennsylvania's mine drainage treatment efforts. Even if Executive Order 1996-1 did not require a cost-benefit analysis, having information on those questions would be essential to making an informed decision on whether to discontinue the collection of the reclamation fee.

We say above that $600,000 to $800,000 per year "could be generated" because that is the range of the annual reclamation fee revenue one would expect if PADEP determined the amount of the fee for each new operation as it did from 1981 through early 2005. On March 12, 2005, without any change to the reclamation fee regulation adopted by this Board, PADEP unilaterally slashed the amount of reclamation fees it collects under that regulation by revising an off-topic guidance document. Subsection 3.A.i., immediately below, recounts the events leading to this recent change, which has the same practical effect as cutting the $100 per acre reclamation fee rate set by this Board.

i. PADEP's slashing of the reclamation fee revenue.

In 1981, at the behest of Pennsylvania's coal mining industry, this Board adopted an alternative bonding system. In fact, the state's mine operators requested that the Board implement an ABS before the granting of "primacy" under SMCRA to "substantially ease the difficulty of bonding surface mining operations." 11 Pa. Bull. 1811 (col. 2) (May 23, 1981). The Board granted that request, putting the ABS into effect a full year before Pennsylvania attained primacy. 11 Pa. Bull. 2680 (August 1, 1981) (final rule implementing ABS); 47 Fed. Reg. 33050 (July 30, 1982) (granting primacy). Both during the year-long period immediately preceding "primacy" and in the original primacy regulation (25 Pa. Code § 86.17(b)), the initial reclamation fee rate of $50 per acre applied to "all acreage proposed to be used for the mining operation."

In 1991, when this Board moved the reclamation fee to its current subsection, 25 Pa. Code § 86.17(e), it provided that the fee "may be paid as acreage within an approved surface mining permit is authorized for mining." 20 Pa. Bull. 3383, 3390-91 (June 16, 1990). See also 21 Pa. Bull. 3316 (July 27, 1991); 56 Fed. Reg. 24687, 24689 (col. 3) (describing changes to Section 86.17). This addition to the reclamation fee regulation did not change the total amount of fees collected for a given operation, but simply allowed that same amount to be paid over time, as PADEP issued a series of authorizations for the mining activities to expand into new portions of the permitted site. At that time (and until August 4, 2001), Pennsylvania allowed mine operators to bond their operations in "increments." The overall operation was covered by a surface mining permit (SMP), and smaller "bonding increments" within that area were covered by a series of "mining permits" (or "authorizations to mine") issued as the operation proceeded into new portions of the overall area permitted under the SMP. Under the 1991 amendment, the reclamation fee was collected for each acre of the mine where mining activities were authorized by the issuance of a new mining permit. So, if PADEP ultimately issued every mining permit/bonding increment included in the SMP, it collected the (then $50) fee for every acre permitted under the SMP.

Against this backdrop of how the amount of the reclamation fee was determined, this Board in 1993 made its last amendment to 25 Pa. Code § 86.17(e), and in the process reaffirmed its decision to rely on an ABS rather than a conventional, full cost system. That year, when the Board amended 25 Pa. Code § 86.17(e) to increase the reclamation fee from $50 to $100 per acre, it found that "[h]aving an alternative bonding mechanism, rather than full cost bonding, keeps the overall cost of bonding lower than the full cost bonding. To allow the [PA SMCRA] Fund to remain insolvent is not an acceptable bond program under Pennsylvania SMCRA or the Federal SMCRA." 23 Pa. Bull 815, 815 (col. 2) (August 7, 1993).

Given the manner in which PADEP determined the amount of the reclamation fees at the time, this Board could only have intended that its increased reclamation fee rate of $100 per acre would be applied to each and every acre within the approved surface mining permit where mining activities had been authorized. In 1991 and 19993, the total amount of fees paid by any given operation did not depend at all on the maximum amount of acreage allowed to be disturbed at any given moment, but rather on the total number of acres – acres with fixed locations on the ground and identifiable on the plan drawings for the operation – on which mining activities had been authorized. Thus, the circumstances surrounding this Board's adoption of the current version of the reclamation fee regulation in 1991 and the amendment of that regulation in 1993 show that the Board intended the reclamation fee to be paid for each and every permitted acre where mining activities were authorized,[4] not for a smaller "operational area" that did not come into existence as a Pennsylvania bonding program concept until 2001. Cf. 1 Pa. C.S. § 1921(c)(2) (General Assembly' intention may be inferred from circumstances surrounding enactment of statute).

In 2001, PADEP unilaterally countermanded this Board's judgment that an alternative bonding system was preferable to a conventional or "full cost" system. It did so by adopting Technical Guidance Document (TGD) No. 563-2504-001, "Conventional Bonding for Land Reclamation – Coal" (August 4, 2001) (hereinafter "Conventional Bonding TGD"), which started the process – still underway – of requiring active, permitted mining operations to replace any bond coverage under the ABS with conventional bonds.

In a passage quoted at greater length on pages 11-12, below, our comments on the May 2001 draft of the Conventional Bonding TGD noted that "the TGD does not explain how the 'conversion' to an all-conventional bonding system will affect DEP's collection of the $100 per acre reclamation fee under 25 Pa. Code § 86.17(e), which remains part of the approved Pennsylvania program." (Attachment 2, p. 4) PADEP neither responded directly to this comment nor addressed the reclamation fee – which is part of the alternative bonding system[5] –

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[4] The only qualification to this statement is required not by a decision made unilaterally by PADEP, but by another regulation adopted by the EQB, 25 Pa. Code § 86.263(c), which implements a statutory requirement to exempt certain remining acreage from the reclamation fee. 52 P.S. § 1398.4f(k). Those provisions did not take effect as part of the approved Pennsylvania program until May 13, 2005. 70 Fed. Reg. 25472, 25480-81 (May 13, 2005).

[5] Our 2001 comments described the reclamation fee as "the central element of the ABS." (Attachment 2, p. 4) See 71 Fed. Reg. 50868, 50869 (col. 1) (Aug. 28, 2006) (describing § 86.17(e) fee as "the Alternative Bonding System (ABS) $100 per acre reclamation fee").

in the final Conventional Bonding TDG. But as set forth in our comments, during a June 4, 2001 meeting, PADEP officials had explained that the agency intended to continue to collect the reclamation fee. (Attachment 2, p. 4) Nothing in the final TGD suggested the amount of reclamation fees collected would change as a result of the adoption of the TGD and the implementation of Conventional Bonding. To the contrary, in the Comment/Response document for the Conventional Bonding TGD, PADEP stated that it "collects approximately $600,000 from reclamation fees per year from active operators," Comments and Responses, Conventional Bonding for Land Reclamation – Coal, 563-2504-001, p. 22 (July 12, 2001), a figure that was in line with its historical collections at the time. See PADEP, "Assessment of Pennsylvania's Bonding Program for Primacy Coal Mining Permits," p. 33 (Feb. 2000) (income from reclamation fee averaged $680,000 per year during 1995-1999).

But in 2005, again acting unilaterally, PADEP dramatically reduced the amount of money it was collecting in reclamation fees under 25 Pa. Code § 86.17(e). This unilateral change effectively nullified this Board's 1993 increase of the reclamation fee from $50 to $100 per acre.

Despite the fact that PADEP had rejected our 2001 suggestion to address the reclamation fee in the original Conventional Bonding TGD, PADEP slashed the amount of reclamation fees collected by revising its Conventional Bonding TGD rather than issuing a new TGD on collection of the reclamation fee. Moreover, the 2004 notice of the proposed revision of the Conventional Bonding TGD said that PADEP was "adding a section about when and how reclamation fees are still collected" – i.e., the timing and mechanics of the collection process – without saying that the new provision more importantly would result in a drastic reduction in the overall amount of reclamation fees collected. 34 Pa. Bull. 5650 (October 9, 2004) (emphasis added).

We believe that before the revised Conventional Bonding TGD took effect on March 12, 2005,[6] PADEP collected $100 per acre for each permitted acre of any newly permitted surface mine, and coal refuse reprocessing operation, as required by 25 Pa. Code § 86.17(e). So, for example, before issuing a permit for a surface mine with 300 permitted acres, PADEP collected a reclamation fee of 300 acres x $100/acre = $30,000. Before the Conventional Bonding TGD took effect on August 4, 2001 and did away with the concept of "bonding increments," this $30,000 might have been collected over time as PADEP issued a series of mining permits within the overall permitted area of the mine. No matter when and how it was paid, however, the total amount of reclamation fees paid by the operation would have been $30,000 (if the entire operation were completed).

In contrast, under the March 12, 2005 revision to the TGD, the total reclamation fee paid by the exact same operation would be a small fraction of the $30,000 that would have (or should have) been collected under the exact same regulation before that date. What changed? Instead of applying the reclamation fee to all 300 permitted acres of the operation, PADEP switched to using the acreage of the "operational area" under the Conventional Bonding TGD. The "operational area" is the maximum acreage the mine operator may have open (disturbed

[6] We say "we believe," because it is unclear whether the 2005 amendment to the TGD simply ratified a change PADEP already had made in practice.

and not reclaimed) at any given moment under the approved operation plan. It is almost always smaller than the overall permit area, and generally is much smaller than the overall permit area. If our hypothetical 300 permitted acre mine has an operational area of only 50 acres, it would pay a reclamation fee of 50 acres x $100/acre = $5,000. But unlike the previous (1991-2005) practice, the mine operator does not pay additional reclamation fees as the "operational area" moves from the initial 50 acres into the remaining 250 permitted acres of the mine. Instead, $5,000 is the final amount collected for the entire operation, meaning that the total amount of reclamation fees collected for the operation is $25,000 (and 83%) less than it would have before PADEP made the unilateral change in 2005 through its Conventional Bonding TGD.

In short, by changing the way the amount of the reclamation fee is determined – switching from the overall permit area to the smaller "operational area" – PADEP effectively slashed the $100 per acre reclamation fee rate this Board established in 1993. This change was patently unlawful, as we recently explained to PADEP in the comments attached to this letter as Attachment 3. PADEP's practice from 1981 through March 2005 confirms that when this Board amended the reclamation fee regulation in 1991 and 1993, it indisputably intended the reclamation fee to apply to each acre of the permitted area authorized for mining. Conversely, the Board could not have intended the reclamation fee rate to be based on the size of the "operational area," because that concept was not created until 2001, eight years after this Board's last amendment to the reclamation fee regulation. In addition to being unlawful and underhanded, limiting the reclamation fee to the smaller "operational area" has significant consequences for the amount of money amount of money going into the PA SMCRA Fund. Despite needing more money to treat mine drainage from ABS bond forfeiture sites, PADEP has gone well out of its way to collect less money that could be put to that good purpose.

If PADEP had not changed the way it calculates the amount of reclamation fees due, based on the acreage figures in the Pennsylvania Bulletin notices for applications for new permits submitted in 2005 and 2006, it could be collecting more than the $600,000 to $680,000 per year in reclamation fees it reported in 2000 and 2001, and perhaps as much as $800,000 per year.[7] But whether the precise figure is $800,000 or $600,000, something in that range is the proper measure of the amount of revenue dedicated to the reclamation of ABS bond forfeiture sites that would be foregone by terminating the collection of the reclamation fee.

ii. The money generated by continued collection of the reclamation fee could contribute to solving the longstanding problem of untreated discharges from ABS bond forfeiture sites.

For good reason, the proposed rule does not suggest that Pennsylvania could not productively use the money that would be generated by continued collection of the reclamation fee. There remain dozens of mines that obtained bond coverage under the ABS by paying the reclamation fee, later had their bonds forfeited, and continue to leak toxic mine drainage. The June 2003 PADEP-OSM document entitled "Pennsylvania Bonding System Program Enhancements" included a list of 63 ABS primacy bond forfeiture sites with 99 long term discharges for which treatment is not guaranteed, and in most cases not currently provided.

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[7] The Department of Energy forecasts substantial increases in U.S. coal production over the next 25 years, so the current level of permitting activity is likely to be sustained or increased.

The Program Enhancements document estimated that treating those 99 discharges would cost $1.3 million per year, and estimated the initial capital cost for chemical treatment facilities at $3.5 million. It described the $3.5 million as a "one-time capital cost," but did not explain why the "chemical treatment facilities" would not require replacement. The document also did not provide an estimate for even the initial costs of constructing passive treatment systems on the remaining sites. In many instances, components of those systems would have to be replaced or replenished at regular intervals.

Even if the 99 ABS primacy mine discharges and their annual price tag of $1.3 million were the only problem, any revenue would help the cause, and several hundred thousand dollars per year would defray a healthy fraction of the annual cost. In fact, more discharges already have been added to this category since June 2003, and still more are likely to be added to it in the future. The figures presented in the Program Enhancements document indicate that there are at least 270 reclaimed primacy sites[8] in Pennsylvania with post-mining discharges, sixty percent of which require active chemical treatment. As of March 2006, PADEP had established about 20-25 trust accounts, which, although covering more than that number of discharges, left dozens if not hundreds of discharges without a perpetual treatment guarantee.

Moreover, the funds generated by the reclamation fee could be used for some purposes that other state funds may not. Specifically, "Growing Greener II" grant funds may be used only for treatment system infrastructure and may not be used to cover routine operation and maintenance costs. ("Growing Greener I & II, Watershed and Flood Protection Grant Application Package, p. 40) The money raised by the reclamation fee is not subject to this limitation.

As explained in Comments 1 and 2 and the attachments incorporated therein, the organizations submitting these comments contend that Pennsylvania has a legal duty under federal law to adjust its ABS to generate more revenue. If we are correct, taking an action that would generate less revenue for the ABS by terminating the collection of the reclamation fee obviously would violate that legal duty.

But even if Pennsylvania had no such legal obligation, as a matter policy, it simply does not make sense to cut off the flow of several hundred thousand dollars per year in reclamation fee revenues when Pennsylvania could use every reclamation dollar it can find. So long as the revenues generated by the reclamation fee could contribute to providing and guaranteeing the treatment of discharges from ABS bond forfeiture sites, it just makes sense to keep that stream of revenue flowing.

Finally, there is a second legal obligation, this one under state law, that should lead this Board to keep the reclamation fee in effect. Article I, Section 27 of the Pennsylvania Constitution directs the Commonwealth, as the trustee of Pennsylvania's public natural resources, to conserve and maintain those resources for the benefit of all people, including

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[8] Not all of these 270 mines were bonded under the ABS. Specifically, perhaps 75 to 100 of the 270 primacy mines with post-mining discharges are from underground mines or coal refuse disposal sites. But the ABS also is responsible for providing perpetual discharge treatment at an undetermined number of "pre-primacy" sites that were bonded and forfeited under the ABS.

future generations. Pa. Const., art. 1, § 27. This fiduciary duty arising under the highest law of the Commonwealth requires this Board to err on the side of protecting and restoring Pennsylvania's waters. By itself, this constitutional duty as natural resource trustee should lead the Board to allow the reclamation fee to remain in effect.

B. The proposed rule's rationale for discontinuing the collection of the reclamation fee is invalid and does not overcome the legal and policy reasons for allowing the fee to remain in effect.

The preamble to the proposed rule provides a two-step rationale for doing away with the reclamation fee: 1) PADEP "made a commitment with[9] the industry for elimination of the per acre reclamation fee upon completion of the conversion" from an ABS to a CBS, and 2) because PADEP "has essentially completed" that conversion, "termination of the reclamation fee is now appropriate." 36 Pa. Bull. at 4200 (col. 2).

In fact, as we explain in subsection 3.B.ii., below, PADEP's undated and undocumented commitment to a particular outcome is not binding on this Board, and legally, the Board may not consider PADEP's supposed commitment in making its decision on the proposed rule. In addition, the proposed rule contains no data supporting PADEP's assertion that the conversion from an ABS to a CBS is "essentially completed," which in any event falls short of satisfying the precondition of PADEP's commitment that the conversion have been completed. Even if the conversion were complete, however, for the reasons explained in Comment 3.A, above, it would not be "appropriate" to terminate the reclamation fee until all ABS bond forfeiture sites are fully reclaimed, with perpetual treatment of all discharges from them guaranteed.

We begin in subsection 3.B.i., immediately below, by showing that the failure to disclose basic information about the "commitment" underlying the proposed rule violates the requisites of valid rulemaking and due process. In that regard, we note that when responding to our June 12, 2001 comments on the Conventional Bonding TGD (discussed in Comment 2, above), PADEP did not mention having made a commitment to eliminate the reclamation fee. Our comments included the following passage concerning the continued collection of the reclamation fee:

> The TGD describes one of its effects as "converting" from an alternative bonding system to a conventional bonding system. The TGD does not explain, however, what will happen to the remnants of the ABS, including the millions of dollars in reclamation fees collected over the years that are held in the SMCR Fund. Similarly, the TGD does not explain how the "conversion" to an all-conventional bonding system will affect DEP's collection of the $100 per acre reclamation fee under 25 Pa. Code § 86.17(e), which remains part of the approved Pennsylvania program.

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[9] Although the word "with" appears in the text of the preamble, we believe the drafters meant to say that PADEP made a commitment "to" the mining industry. Otherwise, the sentence suggests that PADEP and the industry jointly made a commitment to some other party without identifying that third party.

> During our meeting on June 4, you [Deputy Secretary Roberts], Evan Shuster, and Assistant Counsel Bo Reiley explained that DEP intends to terminate the ABS but also intends to continue to collect the reclamation fee. Because the reclamation fee is the central element of the ABS, these positions seem impossible to reconcile. Without going into the details, you also explained that DEP has been discussing with OSM the need to discharge (so to speak) the ABS's existing liabilities – principally treatment of mine drainage emanating from bond forfeiture sites. Because of the importance of these matters to the overall functioning of the bonding program, DEP should explain its intended actions in the final TGD or comment/response document.

(Attachment 2, p. 4)

PADEP responded that these comments were not germane to the TGD and that "any further adjustment to the bonding program will require additional notice and comment opportunities." (Comments and Responses, Conventional Bonding for Land Reclamation – Coal, 563-2504-001, p. 5 (July 12, 2001)). PADEP's response did not indicate that the agency had made any commitment, agreement, or promise to terminate the reclamation fee. PADEP's failure to mention the "commitment" in 2001 leads to two possible inferences.

First, one might infer that PADEP made its "commitment" to the industry after it released the TGD and Comment/Response document on August 4, 2001. This scenario seems unlikely, because there would appear to be nothing for PADEP to gain from making such a promise after it had started to implement the "full cost" bonding program. If PADEP did make the commitment after August 4, 2001, then at a minimum the proposed rule should have explained when, under what circumstances, and why PADEP made the commitment to terminate the reclamation fee.

The alternative inference is that PADEP made its commitment to the industry during the nearly two years between the announcement and the implementation of "full cost" bonding, but consciously chose not to disclose it during our during our June 4, 2001 meeting, or in the later response to our comment asking PADEP to explain its intended actions regarding the reclamation fee. If PADEP withheld the information about its commitment, the obvious questions are why was PADEP so secretive, and why did it say it intended to continue collecting the reclamation fee without adding that it already had made a commitment to discontinue the fee's collection?

i. The proposed rule violates the fundamental principle that the basis for a rule must be fully disclosed so that interested parties may both understand and comment on it.

A basic and longstanding principle of administrative law provides that an agency must fully disclose the basis for a proposed rule so that interested parties are afforded an opportunity to comment on the foundation for the rule. See, e.g., United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 251-52 (2d Cir. 1977) (where Food and Drug Administration

relied on scientific information not disclosed to public during rulemaking proceeding, rule was invalid and unenforceable because "interested parties were not informed of the scientific data, or at least of a selection of such data deemed important by the agency, so that comments could be addressed to the data"); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973)("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."), cert. denied, 417 U.S. 921 (1974).

PADEP's "commitment" to "the industry" for "elimination" of the reclamation fee is an essential part of the basis for the proposed rule. 36 Pa. Bull. at 4200 (col. 2). But the preamble provides no details about this heretofore undisclosed "commitment." When and why did PADEP make the commitment to eliminate the reclamation fee? Under what circumstances and through what mechanism did it make the commitment? Did it consult with anyone outside "the industry" before making the commitment? What consideration was given by the industry in exchange for PADEP's commitment? Having this information is essential in order to understand the basis for the proposed rule, and thus to have a meaningful opportunity to comment on it. Cf. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" (quoting Armstrong v. Munzo, 380 U.S. 545, 552 (1965)). When the starting point of a proposed rule is known only to the agency and "the industry," other parties are effectively and unlawfully foreclosed from the public comment process, making the resulting rule invalid. Therefore, before this Board proceeds with this rulemaking, it must disclose all the circumstances surrounding and details of PADEP's "commitment," and must afterward give affected parties another opportunity to comment on the proposed rule in light of that information.

ii. Neither the Board as an entity nor its individual members may be constrained by PADEP's "commitment."

This Board as a whole is legal entity separate from PADEP, and therefore is not bound by any commitments PADEP makes. See 71 P.S. §§ 180-1, 510-20. Moreover, both the Commonwealth Documents Law and basic principles of due process demand that the Board and other rulemaking entities not make any advance commitment to a specific outcome in a rulemaking proceeding or otherwise prejudge the issues presented. The Commonwealth Documents Law provides that "[b]efore taking action upon any administrative regulation or change therein the agency shall review and consider any written comments submitted" in response to a notice of proposed rulemaking. 45 P.S. § 1202. That review and consideration of comments is fundamental to the legitimacy of legislative rulemaking, and in order for it to be meaningful, the Board as a whole and its individual members may not have made commitments to a particular outcome before the comments are submitted. See Natural Resource Defense Council, Inc. v. U.S. EPA, 859 F.2d 156, 194 (D.C. Cir. 1988) (per curiam) (a binding promise to make specific changes to regulations is impermissible because it "would seem to defeat Congress's evident intention that agencies proceeding by informal rulemaking should maintain minds open to whatever insights the comments produced by notice under [5 U.S.C.] § 553 may generate"). An advance "commitment" to a particular outcome impermissibly prevents a decisionmaker from changing course in response to insights gained from the review of public

comments. Cf. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (agency decisionmaker should be disqualified if shown to have "an unalterably closed mind on matters critical to the disposition of the proceeding"), cert. denied, 447 U.S. 921 (1980). Such an advance commitment also violates the due process requirement to afford affected parties an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews, 424 U.S. at 333.

In short, both the Commonwealth Documents Law and due process require that all potentially affected parties have an honest opportunity to affect the outcome of the rulemaking proceeding by submitting comments, and that all decisionmakers approach the rulemaking with open minds. An advance commitment made to one set of parties for a specific result would violate the constitutional and statutory requisites for fair and valid rulemaking. The rulemaking process must be a decisionmaking process, not a hollow formality to ratify a decision to which the rulemaking body already is committed.

The principles discussed immediately above dictate that each individual member of the Board approach the proposed rule with an open mind, unconstrained by any advance commitment. See, e.g., Association of Nat'l Advertisers, 627 F.2d at 1170 (individual Commissioner making firm advance decision on whether to issue a rule would frustrate purpose of rulemaking provision of Federal Trade Commission Act). To the extent Secretary and Board Chairperson McGinty is obligated, as PADEP's chief executive, to honor her agency's pre-rulemaking "commitment" by voting in favor of the proposed amendment to 25 Pa. Code § 86.17(e), she should not participate in the consideration of that portion of the proposed rule. Similarly, if the five other cabinet secretaries on the Board are constrained, because of the unified executive power, see Pa. Const., art. IV, §§ 1, 2, not to interfere with the fulfillment of a pre-rulemaking commitment made by another agency in the Governor's cabinet, they should recuse themselves from this portion of the proposed rule.

iii. The conversion from an ABS to a CBS is not complete.

As described in the preamble, PADEP's commitment was "for elimination of the per acre reclamation fee upon completion of the conversion" from the ABS to a CBS. 36 Pa. Bull. 4200 (col. 2) (emphasis added). But the preamble does not, and could not, assert that the conversion has been completed, which will be true only when every ABS site that remained permitted on August 4, 2001 fully replaces its ABS bond coverage and fully converts to conventional bonding by posting approved financial guarantees covering the full costs of reclamation, including perpetual treatment of any post-mining discharges. Instead, employing the ambiguous qualifier "essentially," the preamble states that "termination of the reclamation fee is now appropriate" because PADEP "has essentially completed the conversion from the ABS to the CBS." 36 Pa Bull. at 4200 (col. 2).

First, "essentially completed" obviously is not the same as "completion." Unless the unfinished business here is so trivial that it may be disregarded under the maxim *de minimis non curat lex* ("the law cares not for trifles"), the Board should not consider the proposed regulation until the conversion truly has reached its "completion."

Second, this Board must have a factual basis in order to make such a determination. The preamble contains no data supporting the assertion that the conversion is "essentially completed." Given that the biggest problem with the bonding program since 1991 has been the lack of guarantees for perpetual mine drainage treatment, the salient figures would include:

- for ABS sites with discharges that were permitted as of August 4, 2001, the percentage that now have fully funded, perpetual treatment guarantees;

- for the total estimated cost for perpetually treating all discharges from ABS sites that were permitted as of August 4, 2001, the percentage that is covered by the treatment guarantees currently in place.

It is well within the capacity of PADEP to provide substance to the wiggle word "essentially" by presenting this kind of data. This Board should make its decisions based on data, not ambiguous and unsupported qualifiers like "essentially." If PADEP "has essentially completed the conversion," let PADEP prove it with hard numbers. And going back to the first point, only if the data show that 100 percent of the ABS sites with discharges that were permitted as of August 4, 2001 have posted treatment guarantees covering 100 percent of the estimated future cost of treatment could one say that the conversion to a CBS has been completed.

iv. It is not appropriate to eliminate reclamation fee revenue that could contribute to the reclamation of ABS bond forfeiture sites.

Even if the conversion to a CBS were fully completed, however, the preamble is incorrect that it would be "appropriate" to stop collecting the reclamation fee. As shown in Comment 3.A, above, so long as untreated discharges, or discharges lacking permanent treatment guarantees, are flowing from ABS bond forfeiture sites, it will not be appropriate to shut off a source of revenue that could help provide the needed treatment. The notion that it is appropriate to terminate collection of the reclamation fee "because the Department has changed to a CBS," 36 Pa. Bull. at 4201 (col. 1), inappropriately focuses only on active, permitted sites and ignores the ABS sites that were forfeited before the conversion began. Those ABS bond forfeiture sites relied on the ABS for bond coverage, and the dozens of such sites that lack complete reclamation could use all the reclamation funding the Commonwealth can muster.

The preamble's statement that PADEP "[r]ecognized that the ABS would never address the situation [the growing ABS deficit]," 36 Pa. Bull. 4200 (col. 2), is based on the unstated premise that the only action Pennsylvania could have taken to try to increase revenues to its ABS would have been to increase the per acre reclamation fee. That premise is incorrect for two reasons.

First, as we outlined on pages 6-7 of our June 12, 2001 comments (Attachment 2), without any additional legislative authority, this Board could establish, by regulation, additional or different mechanisms for funding the ABS, including some sort of severance fee. No statute dictates or limits how Pennsylvania's ABS is to be funded, and certainly nothing in PA SMCRA or the Clean Streams Law dictates that the ABS be funded by a one-time, per-acre fee

assessed at the time a surface mining permit or mining authorization is issued. Instead, the statutes in the approved state regulatory program under SMCRA broadly authorize the adoption of "regulations for an alternate coal bonding program." 35 P.S. § 691.315(b); 52 P.S. § 1396.4(d). That is the only statutory authority in the approved Pennsylvania program allowing this Board to create, by regulation, a fee that is dedicated to the reclamation of bond forfeiture sites.[10] If that broad authority authorizes the adoption of a regulation imposing a one-time, per-acre reclamation fee (25 Pa. Code § 86.17(e)), it likewise would authorize the adoption of a regulation imposing a one-time, per-ton or percentage of value reclamation fee imposed at the time of initial sale, which would have the benefit of linking the fee to an event producing revenue for the mine operator.[11]

Second, like West Virginia, which adopted legislation in 2001 to institute the "7-Up Plan" and again in 2005 to expand the Special Reclamation Tax to include thin seam coal and to extend the seven cents per ton surcharge for eighteen months, Pennsylvania could enact legislation increasing the funding to its ABS by changing the funding mechanism to some sort of severance fee. West Virginia faces a bigger reclamation and mine drainage treatment problem on its ABS bond forfeiture sites than Pennsylvania does. But with coal production roughly double that of Pennsylvania, West Virginia raised approximately $94 million for its ABS bond pool between January 1, 2002 and September 30, 2006 through its increased Special Reclamation Tax. See footnote 2, above. If West Virginia can do that, and more,[12] surely Pennsylvania can take care of its smaller problem of guaranteeing the reclamation of all its ABS bond forfeiture sites.

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[10] That is to say, the reclamation fee is not authorized by the statutory provisions that authorize PADEP to assess "a reasonable filing fee" for permit applications. 52 P.S. § 1396.4(a). By statute, the permit application fees specified in 25 Pa. Code § 86.17(a)-(d) "shall not exceed the cost of reviewing, administering and enforcing [the] permit." 52 P.S. § 1396.4(a). And unlike the reclamation fee specified in 25 Pa. Code § 86.17(e), the permit application fees are not dedicated solely to the reclamation of bond forfeiture sites, but instead may be used to defray the costs of reviewing the applications and administering the approved program, including personnel and overhead expenses and the costs of purchasing or leasing vehicles, office space, and equipment. See 25 Pa. Code § 86.187(a)(1), (a)(3). Paralleling this structure, West Virginia assesses a two cents per ton "Special Tax" funding the administration of it approved program under SMCRA, W. Va. Code § 22-3-32, that is distinct from the (currently) fourteen cents per ton Special Reclamation Tax funding the ABS bond pool and dedicated to mine reclamation. W. Va. Code § 22-3-11.

[11] In 1993, when this Board increased the reclamation fee under 25 Pa. Code § 86.17(e) from $50 to $100 per acre, PADER stated on page 4 of its Comment and Response Document that "[i]f the evaluation of the program shows a deficit in the fund at the end of any evaluation year, the Department will recommend increasing revenue to the fund by whatever means is available under the law." PADEP did not follow through on that commitment.

[12] West Virginia also relies on mineral and timber severance taxes to generate revenues for other purposes. In 2005, West Virginia raised more than $307 million through all of its severance taxes, representing 7.1% of the state's tax revenues. U.S. Census Bureau, State Government Tax Collections: 2005 <www.census.gov/statetax/0549wvstax.html>.

Even if the preamble's unstated premise were correct, however, the fact that adjusting the reclamation fee, by itself, would not completely take care of the problem with the ABS does not imply that the state should scrap a source of several hundred thousand dollars per year in reclamation revenue that can contribute to addressing the problem of untreated mine discharges. Wind energy alone will not eliminate American's dependence on foreign oil or sufficiently reduce emissions of carbon dioxide to prevent climate change. But that does not mean Pennsylvania should scrap incentives like the Alternative Energy Portfolio Standards Act that are designed to promote wind energy (and other advanced energy sources), because wind energy is one source that can contribute to solving a number of energy-related problems. That the continued receipt of the reclamation fee under 25 Pa. Code § 86.17(e) similarly could contribute to the solution for ABS bond forfeiture sites is proven by the fact that Pennsylvania relies on the existing ABS bond pool funds as part of its "Alternate Bonding System Primacy Discharge Abatement Workplan." Obviously, if the existing amount of reclamation fees in the PA SMCRA Fund is part of the Workplan, adding to that amount can only help. Conversely, adopting the proposal to eliminate the influx of several hundred thousand dollars per year in badly needed reclamation funds would be a significant step backwards.

v. Summary

The conversion from an ABS to a CBS in Pennsylvania is not complete, and even if it were, the proposed rule fails to discuss the ABS bond forfeiture sites that, despite having obtained bond coverage under the ABS by paying the reclamation fee, have untreated discharges. For both reasons, the preamble to the proposed rule is incorrect when it states that "termination of the reclamation fee is now appropriate." 36 Pa. Bull. at 4200 (col. 2). When ABS bond forfeiture sites – sites that were relying on the ABS for bond coverage when they suffered bond forfeiture – lack mine drainage treatment because the ABS bond pool lacks sufficient funds, it is not appropriate to cut off the principal source of revenue to the bond pool, even if that source of revenue by itself cannot fix the entire problem presented.

Even if Pennsylvania cannot match the kind of political will West Virginia has mustered in a state with a politically powerful coal mining industry to generate $94 million in Special Reclamation Fee revenues in under five years, the least Pennsylvania could do, at a time when dozens of discharges from ABS primacy bond forfeiture sites are going untreated, would be to stand its ground. When SMCRA primacy sites are going unreclaimed, some revenue beats no revenue. We urge the Board to reject the proposed amendment to 25 Pa. Code § 86.17(e), and to allow the reclamation fee to continue contributing to the fulfillment of SMCRA's promise that all primacy sites would be reclaimed completely.

4. The Board should not act to terminate the collection of the reclamation fee before the United States Court of Appeals for the Third Circuit issues its decision in PFSC v. Norton.

For the reasons explained in the preceding comment, no matter what the outcome of the PFSC v. Norton case that is pending before the United States Court of Appeals for the Third

Circuit, this Board should not terminate the collection of the reclamation fee. The six organizations submitting these comments therefore encourage the Board to reject the proposed amendment to Section 86.17(e), and to do so immediately. In this final comment, we explain why, if the Board were otherwise inclined to adopt that proposed amendment, it should withhold its action until the Court of Appeals issues its decision in the PFSC v. Norton case.

As explained in Comment 1, above, and shown in the brief attached to this letter as Attachment 1, the adequacy of the funding of Pennsylvania's ABS is the main issue in the PFSC v. Norton appeal. The Appellants in that case contend that Pennsylvania has an ongoing obligation under federal law to provide more funding to its ABS bond pool (the PA SMCRA Fund). If that contention is correct, terminating the collection of the reclamation fee that supplies the ABS with revenue obviously would violate the Commonwealth's duty under federal law. The EQB therefore should wait until the Court of Appeals resolves the ongoing legal dispute over Pennsylvania's obligations under federal law before taking any final action that would terminate the collection of the reclamation fee.

The preeminence of the federal courts in deciding questions of federal law has been firmly established since the nation's founding. In 1803, Chief Justice Marshall declared: "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). See also 28 U.S.C. § 1257 (granting U.S. Supreme Court jurisdiction to review decisions of state courts involving questions of federal law). As the brief attached to these comments shows, the determination of Pennsylvania's obligations under 30 C.F.R. § 800.11(e)(1) involves application of the canons of construction applicable to federal regulations that are routine fare for, and squarely within the province and expertise of, the United States Court of Appeals. As a matter of federalism and comparative institutional competence, the EQB should defer to the Court of Appeals on the resolution of the legal issue of what obligations, if any, Pennsylvania has under 30 C.F.R. § 800.11(e)(1) toward the funding of the ABS. The EQB therefore should not adopt the portion of the proposed rule affecting the reclamation fee and the funding of the ABS before the Court of Appeals issues its decision in the PFSC v. Norton case.

Practical considerations also counsel the Board to wait for the Court of Appeals to issue its decision in PFSC v. Norton case before acting to amend 25 Pa. Code § 86.17(e). If the Board were to adopt a final rule terminating the reclamation fee, and then the Court of Appeals were to rule in favor of the Appellants in PFSC v. Norton, the Board likely would be forced to go through another (perhaps emergency) rulemaking to reinstate the collection of the reclamation fee. Because of that possibility, it makes sense for the Board to wait until the Court of Appeals has delineated Pennsylvania's obligations under 30 C.F.R. § 800.11(e)(1) before it acts on the proposed amendment to § 86.17(e).

But again, because it bears repeating: For the reasons explained in Comment 3, above, regardless of how the Court of Appeals rules in the PFSC v. Norton case, terminating the collection of the reclamation fee would be a bad idea. Until the day when PADEP certifies that all ABS bond forfeiture sites are fully reclaimed and the treatment of any discharges from them is fully guaranteed in perpetuity, this Board should not discontinue the collection of a fee that could contribute to mitigating the ongoing pollution from those sites.

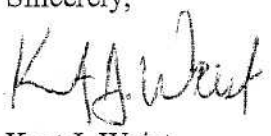
CONCLUSION

In 1993, this Board made a determination that retaining Pennsylvania's alternative bonding system was preferable to having a purely full cost bonding system, and it doubled the reclamation fee required by 25 Pa. Code § 86.17(e) from $50 to $100 per acre. In 2001, PADEP unilaterally determined to "convert" to a conventional/full cost bonding system, putting in motion a conversion process that is far from complete. In 2005, PADEP unilaterally slashed the overall amount of reclamation fees it collects by changing the collection formula in a manner that could not have been contemplated by this Board when it adopted and amended § 86.17(e). At some undisclosed time, PADEP also made a unilateral "commitment" to "the industry" to do away with the reclamation fee completely.

This Board is not bound by PADEP's unilateral commitment. No matter what deal PADEP cut with "the industry," this Board should exercise independent judgment, and should conclude that there is good reason to continue the collection of the reclamation fee, which can contribute needed revenue to Pennsylvania's under-funded coal mine reclamation efforts.

Thank you for your consideration of these comments. Please feel free to contact me at any time if you have any questions.

Sincerely,



Kurt J. Weist
Senior Attorney
Harrisburg Office

Attachments (3)

Summary of Comments

of 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

Proposed Rule: "Coal Mine Reclamation Fees and Reclamation of Bond Forfeiture Sites"

- By returning to the way it determined reclamation fee payment amounts from August 1981 through March 2005, Pennsylvania could generate $600,000 to $800,000 per year in needed mine reclamation revenue through continued collection of the $100 per acre reclamation fee under 25 Pa. Code § 86.17(e).

- Regardless of what legal obligations Pennsylvania has to fund its alternative bonding system (ABS), this Board should not adopt the amendment to 25 Pa. Code § 86.17(e) that would discontinue the collection of the $100 per acre reclamation fee where:

    - Today, untreated post-mining discharges flow from dozens of "ABS bond forfeiture sites," that is, mines that suffered bond forfeiture while relying on Pennsylvania's ABS for bond coverage, which they had obtained by paying the reclamation fee under 25 Pa. Code § 86.17(e) or its predecessors; and

    - **The funding that could be generated by continued collection of the reclamation fee could contribute to solving the longstanding problem of untreated discharges from ABS bond forfeiture sites.**

- In less than five years, from January 2002 through September 2006, West Virginia's ABS has generated about **$94 million** for the reclamation of ABS bond forfeiture sites.

- Pennsylvania has an ongoing obligation under federal law to adjust its ABS so that the ABS provides sufficient funds to treat any post-mining discharges from ABS bond forfeiture sites and any other mines that do not fully replace their ABS bond coverage.

- Pennsylvania's legal obligations under federal law are at issue in an ongoing court case that is pending before the United States Court of Appeals for the Third Circuit (PFSC v. Norton, No. 06-1780). The Board should not adopt the proposed rule discontinuing the collection of the reclamation fee before the Court of Appeals decides the issue of Pennsylvania's legal obligations in the PFSC v. Norton case.

- PADEP's pre-rulemaking "commitment" to the mining industry to terminate the reclamation fee is not binding on this Board and provides no reason to discontinue collecting a fee that would generate needed mine reclamation revenue.

- Any members of the Board who feel constrained to honor PADEP's pre-rulemaking "commitment" to terminate the reclamation fee must recuse themselves from the reclamation fee portion of this rulemaking proceeding.

No. 06-1780

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PENNSYLVANIA FEDERATION OF SPORTSMEN'S CLUBS, INC.; PENNSYLVANIA CHAPTER SIERRA CLUB; PENNSYLVANIA TROUT, INC.; TRI-STATE CITIZENS MINING NETWORK, INC.; MOUNTAIN WATERSHED ASSOCIATION, INC.

v.

GAIL A. NORTON, Secretary, United States Department of the Interior; JEFFREY D. JARRETT, Director, Office of Surface Mining Reclamation and Enforcement; and BRENT WAHLQUIST, Regional Director, Office of Surface Mining Reclamation and Enforcement; and

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor-Defendant in D.C.

Pennsylvania Federation of Sportsmen's Clubs, Inc. et al., Appellants

BRIEF OF APPELLANTS PENNSYLVANIA FEDERATION OF SPORTSMEN'S CLUBS, INC., ET AL. AND APPENDIX VOL. 1 PAGES 1-37

On Appeal from the United States District Court for the Middle District of Pennsylvania

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and 30 U.S.C. § 1276(a)(1). Appendix (App.) 8, 46.[1] This Court has jurisdiction over this appeal from the district court's final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Where OSM approved Pennsylvania's "alternative" coal mine bonding system pursuant to a regulation providing that such systems "must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time," do that regulation and the state's obligation under it continue to apply to coal mines that: a) were permitted, bonded, and operated under Pennsylvania's alternative bonding system; and b) either suffered bond forfeiture before the conversion to a "conventional" bonding system began, or never fully converted to the conventional system and obtained release of their alternative bonding system coverage by posting site-specific guarantees covering the full cost of completing the mine's reclamation plan?

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[1] The district court incorrectly cited 5 U.S.C. § 702 as one basis for its jurisdiction. App. 8. As alleged in the Complaint, App. 46 (¶2), jurisdiction to hear causes of action under 5 U.S.C. § 702 is conferred on the district courts by 28 U.S.C. § 1331. Califano v. Sanders, 430 U.S. 99, 105-07 (1977).

This issue was raised and objected to in the briefs supporting and opposing the cross motions for summary judgment filed below. Doc.[2] 40 (pp. 27-40), Doc. 49 (pp. 21-25), Doc. 50 (pp. 1-10), Doc. 51 (pp. 4-7), Doc. 55 (pp. 2-8). The district court ruled on the issue at pages 29-34 of its February 1, 2006 Memorandum. App. 29-34.

STATEMENT OF THE CASE

This appeal concerns a decision of the United States District Court for the Middle District of Pennsylvania (Senior Judge Sylvia H. Rambo) sustaining two actions of the federal Office of Surface Mining Reclamation and Enforcement (OSM) that ended two actions it had taken a dozen years earlier: 1) the June 12, 2003 termination of a program deficiency notice and program amendment requirement issued on October 1, 1991; and 2) an October 7, 2003 final rule deleting a program amendment requirement promulgated on May 31, 1991 and codified at 30 C.F.R. § 938.16(h). Appellants Pennsylvania Federation of Sportsmen's Clubs, Inc., et al. (Federation), filed a three count complaint on December 8, 2003 against the Secretary of the Interior and the Director and Regional Director of OSM[3] seeking judicial review of OSM's termination of the

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[2] Items not included in the Appendix are cited by their district court docket entry numbers as "Doc. __."

[3] Substitution of the current office holders for the three defendant officials is appropriate pursuant to Fed. R. App. P. 43(c)(2).

October 1, 1991 notice under the Administrative Procedure Act, 5 U.S.C. § 702, and of OSM's final rule under the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1276(a)(1). App. 45. The Federation alleged that OSM had failed to observe procedures required by law,[4] and that each OSM action at issue was arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law. App. 63-64. It requested that the district court reinstate OSM's October 1, 1991 program deficiency notification and the relevant portion of 30 C.F.R. § 938.16(h) by holding unlawful and setting aside both of OSM's 2003 actions. App. 65-66. Without opposition, the court permitted the Pennsylvania Department of Environmental Protection (PADEP) to intervene as a defendant on February 11, 2004. Doc. 9.

The Federal Defendants filed the Administrative Record on March 30, 2004. Docs. 14, 15. On May 28, 2004, the Federation filed a Motion to Compel Supplementation of Administrative Record. Doc. 16. Shortly after the July 15, 2004 oral argument before this Court in a related Freedom of Information Act (FOIA) case, Citizens for Pennsylvania's Future v. United States Department of the Interior, No. 03-4498, the Federal Defendants agreed to add to the Administrative Record in this case the majority of the records addressed by the Motion to Compel, Doc. 28, p. 2; Doc. 29, p. 1, which the district court granted in

[4] This issue is not presented on appeal.

part and denied in part on December 16, 2004. Doc. 32. On December 22, 2004, the Federal Defendants filed a two volume Supplemental Administrative Record, Docs. 34, 35, which they later corrected. Doc. 38.

The parties filed cross-motions for summary judgment, Docs. 39, 47, and related briefs. Docs. 40, 49, 50, 51, 55. In a Memorandum and Order issued on February 1, 2006 and reported at 413 F. Supp. 2d 358, the district court denied the Federation's motion and granted the Appellees' cross-motion. App. 1-35. The clerk entered judgment on February 2, 2006. App. 36. The Federation timely filed this appeal on March 3, 2006. App. 37.

STATEMENT OF RELATED PROCEEDINGS

No proceedings related to this appeal are currently pending before this Court. This appeal relates to the pending matter of Pennsylvania Federation of Sportsmen's Clubs, Inc., et al. v. McGinty, et al., No. 1:CV 99-1791 (M.D. Pa.), which the district court has stayed pending the resolution of this appeal. The McGinty case earlier was before this Court under the caption Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310 (3d Cir. 2002).

On August 3, 2004, this Court dismissed as moot the related FOIA proceeding cited above, Citizens for Pennsylvania's Future v. United States Department of the Interior, No. 03-4498.

STATEMENT OF THE FACTS

SMCRA's Promise of Complete Reclamation

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328, had two central purposes. One was to alleviate the substantial social and economic costs imposed by the existing devastation of unreclaimed, abandoned coal mines. Id. §§ 1201(h), 1202(h). Title IV of the Act, id. §§ 1231-43, created the Abandoned Mine Reclamation Fund to assist the states in reclaiming these "mined areas left without adequate reclamation prior to [the Act's effective date of] August 3, 1977[.]" Id. § 1202(h). See also id. § 1234; American Mining Cong. v. EPA, 965 F.2d 759, 766 (9th Cir. 1992). The second major purpose, addressed through Title V of the Act, 30 U.S.C. §§ 1251-79, was to prevent the abandonment or any more unreclaimed mines or untreated mine discharges by establishing a nationwide regulatory program requiring that mine reclamation be prompt, complete, and guaranteed. See id. §§ 1202(a), 1202(e) (SMCRA is intended to assure that reclamation occurs as contemporaneously as possible with mining operations). Through SMCRA, the nation made a promise to the coalfield residents who had long endured the burdens of supplying its energy needs: no more mines will be abandoned without proper restoration of the land and proper treatment of any polluting discharges.

SMCRA's Bond Requirement

To guarantee this promise is kept, SMCRA requires each mine operator to provide, before mining begins, a financial backstop in the form of a performance bond "sufficient to assure the completion of the [mine's] reclamation plan" in the event the operator fails to perform the necessary work.[5] Id. § 1259(a). All federal and state regulatory programs established under SMCRA must include a "bonding program" for providing and administering this guarantee of timely, complete reclamation, including treatment of any post-mining discharges. See 30 C.F.R. § 732.15(b)(6), pt. 800; West Va. Mining and Reclamation Ass'n v. Babbitt, 970 F. Supp. 506, 510 (S.D.W. Va. 1997) (describing SMCRA bonding program requirement). Where a mine operator seeks to replace its reclamation bond, the regulatory authority may not release the existing bond until it approves a replacement providing equivalent coverage. 30 C.F.R. § 800.30; 25 Pa. Code § 86.166. Final release of all reclamation bonds for a particular mine may not occur until "all reclamation requirements of [SMCRA] are fully met," 30 U.S.C. § 1269(c)(3); see also 52 P.S. § 1396.4(g)(3), a standard that is not satisfied if any discharge must be treated to meet water quality requirements. 61 Fed. Reg. 6511, 6517 (col. 3) (February 21, 1996). Forfeiture and collection of the mine operator's

[5] To protect water resources, a reclamation plan must provide for treatment of any contaminated mine drainage. 30 C.F.R. §§ 780.18(b)(9), 780.21(h); App. 25 ("Complete reclamation includes water treatment.").

bond is a remedy of last resort for the operator's failure or refusal to complete the mine's reclamation or to comply with other regulatory requirements. See 30 C.F.R. § 800.50(a); 52 P.S. § 1396.4(h).

There are two categories of bonding programs under SMCRA: conventional (or "full cost") and alternative (or "alternate"[6]). App. 3, 527-34. See 60 Fed. Reg. 51900, 51903 (col. 2) (October 4, 1995) (summarizing distinctions). In a conventional bonding system (CBS), reclamation is guaranteed on a mine-by-mine basis, with the full cost of the projected reclamation work for each mine covered by a site-specific bond posted by the mine operator before mining begins. Because the site-specific bond provides the only guarantee of reclamation under a CBS, the regulatory program must provide for mandatory adjustment of the bond amount to account for increases in the projected cost of reclamation, such as when an unanticipated, post-mining discharge of contaminated mine drainage occurs. App. 508, 527. See 30 U.S.C. § 1259(e); 30 C.F.R. § 800.15(a), (d).

A bonding system that relies in whole or in part on mechanisms other than full cost conventional bonds is known as an alternative bonding system (ABS). App. 564. See 30 U.S.C. § 1259(c); 30 C.F.R. § 800.11(e). Such systems commonly feature some form of "bond pool," a fund that may be used to reclaim any mine covered by the system. App. 222 & n.1, 530-31. See WVMRA, 970 F.

[6] 52 P.S. § 1396.4(d).

Supp. at 510-11. This risk-spreading mechanism reduces the overall cost of providing the reclamation guarantees by allowing site-specific bonds to be set at discounted levels below the full cost of reclamation, which are supplemented by money drawn from the bond pool if regulators must forfeit a mine's bonds and reclaim the site. App. 395 (col. 2); 413, 468, 530-31. Unlike a CBS, an ABS need not include mandatory adjustment of any site-specific bond because the bond pool provides an additional source of funds to cover any increases in the cost of reclamation. App. 524. See 60 Fed. Reg. at 51908 (col. 2). But because an ABS "must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time," 30 C.F.R. § 800.11(e)(1), the state may have to adjust the funding of the bond pool. App. 524, 534. See 60 Fed. Reg. at 51918 (col. 2) (requiring West Virginia to eliminate deficit in ABS and guarantee complete reclamation of covered mines); 67 Fed. Reg. 37610, 37613 (col. 1) (May 29, 2002) (approving increases in taxes funding West Virginia's ABS bond pool projected to eliminate $47.9 million deficit in 39 months); 71 Fed. Reg. 10764, 10764 (col. 3) (March 2, 2006) (noting 18-month extension of previously-approved reclamation tax surcharge). See also West Virginia Highlands Conservancy v. Norton, 238 F. Supp. 2d 761, 766-74 (S.D.W. Va. 2003) (upholding May 29, 2002 final rule).

As the state's mine operators had requested, 11 Pa. Bull. 1811 (col. 2) (May 23, 1981), Pennsylvania had instituted an ABS for surface coal mines, coal refuse reprocessing operations, and coal preparation plants before it obtained the Secretary of the Interior's approval to regulate mining activities in the state under SMCRA – known as "primacy" – in July 1982. App. 2, 4 & n.4. See 11 Pa. Bull. 2680 (August 1, 1981) (final rule implementing ABS); 47 Fed. Reg. 33050 (July 30, 1982) (granting primacy). See generally Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268-72 (1981) (describing state program approval process); 60 Fed. Reg. at 51900 (col. 2) (describing primacy). Pennsylvania's Surface Mining Conservation and Reclamation Fund (PA SMCRA Fund) served as the ABS's statewide "bond pool," which supplemented the reclamation guarantee provided through site-specific bonds consciously set below the cost of reclamation. App. 4, 344-45, 410, 468. Since primacy, a Pennsylvania regulation has required that the amount of the bond "will be based on," among other factors, the moneys available in the PA SMCRA Fund that are dedicated to reclaiming permitted mines where the operator defaulted on its obligation to reclaim, resulting in forfeiture of the reclamation bond ("bond forfeiture sites"). 25 Pa. Code § 86.149(b)(7). When Pennsylvania attained primacy, mines obtained bond coverage under the ABS by paying a one-time, nonrefundable fee of $50 per permitted acre into the PA SMCRA Fund that was dedicated to reclaiming bond

forfeiture sites. This "reclamation fee" ultimately was codified at 25 Pa. Code § 86.17(e) and remains in effect today at the increased level of $100 per acre. App. 4-5, 410, 468.

SMCRA's reclamation bond requirement serves the "weighty policy of cost internalization" that is "a bedrock principle of SMCRA." WVMRA, 970 F. Supp. at 509, 512. This principle dictates that ""'the cost of the environmental controls and reclamation requirements . . . are properly borne by the mine operators.'"" Id. at 509 (quoting Cat Run Coal Co. v. Babbitt, 932 F. Supp. 772, 780 (S.D.W. Va. 1996) (quoting 119 Cong. Rec. 33181 (October 8, 1973))). A CBS provides for cost internalization on a strict mine-by-mine basis. An ABS internalizes the costs of reclamation more broadly to the state's coal mining industry, or the portion thereof that participates in the ABS. See Cat Run, 932 F. Supp. at 781 n.17 ("[I]n ensuring West Virginia's alternative bonding program achieves the objectives of the SMCRA, OSM consistently has demanded all reclamation costs, including water treatment, be covered not by landowners and others, but solely by the bond system funded by coal operators and permittees."). Whether a state's bonding program is conventional or alternative, however, SMCRA demands that it guarantee prompt reclamation of every regulated mine, thus ensuring that the enormous burden on SMCRA's Abandoned Mine Reclamation Fund and other public and private resources used in reclaiming abandoned mines and treating abandoned discharges gets no heavier.

OSM's 1991 Actions

In January 1991, the Director of OSM notified an official of the Pennsylvania Department of Environmental Resources (since June 1995, PADEP[7]) that Pennsylvania's "alternative bonding system must be modified to provide the resources needed to reclaim existing permanent program forfeiture sites within a reasonable timeframe and to ensure that future forfeiture sites will be reclaimed in a timely manner. These resources must be sufficient to complete the reclamation plan approved in the permit." App. 430. In an April 1991 reply to the PADEP official, the Director specifically cited the PA SMCRA Fund's "liabilities associated with treatment of post mining discharges" as one of the factors supporting "OSM's determination that PADER must modify the alternative bonding system[.]" App. 425.

OSM quoted the Director's January 1991 letter in a May 31, 1991 final rule that approved amendments to Pennsylvania's regulatory program under SMCRA. App. 423 (col. 1). In that same final rule, OSM codified a "required regulatory program amendment" at 30 C.F.R. § 938.16(h) that directed Pennsylvania to submit, by November 1, 1991, an actuarial study or other information demonstrating that the PA SMCRA Fund was solvent ("ABS solvency

[7] See 71 P.S. § 1340.501. This brief refers to the agency as "PADEP" throughout.

demonstration requirement"),[8] and thus that the state's ABS could satisfy the requirements of 30 C.F.R. § 800.11(e). App. 424 (col. 2). See also App. 423 (col. 1) (explaining rationale).

The prelude to OSM's second 1991 action came in an August 1991 OSM Evaluation Report entitled "Pennsylvania Bond Program As An Alternative Bonding System." App. 409-19. In describing Pennsylvania's ABS, the report stated that "the [PA SMCRA] fund assumes full financial liability to supplement bonds posted to cover the costs of reclamation," so that "when bonds are declared forfeit the operators [sic] financial obligations are transferred to the bond fund to supplement posted bonds in fulfilling reclamation obligations." App. 413. Noting that an ABS must be solvent "to insure prompt reclamation," OSM found that Pennsylvania's ABS "is currently not solvent . . . [and] presently does not address treatment or abatement of pollutional discharges emanating from forfeited sites." App. 409. OSM concluded that the "[c]urrent bond program data show . . . the need for enhancement of the alternative bonding program at this time." App. 411.

Based on this evaluation, the Deputy Director of OSM on October 1, 1991 issued a formal "Part 732 notice" to the Secretary of PADEP pursuant to 30 C.F.R. § 732.17(c)-(f)(1). App. 407-08. The Part 732 notice declared that "to be in

[8] An actuarial study Pennsylvania submitted to OSM in 1993 (Doc. 15, Admin. Rec. 754-813) confirmed that the ABS remained insolvent. App. 147.

accordance with SMCRA, an ABS must provide for abatement or treatment of pollutional discharges emanating from bond forfeiture sites, unless the approved program includes some other form of financial guarantee." App. 408. Finding that Pennsylvania's ABS was "financially incapable of abating or permanently treating pollutional discharges from bond forfeiture sites" even if no additional discharges were abandoned, App. 407, the Part 732 notice declared that "the ABS and hence the approved program are no longer in conformance with SMCRA and the Federal regulations." App. 408. It further directed Pennsylvania to submit a rectifying program amendment (or the description of an amendment plus a timetable for adoption) to OSM within sixty days, as required by 30 C.F.R. § 732.17(f)(1). App. 408.

Pennsylvania did not fulfill that duty. On March 3, 1992, OSM informed the Secretary of PADEP that his December 1991 response to the Part 732 Notice (App. 404) was insufficient to satisfy the requirements of 30 C.F.R. § 732.17(f)(1). App. 402. But having failed to receive a satisfactory program amendment submission within the 60-day deadline of 30 C.F.R. § 732.17(f)(1), OSM matched the state's default by failing to carry out its mandatory duty under 30 C.F.R. § 732.17(f)(2)[9]

[9] A 2005 amendment to § 732.17(f)(2) making the commencement of a Part 733 oversight proceeding discretionary was not retroactive. App. 21-22 n.17.

to institute proceedings pursuant to 30 C.F.R. pt. 733 to enforce or withdraw approval of the relevant portions of the state regulatory program. App. 21-22 & n.17.

The 1993 "Stop-Gap" Reclamation Fee Increase and 1995 Dunning Letter

OSM's October 1, 1991 Part 732 notice acknowledged that Pennsylvania had initiated the process to increase the ABS reclamation fee from $50 to $100 per acre. App. 408. When it submitted the amended regulation to OSM for approval as a program amendment, "Pennsylvania acknowledge[d] that '[e]ven though the proposed fee of $100 per acre may still be insufficient, a stop gap measure [was] needed to keep the situation from worsening.'" App. 399 (col. 2). OSM approved the fee increase in July 1993 as "an intermediate step to keep the shortage in the [PA SMCRA] Fund from further deteriorating," id., but one that did not satisfy the ABS solvency demonstration requirement codified at 30 C.F.R. § 938.16(h) or the program amendment requirement imposed by OSM's October 1991 Part 732 notice. App.394-394B, 399 (col. 1-2). When putting the reclamation fee increase into effect, the Pennsylvania Environmental Quality Board acknowledged that "[t]o allow the [PA SMRCA] Fund to remain insolvent is not an acceptable bond program under Pennsylvania SMCRA or the Federal SMCRA." App. 395 (col. 2).

Nearly two years later, on May 31, 1995, OSM sent the Secretary of PADEP a dunning letter reminding him of the state's outstanding program amendment

obligation under OSM's 1991 Part 732 notice. App. 394. OSM still failed, however, to perform its mandatory duty under 30 C.F.R. § 732.17(f)(2) to institute a Part 733 oversight proceeding.

1998-2000: "The dog is no longer sleeping."

In a letter dated September 28, 1998 to a mining association official, PADEP's Jeffrey D. Jarrett, who later would become the Director of OSM, illustrated the magnitude of the problem with Pennsylvania's bonding program:

> DEP is currently holding about $89 million in reclamation bonds involving 178 coal operators and 102 financial institutions on 331 permits that have long been reclaimed, but have one or more discharges. Pennsylvania law prohibits the release of these bonds unless other financial assurances for the long-term treatment of water are provided. In addition, the bonds do not represent anywhere near the amount of money required by the Department to provide for the long-term treatment of discharges in the case of default by an operator.

App. 193 (emphasis added). Jarrett closed his letter by warning: "The risk, and I believe certain consequence, of not dealing with this problem now and in earnest is the real possibility that some court will eventually decide the issue for us. The dog is no longer sleeping." App. 195.

On June 3, 1999, the Federation served the advance notice required to initiate a "citizen suit" under SMCRA to rectify listed shortcomings of Pennsylvania's bonding program. App. 197. See 30 U.S.C. § 1270(b)(2). The notice letter, which highlighted the devastating pollution impacts of untreated mine

discharges, App. 203-05, sparked a flurry of meetings and correspondence. App. 349 (December 1999 OSM letter stating that OSM and PADEP had been meeting approximately every other week). In the midst of settlement negotiations, App. 370-73, 379-92, 432-55, PADEP issued a news release on October 6, 1999 announcing its decision to adopt a new "full cost" bonding system with site-specific bonds that would "fully reflect the department's estimated cost for [land] reclamation . . . and, when necessary, provide for the perpetual treatment of acid mine drainage discharges" in order "[t]o be sure taxpayers do not pick up the cost of treating" such discharges. App. 367. PADEP's public announcement came as a surprise to the Federation, which had expected to receive a letter continuing the private settlement dialogue. App. 360-61 (testimony of John Hanger, Citizens for Pennsylvania's Future). On October 13, 1999, the Federation filed an action in the district court to rectify the violations detailed in the June 1999 notice letter. App. 8 n.10. As noted above, that related action (McGinty) is currently stayed pending the resolution of this appeal.

On December 14, 1999, PADEP's Deputy Secretary for Mineral Resources Management testified before a state legislative committee that "the ABS is insolvent." App. 357. He explained that PADEP had "identified shortfalls in the bond pool that are attributable to land reclamation obligations," but that "[a]n insolvency, or perhaps better described as a bankruptcy, is created by costs

associated with water [mine drainage] treatment." App. 358. In a February 2000 continuation of the hearing, PADEP's Jarrett similarly testified that "when you throw water [mine drainage] into the problem and the perpetual need for money to treat a discharge forever and a bond pool responsible for that on each of the sites, you know, that all of a sudden makes the bond fund in the hundreds of millions of dollars short." App. 345.

OSM's Position Before November 2000

A 1998 OSM report had documented that there were at least thirty-seven primacy bond forfeiture sites in Pennsylvania with untreated post-mining discharges. App. 204, 432. "OSM's position, expressed at a Nov. 18, 1999, meeting with PADEP representatives, [was] that conversion to FCB [full cost bonding] for all current and future permits, as outlined by PADEP, would not completely resolve the outstanding [1991] Part 732 Notification" because it would not provide for the treatment of all discharges from sites bonded under the Pennsylvania ABS. App. 554. OSM "insist[ed] that PADEP must deal with the current liability that has accrued against the ABS [through past bond forfeitures] as well as any future liability from the forfeiture of existing permits bonded under the ABS that are unwilling or unable to convert to FCB." App. 554. OSM believed "[t]his position [was] mandated by the Federal regulations at 30 CFR § 800.11(e)(1)," and that "[t]he PADEP proposal [was] less effective than 30 CFR

§ 800.11(e) because it [did] not offer any means for ensuring that the [PA SMCRA Fund] will contain sufficient moneys to cover the costs of reclamation for permanent program [i.e., primacy] bond forfeiture sites, and for sites that fail to procure adequate FCB after the conversion date, and for which bonds are subsequently forfeited." App. 554. OSM also maintained its "position [was] consistent with decisions it ha[d] issued with respect to ABS program amendments from Missouri and West Virginia."[10] App. 554-55.

At the same time, OSM rejected PADEP's argument that "its ABS liability is no greater than that of a conventional bonding system." App. 555. In a conventional system, the mandatory adjustment requirement generally should ensure that the bond provides sufficient funds for the state to complete the reclamation plan. If a shortfall does exist at the time of bond forfeiture, however, "there is no opportunity to increase the available bond money under a [CBS]," and the state has no obligation to provide any funds to reclaim the site beyond those obtained through forfeiting and collecting the operator's bond. App. 555. See 30 C.F.R. § 800.50(d)(1). Asserting that "an ABS should be held to the same standard," PADEP argued that if the ABS bond pool lacked enough money to fully reclaim all ABS bond forfeiture sites, the state's obligation was limited to spending the insufficient amount of funds available in the bond pool. App. 555. As a result,

[10] Section A.3 of the Argument discusses these program amendments.

even though "PADEP [did] not expect to have sufficient funds available in the ABS to cover the costs of [mine drainage] treatment on any of the [existing ABS bond forfeiture sites]," it informed OSM during the 1999 meetings that "no effort [would] be made to increase revenues to the ABS." App. 512.

OSM found PADEP's argument "unavailing" because of the plain language of 30 C.F.R. § 800.11(e)(1). App. 555. It explained that "the liability of a bond pool for the reclamation costs on a given forfeited site is not limited to any assigned amount. Rather its obligation, as stated in 30 CFR §800.11(e)(1), is to 'have available sufficient money to complete the reclamation plan for any areas which may be in default at any time.'" App. 555. Applying that standard, OSM found that "PADEP's proposal cannot be approved in its entirety." App. 555.

At a December 6, 1999 meeting with PADEP, OSM agreed that the ABS would have no continuing liability for permitted ABS mines that were <u>fully</u> converted to the new conventional system, with the understanding that "[f]ully converted implies that adequate bond or financial assurance was provided for any converted ABS permits with long term discharges." App. 510 ("Notes reflecting 12/06 OSM/PADEP Meeting" dated 12/08/99). But OSM reiterated its position that the 1991 Part 732 notice "require[d] more than a prospective solution," and that PADEP had to address the mine drainage treatment liabilities for both existing

ABS bond forfeiture sites and any additional sites bonded under the ABS that would be unable to convert to the conventional system. App. 507.

In a document sent to PADEP in June 2000 that "represent[ed] the agency's current position," App. 498, OSM reiterated its interpretation that "Federal regulations do not authorize partial or full 'write off' of liability through ABS modification, and Pennsylvania must administer the program so that all liabilities accrued against the ABS are accounted for, including water treatment." App. 500. OSM's counsel further stated that "[i]f conventional bonds are insufficient to cover a perpetual reclamation obligation [i.e., mine drainage treatment], then a regulatory authority must prescribe an alternative system, pursuant to 30 C.F.R. § 800.11(e)." App. 499.

A full year after PADEP's announcement of "full cost bonding," OSM formally proclaimed that conversion to conventional bonding for new and existing permitted sites would be inadequate because it failed to guarantee the treatment of pollutional discharges from bond forfeiture sites. In a letter to the Secretary of PADEP dated October 11, 2000, OSM Regional Director Allen Klein stated that "[a]ddressing forfeiture sites remains a critical aspect of OSM's 1991 notice on ABS insolvency and requires corrective action." App. 339. After quoting 30 C.F.R. § 800.11(e)(1), Klein explained that OSM "ha[d] consistently interpreted these provisions as requiring that (1) a state is responsible to administer its ABS in

a manner that provides sufficient funds, including funds for treatment of AMD [acid mine drainage] emanating from forfeiture primacy permits; and (2) an ABS can only be terminated when all sites bonded under the system are successfully reclaimed or adequate replacement bonds are provided." App. 339.

OSM's About-Face

Although not as sudden as its reversal of position on the question of whether Pennsylvania was required to submit a program amendment,[11] OSM eventually abandoned its position that Pennsylvania's bonding program had to guarantee complete reclamation of all sites that had been bonded under the ABS. Initially OSM held to its previously-stated position that the ABS had to provide for the treatment of the existing discharges from ABS bond forfeiture sites. In letters dated January 19, 2001, OSM's Acting Director stated that "OSM remain[ed] concerned with the capability of the bond pool to deal with outstanding land reclamation and water treatment on existing primacy forfeiture sites," App. 334, and that federal and state officials had been "unable to reach a mutual understanding regarding whether financial liability exists for bond pool

[11] Contrast App. 337 (October 11, 2000 OSM letter concluding that "Pennsylvania must submit a program amendment" and "OSM must approve a program amendment") with App. 335 (PADEP letter recounting November 17, 2000 meeting convened "on short notice" where OSM explained that PADEP could implement bonding guideline changes without submitting program amendment).

forfeitures." App. 462. Eventually, however, PADEP and OSM came to a mutual understanding about the scope and duration of the ABS's obligations, and by September 2002 were jointly drafting an explanation of how they would "proceed on the agreement that the [1991 Part] 732 notice is satisfied through the conversion to full cost bonding." App. 566.

PADEP's August 4, 2001 Technical Guidance Document

OSM's May 1995 dunning letter, App. 189-90, Jarrett's September 1998 letter, App. 193-95, the Federation's June 1999 citizen suit notice letter, App. 201-09, and the later testimony of PADEP's officials, App. 344-45, 358, all showed that the pressing problem with Pennsylvania's bonding program was not an inability to reclaim lands, but rather the failure to guarantee the treatment of post-mining discharges. Indeed, OSM had not cited a single ABS mine where PADEP had been unable to restore the land surface after forfeiting the reclamation bond, but had documented dozens of ABS bond forfeiture sites with untreated discharges. App. 144.

In May 2001, PADEP released a draft technical guidance document describing how it would implement the "full cost" bonding initiative announced nineteen months earlier. App. 568. It included a "Postmining Water Treatment Bond" as one of five possible components of the "Total Bond" for each mine. App. 596. PADEP confirmed to the Federation that all permitted sites with post-

mining discharges would be required to include treatment costs in their bond calculations. App. 217. In addition to contending that Pennsylvania must continue and renovate its ABS, App. 219-23, the Federation supported the Postmining Water Treatment Bond component and recommended that PADEP remove the reference to "Land Reclamation" from the guidance document's title. App. 217-18 (citing 25 Pa. Code § 149(b)(5)) (bond amount "will be based on . . . [t]he cost of . . . constructing, operating and maintaining treatment facilities"). In the final guidance document dated August 4, 2001 (App. 464), however, PADEP deleted the water treatment bond component and limited the bond amount calculations exclusively to land reclamation costs. App. 150, 159-60, 491. PADEP explained that "because bonding for postmining treatment may involve significant costs to the coal mining industry and a significant burden on Department staff, it will be handled as a separate initiative." App. 497.

The June 2003 Program Enhancements Submission

For roughly two years, OSM and PADEP exchanged drafts of what would become the jointly authored "Pennsylvania Bonding System Program Enhancements" (Program Enhancements), App. 253-332, which PADEP submitted to OSM on June 5, 2003. PADEP's cover letter asserted that the "program enhancements and evaluations satisfy OSM's October 1, 1991, notice to PADEP under 30 CFR 732.17." App. 252. In a separate letter asserting that the

submission also satisfied the ABS solvency demonstration requirement. PADEP requested that OSM remove 30 C.F.R. § 938.16(h). App. 249. The Program Enhancements document stated that "[o]n August 4, 2001 PADEP ended the ABS and implemented a CBS" for the three relevant categories of operations, App. 258; described how PADEP had "converted" 679 ABS mining operations to a "conventional" bonding system covering only land reclamation, App. 262-63; described a "Long Term Pollutional Discharge Enforcement/Compliance Process" (App. 272-74) for obtaining full cost mine drainage treatment guarantees at the roughly 270 ABS sites with post-mining pollutional discharges, App. 261-62; listed the ABS primacy bond forfeiture sites with long-term discharges but lacking long-term treatment guarantees, App. 306-09; and presented a multi-phase "Alternate Bonding System Primacy Discharge Abatement Workplan" (Workplan) for deciding whether and when to treat coal mine discharges. App. 310-26.

The Workplan explains that PADEP plans to address pollutional discharges from primacy ABS bond forfeiture sites "in the context of addressing the universe of [coal mine] discharges." App. 312. It also lists and discusses some of the resources available for this effort through existing programs, including Pennsylvania's "Growing Greener" program and "other funds" dedicated to natural

resource protection and restoration projects.[12] App. 313-14, 320-26. The Workplan describes how PADEP would allocate those scarce resources among the universe of discharges by:

-- first performing stream assessments across the state; then

-- establishing priorities for the development of maximum pollutant thresholds for streams known as Total Maximum Daily Loads (TMDLs), see 40 C.F.R. § 130.7; then

-- developing the TMDLs; then

-- creating watershed pollution abatement plans; then

-- selecting mine discharges for treatment; then

-- developing site-specific discharge treatment or abatement plans; then

-- coming up with an implementation schedule; and finally

-- implementing the treatment plans, if sufficient funds are available.

App. 315-20.

[12] These additional funds used in mine drainage treatment projects in Pennsylvania include federal grant programs under the Watershed Protection and Flood Prevention Act ("P.L. 566"), 16 U.S.C. §§ 1001-1012, and Section 319 of the Clean Water Act, 33 U.S.C. § 1329. Government grant programs often require recipients to match the value of the grant with other funds or in-kind services. App. 94-101 (Lichvar Declaration ¶¶ 18, 24-25. 29, 30, 41); App. 104-09 (Morrow Declaration ¶¶ 15, 18, 19, 34-35).

The OSM Actions At Issue

On June 12, 2003, just one week after receiving the 80-page Program Enhancements submission, OSM Regional Director Brent Wahlquist (today the Acting Director of OSM), sent the Secretary of PADEP a short letter finding that PADEP's "transition of existing active and inactive permits covered by the ABS to conventional bonds . . . is now complete." App. 247. Concurring with PADEP that the actions described in PADEP's submission "satisf[ied] OSM's October 1, 1991, Notice under 30 CFR 732.17, and [the] follow up letter dated May 31, 1995," were "sufficient to address the issues described in" those earlier letters, and were "sufficient to resolve [OSM's] 1991 Notice," Wahlquist declared that the Part 732 notice "is hereby terminated." App. 247.

On the same day, Wahlquist issued a proposed rule, App. 243, proposing the deletion of 30 C.F.R. § 938.16(h). The preamble to the proposed rule did not assert that 30 C.F.R. § 800.11(e) was no longer applicable, but instead explained that according to PADEP, the information in the Program Enhancements would "satisfy [OSM's] concerns as to whether the [PA SMCRA] Fund can be operated in a manner that will meet the requirements of 30 CFR 800.11(e)." App. 244 (col. 1) (emphasis added). OSM further stated that "[s]ince [it was] now satisfied that the State's bonding program enhancements adequately address [its] concerns about the ability of the bonding program to ensure the completion of the reclamation

plans for all operations on which the operators default on their obligations to reclaim, [it was] proposing the removal of the [ABS solvency demonstration requirement] of 30 CFR 938.16(h)." App. 244 (col. 2-3).

The Federation submitted comments to OSM on the proposed rule, App. 125, that incorporated objections submitted on the termination of the Part 732 notice. App. 142. The Federation explained that OSM's June 12, 2003 finding that Pennsylvania's "transition" from an ABS to a CBS "is now complete" (App. 247) was incorrect for several reasons. Most prominent was the failure of the new program to cover the costs of mine drainage treatment, and thus the full cost of reclamation, at many sites with post-mining discharges. App. 159-60. Citing OSM's rulings on the Missouri and West Virginia ABSs, the Federation also objected that Pennsylvania could not "write off" ABS reclamation liabilities, whether by leaving discharges from ABS forfeiture sites untreated, or by foisting those liabilities onto other programs and sources of funding identified in the Workplan. Instead, Pennsylvania had to fulfill its obligation under 30 C.F.R. § 800.11(e)(1) by modifying its ABS to provide sufficient resources to guarantee the treatment of all discharges from ABS sites that already had suffered bond forfeiture, plus those that would be forfeited in the future without having posted a full cost guarantee of perpetual treatment. App. 164-68, 177. Finally, noting that the discharge Workplan contained no enforceable commitments to specified

funding levels or implementation deadlines. App. 171-73, 178-80, the Federation objected that "[a] 'Workplan' is no substitute for [the] guarantee" of treatment required by SMCRA. App. 173.

Wahlquist responded to the comments on the termination of the Part 732 notice on October 3, 2003. App. 120. OSM published its Final Rule deleting § 938.16(h) on October 7, 2003. App. 110. OSM's overarching response to the Federation's comments was that 30 C.F.R. § 938.16(h) and the 1991 Part 732 notice were "moot" because of PADEP's conversion from an ABS to a CBS for new and ongoing, permitted mining operations. App. 111 (col. 3). OSM did not explain why the requirement for permitted mines to replace their ABS bond coverage with conventional bonds affected the obligations pertaining to ABS mines that did not post conventional bonds covering all reclamation costs, in particular those that had been permitted, operated, and forfeited under the ABS before the conversion to a CBS began on August 4, 2001. Though PADEP had argued in 1999 that 30 C.F.R. § 800.50(d)(1) provided the reason, App. 555, OSM did not cite § 800.50 in its proposed or final rules regarding § 938.16(h), or in Wahlquist's October 3, 2003 response letter.[13] OSM also did not explain why the Program Enhancements satisfied the fundamental concern underlying its 1991 Part

[13] Before the district court, the Appellees cited § 800.50 only once, for the proposition that failure to complete the reclamation plan may lead to bond forfeiture. Doc. 51, p. 6. See 30 C.F.R. § 800.50(a).

732 notice, namely the failure to ensure that primacy sites are "fully reclaim[ed] . . . in accordance with permanent program requirements in a timely manner." App. 408. To the contrary, OSM conceded that the Workplan's process of collecting data and developing and implementing the series of plans "may require a considerable amount of time," and that "certain discharges may go untreated" during that process. App. 116 (col. 1). Without offering specific timeframes, it further conceded that some primacy site discharges "will have to wait longer than others" to be "addressed." App. 116 (col. 3).

The Proceedings Below

The Federation timely commenced the underlying action on December 8, 2003. As customary in such review proceedings, the parties presented their cases through cross motions for summary judgment. The district court denied the Federation's motion and granted the Appellees' cross motion in a Memorandum and Order issued February 1, 2006.[14] App. 1. The court held that both OSM's final rule deleting 30 C.F.R. § 938.16(h) and its termination of the 1991 Part 732 notice were subject to judicial review. App. 18-23. Because the rationales for both OSM actions were "essentially the same," the district court reviewed those actions,

[14] The seven declarations attached to the Federation's motion for summary judgment, Doc. 39, amply demonstrated the Plaintiffs' standing, which the Appellees did not challenge below, and which the district court did not discuss.

and the two counts of the Complaint challenging them on the merits, together. App. 18. The details of the district court's decision are discussed in the relevant sections of the Argument, below.

STANDARDS OF REVIEW

In proceedings for judicial review on an administrative record, this Court reviews the grant of summary judgment de novo, applying the same standard as the district court, e.g., Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142, 151 (3d Cir. 2004), which in this case provides that OSM's actions be set aside if they are arbitrary, capricious, or otherwise inconsistent with law. 5 U.S.C. § 706(2)(A), 30 U.S.C. § 1276(a)(1). In applying that standard, "a reviewing court may not merely rubber-stamp the [agency's] actions, but must ensure that the agency's ruling is neither clearly erroneous nor inconsistent with applicable regulations." Mercy Catholic, 380 F.3d at 151.

"Because this appeal concerns solely the legal issue of the proper interpretation of statutes and regulations, [this court] exercise[s] de novo review over the district court's order." Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 202 (3d Cir. 1998). Additional standards governing the construction of regulations are discussed in Section A.2 of the Argument.

SUMMARY OF ARGUMENT

By its plain terms, 30 C.F.R. § 800.11(e)(1) requires Pennsylvania to adjust its alternative bonding system so that it provides "sufficient money to complete the reclamation plan for any areas which may be in default at any time." The district court erroneously found this language ambiguous and impermissibly allowed OSM, under the guise of "interpretation," to add a limitation that is inconsistent with the regulation's plain and all-inclusive language. Contrary to the district court's conclusion, § 800.11(e)(1) does not instantly become inapplicable when a state begins to convert to a conventional bonding system. Instead, it continues to apply to all mines bonded under the alternative system for which the state had forfeited the reclamation bonds before the conversion process began, and to ongoing operations until they fully replace and obtain release of their alternative bonding system coverage by posting conventional bonds or other approved guarantees sufficient to ensure completion of the mine's reclamation plan.

The discharge treatment Workplan devised by OSM and PADEP fails to provide the guarantee of prompt and complete reclamation SMCRA demands. In addition to externalizing the costs of pollution from untreated discharges, the Workplan improperly places the burdens of treating some primacy mine discharges on watershed protection groups and public and private conservation funds, which SMCRA's bonding program is supposed to insulate from additional burdens.

ARGUMENT

PENNSYLVANIA'S ABS MUST PROVIDE SUFFICIENT MONEY TO COMPLETE THE RECLAMATION PLAN FOR ALL MINES THAT COULD NOT HAVE, OR HAVE NOT, FULLY REPLACED THEIR ABS BOND COVERAGE WITH FINANCIAL GUARANTEES SUFFICIENT TO ENSURE COMPLETE RECLAMATION.

A. The District Court Erroneously Found 30 C.F.R. § 800.11(e)(1) Ambiguous and Improperly Deferred to OSM's Interpretation.

Section 509(c) of SMCRA provides that Secretary of the Interior may approve an alternative bonding system if it "will achieve the objectives and purposes of the bonding program pursuant to this section." 30 U.S.C. § 1259(c). OSM's regulation governing ABSs, 30 C.F.R. § 800.11(e),[15] reiterates Section 509's fundamental objective of fully protecting all potentially affected lands and waters by guaranteeing the timely completion of the reclamation plan for every permitted mine. In relevant part,[16] the regulation provides:

> (e) OSM may approve, as part of a State or Federal program, an alternative bonding system, if it will achieve the following objectives and purposes of the bonding program:
>
> > (1) The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time[.]

30 C.F.R. § 800.11(e)(1).

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[15] This regulation initially appeared with virtually identical language at 30 C.F.R. § 806.11(c). See 44 Fed. Reg. 14902, 15388 (March 13, 1979).

[16] Subsection 800.11(e)(2) was not cited in OSM's 2003 actions or the decision below and is not at issue in this appeal.

The Appellees did not contend below, and the district court did not find, that Pennsylvania's ABS has sufficient money to complete the reclamation plan for all sites bonded under the ABS that are (or may become) in default of their reclamation obligations. Rather, as described by the district court, the Appellees argued that "once Pennsylvania converted from the ABS to the CBS, the obligations of § 800.11(e) became inapplicable to the State's bonding program," and as a result, "Pennsylvania's 'programmatic responsibility' to assure that the ABS has sufficient funds to cover sites forfeited under the ABS ended once the bond program converted to the CBS." App. 32-33. The Appellees maintained that the ABS was "terminated," App. 82 (¶14), or "ended," App. 258, on August 4, 2001, when PADEP's Technical Guidance Document on "Conventional Bonding for Land Reclamation" took effect. App. 464. From that point on, PADEP's bond rate guidelines covered the full cost of land reclamation, but: a) dozens of mines bonded under the ABS that had their bonds forfeited before August 4, 2001 had postmining discharges that were untreated or lacked perpetual treatment guarantees, App. 204-05, 306-09; and b) PADEP's August 4, 2001 guidance was limited to land reclamation costs, meaning that the bonds posted for many sites with discharges covered only part of the costs of reclamation, and therefore failed to satisfy the full cost conventional bonding standard of Section 509(a) of SMCRA, 30 U.S.C. § 1259(a) and 30 C.F.R. §§ 800.11(a), 800.14(b). Even two

years later, the Program Enhancements submission merely described a "Long Term Pollutional Discharge Enforcement/Compliance Process," App. 271-73, for obtaining, by some unspecified point in the future, full cost mine drainage treatment guarantees for the roughly 270 ABS sites with post-mining pollutional discharges. App. 261-62.

Pennsylvania's bond replacement regulation specifically authorizes PADEP to "allow permittees to replace existing [conventional] surety or collateral bonds with other surety or collateral bonds," but grants no authority for replacing bond coverage under the ABS with another form of bond. 25 Pa. Code § 86.166(a). Nevertheless, the Federation conceded below that § 800.11(e)(1) no longer applies to sites that have fully converted to the CBS by posting a conventional bond (or other acceptable financial guarantee[17]) covering the full costs of land restoration and (where necessary) perpetual mine drainage treatment, thereby satisfying SMCRA's standard of ensuring the completion of the reclamation plan. 30 U.S.C. § 1259(a). For other ABS mines, however, whether sites for which PADEP had forfeited the bonds before the conversion process began in August 2001, or those that had failed to replace their ABS bond coverage with full cost reclamation

[17] In Pennsylvania, some trust funds guaranteeing discharge treatment are considered conventional bonds, see 70 Fed. Reg. 25472, 25474 (col. 1) (May 13, 2005), while others are considered non-bond enforcement mechanisms. App. 26-27 & n.21.

guarantees, the Federation argued that § 800.11(e)(1) continues to apply and to impose on the state an ongoing obligation to adjust the funding of the bond pool so that the ABS provides sufficient money to complete the mines' reclamation plans.

The district court found the relevant provisions ambiguous because "[t]he language of SMCRA itself does not address dissolution of an ABS one way or the other," and "Section 800.11(e) . . . is silent regarding termination of an ABS." App. 31. The court therefore granted OSM deference under Chevron[18] and, finding OSM's interpretation of § 800.11(e)(1) permissible, held that "the decision to allow PADEP to convert from an ABS to a CBS without first requiring Pennsylvania to make the ABS solvent was not arbitrary and capricious."[19] App. 32. The court also "agree[d] [with the Appellees] that a conversion to the CBS amounts to a conversion of applicable statutory provisions and regulations. Accordingly, any ongoing obligations arising from 30 C.F.R. § 800.11(e) cease to apply." App. 33.

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[18] Chevron U.S.A., Inc. v. Natural Resources Def. Council, 467 U.S. 837 (1984).

[19] The word "first" in this conclusion misstates the issue. Responding to a similar misstatement in OSM's October 7, 2003 final rule, App. 115 (col. 3), the Federation explained below that "the fact that the state need not make the ABS solvent before starting the conversion process says nothing about what obligations remain under § 800.11(e) after the ABS sites that are able to post conventional bonds do so." (Doc. 40, p. 29)

1. **Pennsylvania's ABS has not been dissolved or terminated.**

The district court's premise that the Pennsylvania ABS was dissolved or terminated on or before August 4, 2001 is plainly incorrect. Earlier in its opinion, the court found that as approved by OSM in 1982, the Pennsylvania regulatory program included both a CBS and an ABS. App. 4. The same was true at the time of the district court's decision and remains true today. The approved program still requires payment of the $100 per acre reclamation fee, which continues to be "deposited in the [PA SMCRA Fund] as a supplement to forfeited bonds" and dedicated to "reclaiming mining operations which have defaulted on their obligation to reclaim," 25 Pa. Code § 86.17(e), see also id. § 86.187(a)(1), and it still requires PADEP to take the availability of those dedicated fees into account in setting bond amounts. Id. § 86.149(b)(7). PADEP could, merely by adopting or amending a guidance document, again allow new and ongoing operations to rely on the ABS for bond coverage. Because the ABS is part of the approved Pennsylvania regulatory program, it may be dissolved or terminated only through PADEP's submission and OSM's approval of a state program amendment deleting the authorization for an ABS from the program. See 30 C.F.R. § 732.17(g), (h).

All PADEP did on August 4, 2001 was begin the process through which ongoing operations that had been permitted and bonded under the ABS would replace their ABS bond coverage with conventional bonds, App. 115 (col. 3), and

establish new guidelines for calculating land reclamation bonds. App. 261, 464. That purely prospective replacement/conversion process could not retroactively terminate either the reliance placed on the ABS for bond coverage by mines that had suffered bond forfeiture before August 4, 2001, or the ABS's obligation under § 800.11(e)(1) to provide sufficient money to complete the reclamation plan at those sites. App. 403, 413 (ABS assumes full financial liability for reclamation upon bond forfeiture). And for permitted mines with post-mining discharges, only completion of both phases of the conversion process – land reclamation and mine drainage treatment – by fully replacing their ABS bond coverage with a full cost guarantees would end a given mine's reliance on the ABS for bond coverage, and thus the obligation for the ABS to ensure the completion of the mine's reclamation plan. See 30 C.F.R. §§ 800.11(e)(1); 800.30 (prohibiting release of existing performance bond until regulatory authority approves acceptable replacement providing equivalent coverage).

2. The district court impermissibly allowed OSM to add, through interpretation, a restriction that is inconsistent with the plain language of 30 C.F.R. § 800.11(e)(1).

When an ambiguous statutory provision is at issue, "[d]eference in accordance with Chevron . . . is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the

exercise of that authority.'" Gonzales v. Oregon, 126 S. Ct. 904, 914-15 (2006) (quoting United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)). Here, the agency interpretation promulgated under SMCRA's delegation of rulemaking power,[20] and thus entitled to Chevron deference, is Section 800.11(e)(1) itself. That regulation's interpretation of Section 509(c) of SMCRA as requiring that an ABS must "have available sufficient money to complete the reclamation plan for any areas which may be in default at any time," 30 C.F.R. § 800.11(e)(1), is binding, having the force of law. See, e.g., Wilson v. United States Parole Comm'n, 193 F.3d 195, 200 (3d Cir. 1999).

The basic tenets of statutory construction apply to the construction of regulations. E.g., Burns v. Barnhart, 312 F.3d 113, 125 (3d Cir. 2002); Idahoan Fresh, 157 F.3d at 202. As with a statute, the "starting point on any question concerning the application of a regulation is its particular written text." Wilson, 193 F.3d at 197. If the meaning of the regulation's language is plain, it is controlling, and no further inquiry or deference to the agency is warranted. Christensen v. Harris County, 529 U.S. 576, 588 (2000); Burns, 312 F.3d at 125; Wilson, 193 F.3d at 199. Even where the language of the regulation is ambiguous, "[this Court] defer[s] only where an agency's interpretation sensibly conforms to the purpose and the wording of the regulation." Id. See also Director, Office of

[20] See 30 U.S.C. § 1251(b) (authorizing permanent program regulations).

Workers' Comp. Prog. v. Mangifest, 826 F.2d 1318, 1324 (3d Cir. 1987) (court must "understand how the agency finds its position in the language of the regulation"). If a regulation is ambiguous, the implementing agency's interpretation generally is controlling unless it is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotations omitted). OSM's reading of § 800.11(e)(1) fails that standard because it is inconsistent with the regulation's unambiguous language.

An agency may not, under the guise of interpretation, create a new standard or ignore, rewrite, or supplement the text of a regulation. E.g., Christensen, 529 U.S. at 588 (Auer inapplicable where deferring to agency's position "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation"); Star Enterprise v. EPA, 235 F.3d 139, 151 (3d Cir. 2000) (EPA impermissibly "ignore[d] the [regulation's] requirement that regulated turbines be located 'in' a 'petroleum refinery'"); Shalala v. St. Paul-Ramsey Med. Ctr., 50 F.3d 522, 529 (8th Cir. 1995) (court could not defer to agency interpretation that sought to add verification requirement "not existing anywhere in the text" of regulation); Mangifest, 826 F.2d at 1324 (agency may not imply language that simply does not exist in regulation); Marshall v. Western Union Tel. Co., 621 F.2d 1246, 1250 (3d Cir. 1980) (district court erred deferring to agency position that was "in reality not an 'interpretation' of the governing statute or of the existing short test regulations,

but rather a substantive amendment of the regulations"). Agencies specifically may not, through "interpretation," add restrictions not found in the language of the regulation. E.g., Mercy Catholic, 380 F.3d at 151-53 (Secretary's restrictive approach allowing correction of only certain misclassified costs conflicted with regulation's plain language requiring correction of all misclassified costs); LEAF, Inc. v. EPA, 276 F.3d 1253, 1263-64 (11th Cir. 2001) (EPA's attempt to create exemption based on factors not mentioned in regulation's definition set aside as inconsistent with plain language of regulation), cert. denied, 537 U.S. 989 (2002).

SMCRA expressly mandates that its implementing regulations be unambiguous. Specifically, Section 501(b) dictates that the permanent program regulations of which 30 C.F.R. § 800.11(e)(1) is a part "shall be concise and written in plain, understandable language," 30 U.S.C. § 1251(b), a directive the Secretary of the Interior presumably obeyed in promulgating § 800.11(e). The district court nevertheless found § 800.11(e) ambiguous, and therefore open to interpretation, on the grounds that it "simply provides for the option to implement an ABS, but is silent regarding termination of an ABS." App. 31.

As explained in the preceding subsection, the district court's premise that the ABS has been terminated is incorrect. Moreover, even if that premise were correct, the failure of § 800.11(e)(1) to discuss explicitly the termination of an ABS does not mean that the regulation is silent or ambiguous on the critical

question: the scope and duration of the ABS's obligation to provide sufficient money to ensure the completion of each mine's reclamation plan. To the contrary, it explicitly addresses that critical issue in language that could not be more expansive or open-ended: "The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time[.]" 30 C.F.R. § 800.11(e)(1) (emphasis added). See New York v. EPA, 443 F.3d 880, 885 (D.C. Cir. 2006) ("any" has expansive meaning).

It is well settled that "general rules need not list everything they cover" in order to avoid being found ambiguous. NPR v. FCC, 254 F.3d 226, 229 (D.C. Cir. 2001). The Communications Act provision at issue in NPR exempted noncommercial education broadcasters (NCEs) from competitive bidding, but "nothing in the Act's text specifically sa[id] that NCEs applying for commercial licenses [for portions of the spectrum not reserved for NCEs] are exempt from auctions." Id. at 229. The FCC contended its interpretation was entitled to deference under Chevron because the statute was "silent on the specific question" of whether NCEs must compete for commercial licenses through auctions. Id. Applying the Act's plain language, the court rejected the FCC's contention and held that the "NCE exemption from all auctions means that NCEs are exempt from auctions for commercial as well as reserved licenses." Id. at 229-30.

The same court recently rejected "EPA's attempt . . . to find ambiguity in the phrase 'any physical change,'" in the Clean Air Act's definition of "modification" of an emission source as "any physical change" that increases emissions (42 U.S.C. § 7411(a)(4)). New York, 443 F.3d at 886. The challenged EPA regulation would have excluded from the category of "modification" (and the Act's New Source Review requirements) the replacement of components with new ones costing less than twenty percent of the process unit's value, even if emissions increased. Id. at 883. Despite Congress's failure to "include a phrase such as 'regardless of size, cost, frequency, effect,' or other distinguishing characteristic" in the definition, id. at 887, the court invalidated the regulation's cost threshold as inconsistent with the plain language of the Act. Id. at 884-90. See also Shays v. FEC, 414 F.3d 76, 108 (D.C. Cir. 2005) (Congress need not "rul[e] out every possible limitation on statutory language" in order for statute to be unambiguous).

Similarly, regulations need not expressly mention every specific element or circumstance at issue in order to state a determinative rule. For example, in Christensen, the issue was whether an employer could unilaterally compel employees to use compensatory time by scheduling time off. The regulation at issue provided that "'[t]he agreement or understanding [between the employer and employees or their representative] *may* include other provisions governing the preservation, use, or cashing out of compensatory time[.]'" Christensen, 529 U.S. at

587-88 (quoting 29 C.F.R. § 553.23(a)(2)) (emphasis added by Court). The Department of Labor interpreted the regulation as allowing an employer to "compel the use of compensatory time only if the employee has agreed in advance to such a practice," id. at 586, a position the United States claimed was entitled to deference under Auer. Christensen, 529 U.S. at 588. Despite the fact that the "regulation [did] not address the issue of compelled compensatory time," id. at 587, the Supreme Court held that "the regulation is not ambiguous on the issue of compelled compensatory time," and that deference to the agency's interpretation therefore was unwarranted. Id. at 588. Because the regulation's general language concerning use of compensatory time was "plainly permissive," id., the Supreme Court refused "to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." Id.

In Mercy Catholic, the substantive regulation at issue governed Medicare reimbursements for graduate medical education. That regulation did not discuss a specific issue addressed in the Secretary of Health and Human Services' later interpretive rule, namely what effect could be given to documentation from years following the base year used in determining a reimbursement. Nevertheless, this Court found that the neutral, general language of the reimbursement regulation unambiguously required the correction of all costs, regardless of the effect on the amount of reimbursement. It therefore prohibited the Secretary, under the guise of

interpreting the reimbursement regulation, from prohibiting upward adjustments in costs and reimbursements based on documentation from after the base year. Mercy Catholic, 380 F.3d at 146-48, 151-53, 158.

The regulatory definition of "affected facility" at issue in Star Enterprise was silent about power projects supplying steam and electrical power to petroleum refineries located on adjacent parcels owned by the same company. But the definition's failure to address those factors, much less their constellation, did not mean that its scope was ambiguous. This Court held that the plain language of the regulation – "in" – made physical location of the turbine the touchstone, and that EPA could not, through interpretation, expand the definition by adding considerations not encompassed by the regulation's plain language. Star Enterprise, 235 F.3d at 148-52. Conversely, EPA's attempt to narrow a regulatory classification based on extra-textual factors was invalidated by the Eleventh Circuit in LEAF. Again, the plain language of the regulation did not address the factors on which EPA relied – the duration of injection and principal function of the well – in determining that wells used in hydraulic fracturing of coal beds for methane extraction were not Class II injection wells as defined at 40 C.F.R. § 144.6. LEAF, 276 F.3d at 1262-64. Focusing instead on the language of the regulation, the court held that the hydraulic fracturing wells "fit squarely within the definition of Class II wells . . . [and] must be regulated as such." Id. at 1263.

Notwithstanding the unlimited language at the end of 30 C.F.R. § 800.11(e)(1) – "at any time" – the district court found the regulation ambiguous because it does not specifically mention an unprecedented circumstance presented here, namely that the state terminated its ABS (or more accurately, required ongoing operations to replace their ABS bond coverage with full cost conventional bonds). App. 31. But the failure to mention that specific circumstance does not mean that the regulation fails to address, or is ambiguous about, the critical issue – the scope and duration of the ABS's obligation to provide sufficient money to reclaim the sites bonded thereunder. On that score, the language of the regulation could not be clearer: the obligation extends to "any areas which may be in default at any time." Id. See Shays, 414 F.3d at 107-09 (rejecting FEC's "[a]ttemp[t] to concoct ambiguity" based on failure of statutory definition of "electioneering communication" to mention funding, and affirming invalidation of FEC regulation that limited statute's category of communications "made" within specified periods to those made "for a fee").

OSM's "interpretation" of § 800.11(e)(1) seeks to accomplish the kind of de facto amendment of a regulation held impermissible in Christensen. Specifically, OSM reads into the regulation a limitation on the duration of the ABS's obligation that not only is missing from the text, but also is plainly inconsistent with the unlimited language – "at any time" – that does appear in the text. See, e.g., Mercy

Catholic, 380 F.3d at 151-154 (ratchet-like interpretation of Medicare regulations prohibiting upward reimbursement adjustments was inconsistent with regulations' neutral, two-way language). See also New York, 443 F.3d at 884-90 (striking down EPA regulation that sought to add cost threshold to projects considered "modifications" subject to New Source Review permitting under Clean Air Act). In effect, OSM's reading would append to subsection (e)(1) the phrase "until the regulatory authority implements another bonding system for new and ongoing mining operations." But the regulation itself does not cut off the ABS's obligations in this manner. Because OSM's position is plainly inconsistent with the regulation, it warrants no deference. This Court must give effect to the unlimited language OSM promulgated, not the unwritten restriction it seeks to add under the guise of interpretation.

By requiring that the ABS provide sufficient money to fully reclaim ABS bond forfeiture sites and other ABS mines lacking adequate reclamation guarantees, giving effect to the language of 30 C.F.R. § 800.11(e)(1) as written would serve: 1) SMCRA's foremost purpose of "protect[ing] society and the environment from the adverse effects of surface coal mining operations," 30 U.S.C. § 1202(a); 2) SMCRA's specific objective of "assur[ing] the completion of the reclamation plan" for all mines regulated under the Act, 30 U.S.C. § 1259(a); and 3) "the weighty policy of cost internalization present in [SMCRA]."

WVMRA, 970 F. Supp. at 509. Conversely, because OSM's interpretation of § 800.11(e)(1) would allow Pennsylvania to abandon the ABS in an insolvent condition, the state's bonding program would fail to satisfy SMCRA's promise that all regulated mines will be reclaimed promptly and completely. These considerations further support giving effect to the regulation's unambiguous language as written. See Mercy Catholic, 380 F.3d at 157 (refusing to defer to "Secretary's interpretation [that] eschews the fundamental goal of neutral accuracy in a reaudit"); Trent Coal, Inc. v. Day, 739 F.2d 116, 118 (3d Cir. 1984) (regulation must be construed so as to conform to authorizing statute).

3. OSM's current position that Pennsylvania "is only obligated to treat forfeiture discharges to the extent bond funds are available" is inconsistent with its earlier interpretation of 30 C.F.R. § 800.11(e)(1) as requiring ABSs to provide for the complete reclamation of all ABS bond forfeiture sites.

By itself, the plain language of 30 C.F.R. § 800.11(e)(1) is determinative, and makes the district court's deference to OSM improper. An additional reason OSM's current interpretation deserves no deference is the dramatic change between how OSM "ha[d] consistently interpreted" § 800.11(e)(1), as summarized in its October 2000 letter to the Secretary of PADEP, App. 339, and the position OSM adopted in 2003 in taking the actions under review. See INS v. Cardoza-Fonseca, 480 U.S. 421, 446-47 n.30 (1987) (inconsistent agency interpretation is "'entitled to considerably less deference'" than a consistently held view) (quoting

Watt v. Alaska, 451 U.S. 259, 273 (1981)); Mercy Catholic, 380 F.3d at 155 (Secretary's internally conflicting positions militated against affording deference).

OSM acknowledged in its October 7, 2003 final rule that it had "consistently required, in Pennsylvania as well as other states, that any ABS must have sufficient assets to complete the reclamation plan of all sites covered by the ABS," and had "consistently judged efforts to correct identified deficiencies in an ABS by that same standard." App. 115 (col. 2-3). See App. 423 (col. 1) (May 31, 1991 OSM final rule citing Director's determination that Pennsylvania ABS must be modified to ensure timely reclamation of existing and future forfeiture sites); App. 558 (OSM Director's Briefing Paper describing OSM interpretation of 30 C.F.R. § 800.11(e)(1) upheld in WVHC, 238 F. Supp. 2d at 766-74). For the first time, however, OSM ruled that the state "is only obligated to treat forfeiture discharges to the extent bond funds are available," App. 115 (col. 3), implying that Pennsylvania need not adjust the ABS to generate more bond pool funds so that all discharges from ABS sites are treated. But OSM disagreed that it had "flip-flopped from its previous insistence that all forfeiture discharges receive timely treatment." App 115 (col. 2). It explained that "this is the first time [OSM had] faced a situation in which a State has decided to replace ABS bond coverage for new and existing permits with conventional bonds rather than trying to fix a

deficient ABS and continue reliance upon it."[21] App. 115 (col. 3). The Appellees therefore argued below that rather than changing its interpretation of Section 800.11(e)(1), OSM had provided a "different answer to a different set of circumstances" than those encountered in Missouri and West Virginia.[22] Doc. 46, p. 23. Similarly, in distinguishing OSM's ruling on the Missouri ABS, the district court noted that "OSM's decision was made in the context of Missouri's choice to continue operating an ABS." App. 31.

In fact, the circumstances are different in Pennsylvania only for the non-forfeited ABS sites that fully converted to the CBS by posting a replacement guarantee covering all reclamation costs. In subsections A.3.a and A.3.b., below, the Federation shows why the bases on which the district court distinguished OSM's earlier actions applying § 800.11(e)(1) are irrelevant to the critical question of the obligations of Pennsylvania's ABS toward sites forfeited before August 2001 or otherwise unable to convert fully to conventional bonding.

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[21] Liability under an existing bond continues until it is fully replaced by an acceptable substitute guarantee. 30 C.F.R. § 800.30(b); 25 Pa. Code § 86.166(b).

[22] Despite a full year of exchanges with PADEP about its proposed conversion to conventional bonding, OSM obviously had not perceived this supposed distinction by the time of its October 11, 2000 letter to the Secretary of PADEP. App. 339.

a. **Conversion from an ABS to a CBS only affects the ABS's obligations toward non-forfeited sites that fully convert by posting an adequate substitute for their ABS bond coverage.**

OSM emphasized the ongoing nature of the obligation under § 800.11(e)(1) in its 1991 final rule concerning Missouri's ABS. 56 Fed. Reg. 21281 (May 8, 1991). In the wake of "an unexpectedly large default" that left substantial acreage unreclaimed at mines forfeited before September 1988, id. at 21283 (col. 1), 21286 (col. 2), Missouri submitted a program amendment to OSM that would have modified the state's ABS "to provide money to cover only part of the cost of reclaiming sites that were in bond forfeiture prior to September 1, 1988." Id. at 21283 (col. 1) (emphasis added). In rejecting the proposal, OSM explained:

> Reclamation liability under a bond pool must be continuous. The liability and obligation of an ABS does not disappear if the bond pool finds itself unable to meet its obligations as they mature, or its existing capital structure is impaired or its ability to perform any of its obligations is impaired. Additionally, existing liabilities of an impaired pool cannot be erased simply because proposed modifications to the pool will assure partial satisfaction of existing reclamation liabilities. Stated differently, if a bond pool comes up short of cash, the regulatory authority cannot and should not be able to simply "write off" any existing reclamation liabilities and then resume business as usual by proposed modifications to the previous ABS. This would be directly in conflict with the language of 30 CFR 800.11(e) and the purposes and objectives of section 509 of SMCRA, which provide that an ABS must have available sufficient money to complete reclamation for any areas which may be in default at any time.

56 Fed. Reg. at 21286 (col. 2-3).

The "existing liabilities of an impaired pool" to which OSM referred arose from the "sites for which [the ABS bond pool] assumed reclamation responsibility prior to September 1, 1988," when Missouri forfeited the reclamation bonds for those mines. Id. at 21286 (col. 3). Because the proposed revisions "[did] not provide sufficient funding to adequately reclaim those sites," OSM rejected this aspect of the state's proposal as "inconsistent with the requirements in 30 CFR 800.11(e)," and required the state "to amend its program in a manner that will ensure sufficient funds are available to reclaim fully the defaulted acreage." 56 Fed. Reg. at 21286 (col. 3). See also 61 Fed. Reg. 26445, 26449 (col. 3) – 26450 (col. 1) (May 28, 1996) (approving changes to provide "the funds necessary to reclaim the backlog of sites forfeited prior to September 1, 1988").

In the same rule, OSM rejected Missouri's proposal to add a CBS to its existing ABS. Missouri proposed to allow new operations to "opt-out" of the ABS by posting a full cost conventional bond, 56 Fed. Reg. at 21287 (col. 1-2, Finding B.5(a)), and existing permittees to "buy-out" of the ABS by posting such a bond and paying a one-time assessment into the state's ABS bond pool fund. Id. at 21287 (col. 2-3, Finding B.5(c)). In light of the Missouri ABS fund's "continuing liability to reclaim sites forfeited in the past," id. at 21287 (col. 3) (emphasis added), OSM disapproved these conventional bonding options because the state

had provided "no assurance that past bond forfeiture liabilities [of the ABS] will be met." Id. at 21287 (col. 1-3) (emphasis added).

OSM did not say that Missouri's ABS remained liable to reclaim "past" bond forfeiture sites because Missouri had proposed to keep its ABS as one bonding option for new or ongoing, permitted operations. Rather, as OSM said in 1991 about Pennsylvania's ABS, App. 413, each of the forfeitures that already had occurred under the Missouri ABS represented a "liability and obligation of [the] ABS" that required the state to make appropriate adjustments to the ABS. 56 Fed. Reg. at 21286 (col. 2). The critical consideration was that Missouri was relying on the ABS at the time of the bond forfeitures, which, coupled with the language of § 800.11(e)(1), gave the Missouri ABS a "continuing liability to reclaim sites forfeited in the past." 56 Fed. Reg. at 21287 (col. 3). The same is true in Pennsylvania today: the conversion to a CBS for new and ongoing, permitted sites does nothing to limit the state's continuing obligation under § 800.11(e)(1) to adjust its ABS so that the ABS guarantees the reclamation of ABS bond forfeiture sites.

In West Virginia, OSM required the state to "eliminate the deficit in the State's alternative bonding system and to ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites." 60 Fed. Reg. at 51918 (col. 2) (emphasis

added). The obligation applied to "existing" bond forfeiture sites because they had been relying on the state's ABS when bond forfeiture occurred, and to "future" forfeitures because the state was continuing to rely on the ABS for ongoing and new operations. OSM later approved adjustments to the funding of West Virginia's ABS that were projected to eliminate a $47.9 million deficit in about three years. 67 Fed. Reg. at 37613 (col. 1). See also 71 Fed. Reg. at 10764 (col. 3) (noting state's extension, through September 2006, of special reclamation tax surcharge that took effect in 2002).

In both Pennsylvania and West Virginia, there are existing ABS bond forfeiture sites for which the ABS lacked sufficient funds to provide complete reclamation (including mine drainage treatment) at the time of bond forfeiture. On the question of whether the state must adjust the ABS to provide sufficient funds to reclaim those sites completely, the fact that West Virginia has chosen to continue to implement an ABS for ongoing and newly-permitted sites while Pennsylvania has chosen to convert to a CBS is irrelevant. What is relevant is that ABS bond forfeiture sites in both Pennsylvania and West Virginia were relying on the ABS for part of their bond coverage at the time their bonds were forfeited, and that many of those mines remain in default today. For those sites, the state's reclamation obligation is not limited to spending the insufficient amount of funds that were available in the ABS bond pool at the time of forfeiture. Instead, both

states have an ongoing obligation to "assure that [they] will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time." 30 C.F.R. § 800.11(e)(1) (emphasis added).

Contrary to the district court's decision, Pennsylvania's mere institution of a requirement to replace ABS bond coverage with conventional bonds does not limit the ongoing obligation under § 800.11(e)(1). Only by obtaining release of the ABS bond coverage, either through actual replacement with an acceptable guarantee of complete reclamation, 30 C.F.R. § 800.30(b), or by completing all reclamation requirements, 30 C.F.R. § 800.40(c)(3), is the ABS's obligation to guarantee the reclamation of a particular mine extinguished. Those sites, however, are not at issue. For the ABS sites that are at issue – the bond forfeiture sites and other mines lacking perpetual mine drainage treatment guarantees – Pennsylvania must satisfy its ongoing obligation under 30 C.F.R. § 800.11(e)(1) by adjusting its ABS so that it provides the guaranteed and complete reclamation SMCRA demands. See 30 U.S.C. § 1259(a), (c).

b. The hypothetical OSM takeover is irrelevant to determining the state's obligations where it remains the regulatory authority because OSM never voluntarily accepted the ongoing obligation imposed by § 800.11(e)(1).

The district court found "persuasive" a second irrelevant consideration, namely OSM's assertion that if OSM took over the operation of the bonding

program in Pennsylvania, it would do nothing about ABS bond forfeiture sites,[23] and would only require new and continuing mining operations to replace their ABS bond coverage with a conventional bond. App 31-32, 115 (col. 3). The reasons this hypothetical outcome is irrelevant, and the situations of Pennsylvania and OSM are materially different, are provided by three actual, relevant considerations the district court disregarded: 1) Unlike OSM, Pennsylvania had sought and obtained approval to operate an ABS in 1982 pursuant to 30 C.F.R. § 800.11(e)(1); 2) regardless of how a federal program would operate, a state must faithfully implement its state regulatory program as approved by OSM, 30 C.F.R. § 733.11; and 3) unlike Pennsylvania, OSM never assumed an obligation under 30 C.F.R. § 800.11(e)(1) to assure that an ABS provide sufficient funds to reclaim mines that are in default of their reclamation obligations.

For parallel reasons, it is irrelevant to West Virginia's obligations under 30 C.F.R. § 800.11(e)(1) that if OSM had taken over that state's bonding program in 2001 – something it had started to do[24] – it would have instituted a CBS prospectively and would have done nothing about the ABS bond pool's $47.9 million deficit. Cf. 67 Fed. Reg. at 37613 (col. 1). In short, the assumption that

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[23] In 2000, OSM had taken the position that the SMCRA regulatory authority must prescribe an ABS if conventional bonds will not cover perpetual treatment obligations. App. 499.

[24] See WVHC, 238 F. Supp. 2d at 763-65.

OSM, having never operated an ABS in Pennsylvania, would have no continuing obligation under § 800.11(e)(1) in the event of a federal takeover says nothing about whether Pennsylvania has such obligations now, while it remains the regulatory authority under a state program containing an ABS that has not fully reclaimed all of the forfeited sites that relied on the ABS for bond coverage.

B. The Discharge Workplan Does Not Satisfy Pennsylvania's Ongoing Obligation Under 30 C.F.R. § 800.11(e)(1).

The Program Enhancements submission states: "OSM finds that the [W]orkplan resolves, in a satisfactory manner, the October 1991 Section 732 notice to Pennsylvania." App. 267. See also App. 113 (col. 3), 116 (col. 2)-117 (col. 1). The district court upheld OSM's reliance on the Workplan in taking the two 2003 actions under review, finding that the Workplan's "recogni[tion] that additional scheduling will need to be determined after initial scheduled phases are complete ([App. 319]) does not give the court sufficient cause to find the entire plan irrational." App. 33.

For two fundamental reasons, the Workplan is not a lawfully adequate substitute for a solvent ABS. First and foremost, the Workplan does not provide the guarantee of timely and perpetual discharge treatment demanded by Section 509 of SMCRA, 30 U.S.C. § 1259, and 30 C.F.R. § 800.11(e)(1). App. 408. The Workplan is supposed to address the inadequacy of the funding available in the

ABS's bond pool to treat all discharges from ABS bond forfeiture sites. Instead of focusing on that comparatively narrow problem, however, it begins by redefining the problem as the entire "universe" of coal mine discharges in Pennsylvania, including non-ABS primacy sites (underground mines and coal refuse disposal operations), "pre-primacy" sites permitted before July 31, 1982, and Title IV mines abandoned before the enactment of SMCRA. Cf. 30 U.S.C. § 1202(h). The Workplan provides no new or additional funding. It merely lists "resources and mechanisms," App. 313-14, 320-26, that would be available regardless of the Workplan's existence, most of which are not dedicated to the reclamation of ABS bond forfeiture sites. Moreover, unlike an approved program amendment, cf. 30 C.F.R. §§ 732.17(g), 733.11, PADEP's "programmatic commitment" to follow the Workplan, App. 313, is unenforceable, making it an inappropriate basis for agency action. See Northwest Environmental Advocates v. EPA, 268 F. Supp. 2d 1255, 1268-69 (D. Or. 2003) (EPA improperly premised approval of state water quality standards on unenforceable commitment by state).

In order for an agency decision to withstand scrutiny under the standards of 5 U.S.C. § 706(2), "a reasonable explanation of the specific analysis and evidence upon which the [a]gency relied is necessary." Bluewater Network v. EPA, 370 F.3d 1, 21 (D.C. Cir. 2004). The record contains no evidence or analysis suggesting that the resources identified in the Workplan will be sufficient in

amount or duration to guarantee the treatment of all discharges from ABS sites for which other guarantees are not posted. Cf. Sierra Club v. EPA, 167 F.3d 658, 666 (D.C. Cir. 1999). It also contains no reasoned explanation for why OSM "anticipate[s] that all primacy forfeiture pollutional discharges will be addressed by PADEP," App. 116 (col. 3), a statement that both carefully avoids saying those discharges will be "treated" and omits the anticipated timeframe. As a result, OSM's "anticipation" fails to provide the required rational basis for its actions. E.g., Northeast Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 954 (D.C. Cir. 2004) (remanding rule where EPA "stated only that it 'believes' state permit limits reasonably reflect the actual performance for the best performing units without explaining why this is so"); Sierra Club, 167 F.3d at 663 (similar).

The Workplan outlines a system for allocating scarce resources, not for assuring that "sufficient money" will be available "at any time" a discharge from an ABS bond forfeiture site must be treated. 30 C.F.R. § 800.11(e)(1). The Workplan is, in essence, an elongated triage process for addressing the absence of the reclamation guarantee demanded by SMCRA.

Second, the Workplan's scheme of robbing Peter to partially bail out Paul is inconsistent with SMCRA's principle of cost internalization. SMCRA's regulatory program is supposed to insulate the public from the costs of mining and reclamation, see WVMRA, 970 F. Supp. at 509, not leave behind "orphan" mines

that impose environmental, social, and economic burdens on coalfield residents until they cared for (if at all) by other resource conservation programs. Just as the state may not externalize the costs of mining by "writing off" ABS bond forfeiture sites, it may not do so by foisting the ABS's responsibility to provide "sufficient money to complete the reclamation plan for any areas which may be in default at any time" onto other funding programs and the matching private contributions of money and labor on which some of them rely (App. 94-101, 104-09). 30 C.F.R. § 800.11(e)(1). Cf. Mercy Catholic, 380 F.3d at 158 n.18 (Secretary's restrictive interpretation of regulation might impermissibly shift costs properly borne by Medicare to non-Medicare patients).

For mines regulated under SMCRA, triage is not an option. To fulfill SMCRA's promise of guaranteed, timely, and complete reclamation, and its bedrock principle of cost internalization, Pennsylvania must do what the plain language of § 800.11(e)(1) dictates: adjust the ABS so that it provides sufficient money to promptly and fully reclaim the ABS sites forfeited before the conversion to a CBS began, plus any additional ABS sites that are not fully converted to the CBS by replacing their ABS bond coverage with full cost land reclamation and mine drainage treatment guarantees.

CONCLUSION

For the reasons set forth above. the Federation requests that this Court reverse the district court's judgment with respect to Counts 2 and 3 of the Complaint and remand the case to the district court with instructions to set aside OSM's June 12, 2003 termination of its October 1, 1991 Part 732 notice, and the portion of OSM's October 7, 2003 final rule deleting the ABS solvency demonstration requirement of 30 C.F.R. § 938.16(h).

Respectfully submitted,

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DATED: May 12, 2006

Penn FUTURE

June 12, 2001

Mr. J. Scott Roberts
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Re: **Draft Technical Guidance Document Number 563-2504-001**
"Conventional Bonding for Land Reclamation -- Coal"

Comments of the Pennsylvania Federation of Sportsmen's Clubs, Inc., Pennsylvania Chapter Sierra Club, Pennsylvania Trout, Inc., Tri-State Citizens Mining Network, Inc., and Mountain Watershed Association, Inc.

Dear Scott:

The organizations listed above are the Plaintiffs in the matter of Pennsylvania Federation of Sportsmen's Clubs, Inc., et al v. Seif, et al., 1: CV 99-1791 (M.D. Pa.), which addresses Pennsylvania's bonding program for coal mines. On behalf of these five organizations, PennFuture submits these comments on the draft Technical Guidance Document Number 563-2504-001, entitled "Conventional Bonding for Land Reclamation – Coal." In addition to presenting comments on specific aspects of the draft Technical Guidance Document (TGD), we discuss below the broader question of DEP's proposal to terminate its existing alternative bonding system and to convert to a system relying exclusively on "conventional" bonds and other site-specific financial guarantees, including mine drainage treatment trusts.

I. The TGD Should Explain that It Requires All Sites with Post-Mining Discharges to Include a "Postmining Water Treatment Bond" Component in the Bond Calculation.

Pennsylvania's coal mine bonding program is required by law to guarantee treatment of post-mining discharges in addition to reclamation of the land surface. A performance bond submitted pursuant to the Surface Mining Conservation and Reclamation Act (SMCRA), the Coal Refuse Disposal Control Act (CRDCA), or The Clean Streams Law (CSL) must guarantee the faithful performance of "all of the requirements" of SMCRA, CRDCA, CSL, the Air Pollution Control Act, the Solid Waste Management Act, and the Dam Safety and Encroachments Act. 35 P.S. § 691.315(b); 52 P.S. §§ 30.56(a), 1396.4(d). The amount of the bond must be "based on the cost to the Commonwealth of taking corrective measures in case of the operator's failure to comply" with these requirements, and must be sufficient "to insure that there will be compliance with the law, the rules and regulations of the department, and the provisions and conditions of [each] permit including but not limited to conditions pertaining to restoration measures or other provisions insuring that there will be no polluting discharge after mining operations have ceased." E.g., 35 P.S. § 691.315(b). The requirements for which the bond must assure faithful performance include:

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-- A discharge from a mine, including a post-mining discharge, must be authorized by the rules and regulations of the department or a permit issued by the department. 35 P.S. § 691.315(a).

-- A discharge from a mine, including a post-mining discharge, must satisfy the effluent limitations set forth in the mining regulations and the requirements of the water quality regulations. See 25 Pa. Code §§ 87.101(c), (d), 87.102(e), (f); 88.91(c), (d), 88.92(e), (f); 88.186(d), (e), 88.187(e), (f); 88.291(c), (d); 88.292(e), (f); 89.52(c), (f), (h); 90.101(c), (e), 90.102(e), (f).

The regulations governing the amount of the performance bond likewise make it clear that the bond must provide for all reclamation, restoration, and abatement measures, including treatment of mine drainage. Since the first day of "primacy" in Pennsylvania, the approved Pennsylvania program has provided:

> (a) The standard applied by the Department in determining the amount of bond shall be the estimated cost to the Department if it had to complete the reclamation, restoration and abatement work required under the acts, the regulations thereunder and the conditions of the permit.
>
> * * *
>
> (b) This amount will be based on, but not limited to, the following:
>
> * * *
>
> (5) The cost of . . . constructing, operating and maintaining treatment facilities[.]

25 Pa. Code § 86.149(a), (b)(5)(emphasis added). See 12 Pa. Bull. 2473, 2492 (July 31, 1982).

Most of the draft TGD appears to be inconsistent with these requirements. From its title – "Conventional Bonding for Land Reclamation" – through page 29, the document barely mentions mine drainage and talks exclusively about the amount of bond that is needed to guarantee land reclamation. Ultimately, however, the TGD recognizes that mine drainage treatment is an essential component of a properly calculated bond under SMCRA, CSL, CRDCA, and the regulations in the approved Pennsylvania program. On the fifth page of the "Bond Calculation Worksheet" in Appendix B (page 29 of the draft TGD), the guidance document presents a simple formula for calculating a "Postmining Water Treatment Bond," which is one of five possible components of the "Total Bond" listed on the same page. During our meeting on June 4, 2001, you explained that all permitted sites with post-mining discharges, including those with discharges that exist today, will be required to include the "Postmining Water Treatment Bond" component in their calculation of the total conventional bond.

We wholeheartedly support this application of the Postmining Water Treatment Bond component and agree that including perpetual mine drainage treatment as a component of the bond calculation will give operators a powerful incentive to establish the kinds of site-specific treatment trusts DEP is encouraging them to employ. This mine drainage treatment aspect of the bond calculation is so important, however, that the TGD should include a separate section explaining its details and making clear that all sites with post-mining discharges, including sites where such discharges exist today, are required to include the Postmining Water Treatment Bond component in the bond calculation. The words "for Land Reclamation" also should be deleted from the TGD's title.

You also explained during our June 4 meeting that the formula on page 29 of the draft TGD for calculating the Postmining Water Treatment Bond is likely to be replaced by the following:

$$\frac{\text{Annual treatment cost } (1 + \text{inflation rate})^6}{\text{interest rate} - \text{inflation rate}}$$

The revision of the numerator provides an appropriate formula for calculating the "adjusted annual treatment cost" described on page 29 of the draft TGD. The overall formula appropriately assumes that DEP will deposit the proceeds from forfeiting and collecting a bond into an interest-bearing account. With the significant qualification presented below concerning maintenance and replacement of the treatment system, this formula is a proper one for assuring perpetual treatment of a discharge if DEP forfeits the bond at any time during the five-year permit term. The TGD should explain how DEP will determine the applicable interest rate and inflation rate. Without such an explanation, the term "interest rate" (or "rate of earned interest," as used in the denominator of the equation on page 29) could be confusing because the bond itself does not earn interest. In light of the fact that DEP deposits the monies from the bonds it forfeits and collects into the Surface Mining Conservation and Reclamation Fund, we suggest that the interest rate used in the formula be the rate of return earned by the SMCR Fund over the preceding ten years.

It is critical that this formula or some other component of the bond calculation account for the costs of 1) maintaining and 2) replacing or reconstructing the treatment facilities. If maintenance costs are to be included in the "annual treatment cost" figure in the formula, the TGD should explain that fact. It may be that the capital costs of replacing or reconstructing the treatment facilities (or portions thereof) are supposed to be included under "Other Activities" on the fourth page of the Bond Calculation Worksheet (page 28 of the TGD), but the examples listed on that page do not mention mine drainage treatment facilities. No matter where these items appear, however, it is essential that they be included on the calculation worksheet and that the overall bond cover these expenses.

II. Pennsylvania Cannot and Should Not Abandon Its Alternative Bonding System.

The TGD states that "[a]mong other things, the [Pennsylvania Federation v. Seif] suit alleged the ABS does not meet the objectives and purpose of federal SMCRA." (TGD, p. 6) To be clear, the shortcomings identified in the lawsuit are not limited to the alternative bonding system (ABS). The Complaint alleges that both the ABS and the overall Pennsylvania bonding program fail to satisfy the objectives and purposes of a bonding program under federal SMCRA and the approved Pennsylvania program.

The TGD explains that one of the "many shortcomings" of the ABS is the "lack of parity between different categories of mining operations" that results in "contributions to the bond pool by some operators [that] are not proportionate with contributions from others" in the event of forfeiture. (TGD, p. 6) It then compares the large disparity between the $1,000 per acre standard bond rate for coal refuse disposal operations and the average reclamation cost of more than $20,000 per acre for such operations with the much smaller difference between the same figures for surface mines ($3,000 and $5,500, respectively). The problem with the example is that according to DEP, coal refuse disposal operations are not part of the ABS but instead are part of the existing "full cost" bonding program. ("Assessment of Pennsylvania's Bonding Program for Primacy Coal Mining Permits" (Feb. 2000), pp. 11, 29-30) Thus, the example illustrates a problem with the existing full cost (conventional) bonding program, not the ABS.

The TGD describes one of its effects as "converting" from an alternative bonding system to a conventional bonding system. The TGD does not explain, however, what will happen to the remnants of the ABS, including the millions of dollars in reclamation fees collected over the years that are held in the SMCR Fund. Similarly, the TGD does not explain how the "conversion" to an all-conventional bonding system will affect DEP's collection of the $100 per acre reclamation fee under 25 Pa. Code § 86.17(e), which remains part of the approved Pennsylvania program.

During our meeting on June 4, you, Evan Shuster, and Assistant Counsel Bo Reiley explained that DEP intends to terminate the ABS but also intends to continue to collect the reclamation fee. Because the reclamation fee is the central element of the ABS, these positions seem impossible to reconcile. Without going into the details, you also explained that DEP has been discussing with OSM the need to discharge (so to speak) the ABS's existing liabilities – principally treatment of mine drainage emanating from bond forfeiture sites. Because of the importance of these matters to the overall functioning of the bonding program, DEP should explain its intended actions in the final TGD or comment/response document.

With that said, we hope to convince DEP not to wind up the affairs of the ABS, and instead to integrate its approach to site-specific financial guarantees with continuing and improving the ABS. In this section of the comments, we explain why the proposed approach to site-specific bonding set forth in the draft TGD, and the intended meshing of that approach with DEP's site-specific trust concept, are perfectly consistent with reliance on the ABS to address several important problems that the site-specific mechanisms are incapable of handling alone. Indeed, we believe that if DEP had set out with a goal of improving the ABS, two important

steps would have been to change the way the land reclamation component of the site-specific bond is calculated (as proposed in the TGD) and to increase the reliance on site-specific mechanisms to guarantee discharge treatment (as proposed in the TGD and the related treatment trust concept).

A. Termination and Abandonment of the ABS Would be Unlawful.

A fundamental purpose of a bonding program is to achieve federal SMCRA's policy of ensuring that all costs of mining and reclamation are borne exclusively by mine operators rather than the public – i.e., that mine operators "internalize" all of those costs. See Cat Run Coal Co. v. Babbitt, 932 F. Supp. 772, 780-81 & n.17 (S.D.W. Va. 1996). In an ideal situation, all of the costs associated with each particular operation would be fully internalized by the individual operator. But by expressly authorizing alternative bonding systems, see 30 U.S.C.§ 1259(c), federal SMCRA also allows bonding programs to internalize costs on an industry-wide rather than a site-by-site or operator-by-operator basis.

Pennsylvania's ABS was part of the regulatory program approved by the Secretary of the Interior in 1982 when Pennsylvania attained primacy. After DEP and OSM identified deficits in the ABS, OSM placed conditions on its May 1991 approval of amendments to the Pennsylvania regulatory program. One of those conditions provided: "By November 1, 1991, Pennsylvania shall submit information, sufficient to demonstrate that the revenues generated by the collection of the reclamation fee, as amended in [25 Pa. Code] § 86.17(e), will assure that the Surface Mining Conservation and Reclamation Fund can be operated in a manner that will meet the requirements of 30 CFR 800.11(e). Pennsylvania could provide such a demonstration through an actuarial study showing the Fund's soundness or financial solvency." 56 Fed. Reg. 24687, 24690, 24719 (May 31, 1991). Pennsylvania did not seek judicial review of this condition, which remains codified at 30 C.F.R. § 938.16(h). Pennsylvania still has not satisfied this condition.

When DEP proposed an increase in the reclamation fee from $50 to $100 per acre in 1993, it acknowledged that "'[e]ven though the proposed fee of $100 per acre may still be insufficient, a stop gap measure is needed to keep the situation from worsening.'" 58 Fed. Reg. 36139, 36140 (July 6, 1993). In authorizing the increase to take effect, OSM emphasized that the "amendment is not intended to satisfy the solvency requirements stipulated by the Director's conditional approval of section 86.17 (56 FR 24687) but is instead an intermediate step to keep the shortage in the [Surface Mining Conservation and Reclamation] Fund from further deteriorating." 58 Fed. Reg. 36139, 36140.

Thus, the condition codified in the Code of Federal Regulations requiring Pennsylvania to demonstrate the "soundness or financial solvency" of its ABS remains in effect. Unless and until DEP satisfies this condition by demonstrating that the ABS or any site-specific mechanisms intended to replace it are capable of "completing the reclamation, restoration and abatement work required under the acts, the regulations thereunder and the conditions of the permit" for all sites that are part of the ABS, 25 Pa. Code § 86.149(a), DEP cannot lawfully terminate the ABS. Instead, the Commonwealth must take the steps that are necessary to make the ABS solvent. Fixing the ABS, not abandoning it, is the solution.

The only purpose of the $100 per acre reclamation fee under 25 Pa. Code § 86.17(e) is to fund the ABS. DEP's intention to continue collecting the reclamation fee is completely at odds with the notion that the ABS will be terminated, and it is an acknowledgment that DEP cannot unilaterally terminate the ABS. DEP must continue to collect the reclamation fee until OSM approves an amendment deleting Section 86.17(e) from the approved Pennsylvania program, see 30 C.F.R. §§ 732.17(g), 733.11, and DEP has not indicated any intention of submitting such a program amendment to OSM. Thus, even if DEP implements the conventional bonding TGD, funds generated by the reclamation fee will continue to flow into the ABS, and new sites will be added to the ABS's coverage. In other words, the ABS will continue to exist, as it must under the law. But just as DEP must continue to collect the reclamation fee, it remains obligated to satisfy the decade-old condition codified at 30 C.F.R. § 938.16(h) by making the ABS solvent.

B. Termination and Abandonment of the ABS Would be Unwise.

Even if DEP lawfully could terminate the ABS, it should not do so. Instead, DEP should keep the ABS in operation, improve it by integrating it with DEP's proposed improvements in site-specific financial guarantees, and strive to make it solvent by enhancing the ABS's funding mechanism. DEP does not expect the conventional bonds and other site-specific financial mechanisms to solve all of the ABS's "many shortcomings." (TGD, p. 6) To prevent sites from being abandoned without proper reclamation and abatement measures being taken, DEP should supplement the site-specific mechanisms with a statewide "bond pool" that has sufficient resources to address the problematic sites.

The most basic shortcoming of the ABS is not a "lack of parity" (TGD, p. 6) but rather a lack of money compared to the potential reclamation and abatement obligations. One way to correct that imbalance is to increase amount of the liability load borne by site-specific financial mechanisms, thereby reducing the amount of the liability burden assigned to the statewide bond pool. The TGD's proposed approach for calculating site-specific bonds and the related, forthcoming initiative for establishing site-specific treatment trusts would appropriately work on the "liability" end of the equation by reducing the potential liabilities that must be addressed by the statewide bond pool. We support these moves to place greater reliance on true full-cost, site-specific guarantees, because such mechanisms maximize the mine operators' internalization of the costs of reclamation and abatement, and reduce the amount of funding that must be generated by the reclamation fee or other funding mechanism. These changes also are essential for the sites that historically have been part of the "full cost" portion of Pennsylvania's bonding program.

The improved site-specific mechanisms will help to reduce the deficit in the ABS, but they alone will not be enough to make the ABS solvent. For certain sites with mine drainage discharges (those with long-term mine drainage liability that greatly exceeds the amount of the bond) and certain sites with large land reclamation liabilities, DEP does not expect that operators will post site-specific financial guarantees covering the full costs of reclamation and abatement. As a result, work is needed on the "asset" side of the ABS equation as well. Under the broad authority granted by SMCRA and CSL to establish an "alternate coal bonding program" by regulation, e.g., 35 P.S. § 691.315(b), the Environmental Quality Board adopted

the reclamation fee funding mechanism for the ABS and later increased the amount of the fee. See 25 Pa. Code § 86.17(e); 58 Fed. Reg. 36139 (July 6, 1993). This broad authority remains unchanged and allows the EQB to establish other revenue generation mechanisms such as a reclamation fee for each ton of coal severed. DEP could draft such a regulation for consideration by the EQB or could draft and push for the enactment of legislation that would create a severance fee funding mechanism for the ABS.[1] Discussion of severance fees led DEP to issue a contract in 1999 for a comparison of the tax burden on coal mine operators in Pennsylvania, West Virginia, Kentucky, Illinois, Indiana, and Ohio (Contract Inquiry No. SP3590007578). The expiration date of this contract was June 30, 2000, but to our knowledge, DEP has not published or presented the results of that study.

As mentioned above, alternative bonding systems are not perfect devices for allocating risks and costs, but by placing the risks and costs on the regulated industry, they are preferable to a situation in which the public bears the costs of unreclaimed mines or untreated discharges and the risks of similar failures in the future. Whether the public absorbs those risks and costs by enduring the effects of unreclaimed sites or by paying increased taxes to prevent those adverse effects, those results are unacceptable (not to mention unlawful under SMCRA). Adequately funding the ABS may not be an ideal solution, but it is far better than writing off the problematic primacy sites and forcing taxpayers to bear the costs of reclamation and abatement, or forcing those who live, work, or recreate near those sites to endure the economic, environmental, and social costs of more abandoned mine lands.[2] Again, fixing, not abandoning, the ABS is the proper solution.

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[1] Among the states that use severance fees to fund their alternative bonding systems in whole or in part are Maryland, Missouri, Ohio, Virginia, and West Virginia. See Md. Env. Code Ann. §§ 15-505(e), 15-509; Vernon's Ann. Mo. Stat. §§ 444.960, 444.965; Ohio Rev. Code Ann. §§ 1513.18(D); 5749.02(A)(1), (B), (C); Va. Code § 45.1-270.4; W. Va. Code § 22-3-11 (establishing three cents per ton coal tax for Special Reclamation Fund that is part of West Virginia ABS). See also id. § 22-3-32 (establishing two cents per ton tax used to fund West Virginia Mining and Reclamation Operations Fund). A number of coal producing states employ severance taxes to raise revenues for the state's general fund or for distribution to counties or municipalities. Kentucky has collected more than $150 million in coal severance taxes in each of the last 20 fiscal years. Its current severance tax is 4.5 percent of gross revenue or a minimum of 50 cents per ton. See Kent. Rev. Stat. Ann. § 143.020. West Virginia has severance tax of five percent of gross receipts or a minimum of 75 cents per ton, see W. Va. Code §§ 11-12B-3, 11-13A-3, which generated more than $160 million in each of fiscal years 1997 though 1999. Among other states with severance taxes are Alabama, Colorado, Montana, North Dakota, Tennessee, and Wyoming. See Ala. Code §§ 40-13-30 to 40-13-36; Colo. Rev. Stat. § 39-29-106; Mont. Code Ann. §§ 15-35-101 to 15-35-122; N.D. Cent. Code Ch. 57-61; Tenn. Code Ann. §§ 67-7-101 to 67-7-110; Wyo. Stat. §§ 39-14-101 to 39-14-111. Colorado, Montana, and Wyoming have set aside a portion of their severance tax revenues in perpetual trusts for use by future generations. See Colo. Rev. Stat. § 39-29-109; Mont. Const. art. IX, § 5; Wyo. Const. art. 15, § 19.

[2] Like Pennsylvania, West Virginia currently treats discharges from a very small percentage of bond forfeiture sites with post-mining discharges. West Virginia's Division of Environmental Protection is considering a draft plan for adding a statewide mine drainage treatment trust to its existing alternative bonding system. One element of this trust would be a new fee of 3.6 cents per ton of coal severed, which would be used to pay for the treatment of discharges from existing bond forfeiture sites.

Indeed, expanding the ABS – both its financing mechanism and the scope of its coverage – may be essential to rectify all of the shortcomings of the bonding program, including the problems presented by under-bonded sites in the existing "full cost" portion of the bonding program. Certain deep mines and coal refuse disposal sites with perpetual discharges threaten to ruin streams if the discharges go untreated. Again, DEP expects that the operators of some of these sites will choose to allow DEP to forfeit the existing performance bonds rather than to increase the site-specific guarantees to the true full cost of reclamation. This scenario would leave an impermissible gap in the bonding program that could be filled by funds from an enhanced ABS, by taxpayer funding, or by allowing the public to bear the economic, environmental, and social costs inflicted by the untreated discharges and unreclaimed mines and refuse areas. Expanding and enhancing the ABS is the best of these alternatives and the one that fits with federal SMCRA's goal of protecting taxpayers and the public at large from absorbing the costs of reclamation and abatement.

There is one other extremely important feature of the ABS's statewide bond pool that I neglected to mention during our meeting on June 4, but that our coalition has stressed repeatedly in discussions with Deputy Secretary Jarrett and others at DEP and OSM. Even for sites that are adequately bonded, the duration of the processes for forfeiting and collecting the bond and awarding a reclamation contract can preclude effective reclamation where any delay in performing the work will have irreversible or substantial impacts that could have been avoided by immediate action. The obvious example is a post-mining discharge that would, if untreated, have a significant adverse impact on the receiving stream. Unless DEP can respond immediately to take over the operator's treatment of such a discharge, the process of collecting the bond and awarding a contract may be for naught. We therefore have discussed with Mr. Jarrett the idea of setting aside some amount of funding in an "emergency account" that DEP could tap in such situations in order to prevent immediate harm to public health or the environment while the formal collection and contracting processes are completed. Although some changes might have to occur to allow the funds to be used in this manner, the statewide bond pool of the ABS is the logical repository for such an emergency account.

We recognize that converting to a more accurate way of calculating the land reclamation component of the bond, incorporating a "Postmining Water Treatment Bond" component in the bond calculation, and encouraging operators to establish mine drainage treatment trusts are important steps in fixing both the ABS and the existing "full cost" portion of the Pennsylvania bonding program. These steps are not, however, complete and adequate substitutes for the ABS. Instead of giving up on the ABS and the problematic sites, DEP should continue with its site-specific initiatives and supplement them by submitting a proposed regulation to the EQB that would generate enough revenue to perform the required reclamation and abatement at all sites where site-specific mechanisms will not suffice.

July 24, 2006

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Re: Technical Guidance Document Number 563-2504-001
"Conventional Bonding for Land Reclamation -- Coal"
36 Pa. Bull. 3166 (June 24, 2006)

Comments of 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

Dear Mr. Allen:

In May 2001, the Pennsylvania Department of Environmental Protection (PADEP) released its initial draft of Technical Guidance Document No. 563-2504-001, "Conventional Bonding for Land Reclamation – Coal" (hereinafter, "Conventional Bonding TGD"). Because of the demonstrated interest of the above-referenced conservation organizations in Pennsylvania's bonding program, (then) Bureau Director J. Scott Roberts mailed PennFuture a copy of the proposed Conventional Bonding TGD and, along with Evan Shuster and Assistant Counsel Bo Reiley, met with me on June 4, 2001 to discuss the draft document. On June 12, 2001, PennFuture submitted comments on the draft Conventional Bonding TGD to PADEP on behalf of the five other organizations listed above.

When PADEP proposed modifications to the Conventional Bonding TGD in 2004, it did not similarly send the draft document to PennFuture, and unfortunately, I either overlooked the notice of the proposed revisions or assumed that the new "section about when and how reclamation fees are still collected" would not affect the overall amount of reclamation fees collected for a given mining operation, but rather "when and how" PADEP would collect that same amount. 34 Pa. Bull. 5650 (October 9, 2004). As explained below, we otherwise had good reason to believe that the amount of reclamation fees collected would not change unless the Environmental Quality Board amended the reclamation fee regulation, 25 Pa. Code § 86.17(e). In reviewing the current proposal to modify the Conventional Bonding TGD, we discovered that the revisions that took effect on March 12, 2005 had dramatically reduced the overall amount of reclamation fees collected, not just "when and how" the fees would be collected.

We recognize that PADEP is "seeking public comments on the substantive revisions to technical guidance 563-2504-001," 36 Pa. Bull. 3166 (June 24, 2006), and that PADEP is not proposing to revise the provisions of the TGD concerning the collection of the reclamation fee. There is no administrative finality, however, for unappealable TGDs. For the reasons explained below, PADEP should reverse the unlawful decision it made in 2005 to base the amount of the reclamation fee payment under 25 Pa. Code § 86.17(e) on the acreage of the "operational area" that may be disturbed at any given time, rather than (as it had done for 24 years) collecting the fee for every acre within the permitted area authorized for mining. That result-driven artifice for dramatically reducing the amount of reclamation fees collected is inconsistent with both the plain language of the regulation and the intention of the EQB in promulgating it.

Background

As recounted on page 4 of our June 12, 2001 comments on the initial draft of the Conventional Bonding TGD, during the June 4, 2001 meeting, PADEP assured us that collection of the reclamation fee would continue. In our comments, we encouraged PADEP to explain this (and related matters) in the final TGD or the Comment/Response document:

> The TGD describes one of its effects as "converting" from an alternative bonding system to a conventional bonding system. The TGD does not explain, however, what will happen to the remnants of the ABS [alternative bonding system], including the millions of dollars in reclamation fees collected over the years that are held in the SMCR Fund. Similarly, the TGD does not explain how the "conversion" to an all-conventional bonding system will affect DEP's collection of the $100 per acre reclamation fee under 25 Pa. Code § 86.17(e), which remains part of the approved Pennsylvania program.
>
> During our meeting on June 4, you [(then) Bureau Director Roberts], Evan Shuster, and Assistant Counsel Bo Reiley explained that DEP intends to terminate the ABS but also intends to continue to collect the reclamation fee. Because the reclamation fee is the central element of the ABS, these positions seem impossible to reconcile. Without going into the details, you also explained that DEP has been discussing with OSM the need to discharge (so to speak) the ABS's existing liabilities – principally treatment of mine drainage emanating from bond forfeiture sites. Because of the importance of these matters to the overall functioning of the bonding program, DEP should explain its intended actions in the final TGD or comment/response document.

(June 12, 2001 Comments, p. 4)

PADEP responded that these comments about the alternative bonding system and one of it central components, the reclamation fee, were not germane to a TGD on conventional bonding, and that "any further adjustment to the bonding program will require additional notice and comment opportunities." (Comments and Responses, Conventional Bonding for Land Reclamation – Coal, 563-2504-001, p. 5 (July 12, 2001)). Nothing in final version of the Conventional Bonding TGD suggested that the amount of reclamation fees collected would change as a result of the implementation of Conventional Bonding or the "operational area" concept first introduced by the Conventional Bonding TGD. To the contrary, the Comment/Response document stated that PADEP "collects approximately $600,000 from reclamation fees per year from active operators," Comments and Responses, p. 22, a figure that was in line with its historical collections at the time. See PADEP, "Assessment of Pennsylvania's Bonding Program for Primacy Coal Mining Permits," p. 33 (Feb. 2000) (income from reclamation fee averaged $680,000 per year during 1995-1999).

From the institution of Pennsylvania's alternative bonding system in 1981 through (apparently) March 12, 2005,[1] each newly permitted mine subject to 25 Pa. Code § 86.17(e) or its predecessors paid a reclamation fee of $50 per acre (before August 7, 1993) or $100 per acre (after August 7, 1993) for each permitted acre where surface mining activities were authorized. So, for example, the total reclamation fee for a 300-acre surface mine permitted in 1999 was 300 acres x $100/acre = $30,000. Before the Conventional Bonding TGD took effect on August 4, 2001 and did away with the concept of "bonding increments," this $30,000 might have been collected over time as PADEP issued a series of "mining permits" (or "authorizations to mine") within the overall area under the mine's surface mining permit (SMP). No matter when and how it was paid, however, the total amount of reclamation fees paid for the operation would have been $30,000 (if the entire operation were completed).

In contrast, under the March 12, 2005 revision to the Conventional Bonding TGD, the total reclamation fee paid for the exact same mine would be a small fraction of the $30,000 that would have been collected under the exact same regulation before that date. Instead of applying the reclamation fee to all 300 permitted acres of the operation, PADEP switched to using the acreage of the "operational area" under the Conventional Bonding TGD – the maximum acreage the mine operator may have open (disturbed and not reclaimed) at any given moment under the approved operation plan. That area is almost always smaller, and generally is much smaller, than the overall permit area. If our hypothetical 300 permitted acre mine has an operational area of only 50 acres, it would pay a reclamation fee of 50 acres x $100/acre = $5,000. But unlike the previous practice of issuing a series of mining permits and collecting a series of reclamation fee payments, under the 2005 revision to the TGD, the mine operator does not pay additional reclamation fees as the "operational area" moves from the initial 50 acres into the remaining 250 permitted acres of the mine. Instead, $5,000 is the total amount of reclamation fees collected for the entire operation, meaning that the total amount is $25,000 (and 83%) less than it would have been for the exact same operation before March 12, 2005.

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[1] We say "apparently" because it is unclear whether the March 12, 2005 amendment to the Conventional Bonding TGD made a change or simply ratified a change PADEP already had made in practice, through case-by-case adjudications in issuing new permits.

Though PADEP did provide "additional notice and comment opportunities" for its 2004 proposal to revise the Conventional Bonding TGD, we question whether the notice's mention of "a section about when and how reclamation fees are still collected," 34 Pa. Bull. 5650 (emphasis added), which seems to describe the timing and mechanics of the collection process, adequately apprises a reader that the principal change is to the pre-collection determination of the amount of the fee, much less that the new guidance document might dramatically change the amount of reclamation fees paid by a given mining operation under a regulation that has not changed since 1993. In light of the assurance given during our June 4, 2001 meeting that the reclamation fee would continue to be collected and our obvious heightened interest in the ABS and the reclamation fee, we also are disappointed that we did not receive in 2004 the kind of individual notice that the Ridge Administration saw fit to provide in 2001.

That procedural history is blood under the bridge, but the substantive problem created in 2005 continues, and PADEP should correct it immediately. The determination of the amount of the reclamation fee under 25 Pa. Code § 86.17(e), as described in the March 12, 2005 version of the Conventional Bonding TGD and reiterated in the pending draft revision of that TGD, is unlawful because it is contrary to the intention of the EQB in adopting and amending Section 86.17(e) and the plain language used in the regulation. PADEP should take the opportunity provided by the pending revision to correct this obvious error by returning to the way it determined the amount of the reclamation fee from August 1981 through March 12, 2005, altered only by the exception for qualified remining acreage under 25 Pa. Code § 86.263(c), which took effect as part of the approved Pennsylvania program on May 13, 2005. 70 Fed. Reg. 25472, 25480-81 (May 13, 2005).

Comment

For each newly-permitted mining operation subject to 25 Pa. Code § 86.17(e), PADEP must collect the $100 per acre reclamation fee for the entire permitted area of the operation under the surface mining permit, minus the acreage of any qualified remining area. The EQB could not have intended the total fee to be based on a smaller, "operational area," because the concept of the "operational area" and its use in determining the amount of the site-specific bonds did not exist when the EQB adopted and amended § 86.17(e).

Just as the object of statutory construction is "to ascertain and effectuate the intention of the General Assembly," 1 Pa. C.S. § 1921(a), by analogy, the object of construing a regulation is to give effect to the intention of the agency or body that promulgated the regulation. Here, the clear intention, and indeed the only possible intention, of the EQB was that the "$100 per acre reclamation fee for surface mining activities except for the surface effects of underground mining" be collected for every acre of land within an approved surface mining permit on which mining activities are authorized, not a small subset of that acreage which may be disturbed at any given moment. 25 Pa. Code § 86.17(e).

The EQB put Pennsylvania's ABS into effect in 1981, a full year before Pennsylvania attained "primacy," in order to "substantially ease the difficulty of bonding surface mining operations." 11 Pa. Bull. 1811 (col. 2) (May 23, 1981). See 11 Pa. Bull. 2680 (August 1,

1981) (final rule implementing ABS); 47 Fed. Reg. 33050 (July 30, 1982) (granting primacy). Both during the pre-primacy period and in the original primacy regulation (25 Pa. Code § 86.17(b)), the initial reclamation fee rate of $50 per acre applied to "all acreage proposed to be used for the mining operation."

In 1991, when the EQB moved the reclamation fee to its current subsection, 25 Pa. Code § 86.17(e), it provided that the fee "may be paid as acreage within an approved surface mining permit is authorized for mining." 20 Pa. Bull. 3383, 3390-91 (June 16, 1990). See also 21 Pa. Bull. 3316 (July 27, 1991); 56 Fed. Reg. 24687, 24689 (col. 3) (describing changes to Section 86.17). This addition to the reclamation fee regulation did not change the total (nominal) amount of fees collected for a given operation, but simply allowed that same amount to be paid over time, as PADEP issued a series of authorizations for the mining activities to expand into new portions of the permitted site. At that time (and until August 4, 2001), Pennsylvania allowed mine operators to bond their operations in "increments." The overall operation was covered by a SMP, and smaller "bonding increments" within that area were covered by a series of "mining permits" (or "authorizations to mine") issued as the operation proceeded into new portions of the overall area permitted under the SMP. Under the 1991 amendment, the reclamation fee was collected for each acre of the mine where mining activities were authorized by the issuance of a new mining permit. So, if PADEP ultimately issued every mining permit/bonding increment included in the SMP, it collected the (then $50) fee for the entire acreage permitted under the SMP.

Against this backdrop of how the amount of the reclamation fee was determined, the EQB in 1993 made its last amendment to 25 Pa. Code § 86.17(e), which increased the reclamation fee from $50 to $100 per acre. 23 Pa. Bull 815 (August 7, 1993). Given the manner in which PADEP determined the amount of the reclamation fees at the time, the EQB could only have intended that its increased reclamation fee rate of $100 per acre would be applied to each and every acre within the approved surface mining permit where mining activities had been authorized. The total amount of fees paid by any given operation did not depend at all on the maximum amount of acreage allowed to be disturbed at any given moment, but rather on the total number of acres – acres with fixed locations on the ground and identifiable on the plan drawings for the operation – on which mining activities had been authorized. Thus, the circumstances surrounding the EQB's adoption of the current version of the reclamation fee regulation in 1991 and the amendment of that regulation in 1993 show that the EQB intended the reclamation fee to be paid for each and every permitted acre where mining activities were authorized,[2] not for a smaller "operational area" that did not come into existence as a Pennsylvania bonding program concept until 2001. Cf. 1 Pa. C.S. § 1921(c)(2) (General Assembly' intention may be inferred from circumstances surrounding enactment of statute).

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[2] As noted above, the only qualification to this statement is required not by a decision made unilaterally by PADEP in a TGD, but by another regulation adopted by the EQB, 25 Pa. Code § 86.263(c), which implements a statutory requirement to exempt qualified remining acres from the reclamation fee. 52 P.S. § 1396.4f(k). Those provisions did not take effect as part of the approved Pennsylvania program until May 13, 2005. 70 Fed. Reg. at 25480-81.

The plain language of § 86.17(e) compels this same result. The regulation provides that "there is a $100 per acre reclamation fee for surface mining activities except for the surface effects of underground mining." 25 Pa. Code § 86.17(e). Under that plain language, the operator must pay the $100 per acre reclamation fee for all areas where surface mining activities occur. The only exceptions are for underground mines (in § 86.17(e) itself) and for qualified remining areas (in 25 Pa. Code § 86.263(c)). Section 86.17(e) says nothing about the "operational area" or the maximum area that may be disturbed at any given moment. The reference in the text to "acreage . . . authorized for mining," 25 Pa. Code § 86.17(e), does not limit the fee to the "operational area" under the Conventional Bonding TGD. In 1991, when the EQB added the provision that allowed the reclamation fee to be paid over time "as acreage within an approved surface mining permit is authorized for mining," id., mining was only authorized on those portions of the SMP for which PADEP had issued a separate mining permit. The initial mining permit accompanied the issuance of the SMP, and unless the operation had only one mining permit (bonding increment), upon issuance of the SMP, there would be some acreage within the overall SMP in which mining activities were not yet authorized. As additional mining permits authorized mining activities on additional acreage, the operator paid additional reclamation fees. The Conventional Bonding TGD did away with separate mining permits and bonding increments. Today, as soon as PADEP issues an SMP, mining activities are authorized on the entire permitted acreage of the SMP. Those activities may only disturb a certain amount of land at any given time, but the mine operator need not post any additional site-specific bonds or obtain any additional "authorizations to mine" or "mining permits" from PADEP in order to move onto additional land within the SMP. Because the entire permitted area of the SMP "is authorized for mining" at the time PADEP issues the SMP, the $100 per acre reclamation fee for every acre permitted under the SMP is due when PADEP issues the SMP.

The March 12, 2005 TGD improperly attempts to substitute the new "operational area" for the old bonding increment or mining permit areas. But those old and new areas are not equivalent. The old bonding increments were specific, mapped locations within the SMP area. The new operational area floats around the entire area permitted under the SMP. At the time it adopted the current version of the reclamation fee regulation in 1991 and amended the regulation to increase the fee rate in 1993, the EQB's experience with the determination of reclamation fees was based on the old system, and it is clear that the EQB could not have contemplated in the early 1990s that the reclamation fee rate of $100 per area would be limited to some "operational area" that would not be defined until PADEP produced its Conventional Bonding TGD in 2001. If PADEP today collected additional reclamation fees every time the operational area shifted onto new territory, in a manner parallel to the issuance of additional mining permits under the old system, that procedure, though cumbersome, would be consistent with the language and intention of the regulation. But as described in the Conventional Bonding TGD, if a 10-acre operational area moves around a 1,000-acre SMP, PADEP collects only $1,000 in reclamation fees for the entire operation, not the $100,000 it would have collected (probably over time) under the old system. This new and substantial limitation on the amount of reclamation fees collected under a regulation that has not changed since 1993 is unlawful.

As a policy matter, it is disappointing that despite Pennsylvania's need for more money to treat mine drainage from ABS bond forfeiture sites, PADEP has gone well out of its way to collect less reclamation fee money that could be put to that good purpose. But the dispositive consideration is that what PADEP has done in order to greatly reduce the amount of reclamation fees it collects under 25 Pa. Code § 86.17(e) is patently unlawful and clearly frustrates the intention of the EQB. If the amount of reclamation fees collected under a regulation last amended by the EQB thirteen years ago is going to change so dramatically, it should be because the EQB amends the regulation, not because PADEP unilaterally does something that has the same practical effect as slashing the $100 per acre reclamation fee rate duly promulgated by the EQB.

CONCLUSION

We recognize that on May 17, 2006, the EQB issued a proposed rule that, if adopted on final rulemaking, would amend 25 Pa. Code § 86.17(e) to discontinue the collection of the reclamation fee entirely. Though we disagree with and will argue against that proposal, the rulemaking process is the only proper way to go about changing the amount of reclamation fees collected under the regulation. In contrast, the partial discontinuation of collections PADEP has effected unilaterally by amending a mere guidance document is underhanded. It also, as explained above, is so patently unlawful and inconsistent with the intention of the EQB that it never should have made its way onto paper. We urge PADEP to return immediately to basing the total amount of reclamation fees on the total permitted acreage authorized for surface mining activities, not the maximum "operational area" that may be disturbed at any given moment.

Sincerely,

Kurt J. Weist
Senior Attorney
Harrisburg Office