

operated by the State. In addition, the real-time information program shall complement current transportation performance reporting systems by making it easier to gather or enhance required information.

(b) *Data quality.* The States shall develop the methods by which data quality can be ensured to the data consumers. The criteria for defining the validity of traffic and travel conditions reporting from real-time information programs shall be defined by the States in collaboration with their partners for establishing the programs.

(c) *Participation.* The establishment, or the enhancement, of a real-time information program should include participation from the following agencies: Highway agencies; public safety agencies (e.g. police, fire, emergency/medical); transit operators; and other operating agencies necessary to sustain mobility through the region and/or the metropolitan area.

(d) *Update of Regional ITS Architecture.* All States and regions that have created a Regional ITS architecture in accordance with Section 940 in Title 23 of the Code of Federal Regulations are required to complete an update of the Regional ITS architecture. The updated Regional ITS architecture shall explicitly address real-time highway and transit information needs and the methods needed to meet such needs. The updated Regional ITS architecture shall address coverage, monitoring systems, data fusion and archiving, and accessibility to highway and transit information for other States and for value added information product providers. The updated Regional ITS architecture shall feature the components and functionality of the real-time information program.

(e) *Effective date.* Traffic and travel conditions reporting needs for all Interstate system highways shall be considered. Establishment of the real-time information program for traffic and travel conditions reporting along the Interstate system highways shall be completed no later than [date 2 years after date of publication of final rule].

#### **§ 511.313 Metropolitan Area real-time information program supplement.**

(a) *Applicability.* Metropolitan Areas exceeding a population of 1,000,000 inhabitants are subject to the provisions of this section.

(b) *Requirement.* Metropolitan Areas shall establish a real-time information program for traffic and travel conditions reporting with the same provisions described in § 511.311.

(c) *Effective date.* Traffic and travel conditions reporting needs and the

impacts from congestion for all Metropolitan Area Interstate system highways shall be considered. Establishment of the real-time information program for traffic and travel conditions reporting along the Metropolitan Area Interstate system highways shall be completed no later than [date 2 years after date of publication of the final rule].

(d) *Routes of significance.* States shall designate metropolitan area, non-Interstate highways that are routes of significance that merit traffic and travel conditions reporting. States shall apply the existing practices and procedures that are used for compliance with 23 CFR part 940, and with 23 CFR part 420. States shall select routes of significance based on various factors relating to roadway safety (e.g. crash rate, routes affected by environmental events), public safety (e.g. routes used for evacuations), economic productivity, severity of congestion, frequency of congestion, and utility of the highway to serve as a diversion route for congestion locations. States shall consider, in consultation with the FHWA, routes that are federally funded, State and locally funded, and privately funded when designating routes of significance. States shall consider toll facilities and other facilities that apply end user pricing mechanisms when designating routes of significance. Arterial highways and other highways that serve as diversion routes for congestion shall be considered for designating routes of significance. Establishment of the real-time information program for traffic and travel conditions reporting along the State-designated metropolitan area routes of significance shall be completed no later than [date 4 years after date of publication of the final rule].

#### **§ 511.315 Program administration.**

(a) Prior to authorization of highway trust funds for construction or implementation of ITS projects, compliance with § 511.311 and § 511.313 shall be demonstrated.

(b) Compliance with this part will be monitored under Federal-aid oversight procedures as provided under 23 U.S.C. 106 and 133, and 23 CFR 1.36.

[FR Doc. E9-392 Filed 1-13-09; 8:45 am]

**BILLING CODE 4910-22-P**

## **DEPARTMENT OF THE INTERIOR**

### **Office of Surface Mining Reclamation and Enforcement**

#### **30 CFR Part 938**

[PA-153-FOR; Docket ID: OSM-2008-0021]

#### **Pennsylvania Regulatory Program**

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

**ACTION:** Proposed rule; public comment period and opportunity for public hearing on the proposed amendment.

**SUMMARY:** We are announcing receipt of an amendment to the Pennsylvania regulatory program (the "Pennsylvania program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). In response to a required program amendment codified in the Federal regulations and to a subsequent notification by letter, Pennsylvania has submitted changes to its regulations involving definitions; permit and reclamation fees; and the use of money and has provided additional descriptions, assurances, and supporting information to ensure that the reclamation of all sites that were bonded under its previous Alternative Bonding System (ABS) will be provided for under the approved Pennsylvania program and consistent with Federal regulations at 30 CFR Part 800.

This document gives the times and locations that the Pennsylvania program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

**DATES:** We will accept written comments until 4 p.m., *e.s.t.* February 13, 2009. If requested, we will hold a public hearing on February 9, 2009.

We will accept requests to speak at a hearing until 4 p.m., *e.s.t.* on *January 29, 2009.*

**ADDRESSES:** You may submit comments, identified by PA-153-FOR; Docket ID: OSM-2008-0021 by either of the following two methods:

*Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). The proposed rule has been assigned Docket ID: OSM-2008-0021. If you would like to submit comments through the Federal eRulemaking Portal, go to [www.regulations.gov](http://www.regulations.gov) and do the following. Click on the "Advanced Docket Search" button on the right side of the screen. Type in the Docket ID

OSM–2008–0021 and click the “Submit” button at the bottom of the page. The next screen will display the Docket Search Results for the rulemaking. If you click on OSM–2008–0021, you can view the proposed rule and submit a comment. You can also view supporting material and any comments submitted by others.

*Mail/Hand Delivery/Courier:* Mr. George Rieger, Chief, Pittsburgh Field Division, Office of Surface Mining Reclamation and Enforcement, 4th and Market Sts., Suite 3C, Harrisburg, Pennsylvania 17101.

*Instructions:* For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comment Procedures” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* In addition to obtaining copies of documents at [www.regulations.gov](http://www.regulations.gov), information may also be obtained at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM’s Pittsburgh Field Division Office.

George Rieger, Chief, Pittsburgh Field Division, Harrisburg Office, Office of Surface Mining Reclamation and Enforcement, 4th and Market Sts., Suite 3C, Harrisburg, Pennsylvania 17101, Telephone No. (717) 782–4036, E-mail: [grieger@osmre.gov](mailto:grieger@osmre.gov)  
Joseph P. Pizarchik, Director, Bureau of Mining and Reclamation, Pennsylvania Department of Environmental Protection, Rachel Carson State Office Building, P.O. Box 8461, Harrisburg, Pennsylvania 17105–8461, Telephone: (717) 787–5015 E-mail: [jpizarchik@state.pa.us](mailto:jpizarchik@state.pa.us).

**FOR FURTHER INFORMATION CONTACT:**  
George Rieger, Telephone: (717) 782–4036. E-mail: [grieger@osmre.gov](mailto:grieger@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Pennsylvania Program
- II. Description of the Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

**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.

From 1982 until 2001, Pennsylvania’s bonding program for surface coal mines, coal refuse reprocessing operations, and coal preparation plants, was funded under an ABS, which included a central pool of money, the Surface Mining Conservation and Reclamation Fund (Fund), used for reclamation. This pool was funded in part by a per-acre reclamation fee paid by operators of permitted sites and supplemented by site bonds posted by those operators for each mine site.

In 1991, our oversight activities determined that Pennsylvania’s ABS included unfunded reclamation liabilities for backfilling, grading, and revegetating mined land and we determined that the ABS was financially incapable of abating or treating pollutional discharges from bond forfeiture sites under its jurisdiction. As a result, on May 31, 1991, we imposed the required amendment codified at 30 CFR 938.16(h). That amendment required Pennsylvania to demonstrate that the revenues generated by its collection of the reclamation fee would assure that its Fund could be operated in a manner that would meet the ABS requirements contained in 30 CFR 800.11(e). This provision requires that an ABS 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.” It also requires that the ABS “provide a substantial economic incentive for the permittee to comply with all reclamation provisions”.

Also, on October 1, 1991, OSM sent Pennsylvania a letter, pursuant to 30 CFR Part 732, notifying the State that it must submit a program amendment that would address the aforementioned deficiencies in the ABS. This document is commonly referred to as a “732 letter.”

After a decade of trying to address the problems with the ABS, the Pennsylvania Department of Environmental Protection (PADEP) terminated the ABS in 2001 and began converting active surface coal mining permits to a conventional bonding system (CBS) or “full-cost” bonding program. This CBS 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.

By letter dated June 12, 2003, OSM notified the PADEP that it concurred

that the conversion to a CBS, 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. Then, 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 CBS rendered the requirement to comply with 30 CFR 800.11(e) moot. 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, *Pennsylvania Federation of Sportsmen’s Clubs Inc. et al. v. Norton*, No. 1:03–CV–2220. The district court affirmed OSM’s decision in a Memorandum Opinion and Order dated February 1, 2006. *Id.*

However, 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). At issue, relevant to this notice, was whether OSM properly terminated the requirement that Pennsylvania demonstrate that its Surface Mining Conservation and Reclamation Fund was in compliance with 30 CFR 800.11(e).

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 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 Section 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. Pennsylvania believes the submission that is the subject of this rulemaking will comply with the Third Circuit’s mandate, and thus will satisfy the reinstated required

amendment and the October 1, 1991, 732 letter.

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.

## II. Description of the Amendment

By letter dated August 1, 2008 (Administrative Record Number PA 802.43), Pennsylvania sent us 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.

This Pennsylvania program amendment submission provides a 44-page detailed narrative of actions taken by PADEP subsequent to the OSM 1991 required amendment and 732 letter to address bond program deficiencies. Pennsylvania requests that the changes described be included in its approved program. The program amendment under consideration consists of changes to Pennsylvania regulations as well as narrative demonstrations as identified below. Included in parentheses are the pages within the 44-page Pennsylvania narrative that are specific to each amendment:

A. *Regulatory Changes to Establish Legally Enforceable Means of Funding the O&M and Recapitalization Costs for the ABS Legacy Sites* (summarized on pages 36–39; the actual text of these regulatory changes, along with brief summaries of them, are set forth below in Section A of Section Descriptions);

B. *The Conversion Assistance Program* (pages 13–18);

C. *Trust Funds as an Alternative System and Other Equivalent Guarantee: Rationale for Approval* (pages 26–31);

D. *Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites* (pages 31–33); and

E. *Demonstration of Sufficient Funding for Construction of All Necessary Discharge Treatment Facilities at the Primacy ABS Forfeiture Site* (pages 33–34).

Pennsylvania believes this State program amendment includes provisions that will cover the costs of all reclamation for sites bonded under the ABS that have had their bonds forfeited, as well as potential reclamation costs for sites bonded under the ABS and not yet forfeited, but for which conventional, full cost bonds or other sufficient financial assurance mechanisms have not been posted. These sites are the responsibility of the former ABS should they be forfeited prior to the posting of full-cost bonds or other adequate financial mechanisms.

### Section Descriptions

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

Pennsylvania has completed final rulemaking to amend existing provisions of Chapter 86 relating to reclamation fees, definitions, and to the PADEP's use of money for reclamation of forfeited surface coal mine sites. The revised regulatory language and the State's summary of its rationale for these specific changes are identified below:

#### Subchapter A. General Provisions: Revised Language to the Pennsylvania Code:

##### Subchapter A. General Provisions

##### Section 86.1 Definitions

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

ABS Legacy Sites—Mine sites, permitted under the primacy Alternate Bonding System, that have a post-mining pollutional discharge where the operator has defaulted on its obligation to adequately treat the discharge and, either the bond posted for the site is insufficient to cover the cost of treating the discharge, or a trust to cover the costs of treating the discharge was not fully funded and is insufficient to cover the cost of treating the discharge.

\* \* \* \* \*

Operational Area—The maximum portion of the permitted area that the permittee is authorized to disturb at any specific time during the permit term in accordance with the approved mining and reclamation plan, including all of the land affected by mining activities that is not planted, growing and stabilized.

Operation and Maintenance Costs—Expenses associated with the day-to-day operation and maintenance of a conventional or a passive treatment facility, such as chemicals, electricity, labor, water sampling, sludge removal

and disposal, maintenance of access roads, mowing, snow removal, inspecting facilities, repairing and maintaining all aspects of the treatment facility, equipment, and buildings.

\* \* \* \* \*

Primacy Alternate Bonding System—Bonding system utilized by Pennsylvania from July 31, 1982 until August 4, 2001 for surface coal mines, coal refuse reprocessing facilities, and coal preparation plants in which a central pool of money to be used by the Department for reclamation of forfeited sites was funded in part through imposition of a per-acre reclamation fee paid by operators of permitted sites.

\* \* \* \* \*

Recapitalization Costs—The costs associated with replacing discharge treatment facility components or the costs to install treatment systems with lower operation and maintenance costs than the system being replaced.

#### Summary of Regulatory Changes—Section 86.1, Definitions

a. Section 86.1 (Definition of “ABS Legacy Sites”)

The term “ABS legacy sites” has been added to the list of terms in Section 86.1 because it is used throughout the amendments to Sections 86.17(e) and 86.187. The term “ABS legacy sites” represents a certain class of surface coal mine sites which were permitted under the PADEP's ABS. These sites have post-mining pollutional discharge(s), the operator has defaulted on its obligation to adequately treat the discharge(s), and the operator's financial guarantee for reclamation is insufficient to cover the cost of treating the discharge in perpetuity. The PADEP's means for addressing reclamation of the ABS legacy sites, including the cost of treating the discharges in perpetuity, is the subject of the ruling of the Third Circuit Court of Appeals in the Kempthorne case discussed above. The cost of treating the discharges at these sites is being addressed by the amendments to Sections 86.17(e) and 86.187 as part of this final rulemaking.

b. Section 86.1 (Definition of “Operational Area”)

The term “Operational Area” is being added to Section 86.1 in order to help clarify the amendments to Section 86.17(e) concerning the manner in which the reclamation fee is assessed in a CBS.

c. Section 86.1 (Definition of “Operation and Maintenance Costs”)

The term “Operation and Maintenance Costs” is being added to

Section 86.1 in order to help clarify the amendments to Section 86.17(e) and Section 86.187 concerning how certain monies are to be used to treat discharges on a certain class of bond forfeiture sites—the ABS legacy sites.

d. Section 86.1 (Definition of “Primacy Alternate Bonding System”)

The term “Primacy Alternate Bonding System” is being added to Section 86.1 to accurately identify the class of mine sites being addressed by the amendments to Section 86.17(e) and Section 86.187. The ABS legacy sites, which are the focus of the *Kemphorne* case, are a class of coal mine sites that were permitted under the “primacy alternate bonding system” and have certain additional characteristics described in the definition for “ABS legacy sites.” PADEP is proposing this definition because it believes that it is necessary to distinguish sites permitted under the ABS from those converted to, or originally permitted under, the CBS in order to accurately identify the ABS legacy sites. Pennsylvania also proposes this definition to distinguish further between the “primacy” ABS and the ABS that existed for surface coal mine sites prior to Pennsylvania obtaining primacy in July 1982, because the pre-primacy ABS sites are not subject to the requirements of 30 CFR 800.11(e).

e. Section 86.1 (Definition of “Recapitalization Costs”)

The term “Recapitalization Costs” is being added to the list of terms in Section 86.1. Recapitalization costs are expressly included as part of the operation and maintenance costs for treating discharges at ABS legacy sites in changes being made to Section 86.17(e) and Section 86.187. When calculating the costs to treat post-mining pollutional discharges at mine sites in perpetuity, the PADEP proposes to include an amount to cover the costs to replace discharge treatment facility components over time (as such components simply wear out or otherwise need to be replaced). This term is needed to assure that these specific equipment-replacement costs are identified as part of the ongoing costs for treating post-mining discharges at the ABS legacy sites.

**Subchapter B. Permits: Revised Language to the Pennsylvania Code:**

**Subchapter B. Permits**

General Requirements for Permits and Permit Applications

Section 86.17 Permit and Reclamation Fees

\* \* \* \* \*

(e) In addition to the bond established under Sections 86.143, 86.145, 86.149 and 86.150 (relating to Requirement to File a Bond; Department responsibilities; determination of bond amount; and minimum amount), and subject to the exception provided for in Section 86.283(c) (relating to procedures), the applicant for a permit or a permit amendment shall pay a per-acre reclamation fee for surface mining activities except for the surface effects of underground mining. This reclamation fee will be assessed for each acre of the approved operational area and shall be paid by the applicant prior to the Department’s issuance of a surface mining permit. If a permit amendment results in an increase in the approved operational area, the reclamation fee will be assessed on the increased acreage and shall be paid by the operator prior to the Department’s issuance of the permit amendment.

(1) The reclamation fee will be deposited into a separate subaccount within the Surface Mining Conservation and Reclamation Fund called the Reclamation Fee O&M Trust Account, as a supplement to bonds forfeited from ABS Legacy Sites. The reclamation fee will be used by the Department to pay the construction costs and operation and maintenance costs associated with treating post-mining pollutional discharges at ABS Legacy Sites, and such money may not be used for any other purpose. The interest earned on the monies in the Reclamation Fee O&M Trust Account will be deposited into the Reclamation Fee O&M Trust Account and will be used by the Department to pay the construction costs and operation and maintenance costs associated with treating post-mining pollutional discharges at ABS Legacy Sites. Such interest may not be used for any other purpose. For purposes of this section, operation and maintenance costs include recapitalization costs.

(2) After the end of each fiscal year, the Department will prepare a fiscal-year report containing a financial analysis of the revenue and expenditures of the Reclamation Fee O&M Trust Account for the past fiscal year and the projected revenues and expenditures or the current fiscal year. Beginning with the report for fiscal year 2008–09, the report will include the Department’s calculation of the required amount of the reclamation fee, and the proposed adjustment of the reclamation fee amount. The fiscal-year report will be submitted to the members of the Mining and Reclamation Advisory Board for their review and comment and will be published on the Department’s Web site. Notice of the report’s

availability will be published in the *Pennsylvania Bulletin*. The Department will review the fiscal-year report at a meeting of the Mining and Reclamation Advisory Board.

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

(i) The reclamation fee will be used until the ABS Legacy Sites Trust Account is actuarially sound unless an alternative permanent funding source in lieu of the reclamation fee is used to fund the Reclamation Fee O&M Trust Account.

(ii) Until the ABS Legacy Sites Account is actuarially sound, the alternative permanent funding source must provide sufficient revenues to maintain a balance in the Reclamation Fee O&M Trust Account of at least \$3,000,000 and to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS Legacy Sites. Funds that are not needed for annual operation and maintenance or to maintain the \$3,000,000 balance may be deposited into the ABS Legacy Sites Trust Account.

(4) Commencing January 1, 2010 and continuing until the ABS Legacy Sites Trust Account is actuarially sound, the amount of the reclamation fee will be annually calculated and, if necessary, will be adjusted in multiples of \$50 based on the following factors:

(i) The current balance in the Reclamation Fee O&M Trust Account;

(ii) The total amount of revenue into the Trust Account during the previous fiscal year from collection of the reclamation fee, the interest accrued by the Reclamation Fee O&M Trust Account, the deposits of civil penalties into the Trust Account and deposits from other sources of monies into the Trust Account;

(iii) The amount of ongoing operation and maintenance costs incurred by the Reclamation Fee O&M Trust Account during previous fiscal years;

(iv) The projected number of acres subject to the reclamation fee during the current fiscal year;

(v) The projected amount of revenue into the Reclamation Fee O&M Trust Account during the current fiscal year from projected interest accrued by the Trust Account, projected deposits of civil penalties, and projected deposits of monies from other sources; and

(vi) The projected expenditures of the Reclamation Fee O&M Trust Account for operation and maintenance costs for the current fiscal year.

(5) Following the Department's review of its calculation of the required reclamation fee amount at a public meeting of the Mining and Reclamation Advisory Board pursuant to Subsection (2), the Department will publish the adjustment in the required amount of the reclamation fee in the *Pennsylvania Bulletin*. Adjustments to the amount of the reclamation fee will become effective upon publication in the *Pennsylvania Bulletin*. The Department's determination of the required amount of the reclamation fee pursuant to Subsections (3) and (4) will be a final action of the Department appealable to the Environmental Hearing Board.

(6) The Department will cease to assess and collect the reclamation fee when the ABS Legacy Sites Trust Account established pursuant to Section 86.187(a) (relating to use of money) becomes actuarially sound. The ABS Legacy Sites Trust Account will become actuarially sound when the following conditions are met:

(i) Financial guarantees sufficient to cover reclamation costs, including the costs to treat each discharge in perpetuity, have been approved by the Department for all mine sites permitted under the Primacy Alternate Bonding System;

(ii) Construction of the necessary discharge treatment facilities has been completed at the ABS Legacy Sites; and

(iii) The ABS Legacy Sites Trust Account, combined with the Reclamation Fee O&M Trust Account, contains funds which generate interest at a rate and in an amount sufficient to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS Legacy Sites.

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

a. Section 86.17(e) Reclamation Fees

This proposal 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 remaining 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 Surface Mining Conservation and Reclamation (SMCR) Fund called the Reclamation Fee O&M (operation and maintenance) Trust Account, and requires the PADEP to deposit all reclamation fees it collects into the Reclamation Fee O&M Trust Account. This subsection also requires that the PADEP use the reclamation fees only for the purpose of paying the costs associated with treating post-mining pollutional discharges at ABS legacy sites. In addition, this paragraph requires that all interest earned on the monies in the Reclamation Fee O&M Trust 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. The name of this account reflects that it is a trust established by this rulemaking and that the funds contained in the account are held in trust by the Commonwealth for the benefit of the people to be used by the Commonwealth to treat post mining pollutional discharges at ABS legacy sites. The PADEP decided to make the reclamation fee an adjustable source of revenue that would be used to help cover the costs of treating discharges at the ABS legacy sites.

c. Section 86.17(e)(2) (Preparation of Fiscal-Year Report on Reclamation Fee O&M Trust 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 Reclamation Fee O&M Trust 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 Reclamation Fee O&M Trust 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 Section 800.11(e) as applied to the ABS legacy sites, the Court ruling in *Kemphorne*, and the required program amendment at 30 CFR Section 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 Sections 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 Sections 86.17(e)(3)(i) and (ii). Section 86.17(e)(3) provides that the PADEP will 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 Sites Trust Account becomes actuarially sound. (See the discussion of the ABS Legacy Sites Trust Account in subsection 4.g., below.) Section 86.17(e)(3)(i) reiterates the commitment for annual adjustment of the reclamation fee until the ABS Legacy Sites Trust Account is actuarially sound, unless a permanent alternative funding source in place of the reclamation fee is used to fund the Reclamation Fee O&M Trust 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 Reclamation Fee O&M Trust 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 expects that the adjusted amount of the reclamation fee will 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 Reclamation Fee O&M Trust 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 Reclamation Fee O&M Trust 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 upcoming 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.

Sections 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 Reclamation Fee O&M Trust Account to prevent pollution and assure that the PADEP has sufficient money at any 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 Section 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 Reclamation Fee O&M Trust 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 Sites Trust Account, established pursuant to Section 86.187(a)(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 \$1,200,000. However, the ultimate annual amount for operation and maintenance costs vary considerably 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 ascertain 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 sites 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.

#### **Subchapter F. Bonding and Insurance Requirements: Revised Language to the Pennsylvania Code:**

##### **Subchapter F. Bonding and Insurance Requirements**

###### Bond Forfeiture

###### Section 86.187 Use of Money

(a) Monies received from fees, fines, penalties, bond forfeitures and other monies received under authority of the Surface Mining Conservation and Reclamation Act (52 P.S. Sections 1396.1–1396.31), and interest earned on the monies, will be deposited in the Fund.

(1) Monies received from the reclamation fees required by Section 86.17[(b)](E) (relating to permit and reclamation fees), and the interest accrued on these monies, will be deposited into a separate subaccount within the fund called the Reclamation Fee O&M Trust Account.

(i) The Department will deposit into the Reclamation Fee O&M Trust Account, up to \$500,000 in a fiscal year, the monies collected from civil penalties assessed by the Department pursuant to the Surface Mining Conservation and Reclamation Act (52 P.S. Sections 1396.1–1396.31) less the percentage of those penalty monies due the Environmental Education Fund pursuant to 35 P.S. Section 7528. If the amount of penalty monies collected exceeds \$500,000 during a fiscal year, the Department may deposit the amount collected in excess of \$500,000 into the fund and use the excess amount in accordance with Subsection (3).

(ii) The Department may deposit into the Reclamation Fee O&M Trust Account a portion, to be determined at the Department's discretion, of the interest earned on other monies in the fund.

(iii) The Department may deposit other monies into the Reclamation Fee O&M Trust Account, including appropriations, donations, or the fees collected for sum-certain financial guarantees needed to facilitate full-cost bonding in accordance with applicable law.

(iv) The monies deposited in the Reclamation Fee O&M Trust Account will be used to pay construction costs and operation and maintenance costs associated with treating post-mining

pollutional discharges at ABS Legacy Sites, and such monies may not be used for any other purpose. For purposes of this section, operation and maintenance includes recapitalization costs. Monies in the Reclamation Fee O&M Trust Account will be held by the Commonwealth in trust for the benefit of all the people to protect their right to pure water and the preservation of the values of the environment. The State Treasurer will manage the investment of the funds in the Reclamation Fee O&M Trust Account with the advice of the Department.

(2) Monies received from the forfeiture of bonds will be used only to reclaim land and restore water supplies affected by the surface mining operations upon which liability was charged on the bond, except as otherwise provided in this section and in Section 86.190 (relating to sites where reclamation is unreasonable, unnecessary or impossible; excess funds). Interest accrued on these monies will be used only to reclaim land and restore water supplies affected by surface mining operations for which the Department has forfeited bonds, as a supplement to bond forfeiture funds.

(i) Monies received from bonds forfeited on ABS Legacy Sites, and the interest accrued on such monies, will be deposited into a separate subaccount in the Fund called the ABS Legacy Sites Trust Account, the Department may, upon review and recommendation of the Mining and Reclamation Advisory Board, transfer excess monies from the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account. The Department may deposit other monies into the ABS Legacy Sites Trust Account, including appropriations, donations, or interest earned on other monies in the fund.

(ii) Monies in the ABS Legacy Sites Trust Account, including the interest accrued by the Trust Account, will be used to pay the operation and maintenance costs associated with treating post-mining pollutional discharges at ABS Legacy Sites, and such monies may not be used for any other purpose. Monies in the ABS Legacy Sites Trust Account will be held by the Commonwealth in trust for the benefit of all the people to protect their right to pure water and the preservation of the values of the environment. The State Treasurer will manage the investment of the funds in the ABS Legacy Sites Trust Account with the advice of the Department.

(iii) The Department may not make disbursements from the ABS Legacy Sites Trust Account until that Trust Account becomes actuarially sound.

The ABS Legacy Sites Trust Account will become actuarially sound when the following conditions are met:

(A) Financial guarantees sufficient to cover reclamation costs, including the costs to treat each discharge in perpetuity, have been approved by the Department for all mine sites permitted under the Primacy Alternate Bonding System;

(B) Construction of the necessary discharge treatment facilities has been completed at the ABS Legacy Sites; and

(C) The ABS Legacy Sites Trust Account, combined with the Reclamation Fee O&M Trust Account, contains funds which generate interest at a rate and in an amount sufficient to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS Legacy Sites.

(iv) When the ABS Legacy Sites Trust Account becomes actuarially sound the Department will transfer the monies in the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account and the Reclamation Fee O&M Trust Account will terminate. At that time, the reclamation fee or alternative permanent funding source, whichever is in place, will cease and the deposit of civil penalty monies pursuant to Section 86.187(a)(1)(i) will also cease.

*Summary of Regulatory Changes—  
Section 86.187, Use of Money*

a. Section 86.187(a)(1) (Deposit of Reclamation Fee Into Reclamation Fee O&M Trust Account)

This provision, in conjunction with Section 86.17(e)(1), has been revised to establish a separate subaccount within the SMCR Fund called the Reclamation Fee O&M Trust Account, and to require that the reclamation fees collected by the PADEP pursuant to Section 86.17(e) must be deposited into the Reclamation Fee O&M Trust Account. The provision also directs that the interest accrued on collected reclamation fees must be deposited into the Reclamation Fee O&M Trust 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 Pennsylvania Surface Mining Conservation and Reclamation Act (PASMCR), 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 Section 800.11(e).

b. Section 86.187(a)(1)(i) (Deposit of Civil Penalties Into Reclamation Fee O&M Trust Account)

Under Section 18(a) of PASMCR, civil penalties collected pursuant to that statute 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 PASMCR 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 Reclamation Fee O&M Trust Account the monies collected from civil penalties assessed pursuant to PASMCR, 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 *Kemphorne*, supra, it must identify and dedicate specified sources of revenue that combined 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 PASMCR—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).

c. Section 86.187(a)(1)(ii) (Deposit of Interest Earned on Other Monies in the SMCR Fund Into the Reclamation Fee O&M Trust 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 Reclamation Fee O&M Trust 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 monies earn interest that may be used by the PADEP for the purposes specified by Section 18(a) of PASMCR. 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 the interest earned on other monies in the SMCR Fund which will be deposited into the Reclamation Fee O&M Trust Account during any given fiscal year.

d. Section 86.187(a)(1)(iii) (Deposit of Other Monies Into the Reclamation Fee O&M Trust 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 Reclamation Fee O&M Trust 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 Reclamation Fee O&M Trust 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 Reclamation Fee O&M Trust Account)

Section 86.187(a)(1)(iv) specifies that all monies deposited into the Reclamation Fee O&M Trust 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 monies held in the Reclamation Fee O&M Trust 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 Section 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 monies 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 Sections 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 Sites Trust Account. The monies received from the bonds forfeited on ABS legacy sites, and all interest accrued on such monies, must be deposited into the ABS Legacy Sites Trust 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 Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust 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 *Kemphorne* 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 Sites Trust Account. Section 86.187(a)(2)(iii), discussed below, prohibits the PADEP from making any disbursements from the ABS Legacy Sites Trust Account until the account becomes actuarially sound. The Reclamation Fee O&M Trust 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 Sites Trust 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 Reclamation Fee O&M Trust Account sufficient to cover the annual operation and maintenance costs for treating discharges at the ABS legacy sites. Pennsylvania indicates that the ABS Legacy Sites Trust 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 Sites Trust Account)

This provision requires that all monies deposited into the ABS Legacy Sites Trust 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 Sites Trust Account. This regulation states that all monies deposited in the ABS Legacy Sites Trust 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 Sites Trust Account)

Section 86.187(a)(2)(iii) prohibits the PADEP from making any disbursements from the ABS Legacy Sites Trust Account until the account becomes actuarially sound. The conditions that must be met for the ABS Legacy Sites Trust 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 ascertain 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 Sites Trust 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 Sites Trust 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 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 Reclamation Fee O&M Trust Account.

j. Section 86.187(a)(2)(iv) (Transfer of Remaining Funds in Reclamation Fee O&M Trust Account to ABS Legacy Sites Trust Account)

Section 86.187(a)(2)(iv) provides for termination of the Reclamation Fee O&M Trust Account when the ABS Legacy Sites Trust Account becomes actuarially sound. This provision authorizes the PADEP to transfer the remaining funds in the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account when the latter account becomes actuarially sound. At that point, the Reclamation Fee O&M Trust 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 Reclamation Fee O&M Trust Account pursuant to Section 86.186(a)(1)(i) will also cease.

The remaining portions of this State program amendment, described in Sections B through E, below, do not consist of changes to Pennsylvania regulations. Rather, they are financial mechanisms PADEP has established that will, in the PADEP's view, 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).

#### *B. ABS Program Amendment—The Conversion Assistance Program*

Pennsylvania indicated that when implementing the revised CBS and converting the ABS permits to conventional bonding, it had serious concerns regarding the financial ability of existing permittees to post significantly increased bond amounts. To address these risks, the PADEP developed and implemented a conversion assistance program as part of the conversion of ABS active permits to a CBS. Using its authority under Section 4(d.2) of the PASMCRRA, 52 P.S. Section 1396.4(d.2), Pennsylvania developed the conversion assistance program as an alternative financial assurance

mechanism that, it contends, meets the purposes and objectives of the bonding program. In pertinent part, Section 4(d.2) states that “[t]he department [PADEP] may establish alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program.”

The Conversion Assistance program was developed in which the PADEP would essentially operate as a surety company. Funded with an initial general-revenue appropriation of \$7,000,000, and supplemented by annual premiums, the PADEP 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. The Land Reclamation Financial Guarantees (LRFG) were issued only to ABS permittees that were converting to a conventional 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 \$7,000,000 principal would cover up to \$70,000,000 in bond exposure. The PADEP determined that the \$7,000,000, 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.

In June 2001, the Pennsylvania legislature appropriated the \$7,000,000 for the conversion assistance program. See Act of June 22, 2001 (Pub. L. 979, No. 6A), known as the “General Appropriation Act of 2001,” at Section 213 (appropriating \$7,000,000 “for the conservation purpose of providing sum-certain financial guarantees needed to facilitate the implementation of full-cost bonding for a fee and, in the event of forfeiture, to finance reclamation of the forfeited surface mining site in an amount not to exceed the sum-certain guarantee”). The general revenue appropriation of \$7,000,000 was for one fiscal year, which necessitated the issuance of all the LRFGs by mid-2002. Issuance of new LRFGs ended after mid-2002, although some LRFGs have been reassigned to a new operator, generally as part of a permit transfer.

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

PASMCRRA is submitted as part of this program amendment as the authority for employing LRFGs under the Conversion Assistance Program.

The PADEP stated, however, that by the close of the conversion process, there were six permittees actively mining large anthracite operations with outstanding bonding obligations that had to be addressed through Consent Orders and Agreements (CO & A's) establishing reclamation and payment schedules. These sites were either not provided with conversion assistance guarantees, or were provided with guarantees that fell short of underwriting the full estimated cost of land reclamation. Currently, only two of these permittees remain underbonded, and the PADEP asserts that it has made provisions for fully funding the outstanding reclamation obligations for these two remaining cases through reclamation and payment schedules.

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

Pennsylvania is also submitting the provision in Section 4(d.2) of PASMCRRA 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 post-mining pollutional discharges in perpetuity. Pennsylvania is requesting approval of site-specific trusts as an alternative financial assurance mechanism consistent with Section 509(c) of SMCRA and other applicable provisions of SMCRA. Pennsylvania proposes 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 and demonstrations on 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 discussions on Section 4(d.2) of PASMCRRA authority to establish alternative financial assurance mechanisms, the use of the Consent Order and Agreement and a companion Trust Agreement, factors currently used to determine the amount of a site-specific trust fund, and the use of AMD-Treat for cost estimating. 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 (O&M) 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.

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

An analysis by the PADEP of the existing land reclamation 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 (Pub. L. 979, No. 6A), known as the "General Appropriation Act of 2001," at Section 213. PADEP states that it has used the ABS Closeout Funds to complete land reclamation for some of the ABS forfeiture sites. 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 \$5.5 Million legislative appropriation, it has sufficient other funds on hand to cover all land reclamation costs on ABS forfeiture sites. (See the ABS Bond Forfeiture Sites Land Reclamation Status Report, July 2008, p. 15, included as part of Attachment 8 to this State program amendment.) There is also money available in several other accounts in the SMCR Fund. Where funds are not restricted by law 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 this State program amendment.) Thus, the PADEP believes it has demonstrated that it has available

sufficient money to complete the outstanding land reclamation for the ABS legacy sites at any time, as required by the Third Circuit's decision interpreting 30 CFR 800.11(e)(1).

#### *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 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 states 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. Pennsylvania has committed to using the funds in the released bond account to address the reclamation liability for the ABS legacy sites. In addition, money in the PADEP's SMCR Fund, General Operations Account, 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 this State program amendment.) Thus, the PADEP believes it has demonstrated 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).

### **III. Public Comment Procedures**

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the submission satisfies the applicable program approval criteria of 30 CFR 732.15. We

are also seeking comments as to whether the submission satisfies the required amendment at 30 CFR 938.16(h), and the October 1991, 732 letter. If we approve the amendment, it will become part of the Pennsylvania program.

#### *Electronic or Written Comments*

If you submit written comments, they should be specific, confined to issues pertinent to the submission, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent Tribal or Federal laws or regulations, technical literature, or other relevant publications. We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

#### *Public Availability of Comments*

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. We will not consider anonymous comments.

#### *Public Hearing*

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., *e.s.t.* on January 29, 2009. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at a public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and

wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

#### *Public Meeting*

If there is only limited interest in participating in a public hearing, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the submission, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

#### **IV. 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 regulations.

##### *Executive Order 12866—Regulatory Planning and Review*

This rule is exempted from review by the Office of Management and Budget (OMB) 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, to the extent allowable by law, 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 such 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. 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 Governments*

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 Federal regulations 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 a major Federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

##### *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 that is the subject of this rule is based on 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 the 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 governmental 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 state 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 on the analysis performed under various laws and executive orders for the counterpart Federal regulations.

##### **List of Subjects in 30 CFR Part 917**

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 18, 2008.

**Michael K. Robinson,**

*Acting Appalachian Regional Director.*

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