

3074.

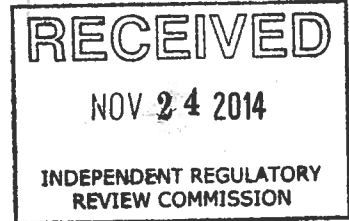
November 24, 2014



Citizens for Pennsylvania's Future  
610 North Third Street  
Harrisburg, PA 17101-1113  
P 717.214.7920 / 800.321.7775  
F 717.214.7927  
info@pennfuture.org  
www.pennfuture.org

Submitted Via Electronic Mail: RegComments@pa.gov  
(Hard Copy to Follow by First-Class Mail)

Environmental Quality Board  
P.O. Box 8477  
Harrisburg, PA 17105-8477



**Re: Proposed Rulemaking**  
**“Land Reclamation Financial Guarantees and Bioenergy Crop Bonding”**  
**44 Pa. Bull. 6781 (October 25, 2014)**

**Comments of Citizens for Pennsylvania's Future (PennFuture)**

To Whom It May Concern:

On behalf of Citizens for Pennsylvania's Future (PennFuture) and its members, I am submitting this comment on the proposed rulemaking, “Land Reclamation Financial Guarantees and Bioenergy Crop Bonding,” which in the main proposes revisions 25 Pa. Code Chapter 86 to implement Acts 95 and 157 of 2012. PennFuture's comment is limited to the revisions being proposed to implement one specific provision of Act 157, which is codified as Section 19.2(b)(7) of Pennsylvania's Surface Mining Conservation and Reclamation Act (PA SMCRA), 52 P.S. § 1396.19b(b)(7). Accompanying this letter is a separate, one-page summary of PennFuture's comment for distribution to the members of the Environmental Quality Board (Board or EQB).

As PennFuture details below, just a few years ago, this Board proposed to eliminate Pennsylvania's reclamation fee *de jure*, but decided instead to preserve the fee and make its rate adjustable annually. Since the rate became adjustable in 2010, however, the reclamation fee has been eliminated *de facto* by being set every year at the unvarying rate of \$0 per acre. The proposed changes to 25 Pa. Code § 86.17(e)(2) in the pending proposed rulemaking would perpetuate that *de facto* elimination of the reclamation fee by helping to ensure that the fee rate remains pegged at \$0 per acre. Act 157 reveals no intention to prevent the fee from being increased above the prevailing rate of \$0 per acre (which is to say, to prevent the fee from being charged in the future), a result that plainly would be at odds with the Board's recent decision to keep the fee in place as a source of revenue to the “*Reclamation Fee O&M Trust Account*.”

**Comment: There is no legal requirement or “need” to offset any increase in the \$0 per acre reclamation fee, which would have the practical effect of eliminating the reclamation fee as a source of revenue to the Reclamation Fee O&M Trust Account.**

In 1993, the Board increased the reclamation fee under 25 Pa Code § 86.17(e) from the rate of \$50 per acre set in 1981 to \$100 per acre. *See* 23 Pa. Bull 815 (August 7, 1993). In 2006,

the Board proposed to eliminate the reclamation fee. *See* 36 Pa. Bull. 4200, 4201 (col. 1) (explaining that § 86.17(e) “is being amended to discontinue collection of the \$100 per acre reclamation fee”), 4202 (col. 1) (August 5, 2006). Before that proposal was finalized, however, the U.S. Court of Appeals for the Third Circuit issued its decision in *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337 (3d Cir. 2007) (*Kempthorne*), which held that Pennsylvania’s alternative bonding system bond pool fund had to provide for the complete reclamation of any mines bonded under the alternative bonding system that did not post full-cost, conventional bonds. Because complete reclamation includes treatment of any post-mining discharges, this is an expensive obligation.

Recognizing the continued need for revenue under the 2007 *Kempthorne* decision, this Board abandoned its 2006 proposal to eliminate the reclamation fee. Instead, after publishing an advance notice of final rulemaking, 35 Pa. Bull. 80 (January 5, 2008), the Board promulgated amendments to the mining regulations that kept the \$100 per acre reclamation fee in place through the end of 2009, and made the fee rate adjustable starting January 1, 2010. *See* 35 Pa. Bull. 4742 (August 8, 2008). *See also id.* at 4747-48 (recounting history of proposal to discontinue collection of reclamation fee). Specifically, the Board provided:

The amount of the reclamation fee shall be \$100 per acre until December 31, 2009. Commencing January 1, 2010, and continuing until either a permanent alternative funding source is established or the ABS Legacy Sites Trust Account is actuarially sound, the reclamation fee will be adjusted as necessary to ensure that there are sufficient revenues to maintain a balance in the Reclamation Fee O&M Trust Account of at least \$3,000,000.

25 Pa. Code § 86.17(e)(3). The Board further specified that the reclamation fee must be adjusted in multiples of \$50, and listed the factors on which the Pennsylvania Department of Environmental Protection’s (PADEP’s) annual adjustments to the amount of the fee must be based. *Id.* § 86.17(e)(4). Among those factors is “the projected amount of revenue into the Reclamation Fee O&M Trust Account during the current fiscal year from projected interest accrued by the trust account, projected deposits of civil penalties and projected deposits of moneys from other sources.” *Id.* § 86.17(e)(4)(v). Under the regulations adopted by the Board in 2008, PADEP must prepare an annual report for each fiscal year (July 1 to June 30) in which it tentatively determines the amount of the reclamation fee for the following calendar year. *Id.* § 86.17(e)(2). After receiving input from the Mining and Reclamation Advisory Board (MRAB) and the public, PADEP publishes a public notice of its final determination of the fee rate for the upcoming calendar year. *Id.* § 87.17(e)(5).

Despite the fact that the Board’s 2008 final rulemaking expressly countermanded the 2006 proposal to eliminate the reclamation fee, the reclamation fee has been at least temporarily eliminated as a practical matter. Every year since the adjustable reclamation fee first went into effect in 2010, it has been set at zero dollars per acre, and it will remain at zero dollars per acre for calendar year 2015.

The preamble to the pending proposed rulemaking nevertheless asserts that “offsetting an increase in the Reclamation Fee is important to operators because the Reclamation Fee impacts operating expenses.” 44 Pa. Bull. 6781, 6784 (col. 1) (October 25, 2014). To the contrary, from January 1, 2010 through at least December 31, 2015, no Pennsylvania mine operator will have paid a dime in reclamation fees, so the adjustable reclamation fee has been no burden at all on mine operators. It is important to recognize that because the reclamation fee has been set at zero since the beginning of 2010, when the preamble to the pending proposed rulemaking refers to “an *increase* in the Reclamation Fee,” it means charging any reclamation fee at all, and when it says “offsetting an increase in the Reclamation Fee,” it means preventing any reclamation fee at all from being charged.

Through Act 157’s addition of Section 19.2(b)(7) to PA SMCRA, the General Assembly has provided for an additional, potential source of revenue to the Reclamation Fee O&M Trust Account. Section 19.2(b)(7) states:

Beginning in fiscal year 2013-14, up to two million dollars (\$2,000,000) collected from the gross receipts tax on sales of electric energy in Pennsylvania . . . may be appropriated annually by the General Assembly to the department [PADEP] for transfer to the Reclamation Fee O&M Trust Account established pursuant to 25 Pa. Code §§ 86.17 and 86.187 to be used to supplement the funding of the Reclamation Fee O&M Trust Account. The authority to transfer funds under this clause expires June 30, 2039.

52 P.S. § 1396.19b(b)(7). The only legal effect of this provision is its time-limited granting of authority to PADEP to transfer funds that are specifically appropriated in the future for the purpose of being transferred to the Reclamation Fee O&M Trust Account. The General Assembly retains complete discretion over whether any such appropriation occurs, the amount of such appropriation (constrained only by the maximum of \$2 million per year), and the basis upon which the amount is determined. Significantly, Section 19.2(b)(7) does *not* provide that the General Assembly *must*, or even that it *should*, appropriate gross receipts tax revenues for transfer to the Reclamation O&M Trust Account, or that it should be guided by a purpose of offsetting any forecast increase in the reclamation fee (which, as explained above, is the same as saying a purpose of preventing any reclamation fee from being charged).

For the stated purpose of implementing Section 19.2(b)(7), the proposed rulemaking would direct PADEP to include in its annual report on the Reclamation Fee O&M Trust Account the

information necessary for determining the *need to supplement the funding* of the Reclamation Fee O&M Trust Account. The *need to supplement the funding* of the Reclamation Fee O&M Trust Account will be based on the *need to offset an increase in the reclamation fee* and the need to provide for long-term operations at ABS Legacy Sites.

44 Pa. Bull. at 6788 (col. 1) (proposed addition to 25 Pa. Code § 86.17(e)(2)) (emphasis added throughout). Again, given that the reclamation fee remains at zero dollars per acre, when this proposed amendment says “offset an increase in the reclamation fee,” it translates to “prevent the charging of any reclamation fee.” The use of the word “need” – “the *need* to supplement the funding . . . will be based on the *need* to offset an increase in the reclamation fee” – reveals that the premise is that there should never be any increase in the reclamation fee, which, given the starting point of zero, translates to never charging any reclamation fee at all.

The preamble to the proposed rulemaking reveals that the source of this premise is not Section 19.2(b)(7), or Act 157 more generally, but instead the MRAB, which suggested that the amended regulation provide:

No later than the date of the Department’s annual budget request to the Governor’s Budget Office, the Department shall report to the MRAB as to when a transfer from the Gross Receipts Tax to the Reclamation Fee O&M Trust Account is necessary to supplement the funding of the Reclamation Fee O&M Trust Account in order to offset an increase in the reclamation fee in the subsequent fiscal year.

44 Pa. Bull. at 6783 (col. 1). The preamble notes that “[t]hrough not adopting this language verbatim, the Department incorporated the substance of this recommendation” in the proposed amendment to § 86.17(e)(2) quoted above. *Id.*

The premise that the reclamation fee should forever remain at zero finds no support in the law. To the contrary, after initially proposing in 2006 to discontinue the collection of the reclamation fee, this Board reversed course in 2008 and adopted the adjustable reclamation fee. *See* 35 Pa. Bull. at 4747-48, 4761. Moreover, nothing in Act 157 suggests an intention or objective of keeping the reclamation fee at zero by offsetting every potential increase in the fee. Indeed, if the General Assembly had wanted PADEP to tell the Governor’s Office each year how much revenue will be needed to prevent any increase in the reclamation fee (i.e., to keep fee rate at zero), it would have been simple for it to have said so expressly in Act 157.

In short, there is no “need,” or legislative intention, to offset every possible increase in the reclamation fee. Stated another way (given the starting point of zero dollars per acre), there is no “need,” or legislative intention, to keep the supposedly “adjustable” reclamation fee pegged forever at the fixed rate of zero dollars per acre – that is, to effectively *eliminate* the reclamation fee forever. This Board declined to finalize its earlier proposal to eliminate the reclamation fee, and as the first two words of *Reclamation Fee* O&M Trust Account make unmistakably clear, the Board intended the adjustable reclamation fee to be one of the sources supplying revenue to that account. The proposed amendment to § 86.17(e)(2) would subvert that intention by implementing a premise not found in Act 157, namely that the public coffers always should be tapped in preference to charging mine operators any reclamation fee, which should be assessed only as a last resort.

PennFuture recommends that 25 Pa. Code § 86.17(e)(2) be revised to read as presented immediately below. The two deletions in brackets are the same as those found in the proposed

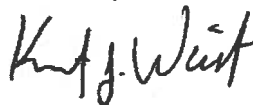
rulemaking. The only change is to the addition to the regulation shown in boldface type without brackets.

(2) After the end of each fiscal year, the Department will prepare a fiscal-year report containing a financial analysis of the revenue and expenditures of the Reclamation Fee O&M Trust Account for the past fiscal year and the projected revenues and expenditures for the current fiscal year. **[ Beginning with the report for fiscal year 2008-09, the [ The report will include the Department's calculation of the required amount of the reclamation fee, [ and [ the proposed adjustment of the reclamation fee amount, and the amount of revenue the proposed adjustment of the reclamation fee is projected to generate during the upcoming calendar year.** The fiscal-year report will be submitted to the members of the Mining and Reclamation Advisory Board for their review and comment and will be published on the Department's web site. Notice of the report's availability will be published in the *Pennsylvania Bulletin*. The Department will review the fiscal-year report at a meeting of the Mining and Reclamation Advisory Board.

Using the amount of revenue the proposed adjustment in reclamation fee is projected to generate in the upcoming calendar year, one may calculate the amount of revenue in an appropriation (or from any other source) that would offset the proposed adjustment of the fee. Thus, PennFuture's suggested language would result in information that could be used to inform any decision concerning future appropriations without improperly suggesting that there is any "need to offset an increase in the [\$0 per acre] reclamation fee."

Thank you for your consideration of these comments. Please feel free to contact me at 717-214-7925 if you have any questions.

Sincerely,



Kurt J. Weist  
Senior Attorney

Enclosure (One-page summary)

**Summary of the Comment of Citizens for Pennsylvania's Future (PennFuture)  
Proposed Rulemaking  
"Land Reclamation Financial Guarantees and Bioenergy Crop Bonding"  
44 Pa. Bull. 6781 (October 25, 2014)**

- In 1993, the Environmental Quality Board (Board) increased the reclamation fee under 25 Pa Code § 86.17(e) from the rate of \$50 per acre set in 1981 to \$100 per acre.
- In 2006, the Board proposed to eliminate the reclamation fee.
- In 2008, in light of the intervening decision of the U.S. Court of Appeals in *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337 (3d Cir. 2007), the Board abandoned its 2006 proposal to eliminate the reclamation fee, and instead kept the \$100 per acre reclamation fee in place through the end of 2009 and made the fee rate adjustable starting January 1, 2010.
- No reclamation fee has been charged since the rate first became adjustable in 2010. The fee rate has been set at zero dollars per acre for calendar years 2010 through 2015.
- Among the provisions added to Pennsylvania's Surface Mining Conservation and Reclamation Act by Act 157 of 2012 was Section 19.2(b)(7), 52 P.S. § 1396.19b(b)(7), which authorizes the Pennsylvania Department of Environmental Protection (PADEP) to transfer gross receipts tax revenues specifically appropriated in the future for the purpose of being transferred to the Reclamation Fee O&M Trust Account.
- Section 19.2(b)(7) does *not* provide that the General Assembly *must*, or even that it *should*, appropriate funds for transfer to the Reclamation O&M Trust Account, or that it should be guided by a purpose of offsetting any increase in the reclamation fee (which, given that the fee rate is set at zero dollars per acre, is the same as saying a purpose of preventing any reclamation fee from being charged).
- The pending proposed amendment to 25 Pa. Code § 86.17(e)(2) states a standard that incorrectly includes "the *need* to offset an increase in the reclamation fee," which, as practical matter (given the starting point of zero dollars per acre), implies an objective of preventing any reclamation fee from being charged.
- The proposed amendment to 25 Pa. Code § 86.17(e)(2) would tend to perpetuate the *de facto* elimination of the reclamation fee that has occurred since the fee rate became adjustable in 2010.
- As the first two words of *Reclamation Fee* O&M Trust Account make unmistakably clear, the Board intended the reclamation fee to be a source of revenue to that account.
- The proposed amendment to 25 Pa. Code § 86.17(e)(2) would subvert that intention by implementing a premise not found in Act 157, namely that the public coffers always should be tapped in preference to charging coal mine operators any reclamation fee.