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30 CFR Part 938

Pennsylvania Regulatory Program; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–153; Docket ID OSM–2008–0021]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; partial approval of amendment.

SUMMARY: OSM is announcing its partial approval of a program amendment submitted by the Commonwealth of Pennsylvania for the purpose of addressing the need for financial guarantees to cover the costs of treatment of post-mining pollutional discharges and land reclamation for those surface coal mining sites that were originally bonded under the Commonwealth's now defunct alternative bonding system (ABS). OSM is requiring that Pennsylvania ensure that its program provides suitable, enforceable funding mechanisms sufficient to guarantee coverage of land reclamation at all original ABS sites.

DATES: *Effective Date:* August 10, 2010.

FOR FURTHER INFORMATION CONTACT: George Rieger, Director, Pittsburgh Field Division, *Telephone:* (717) 782–4036, *e-mail: grieger@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program
II. Description of the Amendment
III. OSM Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
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I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act "* * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." *See* 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982.

You can find additional background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register**, 47 FR 33050. You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15 and 938.16.

General Discussion—Bonding Regulations

SMCRA's implementing regulations at 30 CFR Part 800 specify the minimum requirements for filing and maintaining bonds and insurance for surface coal mining and reclamation operations under regulatory programs. This Part includes (but is not limited to) a description of the regulatory authority's responsibilities and definitions, the requirement to file a bond, the form of the performance bond, the period of liability, the determination of bond amount and adjustment of the amount, and the general terms and conditions of a bond.

Coal operators are required to file a bond for reclamation of disturbed land in accordance with permit requirements. The bond should cover the entire permit area and the amount may be determined incrementally as reclamation phases are completed. Independent increments should be of sufficient size and configuration to provide for efficient reclamation operations should reclamation by the regulatory authority become necessary. The applicant can file a bond or another financial instrument to cover the bond amount.

These bonding methods include a bond for the entire permit area, a cumulative bond schedule and bond for the initial area, an incremental bond schedule and bond for the first increment, or an alternative bonding system if it achieves the objectives and purposes of the bonding program. As set forth at 30 CFR 800.11(e), the objectives of the bonding program are: (1) To 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; and, (2) to provide a substantial economic incentive for the permittee to comply with all reclamation provisions.

In addition to prescribing, by regulation, the terms and conditions for performance bonds, the regulatory authority is also responsible for determining the amount of the bond, including any adjustments to such amount. The determination of the bond amount should depend upon the requirements of the approved permit and reclamation plan and reflect the probable difficulty of reclamation. The amount of the bond should be sufficient to assure the completion of the reclamation plan if the work has to be completed by the regulatory authority.

The amount of the bond shall be adjusted by the regulatory authority from time to time as the area requiring bond coverage is increased or decreased or where the cost of future reclamation changes. The regulatory authority may require periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement.

The regulatory authority may release liability under a bond when reclamation activities are completed and may require forfeiture of such bonds if the terms of the permit or bond are not met. The liability period shall extend until all reclamation, restoration, and abatement work under the permit has been completed.

Throughout the U.S., State regulatory programs have employed a variety of bonding programs, some electing to employ a conventional bonding program (full-cost bonding program that requires site-specific bonds as the only means of assuring reclamation following completion of mining) and others electing to employ an ABS as provided for in § 800.11(e).

Background on Pennsylvania's Bonding Program

For almost 60 years Pennsylvania law has regulated surface mining and has required some degree of land reclamation. For most of the same period it has also required bonds, in changing amounts and formats, to ensure the required land reclamation. The current requirements for both land reclamation and bonding are found in the Surface Mining Conservation and Reclamation Act (PASMCRA) (52 p.s. SS 1396.1–1396.31), the Coal Refuse Disposal Control Act (CRDCA) (52, P.S. SS 30.51–30.66) and the Clean Streams Law (CSL) (35 p.s. SS 691.1–691.1001). These provisions require a bond to be filed prior to commencement of mining, and to be conditioned "that the permittee shall faithfully perform all of the requirements" of PASMCRA, the CSL, and other applicable statutes.

The conventional bonding system is based on the mine operator's description of the maximum amount of reclamation needed during the term of the permit. The proposed dimensions of the mining activity are combined with bond rate guidelines to calculate the total bond. The PADEP developed bond rate guidelines using actual bid costs submitted for abandoned mine lands and forfeited mine sites reclamation contracts and other appropriate sources. Revised guidelines are published in the Pennsylvania Bulletin annually.

Pennsylvania's mining laws provide the basis for conventional bonding. The conventional bonding system incorporates the bonding obligations of those acts and the regulations and considers the following criteria.

The bond amount is the cost to the Commonwealth for hiring a contractor to complete the permitted reclamation plan to regulatory standards. It reflects the Commonwealth's maximum responsibilities under the approved operation and reclamation plan for land reclamation.

The operation and reclamation plans in the coal mining permit application describe how the operator will mine and reclaim the site. The PADEP relies upon the operator's plan, plus site-specific special conditions, when calculating the total bond.

Permit approval requires a finding that there is no presumptive evidence of pollution to the waters of the Commonwealth. Consequently, post-mining pollutional discharges of mine drainage are not anticipated in the reclamation plan. The calculation of the initial bond amount for a coal mining permit does not include costs for the treatment of mine drainage or anything not anticipated in the approved permit and reclamation plan.

Many factors contribute to the design of a mine site, and therefore effect the rate of bond required for full reclamation. If the methods of mining or operation change, standards of reclamation change, or the cost of reclamation, restoration or abatement work increases, the PADEP will require the permittee to recalculate the bond.

From 1982 until 2001, Pennsylvania's approved program included operation of an ABS for surface coal mines, coal refuse reprocessing operations and coal preparation plants. Under the ABS, in the event of bond forfeiture, the amount of bond posted by the operator for the forfeited site was supplemented by other funds (the Surface Mining Conservation and Reclamation Fund, or SMCR Fund). This fund (referred to as a bond pool) was funded in part by a per-acre reclamation fee paid by operators of permitted sites and was used to supplement site-specific bonds posted by those operators for each mine site, in the event of bond forfeiture.

In 1991, OSM's oversight activities determined that Pennsylvania's ABS included unfunded reclamation liabilities for backfilling, grading, and revegetating mined land and OSM determined that the ABS was financially incapable of abating or treating unanticipated pollutional discharges from bond forfeiture sites under its jurisdiction.

In May 1991, OSM codified a required regulatory program amendment at 30 CFR 938.16(h), directing Pennsylvania to submit information by November 1991 which demonstrated that Pennsylvania's ABS was solvent. The program amendment required Pennsylvania to submit information demonstrating that the revenues generated by the collection of the reclamation fee, as amended in 25 Pa. Code 86.17(e) will assure that Pennsylvania's ABS can be operated in a manner that will meet the requirements of 30 CFR Part 800.11(e). *See* 56 FR 24687 (May 31, 1991).

Additionally, in October 1991, OSM notified Pennsylvania that in order for Pennsylvania to maintain jurisdiction of the regulatory program under the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* Pennsylvania had to address program deficiencies related to administration of the ABS. This document is commonly referred to as a "732 letter," because it was issued pursuant to the Federal regulations, at 30 CFR 732.17.

These OSM actions identified a deficiency in the ABS concerning the system's ability to generate sufficient funds to complete the reclamation of all primacy ABS bond forfeiture sites, including the costs to treat pollutional discharges on these sites. Since 1991, Pennsylvania had undertaken actions and made changes to its bonding program in an effort to address the deficiencies identified. In the late 1990s, Pennsylvania concluded the ABS could not be amended to meet the Federal requirements, and in 2001, Pennsylvania terminated the ABS and converted the active permits covered by the ABS to a "full-cost" bonding program (conventional bonding program). This program requires a permittee to post a site-specific bond in an amount sufficient to cover the estimated costs to complete reclamation in the event of bond forfeiture.

Following termination of the ABS, Pennsylvania and OSM developed a programmatic solution for addressing all of the discharges on the forfeited ABS sites, which was memorialized in a document titled "Pennsylvania Bonding System Enhancements." By letter dated June 12, 2003, OSM notified the PADEP that the conversion to a full-cost bonding program, as well as other additional measures taken by the State, were sufficient to remedy the deficiencies cited in the 732 letter, which it declared to be terminated, and agreed with Pennsylvania that the only ABS obligation remaining was to expend remaining ABS monies for reclamation of forfeited sites.

On October 7, 2003, OSM published a final rule removing the required amendment at 30 CFR 938.16(h) on the basis that the conversion from an ABS to a full-cost bonding program rendered the requirement to comply with 30 CFR 800.11(e) moot. *See* 68 FR 57805. Subsequent to these OSM actions, a lawsuit was filed in the U.S. District Court for the Middle District Court of Pennsylvania by several citizens groups in December 2003 challenging OSM's termination of the 1991 Part 732 Notice and its removal of the required program amendment in 30 CFR 938.16(h). (*Pennsylvania Federation of Sportsmen's Clubs Inc. et al.* v. *Norton*, No. 1:03–CV–2220). In 2006, the U.S. District Court granted a motion requesting dismissal of the case. The district court affirmed OSM's decision in a Memorandum Opinion and Order dated February 1, 2006. *Id.* The plaintiffs appealed the District Court's decision to the U.S. Court of Appeals for the Third Circuit.

Court Decision

On August 2, 2007, the United States Court of Appeals for the Third Circuit reversed the district court's decision and set aside OSM's decision to remove the required amendment and the 732 letter. *Pennsylvania Federation of Sportsmen's Clubs* v. *Kempthorne,* 497 F.3d 337 (3rd Cir. 2007) (*Kempthorne*). At issue, relevant to this notice, was whether OSM properly terminated the requirement that Pennsylvania demonstrate that its SMCR Fund was in compliance with 30 CFR 800.11(e). The ruling by the Third Circuit reinstated 938.16(h) and the 1991 Part 732 Notice and remanded the decision to OSM.

The court ruled that the primacy ABS forfeited sites, plus any additional sites permitted under the ABS whose reclamation costs are not fully covered by a conventional bond, remain subject to the requirements of 30 CFR Part 800.11(e)(1). The Third Circuit concluded: "While it is true that the 'ABS Fund' continues to exist in name, it no longer operates as an ABS, that is, as a bond pool, to provide liability coverage for new and existing mining sites." 497 F.3d at 349. However, the Court went on to "conclude that 800.11(e) continues to apply to sites forfeited prior to the CBS [conventional bonding system] conversion." *Id.* at 353. In commenting further on 30 CFR 800.11(e), the Court stated that "[t]he plain language of this provision requires that Pennsylvania demonstrate adequate funding for mine discharge abatement

and treatment at all ABS forfeiture sites." *Id.* at 354.

Finally, the court also concluded that "a plain reading of the words 'any areas which may be in default at any time' indicates that the obligations prescribed by § 800.11(e) are not restricted to the immediate circumstances surrounding the approval of an ABS, but are instead ongoing in nature and apply at any time, so long as those mining areas originally bonded under the ABS, and not yet converted to CBS bonds, still exist." *Id.* at 352. As such, Pennsylvania shall provide for the complete reclamation and treatment of these sites and their pollutional discharges by assuring Pennsylvania has available sufficient money to complete reclamation for these sites at any time.

State Response

Pennsylvania submitted the program amendment in an attempt to satisfy two mandates placed on the State's approved surface coal mining operations regulatory program in 1991. The mandates, in the form of a required amendment published in the Code of Federal Regulations, and a letter from OSM, required Pennsylvania to eliminate funding deficiencies in its bonding program.

Two categories of surface coal mining sites requiring treatment of post-mining pollutional discharges and land reclamation are the subject of this notice: (1) Those sites that already had their bonds forfeited at the time of the dissolution of ABS; and (2) those that were permitted and had bonds that were not forfeited at the time of the dissolution of the ABS, but had existing reclamation liabilities, for which available financial guarantees were not sufficient to cover the entire cost of treatment or reclamation during the conversion to the Commonwealth's conventional bonding system. These sites, if forfeited, would be considered liabilities of the ABS.

II. Submission of the Amendment

By letter dated August 1, 2008 (Administrative Record Number PA 802.43), Pennsylvania sent OSM a proposed program amendment that is intended to satisfy a required amendment that was imposed by OSM in a final rule published in the **Federal Register** on May 31, 1991, 56 FR 24687, and codified in the Federal Regulations at 30 CFR 938.16(h). This proposed program amendment is also intended to satisfy the 732 letter dated October 1, 1991. Both the required amendment and the 732 letter are discussed in more detail in Section I.

OSM announced receipt of the proposed amendment in the January 14, 2009, **Federal Register** (74 FR 2005–2015) (Administrative Record No. PA 802.49) and in the same document invited public comment and provided an opportunity for a public meeting on the adequacy of the proposed amendment. The public comment period closed on February 13, 2009. We received comments from four entities; The Pennsylvania Coal Association comment dated February 11, 2009 (Administrative Record No. PA 802.59); PennFuture letter dated February 27, 2009, representing Pennsylvania Federation of Sportsmen's Clubs, Inc., the Sierra Club, Pennsylvania Council of Trout Unlimited, Citizens for Coal Field Justice, Mountain Watershed Association, Inc., and Citizen's for Pennsylvania's Future (Administrative Record No. PA 802.60); the United States Environmental Protection Agency memorandum dated February 13, 2009 (Administrative Record No. PA 802.58); and the Mining and Reclamation Advisory Board letter dated February 12, 2009 (Administrative Record No. PA 802.56). Two other Federal agencies responded with no comment (U.S. Fish and Wildlife Services' note dated January 22, 2009 (Administrative Record No. PA 802.52), and the U.S. Department of Labor memorandum received February 5, 2009 (Administrative Record No. PA 802.54).

Treatment of Post-Mining Discharges (Parts A, C & E of the Amendment Submission): To address the treatment of post-mining discharges, Pennsylvania proposed regulatory provisions; provided a demonstration of sufficient funding; and proposed the use of treatment trusts.

Land Reclamation (Parts B & D of the Amendment Submission): To address land reclamation liabilities for sites originally permitted under the ABS, Pennsylvania submitted a statutory provision and demonstration of sufficient funding.

This program amendment consists of five parts: (A) Regulatory Changes to Establish Legally Enforceable Means of Funding the O&M and Recapitalization Costs for the ABS Legacy Sites; (B) The Conversion Assistance Program; (C) Trust Funds as an Alternative System and Other Equivalent Guarantee: Rationale for Approval; (D) Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites; and, (E) Demonstration of Sufficient Funding for Construction of all Necessary Discharge Treatment Facilities at the Primacy ABS Forfeiture Sites.

Regulatory Changes (Part A): Pennsylvania explains that the regulatory changes submitted with this amendment provide a "legally enforceable mechanism" for paying the costs of treating the discharges at the ABS legacy sites in perpetuity. In summary, these changes restructure the reclamation fee and dedicate other sources of funding for performing reclamation of the ABS sites. The PADEP recognizes the reclamation fee as a flexible source of funding for the operation and maintenance costs associated with treating discharges at the ABS legacy sites.

Conversion Assistance Program and Treatment Trusts (Parts B and C): The conversion process included several changes to the active bonding program. Section 4(d.2) of the PASMCRA, 52 P.S. 1396.4(d.2), authorized PADEP to establish alternative financial assurance mechanisms that meet the purposes and objectives of the bonding program (*i.e.*, Conversion Assistance Program and Treatment Trusts).

Demonstrations of Sufficient Funding (Parts D and E): Pennsylvania submitted documentation to demonstrate that it has available sufficient funds to complete the outstanding land reclamation and sufficient funds to construct the necessary discharge-treatment facilities for all the ABS legacy sites at any time, as required by the Third Circuit's decision.

Pennsylvania explains that the regulatory changes described in Part A, along with the remaining portions of this State program amendment, described in Parts B through E below, while they do not consist of changes to Pennsylvania regulations, are financial mechanisms PADEP has established that will work in concert with the regulatory changes described above to bring Pennsylvania into compliance with the required amendment at 30 CFR 938.16(h), the 1991 732 letter, and, consequently, with the ABS standard of sufficiency set forth in 30 CFR 800.11(e). Pennsylvania is seeking approval of this program amendment submission in its entirety in accordance with 30 CFR 732.17(h) and the Part 732 Notices.

III. OSM Findings

Part A. Regulatory Changes To Establish Legally Enforceable Means of Funding the O&M and Recapitalization Costs for the ABS Legacy Sites

The following is a description of the changes to Pennsylvania's Code that are being proposed:

Summary of Regulatory Changes—Section 86.1, Definitions

1. Subchapter A. General Provisions, Section 86.1: Definitions

The terms, ABS legacy sites, operational area, operation and maintenance costs, primacy alternate bonding system, and recapitalization costs were added to Pennsylvania's list of definitions to clarify and define these terms when discussing and addressing sites that were permitted under the alternative bonding system.

Finding: We are approving Pennsylvania's changes to its definitions that define the following terms: ABS legacy sites, operational area, operation and maintenance costs, primacy alternate bonding system, and recapitalization costs. There are no Federal counterparts to these definitions; however, they are not inconsistent with SMCRA and its implementing regulations.

Summary of Regulatory Changes—Section 86.17, Permit and Reclamation Fees

2. Subchapter B. Permits, General Requirements for Permits and Permit Applications, Section 86.17 Permit and Reclamation Fees

a. Section 86.17(e) Reclamation Fees:

This provision revises the text of Section 86.17(e) to clarify the application of this subsection in the context of the CBS. The revisions provide that the reclamation fee is assessed for each acre of the approved operational area of the permit. The proposed revisions also clarify the manner in which the reclamation fee is assessed. Finally, minor editorial changes were made by adding references to Section 86.143 (relating to the requirement to file a bond) and to the exception for remining areas provided in Section 86.283(c).

b. Section 86.17(e)(1) (deposit and use of reclamation fees)

This provision, in conjunction with Section 86.187(a)(1), establishes a separate subaccount within the SMCR Fund called the Reclamation Fee O&M (operation and maintenance) Trust Account (RFO&M Account), and requires the PADEP to deposit all reclamation fees it collects into the RFO&M Account. The funds included in the account are held in trust by the Commonwealth to treat post-mining pollutional discharges at ABS legacy sites. This subsection also requires that the PADEP use the reclamation fees only for the purpose of paying the costs associated with treating such discharges. The reclamation fee is an adjustable source of revenue that PADEP will review annually to determine if adjustment of the fee is needed. In addition, this provision requires that all interest earned on the monies in the RFO&M Account be deposited into the account and be used only to pay the costs associated with treating post-mining pollutional discharges at ABS legacy sites.

c. Section 86.17(e)(2) (preparation of fiscal-year report on RFO&M Account)

This provision requires the PADEP to prepare a report at the end of each fiscal year, which will include a financial analysis and projections of the revenues and expenditures of the RFO&M Account. The report must be made available for review by the Pennsylvania Mining and Reclamation Advisory Board (MRAB) and the general public. This provision establishes a process by which the MRAB and the general public can examine the PADEP's expenditure of funds from the RFO&M Account for the treatment of discharges at the ABS legacy sites, the amount of revenue deposited into the account during the prior fiscal year from the various dedicated revenue sources, the projected expenditures and projected revenue. Pennsylvania believes that this provision will assist OSM, the MRAB, affected persons in the industry, and interested members of the public, with their oversight of the PADEP's compliance with the requirements of 30 CFR 800.11(e) as applied to the ABS legacy sites, the Court ruling in *Kempthorne,* and the required program amendment at 30 CFR 938.16(h).

d. Section 86.17(e)(3) (amount of the reclamation fee)

The amount of the reclamation fee is currently set at $100 per acre. Section 86.17(e)(3) requires the fee amount to be maintained at $100 per acre until December 31, 2009. After this initial period at $100 per acre, the reclamation fee will be adjusted annually based on criteria specified in Section 86.17(e)(3) and (4). This section also includes provisions concerning the potential for a permanent alternative source of funding to be used in lieu of the reclamation fee—if that alternative funding source meets the conditions in Section 86.17(e)(3)(i) and (ii). Section 86.17(e)(3) provides that the PADEP was to begin annually adjusting the amount of the reclamation fee as of January 1, 2010, and will continue to do so, until either a permanent alternative funding source is established or the ABS Legacy Account becomes actuarially sound. Section 86.17(e)(3)(i) reiterates the commitment for annual adjustment of the reclamation fee until the ABS Legacy Account is actuarially sound, unless a permanent alternative funding source in place of the reclamation fee is used to fund the RFO&M Account. Section 86.17(e)(3)(ii) establishes the conditions that a permanent alternative funding source must meet before the reclamation fee could be discontinued and the permanent alternative source used instead. The State indicates that such an alternative funding source must be permanent; must provide sufficient revenues to maintain a balance in the RFO&M Account of at least $3,000,000; and must provide sufficient revenue to pay the annual operation and maintenance costs for all the ABS legacy sites.

e. Section 86.17(e)(4) (amount of the reclamation fee)

The PADEP expected that the adjusted amount of the reclamation fee would become effective as of January 1, 2010, and will be similarly made effective on that date each year thereafter. Section 86.17(e)(3) sets the basic parameters for annually adjusting the amount of the reclamation fee, and Section 86.17(e)(4) lists the specific factors to be used in the PADEP's calculation of the adjusted amount. Section 86.17(e)(3) requires that the reclamation fee be annually adjusted to ensure that there are sufficient revenues to maintain a balance of at least $3,000,000 in the RFO&M Account. Following the close of the Commonwealth's 2008–09 fiscal year (in June 2009), the PADEP must prepare its year-end financial analysis of the RFO&M Account pursuant to Section 86.17(e)(2). The 2008–09 fiscal-year report must include the PADEP's calculation of the amount of the reclamation fee for the calendar year commencing on January 1, 2010. Section 86.17(e)(4) prescribes the factors to be used for making the calculation—essentially an analysis of the revenues and expenditures for the past year and projected revenues and expenditures for the current fiscal year.

Section 86.17(e)(3) and (4) establish a mechanism for annually adjusting the amount of the reclamation fee. Pennsylvania indicates that the adjustment procedure is necessary to accommodate the fluctuations in the operation and maintenance costs for treating pollutional discharges at the ABS legacy sites that will occur over time. The PADEP believes that the adjustment procedure is also necessary in order to maintain a sufficient cushion in the RFO&M Account to prevent pollution and assure that the PADEP has

sufficient funds at any one time to treat the discharges at the ABS legacy sites, including any sites with discharges that were originally permitted under the ABS, and for which the bonds are subsequently forfeited before the posting of a full cost, conventional bond or other financial mechanism that is sufficient to cover the costs of discharge treatment, in accordance with 30 CFR 800.11(e).

f. Section 86.17(e)(5) (publishing amount of the adjusted reclamation fee; calculation appealable)

Section 86.17(e)(5) is added to prescribe a procedure for the PADEP to publish the amount of the adjusted reclamation fee. The PADEP must review its calculation of the adjusted reclamation fee amount at a public meeting of the MRAB (most likely in October of each year), where the members of the MRAB, affected persons in the industry, and the general public will have an opportunity to comment on the PADEP's financial report and its calculation of the adjusted amount of the fee. The PADEP will subsequently publish the adjusted amount of the reclamation fee in the Pennsylvania Bulletin, with the adjusted amount becoming effective upon publication. This provision also establishes that PADEP's calculation of the adjusted reclamation fee is a final action appealable to the Environmental Hearing Board. According to Pennsylvania, section 86.17(e)(5) balances the PADEP's need for a flexible mechanism to assure funding to treat discharges at the ABS legacy sites with the interests of the industry and the public in reviewing, commenting on, and challenging, before an independent forum, the PADEP's administration of the RFO&M Account and the calculation of the new reclamation fee.

g. Section 86.17(e)(6) (conditions for ceasing collection of reclamation fee)

Section 86.17(e)(6) requires the PADEP to cease assessment and collection of the reclamation fee when the ABS Legacy Account, established pursuant to section 86.187(a)(2)(i), is actuarially sound. The conditions which must be met for the ABS Legacy Account to become actuarially sound are prescribed here and in section 86.187(a)(2)(ii). The PADEP's current estimate of the annual operation and maintenance costs for treating the discharges at the ABS legacy sites is approximately $1,400,000. However, the ultimate annual amount needed for operation and maintenance costs will vary depending upon the number of additional underfunded sites which go into default and other relevant factors. When financial guarantees sufficient to cover reclamation costs have been approved for all mine sites permitted under the primacy ABS, no additional sites will need to be added to the class of ABS legacy sites. Once the PADEP completes construction of all necessary discharge treatment systems for all of the ABS legacy sites, the PADEP will determine the amount of annual operation and maintenance costs, including recapitalization costs, which will be necessary to treat the discharges at all of the ABS legacy sites. This provision allows the PADEP to cease collection of the reclamation fee when the ABS Legacy Account contains funds which generate interest at a rate sufficient to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at all the ABS legacy sites. At that point, the State believes that the PADEP will always have sufficient funds on hand in the ABS Legacy Account to cover the costs of treating the discharges at all the ABS legacy sites, and that Pennsylvania will have met the requirements of 30 CFR 800.11(e) without the need for additional revenue from the reclamation fee.

Findings: See findings in the section below.

Summary of Regulatory Changes—Section 86.187, Use of Money

a. Section 86.187(a)(1) (deposit of reclamation fee into RFO&M Account)

Section 86.187 (relating to use of money) specifies the purposes for which the PADEP must use monies from fees, fines, penalties, bond forfeitures and other monies received under the PASMCRA, as well as interest earned on these monies. Pennsylvania believes that the enforceable regulatory mechanism created by these revisions will enable its bonding program to meet the requirements of 30 CFR 800.11(e).

This provision, in conjunction with section 86.17(e)(1), has been revised to establish a separate subaccount within the SMCR Fund called the RFO&M Account, and to require that the reclamation fees collected by the PADEP pursuant to section 86.17(e) must be deposited into the RFO&M Account. The provision also directs that the interest accrued on collected reclamation fees must be deposited into the RFO&M Account.

b. Section 86.187(a)(1)(i) (deposit of civil penalties into RFO&M Account)

Under section 18(a) of PASMCRA, civil penalties may be used by the PADEP for reclamation of surface coal mine sites, restoration of water supplies affected by surface coal mining, or for any other conservation purposes provided by the PASMCRA 52 P.S. Section 1396.18(a). The PADEP is thus authorized to use civil penalty monies, as a supplement to forfeited bonds, for purposes of reclaiming the ABS legacy sites including treatment of post-mining pollutional discharges at these sites. New section 86.187(a)(1)(i) will require the PADEP to deposit into the RFO&M Account a portion of the monies collected from civil penalties assessed pursuant to PASMCRA, and to use those monies deposited into the account to pay the costs associated with treating discharges at the ABS legacy sites. PADEP believes that, in order to comply with the Court's ruling in *Kempthorne,* it must identify and dedicate specified sources of revenue that will generate enough money to cover the costs for treating discharges at all the ABS legacy sites. This subsection identifies a source of revenue—civil penalties collected pursuant to PASMCRA—and requires the PADEP to use this source of revenue to fund the discharge-treatment costs of the ABS legacy sites.

This provision recognizes that a percentage of the civil penalties collected must be allotted to the Environmental Education Fund by law. (*See* 35 P.S. Section 7528.) Section 86.187(a)(1)(i) also caps the amount of civil penalties that must be deposited into the Reclamation Fee O&M Account during a single fiscal year at $500,000. If the PADEP collects more than $500,000 in civil penalties during a fiscal year, section 86.187(a)(1)(i) gives the PADEP discretion to deposit the excess amount into the SMCR Fund where it may be used for the purposes described in section 86.187(a)(3).

This provision provides an additional source of revenue for the RFO&M Account which is restricted to the same uses as all other funds deposited into the account. This additional revenue will further enhance the financial solvency of the account, in addition to the adjustable reclamation fee, and will provide PADEP with even more dedicated revenue for water treatment at ABS legacy sites.

c. Section 86.187(a)(1)(ii) (deposit of interest earned on other monies in the SMCR Fund into the RFO&M Account)

Similar to the deposit of civil penalties required by section 86.187(a)(1)(i), this section is being added to authorize the PADEP to deposit into the RFO&M Account a portion of the interest that is earned on other monies in the SMCR Fund. The SMCR Fund includes monies from

released bonds, license fees, and other sources; these funds earn interest that may be used by the PADEP for the purposes specified by section 18(a) of PASMCRA. *See* 52 P.S. section 1396.18(a); 25 Pa. Code section 86.187(a). This provision gives the PADEP discretion as to the amount of interest earned on other monies in the SMCR Fund which will be deposited into the RFO&M Account during any given fiscal year.

d. Section 86.187(a)(1)(iii) (deposit of other monies into the RFO&M Account)

Section 86.187(a)(1)(iii) will give the PADEP authority to deposit other monies from sources such as legislative appropriations or donations into the RFO&M Account. In addition, in the event a change in the applicable law provides for it, this provision will give the PADEP authority to deposit into the RFO&M Account the fees that will be collected for "sum-certain financial guarantees needed to facilitate full-cost bonding." (These devices are also known as "conversion assistance financial guarantees" or "conversion assistance bonds", and are described below in Section B.)

e. Section 86.187(a)(1)(iv) (restriction on use of monies in the RFO&M Account)

Section 86.187(a)(1)(iv) specifies that all monies deposited into the RFO&M Account must be used to pay the costs associated with treating the post-mining pollutional discharges at the ABS legacy sites. This provision establishes that the funds held in the RFO&M Account are being held by the State in trust for the benefit of all the people of the State in order to protect their rights under Article I, Section 27 of the Pennsylvania Constitution. Pennsylvania believes that an actuarially sound account will satisfy the requirements of 30 CFR 800.11(e).

f. Section 86.187(a)(2) (use of monies received from forfeiture of bonds)

A minor editorial change is being made to this provision to clarify that funds received from the PADEP's forfeiture of bonds on ABS legacy sites will be used to reclaim the land and restore water supplies affected by the surface mining operations upon which liability was charged on the bond, and, more specifically, in accordance with the provisions in section 86.187(a)(2)(i) and (ii), which are being added as part of this final rulemaking.

g. Section 86.187(a)(2)(i) (deposit of monies from bonds forfeited on ABS Legacy Sites into separate subaccount)

Section 86.187(a)(2)(i) establishes a separate subaccount within the SMCR Fund called the ABS Legacy Account. The funds received from the bonds forfeited on ABS legacy sites, and all interest accrued on such monies, must be deposited into the ABS Legacy Account according to new section 86.187(a)(2)(i). Section 86.187(a)(2)(i) will also provide regulatory authorization for the PADEP to deposit monies from other sources, such as appropriations, donations, or interest earned on other monies in the SMCR Fund, into this account. Finally, section 86.187(a)(2)(i) authorizes the PADEP to transfer "excess" monies from the RFO&M Account into the ABS Legacy Account. This provision requires the PADEP to seek the MRAB's review and recommendation prior to transferring any "excess" funds. Pennsylvania indicates that section 86.187(a)(2)(i) responds to the court ruling in the *Kempthorne* case regarding the obligation of the PADEP to meet the requirements of 30 CFR 800.11(e).

Section 86.187(a)(2)(i) will establish a type of savings account for monies ultimately to be used to pay the annual operation and maintenance costs associated with all of the ABS legacy sites. The PADEP currently has approximately $4.8 million in forfeited bonds held for primacy ABS forfeited discharge sites; these funds will constitute the initial principal in the ABS Legacy Account. Section 86.187(a)(2)(iii), discussed below, prohibits the PADEP from making any disbursements from the ABS Legacy Account until the account becomes actuarially sound. The RFO&M Account will be used to pay the ongoing operation and maintenance costs on a pay-as-you-go basis, while funds in the ABS Legacy Account accumulate from earned interest and other potential income sources. Pennsylvania believes that the amendments to section 86.17(e) will enable the PADEP to annually replenish and maintain funds in the RFO&M Account sufficient to cover the annual operation and maintenance costs for treating discharges at the ABS legacy sites. Pennsylvania indicates that the ABS Legacy Account will grow to the point that the interest earned on that account will be enough to cover all the annual operation and maintenance costs for the ABS legacy sites, without the need to generate any additional revenue from other sources such as the reclamation fee.

h. Section 86.187(a)(2)(ii) (restriction on use of monies in ABS Legacy Account)

This provision requires that all monies deposited into the ABS Legacy Account be used only to pay the operation and maintenance costs for treating discharges at the ABS legacy sites. As in section 86.187(a)(1)(iv), the PADEP is declaring that it is establishing the ABS Legacy Sites Trust as an account in the SMCR Fund. The PADEP has included language in section 86.187(a)(2)(ii) that specifically establishes the trust called the ABS Legacy Account. This regulation states that all monies deposited in the ABS Legacy Account are held by the State in trust for the benefit of the people of the State to protect their rights under Article 1, Section 27 of the Pennsylvania Constitution.

i. Section 86.187(a)(2)(iii), (A), (B), (C) (restrictions on ABS Legacy Account)

Section 86.187(a)(2)(iii) prohibits the PADEP from making any disbursements from the ABS Legacy Account until the account becomes actuarially sound. The conditions that must be met for the ABS Legacy Account to become actuarially sound are prescribed here. First, financial guarantees sufficient to cover all reclamation costs must have been approved by the PADEP for all mine sites permitted under the primacy ABS. Second, the PADEP must have completed construction of all necessary discharge treatment systems for all of the ABS legacy sites. Once the entire class of ABS legacy sites is known, and all necessary discharge treatment systems have been constructed for these sites, the PADEP will be able to establish the amount of annual operation and maintenance costs, including recapitalization costs, which will be necessary to treat all the discharges at all of the ABS legacy sites. Once this figure is known, the third condition precedent may be satisfied, *i.e.,* the ABS Legacy Account and Reclamation O&M Trust Account must contain funds that generate interest at a rate and amount sufficient to pay the annual operation and maintenance costs for treating all post-mining pollutional discharges at all the ABS legacy sites. Pennsylvania believes that once the ABS Legacy Account becomes actuarially sound, the PADEP will always have sufficient funds on hand in the Account to cover the costs of treating the discharges at all the ABS legacy sites, and therefore, Pennsylvania's bonding program will meet the requirements of 30 CFR 800.11(e) without the need for any revenue from the reclamation fee or the other revenue sources dedicated to the RFO&M Account.

j. Section 86.187(a)(2)(iv) (transfer of remaining funds in RFO&M Account to ABS Legacy Account)

Section 86.187(a)(2)(iv) provides for termination of the RFO&M Account when the ABS Legacy Account becomes actuarially sound. This provision authorizes the PADEP to transfer the remaining funds in the RFO&M Account into the ABS Legacy Account when the latter account becomes actuarially sound. At that point, the RFO&M Account will no longer be necessary and will terminate. In addition, the reclamation fee (or an alternative permanent funding source established in lieu of the reclamation fee) will no longer be needed and will cease to be collected, and the deposit of civil penalty monies into the RFO&M Account pursuant to section 86.186(a)(1)(i) will also cease.

Findings: Sections 86.17(e), Reclamation Fees and 86.187, Use of Money

By creating the RFO&M Account that is funded in large part by an adjustable reclamation fee dedicated to the treatment of AMD discharges on bond forfeiture sites that were originally covered by the ABS, Pennsylvania has created an alternative system of financial guarantees consistent with 30 CFR 800.11(e). Our finding recognizes that Pennsylvania has provided an alternative system that provides sufficient funding to treat AMD pollution originating from a defined set of bond forfeiture sites (ABS legacy sites), that the system can be adjusted to accommodate increases and decreases in treatment obligations, that implementation is supported by an enforceable commitment by Pennsylvania to provide the funding needed to construct treatment facilities, and that Pennsylvania has considered and accounted for foreseeable risks to its operation. Our finding also recognizes that even though this system is restricted to the treatment of mine drainage on ABS legacy sites, the system provides a substantial economic incentive to active mine operators because treatment costs are tied to reclamation fees assessed on each active operation. These reclamation fees may be raised due to operators' failures to provide for fully funded treatment guarantees on active sites that are subsequently forfeited. Indeed, any increases in ABS legacy site treatment costs potentially raise reclamation fee assessments on active mine sites.

There are no specific Federal counterparts to the changes to 25 Pa. Code 86.17(e), 86.187(a)(1) and 86.187(a)(2). However, for the reasons set forth above, we find that these changes are consistent with the Federal regulation at 30 CFR 800.11(e), which contains the criteria for approval of an ABS, and we are therefore approving the changes. Nevertheless, some of the revisions warrant more detailed explanation, which follows.

ABS Legacy Account: We find that the specific conditions at section 86.17(e)(6)(i)(iii) for determining when the ABS Legacy Account is financially capable of covering the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS legacy sites are sufficient and observe that OSM will have oversight responsibilities at the time that any such transition to the use of the ABS Legacy Account is being proposed and acted upon. OSM's finding is limited to the creation of, or an alternative source of funding to, the RFO&M Account. When the State notifies OSM that it has determined that the ABS Legacy Account is deemed to be actuarially sound in accordance with the provisions of section 86.17(e)(6), OSM will review the basis for such a determination and approve or disapprove any termination of the reclamation fee or alternative permanent funding source.

Alternative Permanent Funding Source: We are hereby approving these regulations at sections 86.17(e)(3), (e)(3)(i), (e)(3(ii), and 86.187(a)(2)(iv), which refer to a possible "alternative permanent funding source" that could be created to substitute for the reclamation fee. The creation of any alternative permanent funding source, however, must first be proposed to us as a State program amendment, and could not be used to replace the reclamation fee to pay for treatment costs on ABS legacy sites until we approve such an amendment.

Other Sources of Funding: Sections 86.17(e)(4)(ii), (e)(4)(v), 86.187(a(1)(iii), and (a)(2)(iv) refer to "other sources" of money, including appropriations, donations, and fees paid by operators who receive conversion assistance guarantees. The regulations provide that these funds from "other sources" may be deposited into the RFO&M Account and, except for fees for conversion assistance guarantees, into the ABS Legacy Account. 86.187(a)(1)(iii), (a)(2)(i). The transfer of fees from conversion assistance guarantees into the Reclamation Fee O&M Account must be authorized by State law. Therefore, no such transfers may take place until Pennsylvania enacts the necessary statutory revision, and then obtains our approval of the revision as a program amendment. Any use of "other sources" of money cannot be made until we either approve the proposed sources through the State program amendment process or decide that the proposed sources do not constitute program amendments requiring our approval.

Part B. The Conversion Assistance Program

When implementing the revised full-cost bonding program and converting the ABS permits to full-cost bonding, Pennsylvania had concerns regarding the financial ability of existing permittees to post significantly-increased bond amounts. Operators contemplating a new mining operation after August 2001 would be able to factor the revised bond guidelines into their decision making process, but existing ABS operators had already made financial and operational commitments based on their existing bonds and the ABS. Surety providers had made decisions to provide existing ABS bonds based on the risk they were willing to take at the time of permit issuance. As a result, many operators were unlikely to be able to comply with the mandatory bond adjustment. Those operators would be faced with the uncertainty of a negotiated settlement with the Department regarding bonding and reclamation liability or risk being forced out of business. The choice for the surety industry would likewise be difficult. They could either provide more bonds than their risk assessment dictated or be subject to forfeiture of the existing bond. There was a risk to Pennsylvania that forfeiture of existing inadequate bonds would further increase the deficit of the ABS.

To address these risks, in 2001–2002, the PADEP developed and implemented a conversion assistance program in which Pennsylvania essentially operates as a surety and provides part of the bonding for sites converting to full-cost bonding, thus easing the transition for active operators to full-cost bonding and thereby preventing bankruptcies and/or abandonment of sites. Funded with an initial general-revenue appropriation of $7 million in June 2001 and supplemented by annual premiums paid by the industry, the Department issued a "land reclamation financial guarantee" in a sum-certain amount to individual ABS permittees required to convert to a full-cost bond for land reclamation on an existing permit. *See* Act of June 22, 2001 (P.L. 979, No. 6A) known as the General Appropriation Act of 2001," at 213. The Land Reclamation Financial Guarantees (LRFG) were issued only to ABS permittees that were converting to full-cost bonding; permit applicants

who submitted applications after termination of the ABS are not eligible for the conversion assistance program.

The PADEP indicates that as of November 30, 1999, the forfeiture rate for primacy ABS permits was 10.4%. The PADEP concluded that, based on this historic rate, the $7 million principal would cover up to $70 million in bond exposure. The PADEP determined that the $7 million, when combined with existing site bonds, would be sufficient to pay for all forfeitures that may occur. Additionally, premiums collected for the LRFGs would provide additional funds to complete reclamation.

As part of this submission, Pennsylvania requests that OSM approve the Conversion Assistance Program and its use of the LRFG as a financial guarantee equivalent to a conventional bond. Section 4(d.2) of PASMCRA is submitted as part of this program amendment as the authority for employing LRFGs under the Conversion Assistance Program.

Finding: Pennsylvania's use of LRFGs is consistent with the use of other conventional bonding mechanisms that provide sum-certain amounts payable to the regulatory authority to provide for reclamation in the event of operator default. In this case, the form of performance guarantee is provided by the Commonwealth of Pennsylvania as conversion assistance in an amount necessary to supplement the original site-specific bond, such that the total amount of bond coverage provided is equivalent to the amount required under a CBS. In effect, for a limited number of permits that were in the ABS, and that are transitioning to full-cost bonding, the State is acting as a surety to guarantee part of the reclamation costs. However, SMCRA Section 509 (b) provides that a surety executing a bond must be "* * * a corporate surety licensed to do business in the State * * *" Given that restriction, OSM cannot approve the conversion assistance program as a conventional bond as requested by PADEP. Rather, OSM finds that the conversion assistance program is an alternative system that will achieve the objectives and purposes of a bonding program in accordance with Section 509(c) of SMCRA, and that the conversion assistance program meets the objectives of an ABS pursuant to 30 CFR 800.11(e). OSM is approving the conversion assistance program as a one-time alternative bonding mechanism implemented solely for the conversion process from the ABS to conventional bonding.

Other Sites Not Fully Converted to Full Cost Bonding

PADEP stated that at the end of the conversion process (*i.e.,* active ABS permits converting to conventional bonding) two permitted sites remain insufficiently bonded. These two anthracite operations are permitted by Lehigh Coal & Navigation (LCN) and Coal Contractors Inc. (CCI). The State contends it has made provisions for fully funding the outstanding reclamation obligations for these two sites through reclamation and payment schedules. PADEP stated in its submission that the land reclamation on the LCN site "does not present a potential liability to Pennsylvania at this time because it is being adequately addressed through the Consent Order and Agreement (CO&A) process and, in any event, will most likely be addressed through permit transfer or remining operations." PADEP indicated the bond deficiency as of June 2, 2008, amounted to $8.96 million, which was being addressed through quarterly payments ending in December 2011. In addition, LCN is required under a CO&A to complete backfilling at a rate of 1.7 million cubic yards annually to meet the bond obligation.

We disagree with the State's assertion that the LCN site land reclamation is not a potential liability; neither bond deficiency payments nor land reclamation schedules pursuant to a CO&A, potential permit transfers, nor potential remining operations are equivalent substitutes for a full cost bond. None of these instruments constitutes the guarantee of sufficient funding to pay for the land reclamation required to be performed under the approved State program.

For the CCI site, Pennsylvania contends it has sufficient monies available in the SMCR Fund to complete land reclamation in the event of forfeiture. The State estimates the CCI land reclamation liability in excess of the available bond amount to be about $170,000. Pennsylvania's contention that it has sufficient funds falls short of the type of "guarantee" ensured by the posting of an adequate bond, because it is not enforceable.

Finding: Pennsylvania has not provided guaranteed funding to cover the cost of the outstanding land reclamation liabilities at the LCN and CCI sites in the event the bonds for these sites are forfeited. Therefore, OSM is revising the required amendment at 30 CFR 938.16(h) to require the PADEP to ensure that its program provides suitable, enforceable funding mechanisms that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS.

Part C. Trust Funds as an Alternative System and Other Equivalent Guarantee

Beginning in the early 1990s, Pennsylvania developed and implemented treatment trust funds to guarantee the treatment of unanticipated post-mining pollutional discharges in perpetuity. Permittees unable or unwilling to provide a surety or collateral bond to cover the costs of a post-mining discharge can establish a site-specific trust fund managed by a third-party trustee. The purpose of the trust is to generate sufficient income to cover all costs associated with treating these discharges in perpetuity. Trust funds have been established to cover discharge-treatment costs at ABS sites, although the Department's implementation of trust funds is not limited to sites formerly covered by the ABS. Pennsylvania had received approval from OSM to add annuities and trust funds to the list of acceptable collateral bonds on May 13, 2005. 70 FR 25472, amended at 70 FR 52916.

Pennsylvania is submitting the provision in Section 4(d.2) of PASMCRA for the additional purpose of providing the authority for the establishment of site-specific trust funds to be used to pay the costs of treating unanticipated post-mining pollutional discharges in perpetuity. Pennsylvania is requesting approval of site-specific trusts as an alternative financial assurance mechanism (not a collateral bond) consistent with Section 509(c) of SMCRA and other applicable provisions of SMCRA. Pennsylvania states that its site-specific trust fund program is an alternative financial system to a bonding program that achieves the objectives and purposes of a conventional bonding program, and provides equivalent guarantees no less effective than a performance bond and 30 CFR subchapter J.

In support of its request for approval of site-specific trusts as an alternative financial assurance mechanism consistent with Section 509(c) of SMCRA and other applicable provisions of SMCRA, PADEP provided descriptions of its authority to enter into trust agreements, trust development and management process, and some of the administrative and financial components. More specifically, PADEP has provided the following: Discussions of its authority, under Section 4(d.2) of PASMCRA, to establish alternative financial assurance mechanisms; the use of the CO&A and a companion Trust Agreement; factors currently used to

determine the amount of a site-specific trust fund; and the use of AMDTreat for treatment cost estimation. PADEP's proposed amendment also discusses rates of return, inflation rates, and volatility rates used on previous trust agreements as well as how operation and maintenance and recapitalization costs are addressed. Finally, the amendment submission describes trust disbursement procedures and flexibility to allow the permittee a reasonable period of time to fully fund a treatment trust. (Administrative Record No. PA 802.44, Attachments 5 and 7).

Site-specific trusts are established by forms prescribed and furnished by the PADEP. The trust covers the area of land within the permit area necessary for the operator to operate and maintain the treatment facility. The amount of the trust is calculated based on all the costs of treating the post-mining discharge in perpetuity, and the trust generates sufficient money to cover the costs of treating the discharge even if the operator defaults on its obligation. Moreover, unlike a performance bond—a sum-certain instrument which does not increase in value—trust funds can keep pace with inflation, making them more suitable for guaranteeing long-term treatment obligations. Liability under the trust is for the duration of the reclamation. The CO&A is executed by the operator and the PADEP, and the declaration of trust will be executed by a trustee who must be registered to do business in Pennsylvania and meet criteria for reliability similar to a surety company. Finally, the trust amount is adjusted by the PADEP in the event the cost of reclamation changes, in accordance with Section 509(e) of SMCRA. Thus, Pennsylvania asserts the trust funds program assures that the State will have available sufficient money to complete the reclamation plan for sites covered by site-specific trusts.

Pennsylvania states that site-specific trusts also provide a substantial economic incentive for the permittee to comply with all reclamation provisions because the permittee must fund the necessary trust principal. Moreover, the CO&A for the treatment trust contains stipulated civil penalties which are invoked if the operator fails to comply with the terms of the CO&A or the Trust Agreement. A failure to comply would also effectively put the operator out of business due to the permit block and permit revocations that would result. Thus, Pennsylvania concludes, all of these aspects of the trust fund program render it no less stringent than Section 509 of SMCRA.

Finding: When we approved Pennsylvania's use of treatment trusts and annuities as collateral bonds in 2005, we noted that Section 4(d.2) of PASMCRA expressly provides for the establishment of alternative financial assurance mechanisms including site-specific trust funds for the perpetual treatment of unanticipated post-mining discharges. We noted that the Federal rules do not expressly include site-specific trust funds or annuities in the Federal collateral bonding regulations at 30 CFR 800.21. However, with the safeguards that were included in the State's provision, it appeared that trust funds and annuities presented no greater risks than those inherent in those forms of collateral bonding expressly named in 30 CFR 800.21. Therefore, we concluded that the addition of Subsection (f) of Pennsylvania's regulations would not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509 of SMCRA. 70 FR at 25474.

While we have approved Pennsylvania's allowance of trust funds as a form of collateral bond, the Federal regulations at 30 CFR 800.11(e) provide another option for approving trust funds and annuities. Those regulations implement the provision in section 509(c) of SMCRA, 30 U.S.C. 1259(c), authorizing OSM and the States to establish an "alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section." The regulations at 30 CFR 800.11(e) require that those alternative systems "(1) * * * 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;" and "(2) * * * provide a substantial economic incentive for the permittee to comply with all reclamation provisions." As we noted in our decision approving trust funds as a form of an ABS in Tennessee, a fully-funded trust or annuity would satisfy the first criterion, while the permittee's obligation to provide the monies needed to establish a trust fund or annuity and the express terms of the trust would satisfy the second criterion. 72 FR 9616, 9618–9 (March 2, 2007).

We find that trust funds may serve as alternative funding mechanisms intended to assure long-term treatment of pollutional discharges. A fully-funded trust, *i.e.*, one that generates sufficient interest to pay for the costs of establishing a treatment facility, as well as the costs of treating pollutional discharges in perpetuity, is consistent with, and therefore no less effective than, the Federal regulations at 30 CFR 800.11(e). Section 4(d.2) of PASMCRA, and the use of site-specific trust funds as alternative bonding financial mechanisms, are hereby approved. We find, however, that specific approval of the underlying financial components Pennsylvania has used or is currently using to develop treatment trusts is not necessary. That is, we make no findings with respect to explicit portfolio mixtures, volatility rates, inflation rates, the 11.1% expected rate of return, or other financial parameters Pennsylvania now considers, such as specific recapitalization schedules, site maintenance costs, or the use of the AMDTreat program.

We have concluded that the implementation of treatment trusts allows program managers to have a degree of flexibility that may not be afforded if specific percentages, rates, or schedules are formally incorporated into the approved State program. Those flexibilities require ongoing analyses and adjustments to reclamation cost parameters such as those for fuel, materials, supplies, equipment rates, and dozens of other cost components. The State has provided a mechanism, in the form of annual evaluations of the trust funds, for determining when any such adjustments must be made. (*See* the program amendment, Attachment 7, "Postmining Treatment Trust Consent Order and Agreement", paragraph 8.) (Administrative Record No. PA 802.43)

We have accorded similar flexibility to Pennsylvania with respect to setting and adjusting site-specific bond rates where conventional types of bonding instruments, such as surety bonds, are used. The PADEP uses bond rate guidelines to set the appropriate amounts of these site-specific bonds. We have not required these guidelines, nor any changes thereto, to be submitted as amendments to the State program.

Our approach to both treatment trust fund calculations and bond rate guidelines is consistent with the Federal regulations at 30 CFR 800.14 (determination of bond amount) and 800.15 (adjustment of amount). Neither of these provisions spells out the precise parameters for calculation of the original bond amount or for periodic adjustments of the bond amount. Rather, those decisions are to be made by the regulatory authority.

We are approving treatment trust funds as alternative bonding mechanisms. However, until PADEP makes a complete formal finding that sites originally permitted under the former ABS are now adequately bonded by a fully-funded trust, monies from the RFO&M Account must remain available for the costs of discharge treatment at those sites in the event of bond forfeiture. We will continue to monitor,

on an annual basis, the reclamation fee adjustment scheme approved in Part A, above, and its ability to provide revenues for existing and potential ABS legacy sites.

Finally, we maintain oversight over the use of treatment trusts under the approved Pennsylvania program. Should the State improperly find a trust to be fully funded, and, as a result, declare the site to no longer be covered by the RFO&M Account in case of forfeiture, we have the ability to require the State to take appropriate action.

Part D. Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites

An analysis by the PADEP of the existing land reclamation at ABS forfeiture sites was initially prepared in a February 2000 report titled *Assessment of Pennsylvania's Bonding Program for Primacy Coal Mining Permits.* Based on the report's conclusions, the PADEP requested that the Pennsylvania legislature appropriate general revenue funds to provide the additional money needed to complete the land reclamation of ABS forfeiture sites. In 2001, the General Assembly appropriated $5,500,000 to be used solely for the costs of land reclamation at ABS forfeiture sites (the "ABS Closeout Funds"). *See* Act of June 22, 2001 (P.L. 979, No. 6A), known as the "General Appropriation Act of 2001," at Section 213. PADEP indicates that it has used the ABS Closeout Funds to complete land reclamation for some of the ABS forfeiture sites. At the time of submission of this amendment, there was $4,431,088 remaining in ABS Close-Out Funds. In 2007–08, the PADEP prepared an updated list of primacy ABS bond forfeiture sites with outstanding land reclamation. It also prepared a detailed analysis of the current costs to complete all outstanding land reclamation at these sites and provided an estimated total cost to complete the land reclamation for all primacy ABS bond forfeiture sites of $7,946,890.

The PADEP indicates that, in addition to the $4,431,088 remaining from the $5.5 million legislative appropriation, it has sufficient other funds on hand to cover all land reclamation costs on ABS forfeiture sites. The Released Bond Account monies must be used for such reclamation; also, there is a Restricted Bond Account, from which monies can be made available and placed into the Released Bond Account. The Released Bond Account is composed of monies from forfeited bonds that have been "released" for use on sites other than the ones for which the monies were originally dedicated. Once released, the funds may be used to reclaim any primacy bond forfeiture site, and are thus available for land reclamation at these forfeited sites. As of the date of submission of this amendment, there was $2,800,000 in the Released Bond Account.

The Restricted Bond Account is composed of monies from bonds that were forfeited. This money must be used to reclaim the site for which the bond is posted, unless the PADEP determines that those monies are no longer needed to reclaim that site, in which case, those monies may be transferred from the Restricted Bond Account to the Released Bond Account. (*See* the ABS Bond Forfeiture Sites Land Reclamation Status Report, July 2008, p. 15, included as part of Attachment 8 to the State program amendment.) As of the date of submission of this amendment, there was $1,716,974 in the Restricted Bond Account. In addition, there was $68,319 in forfeited, but not yet collected, bond money for one site.

Finally, $20,844 was used from another account, called the General Operations Account, to accomplish land reclamation. This expenditure lowered the land reclamation liability total from $7,946,890 to $7,926,046. To cover this land reclamation liability, Pennsylvania has available a total of $9,016,381 in funds that it is authorized and required to expend for reclamation. (As noted below, not all of the $2,800,000 in the Released Bond Account will be needed for land reclamation. The remainder, approximately $1,100,000, will be available and used for the construction of treatment facilities at ABS legacy sites.) There are also funds available in several other accounts in the SMCR Fund. Where funds are not legally restricted solely for use in reclaiming ABS forfeiture sites, the PADEP has identified monies which it is authorized by law to spend for this purpose. (*See* ABS Financial Summary, July 2008, included as part of Attachment 10 to the State program amendment.) For these reasons, the PADEP submits that it has sufficient funds available to complete the outstanding land reclamation for the ABS forfeiture sites at any time, as required by the Third Circuit's decision interpreting 30 CFR 800.11(e)(1).

Finding: We find that PADEP has demonstrated the availability of sufficient funds to address the outstanding land reclamation costs, as determined by PADEP, at ABS forfeiture sites as of the date of submission of this amendment. The ABS Closeout Funds were specifically appropriated to be used for land reclamation on primacy forfeiture sites. Funds in the Restricted Bond Account and the Released Bond Account identified for use in addressing the outstanding land reclamation are required to be used for reclamation under the State program at 25 Pa. Code 86.187 and 86.190. OSM finds that collectively, these funds represent the legally enforceable commitment envisioned by the court in order to demonstrate the availability of sufficient funding for the completion of the land reclamation at ABS forfeiture sites. In addition, we note that the General Operations Account within the SMCR Fund can be used for land reclamation as provided at 52 P.S. Section 1396.18. PADEP has indicated that this account has an unreserved balance of approximately $14.4 million. If additional funds should be required to address land reclamation needs, this account within the SMCR contains funding that could be committed to meet those needs. As such, Pennsylvania has adequate funding to complete land reclamation on all forfeited sites that were originally permitted and bonded under its ABS.

Therefore, OSM is approving the demonstration of sufficient funding regarding reclamation of all outstanding land reclamation at the primacy ABS forfeiture sites.

Part E. Demonstration of Sufficient Funding for Construction of All Necessary Discharge Treatment Facilities at the Primacy ABS Forfeiture Sites

Pennsylvania submitted information to demonstrate that it has sufficient funding to complete any initial treatment facility construction at primacy ABS forfeiture sites. An evaluation of all the primacy ABS forfeited discharge sites was completed by PADEP to project the costs of treating the discharges. Post-mining treatment costs were evaluated in three categories: (i) Initial facility construction costs; (ii) the annual operation and maintenance cost; and (iii) recapitalization costs. Initial facility construction costs cover all of the costs to get a treatment system up and running, such as facility design costs and construction.

The PADEP calculated that, as of July 2008, the total capital cost to construct all necessary discharge-treatment facilities for the primacy ABS forfeiture discharge sites is $2,073,104. The PADEP indicates that it has taken a conservative approach to this cost calculation.

To address this aspect of the ABS legacy, the PADEP must assure that it has the funds to meet this obligation. The PADEP indicates that it currently

has funds on hand that are available to cover the approximately $2,100,000 total capital cost to construct the necessary treatment facilities for the primacy ABS forfeiture discharge sites. In this submission, Pennsylvania has committed to using the approximately $1.1 million of the funds in the Released Bond Account to address the reclamation liability for the ABS legacy sites. (The $1.1 million represents the remainder of the total of $2.8 million in the Released Bond Account, after approximately $1.7 million from this account is used to complete land reclamation at ABS forfeiture sites.) As noted, the PADEP has indicated that there is $14.4 million in its SMCR Fund, General Operations Account. These monies may be used for reclamation purposes as well as general administrative costs. *See* 52 P.S. Section 1396.18. (*See* ABS Financial Summary, July 2008, included as part of Attachment 10 to the State program amendment, Administrative Record No. PA 802.43) As indicated, PADEP has committed to using money from the General Operations Account to cover the additional $1 million needed for treatment facility construction costs. Thus, PADEP submits that it has available, at any time, sufficient money to construct the necessary discharge-treatment facilities for all the ABS legacy sites, as required by 30 CFR Section 800.11(e)(1).

Finding: We find that PADEP has demonstrated the availability of sufficient funds to address the capital costs, as determined by PADEP, of constructing all known discharge treatment facilities at ABS legacy sites as of the date of submission of this amendment. Specifically, the Released Bond Account funds identified for use in the SMCR Fund are required to be used for reclamation (including construction of treatment facilities) by the approved State program at 25 Pa. Code 86.187 and 86.190, thereby providing the legally enforceable commitment required by *Kempthorne.*

Further, the General Operations Account within the SMCR Fund can be used for reclamation (including construction of treatment facilities) as provided at 52 P.S. Section 1396.18. These additional funds should be sufficient to cover the remaining costs for the construction of treatment facilities, and Pennsylvania's submission indicates that these monies will be used for that purpose.

Therefore, because the PADEP will use the monies from the Released Bond Account and the General Operations Account, when needed, to pay the costs of construction of discharge-treatment facilities, OSM is approving the demonstration of sufficient funding regarding construction of all necessary discharge-treatment facilities at the primacy ABS forfeiture sites.

Summary of OSM's Findings on Pennsylvania's Program Amendment Submission

With regard to the treatment of post-mining discharges, we are approving the following parts and provisions of the submission in accordance with the requirements of 30 CFR 800.11(e):

(1) Those regulations that provide an adjustable source of revenue dedicated to treatment and that can ensure adequate funds to treat discharges at the ABS legacy sites (those forfeited ABS sites requiring treatment of post-mining pollutional discharges that did not have sufficient bond or a fully funded treatment trust to cover costs of treating the discharge) and provide for the establishment of an alternative permanent funding source to treat post-mining pollutional discharges that is based on specific criteria and approved by OSM;

(2) Pennsylvania's demonstration of sufficient funding for the construction of all necessary discharge treatment facilities at ABS forfeiture sites; and

(3) Pennsylvania's use of treatment trusts as an alternative bonding system, intended to make available sufficient funds to complete the treatment of post-mining pollutional discharges.

With regard to the land reclamation at sites that were originally permitted under the ABS, we are approving the following parts/provisions of the submission in accordance with the requirements of 30 CFR 800.11(e):

(1) Pennsylvania's use of the Conversion Assistance Program, which provided financial guarantees for land reclamation to qualified permittees that converted to the conventional bonding system, thereby avoiding bond forfeiture; and

(2) Pennsylvania's demonstration of sufficient funding for the sites that were originally bonded under the ABS, but forfeited at the time of dissolution.

However, we find that Pennsylvania has not demonstrated sufficient funding for sites that were bonded under the former ABS and not forfeited, but have the potential to be liabilities under the ABS because the operators may not be able to obtain full-cost, site-specific bonds that are adequate to cover all reclamation costs on those sites. Several sites were actively permitted at the time of the ABS dissolution, but were not adequately covered by conventional bond or other funding mechanism subsequent to the conversion. Two such sites remain. PADEP has not identified a source of money that can be used to reclaim these two sites in the event of bond forfeiture.

We acknowledge the significant progress that Pennsylvania has made in addressing the reclamation liabilities of those sites originally covered under the ABS. However, because Pennsylvania's program amendment submission does not assure, with respect to these two currently permitted sites, that sufficient money is available to complete reclamation plans in the event of forfeiture, OSM cannot approve that aspect of Pennsylvania's program amendment.

Required Amendment: As a result of Pennsylvania's failure to assure that outstanding land reclamation liabilities at these two sites are fully funded, OSM is revising the required amendment at 30 CFR 938.16(h) to require Pennsylvania to ensure that its program provides suitable, enforceable funding mechanisms that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS.

IV. Summary and Disposition of Comments

We received comments from four entities: The Mining and Reclamation Advisory Board (Administrative Record No. PA 802.56), the United States Environmental Protection Agency (Administrative Record No. PA 802.58), the Pennsylvania Coal Association (Administrative Record No. PA 802.59), and PennFuture (Administrative Record No. PA 802.60). Two other Federal agencies responded with no comment (U.S. Fish and Wildlife Services, Administrative Record No. PA 802.52, and the U.S. Department of Labor, Administrative Record No. PA 802.54). Since PennFuture submitted the majority of the comments received, we will address those comments first and the other entities' comments following.

PennFuture submitted ten general comments with numerous specific comments that support its general comments. We will address these specific comments where we determine that the topic had not already been addressed in our response to one of the general comments.

Generally, PennFuture contends that the program amendment does not guarantee the reclamation of all existing and potential "ABS legacy sites." PennFuture has indicated that the mechanisms presented in the ABS program amendment have moved or will move Pennsylvania's regulatory program closer to the objective, but they do not fully satisfy the outstanding

requirements of the Part 732 Notice and 30 CFR 800.11(e) and 938.16(h), as interpreted in *Kempthorne.* For the reasons set forth in our findings above, and in our responses to comments below, we disagree with this assertion in large part, though we are revising the required amendment at 30 CFR 938.16(h) to require Pennsylvania to ensure that its program provides suitable, enforceable funding mechanisms, that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS

The comments and our responses to them follow.

1. The ABS Program Amendment correctly recognizes that the reclamation of all existing and potential "ABS Legacy Sites" must be guaranteed.

Response: We agree, and have found that the State program amendment satisfies this obligation.

2. OSM has the discretion to approve parts of the ABS Program Amendment while disapproving others, and has the authority to place conditions on any approval or partial approval of the ABS Program Amendment.

Pennsylvania is seeking approval of this program amendment submission as a complete package, in accordance with 30 CFR 732.17(h) and the part 732 Notices. PennFuture states that nothing in the phrase "shall approve or disapprove the amendment request" in 30 CFR 732.17(h)(7) prevents OSM from approving certain provisions in a program amendment package while disapproving others. PennFuture indicates that OSM has the discretion to approve parts of the ABS Program Amendment while disapproving others, and has the authority to place conditions on any approval or partial approval of the ABS Program Amendment.

Response: We agree that there is nothing in 30 CFR 732.17(h) that prevents OSM from approving certain provisions in a program amendment, while disapproving others. We also agree that we have the authority to qualify our approval or partial approval of any program amendment, or to require additional amendments to the State program.

3. In taking action on the ABS Program Amendment, OSM may consider only the ABS Program Amendment and its attachments, along with any comments and supporting information submitted in response to the proposed amendment.

PennFuture notes that the ABS Program Amendment purports to incorporate by reference the entire, 82-page Program Enhancements Document (PED) that was transmitted to OSM on June 5, 2003. PennFuture further states that the PED is five years old, is inconsistent with the ABS Program Amendment, and that the program amendment does not appear to cite or to rely on any specific data, guidance documents, or passages of the PED. Finally, PennFuture states that OSM may consider only the ABS Program Amendment and its attachments, along with any comments and supporting information submitted in response to the proposed amendment. It further stated that if Pennsylvania is allowed to incorporate the PED by reference, it would incorporate its July 2003 comments by reference.

PennFuture also noted that Pennsylvania submitted to OSM a report on the progress recently made on the ABS primacy bond forfeitures, including a January 2009 update of the July 2008 version of the Trust Fund/Bond Agreement Summary Report, but that the State made it clear that the updated submission is neither a program amendment nor a revision to the program amendment. Therefore, according to PennFuture, the January 15, 2009, submission should not be considered by OSM in deciding on the ABS Program Amendment, nor should it be included in the administrative record in this proceeding. If, however, OSM intends to consider that new information or to include it in the administrative record of this proceeding, PennFuture contends that it must give it and the public an opportunity to comment on any such submission.

Response: We agree that the program amendment does not appear to cite or to rely on any specific data, guidance documents, or passages of the Program Enhancement Document submission. Neither the Program Enhancement Document nor the updates to the Trust Fund/Bond Agreement Summary Report were considered during this review.

4. There is no distinction between an "alternative bonding system" approved under Section 509(c) of SMCRA and an "alternative system" approved under Section 509(c) of SMCRA.

As noted in the program amendment submission, Pennsylvania seeks approval of its use of Conversion Assistance Guarantees and mine drainage treatment trust funds as "alternative systems" under Section 509(c) of SMCRA. Pennsylvania contends that there is a significant distinction between an alternative bonding system and "alternative system" under section 509(c).

In its submission, Pennsylvania cites 30 CFR 732.15(b)(6), which provides that the Secretary of the Interior may not approve a State regulatory program unless he finds that the provisions of the State program "implement, administer, and enforce a system of performance bonds and liability insurance, or other equivalent guarantees, consistent with the requirements of subchapter J of this chapter." Pennsylvania asserts that the Conversion Assistance Program and mine drainage treatment trust funds are equivalent to or better than conventional bonds and may be approved under § 732.15(b) as an "alternative system or other equivalent guarantee."

PennFuture commented that there is no distinction between an "alternative bonding system" approved under Section 509(c) of SMCRA and an "alternative system" approved under Section 509(c) of SMCRA. The authorization of an "alternative system" in Section 509(c) of SMCRA is implemented through OSM's regulation governing "alternative bonding systems" at 30 CFR 800.11(e). It cited OSM's "authoritative interpretation, originally codified through notice and comment rulemaking at 30 CFR 806.11(c) and currently codified through notice and comment rulemaking at 30 CFR 800.11(e), [that] an 'alternative system that will achieve the objectives and purposes of the bonding program' within the meaning of section 509(c) of SMCRA, 30 U.S.C. 1259(c), is an alternative bonding system.' " It further cited rulemaking language that it believes supports its position that OSM sees no distinction between an alternative system and alternative bonding system.

The last clause of § 732.15(b)(6) limits OSM's discretion by tethering it to the substantive standards in 30 CFR Chapter VII, subchapter J, which today consists entirely of Part 800. The only provisions of 30 CFR part 800 implementing section 509(c)'s authorization to approve an "alternative system that will achieve the objectives of the bonding program under this section" 30 U.S.C. 1259(c) is the regulation authorizing the approval of "alternative bonding systems," 30 CFR 800.11(e).

The criteria for approval or disapproval of State programs in 30 CFR 732.15(b)(6) do not make 30 CFR 800.11(e) inapplicable to an alternative reclamation guarantee proposed for approval under section 509(c) of SMCRA. To the contrary, in order to be consistent with the requirements of subchapter J of this chapter, 30 CFR 732.15(b)(6), any reclamation guarantee proposed for approval as an "alternative system" under section 509(c) of SMCRA

must satisfy the requirements for "alternative bonding systems" codified in subchapter J at 30 CFR 800.11(e).

Response: We agree that the authorization of an "alternative system" in section 509(c) of SMCRA is implemented through OSM's regulation governing "alternative bonding systems" at 30 CFR 800.11(e). Therefore, we regard both the Conversion Assistance Program and mine drainage treatment trust funds as alternative bonding systems.

5. OSM should approve Pennsylvania's Conversion Assistance Program as an alternative bonding system under section 509(c) of SMCRA and 30 CFR 800.11(e).

Response: OSM agrees, and is approving the Conversion Assistance Program as an alternative bonding system under section 509(c) of SMCRA and 30 CFR 800.11(e).

6. OSM should partially disapprove and partially approve, with conditions, Pennsylvania's use of mine drainage treatment trusts as an alternative bonding system under section 509(c) of SMCRA and 30 CFR 800.11(e).

We received extensive comments from PennFuture expressing concerns relative to the treatment trust approach proposed by Pennsylvania. PennFuture commented, generally, that OSM's evaluation of Pennsylvania's request for approval of trust funds as an alternate system and our determination of whether the Part 732 Notice and the required amendment at 30 CFR 938.16(h) have been satisfied, must be based upon a realistic scenario in which there is no financially responsible party available to bear higher than expected treatment costs or to supplement the trust corpus in order to restore it to a perpetually sustainable level. PennFuture's comments promote the importance of establishing a sustainable primary target valuation for each trust that will provide a revenue stream sufficient to provide the necessary AMD treatment.

In support of its comment, PennFuture sets forth the following deficiencies it alleges exist with respect to treatment trust amount calculations. According to PennFuture, each of these deficiencies, by itself, precludes OSM from determining that either the 1991 732 Letter or the required amendment codified at 30 CFR 938.16(h) can be removed.

First, PennFuture asserted that the assumed investment portfolios for many existing trust funds are more aggressive than the actual investment portfolios, which tend to be more conservative. Because of this discrepancy, operators are allowed to fund the trusts with less money than will be needed for full funding, since the assumed aggressive investment strategies do not match the actual, more conservative investment mixes. PennFuture demanded that OSM codify a required amendment requiring Pennsylvania:

(1) To assume a rate of return corresponding to the most conservative investment portfolio the trustee reasonably may be expected to hold when calculating the initial amount of mine drainage treatment trust funds;

(2) To review the investment portfolio of existing treatment trusts, and, for those trusts for which the actual investment portfolio allocation deviates materially from the portfolio assumed when calculating the initial amount of the trust, to recalculate the amount of the trust using the expected rate of return for the actual investment portfolio; and

(3) Where the recalculated amount is higher than the original calculation, to either: (a) Require the mine operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

We note that PennFuture does not define what it means by a "material" deviation between the assumed and actual investment portfolio.

Second, PennFuture contended that mine drainage treatment trust funds have low tolerance for risk, primarily because it provides the only source of funding for its intended service, *i.e.,* the payment of treatment costs at specific sites, often in perpetuity. According to PennFuture, Pennsylvania's decision to authorize trust investment mixes of 80% stocks and 20% bonds is entirely too aggressive to accommodate the extremely low risk tolerances inherent in these funding mechanisms. Instead, Pennsylvania should authorize only low risk investment mixes that do not exceed the 5.25% expected annual rate of return on investment bonds. Of course, limiting the investments to those with more conservative expected rates of return will require the operator to invest more money into the trust at the outset. PennFuture demanded that OSM codify a required amendment requiring Pennsylvania:

(1) To assume a rate of return on the trust's investment portfolio no greater than 5.25% in calculating the amount of any mine drainage treatment trust fund; and (2) to recalculate, using a gross rate of return no greater than 5.25%, the amount of any existing treatment trust for which the gross rate of return on the investment portfolio assumed in the calculation of the initial trust amount exceeded 5.25%, and to either (a) require the operator to make up any deficiency in the trust amount; or (b) where a deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

Third, PennFuture commented that the assumed 11.1% rate of return on the equities portion of its authorized mine drainage treatment trust fund investment mixes is excessively optimistic, and results in unacceptably low initial trust fund investments. PennFuture illustrated what it believes to be the significance of the rate of return assumption by showing the significant difference between the initial trust investment for an assumed 11.1% rate of return on equities vs. lower assumed rates of return. PennFuture's expert, Dr. Small, recommended an assumed rate of return of no greater than 6% on equities. PennFuture claimed that Pennsylvania's mine drainage treatment trusts are "doomed to insolvency from the outset by the unrealistic [assumed] rate of return." Finally, PennFuture asserted that Pennsylvania's volatility multiplier of 1.16% does not adequately account for the trust fund portfolio's market risk. Therefore, PennFuture demanded that OSM expressly disapprove the portion of the amendment that would allow the State to assume a gross rate of return of 11.1% on equity investments, and that it codify a required amendment requiring Pennsylvania:

(1) To assume a gross rate of return on equities no higher than 6% in calculating the amount of any mine drainage treatment trust fund; and (2) to recalculate, using a gross rate of return on equities no greater than 6%, the amount of any existing treatment trust for which the gross rate of return on equities assumed in the calculation of the initial trust amount exceeded 6% and to either: (a) Require the operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

Fourth, PennFuture argued that limiting the period used for calculating recapitalization costs for treatment facilities to 75 years "is unwarranted, unsupported by any information in the ABS Program Amendment submission, and results in trust fund amounts below the amount needed to provide a full cost guarantee of perpetual treatment." Rather, PennFuture maintained that the only way to capture the full present

value of all recapitalization costs is to use a calculation period of infinite duration. Therefore, PennFuture demanded that OSM "expressly disapprove the portion of the ABS Program Amendment that would allow Pennsylvania to limit the calculation of the present value of the recapitalization costs to 75 years", and to codify a required amendment requiring Pennsylvania:

(1) To use a calculation period of infinite duration that captures the full present value of all recapitalization costs when calculating the amount of a mine drainage treatment trust fund; and (2) to recalculate the amount of existing treatment trusts using a calculation period of infinite duration that captures the full present value of all recapitalization costs and to either: (a) Require the operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

Fifth, PennFuture contended that mine drainage treatment trust funds fail to account for the risk of premature system failure. Therefore, according to PennFuture, the trust funds are not full-cost, perpetual guarantees. Accounting for this risk would require that additional, up front monies be invested by the operators into the trust funds. Therefore, PennFuture demanded that OSM codify a required amendment requiring Pennsylvania:

(1) To fully account for the risk of premature failure of the treatment system or its components when calculating the amount of mine drainage treatment trust funds; [and] (2) to recalculate the amount of any existing treatment trust where a material risk of premature failure of the treatment system or its components exists, and to either: (a) Require the operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

We note that PennFuture does not define what it means by a "material risk of premature failure."

Sixth, PennFuture maintained that the mine drainage treatment trusts do not account for costs of complying with the National Pollutant Discharge Elimination System (NPDES) program; as such, PennFuture contended the trusts "are not full-cost, perpetual treatment guarantees." Of course, initial trust investment amounts may need to be higher in order to account for NPDES requirements. Therefore, PennFuture demanded that OSM codify a required amendment requiring Pennsylvania:

(1) To fully account for all costs of complying with the NPDES requirements when calculating the amount of mine drainage treatment trust funds; and (2) to recalculate the amount of any existing treatment trust where compliance with the NPDES requirements would materially increase the costs that must be covered by the trust, and to either: (a) Require the operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

We note that PennFuture does not define the phrase "materially increase the costs that must be covered by the trust."

Response: For the reasons discussed below, we decline to impose any of the above-referenced demanded required amendments. Likewise, we decline to disapprove the provisions for which PennFuture demanded disapproval.

When we conducted our programmatic reviews in the late 1980s and began identifying shortcomings in the Pennsylvania bonding system, there existed no site-specific financial vehicle able to provide a revenue stream for long-term reclamation needs like a pollutional discharge. Pennsylvania's treatment trust efforts since the passage of Pennsylvania Act 173 in 1992 were creative and relied on flexibility within the developmental environment. Ultimately, their efforts provided both the vehicle and structure of a financial mechanism that can serve as an alternate to traditional conventional bonds or a State-wide bond pool. The treatment trust approach of making revenues available on an ongoing basis through interest payments on investments is an important leap forward in the search for a stable and self-sustaining source of funds for long-term reclamation costs. Our implementation of treatment trusts in the Federal program in Tennessee relied heavily on the techniques and experiences of Pennsylvania program officials. Our decision to approve treatment trusts as part of the Tennessee Federal program reflects our conclusion that it is important to maintain flexibility in the program so that the treatment trusts approach can undergo necessary refinements and respond to changing economic conditions.

As discussed under our findings, we are approving treatment trusts as an alternative bonding system under SMCRA section 509(c) and 30 CFR 800.11(e). Our approval confers on Pennsylvania the authority to implement enforceable trust agreements for long-term treatment of acid mine drainage in lieu of a conventional bond. In addition, and as discussed in our findings, we are not providing specific approval of the underlying financial components Pennsylvania has used or is currently using to develop treatment trusts. Similarly, we are not requiring that Pennsylvania incorporate into mine drainage treatment trust funds any explicit portfolio mixtures, volatility rates, specific cushions against premature failure, rates of return, recapitalization calculations, or inflation rates. Furthermore, we are not approving or disapproving other financial parameters Pennsylvania now considers, such as site maintenance costs, or the use of the AMDTreat program. We have concluded that the implementation of treatment trusts requires program managers to have a degree of flexibility that may not be afforded when specific percentages, rates, or schedules are imposed through a formal amendment structure of 30 CFR Part 732. As a parallel, State regulatory programs are responsible for managing bond rate guidelines for surface mine reclamation on an annual basis. Those responsibilities require ongoing analyses and revisions to reclamation cost parameters such as those for fuel, materials, supplies, equipment rates, and dozens of other cost components. We believe that treatment trusts will also need routine periodic revisions that will be hindered if revisions are subject to the formal program amendment process.

PennFuture's assertion that existing and future trust portfolios are not being managed or may not be performing consistent with the projections used to set the primary target valuation is an important comment and potential cause for concern. However, the potential for disparity between trust target assumptions and actual trust performance further convinces us not to impose rigid financial parameters such as rates of return. Rather, we are even more convinced of the importance of preserving programmatic flexibility so that Pennsylvania can revisit trusts on a periodic basis to revise and refine trust parameters, including the financial components and the primary target valuation, within the authority of its approved program. Pennsylvania could have adopted investment strategies in line with PennFuture's demands; had it done so, we almost certainly would have approved the use of trust funds, just as we are approving them in this

rulemaking. However, we believe the mechanics of trust fund structures are best left to the PADEP, which has an incentive to ensure that the funds do not fail. The annual evaluations, which may result in adjustments to the mine drainage treatment trust fund target amounts, are one such assurance against failure. (*See* Attachment 7, "Postmining Treatment Trust Consent Order and Agreement", paragraph 8.)

The PennFuture comments also highlight the importance of maintaining clarity in our decision consistent with the decision in *Kempthorne.* In our findings section, we approved the use of treatment trusts as an alternative bonding system under SMCRA section 509(c) and 30 CFR 800.11(e).

Nonetheless, and as provided for under our finding, unless and until Pennsylvania demonstrates the financial adequacy of a trust supporting a qualifying ABS discharge, that discharge will still be subject to the requirements imposed on an ABS legacy site. Our clarification is consistent with the holding in *Kempthorne* that conversion from the old ABS only takes effect when the complete reclamation costs are fully covered by the CBS bonds (or in this case, a treatment trust). Under our decision, Pennsylvania must successfully demonstrate adequate coverage by a treatment trust for any ABS discharge it wishes to remove from coverage under the definition of ABS legacy sites in Chapter 86.

Our decision also reflects our implementation of the *Kempthorne* court's direction that OSM supervision be present until full guarantees of reclamation are in place. Moreover, and as discussed in our finding above, we conclude that the regulatory revisions to Chapter 86 put into place a revenue source that accommodates changes in ABS legacy sites treatment costs through annual reviews and adjustments to the reclamation fee. PADEP also provided information indicating that the proposed annual revenues could be adjusted as necessary to cover all ABS discharge costs, including those with partially funded trusts (*see* amendment submission: Evaluation of Potential Primacy ABS Discharge Sites).

Other Permit Costs: PennFuture asserts the following: Pennsylvania fails to account for the additional costs of complying with the NPDES requirements at ABS legacy sites. PADEP generally does not require its Bureau of Abandoned Mine Reclamation (BAMR) to get NPDES permits for bond forfeiture discharge sites where BAMR takes over operation and maintenance of the treatment systems. Likewise, where the mine operator has wound up affairs or otherwise is not in control of the mine site, PADEP generally does not require either the trustee or the trustee's contractor to hold NPDES permits for treatment trust discharge sites. PennFuture suggests that OSM should direct PADEP to provide the number of the current NPDES permit and its expiration date for each treatment trust sites. But, PennFuture contends, largely because Pennsylvania has improperly assumed away the NPDES requirements for most treatment trusts and bond forfeiture sites, the amendment fails to address any added costs those requirements might impose. Pennsylvania's failure to account in the calculation of the initial amount of a site-specific mine drainage treatment trust for any additional costs associated with compliance with the NPDES requirements produces a trust that does not fully guarantee the treatment of the covered charges in perpetuity, and therefore fails "to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of a forfeiture," 30 U.S.C. 1259(a), and to assure that the regulatory authority will have available sufficient money to complete.

Next, PennFuture asserts that section 509(c) and 30 CFR 800.11(e) prohibits OSM from approving the use of treatment trusts unless these additional costs are properly taken into account in all of the scenarios in which Pennsylvania uses trust funds. Moreover, unless the treatment trust fully accounts for and guarantees the coverage of these additional costs, Pennsylvania's implementation of them does not satisfy the requirements of the Part 732 Notice and 30 CFR 938.16(h), because trust fund sites that were bonded under the ABS will continue to lack the full and firm reclamation guarantees demanded by *Kempthorne.*

Response: With regard to NPDES permit costs, approval of this alternative system does not alter existing responsibilities of permittees to address any other Federal or State agency requirements relating to treatment of post-mining pollutional discharges. In the event the party responsible for abating or treating a discharge is required to obtain an NPDES permit pursuant to the CWA in order to operate and maintain treatment facilities at ABS legacy sites, then the costs associated with obtaining such permits and treating to the required effluent limits must be absorbed by the treatment trust. These costs, if and when they are required, should be incorporated into any calculations regarding the amount of funds needed to fully fund a trust.

Pennsylvania states that once a trust has been established and fully funded, the reclamation bonds for the site may be released. In addition, after the trust is fully funded, the permittee can, at the discretion of the Department, be reimbursed at the end of each year, based on the calculated costs of treatment for that year's costs.

PennFuture states that OSM must make clear that any mine for which a treatment trust is established continues to be regulated under Title V of SMCRA and the approved State regulatory program. In partially approving Pennsylvania's use of trust funds, OSM should make clear that until PADEP has granted final release of the section 509(c) trust fund, the mine remains a permitted mining operation within the jurisdiction of the State regulatory authority and the oversight jurisdiction of OSM under Title V of SMCRA. OSM should do so by disapproving the amendment to the extent it would allow full and final bond release for the entire mine site upon the funding of a mine drainage treatment trust fund, and by conditioning partial approval of Pennsylvania's use of trust funds under section 509(c) on Pennsylvania's retaining regulatory jurisdiction under the approved State program so long as mine drainage treatment operations continue at a trust fund site.

Response: PennFuture raised this concern during the rulemaking that resulted in our approval of Pennsylvania's use of treatment trust funds and annuities as collateral bonds. 70 FR 25472, 25487 (May 13, 2005). PennFuture was concerned that use of a financial guarantee (such as a trust fund established to treat acid mine drainage) would lead to bond release and therefore termination of the regulatory authority's jurisdiction over a mine site. PennFuture commented that the Federal regulations allow release of a bond upon its replacement with another bond that provides equivalent coverage, but this substitution does not constitute a bond release. PennFuture also noted that an existing bond could be released upon establishment of a trust fund or other adequate financial guarantee of perpetual treatment, but that the substitute guarantee must be treated as the equivalent of a performance bond under section 509 of SMCRA. Section 509 does not allow bond release and the termination of jurisdiction over a site where mine drainage treatment operations are occurring.

The Federal regulations do not allow full bond release until all requirements of the State program and the permit have been met. Additionally, Pennsylvania's regulations at 25 Pa.

Code 86.151(j) provides that release of bonds does not alleviate the operator's responsibility to treat discharge of mine drainage emanating from, or hydrologically connected to, the site to the standards in the permit, PASMCRA, the Clean Stream Law, the Federal Water Pollution Control Act (or Clean Water Act) and the rules and regulations thereunder. We construe the references to "release of bonds" in section 86.151(j) to mean the replacement of the original bond by another bond, whether it be a trust fund or other financial instrument used as a collateral bond, that will cover the area and cost of treatment facilities.

When a trust fund or annuity is in place and fully funded, the regulatory authority may approve release under 30 CFR 800.40(c)(3) of conventional bonds posted for a permit or permit increment, provided that, apart from the pollutional discharge and associated treatment facilities, the area fully meets all applicable reclamation requirements and the trust fund or annuity is sufficient for treatment of pollutional discharges and reclamation of all areas involved in such treatment. The portion of the permit required for post-mining water treatment must remain bonded. The trust fund or annuity may serve as that bond. In addition, Pennsylvania may not terminate its regulatory jurisdiction over any bonded area, including a water treatment facility bonded by a trust fund or another financial mechanism. We do not expect any issues to arise pertaining to termination of jurisdiction, however, since Pennsylvania's program lacks a provision allowing termination of jurisdiction under any circumstances.

7. OSM must codify enforceable conditions requiring the completion of land reclamation at primacy ABS bond forfeiture sites and the construction of mine drainage treatment systems at ABS Legacy Sites by specified deadlines.

Pennsylvania stated in its submission that it is committed to completing the arrangements for land reclamation at the ABS sites within the next couple of years and the PADEP has the funds available to perform the work.

PennFuture contends that OSM must codify enforceable conditions requiring the completion of land reclamation at primacy ABS bond forfeiture sites and the construction of mine drainage treatment systems at ABS legacy sites by specified deadlines. PennFuture contends that the Department's commitment is not enforceable. As a result, OSM must supply the enforceability by codifying enforceable obligations at 30 CFR 938.16 for Pennsylvania to complete the outstanding land reclamation and mine drainage treatment system construction work at primacy ABS bond forfeiture sites. PennFuture agrees with Pennsylvania that a site-by-site schedule with individual completion deadlines for each mine is unnecessary. Given the extraordinary, decades-long delays in reclamation or mine drainage treatment at some PA ABS bond forfeiture sites, however, PennFuture asserts that definitive and enforceable overall deadlines for the completion of the land reclamation and treatment system construction works are essential.

PennFuture recommends that OSM codify conditions at 30 CFR 938.16 requiring Pennsylvania to complete the construction of mine drainage treatment systems at all ABS legacy sites and the land reclamation at all primacy ABS bond forfeiture sites within one year following the effective date of OSM's final rule, subject to an exception for sites where Pennsylvania is unable to complete the necessary work by the deadline because of forces beyond Pennsylvania's control.

Response: It would be ideal if necessary land reclamation and water treatment projects at bond forfeiture sites could be completed by the deadline recommended by PennFuture. However, logistical and contractual limitations mean that it would be extremely difficult, if not impossible, to reclaim all the land that needs to be reclaimed and treat all the water that needs to be treated within one year of the effective date of this final rule. To accomplish the necessary land reclamation and water treatment, the State will need time to develop specifications, bid and award contracts, secure necessary easements and permits, and design and construct needed treatment facilities. For purposes of this rulemaking, we do not believe that it is necessary to impose deadlines for completion of sites. However, progress on the completion of sites is a topic that may be reviewed during oversight activities to assure that the regulatory authority is carrying out its activities in accordance with the provisions of its approved program.

8. OSM must disapprove the use of a consent order and agreement in lieu of an approved Section 509 reclamation guarantee, and must prohibit the proposed redesignation of the existing reclamation fee account until full-cost land reclamation guarantees are posted for the two mines covered by consent orders and agreements.

PennFuture contends that OSM must disapprove the use of a consent order and agreement in lieu of an approved section 509 reclamation guarantee. PennFuture also states that the amendment does not claim that Pennsylvania has sufficient money available in the SMCR Fund or elsewhere to cover the much larger shortfall for the LCN site, which includes a post-mining discharge that has been included on PA's list of potential ABS legacy sites. Although the amendment avoids stating the dollar amount by which the LCN site is underbonded, the $7 million in reclamation guarantees posted for the LCN site was more than $8.9 million below the estimated liability for land reclamation alone. Thus, according to PennFuture, the available monies cover only 44% of the estimated land reclamation liability.

PennFuture notes that Pennsylvania wants OSM to treat a consent order and agreement as satisfying Section 509 of SMCRA. But, PennFuture contends, as a matter of law, a consent order and agreement is not a section 509 performance bond or alternative bonding system. PennFuture asserts that section 509 of SMCRA can be satisfied only by approved reclamation guarantees that meet or exceed the amount of outstanding reclamation liability, not by an agreement to bring it about in the future.

PennFuture further asserts that OSM may not consider the Part 732 Notice and required amendment at § 938.16(h) to be fully satisfied until all land reclamation liabilities at the LCN and CCI sites are guaranteed by financial guarantee mechanisms approved under section 509 of SMCRA.

Finally, PennFuture states that OSM must require that, before PADEP can limit the use of the reclamation fees to paying the costs associated with treating post-mining pollutional discharges at ABS legacy sites, PADEP must guarantee that all land reclamation liabilities at the LCN and CCI sites are fully funded.

Response: As we note in Part B of the findings, a CO&A does not constitute the guarantee of sufficient funding to pay for reclamation, as required under section 509 of SMCRA. Accordingly, we found that Pennsylvania will not have fully satisfied the requirements of 30 CFR 800.11(e) until all land reclamation liabilities at the LCN and CCI sites are guaranteed to be fully funded. We are thus revising the required amendment at 30 CFR 938.16(h) to require Pennsylvania to ensure that its program provides suitable, enforceable funding mechanisms that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS. Because we are taking this action, it is not necessary to prohibit Pennsylvania

from using its RFO&M Account for water treatment only on ABS legacy sites.

9. The ABS Program Amendment does not fully satisfy the Part 732 Notice and 30 CFR 938.16(h) because it does not demonstrate that the two new trust accounts provide the firm guarantee of perpetual treatment at all existing and potential ABS Legacy Sites required by *Kempthorne.*

Pennsylvania stated that the RFO&M Account is designed to go into operation immediately and to continue to serve as the only funding mechanism until it is merged into the two accounts which are set up to operate in series and are part of a system that is intended to cover the costs of mine drainage treatment at ABS legacy sites after treatment systems are initially installed using other funds. The Legacy Account, which, having been found "actuarially sound" by PADEP, then takes over forever as the sole mechanism providing for mine drainage treatment at the ABS legacy sites. Pennsylvania concluded that it has established an enforceable regulatory mechanism which will generate sufficient funds to cover the total annual O&M and recapitalization costs for the ABS legacy sites (and has also accounted for the potential ABS legacy sites.

PennFuture contends, however, that the amendment does not fully satisfy the Part 732 Notice and § 938.16(h) because it does not demonstrate that the two new trust accounts provide the firm guarantee of perpetual treatment at all existing and potential ABS legacy sites. PennFuture adds that information presented in the amendment at most shows that the system described in Part 5 of the amendment may work for the very near term. Under *Kempthorne,* however, the assurance required to satisfy § 800.11(e) must extend indefinitely beyond the next few years.

Specifically, PennFuture contends that:

Inventory: The program amendment fails to account for several mines that appear to be ABS legacy sites or potential ABS legacy sites. In particular, it provided examples of sites that were in the mine drainage inventory, but not listed as existing or potential ABS legacy sites, sites that were reclassified from "primacy" to "pre-primacy," and sites for which removal from the mine drainage inventory is not justified by the documentation provided by OSM.

Reclamation Fee O&M Account: Because the ABS Program Amendment does not demonstrate that the Legacy Account will ever be "actuarially sound," it must demonstrate that the RFO&M Account guarantees the treatment of all discharges at ABS legacy sites in perpetuity.

The $3.7 million in the SMCR Fund's existing reclamation fee account remains encumbered and unavailable for the payment of mine drainage treatment costs at the ABS legacy sites until all land reclamation obligations at the LCN and CCI sites are fully guaranteed by financial guarantee mechanisms approved under section 509 of SMCRA. Only if the $9 million reclamation obligation of the existing reclamation fee account is covered by full cost bonds or some other approved financial guarantee mechanism may OSM approve restricting the $3.7 million to the purpose of paying for mine drainage treatment at ABS legacy sites through the redesignation of the existing reclamation fee account as the RFO&M Account.

Only the revenue streams that must be deposited in the RFO&M Account may be considered in analyzing the capability of the account to provide the required guarantee of perpetual discharge treatment.

The ABS Program Amendment fails to guarantee that all recapitalization cost at ABS legacy sites are covered in perpetuity. PennFuture opposes limiting the calculation period for recapitalization costs to 75 years, for the same reasons it opposed the 75 year recapitalization cost calculation period for site-specific mine drainage treatment trust funds.

The ABS Program Amendment does not address recapitalization costs at potential ABS legacy sites. These costs must be addressed, and their present value must be based on a period of infinite duration.

The ABS Program Amendment's use of annualized recapitalization cost figures in the analysis of the RFO&M Account is improper and misleading. Because the PADEP does not contain an enforceable commitment for PADEP to collect and set aside funds to cover recapitalization costs in future years, the analysis of the RFO&M Account should not be premised on such a "set-aside." Moreover, PADEP should not assume that an equivalent amount of recapitalization costs will be spent each year, when it knows that will not be the case. Instead, the analysis of the RFO&M Account should be based on the irregular, discontinuous pattern of recap costs revealed by the Federation's "ABS Legacy Recap Cost Pattern (rev 2009)."

The ABS Program Amendment fails to account for the additional costs of complying with the NPDES requirements at ABS legacy sites.

The ABS Program Amendment fails to demonstrate that the RFO&M Account and associated mechanisms guarantee the perpetual treatment of all discharges at the existing ABS legacy sites. Instead, the analysis of the account is limited and exclusively near-term in scope. Pennsylvania has failed to demonstrate that potentially dramatic increases in the reclamation fee will not reduce the number of acres subject to the fee to the point that revenues will be insufficient to cover treatment costs. PennFuture insists that the analysis of the account must project the costs and revenues for the entire period in which the account may have to remain in operation. PennFuture's analysis of the condition of the account over a 75-year period show increasing burdens that the PADEP has failed to demonstrate what the account can bear.

The ABS Program Amendment fails to demonstrate that the RFO&M Account and associated mechanisms guarantee the perpetual treatment of all discharges at the potential ABS legacy sites. While the PADEP accounts for a "worst-case scenario" in which every potential ABS legacy site forfeits in a single year, it applies its analysis only to Year 1; in subsequent years, the needed additional revenues would be higher. In addition, and as noted above, the analysis does not account for recapitalization costs at these newly forfeited sites, but is limited to O&M costs.

Next, the amount of existing, site-specific bond money is overstated, because some of that money is needed for land reclamation on the LCN site. Finally, the site-specific bond monies would not be available anyway, because the proposed regulations require that such monies be deposited into the ABS Legacy Account, where they cannot be used until that account is declared to be actuarially sound. As with the ABS legacy sites, the analysis of the impact of future forfeitures of potential ABS legacy sites is short-sighted, and fails to demonstrate that the RFO&M Account will withstand the increased burdens that it may be required to bear.

Therefore, PennFuture demands that OSM condition its approval of the proposed regulations on Pennsylvania:

(1) Identifying the maximum period the RFO&M Account may be in operation, and providing information sufficient to demonstrate that the RFO&M Account and its ancillary mechanisms will assure treatment of all discharges from the ABS legacy sites for the entire, maximum period the account may be in operation; and, (2) including in the information submitted, and accounting for: (a) The recapitalization costs for the potential ABS legacy sites; b) the full, perpetual recapitalization costs for both existing and potential ABS legacy sites by using a calculation period of infinite duration that captures the full present value of all

recapitalization costs; and c) any additional treatment costs at the ABS legacy sites resulting from compliance with the requirements of the NPDES program.

ABS Legacy Account (Legacy Account): PennFuture demands that OSM codify a required amendment, requiring that before the Legacy Account may be found "actuarially sound," all of the conditions identified in PennFuture's comments pertaining to site-specific trust funds for sites originally bonded under the ABS must be satisfied. In addition, PennFuture contends that the ABS Program Amendment fails to demonstrate that the Legacy Account guarantees the perpetual treatment of all discharges at the ABS legacy sites. This demonstration is critical, PennFuture argues, because once the determination of actuarial soundness is made, it applies for eternity; that is, there is no provision in the proposed regulations for reviving the reclamation fee, or tapping another source of revenue, to cover treatment and recapitalization costs in the event the ABS Legacy Account ceases to be "actuarially sound." PennFuture recommends that the determination of actuarial soundness be made by an actuary.

For all of these reasons, PennFuture demands that OSM condition its partial approval of the proposed regulations on Pennsylvania:

(1) Basing the calculation of the initial, "actuarially sound" funding level of the Legacy Account on an expected gross rate of return on the Legacy Account's asset portfolio no greater than 5.25%; (2) basing the calculation of the initial, "actuarially sound" funding level of the Legacy Account on the full present value of all future recapitalization costs for the ABS legacy sites, determined by using a calculation period of infinite duration; (3) accounting for the risk of premature failure of the mine drainage treatment systems and components of the ABS legacy sites in determining the initial, "actuarially sound" funding level of the Legacy Account; and, (4) accounting for all costs of complying with the NPDES requirements at ABS legacy sites in determining the initial, "actuarially sound" funding level of the Legacy Account.

Summary: OSM must impose conditions on its approval that are necessary to ensure that the new accounts and related mechanisms provide the firm guarantee of perpetual treatment. Until those conditions are satisfied, OSM may not grant full approval of Part 5 of the amendment or terminate the 732 Notice and § 938.16(h) as being fully satisfied.

Because Pennsylvania can neither guarantee nor predict when the Legacy Account will become actuarially sound, the worse-case scenario in this regard is one in which the Legacy Account never attains actuarial soundness, and the RFO&M Account serves forever as the repository of funds for covering all treatment expenses at the ABS legacy sites. As a result, the amendment must demonstrate that the RFO&M Account and its ancillary mechanisms, even though intended to serve as only a temporary vehicle for administering the funds for discharge treatment at ABS legacy sites, nevertheless are capable of handling a worse-case scenario under which they must administer those funds permanently.

Given the lack of any proof that the Legacy Account will become actuarially sound and take over for the RFO&M Account anytime soon (or ever), the long-term sufficiency of the RFO&M Account, its capability to provide the firm financial guarantees demanded by *Kempthorne* must be proven by presentation and analysis of long-term projections.

Response:

Inventory: PennFuture commented on the inventory of ABS discharge sites PADEP submitted in support of the program amendment and stated that the ABS Program Amendment comes up short in its listing of and accounting for existing and potential ABS legacy sites. To support its comment, PennFuture discussed eight individual sites it thought should be included on the inventory list and said that it has questions concerning the classification of additional sites.

We disagree with PennFuture's implication that OSM is prohibited from removing the 1991 732 letter and the required amendment at 30 CFR 938.16(h) until there is an undisputed listing of ABS legacy sites and discharges. We conclude it is unnecessary to delay our consideration of the proposed modifications to the Pennsylvania program until OSM, PADEP, and PennFuture agree on a final list. As proposed, the PADEP amendment would establish an ABS legacy sites definition that clearly requires treatment of any discharge on a site bonded under the ABS, regardless of past, current, or future status on the MDI ABS Sites database. In addition, the proposed amendment would create a revenue source that, through annual reviews and adjustments to the reclamation fee, accommodates changes in ABS treatment costs, including changes in the number of qualifying sites or discharges (*see* program amendment submission Appendix 12).

The tracking of the MDI ABS Sites is the responsibility of PADEP and the current database is cooperatively maintained by OSM and PADEP to facilitate the reclamation of AMD and other pollutional discharges on sites that operated under the ABS. As essential as the MDI ABS Sites database is to OSM and PADEP, it is merely a program management tool and does not in itself determine whether a particular site is an "ABS Legacy Site." For this reason, we are not approving or disapproving the MDI ABS Sites database in this rulemaking. Because the database is not, *per se,* a component of the Pennsylvania regulatory program, any changes to the database do not need to be submitted to OSM as program amendments. Requiring database changes to be submitted as program amendments is not only unnecessary, but could also seriously delay or hinder PADEP efforts to complete required reclamation.

Our view is based upon an acceptance that the information on the MDI ABS Sites database will change as sites are reviewed and better information is collected. We believe such an approach is essential. Information on ABS sites is constantly being collected as treatment techniques and estimates are being refined. Since its inception in 1999, the database has been modified to include improved water quality information and to add ABS sites that were thought to qualify. OSM and PADEP have also had occasion to reclassify sites that no longer appear to represent an ABS treatment liability. Even with modifications being made over the last nine to ten years, the number of ABS discharges has remained relatively constant at approximately 100 discharges. OSM believes an active database management process is the best tool and approach for moving forward with reclamation while guaranteeing treatment of discharges on all qualifying sites.

In closing, we are not modifying our decision based upon PennFuture's comments concerning eight specific sites and its indication that it may have questions concerning additional sites. We conclude that delaying our decision on this program amendment until there is an undisputed list between OSM, PADEP, and PennFuture is unnecessary. If a site meets the definition of an "ABS Legacy Site," the old ABS, as modified in this amendment, remains responsible for the treatment of that site, regardless of whether it is on the MDI ABS Sites database. We encourage PennFuture and any other interested parties with important information concerning ABS site eligibility and treatment to contact PADEP and provide it with sufficient details to conduct an investigation.

RFO&M Account: Section 86.17 (Reclamation Fee) was significantly

revised by Pennsylvania. Under the proposed revisions, the reclamation fee amount must be set to guarantee that sufficient revenue is generated to both cover the ongoing and projected O&M costs. In addition, the fee must provide sufficient revenues to maintain, on a State fiscal year basis, a minimum account balance to protect against unforeseen cost increases. To accomplish these tasks, section 86.17 relies on the new definitions in section 86.1 (Definitions) and restrictions on the use of the funds under section 86.187 (Use of Money). Section 86.17(e) establishes, collects, and deposits an adjustable reclamation fee (currently $100) into the RFO&M Account. Through defined procedural steps, Pennsylvania proposed annual assessments of the account balance, expected revenues, and anticipated costs. Pennsylvania proposed an adjustable fee sufficient to pay for the operation and maintenance costs of AMD treatment, including recapitalization costs and to maintain a $3 million minimum balance in the O&M Trust Account.

Pennsylvania significantly revised section 86.187 (Use of Money) to address how funds collected under section 86.17(e) would be dedicated to AMD treatment on ABS legacy sites. Pennsylvania's submission also makes available monies collected from civil penalties assessed by the Department under the Surface Mining Conservation and Reclamation Act. Under the proposed amendment, Pennsylvania must deposit into the O&M Trust Account all civil penalty collections up to $500,000 in a fiscal year, minus a small percentage that are required for deposit into the Pennsylvania Environmental Education Fund. While section 86.187(a) also allows, at the discretion of the Department, the deposit interest on other monies in the SMCR Fund, appropriations, donations, or fees collected from operators participating in the Conversion Assistance Program, the reclamation fees and civil penalties represent the only mandatory sources of funding. To provide a perspective on current revenues from mandatory and other sources, Pennsylvania submitted a document titled ABS Financial Summary July 2008. The summary describes various accounts in the SMCR Fund, available monies, interest, civil penalty collections, and miscellaneous sources.

Pennsylvania's proposed amendment includes discussions of AMD treatment costs on sites defined as ABS legacy sites at the time of the submission to OSM. The Primacy ABS Bond Forfeiture Discharge Sites Status Report for July 2008 provides the forfeited primacy permits bonded under the ABS with site-specific costs for treatment facility construction, annual operation and maintenance costs (O&M), recapitalization costs (system rehabilitation/replacement), and the status of the site. The report provides that, as of July 2008, the annual estimated O&M cost for all sites was approximately $1.35 million. Pennsylvania's proposed approach also considers annualized recapitalization cost estimates.

Pennsylvania's submission provides recapitalization costs for each year, continuing up to year 75 and estimates that for the first ten years recapitalization costs slowly escalate from approximately $230,000 to $302,000. Because Pennsylvania's submission proposes that recapitalization costs will be addressed on a "pay-as-you-go" approach, the maximum potential treatment outlay for year one is estimated to be approximately $1,580,000.

ABS legacy site treatment through the new adjustable trust account is dependent on the expenditure of approximately $2.07 million to construct treatment facilities. To develop the $2.07 million estimate, Pennsylvania reviewed existing ABS legacy sites and identified 67 discharges where systems are lacking or in need of substantive refurbishing. The funding aspects of treatment facility construction are discussed in several locations in Pennsylvania's submission. In ABS Program Amendment Part 4 (Section B), Pennsylvania describes ABS legacy site treatment facility construction, provides the number of sites that have functioning treatment systems, and provides the $2.07 million estimate. The narrative also commits to funding the facility construction effort with $1.1 million from the Released Bond Account and the remaining amount from the General Operations Account under the Department's SMCR Fund. In addition to the analysis and commitment of funding under ABS Program Amendment Part 4, Pennsylvania submitted further support information under two additional documents; the Primacy ABS Bond Forfeiture Discharge Sites Status Report for July 2008 and the ABS Financial Summary for July 2008. These support documents identify specific site treatment facility construction estimates and confirm fund amounts under the General Operations Account and the Released Bond Account.

We acknowledge that the revenues collected from reclamation fees ($190,125) and from civil penalties ($225,400.75) in 2007–2008 are less than the $1,580,000 maximum potential treatment outlay for year one. Nonetheless, the actual amount of money needed for treatment during year one will be significantly lower than the $1.58 million maximum, because that maximum amount is based on an assumption that all treatment facilities will have been constructed and be ready to start treating discharges at the beginning of year one. Actually, though, Pennsylvania must still complete construction of 67 facilities needed to treat mine drainage on ABS legacy sites. Disbursements from the O&M Trust Account cannot occur until the facility is constructed. At this time, we have no estimate on the degree to which disbursements from the O&M Trust Account will be postponed; however, we anticipate that it will be at least several years based upon discussions under ABS Program Amendment Part 4. In the event that treatment facility construction is accelerated and occurs sooner than anticipated, the O&M Trust Account has a balance of $3,699,896.50 to cover additional treatment outlays until the fee can be adjusted in the following year.

Pennsylvania also submitted information on the financial risk associated with active coal mine sites that were originally under the ABS but, at the time of the submission, had no fully funded mechanism for treatment of AMD. These sites are viewed as a potential financial burden on the O&M Trust Account because in the event of forfeiture, their treatment costs must be covered. For the 44 sites that met the potential risk scenario, Pennsylvania estimated that $1,450,000 represented a conservative AMD treatment estimate. Pennsylvania further provided that the risk to the O&M Account is minimized because some sites have bond exceeding the amount necessary for a site specific treatment trust. We accept Pennsylvania's conclusion that the risk of increased costs to the O&M Trust Account has been addressed. We agree that it is unrealistic to assume that all 44 sites would default in the same year. We also observe that the O&M Trust Account balance of $3.7 million and the adjustable fee process are available to address short-term and long-term increases in treatment costs.

As previously discussed in our finding at Part A, concerning the proposed regulatory changes to establish a legally enforceable means of funding the O&M and recapitalization costs for the ABS legacy sites, OSM recognizes that Pennsylvania has provided an alternate system that provides sufficient

funding to treat AMD pollution originating from a defined set of bond forfeiture sites (ABS legacy sites). In addition we found that the reclamation fee can be adjusted to accommodate all increases and decreases in treatment obligations, and that these provisions constitute an enforceable commitment by Pennsylvania to provide the funding needed to construct treatment facilities.

ABS Legacy Account: Pennsylvania also proposed an alternate funding source under § 86.17(e)(6) called the ABS Legacy Account that, when actuarially sound, could supersede the RFO&M Account as the source of funding for AMD treatment on the ABS legacy sites. Pennsylvania proposed specific conditions at section 86.17(e)(6)(i) through (iii) for determining when the ABS Legacy Account is financially capable of covering the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS legacy sites.

As previously discussed in our finding at Part A regarding this account, OSM did not consider this revenue to be a component of the funding required to meet any of the needs for treatment of the ABS legacy sites. Our approval of the language establishing this account, and the transfer of monies into the account is limited in that the ABS Legacy Account, and monies contained within the account, cannot be used until certain conditions are met. At that time, OSM can revisit any issue with regard to the solvency of this fund and the appropriateness of terminating the reclamation fee (or alternate revenue source).

We decline to impose any of the conditions on our approval of these two accounts demanded by PennFuture. We believe formal imposition of these conditions upon the State's approved program is unduly burdensome; it is also unnecessary, given the plain language of the regulations, which requires adjustment of the reclamation fee to account for any increased costs, and a demonstration of actuarial soundness, a defined term, for the ABS Legacy Account prior to termination of the reclamation fee. Pennsylvania's willingness, and its ability, to raise the needed additional monies through reclamation fee increases will be continually evaluated by OSM through its oversight authority. In short, the regulations create the mandate to fully fund discharge treatment costs for all existing and potential ABS legacy sites in perpetuity. The burden of ensuring the fulfillment of that mandate falls squarely on the PADEP, and indirectly on OSM, through oversight. With the commitment already set forth in the regulations, additional conditions are simply not needed, at this time. Therefore, we decline to impose them.

10. OSM should defer ruling on the proposal to allow funding of the RFO&M Account and Legacy Account through "appropriations" and funding sources that are not specifically identified in the ABS Program Amendment.

PennFuture contends that one of SMCRA's bedrock principles is cost internalization; that is, the statute in general, and its bonding requirements in particular, require that the costs of reclaiming surface mining sites, including the costs of discharge treatment at those sites, must be borne by the coal industry, and not by the public. Thus, PennFuture concludes, OSM should not approve proposed regulatory language that would allow the PADEP to deposit into the RFO&M Account or Legacy Account: (1) "appropriations * * *." 25 Pa. Code 86.187(a)(1)(iii), 86.187(a)(2)(i); (2) fees for Conversion Assistance Program guarantees, until a statutory change removing the restriction on the use of those funds is submitted as a program amendment; (3) "other monies" from sources not specifically listed in 25 Pa. Code 86.187(a)(1)(iii) and (a)(2)(i), until the specific sources of funding are identified and submitted for approval as a program amendment; or (4) the "permanent alternative funding sources for the RFO&M Account, 25 Pa. Code 86.17(e)(3), (e)(3)(i), (e)(3(ii), until the specific alternative source is identified, Pennsylvania submits the source as a State program amendment and OSM approves the source as a replacement for the reclamation fee. PennFuture thus asserts OSM should defer ruling on these provisions in this rulemaking for the substantive reason that the money purported to be authorized therein, with the exception of fees for Conversion Assistance Program guarantees, may come from outside the coal industry, and therefore violate the principle of cost internalization. PennFuture further asserts that OSM should also defer its decision on all of the above provisions, including the use of fees from Conversion Assistance Program guarantees, for a procedural reason: neither PennFuture nor any other interested party may provide meaningful comment on the provisions until they are submitted to OSM through the formal program amendment process. Moreover, and in the same vein, PennFuture contends that OSM cannot properly rule on the consistency of these provisions with the requirements of SMCRA and the Federal implementing regulations until they are squarely presented to it as State program amendments.

Response: For the reasons set forth above in Part A of our findings, we are approving the regulatory provisions cited by PennFuture here. However, any "alternative permanent funding source" that would be proposed to substitute for the reclamation fee must first be submitted to us for review and may not be used to pay treatment costs on ABS legacy sites until we either approve the amendment, or decide that the mechanism need not be treated as a program amendment requiring our approval. Nothing in SMCRA or its implementing regulations explicitly prohibits the use of "other sources" of money, such as appropriations, to pay for reclamation of forfeited sites. If any such "other sources" are deposited into either the RFO&M Account or the Legacy Account, we will determine whether a program amendment is required before PADEP may use those monies. Further, the transfer of fees from Conversion Assistance guarantees into the RFO&M Account must be authorized by State law. Therefore, no such transfers may take place until Pennsylvania enacts the necessary statutory revision, submits it to us, and we approve it.

Other Comments

The Pennsylvania Coal Association (PCA)

The PCA commented that it supported approval of the program amendment. In its comments the PCA indicated its agreement to continue paying the $100 per acre reclamation fee for pollutional discharges for which its members have no liability. This approval was conditioned on continuing efforts to find a permanent alternate source of funding to address such pollution.

The Mining and Reclamation Advisory Board (MRAB)

The MRAB commented generally on the process that resulted in the regulations recommended by the Board, as submitted in the program amendment. MRAB commented in support of OSM's approval of the amendment.

Federal Agency Comments

Mine Safety and Health Administration (MSHA)

MSHA indicated it had no comments or concerns regarding the proposed amendment.

U.S. Fish and Wildlife Service

The USFWS indicated it had no comments on the proposed amendment.

U.S. Environmental Protection Agency

The USEPA noted that all discharges of water from areas disturbed by surface mining shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by USEPA as set forth at 40 CFR Part 434.

USEPA indicated that implementation of the State's regulations, including the proposed amendments, must comply with the CWA, the regulations implementing NPDES, and other relevant environmental statutes and regulations. EPA further noted that SMCRA and its implementing regulations, including PADEP's proposed amendments, do not supersede, modify, amend or repeal the CWA and its implementing regulations.

In other words, the EPA stated, "* * * any discharges associated with ABS legacy surface mining operations must comply with the CWA."

Response: OSM agrees that approval of this amendment does not alter the State's or a permittee's responsibility for compliance with any applicable provisions of the CWA. Specifically, approval of this amendment does not alter existing or future responsibilities of the State or a permittee to address any other Federal or State agency requirements relating to treatment of post-mining pollutional discharges.

V. OSM's Decision

Based on the above findings, we are partially approving the Pennsylvania program amendment sent to us on August 1, 2008, (Administrative Record No. PA 802.43). To implement this decision, we are amending the Federal regulations at 30 CFR Part 938 which codify decisions concerning the Pennsylvania program. Pursuant to 5 U.S.C. 553(d)(3), an agency may, upon a showing of good cause, waive the 30 day delay of the effective date of a substantive rule following publication in the **Federal Register**, thereby making the final rule effective immediately.

We find that good causes exist under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Because Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes, making this regulation effective immediately will expedite that process.

Specifically, waiving the 30 day period after publication will allow Pennsylvania to immediately implement these new provisions that are designed to bring more financial resources to bear toward the abatement of water pollution on permitted and abandoned mine sites in the State. Improved water quality will thus inure more quickly to the benefit of the citizens of the Commonwealth of Pennsylvania. Therefore, under 5 U.S.C. 553(d)(3), this rule will be effective immediately.

In addition, for the reason set forth in our findings, we are revising the required amendment at 30 CFR 938.16(h) to require Pennsylvania, within the time provided therein, to ensure that its program provides suitable, enforceable funding mechanisms that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS. Satisfaction of the revised required program amendment at 30 CFR 938.16(h) will likewise constitute satisfaction of the remaining requirements of the October 1, 1991, 732 letter.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of Subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Government

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian Tribes and have determined that the rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State Regulatory program and does not involve a Federal Regulation involving Indian Lands.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 22, 2010.

Thomas D. Shope,

Regional Director, Appalachian Region.

■ For the reasons set out in the preamble, 30 CFR Part 938 is amended as set forth below:

PART 938—PENNSYLVANIA

■ 1. The authority citation for Part 938 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 938.15 is amended by adding a new entry to the table in chronological order by "Date of final publication" to read as follows:

§ 938.15 Approval of Pennsylvania regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	* * * * *
August 1, 2008	August 10, 2010	52 P.S. 1396.4(d.2); 25 Pa. Code 86.1, 86.17(e), 86.187(a); The Conversion Assistance Program; Trust Funds as an Alternative Bonding System (ABS); Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites; and, Demonstration of Sufficient Funding for Construction of All Necessary Discharge Treatment Facilities at the ABS Forfeiture Sites.

■ 3. Section 938.16 is amended by revising paragraph (h) to read as follows:

§ 938.16 Required regulatory program amendments.

* * * * *

(h) No later than October 12, 2010, Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to ensure that its program provides suitable, enforceable funding mechanisms, that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS.

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