

# Plaintiff's Exhibit C



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west virginia department of environmental protection

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Earl Ray Tomblin, Governor  
Randy C. Huffman, Cabinet Secretary  
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February 1, 2011

Honorable Earl Ray Tomblin  
Office of the Governor  
State Capitol Complex  
Charleston, WV 25305

Honorable Jeffrey V. Kessler  
West Virginia Senate  
Room 227M, Building 1  
State Capitol Complex  
Charleston, WV 25305

Honorable Rick Thompson  
West Virginia House of Delegates  
Room 228M, Building 1  
State Capitol Complex  
Charleston, WV 25305

Re: Status of the Special Reclamation Tax, Special Reclamation Fund, and  
Special Reclamation Water Trust Fund, Pursuant to W. Va. Code § 22-3-11(h)(1)

Dear Sirs:

The Legislature created the Special Reclamation Advisory Council (“the Council”) in 2001 “to ensure the effective, efficient and financially stable operation of the Special Reclamation Fund.” W. Va. Code § 22-1-17(a). The Special Reclamation Fund was established pursuant to the West Virginia Surface Coal Mining and Reclamation Act to assure that sufficient capital exists to complete the environmental reclamation of bond-forfeited mine sites.

The Council is comprised of eight members: the Secretary of the Department of Environmental Protection is an *ex officio* member and serves as the chair, the Treasurer of the State of West Virginia, and the Director of the National Mine Land Reclamation Center at West Virginia University. The remaining five members are appointed by the Governor, typically for full terms of six years, and any member may serve successive terms upon renewal of appointment. The balance of constituencies among the Council members is fixed by statute as follows: a member of the major trade association representing the coal industry; a member representing organizations advocating environmental protection; an actuary or economist; a member to represent the interests of coal miners; and a member of the general public.

The Council is to be commended for the considerable time and effort it has invested in quarterly meetings since 2001 to review and evaluate extensive reclamation project data and associated financial information; however, the Council is now suffering vacancies that impede its ability to fully execute its statutory duties. For calendar year 2010, the Council had three

Promoting a healthy environment.

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vacancies (the coal miners' representative was only appointed in September), with all five appointed members working under expired terms. Due in part to the vacancies, recent meetings called for the Council to review and question the 2010 final actuary report and to discuss the 2010 Annual Report did not constitute a quorum of the total membership of the Council. The current membership of the Council is detailed in the following chart:

MEMBER	APPOINTMENT	REPRESENTS	TERM EXPIRES
Ken Ellison, <i>Ex Officio</i> Non-Voting	9-15-2001	DEP Secretary	N/A
Carolyn Atkinson	9-15-2001	State Treasurer	N/A
Paul Ziemkiewicz Morgantown, West Virginia	9-15-2001	National Mine Lands Reclamation Center	N/A
Bill Raney Charleston, West Virginia	7-1-2002	Coal Industry	6-30-2004
John Morgan Lexington, Kentucky	7-1-2002	Environmental Protection	6-30-2004
<b>Vacant</b>	7-1-2002	Actuary/Economist	6-30-2006
Ronald Pauley Sumerco, West Virginia	9-8-2010	Coal Miners	6-30-2012
<b>Vacant</b>	7-1-2002	General Public	6-30-2008

The Council is charged with multiple tasks to carry out its duties. One of these is to contract with a qualified actuary to account for both known bond forfeitures and anticipated bond forfeitures from existing surface mining permits. My growing concern is that the Council, in recent years, has come to rely exclusively on the actuary recommendation as a substitute for its own recommendation to the Legislature and the Governor, as demonstrated in the enclosed Annual Report. I believe the Council's overreliance on the actuary's report is due largely to the vacancies detailed above.

In the 2008 Annual Report, the Council also relied exclusively on the 2008 actuary report to recommend a reduction in the special reclamation tax from a total of 14.4¢ per clean ton of coal to 13¢ to assure solvency of the Fund. The Legislature, acting upon a recommendation of this Agency, instead chose to consider the financial implications of pending water treatment-related litigation and maintained the 14.4¢ tax. More importantly, the Legislature chose to amend the statutory language in a manner that does not reduce the tax until there are sufficient moneys to meet the reclamation responsibilities of the State. As a result of this action, the 2010 actuary report found that the funded status of the Special Reclamation Fund increased from 76% in 2008 to 83% in 2010.<sup>1</sup>

The enclosed 2010 Special Reclamation Advisory Council Annual Report again solely references the 2010 actuary's report to recommend an increase in the special reclamation tax from 14.4¢ to a total of 25.69¢ to assure 100% funded status of all liabilities through the year 2025. This recommendation reflects a 61% increase. Similar to the Agency's decision in 2008

<sup>1</sup> It is important to note that the financial implications of the pending litigation are still not completely known.

to demur from the Council's recommendation to reduce the tax, the Agency again takes the position that the Council's 2010 recommendation is not the most appropriate path forward.<sup>2</sup>

Taking into consideration that the current Special Reclamation Fund balance is \$63.22 million, the continuation of the 14.4¢ tax will allow for ongoing efforts to complete reclamation of the existing \$53.5 million in forfeited liabilities and the near future liabilities. I, therefore, recommend the following:

- Although required as a bi-annual actuary evaluation, the Agency will repeat the actuary study in 2011 with the anticipation that any additional financial implications of the pending litigation regarding the Agency's NPDES permit status will be forthcoming and included in the actuary review.<sup>3</sup>
- The Agency will contract with Dr. George Hammond of West Virginia University in 2011 to review and revise the *Consensus Coal Production Forecast for West Virginia 2009 – 2030*.
- The Agency will work closely with the Governor's Office to fill the vacancies on the Council and reappoint existing members as appropriate.
- The Agency will encourage the Council to conduct the mandated tasks and make an independent recommendation to the Legislature in lieu of relying exclusively on the actuary report in 2012.

In conclusion, the alternating recommendations to decrease and then increase the special reclamation tax based solely on actuary reports is not conducive to reasonable policy that will ensure the long-term stability of the Special Reclamation Fund or the Special Reclamation Water Trust Fund. I believe the Agency and the Council should undertake renewed efforts to fully meet both the letter and the spirit of the legislation enacted to oversee these very important Funds.

If you have any questions or concerns, please do not hesitate to contact me. Thank you for your kind assistance in this matter.

Very truly yours,



Randy C. Huffman  
Cabinet Secretary

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<sup>2</sup> Of utmost concern is the question of the legality of the Council's recommendation and report, in light of the fact it was unable to seat a quorum of members for a majority of the year.

<sup>3</sup> Please note that future NPDES water treatment costs cannot be reasonably estimated by the Office of Special Reclamation professional staff until the NPDES litigation has been resolved or NPDES permit water quality standards, terms, and conditions have been finalized.