

**Pennsylvania Regulatory Program Amendment  
Regarding Pennsylvania's Defunct Alternative Bonding System  
as Required by 30 C.F.R. § 938.16(h) and the Part 732 Notices**

**Submitted by the Department of Environmental Protection, Commonwealth  
of Pennsylvania to the Office of Surface Mining Reclamation and  
Enforcement for Review and Approval in Accordance with 30 CFR § 732.17**

**(ABS Program Amendment)**

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1. Part 732 Notice, dated October 1, 1991;  
Part 732 Notice, dated July 8, 2008
2. Chronology of Steps Taken by Pennsylvania and the federal Office of Surface Mining Reclamation and Enforcement to Address the 1991 Part 732 Notice and § 938.16(h)
3. Technical Guidance Document # 563-2504-001, *Conventional Bonding for Land Reclamation—Coal*
4. Final Report on Conversion of ABS Permittees to Full-Cost Bonding, dated October 23, 2002

5. 52 P.S. § 1396.4(d.2);  
Act of June 22, 2001 (P.L. 979, No. 6A), § 213;  
“Procedures for Implementing the Conversion Assistance Program,” dated December 3, 2001;  
Application and Agreement for Land Reclamation Financial Guarantee;  
List of Land Reclamation Financial Guarantees Issued by the Department, as of 7/1/08
6. Report on Alternate Bonding Sites Transitioned to Conventional Bonding Through Consent Order and Agreements
7. 52 P.S. § 1396.4(d.2);  
Post-Mining Treatment Trust Consent Order and Agreement;  
Post-Mining Discharge Treatment Trust Agreement;  
Trust Fund/Bond Agreement Summary Report
8. Report on Primacy ABS Bond Forfeiture Land Reclamation Obligation, as of July 2008;  
Tracking Spreadsheet listing primacy ABS forfeiture sites with outstanding land reclamation
9. Report on Primacy ABS Bond Forfeiture Permits and Discharges, as of July 2008;  
Tracking Spreadsheet with list of ABS forfeiture discharge sites;  
AMDTreat data for individual ABS bond forfeiture discharge sites (on CD-Rom only)
10. Financial Analysis of SMCR Fund Accounts, as of July 2008;  
ABS Legacy Statistical Summary Spreadsheet;  
Recapitalization Cost Data Spreadsheet
11. Report on Evaluation of Potential ABS Discharge Sites;  
Spreadsheet Compiling List of Potential ABS Discharge Sites, Bond Amount, Estimated O&M Cost, and Number of Individual Discharges for Potential ABS Discharge Sites
12. Final Rulemaking Package for Amendments to 25 Pa. Code §§ 86.1, 86.17(e) and 86.187  
Related to Funding Operation and Maintenance Costs for ABS Legacy Sites

## I. Introduction

On July 31, 1982, the Secretary of the Interior conditionally approved Pennsylvania's regulatory program granting Pennsylvania primary jurisdiction over the regulation of surface mining and reclamation operations in the Commonwealth. *See* 47 FR 33,050 (July 30, 1982). Pennsylvania's approved program included operation of an alternative bonding system (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 to complete reclamation. In 1991, the federal Office of Surface Mining, Reclamation and Enforcement (OSM) determined the ABS was financially incapable of completing all land reclamation at forfeited sites covered by the ABS, and that the ABS lacked sufficient funds to treat post-mining pollutional discharges at forfeited ABS sites.

Consequently, in May 1991 OSM codified a required regulatory program amendment, 30 CFR § 938.16(h), directing Pennsylvania to submit information by November 1991 which demonstrated that Pennsylvania's ABS was solvent. Specifically, OSM 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 C.F.R. § 800.11(e)." *See* 56 FR 24,687 (May 31, 1991). Shortly thereafter, in October 1991, OSM notified Pennsylvania, pursuant to 30 CFR § 732.17, 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. (FSMCRA), Pennsylvania had to address program deficiencies related to administration of the ABS (the 1991 Part 732 Notice).<sup>1</sup>

Put simply, these two OSM actions identified a deficiency in the ABS concerning the system's ability to generate sufficient money to complete the reclamation of all primacy ABS bond forfeiture sites, including the costs to treat pollutional discharges on these sites. Since 1991, Pennsylvania has undertaken many actions and made many changes to its bonding program in an effort to address the deficiencies identified by, and to satisfy the requirements of, both the 1991 Part 732 Notice and 30 CFR § 938.16(h).<sup>2</sup> Among these changes was the termination of the ABS. 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 conventional bonding system.

Unfortunately, neither FSMCRA nor OSM's regulations specify how the unfunded reclamation legacy of a defunct alternative bonding system should be addressed. Following termination of the ABS, Pennsylvania and OSM developed a programmatic solution for addressing all the discharges on the forfeited ABS sites which was memorialized in a document titled *Pennsylvania Bonding System Program Enhancements*.<sup>3</sup> In June 2003, OSM responded by

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<sup>1</sup> A copy of the notice issued by OSM to Pennsylvania on October 1, 1991 pursuant to 30 CFR § 732.17 regarding deficiencies in Pennsylvania's ABS (the 1991 Part 732 Notice) is included as Attachment 1.

<sup>2</sup> Attachment 2 contains a summary of some of the actions taken by Pennsylvania and OSM during the 1990s as they addressed the 1991 Part 732 Notice and the conditions set forth in 30 CFR § 938.16(h).

<sup>3</sup> This document is not attached, but is incorporated into this submission by reference.

terminating the bonding program deficiencies related to the ABS. A lawsuit was filed 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 intervened as a defendant in this litigation. *See Pennsylvania Federation of Sportsmen's Clubs, Inc. et al. v. Norton, et al.*, 413 F. Supp. 2d 358 (M.D. Pa. 2006). In 2006, the U.S. District Court granted a motion requesting dismissal of the case. Plaintiffs then appealed the District Court's decision to the U.S. Court of Appeals for the Third Circuit.

Plaintiffs argued that it was a violation of § 509 of FSMCRA, 30 U.S.C. § 1259, and implementing regulations—specifically 30 CFR § 800.11(e)(1)—for Pennsylvania to terminate its ABS. They also argued that, even if the ABS was lawfully terminated in 2001, the primacy ABS forfeited sites plus any additional sites whose reclamation costs are not fully covered by conventional bonds remain subject to the requirements of 30 CFR § 800.11(e)(1). On August 7, 2007, the U.S. Court of Appeals for the Third Circuit issued an opinion in which the court reversed, in part, the district court and remanded the case for further proceedings in accordance with the appellate decision. *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337 (3d Cir. 2007).

This recent ruling by the Third Circuit reinstated § 938.16(h) and the 1991 Part 732 Notice, and helped to clarify the demonstration that must be made by Pennsylvania in order to address the legacy of the defunct ABS and satisfy § 938.16(h). The Third Circuit first determined the ABS was lawfully terminated by Pennsylvania. The Court then 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 § 800.11(e)(1). *See Kempthorne*, 497 F.3d at 353 (section 800.11(e) “requires that Pennsylvania fulfill the obligations it voluntarily assumed to ensure that these sites are fully reclaimed”). 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. *See* 30 CFR § 800.11(e)(1) (a State's ABS “must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time”). Finally, the Court ruled the *Pennsylvania Bonding System Program Enhancements* document did not meet federal requirements because it was not a formal program amendment and was not legally enforceable.

Following the ruling in *Kempthorne*, Pennsylvania and OSM met to discuss the contents of a formal program amendment submission that would satisfy the reinstated 1991 Part 732 Notice and § 938.16(h), in light of the guidance provided by the appellate court. Pennsylvania also worked on revisions to a set of previously proposed regulations to establish an enforceable funding mechanism for treating discharges at forfeited primacy ABS sites. On July 8, 2008, OSM issued a final rule in which it modified 30 CFR § 938.16(h) to make it consistent with the Court's opinion. *See* 73 FR 38,918 (July 8, 2008). OSM modified 30 CFR § 938.16(h) to read: “By September 8, 2008, Pennsylvania must either submit information sufficient to demonstrate that the revenues to the Surface Mining Conservation and Reclamation Fund (the Fund) are adequate to fulfill outstanding reclamation obligations at forfeited sites for which the Fund provides partial bond coverage under 30 CFR 800.11(e), or amend its program to otherwise meet

those outstanding financial obligations at these forfeited sites.” 73 FR at 38,919.

On July 8, 2008, OSM also revised and reissued the 1991 Part 732 Notice to make it consistent with the Court’s opinion in *Kemphorne*.<sup>4</sup> See 30 CFR §§ 732(c), (d), and (e). The reissued Part 732 Notice provided Pennsylvania 60 days from the date of the notice to “either submit information sufficient to demonstrate that revenues to the Surface Mining Conservation and Reclamation Fund (Fund) are adequate to fulfill outstanding reclamation obligations at forfeited sites for which the Fund provides partial bond coverage under 30 CFR 800.11(e), a proposed amendment to its program to otherwise meet those outstanding financial obligations at these forfeited sites, or a description of amendments to be proposed together with a timetable for adoption and implementation consistent with established administrative procedures in Pennsylvania.” See Attachment 1.

Pennsylvania formally submits this comprehensive response to the Part 732 Notices and 30 CFR § 938.16(h).<sup>5</sup> This submission is made in accordance with 30 CFR § 732.17(f) and describes the significant program changes made by Pennsylvania to address the legacy of the former ABS, as required by the Part 732 Notices and 30 CFR § 938.16(h). The changes to the program can be grouped into three categories: (1) changes made to Pennsylvania’s bonding program for active surface mining operations; (2) development of site-specific treatment trust funds as an alternative system/other equivalent guarantee used to cover the long-term costs of treating post-mining pollutional discharges; and, (3) changes, including financial demonstrations, made to the mining program to address reclamation of the ABS legacy sites. Pennsylvania is seeking approval of this entire submission in accordance with 30 CFR § 732.17(h)(7).

#### A. *Summary of Changes to the Active Bonding Program*

Pennsylvania has made significant amendments to its active bonding program. These changes halted the accumulation of further reclamation costs resulting from the continued operation of the ABS.

After years of attempting to fix the bonding program, Pennsylvania terminated the ABS in 2001, implemented a conventional bonding system for the types of permits that were formerly covered by the ABS, and converted the active ABS permits to the conventional bonding system over the course of 2001-02. Termination of the ABS meant that, going forward, all permit applicants for surface coal mines, coal refuse reprocessing operations and coal preparation plants would post a full-cost conventional bond prior to obtaining a permit.

Implementation of conventional bonding for all of the existing ABS actively-mined permitted sites involved calculating and obtaining full-cost conventional bonds to cover land reclamation from each of these permittees. Pennsylvania already had conventional bonding regulations in place; consequently, regulatory changes were not needed. The change from the

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<sup>4</sup> A copy of the Part 732 Notice, as revised and reissued on July 8, 2008, is included in Attachment 1.

<sup>5</sup> This submission is intended to comprehensively respond to 30 CFR § 938.16(h) as originally issued in 1991 and as amended in 2008. Similarly, this submission is intended to remedy the deficiencies identified in the 1991 Part 732 Notice and to fully respond to the requirements stated in the revised Part 732 Notice issued in 2008.

defunct ABS to full cost bonding necessitated development of a detailed technical guidance document that set forth the mechanics of the conventional bonding process. Pennsylvania continues to use this guidance policy for its conventional bonding program, and the policy is being submitted for informational purposes as part of this response.

The conversion process included several significant changes to the active bonding program. Section 4(d.2) of the Pennsylvania Surface Mining Conservation and Reclamation Act (PASMCR), 52 P.S. § 1396.4(d.2), authorizes Pennsylvania's Department of Environmental Protection (Department) to establish alternative financial assurance mechanisms that meet the purposes and objectives of the bonding program. In 2001-02, the Department developed and implemented, under the authority of § 4(d.2) of PASMCR, a conversion assistance program in which Pennsylvania effectively operates as a surety and provides part of the bonding for sites converted to conventional bonding, thus easing the transition for active operators to conventional bonding and thereby preventing bankruptcies and/or abandonment of sites. A sum of \$7 million was appropriated by the General Assembly to underwrite the conversion assistance program, and the Department developed necessary forms and procedures for issuing an alternative financial assurance mechanism called a "Land Reclamation Financial Guarantee" that operates as a financial guarantee equivalent to a performance bond. Pennsylvania continues to operate the conversion assistance program. Information pertaining to this program, including relevant statutory provisions, is being submitted as part of this response, along with an analysis of the consistency of this program and its financial assurance mechanism with FSMCR and applicable federal regulations.

The conversion process also resulted in the Department's exercise of its existing enforcement authority with respect to six active primacy ABS permittees to address bonding shortfalls. The transition to full-cost conventional bonding for these six permittees with large open pit mining operations was effected through a Consent Order and Agreement entered into for each case. Two of the six still have an outstanding bonding shortfall. Information on the conversion process for these six cases is being submitted as part of this response.

#### *B. Site-Specific Treatment Trust Funds*

Beginning in the early 1990s Pennsylvania developed and implemented treatment trust funds as an alternative financial assurance mechanism used to guarantee the treatment of post-mining pollutional discharges in perpetuity. Section 4(d.2) of PASMCR, 52 P.S. § 1396.4(d.2), authorizes the Department to establish alternative financial assurance mechanisms that meet the purposes and objectives of the conventional bonding program. One alternative financial assurance mechanism established by the Department is a site-specific trust fund. Those 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 the cost of treatment 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. Information pertaining to this program, including relevant statutory provisions and implementing documents, is being submitted as part of this response, along with an analysis of the consistency of this alternative financial assurance mechanism with FSMCR and applicable federal regulations.

C. *Summary of Changes Made to Address the ABS Legacy Sites*

The ABS legacy sites consist of the primacy ABS bond forfeiture sites with outstanding reclamation obligations—which reclamation primarily includes discharge treatment. The ABS permits with a discharge where a treatment trust has been established by the operator but the trust is only partially funded to date (the partially-funded trust sites), are a *potential* cost. Some of these partially-funded trust sites may ultimately forfeit and thereby become part of the legacy which must be reclaimed by Pennsylvania; consequently, Pennsylvania has taken these sites into account in resolving the deficiencies of the defunct ABS. Similarly, the ABS permits with a discharge which the operator is currently treating, but where no treatment trust has yet been established and the existing bond is inadequate to cover perpetual treatment costs, remain a potential cost, and, upon forfeiture could become part of the ABS legacy. Again, the potential impact of these sites has been assessed by Pennsylvania when developing its funding mechanisms for completing reclamation of the ABS legacy sites.

Pennsylvania has taken a variety of actions, and made numerous significant changes to its mining program, to address the reclamation of the ABS legacy sites. These actions and changes will assure that Pennsylvania has available sufficient money to complete reclamation for the ABS legacy sites at any time, thereby meeting the requirements of 30 C.F.R. § 800.11(e).

Initially, an analysis of the scope of outstanding reclamation costs for the ABS legacy sites had to be undertaken. The Department carefully examined and determined the costs associated with all of the ABS legacy sites. The reclamation cost of the ABS legacy sites was divided into two categories: outstanding land reclamation; and the abatement or perpetual treatment of post-mining polluttional discharges. In 2000, a comprehensive analysis of the existing primacy ABS deficit for land reclamation was completed by the Department. Land reclamation has been completed at some of these sites, and in 2007-08 an updated detailed analysis of the costs to complete all outstanding land reclamation at primacy ABS forfeiture sites was performed. The analysis and supporting data concerning outstanding land reclamation for primacy ABS bond forfeiture sites are being submitted with this response.

The Department determined the total cost of completing the land reclamation of all primacy ABS bond forfeiture sites, and identified the funds needed to cover the costs of all land reclamation. Some of these funds are restricted by law only for use in reclaiming primacy ABS forfeiture sites. For example, the Pennsylvania General Assembly appropriated \$5.5 million in 2001 to cover the land reclamation deficit for primacy ABS forfeiture sites and that money may only be used for this purpose. In addition, pursuant to PASMCRRA forfeited bond money must first be used to cover the costs of reclamation at the site for which the bond was forfeited. The Department currently has available the money needed to cover the costs to complete the outstanding land reclamation for all primacy ABS bond forfeiture sites.

In 2007-08 the Department developed an updated index of all primacy ABS bond forfeiture discharge sites and obtained updated data on the nature of the discharges at these sites. The Department performed a detailed analysis in 2007-08 of the costs to treat all polluttional discharges at the primacy ABS bond forfeiture sites, including construction, operation and maintenance, and recapitalization costs. The Department determined the total cost of

constructing all necessary treatment facilities for the discharges at primacy ABS bond forfeiture sites, and it identified the funds needed to cover the costs of all necessary construction. Again, some of these funds are restricted by law only for use in reclaiming ABS forfeiture sites. The analysis and supporting data concerning the costs of treating all the discharges associated with primacy ABS bond forfeiture sites are being submitted with this response.

The Department prepared a financial analysis of existing funds, and it identified available funds sufficient to cover the costs for land reclamation and construction of all necessary discharge treatment facilities at the primacy ABS bond forfeiture sites. Where not restricted by law, the Department has dedicated additional necessary funds for use in completing all outstanding land reclamation and construction of all necessary discharge treatment facilities. A financial analysis of existing funding and account restrictions is being provided with this response.

The Department has made organizational changes to its program to better manage the reclamation of the ABS legacy sites, thereby assuring that reclamation of these sites will be completed in a timely manner. For example, in 2004 the responsibility for coordinating the reclamation of primacy ABS bond forfeiture sites was transferred from the Department's Bureau of Abandoned Mine Reclamation to the Bureau of District Mining Operations. A description of relevant organizational changes is provided below.

Finally, Pennsylvania has recently promulgated amendments to its regulations in 25 Pa. Code Ch. 86, specifically § 86.17(e) (reclamation fees), § 86.1 (definitions) and § 86.187 (use of money) as part of its comprehensive response to the Part 732 Notice and § 938.16(h). The Department has sufficient funds on hand to complete the land reclamation and to construct all necessary discharge treatment facilities for the primacy ABS bond forfeiture sites. However, post-mining pollutional discharges are generally projected to endure indefinitely and, consequently, the treatment facilities must be operated and maintained for a very long time. The Department's cost analyses includes calculations of the annual operation and maintenance costs for all primacy ABS bond forfeiture discharge sites. In order to assure Pennsylvania has sufficient funds to complete the reclamation of all ABS legacy sites, Pennsylvania established a long-term ongoing funding source for operation and maintenance costs. The recently-promulgated amendments to the Department's regulations establish an enforceable regulatory mechanism for generating funds adequate to cover the operation and maintenance costs associated with treating the pollutional discharges at all ABS legacy sites.

The rulemaking maintains the reclamation fee imposed by § 86.17(e) and establishes a procedure for adjusting the reclamation fee amount. The adjustment procedure is necessary to accommodate the fluctuations in operation and maintenance costs that will occur over time and to maintain a sufficient reserve in the account used to pay annual operation and maintenance costs. The adjustment mechanism and the \$3 million reserve will also enable Pennsylvania to generate sufficient money to cover discharge treatment costs for underfunded sites permitted under the former ABS—potential ABS legacy sites—that ultimately forfeit and become part of the ABS legacy.

The amendments also *require* the Department to dedicate certain funding sources to pay

the reclamation costs for ABS legacy sites by depositing the moneys into special accounts where the moneys are held in trust. The rulemaking establishes two accounts to manage the funds. The Reclamation Fee O&M Trust Account will be used to pay the operation and maintenance costs on an on-going basis. The ABS Legacy Sites Trust Account, which will be funded over time, will ultimately be used to fund the perpetual costs of treatment for the discharges at the ABS legacy sites—similar to a master treatment trust fund. Copies of the final rulemaking package are being submitted as part of this response.

The changes to the Pennsylvania program are described in more detail below, and supporting data and analyses are attached. Copies of relevant statutory and regulatory amendments are attached, and legal analysis (i.e. accordance with FSMCRA and consistency with the federal regulations) is provided where appropriate.

Pursuant to 30 CFR § 732.17(f)(1), Pennsylvania submits this program amendment to satisfy 30 CFR § 938.16(h) and the Part 732 Notices. Pennsylvania requests OSM approve *the entire* program amendment, in accordance with 30 CFR § 732.17(h)(7). This program amendment consists of the following parts which are described in detail below:

*ABS Program Amendment Part 1 - The Conversion Assistance Program;*

*ABS Program Amendment Part 2 – Trust Funds as an Alternative System and Other Equivalent Guarantee: Rationale for Approval;*

*ABS Program Amendment Part 3 – Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites;*

*ABS Program Amendment Part 4 – Demonstration of Sufficient Funding for Construction of All Necessary Discharge Treatment Facilities at the Primacy ABS Forfeiture Sites;*

*ABS Program Amendment Part 5 – Regulatory Changes to Establish Legally Enforceable Means of Funding the O&M and Recapitalization Costs for the ABS Legacy Sites*

Pennsylvania is seeking approval of this program amendment submission *in toto*, in accordance with 30 CFR § 732.17(h)(7), to satisfy the conditions imposed by 30 CFR § 938.16(h) and the Part 732 Notices. The changes described, and the demonstrations made, in this document remedy the deficiencies in Pennsylvania’s bonding program by assuring that Pennsylvania will have available sufficient money to complete reclamation of the ABS legacy sites at any time. Pennsylvania therefore requests OSM determine that the required regulatory program amendments prescribed in 30 CFR § 938.16(h) and the Part 732 Notices have been satisfied.

## II. The Active Bonding Program

### A. Termination of Pennsylvania's ABS in 2001

From 1982 until 2001, Pennsylvania employed a bifurcated bond system: surface coal mines, coal refuse reprocessing operations and coal preparation plants were covered by the ABS, while underground coal mines and coal refuse disposal operations were covered by a conventional bonding system. The ABS was intended to enable the Department to complete reclamation of forfeited mine sites notwithstanding that the actual cost of reclamation exceeded the amount of the individual bonds posted by the operator for a specific site. Pennsylvania's ABS consisted of a system in which various sources of revenue—per-acre reclamation fees, license and permit fees, fines and civil penalties, and excess bond money from forfeited and reclaimed sites—were all placed into the Surface Mining Conservation and Reclamation Fund (the SMCR Fund). *See* 52 P.S. § 1396.18(a). A one-time reclamation fee was paid by operators of permitted sites on a per-acre basis for each acre authorized in the surface mine operator's permit; the fee was originally assessed at \$50 per acre. Operators were also required to post site-specific bonds for surface mining operations covered by the ABS, but they were not required to post a bond sufficient to cover the full cost of completing reclamation of the mine site. The SMCR Fund was intended to cover the difference between the bond amount and the actual cost of reclamation in the event of bond forfeiture.

Problems relating to the solvency of Pennsylvania's ABS were identified around 1990, and by early 1991 OSM began to exercise its oversight authority in an effort to bring Pennsylvania's ABS into compliance with applicable federal standards. *See* 30 U.S.C. §§ 1253, 1254; 30 CFR §§ 732.17, 733.11, 733.12. In January 1991, OSM notified the Department that the ABS must be modified to provide the resources needed to reclaim existing primacy ABS forfeited sites within a reasonable timeframe, and to ensure that future forfeiture sites would be reclaimed in a timely manner. In May 1991, OSM conditionally approved a Pennsylvania revision to the ABS pending a demonstration that the revenues generated through collection of the reclamation fee would meet the requirements of 30 CFR § 800.11(e). *See* 56 FR 24,687 (May 31, 1991). At that time, OSM codified a required program amendment directing Pennsylvania to submit information by November 1991 which demonstrated that the ABS was solvent. *Id.*; *see* 30 CFR § 938.16(h). Specifically, OSM required Pennsylvania to submit information demonstrating that the ABS “can be operated in a manner that will meet the requirements of 30 C.F.R. § 800.11(e)” or, to amend its program to be compliant with federal standards. 56 FR at 24,719-21.

In August 1991, OSM's Harrisburg Field Office issued a report titled *Pennsylvania Bond Program as an Alternative Bonding System*. The 1991 report documented Pennsylvania's failure to adequately reclaim all forfeited primacy ABS sites, primarily because Pennsylvania was not addressing post-mining pollutional discharges at many of the sites. The report concluded that the ABS was insolvent because the Department did not have sufficient funds to complete the reclamation at all of the primacy ABS forfeiture sites.

In October 1991, OSM notified the Department, pursuant to 30 CFR § 732.17, that in order for Pennsylvania to maintain jurisdiction of the regulatory program under FSMCRA,

Pennsylvania had to adopt changes to its ABS to address program deficiencies and outstanding reclamation on primacy ABS forfeiture sites (the 1991 Part 732 Notice). *See* Attachment 1. The 1991 Part 732 Notice concluded that the ABS was no longer in conformance with FSMCRA and the federal regulations, which mandate that an ABS “must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time.” 30 CFR § 800.11(e)(1).

Pennsylvania sent a written response to the 1991 Part 732 Notice to OSM in December 1991 in which Pennsylvania outlined its plans to address the deficiencies with the ABS. At this early stage, the Department believed that the problems with the ABS could be remedied, however, it was clear that structural changes would be necessary. The development of site-specific trust funds was identified as the most promising means to resolve the problems with long-term treatment of post-mining discharges. In addition, a long-term funding mechanism in the form of an “umbrella trust” or a “master treatment trust” was contemplated. Amendments to PASMCRRA and to the Department’s mining regulations would be needed.

Pennsylvania made several fundamental changes to its ABS during the 1990s in an effort to satisfy OSM’s required program amendment in § 938.16(h) and the 1991 Part 732 Notice by bringing the ABS into compliance with the requirements of 30 CFR § 800.11(e). A description of some of the main efforts follows.<sup>6</sup>

The Department contracted with an independent actuarial firm for a review and financial analysis of the solvency of the ABS. The Actuarial Study of the Pennsylvania Coal Mining Reclamation Bonding Program by Milliman & Robertson, Inc. was completed in mid-1993. The study concluded that the ABS was solvent with respect to the current and projected obligations for land reclamation, but the ABS was insolvent with respect to the costs to treat post-mining polluttional discharges at primacy ABS forfeited sites. Finding ways to generate enough money for long-term treatment of discharges became the focus.

The per-acre reclamation fee was increased. In early 1992, the Department proposed to amend its regulations to increase the reclamation fee from \$50 to \$100 per acre in order to generate more revenue for reclamation of ABS forfeited sites. The fee increase was primarily intended to assist in rendering the ABS more solvent—to function as an intermediate step to keep the shortage in the SMCR Fund from worsening while a more permanent solution was developed. The regulations were amended in 1993 to increase the amount of the reclamation fee to \$100 per acre. This regulatory amendment was submitted to OSM for approval, and OSM conditionally approved the amended § 86.17(e). *See* 58 FR 36,139 (July 6, 1993).

The Department worked throughout the 1990s on developing financial tools which would adequately cover the costs of treating post-mining discharges in perpetuity. The use of trust funds as an optimum means for funding the long-term treatment of post-mining discharges received significant attention and study by OSM, Pennsylvania and other States throughout the

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<sup>6</sup> A more detailed chronology of related events dating from 1991 to early 2000 is included as Attachment 2. Each of the documents itemized in Attachment 2 is incorporated into this submission by reference.

1990s. *See* Attachment 2.<sup>7</sup> Beginning in 1992 and continuing through the 1990s, the Department worked on developing and implementing site-specific trusts funded by the operator as an alternative financial assurance mechanism used to cover the costs of treating post-mining discharges. The Department also contemplated establishment of a master trust fund which would generate enough money through investment returns to cover the discharge-treatment costs at forfeited sites; the Department would manage the trust fund as a supplement to the SMCR Fund.

Legislative amendments to PASMCRRA were necessary before the Department could develop and implement site-specific trust funds for long-term treatment of post-mining polluttional discharges. Beginning in 1992, the Department worked on obtaining necessary legislative amendments to PASMCRRA for site-specific treatment trusts. In December 1992, PASMCRRA was amended to add provisions concerning the use of site-specific trusts funded by the mine operator to cover the costs of treating post-mining polluttional discharges. *See* P.L. 1384, No. 173 (Dec. 18, 1992) (Act 173). One of the provisions added by Act 173 expressly authorized the Department to “establish alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program. These mechanisms may include, but are not limited to, the establishment of a site-specific trust fund funded by the operator for the treatment of post-mining discharges of mine drainage.” *See* 52 P.S. § 1396.4(d.2).

Act 173 did not establish a master trust fund. Instead, the legislature sought more information from the Department before committing the necessary funds, which would clearly be substantial. Section 4(d.2) directed the Department to “recommend to the Governor alternative financing mechanisms for the perpetual treatment of post-mining discharges of mine drainage” within six months of enactment of Act 173. *Id.*

In late 1993, the Department submitted a bonding program proposal to the Governor and the General Assembly designed to create a master trust fund capable of treating post-mining polluttional discharges on all primacy and pre-primacy abandoned or forfeited sites. The proposal estimated the cost at \$50 million. Despite its efforts, the Department was unable to obtain enactment of the proposal through 1995. The Department did not give up on the idea; it updated the master trust fund proposal and submitted it to the new governor in 1996. Various amendments to PASMCRRA were signed into law in mid-1996, including provisions improving the Department’s ability to effectuate timely reclamation of forfeited surface mine sites, *see* P.L. 232, No. 43 (May 22, 1996), however, the Department was ultimately unsuccessful in securing enactment of the master trust fund proposal.

Unable to effectuate the master trust fund option, the Department had to decide whether the ABS could be salvaged. The Department concluded in the late 1990s that amending the ABS was not a viable option for addressing the deficiencies identified in § 938.16(h) and the 1991 Part 732 Notice. Doubling the reclamation fee did not generate sufficient funds to eliminate the

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<sup>7</sup> *See also, e.g.*, 67 FR 35,070 (May 17, 2002) (OSM advanced notice of proposed rulemaking titled: “Bonding and Other Financial Assurance Mechanisms for Treatment of Long-Term Polluttional Discharges and Acid/Toxic Mine Drainage (AMD) Related Issues”) (noting that surety and collateral bond forms prescribed in 30 CFR § 800.12 “do not necessarily lend themselves well to bonds for water treatment costs because of the lengthy timeframes involved and uncertainties associated with the AMD treatment obligations” as well as high upfront costs or collateral requirements and unwillingness by surety companies to cover long-term AMD treatment costs).

ABS deficit. The number of acres being permitted had been declining (with a corresponding reduction in income from the reclamation fee), and although good progress had been made on completing land reclamation of forfeited sites there was still a significant number of underbonded ABS permits with post-mining discharges. Implementation of site-specific trust funds had helped with some of the discharge sites, but that mechanism was not going to address the long-standing ABS deficit with respect to forfeited sites. Recognizing that the ABS in its current form would never address the situation, and that the systemic changes necessary to remedy the ABS could not be made, the Department decided the best solution was to terminate the ABS and to employ a conventional full-cost bonding system for all of Pennsylvania's active mine sites. Consequently, after much deliberation and a lot of work to prepare for the change, in August 2001 the ABS was formally terminated.

Pennsylvania's termination of the ABS has been previously approved by OSM. *See* 68 FR 57,805 (Oct 7, 2003). Moreover, OSM's approval of the termination of the ABS has been upheld by the U.S. Third Circuit Court of Appeals in the *Kemphorne* case. 497 F.3d at 349.

#### *B. Conversion of ABS Actively-Mined Sites to Conventional Bonding*

On August 4, 2001, Pennsylvania terminated the ABS and implemented a conventional bonding system for surface mines, coal refuse reprocessing and coal preparation plants. All permit applications received on or after August 5, 2001 were required to be bonded under the conventional bonding system. Operators with active mine sites permitted under the ABS were required to either fully bond the operation or reclaim the site by June 30, 2002. It was not possible to terminate the ABS and convert hundreds of active surface mining permits to full-cost bonding overnight. The conversion of the ABS permits to conventional bonding required a complex approach by the Department in coordination with the legislature and the mining industry. The first task was to work out the mechanics of conventional bonding for surface mining permits covered by the ABS.

From the end of the 1990s until 2001, the Department developed an enhanced conventional bonding approach that involves two components: a full-cost bond for land reclamation and a water treatment bond based on a newly-developed methodology for calculating bond amounts for treatment of discharges. The bond rate guidelines for land reclamation apply to both existing permits and new permits at the time of issuance. Water treatment bond calculations are applied to existing primacy permits on sites that develop unanticipated long-term pollutorial discharges. The amount of a water treatment bond is conservatively based on anticipated costs over a six-year period because the bond must be renewed every five years. The bond calculation includes a sixth year as a safety precaution for permits that forfeit near the end of the fifth year, thus ensuring there is adequate money for treatment once the bond money is actually collected. In the event an unanticipated discharge develops on a site after permit issuance, the Department will calculate the costs for water treatment and require additional bond or, alternatively, the establishment of a site-specific treatment trust fund.

## 1. Implementation of a Revised Conventional Bonding System

Because Pennsylvania had employed a bifurcated bond system from 1982 to 2001, the statutory and regulatory framework was already in place for a conventional bonding system.<sup>8</sup> Pennsylvania's existing approved State program provided authority for the Department to exercise its discretion to set site-specific bond amounts at the full cost of reclamation, without regard to monies that may be available in the SMCR Fund for forfeiture reclamation. *See* 52 P.S. § 1396.4(d); 25 Pa. Code §§ 86.145(c), 86.149(a). While §§ 86.145(c) and 86.149(a) require the use of rate schedules, the actual rates themselves are not set by regulation. Instead, these provisions require guidelines to be reviewed annually and revised if necessary to reflect the current cost of reclamation. Thus, the Department already had the legal authority to adjust rate schedules without amending its regulations. The revised bond rate guidelines were consequently implemented through use of the Department's Technical Guidance Document (TGD) # 563-2504-001, "*Conventional Bonding for Land Reclamation – Coal.*" The TGD was revised to set forth the details and worksheets for calculating a conventional bond, and was used to determine the amount of bond required on the existing ABS operations in order to convert them to conventional bonding. A copy of the current version of the Department's Technical Guidance Document # 563-2504-001, *Conventional Bonding for Land Reclamation – Coal* is included for informational purposes as Attachment 3.

## 2. Converting the ABS Permitted Sites to the Conventional Bonding System

The Department evaluated over 2,700 inspectable units to determine the scope of the conversion process. The permits were divided into one of six categories used to determine the requirements to be applied with respect to converting to conventional bonding and posting a full cost bond. The categories and approximate percentage of total permits were: (a) permits that were not started, were actively mining coal, or were inactive (46%); (b) permits where mining was completed and regrading was underway (1%); (c) permits which met Stage I land reclamation standards (backfilling and regrading was completed) (15%); (d) permits which met Stage II land reclamation standards (topsoil was spread and site was revegetated) (28%); (e) permits which met Stage III land reclamation standards (but have discharges requiring chemical treatment) (6%); and, (f) permits which met Stage III land reclamation standards (but have discharges allowing passive treatment) (4%).

The Department executed the conversion process according to the following groups:

- Groups a, b, and c were required to complete the Bond Rate Guideline worksheets and adjust bond as required.

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<sup>8</sup> *See* 52 P.S. § 1396.4(d); 52 P.S. § 30.56; 25 Pa. Code §§ 86.145, 86.149. The regulations at 25 Pa. Code §§ 86.156-158 regarding the form, terms and conditions of bonds and insurance had been approved and needed no change. Similarly, regulations regarding minimum bond amounts for bituminous and anthracite mines (§ 86.150); bond submission (§ 86.143); and bond release procedures (§§ 86.170-175), met federal requirements and needed no changes. Revisions to § 86.152 concerning mandatory bond adjustment were approved by OSM in 2004-05. *See* 69 FR 71,528, 71,534 (Dec. 9, 2004); 70 FR 25,472, 25,478 (May 13, 2005).

- Group b permits that would not be regraded prior to June 30, 2002 were required to adjust their bonds for the full amount of a conventional bond.
- Group b permits that were regraded prior to June 30, 2002 were required to bond only for planting and select grading.
- Group c permits were bonded for planting and select grading.
- Group d permits were addressed based upon whether they contained ponds and/or roads that required reclamation. The Department did not adjust bonds on those permits without roads/ponds, however, the permits were reissued under the conventional bonding system. The Department adjusted bonds on permits with ponds/roads as necessary, and these permits were also reissued under the conventional bonding system.
- Groups d and e sites were required to post a bond, or establish a site-specific treatment trust fund, for discharge treatment.

There were 805 active operations with open pits or some other feature that indicated a need to revise the bond. The Department notified the permittees for all 805 active operations of the requirement to complete the Conventional Bonding Technical Guidance Document worksheet calculations. The requirement to submit the calculations was waived on 188 sites after the Department determined the sites would be backfilled before June 30, 2002. Four additional sites did not require conversion because the permits had not yet been issued.

Of the 679 sites where a conversion calculation was completed, on 234 the bond was reduced, on 69 the bond remained the same, and on 376 the bond amount increased. A conversion calculation was not submitted on twenty sites, primarily on account of pending litigation. The Department completed the conversion calculation on these twenty sites and requested the operator adjust the bond amount. Fifteen of these twenty sites were addressed through the signing of a Consent Order and Agreement. On two of these sites the operator accepted the Department's calculations and provided the additional bond, and on the remaining three sites, the Department initiated compliance actions that resulted in reclamation being completed or a full-cost bond being posted. On 114 of the 118 sites where conventional bond calculations were waived because the sites were to be backfilled by June 30, 2002, backfilling was completed by June 30, 2002. On 3 of these 118 sites the operator reduced his reclamation obligation and completed the conversion to conventional bonding. In the remaining case the Department took compliance action. The Department prepared a final report on the conversion process in October 2002. A copy of the final report is included as Attachment 4.

### *C. ABS Program Amendment Part 1 - The Conversion Assistance Program*

When implementing the revised conventional bonding system and converting the ABS permits to conventional bonding, Pennsylvania had serious 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 bonding capacity 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 issuance. Many operators were likely to be unable to comply with the mandatory bond adjustment, and 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 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, Pennsylvania developed and implemented a conversion assistance program as part of the conversion of ABS active permits to a conventional bonding system. The conversion assistance program was designed to avoid creating additional forfeiture deficits that would have otherwise occurred because of permittees' inability to post additional bond amount to convert existing ABS permits to a conventional bond. Using its authority under § 4(d.2) of PASMCR, 52 P.S. § 1396.4(d.2), Pennsylvania developed an alternative financial assurance mechanism that meets the purposes and objectives of the bonding program.<sup>9</sup>

A program was developed in which the Department would effectively operate as a surety. Funded with an initial general-revenue appropriation of \$7 million, and supplemented by annual premiums, 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. The Land Reclamation Financial Guarantees (LRFG) were issued only to ABS permittees that were converting to conventional bonding; permit applicants who submitted applications after termination of the ABS are not eligible for the conversion assistance program. As of November 30, 1999, the forfeiture rate for primacy ABS permits was 10.4%. Based on the historic rate of bond forfeitures, the \$7 million principal would cover up to \$70,000,000 in bond exposure. The Department concluded that the \$7 million, when combined with existing site bonds, would be sufficient to pay for all forfeitures that may occur. The premiums collected for the LRFGs would provide additional funds to complete reclamation.

In June 2001, the Pennsylvania legislature appropriated the \$7 million for the conversion assistance program. *See* Act of June 22, 2001 (P.L. 979, No. 6A), known as the "General Appropriation Act of 2001," at § 213 (appropriating \$7 million "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").<sup>10</sup> The general revenue appropriation of \$7 million was for one fiscal year, which necessitated the issuance of all the LRFGs by mid-2002. Issuance of new LRFGs ended at that point, although some LRFGs have been reassigned to a new operator, generally as part of a permit transfer.

A set of procedures for the Conversion Assistance Program, and an application form for an LRFG were prepared in December 2001. The Conversion Assistance Program funds were

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<sup>9</sup> A copy of § 4(d.2) of PASMCR is included in Attachment 5.

<sup>10</sup> A copy of § 213 of the Act of June 22, 2001 (P.L. 979, No. 6A) is included in Attachment 5.

deposited into a separate account within the SMCR Fund; premiums for the LRFGs are placed into this account. A permittee whose bonding obligation increased in converting from the ABS to conventional bonding was eligible for a Department-issued LRFG in a sum-certain amount equal to the increase in bond dictated by the conversion from the ABS to the conventional bonding system. Financial guarantees under the Conversion Assistance Program would serve all the purposes of a bond under PASMCR and The Clean Streams Law.

The following additional conditions were placed on LRFGs:

- Guarantees written under this program are not available to cover an operator's obligations for treating post-mining polluting discharges. Permits for which the Department has determined there exists an obligation for treating a post-mining discharge do not qualify for assistance unless the permittee and Department have a binding agreement to establish financial provisions for post-mining treatment costs. If a post-mining discharge develops on a participating site, the operator will immediately be required to post another financial mechanism to guarantee long-term treatment.
- The LRFG is the first financial guarantee released from the permit (aside from any Remining Financial Guarantees). The Department's procedures for release of a surety or collateral bond are similarly applied to LRFGs.
- The permittee must pay a premium of 1.5% per year of the amount of the financial guarantee.

In the event of forfeiture, the Department is committed to pay the entire amount of the LRFG. The guaranteed amount, combined with the operator's bond, is used to reclaim the site according to the approved reclamation plan. Copies of the "Procedures for Implementing the Conversion Assistance Program" and the LRFG application form are included in Attachment 5.

During the conversion process, 324 of the 366 permits with increasing bond amounts requested a LRFG. A total of \$60,154,690 in LRFGs was approved and issued. Further details on the LRFGs initially issued are provided in the Final Report on Conversion of ABS Permittees to Full-Cost Bonding in Attachment 4.

The Department has operated the Conversion Assistance Program continuously since its inception in 2001-02, and expects the program will continue for another 10 to 15 years. The program has been very successful. The annual premiums collected for the LRFGs have increased the amount of the original \$7 million reserve to approximately \$11.5 million, which is currently in the Conversion Assistance Account. Nearly half of the approximately \$60 million in LRFGs that were issued have been retired because land reclamation was properly completed by the permittee and bond release approved. As of June 2008, the Department has approximately \$33.1 million in outstanding LRFG liability; thus the liability/reserve ratio is now about 3 to 1. Forfeitures among permittees holding LRFGs have been very minimal. During the more than six-year period that the program has been operating, there have been only five LRFG forfeitures (two by the same operator). On one of these sites, reclamation was completed by the corporate surety without any expenditure of Conversion Assistance Program funds. One forfeited site was

transferred to another operator, and no expenditure of Conversion Assistance Program money was necessary. Another permit is expected to be reclaimed by the landowner. Reclamation of one site is being negotiated with the corporate surety; the potential liability for the Conversion Assistance Program on that site does not exceed \$317,000. The most recent case in June 2008 has \$34,000 in LRFG that was declared forfeit. To date, Pennsylvania has not had to expend any Conversion Assistance Program funds. A report with a list of the LRFGs issued, the amount of each LRFG, and the current status, is included as part of Attachment 5.

1. The Conversion Assistance Program is No Less Stringent Than FSMCRA and No Less Effective Than Applicable Federal Regulations in 30 CFR Part 800

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 PASMCRPA authorizes the Department to “establish alternative financial assurance mechanisms that meet the purposes and objectives of the bonding program.” One of the alternative financial assurance mechanisms established by the Department is a LRFG. Pennsylvania is submitting the provision in § 4(d.2) of PASMCRPA—as specifically implemented in the form of LRFGs and the Conversion Assistance Program. The materials related to the Conversion Assistance Program are included in Attachment 5 for informational purposes.

It is important to recognize that the Conversion Assistance Program is not an alternative bonding system. Nor is it a continuation of Pennsylvania’s ABS. The funds for the Conversion Assistance Program do not constitute a bond pool because each LRFG is site-specific, and only the operator issued an LRFG must pay an annual premium. The annual premium is based on the sum-certain face value of the LRFG, similar to the premium calculation for a surety bond. The Department’s liability for any forfeited LRFG does not exceed the amount of the LRFG that has been issued. An LRFG issued and underwritten by the Department is not a surety bond however. Rather, the program is an *alternative system* to conventional bonding that achieves the objectives and purposes of a conventional bonding program.

It should also be noted that Pennsylvania has not promulgated regulations which specifically implement the Conversion Assistance Program; the constraints on the conversion process and the legislative appropriation for the program did not allow the Department sufficient time to promulgate regulations before the LRFGs had to be issued. Moreover, new regulations are not needed to effectively operate the program. Under PASMCRPA § 4(d.2), the Department has authority to administer the Conversion Assistance Program and to issue LRFGs. The LRFG instrument is enforceable under the Department’s existing enforcement regulations in 25 Pa. Code §§ 86.211-213. Nor would it be prudent at this point to expend the time and effort needed to promulgate such regulations. The Conversion Assistance Program is a one-time program implemented solely for the conversion process from the ABS to conventional bonding.

There is no federal counterpart to Pennsylvania’s Conversion Assistance Program. The correlative to the LRFG is, of course, the corporate surety bond. When describing the surety bond, FSMCRA refers only to “a corporate surety licensed to do business in the State where such operation is located.” 30 U.S.C. § 1259(b). In the Conversion Assistance Program, instead of a corporate surety the Department is effectively acting as the surety and issuing an equivalent to a surety bond for a portion of the land reclamation liability of an ABS permittee who converted to

conventional bonding.

The Conversion Assistance Program is in accordance with 30 U.S.C. § 509(c). Section 509(c) states that “the Secretary may approve as part of a State or Federal program an *alternative system* that will achieve the objectives and purposes of the bonding program pursuant to this section.” 30 U.S.C. § 509(c) (emphasis added). Section 509(c) is not limited to “alternative bonding systems”; the statutory text describes a more expansive category. Pennsylvania submits that § 509(c) authorizes the operation of an alternative system in which the regulatory authority functions essentially as a surety for a portion of the full-cost conventional bond required of the permittee. Notably, in recent amendments to Title IV of FSMCRA, Congress expressly authorized the “use of amounts in the fund to provide financial assurance for remining operations in lieu of all or a portion of the performance bonds required under section 1259 of this title.” 30 U.S.C. § 1244(c)(1)(B). While this recent amendment to FSMCRA § 413 specifically relates to remining incentives, it supports Pennsylvania’s interpretation of § 509(c).

Further authority for the Conversion Assistance Program is found in OSM’s regulations. According to the criteria for approval of State programs in 30 CFR § 732.15, a State program should include provisions to 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.” 30 CFR § 732.15(b)(6). This regulation recognizes the authority provided in § 509(c) of FSMCRA, and specifies the standards of approval, for a State program to utilize an alternative system of financial guarantees equivalent to bonds in terms of accomplishing the objectives and purposes of a conventional bonding program. Pennsylvania requests approval of the Conversion Assistance Program as a § 509(c) alternative system, with the LRFG functioning as a form of equivalent guarantee. The program accomplishes the purposes of a conventional bonding program, because the Conversion Assistance Program is in accordance with § 509 of FSMCRA.

Section 509(c) provides for an alternative system “that will achieve the objectives and purposes of the bonding program pursuant to this section.” The Conversion Assistance Program is clearly consistent with the objectives of a bonding program set forth in § 509 of FSMCRA. The LRFG is applied for and issued on forms prescribed and furnished by the Department, and LRFGs are conditioned upon the faithful performance of all the requirements of PASMCR and the permit. An LRFG covers the permit area on which the operator conducts surface coal mining and reclamation operations. Together with the operator’s conventional bond, the amount of the LRFG is sufficient to assure completion of the reclamation plan if the work has to be performed by the Department in the event of a forfeiture. *Cf.* 30 U.S.C. § 1259(a). LRFGs also meet the provisions of § 509(b) in that the liability period is for the duration of the surface coal mining and reclamation operation and the period coincident with the operator’s responsibility for revegetation requirements.

The Conversion Assistance Program is also no less effective than the federal regulations in 30 CFR Part 800. The liability/reserve ratio for the Conversion Assistance Program is quite conservative. Currently, the liability/reserve ratio is about three to one; Pennsylvania is not aware of any surety company with a liability to reserve ratio as fiscally conservative as the Conversion Assistance Program. Although liability does not extend beyond the amount of the

individual LRFG, that is no different than a surety bond company. But unlike a corporate surety, the LRFG is required to be the first bond released as reclamation is completed, thus reducing the overall risk to Conversion Assistance Program funds. Finally, in the event of a forfeiture by the operator, there can be a significant delay in obtaining funds from the surety company as a result of appeals, but there is no such delay where Pennsylvania is acting as surety in the Conversion Assistance Program because Pennsylvania is already in possession of the funds necessary to complete reclamation.

Pennsylvania submits that the Conversion Assistance Program is in accordance with 30 U.S.C. § 509(c), consistent with § 509 of FSMCRA and 30 CFR § 732.15(b)(6), and is no less effective than the federal regulations in 30 CFR Part 800. Pennsylvania requests that OSM approve this change to its program.

*D. Use of Existing Enforcement Authority to Address Outstanding Bonding Obligations Through Execution of Consent Order and Agreements*

During the conversion of the ABS permits to the conventional bonding system, six permittees with large anthracite open pit mining operations had to be addressed through execution of a Consent Order and Agreement pursuant to the Department's existing enforcement authority. *See, e.g.*, 52 P.S. § 1396.4c (the Department "may issue such orders as are necessary to aid in the enforcement of the provision of this act"); 25 Pa. Code §§ 86.211-215. These permittees had significant outstanding bonding obligations, such that requiring the operators to immediately post the full-cost conventional bond would have forced the operators into bankruptcy or forfeiture. One of these cases involved multiple companies and permits, and a bankruptcy proceeding. The Department negotiated a Consent Order and Agreement to resolve the operators' obligations in each of these cases. Most of these CO&As involved the establishment of reclamation schedules as the means of reducing the bonding obligation to the point at which the operator would be capable of posting a full-cost conventional bond for the permit. Compliance with the terms of the CO&As has resulted in four of the six permittees now being full-cost bonded and thus fully converted to the conventional bonding system. The remaining two permittees have reduced their outstanding bonding obligation, but further reduction is necessary before the sites are full-cost bonded. A report summarizing the main points for each of these six permittees is included as Attachment 6.

### **III. Development and Implementation of Site-Specific Treatment Trust Funds**

Pennsylvania has developed site-specific treatment trust funds as an alternative financial assurance mechanism which can be used to guarantee the costs of treating discharges in perpetuity. As part of this submission, Pennsylvania requests that OSM approve the use of site-specific treatment trusts as an alternative system which meets the objectives and purposes of a conventional bonding program, and as an equivalent guarantee consistent with the requirements of 30 CFR subchapter J.

A. *Background*

In 1999, Pennsylvania submitted a program amendment (PA-124-FOR) to the federal Office of Surface Mining (OSM) to reflect changes made to the Pennsylvania Surface Mining Conservation and Reclamation Act (PASMCR) by Acts 173 and 43. *See* 64 FR 12,269 (March 12, 1999). Among other provisions, the changes submitted for approval included the addition of PASMCR § 4(d.2). *See* 64 FR at 12,270. Section 4(d.2) provides, in relevant part, as follows:

The department may establish alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program. These mechanisms may include, but are not limited to, the establishment of a site-specific trust fund funded by the operator for the treatment of post-mining discharges of mine drainage.

52 P.S. § 1396.4(d.2).<sup>11</sup>

PA-124-FOR also included an amendment that had been made to § 4(d) of PASMCR, 52 P.S. § 1396.4(d), and related additions to Pennsylvania regulations in 25 Pa. Code §§ 86.142, 86.156 and 86.158. *See* 64 FR at 12,270. Section 4(d) was amended in late 1992 to allow for the use of life insurance policies, annuities, and trust funds as an acceptable form of collateral for a mining bond. Section 4(d) already allowed other types of collateral—e.g., cash, certain negotiable government bonds, and irrevocable letters of credit. The amendment to § 4(d) simply added several instruments to the list of allowable types of collateral the Department could accept as collateral for a mining bond.

Pennsylvania originally submitted the portion of § 4(d) of PASMCR regarding new types of allowable collateral to OSM as a program amendment in 1993. *See* 58 FR 31,925 (June 7, 1993) (Administrative Record No. 822.00). OSM issued a determination on the PASMCR authorization to allow life insurance policies, annuities and trust funds as acceptable collateral for collateral bonds in December 1993. *See* 58 FR 64,151 (Dec. 6, 1993). At that time, OSM deferred a “decision on that part of the amendment concerning Pennsylvania’s proposal to use a life insurance policy or an annuity or trust fund as bonding instruments . . . until such time as Pennsylvania submits proper procedures and safeguards”—presumably in the form of regulations. *Id.* at 64,152.

Pennsylvania’s regulations were amended in 1997 to implement the change to § 4(d) of PASMCR. *See* 27 Pa. Bull. 6041 (Nov. 15, 1997). Specifically, several subsections were added to 25 Pa. Code § 86.158 which prescribed conditions for accepting a life insurance policy as collateral, see 25 Pa. Code § 86.158(e), and for accepting an annuity or a trust fund as collateral for a mining bond, see § 86.158(f). Section 86.142 was revised to add definitions for “annuity,” “trust fund” and “trustee.”

In 2005, OSM issued a final rule related to PA-124-FOR in which it approved many of the changes submitted. 70 FR 25,472 (May 13, 2005). The changes to PASMCR § 4(d) and 25 Pa. Code §§ 86.158(e), (f) related to acceptability of life insurance policies, annuities and

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<sup>11</sup> A copy of 52 P.S. § 4(d.2) is included in Attachment 7.

trust funds as a form of collateral for a mining bond were approved. OSM determined that the three forms “are an acceptable form of collateral and, with the safeguards included in the State’s regulations” (i.e. in 25 Pa. Code §§ 86.142, 86.158(e) and 86.158(f)), these forms of collateral present no greater risks and are therefore no less effective than the forms of collateral bonding expressly contained in 30 CFR § 800.21. *See* 70 FR at 25,474 and 25,478-79.

However, while OSM made reference to § 4(d.2) of PASMCRRA in its final rule regarding PA-124-FOR, *see* 70 FR at 25,474, OSM did not ultimately address the question of whether alternative financial assurance mechanisms which achieve the objectives and purposes of a conventional bonding program can be employed by Pennsylvania consistently with § 509 of FSMCRA. Some confusion between § 4(d) and § 4(d.2) was exhibited in OSM’s final rulemaking with respect to trust funds as an acceptable form of collateral for a mining bond. Section 4(d.2) grants the Department the broad authority to “establish alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program.” 52 P.S. § 1306.4(d.2). The provision goes on to state that such mechanisms may include site-specific trust funds funded by the mine operator for the treatment of post-mining discharges of mine drainage. When discussing § 4(d.2) in the final rule, OSM focused solely on trust funds and disregarded the authority to establish “alternative financial assurance mechanisms.” OSM then conflated the purposes of the two PASMCRRA provisions (§ 4(d) and § 4(d.2)) and treated site-specific trust funds only as a form of collateral bond. *See* 70 FR at 25,474.

Pennsylvania’s program amendment submission for PA-124-FOR contributed to the confusion between site-specific trust funds as an “alternative financial assurance mechanism” and trust funds as an acceptable form of collateral for a collateral bond. The submission did not describe the distinction with sufficient precision. Moreover, Pennsylvania did not adequately communicate to OSM that the regulatory changes to § 86.142 and § 86.158 implemented § 4(d) of PASMCRRA, and did not implement § 4(d.2).<sup>12</sup>

Pennsylvania did *not* intend to submit § 4(d.2) as authority for simply another form of collateral bond. The intention was to submit § 4(d.2) for approval under § 509(c) of FSMCRA as an “alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section.” 30 U.S.C. § 1259(c).

Pennsylvania has no regulations currently in effect which specifically implement § 4(d.2) of PASMCRRA.<sup>13</sup> Using the authority granted by § 4(d.2), as well as the Department’s authority

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<sup>12</sup> The confusion continued in the preamble to the proposed rule changes to the Tennessee Federal Program establishing trust funds or annuities to fund the treatment of long-term postmining pollutional discharges. *See* 71 FR 17,682 (April 6, 2006). The preamble stated: “When Pennsylvania submitted the amendment to its program authorizing the use of trust funds and annuities, it characterized those financial instruments as collateral bonds and we approved them as such.” *Id.* at 17,684. Pennsylvania submitted § 4(d) of PASMCRRA and 25 Pa. Code §§ 86.158(e) and (f), which allow life insurance policies, annuities and trust funds to be used as an acceptable form of collateral for a mining bond and describe conditions for those forms of collateral; these provisions were approved by OSM in its final rule issued in 2005. 70 FR at 25,474. The authority for Pennsylvania to use “alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program” granted by § 4(d.2) of PASMCRRA has not been addressed or approved by OSM.

<sup>13</sup> In 1995, Pennsylvania had proposed changes to its regulations in §§ 86.142, 86.149, 86.152, 86.172 and 86.174 which were intended to implement the authority in § 4(d.2) for PASMCRRA to establish the alternative financial

in 52 P.S. § 1396.4c, 35 P.S. § 691.5(b) and § 691.610 to issue such orders as are necessary to aid in the enforcement of the provisions of PASMCR and The Clean Streams Law, the Department established and implemented site-specific trust funds. A site-specific trust fund for treating a post-mining polluttional discharge is established by a Consent Order and Agreement, coupled with a Trust Agreement; these agreements form the primary legal basis for the alternative financial assurance mechanism (the trust fund) which guarantees the operator's obligation to pay the costs of treating the post-mining polluttional discharge in perpetuity. It is not necessary to promulgate regulations which specifically implement § 4(d.2), because Pennsylvania can rely on other parts of its approved program. The Consent Order and Agreement used for § 4(d.2) trust funds is an order of the Department issued pursuant to the Department's enforcement authority which is already part of Pennsylvania's approved program. OSM has previously approved § 4.3 of PASMCR, 52 P.S. § 1396.4c, as well as the regulations pertaining to enforcement in 25 Pa. Code §§ 86.211 to 86.213 and Pennsylvania's Inspection and Enforcement Policy. *See* 30 CFR § 938.15.

OSM has not yet addressed the amendment to Pennsylvania's program authorizing the use of alternative financial assurance mechanisms which achieve the objectives and purposes of the bonding program, as specifically implemented in the form of site-specific trust funds used to pay the costs of treating post-mining polluttional discharges in perpetuity. Pennsylvania has established treatment trust funds for permits formerly covered by the ABS, (as well as generally implementing this alternative assurance mechanism as part of its mining program). Site-specific trust funds are part of the conversion process from ABS to conventional bonding and one of the methods for addressing discharges on ABS legacy sites. Consequently, Pennsylvania is requesting that OSM approve the trust fund program as an integral component of this comprehensive response to § 938.16(h) and the Part 732 Notices. A copy of § 4(d.2) is included as Attachment 7; copies of the standard documents which implement site-specific trust funds, and a Summary Report of the database used to track treatment trust funds are also included in Attachment 7 for informational purposes.<sup>14</sup> Pennsylvania is requesting that OSM approve this alternative financial assurance mechanism as consistent with § 509(c) and in accordance with other applicable provisions of FSMCR because the site-specific trust fund program is an alternative system to a bonding program that achieves the objectives and purposes of a

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assurance mechanism of a site-specific trust fund to assure future treatment of postmining discharges. *See* 25 Pa. Bull. 5,885 (Dec. 16, 1995). However, the final rulemaking removed those provisions. *See* 27 Pa. Bull. at 6,042. At that time, the Department had undertaken an evaluation of the overall environmental and economic costs associated with post-mining polluttional discharges, including mechanisms to assure future treatment of post-mining discharges. The results of that evaluation were expected to have a significant influence on how post-mining discharges would be addressed. The issue of treatment of post-mining discharges was also engaging substantial attention from OSM, and there existed the potential for changes in Federal oversight. Concerned that these activities might result in conflict with the regulatory provisions proposed in 1995 to implement § 4(d.2), the Department concluded in 1997 that rulemaking on the subject of site-specific trust funds as an alternative financial assurance mechanism should be postponed until its evaluation was complete and clarification of Federal thinking on the issue was obtained. *See* 27 Pa. Bull. at 6,042. Since that time, the Department has not proposed regulatory changes designed to implement § 4(d.2) of PASMCR.

<sup>14</sup> It is important to recognize that the Trust Fund/Bond Agreement Summary Report included in Attachment 7 contains information on pre-primacy sites and sites permitted under the original conventional bonding system such as underground mines, in addition to information on former ABS sites. The report is over-inclusive and the information being tracked is fluid.

conventional bonding program, and the trust funds are an equivalent guarantee no less effective than a performance bond and 30 CFR subchapter J. *See* 30 CFR § 732.15(b)(6).

*B. Description of Site-Specific Trust Funds Used to Assure Funding for Long-Term Treatment of Post-mining Discharges*

As an alternative to bonds, § 4(d.2) of PASMCRRA authorizes the Department to establish alternative financial assurance mechanisms that meet the purposes and objectives of the bonding program. One alternative financial assurance mechanism established by the Department is a site-specific irrevocable trust fund. Those permittees unable or unwilling to provide a surety or a collateral bond can establish and fund a site-specific irrevocable trust fund managed by a third-party trustee. The main purpose of the trust fund is to generate sufficient income to cover the cost of treatment into the future. The Department is the beneficiary of the trust. The trust is established using Department forms containing the terms and conditions established by the Department. The trust is implemented through a negotiated Consent Order and Agreement and a companion Trust Agreement. The Consent Order and Agreement is entered into under the authority of, *inter alia*, PASMCRRA, The Clean Streams Law, 35 P.S. § 691.1 *et seq.*, the Commonwealth Attorneys Act, 71 P.S. § 732-101 *et seq.*, and 25 Pa. Code §§ 86.211 to 86.213, all of which are part of Pennsylvania's approved program. Once the trust is in place and fully funded, the permittee can be reimbursed from the trust for the yearly cost of treatment. In the event the permittee defaults on its legal obligations to treat the discharge, the trust funds will be used to treat the mine discharge. The trustee will make disbursements at the direction of the Department.

The Department uses four factors to determine the amount of a site-specific trust fund used as a financial assurance mechanism to guarantee the costs for long-term treatment of a post-mining discharge. These are: (i) the annual operation and maintenance costs; (ii) the initial capital costs and the recapitalization costs; (iii) inflation; and, (iv) the rate of return on the invested funds. In addition, Pennsylvania's trust funds contain additional funds to account for normal fluctuations in the earnings of the investment (i.e. volatility).

The annual operation and maintenance (O&M) costs are all those costs and expenses associated with the day-to-day operation and maintenance of the treatment facility. Operation costs include, but are not limited to: chemicals, electricity, labor (including benefits), water sampling, sludge removal and disposal, transportation, maintenance of access roads, mowing, snow removal, general upkeep and contingency costs. System maintenance costs include, but are not limited to cleaning influent and effluent channels, inspecting the berms for rodent holes and repairing them, correcting short-circuiting in the ponds, repairing and maintaining all equipment and buildings.

Costs are determined, where possible, using the permittee's actual annual costs as a guide. The average of the permittee's costs for the three most recent years will generally be used to account for variations associated with variable flow conditions. The permittee can establish its annual operation and maintenance costs by providing an accounting of the costs prepared in accordance with Generally Accepted Accounting Principles and accompanied by an affidavit of the treasurer or other corporate officer responsible for the financial affairs of the permittee and accompanied by an affidavit of the permittee's president attesting to the completeness and

accuracy of the costs. The permittee's annual operation and maintenance costs are verified by using available treatment cost calculation models (e.g. AMDTreat, developed by OSM, with input from WV DEP and PA DEP). In those cases where the actual annual costs are unavailable or unreliable, the output from the treatment cost calculation model is used for the initial calculations.

The AMDTreat tool is generally used for verification of the permittee's costs and determining the trust's costs. AMDTreat is used in cases where there is no reliable permittee cost data (e.g. the treatment system hasn't been built yet, or there isn't a long track record of treatment). AMDTreat can determine annual O&M costs and the present value of future recapitalization costs. AMDTreat can do forward cost modeling, i.e. where a system is proposed and the costs must be predicted, and reverse cost modeling, i.e. where a system is in place and the costs must be calculated. For systems that are in place, the actual values are used. For these systems, the Department makes sure that the default costs from AMDTreat are reasonable, or appropriately adjusted to reflect the real site-specific costs. For proposed systems, or where actual values are not available from the permittee, the Department is conservative in calculating costs in order to assure that an adequate trust amount is determined.

Capital improvement or recapitalization costs are those anticipated periodic expenditures necessary for the continued operation of the treatment system. The present value of the recapitalization costs is calculated by determining the expected average lifespan of each major component of the treatment system and its cost in today's dollars. These costs are then inflated to each expected replacement point and the present values of the future costs are added together. Costs are calculated for replacement for a 75-year period. The required amount of recapitalization costs is recalculated on an annual basis and each time a distribution payment is made from the trust. An evaluation of financial data shows that calculations projected beyond 75 years are not useful because of the variability of the data. For passive treatment systems, operator data are compared to other published cost data.

The Department has used a long-term average inflation rate of 3.1% for the trust fund calculations. The rate of inflation was determined through averaging the inflation rate reported by the U.S. Bureau of Labor Statistics over the course of many decades. The period used includes a variety of changes in the inflation rate that may reasonably be expected to occur in the future. The rate will be periodically evaluated and adjusted.

Return on investment is the growth in the value of the trust due to income from its investments, less any fees. The expected rate of return on investment is directly related to the amount of risk the investor is willing to assume. This risk, and the correlating effective rate of return, can be modified based on the mix of investment vehicles used. The Department has used an average long-term rate of return of 11.1 % for stocks and an average rate of return for investment bonds of 5.25%. These rates are periodically evaluated and adjusted. The rates of return for stocks and bonds used by the Department are reasonable because they fall within the range of long-term rates of return documented in publications by financial experts and financial institutions.

Volatility is the variation of the value of the investments from the anticipated value. Based on a volatility analysis conducted for the Department, the assumed volatility for stocks listed on the NYSE composite index is 20%. The assumed volatility for fixed-yield bonds is 0%. The volatility to be used in each case is determined based upon the investment strategy, prorating the volatility accordingly.

The initial trust amount is determined by using a variation of the time value of money formula. The time value of money formula determines the present value of the costs to be incurred in the future. The formula is embedded in a spreadsheet that calculates the costs, adjusted for inflation. The annual operation and maintenance cost and capital cost for replacement are input into this spreadsheet. The spreadsheet calculates balance of funding in the trust. The total trust amount needed is the sum of the present value of the operation and maintenance costs, the present value of the capital improvement/recapitalization costs, and the costs of the first year of treatment. This amount is then adjusted for volatility. The trust has a target value that is higher than the base value in order to account for the volatility. In addition, the annual treatment cost is in the trust account for a year before the permittee is reimbursed at the end of the year. The trust has two sub-accounts, one for operation and maintenance (the Primary Trust), and another for capital improvements/recapitalization (the Capital Improvement Account). The trust provides for annual disbursement to the operator. The disbursement is limited to calculated costs and is subject to fund valuation. The reimbursement is the smaller of the annual treatment costs or the excess value in the trust fund.

The trust is established through two documents: (i) a Consent Order and Agreement between the Department and the permittee; and, (ii) a Trust Agreement between the permittee and a trustee selected by the permittee and approved by the Department. The trustee must be a Pennsylvania chartered or a national bank or a financial institution with trust powers or a trust company with offices located within the Commonwealth and the trust activities must be examined or regulated by a state or federal agency. For permittees with multiple sites with discharges, the Department has determined that it is advantageous to handle them in a single trust. Combining the money for the future treatment of multiple discharges into one trust fund can result in lower trustee fees.

The trustee is required to provide quarterly statements of the activity and balances of the trust. The trustee is paid from the trust. Any tax on the earnings of the trust is to be paid by the permittee. A nontaxable charitable trust can be established, in which case the earnings of the trust would not be taxable. The trust can own real and personal property, easements, and equipment.

In cases where the trust amount is relatively small, the Department will allow a number of permittees to “pool” their individual trust funds. In this situation, rather than having an individual trust agreement, the permittee will execute a participation agreement in order to have its funds placed into an existing trust. In this case, while there are separate accounts established by the trust manager, the trust fund is invested collectively to take advantage of the benefits of working with larger sums of money.

Once a trust has been established and is fully funded the reclamation bonds for the site may be released. In addition, after the trust is fully funded, the permittee can, at the direction of the Department, be reimbursed at the end of each year, based on the calculated cost of treatment, for that year's costs. There are two scenarios for bond release when a trust is established. The first is with a fully funded trust. The second is when the bond is released, but becomes an asset of the trust. The distinction between these releases and typical bond releases is that the public notice reflects the fact that there is a trust in place. For surety bonds to be part of the trust, written authorization of the surety is required. A standard surety bond rider is typically used to amend the surety bond. This rider amends the bond to allow for the proceeds from a forfeiture of the bond to be deposited in the trust.

Updated maps and plans are required to support the Consent Order and Agreement and the Trust Agreement. These maps and plans show the discharge location, treatment facility detail, sampling locations, access roads and any other site-specific features that should be documented (e.g. pipelines or other utilities). Efforts are made to obtain easements from the landowner for access to the property required for the operation and maintenance of the treatment facility. Normally, the operator will maintain a mining permit with revisions to reflect the required treatment area, and an NPDES permit will be maintained for the discharge(s). Any area that may be needed for future enhancements of the treatment system is included in the revised mining permit area.

If the permittee is not able to fully fund the trust immediately, the Department may allow a reasonable period for the permittee to fully fund the trust, and the Consent Order and Agreement will accordingly set forth a required payment schedule to which the permittee must adhere. When the trust is being funded over time, any reclamation bonds not needed to cover land reclamation may be converted to an asset of the trust. If reclamation bonds are included in the trust corpus, then, as the trust increases in value, reclamation bond liability may be reduced as the trust reaches certain milestones. If there are multiple reclamation bond instruments, the progression in which the reclamation bonds are reduced or released is at the Department's discretion.

Each year the costs associated with treating the discharge and the value of the trust are analyzed to determine if the objective of the trust is being met. This is a financial review that includes a detailed accounting of costs. If it is determined that the trust value is insufficient or excessive, appropriate adjustments are made to the trust. An annual meeting with the Department, Trustee and permittee is required by the Consent Order and Agreement to review the performance of the treatment system, and evaluate the trust amount. The treatment system evaluation takes any unusual climatic conditions into account. If the costs for treatment change by more than ten percent since the creation, or last modification, of the trust, then the trust amount is recalculated.

If a permittee fails to continue the required treatment, fails to make required payments to the trust fund, or otherwise violates the terms and conditions of the Consent Order and Agreement for the treatment trust, the funds in the treatment trust are used to assure that treatment of the discharge continues without interruption. At this point, the permittee is in violation of the Consent Order and Agreement—an order of the Department—and the permittee

will be subject to enforcement action for failure to comply with a Department order. The Department generally follows its normal enforcement procedures for violation of a Department order when enforcing the terms of the Consent Order and Agreement used for treatment trusts. *See* 25 Pa. Code §§ 86.211 to 86.213 and Inspection and Enforcement Policy. The enforcement action would result in a permit and license block for the permittee. In most cases, upon default the permit will be revoked. The permit revocation and cessation orders will be input into the Federal Applicant/Violator System and will function as a permit block nationwide. In addition, the Department can seek specific performance of the terms of the Consent Order and Agreement by filing a petition to enforce in Pennsylvania courts. Other alternative enforcement procedures may also be used to compel compliance.

C. *ABS Program Amendment Part 2 – Trust Funds as an Alternative System and Other Equivalent Guarantee: Rationale for Approval*

Pennsylvania is submitting the provision in § 4(d.2) of PASMCRRA, as specifically implemented in the form of site-specific trust funds used to pay the costs of treating post-mining pollutional discharges in perpetuity. Pennsylvania’s treatment trust fund program is in accordance with 30 U.S.C. § 509(c), and is no less effective than the federal regulations in 30 CFR Part 800. Indeed, Pennsylvania’s site-specific trust funds are more effective than conventional bonds for addressing long-term treatment of post-mining discharges.

1. Site-Specific Trust Funds Are No Less Stringent Than § 509(c)

It is important to precisely characterize Pennsylvania’s site-specific trust funds within the legal framework of FSMCRA and the federal regulations. First, these treatment trusts are not a type of conventional bond. Pennsylvania’s site-specific trust funds are an “other equivalent guarantee”; they are not a form of collateral and they do not function as a collateral bond. Second, although these trust funds are an alternative financial assurance mechanism, they serve as an equivalent guarantee, and they are not an *alternative bonding system*. OSM has characterized the trust funds and annuities provided for in recent regulatory amendments to the Tennessee Federal Regulatory Program as an alternative bonding system under § 800.11(e), and the Tennessee program sought approval for Tennessee trust funds as an alternative bonding system. *See* 71 FR 17,682 at 17,684 (April 6, 2006). Pennsylvania is not seeking approval of § 4(d.2) site-specific trust funds as an alternative bonding system. Rather, Pennsylvania is seeking approval of its trust fund program as a § 509(c) alternative system which accomplishes the purposes of a conventional bonding program.

Section 509(c) provides for “an *alternative system* that will achieve the objectives and purposes of the bonding program pursuant to this part.” 30 U.S.C. § 509(c) (emphasis added). In prescribing the criteria for approval of State programs in § 732.15, OSM’s regulations provide that a State program should include provisions to implement, administer and enforce “a system of performance bonds and liability insurance, *or other equivalent financial guarantees*, consistent with the requirements of subchapter J of this chapter.” 30 CFR § 732.15(b)(6). This regulation recognizes the authority provided in § 509(c) of FSMCRA for a State program to utilize an alternative system of financial guarantees which are equivalent to bonds in terms of accomplishing the objectives and purposes of a conventional bonding program.

OSM has also previously recognized, on several occasions, that a financial guarantee or some other enforceable contract or mechanism, may be used in lieu of a performance bond to guarantee the operator's obligation to ensure continued treatment of postmining pollutional discharges. In a March 31, 1997 document entitled "Policy Goals and Objectives on Correcting, Preventing and Controlling Acid/Toxic Mine Drainage," OSM stated that one of its objectives is to assure that financial responsibility associated with acid mine drainage should be fully addressed. One of the strategies the policy included to meet this objective stated: "Strategy 2.3—Where inspections conducted in response to bond release requests identify surface or subsurface water pollution, bond in an amount adequate to abate the pollution should be held as long as water treatment is required, *unless a financial guarantee or some other enforceable contract or mechanism is in place to ensure continued treatment exists.*" See <http://www.osmre.gov/amdpol.txt>.

In subsequent years, OSM affirmed this policy and its reading of FSMCRA. See 67 FR 35,070 at 35,071-072 (May 17, 2002); 72 FR 9,616 at 9,617 (March 2, 2007). In an advanced notice of proposed rulemaking issued in 2002 entitled "Bonding and Other Financial Assurance Mechanisms for Treatment of Long-Term Pollutional Discharges and Acid/Toxic Mine Drainage (AMD) Related Issues," OSM stated: "This is a long-standing policy, which we believe correctly interprets the law." 67 FR at 35,072. It is clear that § 509(c) of FSMCRA allows a State to employ an alternative system to the conventional bonding system described in § 509, so long as the alternative system of financial guarantees, or other enforceable contract or mechanism, achieves the objectives and purposes of a conventional bonding system. The authority granted by PASMCR § 4(d.2) to establish alternative financial assurance mechanisms which achieve the objectives and purposes of a conventional bonding program is synonymous, and therefore consistent, with the authority granted in § 509(c) of FSMCRA.

Pennsylvania has implemented this authority in the form of site-specific trust funds used to guarantee a permittee's obligation to pay the costs of treating post-mining pollutional discharges in perpetuity. To be consistent with § 509(c) of FSMCRA, Pennsylvania's trust funds program must satisfy the objectives and purposes of a conventional bonding program. Section 509 of FSMCRA describes basic standards for a conventional bonding program in which an operator posts either a performance bond executed by a surety and the operator, or collateral in an amount sufficient to guarantee the operator's reclamation obligations. The trust funds program addresses all of the applicable provisions of § 509 and thus achieves the objectives and purposes of the FSMCRA bonding program in the context of providing long-term treatment (i.e., reclamation) of post-mining discharges.

The treatment trust program is clearly in accordance with §§ 509(a) and (b) of FSMCRA. Site-specific trusts are established by forms prescribed and furnished by the Department. 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 which makes them more suitable for guaranteeing long-term treatment obligations. Liability under the trust is for the duration of the reclamation. The

consent order and agreement is executed by the operator and the Department, and the declaration of trust has been 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 Department in the event the cost of reclamation changes, in accordance with § 509(e) of FSMCRA. Thus, the trust funds program assures that Pennsylvania will have available sufficient money to complete the reclamation plan for sites covered by site-specific trusts.

Pennsylvania's 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 consent order and agreement 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. All of these aspects of the trust fund program render it no less stringent than § 509 of FSMCRA.

## 2. Site-Specific Trust Funds are No Less Effective than the Federal Regulations

Pennsylvania's trust funds are also no less effective than the relevant federal regulations in 30 CFR Part 800. The sections relevant to a financial assurance mechanism for treatment of long-term pollutorial discharges are 30 CFR §§ 800.14 to 800.16, § 800.40 and § 800.50.

The Department determines the amount of the trust fund needed to cover the costs of treating the post-mining discharge in perpetuity, i.e. completing reclamation of the mine site. The costs are site-specific and thus reflect the considerations pertinent to the discharge being treated. Like a conventional bond, the amount of the site-specific trust fund must be sufficient to assure completion of the reclamation plan, (in this case, long-term treatment of a postmining pollutorial discharge), if the work has to be performed by the regulatory authority in the event of forfeiture. *See* 30 CFR § 800.14(b). Pennsylvania's treatment trust funds meet this criterion. The amount of treatment trust principal calculated by the Department must at least equal the amount necessary to generate sufficient funds to cover all the costs of treating the discharge in perpetuity. If the operator defaults on its obligation to continue treating the discharge, the treatment trust moneys are available for the trustee, at the Department's direction, to pay all the costs of treatment. The ready availability of the money in the treatment trust funds is actually more effective than a conventional reclamation bond; in the case of conventional reclamation bonds, the bond money is not available to the Department for use in paying treatment costs until the bond forfeiture and collection procedures have been completed, which can take a significant period of time. Eventually operators go out of business. The treatment trust fund is more effective because it enables a seamless transition; even if the operator ceases to exist there is no interruption in treatment, and no need for emergency contracting while the Department is going through the process necessary to collect forfeited bonds. These aspects of the site-specific trust funds are no less effective than 30 CFR §§ 800.14 and 800.16(a) in meeting the requirements of FSMCRA.

In the event the trust is not generating sufficient money to cover the annual treatment cost, the operator is required by the Consent Order and Agreement/Trust Agreement to adjust the amount by adding to the principal of the trust fund, and the operator will not receive an annual

disbursement in that circumstance. The costs associated with treating the discharge and the value of the trust are analyzed annually to determine if the objective of the trust is being met. If it is determined the trust value is insufficient, or excessive, appropriate adjustments are made to the trust. An annual meeting with the Department, the Trustee and the permittee is required by the Consent Order and Agreement to review the performance of the treatment system and evaluate the trust amount. If the costs for treatment change by more than ten percent since the creation or last modification of the trust, then the trust amount is recalculated. These aspects of the site-specific trust funds are no less effective, and are more stringent, than 30 CFR § 800.15.

The Department will allow a permittee a reasonable period of time to fully fund a treatment trust fund, rather than always requiring a lump-sum deposit for the full principal amount. OSM has adopted this same practice in the Tennessee trusts program, and thus has already determined that this procedure is in accordance with FSMCRA and consistent with the federal regulations. *See, e.g.*, 72 FR at 9,619. The process of funding treatment trusts over a reasonable period of time is comparable to the bond adjustment procedure provided for in § 509(e) of FSMCRA and 30 CFR § 800.15. Allowing a trust fund to be funded over time is also comparable to the Department's regulations for phased deposits of collateral in 25 Pa. Code § 86.161, which have been approved by OSM. *See also* 30 CFR § 800.11(d)(2) (allowing for posting of conventional bond under a cumulative bond schedule). Moreover, allowing funding over time provides a substantial economic incentive for the permittee to comply with all reclamation provisions. Experience has shown that, in some cases, compelling an operator to immediately post the full amount of bond sufficient to cover long-term treatment costs for a post-mining discharge will simply result in a forfeiture. In many of those situations the Department has found that allowing the operator to fund a trust over time, while the operator continues to treat the discharge and maintains the posted bond, ultimately results in a fully-funded trust being established by the operator for the site. Allowing time prevents pollution and gives an incentive to comply with the reclamation obligation.

Pennsylvania is the beneficiary of the trust fund, and the trustee expends funds of the treatment trust at the direction of the Department. The Consent Order and Agreement requires faithful performance of all the requirements of Pennsylvania's mining laws, its regulatory program and the mining permit, including completion of the reclamation plan by providing for treatment of the post-mining pollutional discharge in perpetuity. Pennsylvania's site-specific treatment trust funds are designed to generate income sufficient to cover all treatment costs in perpetuity, thus assuring coverage for a period at least as long as the period prescribed by 30 CFR §§ 800.13 and 800.16(d). The trustee is required to provide quarterly statements of the activity and balances of the trust, and to notify the Department in the event the trustee can no longer perform his duties, so that an acceptable new trustee can be appointed. These aspects of the site-specific treatment trust funds are consistent with the federal regulations and no less effective than 30 CFR § 800.16 in meeting the requirements of FSMCRA.

The regulatory provisions concerning release of a performance bond in § 800.40 are not all directly relevant to a trust fund designed to pay the costs of treating a discharge in perpetuity. Notice of the establishment of a treatment trust is provided with the public notice for release of any bonds associated with the permit. The release of the bonds with the establishment and funding of a trust follows all bond release provisions that are already part of Pennsylvania's approved program. With respect to a "release" of the trust fund itself, in the event the discharge

is abated and extinguished or the water quality of the discharge can be improved to the point of meeting water quality limits without treatment of any kind (and is therefore not pollutorial), the permittee can request that the funds in the trust be returned and the operator's obligation be deemed satisfied. As with a request to release a bond, the operator must demonstrate that all reclamation requirements of PASMCR, the Clean Streams Law, and Pennsylvania's mining and water quality regulations have been met, and the Department must concur in writing, before the trust could be dissolved and the funds returned to the permittee. These requirements would include removal of the treatment facility and any final land reclamation that may be needed at the site. Moneys in the trust fund would be available to complete any such final land reclamation related to removal of the treatment facility. These aspects of the Department's treatment trusts are no less effective than 30 CFR § 800.40.

With respect to release of a permittee's surety or collateral bond upon establishment by the permittee of a site-specific treatment trust, the Department follows its standard release procedures that are already part of its approved program. In the case of a treatment trust being funded over a reasonable period of time, the reclamation bond is not finally released until the trust is fully funded. Once the trust is fully funded, the bond can be released because the reclamation requirements of PASMCR and the mining regulations—with respect to the surety or collateral bond—have been fully met. The permittee remains obligated to treat the discharge and maintain the trust fund pursuant to the Consent Order and Agreement/Trust Agreement and Pennsylvania's mining and water quality law. These aspects of the Department's treatment trusts are no less effective than 30 CFR § 800.40.<sup>15</sup>

Pennsylvania's site-specific treatment trust funds are no less effective than the federal regulations in 30 CFR § 800.50, and are in fact more effective. If the permittee defaults on its obligation to pay the costs of treatment, or to fully fund the trust, the Department can take enforcement action to compel the operator's compliance with the terms of the Consent Order and Agreement/Trust Agreement. If the permittee refuses or is unable to perform its obligations under the Consent Order and Agreement, the trust fund will continue to be managed by the trustee for the benefit of the Commonwealth of Pennsylvania, as beneficiary of the trust. The funds in the treatment trust would be immediately available to assure that treatment continues, and there is no forfeiture process to undertake which would delay the availability of funds for treatment costs. Failure to abide by the terms of the Consent Order and Agreement/Trust Agreement is a violation of the Consent Order and Agreement—an order of the Department—and the permittee will be subject to enforcement action for failure to comply with a Department order. Standard, approved, enforcement procedures for violation of a Department order are followed when enforcing the terms

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<sup>15</sup> In its 2005 approval of PASMCR § 4(d) and 25 Pa. Code § 86.158 related to the acceptability of life insurance policies, annuities and trust funds as a form of collateral for a mining bond, OSM also approved § 4(g)(3) of PASMCR, including the phrase: "the remaining portion of the bond could be released in whole or in part at Stage 3 when the operator has completed successfully all mining and reclamation activities and has made provisions with PADEP for the sound future treatment of any pollutorial discharges." See 70 FR 52,916 (Sept. 6, 2005). But OSM addressed and approved this phrase only with respect to replacement of a reclamation bond by a "new bond," i.e. another surety or collateral bond. *Id.* OSM has not addressed § 4(g)(3) of PASMCR with respect to replacement of the reclamation bond by a § 4(d.2) alternative financial assurance mechanism, i.e. a site-specific treatment trust fund established for long-term treatment of a postmining pollutorial discharge. The text of § 4(g)(3) not only refers to a replacement bond; the phrase "has made provisions with PADEP for the sound future treatment of any pollutorial discharges" also encompasses the establishment of a § 4(d.2) site-specific treatment trust. This point may need to be clarified by OSM as part of its review of Pennsylvania's site-specific treatment trusts.

of a Consent Order and Agreement used for treatment trusts. *See* 25 Pa. Code §§ 86.211 to 86.213 and Inspection and Enforcement Policy. The enforcement action would result in a permit and license block for the permittee, and upon default the permit would be revoked. The permit revocation and cessation orders are entered in the Federal Applicant/Violator System and will function as a permit block nationwide. The Department can also seek specific performance of the terms of the Consent Order and Agreement by filing a petition to enforce in Pennsylvania courts. Notwithstanding the default, the permittee remains liable for treatment of the discharge under Pennsylvania’s mining and water quality laws. The site-specific trust funds are thus no less effective, and are more effective, than 30 CFR § 800.50 in meeting the provisions of FSMCRA.

Pennsylvania submits that its treatment trust fund program is in accordance with 30 U.S.C. § 509(c) and no less effective than the federal regulations in 30 CFR Part 800, and requests that OSM approve this change to Pennsylvania’s program.

#### **IV. The ABS Legacy**

Termination of the ABS, and conversion of the active ABS permits to conventional bonding, only partially resolved the deficiencies with the ABS identified by OSM in the 1991 Part 732 Notice and § 938.16(h). There remains the ABS legacy sites, which consist of the primacy ABS bond forfeiture sites with outstanding reclamation obligations. Pennsylvania has made various changes to its program to address the ABS legacy sites by assuring that the Department has sufficient funding to complete the reclamation of all of these sites at any time. The scope of the problem had to be assessed. Because the sites presented a distinct set of issues, the reclamation of the ABS legacy sites was divided into two categories: outstanding land reclamation; and the abatement or perpetual treatment of post-mining pollutorial discharges. Thorough analyses for each category of outstanding reclamation were performed in 2007-08. Generating sufficient funding then had to be accomplished. The means of funding the costs to complete reclamation of all the ABS legacy sites have now been established.

##### **A. *ABS Program Amendment Part 3 – Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites***

A comprehensive analysis by the Department of the existing ABS deficit for land reclamation was initially prepared in a February 2000 report titled *Assessment of Pennsylvania’s Bonding Program for Primacy Coal Mining Permits*.<sup>16</sup> Based on the report’s conclusions, the Department requested the Pennsylvania legislature to 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 \$5.5 million 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 § 213. Using the ABS Closeout Funds, the Department has completed land reclamation for some of the ABS legacy sites. In 2007-08 the Department prepared an updated list of primacy ABS bond forfeiture sites with outstanding land reclamation. The Department also prepared a detailed analysis of the

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<sup>16</sup> The February 2000 report is not attached on account of the subsequent update in 2007-08, but the report is incorporated by reference into this submission; a copy of the document will be provided to OSM upon request.

current costs to complete all outstanding land reclamation at these ABS legacy sites. A summary of the analysis of land reclamation is included as Attachment 8 along with a copy of the spreadsheet used to track these sites. The summary lists all primacy ABS bond forfeiture sites with outstanding land reclamation. For each site, there is information on the collected bond amount, the estimated cost to complete land reclamation, the amount of supplemental funds needed to complete the reclamation beyond the existing bond amount, and the current status as of July 2008. A list of the sites for which land reclamation was completed using ABS Closeout Funds is provided, as well as a list of permits currently in the construction phase for which funds have been encumbered but not yet fully expended. The estimated total cost to complete the land reclamation for all primacy ABS bond forfeiture sites is \$7,946,890. This is a conservative estimate, meaning that it is higher than the amount the Department likely will need to spend. This is because some of the outstanding land reclamation at the ABS legacy sites will be completed at no cost to the Department through use of reming incentives that are currently part of Pennsylvania's approved program.<sup>17</sup>

To address the land reclamation aspect of the ABS legacy, the Department must assure that it has the means of funding this obligation. The Department has these funds on hand, and nearly all of this money is already restricted by law for the purpose of reclaiming ABS forfeiture sites. As of April 2008 the ABS Closeout Funds account balance was \$4,431,088. Forfeited bonds were collected for the ABS legacy sites. The ABS Closeout Funds may only be used for land reclamation of ABS legacy sites. The collected bond money for the land-reclamation ABS legacy sites totals \$1,716,974. Under § 18 of PASMCR, 52 P.S. §1396.18, forfeited bond moneys may only be used for reclamation of the site for which the funds were collected; the collected bond money for the ABS legacy sites is currently held in a restricted account in the SMCR Fund. In addition, \$68,319 of forfeited bond money for one site is pending collection. There is also money available in several accounts in the Department's SMCR Fund. Where funds are not restricted by law solely for use in reclaiming ABS forfeiture sites, the Department has identified moneys which it is authorized by law to spend for this purpose. A small amount of money from the SMCR Fund's General Operations account has already been spent for land reclamation on pending projects (\$20,844). The balance of \$1,709,665 needed to complete the land reclamation at ABS legacy sites will be paid from other moneys currently in the SMCR Fund, including excess bond money from other forfeited sites that have already been fully reclaimed, and interest income on the SMCR Fund moneys. *See* Attachment 8 (statewide summary) and Attachment 10 (financial analysis of Department funds). Bond moneys which exceed the amount necessary for reclamation may be released for use at other sites. As of March 31, 2008, the released bond account had an available balance of \$2.8 million—more than adequate to cover the approximately \$1.7 million needed to complete land reclamation at the ABS legacy sites. The Department is committed to completing arrangements for land reclamation at the ABS legacy sites within the next couple years, and the Department has the funds available to perform the work. Thus, the Department has demonstrated that it has available

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<sup>17</sup> For example, the Vought mine (permit no. 17820114) is included in the list of ABS forfeiture sites needing land reclamation in Attachment 8 (under Moshannon DMO). The cost estimate for the land reclamation at this site is \$1,056,100 and the forfeited bond money collected is dedicated for treating the discharge at the site, leaving a deficit of \$1,056,100 in land reclamation costs. However, the Department expects to issue a reming permit pursuant to 25 Pa. Code Ch. 87, subch. F, §§ 87.201 to 87.209 in the near future to a new operator, who will receive bond credits of approximately \$400,000 in exchange for completing all of the outstanding land reclamation at the Vought site—at no cost to the Department.

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).

*B. ABS Program Amendment Part 4 – Demonstration of Sufficient Funding for Construction of All Necessary Discharge Treatment Facilities at the Primacy ABS Forfeiture Sites*

An evaluation of all the primacy ABS forfeited discharge sites had to be completed in order to project the costs of treating the discharges at these sites. A comprehensive analysis by the Department of the costs to perpetually treat all the post-mining pollutional discharges at the ABS forfeiture sites was performed by the Department over the course of the past year. Post-mining treatment costs are 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 annual operation and maintenance (O&M) costs include: the treatment chemicals as needed, water quality sampling, facility inspection, site maintenance, and sludge removal and disposal. Recapitalization costs are the moneys needed to reconstruct a facility or replace major components of a treatment system. The facility construction costs, and the funding for those costs, will be discussed first; O&M and recapitalization costs present a different set of more complicated funding issues and have been addressed separately by Pennsylvania.

The population of the primacy ABS forfeited discharge sites has been evolving, and Pennsylvania has worked closely with OSM to develop and maintain an accurate inventory of these discharges. In 2003, there were 99 discharges on the primacy ABS forfeiture discharge sites inventory. As of October 2007, there were 97 discharges, however, a significant number of discharges had been removed from the list and others added between 2003 and October 2007.<sup>18</sup> As of July 2008, there are 61 primacy ABS permits where the bond was forfeited and there exists a post-mining discharge that requires continued treatment. Some of these permits contain multiple discharges; as of July 2008, there are 101 discharges at the primacy ABS forfeiture discharge sites. Costs for treating all of these 101 discharges were estimated using the water quality and quantity monitoring data for the discharges and the AMDTreat model developed by OSM. An analysis of each of the primacy ABS forfeiture discharge sites and their discharges, as of July 2008, is included in Attachment 9. The report contains information on the permit, the amount of collected bond money, the individual discharges at the site, whether a treatment facility is currently in place and, if not, the type of facility that will be constructed, and cost estimates for construction, O&M and recapitalization. Spreadsheets used for tracking ABS bond forfeiture discharges, and a compact disc with the AMDTreat calculation data for each discharge site are also included in Attachment 9.

Not all of the primacy ABS forfeiture discharge sites will need to have a treatment facility constructed. Of the 97 discharges on the ABS forfeiture discharge sites inventory in October 2007, thirty of these already had functioning passive treatment systems in place. It is

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<sup>18</sup> A discharge can be removed from the list because the discharge has been abated, for example, or because updated sampling data show that the discharge is no longer pollutional. OSM and the Department have worked diligently on improving the methods for tracking the inventory of post-mining pollutional discharges which currently exist in Pennsylvania.

important to recognize that, unlike O&M costs (and recapitalization), the costs of initial construction are one-time only costs. Once the treatment facility has been constructed, any repairs which may be needed in the future are captured by the calculation of recapitalization costs. The Department has calculated the total capital cost to construct all necessary discharge-treatment facilities for the primacy ABS forfeiture discharge sites at \$2,073,104 as of July 2008. *See* Attachment 9 and Attachment 10 (primacy ABS bond forfeiture costs estimate summary). Again, the Department has taken a conservative approach to this cost calculation.

To address this aspect of the ABS legacy, the Department must assure that it has the funds to meet this obligation. The Department currently has funds on hand which are available to cover the approximately \$2.1 million total capital cost to construct the necessary treatment facilities for the primacy ABS forfeiture discharge sites. There is approximately \$2.8 million in the released bond account; money in that account may be used to pay the treatment facility construction costs. Completing the land reclamation will, at most, require that \$1.7 million be expended from the released bond account, thus leaving \$1.1 million in the account to pay treatment facility construction costs. Pennsylvania has committed to using the funds in the released bond account to address the reclamation liability for the ABS legacy sites. Money in the Department's SMCR Fund, General Operations Account, may be used for reclamation purposes as well as general administrative costs. *See* 52 P.S. § 1396.18. There is approximately \$14.4 million of unreserved/undesignated funds currently held in the General Operations account, more than adequate to cover the additional \$1 million needed for treatment facility construction costs. The Department is committed to constructing these discharge-treatment facilities as rapidly as possible over the course of the next couple years. Thus, the Department 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 § 800.11(e)(1).

*C. Calculating the Operation and Maintenance Costs and the Present Value of Recapitalization Costs for the Necessary Discharge Treatment Facilities at all the Primacy ABS Forfeiture Sites*

Discharge treatment facilities must be operated and maintained continuously for the long-term future, and O&M costs are consequently calculated as an annual amount which will be needed to operate and maintain a specific discharge treatment facility. The Department performed a detailed analysis of the annual O&M cost for each of the primacy ABS bond forfeiture discharge sites and their discharges. *See* Attachment 9 (report on primacy ABS bond forfeiture discharge permits and discharges as of July 2008). The O&M costs for each discharge were calculated using the AMDTreat model developed by OSM. *See* Attachment 9 (CD-Rom with individual AMDTreat calculation data for discharges). The total estimated annual operation and maintenance costs for all the primacy ABS forfeiture discharge sites and their 101 discharges is \$1,351,206. *See* Attachment 10 (ABS Financial Analysis). This figure represents the total amount of O&M once construction of all the necessary treatment facilities has been completed. During the next couple of years while the construction of all remaining necessary discharge treatment facilities is being completed for primacy ABS bond forfeiture discharge sites, the Department expects O&M costs to ramp up from about half this amount to the full \$1.35 million once construction has been accomplished.

Recapitalization costs are usually analyzed and accounted for as a present value number. Unlike the capital costs for initial construction, the recapitalization costs will be incurred over a long-term period; the AMDTreat tool uses a 75-year period for this purpose. The present value of the total recapitalization costs for the 75-year period is \$5,610,224. However, this figure is not particularly useful for purposes of determining the amount of money Pennsylvania will need annually for recapitalization costs. In order to evaluate this annual recapitalization cost, a recapitalization costs schedule was prepared by the Department. The schedule is based on data from the AMDTreat calculations for each discharge. Each itemized recapitalization cost was placed in a spreadsheet with a value that was inflated to represent the cost at the expected replacement time throughout a 75-year period.<sup>19</sup>

A recapitalization schedule was prepared by assuming that an equivalent amount (adjusted for inflation) would be spent each year for reconstruction or replacement of the discharge-treatment facilities at the primacy ABS bond forfeiture sites. A schedule showing the annualized total recapitalization cost estimates for all of the primacy ABS bond forfeiture discharge sites is found in the ABS Financial Analysis in Attachment 10. In year 1 the Department has estimated it will need \$229,000 for recapitalization costs; the amount increases slightly each year until, by year 75, Pennsylvania will need an estimated \$2,200,000 for recapitalization of the treatment facilities at all the primacy ABS bond forfeiture discharge sites. Calculations of recapitalization costs are included in a spreadsheet as part of Attachment 10.

#### *D. Evaluation of O&M Costs for Potential ABS Legacy Sites*

The ABS legacy sites consist of the primacy ABS bond forfeiture sites with outstanding land reclamation, and the primacy ABS bond forfeiture sites with a post-mining pollutional discharge that must receive long-term treatment. These sites have been forfeited and Pennsylvania must complete the reclamation of these sites. There remains one final category of ABS permits which Pennsylvania must account for in addressing the deficiencies of the ABS—the potential ABS legacy sites. These sites are currently underfunded but the liability for reclamation may not ultimately fall on Pennsylvania. In its ruling, the Court in *Kempthorne*, held that Pennsylvania is obligated to “ensure reclamation of sites forfeited before the conversion to a [conventional bonding system] began, plus any additional sites whose reclamation costs are still not fully covered by [conventional] bonds.” *Kempthorne*, 497 F.3d at 349-50. The “potential ABS legacy sites” are those primacy ABS permits whose reclamation costs are still not fully covered by conventional bonding system bonds or other equivalent guarantees. Specifically, they are the primacy ABS permits with a discharge which have not been forfeited, a treatment system is in place which the operator has been operating, and the operator has not yet posted a full-cost bond or established a site-specific treatment trust which is fully-funded. There are 44 permits in this set. A list of these potential ABS legacy sites with discharges is included in Attachment 11.<sup>20</sup>

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<sup>19</sup> For example, if an item currently costs \$450 and has a replacement cycle of 15 years, an inflated cost for this item was included for years 15, 30, 45, 60 and 75. At year 15, the current cost of \$450 is inflated using an annual inflation rate of 3.1% thus yielding a replacement cost in year 15 for that item of \$711.36. At year 30 the inflated cost for the same item is \$1,124.53 and so on for years 45, 60 and 75. The inflation-adjusted figures represent the amount the Department will actually spend for the item at the time the expenditure will become necessary.

<sup>20</sup> The other potential ABS legacy sites are the two active large anthracite mines where the conversion to

The Department is in various stages of the resolution process with each of these potential ABS legacy discharge sites. An evaluation of the potential ABS legacy discharge sites with a status summary on each permit is included in Attachment 11. These sites have an active operator (and sometimes a surety company) with whom the Department is negotiating a resolution, and the situation at each site can vary widely. For example, in some cases a settlement has been reached or is near completion; in others, funding of a site-specific treatment trust is partially complete and the operator is making scheduled payments to the trust; in one site a discharge abatement project was completed and initial results indicate abatement was successful but additional monitoring is needed. It is clear that not all of these permits will ultimately forfeit. Indeed, based on its experience the Department believes that few will end up in forfeiture, but any projection of the total number of these potential ABS legacy sites that will ultimately forfeit is speculative. Nevertheless, the Department has done an analysis of the O&M costs for the 44 potential ABS legacy discharge sites, in order to assure that Pennsylvania has the means of funding the O&M costs for these potential ABS legacy sites should they end up forfeiting and the Department must take over the costs of treating the discharge.

The total estimated O&M costs for all of the 44 potential ABS legacy discharge sites is approximately \$1,450,000. *See* Attachment 11 (spreadsheet compiling bond amount, estimated O&M and number of discharges for potential ABS discharge sites). This is a very conservative figure in two important ways. First, all 44 of the potential ABS legacy discharge sites would have to forfeit before Pennsylvania would have to fund the entire O&M cost, and that scenario is unrealistic. Second, the bond being held for some of these permits actually exceeds the target amount for a site-specific treatment trust for the permit. Moreover, there is approximately \$23 million in bond currently posted on these sites. *See* Attachment 11. The risk of increased O&M costs resulting from forfeitures of the potential ABS legacy discharge sites has been accounted for in Pennsylvania's means for funding the O&M obligation for the ABS bond forfeiture sites.

*E. ABS Program Amendment Part 5 – Regulatory Changes to Establish Legally Enforceable Means of Funding the O&M and Recapitalization Costs for the ABS Legacy Sites*

Unlike the outstanding land reclamation obligation and the construction of the necessary treatment facilities for the ABS forfeiture discharge sites (which are one-time expenditures), the O&M and recapitalization costs for the ABS legacy sites present an annual recurring expenditure for the long-term future. To meet its obligation under 30 CFR § 800.11(e) to assure that Pennsylvania has sufficient funds to cover the cost of reclamation at all the ABS legacy sites, the Department developed a means of generating sufficient revenue to cover the projected annual O&M costs for the ABS forfeiture discharge sites. The Department also structured a funding mechanism which accounts for the potential ABS legacy discharge sites, described above, that may be added to the ABS legacy in the event the operator for the site ultimately forfeits. Finally, the ruling by the Court in *Kemphorne* made clear that the funding mechanism developed by Pennsylvania must be enforceable. The Department amended its regulations in 25 Pa. Code Chapter 86 to create an enforceable regulatory mechanism which would provide sufficient

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conventional bonding was addressed with a CO&A which established a schedule for reclamation and bonding. These are discussed above in Section II(D).

funding to cover the O&M and recapitalization costs for all the ABS legacy sites. A copy of the final rulemaking package, as approved by the Environmental Quality Board on April 15, 2008, is included as Attachment 12.

The final rulemaking amends existing provisions of Chapter 86 relating to reclamation fees, definitions, and to the Department's use of money for reclamation of forfeited surface coal mine sites. The proposed rulemaking was published in the *Pa. Bulletin* on August 5, 2006. See 36 Pa. Bull. 4200 (Aug. 5, 2006). As part of the proposed rulemaking, the Department had proposed to eliminate the per-acre reclamation fee in § 86.17(e), which was an integral component of the ABS. Following the Court's ruling in *Kempthorne* in August 2007, the Department determined that the reclamation fee is an adjustable source of revenue that should be used to cover the costs of treating discharges at the ABS legacy sites and consequently decided not to repeal the reclamation fee in § 86.17(e) as proposed. Among other amendments, the final rulemaking restructured the reclamation fee as part of Pennsylvania's compliance with the mandate of the Third Circuit ruling, the requirements of 30 CFR § 800.11(e) as applied to the ABS legacy sites, and the required program amendment in § 938.16(h).

On January 5, 2008 an Advanced Notice of Final Rulemaking was published in the *Pennsylvania Bulletin* seeking comments on the changes from proposed to final rulemaking and providing thirty days to submit such comments. The Department made final changes to the advanced notice of proposed rulemaking regulations and presented the final rulemaking to the Environmental Quality Board—the agency which promulgates the Department's regulations—at its meeting on April 15, 2008. The Environmental Quality Board approved the final rulemaking and issued an order amending the regulations in 25 Pa. Code §§ 86.1, 86.17(e), 86.187-190 and 86.283, and directing the Chair to submit the amended regulations to the Office of General Counsel and Office of Attorney General for review and approval as to legality and form, as required by Pennsylvania law. The Office of General Counsel has approved the amended regulations, and they were submitted to the Independent Regulatory Review Commission and Senate and House Environmental Resource and Energy Committees as required by the Pennsylvania Regulatory Review Act. On July 10, 2008, the Independent Regulatory Review Commission voted to approve the amended regulations, and they have been submitted to the Attorney General's office for review. The final rulemaking was deemed approved by the Senate and House Environmental Resource and Energy Committees. Pennsylvania expects the amended regulations will be published as final in the *Pennsylvania Bulletin* in September 2008. The amendments to the regulations are described in detail in the final rulemaking package included as Attachment 12. An abbreviated description of the changes follows.

The Department identified several sources of revenue which it could use to cover the annual O&M costs for ABS legacy sites. First, the reclamation fee in § 86.17(e) will continue to be collected for surface coal mining operations and will be assessed on the operational area of the permit. The amount of the reclamation fee currently stands at \$100 per acre. During the past few years, the Department has permitted about 2000 acres per year which are subject to the reclamation fee, yielding approximately \$200,000 per year in revenue from the fee. Second, from past collection of the reclamation fee, the Department has a balance of \$3,699,896 as of July 1, 2008 in the reclamation fee account. The State Treasurer is responsible for the management of Commonwealth money, and moneys in the SMCR Fund generate interest which

is periodically paid into the fund. Interest income has been at an annual rate of about 5%. The interest on the reclamation fee account balance was identified as a reliable funding source of funding for O&M costs; the annual interest earned by the reclamation fee account has been conservatively estimated at \$150,000. Third, civil penalties assessed pursuant to PASMCR were also identified as a revenue source which could be used to fund O&M costs for ABS forfeiture discharge sites. The amount collected for civil penalties assessed under PASMCR tends to fluctuate from year to year, however the average annual amount collected over the past six years has been approximately \$300,000. Finally, interest on the other moneys held in the SMCR Fund was also identified as a potential source of revenue for O&M costs.

The amendments to §§ 86.17(e) and 86.187 *require* the Department to dedicate certain funding sources to pay the reclamation costs for the ABS legacy sites by depositing the moneys into special accounts where the moneys are held in trust. The amended regulations mandate that the reclamation fee, the civil penalties collected, and the interest on the reclamation fee account be used solely for paying O&M and recapitalization costs for ABS legacy sites. The Department may, at its discretion, also use interest earned on other moneys in the SMCR fund for purposes of paying O&M costs at ABS legacy sites. The final rulemaking establishes two accounts to manage the funds generated for use in paying to treat the discharges at ABS legacy sites. The Reclamation Fee O&M Trust Account will be used to fund the operation and maintenance and recapitalization costs on an on-going basis. The ABS Legacy Sites Trust Account will be used to fund the perpetual costs of treatment for the discharges at the ABS legacy sites. The regulations list the requirements for the account to be actuarially sound, which is when there is enough money in the accounts so that the interest will cover all of the costs.

The amended regulations will address the fluctuations in O&M costs from year to year, and the potential ABS legacy sites in several ways. First, the amended regulations establish a procedure for adjusting the reclamation fee amount. Based on annual projections of the amount the Department will need to spend for O&M and recapitalization costs in the coming year, the Department will have the authority to annually adjust the amount of the reclamation fee by operation of law. The adjustment procedure is necessary to accommodate the fluctuations in operation and maintenance costs that will occur over time. Second, the amended regulations require the Department maintain a cash reserve of at least \$3,000,000 in the Reclamation Fee O&M Trust Account. The cash reserve in the account will be available to pay for unexpected treatment costs that arise, or for potential ABS legacy sites that become the responsibility of Pennsylvania as a result of forfeiture. The cushion will make funds available to continue treatment of discharges at underfunded primacy ABS sites forfeited in the future and added to the class of ABS legacy sites, thus preventing water pollution at these sites and helping to assure that the Department has sufficient money at any time to treat the discharges at all the ABS legacy sites. The \$3 million reserve will also assure that a steady amount of interest will be earned by the Reclamation Fee O&M Trust Account each year for deposit into the account as a revenue stream.

Several of the amended regulations in the final rulemaking unrelated to the ABS legacy have already been submitted to, and approved by, OSM. *See* 71 FR 50,868 (Aug. 28, 2006); 72 FR 19,117 (April 17, 2007). Pennsylvania requests that OSM approve the amendments to its regulations in the final rulemaking promulgated by the Environmental Quality Board at its

meeting on April 15, 2008 which have not yet been approved by OSM. Attachment 12 includes an Annex A which sets forth the amendments to the regulations; additions made between proposed and final are in underlined capital letters, and deletions are in strike-through text.

The sole purpose of the amendments in the final rulemaking which have not yet been approved, and which are being submitted here for OSM approval, is to respond to the required program amendment codified at 30 CFR 938.16(h) and the deficiencies raised by the Part 732 Notices. The amended regulations are *part* of the legally enforceable means by which Pennsylvania is assuring it has sufficient money to cover the costs of reclamation for all ABS bond forfeiture sites and for any potential ABS legacy sites that may default in the future. That is, the regulations are part of the means by which Pennsylvania is complying with the mandate of 30 CFR § 800.11(e) as applied by the Court in *Kemphorne*. There are no federal counterparts to the amendments to §§ 86.1, 86.17(e) and 86.187 being submitted here for approval. These amendments are authorized by §§ 4.2(a), 4(d) and 4(d.2) of PASMCRPA. They are consistent with FSMCRPA, and no less effective than relevant federal regulations because, in conjunction with the other amendments to Pennsylvania's program described in this program amendment submission, the amended regulations satisfy the requirements of 30 CFR § 800.11(e).

#### *F. Organizational Changes*

One of the deficiencies raised by the 1991 Part 732 Notice was the failure of the Department to complete reclamation of ABS bond forfeiture sites in a timely manner. Having sufficient funds on hand to perform the reclamation will go a long way to resolving problems with timely completion of reclamation at ABS forfeited sites. In addition, Pennsylvania has made various organizational changes to its mining program to address this issue. A brief description of these changes follows.

One of the most significant changes involved a shift of responsibility for the primacy ABS forfeiture sites. Reclamation of all forfeited sites had long been the responsibility of the Department's Bureau of Abandoned Mine Reclamation (BAMR). In 2004, the responsibility for coordinating reclamation of primacy bond forfeiture sites was transferred from BAMR to the Department's Bureau of District Mining Operations. At that time, there were about 150 primacy permits with outstanding reclamation obligations. This is an important change because of its effect on prioritizing reclamation of ABS forfeiture sites. BAMR is responsible for administering Pennsylvania's FSMCRPA Title IV program, and the Commonwealth has a tremendous legacy of abandoned pre-primacy sites in need of reclamation. Given the number of Title IV sites, and the priority which must be given by law to certain of these sites, there were not adequate resources in BAMR to attend to the ABS forfeiture sites. When this organizational change was implemented, a priority for the District Mining Offices was to complete the outstanding land reclamation on ABS forfeited sites. Priority was also given to pursuing the posting of full-cost bonds or establishment of site-specific treatment trusts for the ABS permits with post-mining discharges where the operator had not forfeited and was treating the discharge. Shifting responsibility for reclamation of the primacy ABS forfeiture sites to the District Mining Offices is expediting the process for completing land reclamation at these sites.

In order to manage the planning, design, construction and maintenance of the treatment

facilities for the primacy ABS bond forfeiture discharges, the watershed managers in the District Mining Offices have been assigned to this project. The districts are developing implementation plans and tentative schedules for establishment of O&M contracts and the design, construction and maintenance of the treatment facilities for the primacy ABS bond forfeiture discharge sites. It is expected this will continue to be the subject of OSM oversight. In January 2008, coordinating the treatment of the ABS legacy discharge sites was assigned to the District Mining Office Watershed Managers as their priority work. This will assure progress is made in completing the treatment of these discharges as promptly as possible. One result of the pending regulatory package is recognition of the need for more detailed tracking and planning of the reclamation work. This is an evolving effort. In the short run, quarterly discussions between the Department's Bureau of Mining and Reclamation and the District Mining Offices are planned to coordinate this tracking and planning. OSM has been invited to participate in these discussions to facilitate oversight of the program.

Other mechanisms for assuring oversight and accountability are being put in place. An accurate inventory of the primacy ABS forfeited discharge sites has been prepared, and an improved communications procedure between OSM and the Department for managing the inventory and tracking the status of individual sites has been implemented. The amendments to the regulations discussed above include provisions requiring the Department to report annually to the Mining and Reclamation Advisory Board (MRAB) regarding the expenditure of funds for reclamation of ABS legacy sites. The meetings of the MRAB are public; OSM and interested citizens groups will be able to monitor and comment on Pennsylvania's annual expenditures for reclamation of ABS legacy sites, as well as its progress in completing reclamation.

Initial efforts have indicated there are a number of obstacles to address. The primary obstacle is land access. To help resolve this issue, a landowner survey, and several model landowner access agreements, have been developed. In addition, an order has been drafted for use in those cases where it will be necessary for the Department to order access to the property to conduct the work. In some cases, there are technical challenges such as difficulty in collecting the discharge or the lack of available land area needed for treatment. These are factors that will dictate which sites will get treatment first.

The Department has established a protocol for efficient use of the available funds for reclamation of primacy ABS forfeiture sites. For example, funding for projects will be from the most restrictive accounts first. At the land reclamation only sites, the available bond collected for the site will be used first, then the ABS Closeout Funds. After the ABS Closeout Funds are completely spent, less restrictive funds (e.g. released bonds and general operations) will be used. A similar process will be used for paying the costs of constructing the necessary discharge treatment facilities. For primacy ABS sites with a partially funded trust, one option is to pay for O&M from the Reclamation Fee O&M Trust account in order to allow the trust to grow to where it is fully-funded, at which point it can be removed from the list of potential ABS legacy sites. This strategy will allow for a more even expenditure from the Reclamation Fee O&M Trust Account. In general, the procedures developed for efficient expenditure will help to assure adequate funds are available for reclamation of the primacy ABS forfeiture sites.

**V. The Amendments to Pennsylvania’s Program Satisfy the Requirements of 30 CFR § 800.11(e) and Resolve the Part 732 Notices and 30 CFR § 938.16(h)**

According to 30 CFR § 938.16(h), as amended: “By September 8, 2008, Pennsylvania must either submit information sufficient to demonstrate that the revenues to the Surface Mining Conservation and Reclamation Fund (the Fund) are adequate to fulfill outstanding reclamation obligations at forfeited sites for which the Fund provides partial bond coverage under 30 CFR 800.11(e), or amend its program to otherwise meet those outstanding financial obligations at these forfeited sites.” 73 FR at 38,919. As described in this submission, Pennsylvania has amended its program to meet the outstanding financial obligations at all primacy ABS forfeiture sites, and has provided the means to address the potential ABS legacy sites.

First, termination of the ABS and conversion of the active ABS permits to conventional bonding resulted in full-cost bonds being posted for nearly all of the permits formerly covered by the ABS. Once these permits were converted to conventional bonding they were no longer part of the ABS legacy, and they cannot become part of the ABS legacy. They are part of Pennsylvania’s conventional bonding system, because a full-cost bond has been calculated and posted for the permit. The permits converted to full-cost bonding include all those which are participating in the Conversion Assistance Program, because the permittee’s surety or collateral bond, in conjunction with the LRFG issued by the Department, results in what amounts to a full-cost bond being posted for the permit. The issue is not the form of the financial instruments guaranteeing the reclamation but whether there is sufficient money available to Pennsylvania to complete the reclamation plan for each permit; the money is available in the form of the full-cost bond posted by the permittee, or in the form of the surety/collateral bond plus the LRFG issued by the Department as part of its Conversion Assistance Program.

By the close of the conversion process, there were six permittees actively mining large anthracite operations with outstanding bonding obligations which had to be resolved through Consent Orders and Agreements establishing reclamation and payment schedules. Only two of these permittees remain underbonded, and the Department has made provisions for fully funding the outstanding reclamation obligations for these two remaining cases through reclamation and payment schedules. Pennsylvania has considered whether the two remaining CO&A anthracite operations (Lehigh Coal & Navigation and Coal Contractors Inc.) should be included as part of the potential ABS legacy. There is a discharge at the Lehigh Coal & Navigation permit, and this discharge has been included on Pennsylvania’s list of potential ABS legacy sites. There remains land reclamation liability at the Lehigh Coal & Navigation permit, however, this land reclamation does not present a potential liability to Pennsylvania at this time because it is being adequately addressed through the CO&A process and, in any event, will most likely be addressed through permit transfer or remaining operations. For the Coal Contractors’ case, the reclamation liability in excess of the bond amount is approximately \$170,000. Pennsylvania has sufficient moneys available in the SMCR Fund to complete reclamation of this site in the event of forfeiture, particularly given the conservative estimate for outstanding land reclamation liability at primacy ABS forfeiture sites.

Second, the amendments to Pennsylvania’s program made to address the ABS legacy sites assure that Pennsylvania has “available sufficient money to complete the reclamation plan

for any areas which may be in default at any time.” 30 CFR § 800.11(e)(1). Pennsylvania has made the necessary changes to its program to assure funding for reclamation of the primacy ABS bond forfeiture sites, including long-term treatment of the discharges at these sites.

The Department analyzed the scope of the outstanding financial obligations for land reclamation and construction of all necessary discharge treatment facilities, and it identified funding sources for these costs. The Department has funds on hand to complete all outstanding land reclamation at primacy ABS bond forfeiture sites and to construct the necessary discharge treatment facilities at the primacy ABS bond forfeiture discharge sites. The ABS Closeout Account funds, together with collected forfeited bond amounts, will pay for the vast majority of the outstanding land reclamation. The remaining \$1.7 million for land reclamation can be paid for with moneys in the Released Bond Account, which has approximately \$2.8 million currently available for reclamation of primacy ABS forfeiture sites. *See* Attachment 10. Similarly, the Department has more than sufficient funds in the Released Bond Account and the SMCR Fund’s General Operations Account to pay the \$2.1 million needed for construction of the necessary discharge treatment facilities at the primacy ABS forfeiture discharge sites.

The ongoing O&M and recapitalization costs for the discharge treatment facilities were analyzed. Pennsylvania has amended its regulations to provide an enforceable regulatory mechanism which will provide sufficient moneys to cover the annual O&M and recapitalization costs. The total amount of annual O&M costs for which the Department must generate revenue is approximately \$1.4 million, once all necessary discharge treatment facilities have been constructed for the primacy ABS forfeiture discharge sites. However, it will take several years before all necessary treatment facilities are constructed. The necessary set-aside for recapitalization costs will average approximately \$200,000 for the next five years. The Department has established an enforceable regulatory mechanism to generate these funds. The mechanism provides for annual adjustments by operation of law to generate the needed revenue.

There is approximately \$3.7 million in the reclamation fee account (which will be redesignated as the Reclamation Fee O&M Trust Account) for use in paying the annual O&M and recapitalization costs. The amended regulations require the Department to deposit the reclamation fees, the interest earned by the Reclamation Fee O&M Trust Account, and civil penalties collected into the Reclamation Fee O&M Trust Account. The reclamation fee is currently set at \$100 per acre, and will remain at that amount until January 1, 2010, at which point it can be adjusted by operation of law to an amount sufficient to maintain a balance of at least \$3 million in the Reclamation Fee O&M Trust Account. The reclamation fee set at \$100 per acre, the interest earned by the Reclamation Fee O&M Trust Account, and the civil penalties collected are projected to generate approximately \$595,000 annually during the next two years (\$200,000 from reclamation fee; \$180,000 from interest; \$215,000 from civil penalties). The Department expects to spend approximately \$700,000 for O&M and recapitalization costs next year. The revenue from these three sources alone, combined with the approximately \$700,000 in the Reclamation Fee O&M Trust Account in excess of the minimum \$3 million balance, will be sufficient to cover the projected O&M and recapitalization costs for the next two years until the reclamation fee can be adjusted.

The amended regulations enable the Department to increase the amount of the revenue

being generated by the reclamation fee, and to draw upon interest earned by other monies in the SMCR Fund, as necessary to cover the annual O&M and recapitalization costs for all ABS legacy sites. (The amended regulations allow for other sources of funds to be deposited into the Reclamation Fee O&M Trust Account should such alternative sources become available.) The annual amount for O&M costs will increase gradually over the next few years until it reaches the \$1.4 million total; when combined with recapitalization costs of about \$200,000 the Department will need approximately \$1.6 million annually to cover O&M and recapitalization costs for all the primacy ABS forfeiture discharge sites. During the past few years, the Department has permitted about 2000 acres per year which are subject to the reclamation fee, yielding approximately \$200,000 annually in revenue from the fee set at \$100 per acre. Assuming the 2000 acres remains steady for the foreseeable future, the Department would have to raise the reclamation fee to \$650 per acre to generate \$1,300,000 for O&M and recapitalization costs. Together with \$150,000 from interest on the Reclamation Fee O&M Trust Account, and \$200,000 from civil penalties, the revenues would be sufficient to cover the total \$1.6 million in O&M and recapitalization costs for all ABS forfeiture discharge sites. This projection assumes the Department does not draw on interest earned by other monies in the SMCR Fund, which it has discretion to deposit into the Reclamation Fee O&M Trust Account for use in paying annual O&M costs for ABS legacy sites. Even if the reclamation fee must be used by itself to supplement the other required sources of revenue, a reclamation fee of \$650 per acre would not impose such a substantial burden on surface mine operators that the Department's revenue generating mechanism created by the amended regulations would fail. In sum, Pennsylvania has established an enforceable regulatory mechanism which will generate sufficient money to cover the total annual O&M and recapitalization costs for the ABS legacy sites.

Pennsylvania has also accounted for the potential ABS legacy sites. Although it certainly will not occur, even if all of the potential ABS legacy sites were to forfeit, the total annual O&M costs for these sites is approximately \$1.4 million. The Department is reasonably certain that few of these sites will ultimately forfeit, but it cannot project the ultimate number. Nevertheless, the amended regulations will require the Department to maintain a balance of at least \$3 million in the Reclamation Fee O&M Trust Account. The minimum reserve provides a sufficient cushion in the event several of the potential ABS legacy sites with significant annual O&M costs forfeit in a given year. Even if all of the potential ABS legacy sites were to forfeit in a single year, the total O&M costs would be approximately \$2.8 million for the current ABS legacy sites and all the potential ABS legacy sites. The \$3 million reserve in the Reclamation Fee O&M Trust Account would be sufficient to cover that cost until the reclamation fee could be adjusted, the \$23.1 million in existing bond collected, or other revenue sources drawn upon for the next year.

Finally, Pennsylvania is committed to completing outstanding land reclamation, and constructing the necessary treatment facilities, at the ABS legacy sites as rapidly as possible. Pennsylvania has instituted organizational changes to effectuate its plan to complete land reclamation and treatment facility construction over the course of the next couple of years. Pennsylvania has the funds available to perform this work. Availability of funding will *not* be an impediment. OSM should recognize that some primacy ABS forfeiture sites will present significant obstacles to completing the reclamation work. For example, landowner access issues will have to be resolved. Some of the discharge sites present significant engineering challenges (e.g. the discharge is emitting from a stream bank or as base flow to a stream); others will require

monitoring for discharges that are intermittent in character; a few have potential abatement solutions in the offing that should be given an opportunity to unfold. It should be emphasized, however, that any delays to completing reclamation at primacy ABS forfeiture sites will not be related to funding. Pennsylvania does not believe a precise schedule for completing reclamation of individual primacy ABS forfeiture sites is necessary. Nor would it be productive to formulate such a schedule given the contingencies involved in arranging and performing land reclamation, and the difficulties that discharge treatment can present. However, Pennsylvania invites both OSM and public oversight of its progress in completing reclamation of the ABS legacy sites, and Pennsylvania has instituted accountability measures to assist with such oversight.

The Court in *Kemphorne* concluded that 30 CFR § 800.11(e) continues to apply to the ABS legacy sites and “that § 800.11(e) requires that Pennsylvania fulfill the obligations it voluntarily assumed to ensure that these sites are fully reclaimed.” *Kemphorne*, 497 F.3d at 353. To meet the requirements of federal law, Pennsylvania must assure it will have sufficient money available at any time to complete the reclamation of all the ABS legacy sites, plus any additional sites whose reclamation liability is not fully covered by conventional bonding system bonds or equivalent guarantees, including the treatment of any post-mining pollutional discharges at these sites. The amendments to Pennsylvania’s program assure Pennsylvania will have available sufficient money to complete the reclamation for all ABS legacy sites and any potential ABS legacy sites that may become part of the ABS legacy. Pennsylvania therefore requests OSM determine Pennsylvania has resolved the deficiencies raised by the Part 732 Notices, and Pennsylvania has satisfied the required program amendment in 30 CFR § 938.16(h).