

**NOTICE OF FINAL RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD**

[25 PA. CODE CH. 86]

Coal Mine Reclamation Fees and Reclamation of Bond Forfeiture Sites

Order

The Environmental Quality Board (Board) by this order amends Chapter 86 (relating to surface and underground coal mining). The final-form rulemaking incorporates amendments necessary to bring Pennsylvania's regulatory program into conformance with federal standards for state coal mining regulatory programs. The amendments address the coal mine reclamation fees paid by surface coal mine operators, the dedicated use of moneys for treatment of post-mining pollutional discharges at certain mine sites, pertinent definitions, and the requirements for reclamation of coal mine sites when the mine operator's bonds were forfeited by the Department of Environmental Protection (Department).

This order was adopted by the Board at its meeting of _____ 2008.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information contact Joseph G. Pizarchik, Director, Bureau of Mining and Reclamation, P.O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103, or Richard S. Morrison, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5988 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection (Department) Web site (<http://www.dep.state.pa.us>).

C. Statutory Authority

The final-form rulemaking is adopted under the authority of Sections 4.2(a), 4(d) and 4(d.2) of the Surface Mining Conservation and Reclamation Act (52 P. S. §§ 1396.4b(a), 1396.4(d), 1396.4(d.2)) (PASMCR); Section 7 of the Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.7), Section 5 of The Clean Streams Law (35 P.S. § 691.5); Section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); Section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20) and Article I, Section 27 of the Pennsylvania Constitution, (Pa. Const. Art. 1, § 27).

D. Background of the Amendments

This final rulemaking primarily addresses Pennsylvania's obligation, under federal law, to provide for the complete reclamation of a certain class of surface mine sites (the ABS Legacy Sites) and the post-mining pollutional discharges on these sites. In order to bring its coal mining program into compliance with federal law, the Department must assure that it always has sufficient money available to complete the reclamation of the ABS Legacy Sites, including paying the ongoing costs to treat the pollutional discharges at these sites in perpetuity. In related litigation, the U.S. Third Circuit Court of Appeals decided that Pennsylvania must demonstrate that it has sufficient funds, and determined that the Department must meet its obligation to assure sufficient funds for reclamation of these sites through legally enforceable means. These amendments are intended to satisfy Pennsylvania's obligations under federal law by establishing an enforceable regulatory mechanism for generating funds adequate to cover the reclamation costs for all of the ABS Legacy Sites.

This final rulemaking establishes two accounts to manage the funds. The Reclamation Fee O & M Trust Account will be used to fund the operation and maintenance costs on an ongoing basis. The regulation also establishes a cash reserve within the Reclamation Fee O & M Trust Account to pay for unexpected treatment costs. 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 regulation also identifies the funding sources for the accounts and provides for adjustments to the reclamation fee to assure that sufficient funds are available for operation and maintenance. In addition, 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.

Required Consistency of Pennsylvania's Mining Program with Federal Law

One of the fundamental purposes of the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq. (FSMCRA), is to establish a "nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). The federal statute authorizes the Secretary of the Interior, through the federal Office of Surface Mining Reclamation and Enforcement (OSM), to administer the programs for controlling surface coal mining operations required by FSMCRA and to promulgate regulations designed to realize the purposes of FSMCRA. 30 U.S.C. §§ 1211(c). These purposes include the reclamation of mined areas left without adequate reclamation and assuring that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations.

FSMCRA allows a State to assume jurisdiction over the regulation of surface coal mining and reclamation operations if the State can administer that program according to federal standards. *See* 30 U.S.C. § 1253. Once a State program is approved by OSM, the State achieves "primacy" over the regulation of its surface coal mining program under FSMCRA. Pennsylvania achieved primacy in 1982. *See* 47 FR 33,050, 33,076 (July 30, 1982). To maintain its jurisdiction over regulation of coal surface mining activities, Pennsylvania must maintain a State program in accordance with the requirements of FSMCRA. 30 U.S.C. § 1253. State laws may

not be inconsistent with the provisions of FSMCRA, 30 U.S.C. § 1255(a), and, in general, a State program must be at least as effective as the requirements in FSMCRA. 30 U.S.C. § 1255.

Conventional and Alternative Bonding Systems

FSMCRA states a general requirement that before a coal mining permit is issued an operator must post a performance bond “sufficient to assure completion of the reclamation plan if the work had to be performed by the regulatory authority.” 30 U.S.C. § 1259(a). FSMCRA also allows OSM to approve as part of a state program an “alternative bonding system that will achieve the objectives and purposes of the bonding program pursuant” to section 509. 30 U.S.C. § 1259(c). PASMCRRA similarly requires a surface coal mining permittee to file a bond with the Department prior to commencing surface mining operations. 52 P.S. § 1396.4(d). The amount of the bond shall be “based upon the total estimated cost to the Commonwealth of completing the approved reclamation plan, or in such other amount and form as may be established by the Department pursuant to regulations for an alternate coal bonding program which shall achieve the objectives and purposes of the bonding program.” *Id.* Thus, under both Pennsylvania and pertinent federal law, the Department has the authority to implement two types of bonding systems to provide financial assurance that surface coal mining operations are properly reclaimed. The two types are known as conventional and alternate bonding.

A conventional bonding system (CBS) requires that the mine operator post a site-specific bond sufficient in amount to assure completion of the mine site’s reclamation plan if the work had to be performed by the Department in the event of a forfeiture. This system is often referred to as full-cost bonding because the amount of the bond is not discounted or intended to be supplemented by other funding sources. An alternate bonding system (ABS) is typically designed as a collective risk-spreading system that draws on other sources of funds for completing reclamation at individual mine sites where the operator has defaulted on its reclamation obligations and the bond for the site has been forfeited. With an ABS, a State can discount the amount of the required site-specific bond to an amount less than the full cost needed to complete reclamation of the mine site in the event of forfeiture. The individual permitted mining operators usually contribute to a reclamation fund administered by the regulatory authority (e.g. through imposition of a standard fee), thus sharing the liability for the reclamation of forfeited sites and supplementing the discounted site-specific bonds.

From 1982 until 2001, the Commonwealth employed a bifurcated bond system: surface coal mines, coal refuse reprocessing operations and coal preparation plants were covered by an ABS, while underground coal mines and coal refuse disposal operations were covered by a CBS. Pennsylvania’s 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—i.e., excess bond money from forfeited and reclaimed sites, license and permit fees, fines and civil penalties, and reclamation fees—were all placed into the Surface Mining Conservation and Reclamation Fund, (the SMCR Fund). *See* 52 P.S. § 1396.18(a). Operators were required to post site-specific bonds for surface mining operations covered by the ABS, but they were not required to post a bond sufficient in amount to

cover the full cost of completing reclamation of the mine site. The money in the SMCR Fund was intended to cover the difference between the bond and the actual cost of reclamation.

The reclamation fee imposed by 25 Pa. Code § 86.17(e) 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 but was raised to \$100 per acre in 1993. As part of administering Pennsylvania's ABS, the reclamation fees and other moneys described above have been deposited by the Department into the SMCR Fund and have been used to supplement site-specific bonds in order to cover the Department's full costs to reclaim mine sites if mine operators defaulted on their reclamation obligations.

Insolvency of Pennsylvania's ABS

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 Pennsylvania's ABS must be modified to provide the resources needed to reclaim existing ABS forfeited sites within a reasonable timeframe, and to ensure that future forfeiture sites would be reclaimed in a timely manner. Moreover, the ABS had to have sufficient funds to complete the reclamation plan approved in the surface mining permit. In May 1991, OSM codified a required program amendment directing Pennsylvania to submit information by November 1991 which demonstrated that the ABS was solvent. 30 CFR § 938.16(h). Specifically, OSM required Pennsylvania to either 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 24,687, 24,719-21 (May 31, 1991).

In August 1991, OSM's Harrisburg Field Office issued a report titled *Pennsylvania Bond Program as an Alternative Bonding System*. The 1991 report documented the Department's failure to adequately reclaim all forfeited ABS sites, primarily because the Department 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, the Department had to adopt changes to its ABS to address program deficiencies and outstanding reclamation on ABS forfeiture sites (the Part 732 Notice). A part 732 notice is a document in which OSM notifies the State that its regulatory program must be amended to be in accordance with FSMCRA and consistent with federal regulations. Such a notification may be necessary as a result of Federal regulation changes, State or Federal court decisions, or problems identified during oversight or other program review processes. *See Pennsylvania Fed'n of Sportsmen's Clubs v. Norton*, 413 F.Supp. 2d 358, 364 (M.D. Pa. 2006). The Part 732 Notice stated, in part:

The specific event leading to this determination is an OSM Field Office evaluation of the adequacy of the Commonwealth's alternative bonding system (ABS). This evaluation identified unfunded reclamation liabilities (for

backfilling, grading, and revegetation) in excess of eight million dollars for current bond forfeiture sites alone. The review also found that the ABS is financially incapable of abating or permanently treating pollutorial discharges from bond forfeitures. Even if no such discharges are created in the future, annual treatment costs for existing discharges are currently estimated at 1.3 million dollars.

The 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).

Termination of ABS and Conversion of Surface Mines to a CBS

The Department undertook various efforts in response to OSM’s required program amendment and the Part 732 Notice (most of which need not be enumerated here), including an increase in amount of the per-acre reclamation fee from \$50 to \$100 per acre in 1993. Doubling the reclamation fee did not generate sufficient funds to eliminate the ABS deficit, and the Department concluded that if significant changes were not made the deficit would only get worse. The number of acres being permitted had been declining (with a corresponding reduction in income from the reclamation fee), and there was a significant number of underbonded ABS permits with post-mining discharges. Recognizing that the ABS would never address the situation, the Department decided to terminate the ABS and to employ a full-cost bonding system for all of Pennsylvania’s active mine sites. In 2001, the Department began converting active surface coal mining permits issued under the ABS to a CBS.

The conversion of the ABS permits to a CBS required a complex approach by the Department in coordination with the legislature and the mining industry. The main components of the approach included the following. A comprehensive analysis by the Department of the existing ABS deficit for land reclamation was prepared in a February 2000 report titled *Assessment of Pennsylvania’s Bonding Program for Primacy Coal Mining Permits*. Based on the report’s conclusions, the General Assembly appropriated \$5.5 million in 2001 to cover that land reclamation deficit. The Department developed a conversion assistance financial guarantee program by which the Department effectively operates as a surety and provides part of the bonding for conventional bonds, thus easing the transition for active operators to the CBS and thereby preventing bankruptcies and/or abandonment of sites. In 2001, the General Assembly appropriated \$7 million to underwrite the conversion assistance financial guarantee program. The Department developed a detailed conventional bonding guidance document that set forth the mechanics of the conventional bonding process for surface mining operations. The Department then implemented conventional bonding for all ABS actively-mined, permitted surface coal mine sites. A plan to address post-mining pollutorial discharges on the ABS forfeiture sites was formulated, resulting in the Program Enhancement Document and the Discharge Abatement Workplan. In August 2001, the ABS was formally terminated.

Related Litigation

In 1999, a citizens' suit was filed in the United States District Court for the Middle District of Pennsylvania by several citizen groups against the Department, OSM and the U.S. Department of the Interior. *Pennsylvania Federation of Sportsmen's Clubs, Inc. et al. v. McGinty, et al.*, (No. 99-cv-1791). Plaintiffs alleged various deficiencies in Pennsylvania's bonding program related to the insolvency of the ABS and the Department's failure to reclaim all the ABS forfeiture discharge sites. Six of the eight counts against the Department were dismissed. The remaining two concerned the Part 732 Notice and required program amendment in 30 CFR § 938.16(h). This lawsuit is currently pending before the United States District Court for the Middle District of Pennsylvania and has been stayed pending the final disposition of a related case in the same court called *Pennsylvania Federation of Sportsmen's Clubs, Inc. et al. v. Kempthorne, et al.*, (No. 03-cv-0220). In June 2003, OSM terminated the bonding program deficiency as it relates to the ABS, in part, as a result of the Department's conversion to the CBS and in response to a report prepared by the Department jointly with OSM. The report is titled *Pennsylvania Bonding System Program Enhancements* and includes a discussion and analysis of the bond program enhancements undertaken to resolve inadequate bonding for the ABS. The *Kempthorne* case was filed in December 2003, by the same plaintiffs that filed the *McGinty* case, in response to OSM's termination of the Part 732 Notice and its removal of the required program amendment in 30 CFR § 938.16(h). The *Kempthorne* (previously called *Norton*) case names the U.S. Department of the Interior and OSM as defendants; the Department 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 in *Kempthorne* granted the joint motion of the federal defendants and the Department requesting dismissal of the case. Plaintiffs then appealed the decision to the U.S. Court of Appeals for the Third Circuit.

In the *Kempthorne* case, plaintiffs argued that it was a violation of section 509 of FSMCRA, 30 U.S.C. § 1259, and the regulations implementing FSMCRA issued by OSM—specifically 30 CFR § 800.11(e)(1)—for the Department to terminate its ABS when it converted to a CBS in 2001. Plaintiffs 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 CBS bonds (together the “ABS Legacy Sites”), remain subject to the requirements of 30 CFR § 800.11(e)(1). As such, Pennsylvania remains obligated to provide for the complete reclamation and treatment of the ABS Legacy Sites and their pollutional discharges by assuring the Department has available sufficient money to complete reclamation for these sites at any time. *See* 30 CFR § 800.11(e)(1).

On August 7, 2007, the Third Circuit decided the appeal and 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. *See Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337 (3d Cir. 2007). The Third Circuit decision in *Kempthorne* directly impacted the Department's decisions with respect to this final rulemaking because the Department had proposed to eliminate the per-acre reclamation fee in § 86.17(e) in the proposed rulemaking. *See* 36 Pa. Bull. 4200, 4200-01 (Aug. 5, 2006). The Court explained the pertinent issue as follows:

Although we have determined that Pennsylvania has effectively converted to a CBS and OSM did not abuse its discretion in approving that conversion, neither we nor OSM are yet out of the woods, so to speak. That is because we are still faced with the question of what obligations, if any, Pennsylvania has to ensure reclamation of sites forfeited before the conversion to a CBS began, plus any additional sites whose reclamation costs are still not fully covered by CBS bonds. To clarify, it is important we distinguish between the ABS as a bonding program, which no longer exists in Pennsylvania, and the particular mine sites bonded under that now defunct program. This distinction is a critical one as the conclusion that it is permissible under [FSMCRA] for a State to dissolve its ABS program, in the manner Pennsylvania has, does not lead ineluctably to the conclusion that all liabilities accrued under that program are also automatically dissolved. In other words, there are still mining sites in Pennsylvania that were originally bonded under the ABS and forfeited prior to the CBS conversion. The question remains as to what obligations Pennsylvania has to provide for complete reclamation and treatment of these mining sites and their polluttional discharges.

Kempthorne, 497 F.3d at 349-50.

The Third Circuit 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.” *Kempthorne*, 497 F.3d at 353. To meet the requirements of federal law, 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.” 30 CFR § 800.11(e)(1). Thus, the Third Circuit ruled that Pennsylvania must assure that it will have sufficient money available at any time to complete the reclamation of all the ABS Legacy Sites, including the treatment of any post-mining polluttional discharges at these sites. The Third Circuit Court also ruled that the Program Enhancement Document did not meet the federal requirements because it was not a formal program amendment and was not legally enforceable. The Court reinstated the Part 732 Notice and the required program amendment in 30 CFR § 938.16(h) and remanded the case to the District Court for further proceedings, see *Kempthorne*, 497 F.3d at 354-55. The related litigation has been temporarily stayed by the District Court pending the issuance of this final rulemaking. To comply with the Court’s ruling, Pennsylvania must assess the extent of the liability associated with all of the ABS Legacy Sites, and must identify specific sources of dedicated revenue that will generate enough money to cover the costs of reclaiming these sites, specifically the ongoing costs for treating any polluttional discharges at these sites. The method for providing the revenue must be submitted to OSM for approval as a formal program amendment which satisfies the Part 732 Notice and 30 CFR § 938.16(h), and it must be legally enforceable.

Reclamation Obligations at the Primacy ABS Legacy Sites

As part of its development of this final rulemaking, the Department carefully examined the extent of the liability associated with all of the ABS Legacy Sites. The reclamation liability 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 2004, in an effort to improve the management of the reclamation of the ABS sites, the responsibility for coordinating

the reclamation of primacy bond forfeiture sites was transferred from the Bureau of Abandoned Mine Reclamation to the Bureau of District Mining Operations. At that time, there were approximately 150 primacy ABS permits with outstanding reclamation obligations (land reclamation and post-mining discharges).

Fifty-five ABS sites had land reclamation remaining to be completed as of November 2007. Of these fifty-five, 23 have had the necessary arrangements made and are in the process of being reclaimed. All of the remaining primacy ABS sites with outstanding land reclamation have been identified and evaluated to determine the projected costs of completing this land reclamation. The estimated cost of the land reclamation for these remaining land-reclamation sites is approximately \$7.8 million. As of November 2007 the ABS deficit closeout account balance was approximately \$4.4 million. Forfeited bonds were collected for the land-reclamation primacy ABS sites; there is approximately \$1.9 million in collected bonds for these sites currently held in a restricted account in the SMCR Fund. The balance of about \$1.5 million needed to complete the land reclamation at ABS Legacy Sites can be paid from other funds 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. The Department has determined that it currently has sufficient money available in the SMCR Fund to complete all of the outstanding land reclamation at the ABS Legacy Sites. Nearly all of this money is already restricted by law for this purpose, and the Department expects that land reclamation at the ABS Legacy Sites will be completed within the next two years. Thus, the changes made for this final rulemaking do not address funding for land reclamation of ABS Legacy Sites.

The ABS Legacy Sites with discharges that need treatment include both the primacy ABS forfeited sites, plus any additional sites whose reclamation costs are not fully covered by CBS bonds when forfeited in the future. All of these sites remain subject to the requirements of 30 CFR § 800.11(e)(1). Establishing a final exact number of ABS Legacy Sites with pollutional discharges that will need treating is not yet possible, though the Department has identified and evaluated the primacy ABS discharges sites that have already had the bond forfeited.

There are 80 primacy ABS permits where the bonds were forfeited and there is a post-mining discharge that requires continued treatment. Some of these permits contain multiple discharges. The population of the ABS forfeited post-mining discharge sites has been evolving, and the Department 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. An evaluation of the primacy ABS forfeited discharge sites was completed in order to project the costs of treating the discharges at these sites. 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, property access and construction. The annual operation and maintenance costs include: the treatment chemicals as needed, water quality sampling, facility inspection, site maintenance, and sludge removal and disposal. Recapitalization costs are the money that needs to be set aside to reconstruct a facility or replace major components of a treatment system. Of the 97 discharges on the ABS forfeiture discharge

sites inventory, 30 have functioning passive treatment systems in place. Costs for treating all the 97 discharges at the primacy ABS forfeiture discharge sites were estimated using the water quality and quantity monitoring data for the discharges and the AMDTreat model developed by OSM.

The initial cost to construct the necessary facilities for the primacy ABS forfeiture discharge sites is approximately \$2.8 million. The Department currently has funds available to cover the cost to construct the necessary initial treatment facilities for the primacy ABS forfeiture discharge sites. There is approximately \$2.5 million in the released bond account which may be used to pay the treatment facility construction costs. Money in the general operations account may be used for reclamation purposes as well as general administrative costs, and there is approximately \$9.2 million currently held in the general operations account. Construction of these initial treatment facilities is expected to occur over the course of the next two to three years. Consequently, the changes made for this final rulemaking do not address the means for funding initial construction costs at the primacy ABS forfeiture discharge sites.

The total estimated annual operation and maintenance costs for the 80 primacy ABS forfeiture discharge sites and their 97 discharges, once construction of all the necessary treatment facilities has been completed, is approximately \$1.2 million. These costs were also calculated using the AMDTreat model developed by OSM. Currently, there is no established, legally-enforceable, means to generate the revenue to pay the annual operation and maintenance costs (including recapitalization costs) associated with the primacy ABS discharge sites. The changes made for this final rulemaking are intended to provide a legally enforceable mechanism for paying the costs of treating the discharges at the ABS Legacy Sites in perpetuity. The final rulemaking restructures the reclamation fee and dedicates other sources of funding for performing reclamation of the ABS Legacy Sites, including the interest earned by the reclamation fee moneys and civil penalties assessed pursuant to PASMCRRA. See Summary of Changes to the Proposed Rulemaking in Section E below.

It is important to recognize that the ABS forfeiture discharge sites inventory will continue to have some sites added to the list. At the time of conversion to the CBS there were some surface coal mining sites, permitted under the primacy ABS, that were not being actively mined but had post-mining pollutional discharges and the operators were continuing to treat the discharges. The bonds for these sites were not sufficient to cover the costs to perpetually treat the discharges. These sites remain part of the ABS legacy until the costs to treat the discharges in perpetuity are covered by fully-funded financial guarantees. At the time of conversion, additional bond needed to be posted, or fully-funded trusts established, for 270 treatment facilities to treat 400 existing post-mining discharges at these sites. As of December 2007, operators had posted additional bonds, or established trust funds, through the execution of 72 agreements covering 174 discharge treatment facilities treating 244 discharges. Forty-four of the 72 agreements are for full-cost bonds totaling \$109.1 million; sixteen are fully-funded trusts totaling \$45.5 million; eleven involve trusts being funded over time that will total \$43.1 million when fully funded. Negotiations are currently ongoing for 22 agreements for 55 facilities and 59 discharges, with a total estimated financial obligation (bond or trust) of \$57.8 million. It was expected that about 124 agreements would be needed to fund the entire set of 270 treatment facilities.

As of December 2007, there remained 45 primacy ABS permits with 85 post-mining discharges where the permittee has yet to post a full-cost financial guarantee, but the bond currently posted for the site has not been forfeited. It is not possible to know how many of these 45 permits will ultimately be forfeited and added to the primacy ABS forfeiture discharge inventory. The operator may ultimately default on its obligation at some of these sites and such defaulted sites would become part of the ABS legacy for which the Department must assure long-term funding for discharge treatment. This final rulemaking addresses this uncertainty, in part, through a mechanism to adjust the amount of the reclamation fee, and by maintaining a \$3,000,000 cash reserve in the Reclamation Fee O&M Trust Account. The Department determined the amount of the cash reserve by taking into account the expected annual operation and maintenance costs up until January 1, 2010 (when the fee can be adjusted). Another consideration was the cost to maintain treatment at ABS sites that may be forfeited. The conditions which must be met before the ABS Legacy Sites Trust Account is actuarially sound are intended to assure the generating of sufficient funds for the Department to pay the discharge treatment costs for the entire class of ABS Legacy Sites.

Available Revenue Sources for Reclamation of ABS Legacy Sites

As part of its development of this final rulemaking, the Department also examined existing funds and revenue sources available to pay for the required reclamation of primacy ABS forfeiture discharge sites. Funds which may be used for reclamation are currently held in the SMCR Fund and are tracked in various accounts. The available funds which may be used to help pay for treatment of discharges at ABS forfeiture sites include the money collected from bonds forfeited at ABS discharge sites and excess bond money in the released bond account. When a bond is forfeited and collected, the money is deposited in the restricted bond account. This money may only be used for reclamation activities for the permit for which it was posted, unless it is determined that the reclamation is unreasonable, unnecessary or impossible. If any of these restricted funds are not needed to reclaim the site for which they were posted, then they are transferred to the released bond account for use to complete other reclamation projects. *See* 52 P.S. § 1396.18(b). Money in the general operations account in the SMCR Fund may be used for reclamation, in addition to other purposes provided for in PASMCR. *See* 52 P.S. § 1396.18(a); 25 Pa. Code § 86.187(a)(3).

Current revenue sources which may be used to pay the costs of treating the discharges at the ABS Legacy Sites were identified. These include the following: (i) revenue from the per-acre reclamation fee imposed by § 86.17(e); (ii) interest on funds held in the reclamation fee account; (iii) interest on funds held in the restricted bond account; (iv) interest on the other moneys held in the SMCR Fund such as moneys in the released bond account or the general operations account; and, (v) civil penalties assessed pursuant to PASMCR. At the current rate of \$100 per acre imposed on the operational area of the permit, the reclamation fee is expected to produce revenue of approximately \$200,000 per year. 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. The interest income has been at an annual rate of about 5%. 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.

Public Response to Elimination of Reclamation Fee in Proposed Rulemaking and Public Involvement in Development of the Final Rulemaking

The proposed rulemaking was published in the *Pa. Bulletin* on August 5, 2006. See 36 Pa. Bull. 4200 (Aug. 5, 2006). Public comments were accepted from August 5, 2006 to September 5, 2006 and the comment period officially closed on November 5, 2006. The Department received extensive public comments regarding the proposed elimination of the reclamation fee imposed by § 86.17(e) and the Department's financial means for addressing the ABS Legacy Sites. The Department proposed to eliminate the reclamation fee for a variety of reasons: the ABS had been terminated in 2001; active mine sites permitted under the ABS had been converted to the CBS; operators are being required to post full-cost bonds for the costs to treat post-mining polluttional discharges which had developed on active mine sites; the General Assembly had appropriated the money needed to complete the land reclamation of all of the ABS forfeited sites; and the discharges on ABS forfeited sites were proposed to be addressed in accordance with the Program Enhancements Document. The public commentators objected to the proposed elimination of the reclamation fee for various reasons. The comments asserted that Pennsylvania had a legal obligation to adequately complete the reclamation of all ABS Legacy Sites, questioned the Department's financial capacity to do so without restructuring the current system, and recommended that the Department maintain the reclamation fee as part of a system for paying the ongoing operation and maintenance costs associated with treating post-mining polluttional discharges at ABS forfeiture sites in perpetuity. A summary of the comments and responses to the proposed rulemaking is set forth in Section F.

Following the close of the comment period on the proposed rulemaking, and prior to the appellate Court's decision in the related litigation, the Department presented this rulemaking to the MRAB at its January 25, 2007 meeting as a final form without having made any changes to the proposed rulemaking. At the January 25, 2007 meeting, the MRAB was deadlocked in the vote on a motion to recommend that the Department proceed to final rulemaking and eliminate the reclamation fee. At that meeting, some MRAB members expressed the view that further progress in obtaining additional bond money for the primacy ABS discharge sites must be accomplished before the reclamation fee could be eliminated. After hearing the Department's report, MRAB members opposed to moving forward with eliminating the reclamation fee stated that it was premature to eliminate the fee because the Department did not have sufficient funds on hand to cover the costs to treat the discharges at all ABS Legacy Sites.

The deadlock in the MRAB's vote, the views expressed by MRAB members at the January 2007 meeting, the public comments on the proposed rulemaking, and ultimately the decision by the Third Circuit in *Kemphorne* discussed above, resulted in the Department's reconsideration of the advisability of eliminating the reclamation fee as part of this rulemaking. In the wake of the August 2007 Court decision in *Kemphorne*, the Department sought the advice of the MRAB on how to proceed in response to that decision. A series of MRAB meetings were held specifically so that the Department could obtain advice and recommendations from the MRAB based upon: the Third Circuit court decision, the outstanding required program amendment and Part 732 Notice issued by OSM, and the public comments on the proposed rulemaking. This issue was on the agenda at the meetings of the full MRAB on October 25, 2007 and the special meeting on November 29, 2007. In addition, the Regulation, Legislation

and Technical Committee of the MRAB met on October 17, 2007 and November 15, 2007 solely to address this issue.

At its November 29, 2007 meeting, the MRAB unanimously recommended that the Department address the ABS Legacy Sites by means of the following components. First, the Department should retain the reclamation fee and should dedicate the money collected from imposition of the fee solely for the purpose of paying operation and maintenance costs for the discharges on the ABS Legacy Sites. Second, the amount of the reclamation fee should be maintained at its current rate of \$100 for two years. After two years, it should be adjusted by operation of law so as to generate sufficient funds to pay operation and maintenance costs for discharges on the ABS Legacy Sites until a permanent alternate source of funding is found and the reclamation fee can be discontinued. Third, the Department should also dedicate money from certain other specific sources for use in paying operation and maintenance costs for ABS Legacy Sites. The MRAB suggested dedicating the moneys received from civil penalties collected under PASMCRRA, a portion of the interest earned on other moneys held in the SMCR Fund (to be determined at the Department's discretion), and funds from certain other identified sources. Lastly, the MRAB requested that the Department present its annual review and proposed adjustment of the reclamation fee amount to the MRAB for review and comment in advance of the adjusted amount being published in the *Pennsylvania Bulletin*, and that the final rulemaking include a provision expressly noting that the Department's determination of the adjusted amount is appealable to the Environmental Hearing Board. The MRAB agreed with the Department's proposal to create a separate restricted ABS Legacy Sites Account which would hold the collected bonds on primacy ABS forfeited discharge sites and the interest generated by those funds.

The Department met informally with OSM between August 2007 and January 2008 in order to discuss compliance with the appellate court decision in *Kemphorne*, and the Department's response to the outstanding required program amendment in 30 CFR § 938.16(h) and the Part 732 Notice issued by OSM and reinstated by the Court. On November 6, 2007, OSM provided some direction in a letter to the Department regarding its expectations for a program amendment to address the ABS deficiencies. The letter stated that the Department should focus its attention on "developing an amendment that provides enforceable guarantees that satisfy the financial obligations prescribed by § 800.11(e) for those reclamation obligations not covered by full cost bonds." The November 6, 2007 letter from OSM also stated that "the amendment needs to identify the specific revenue sources to be used, and include a requirement that the revenue generated be directed towards the reclamation of mine sites that were permitted after Pennsylvania obtained programmatic 'primacy' in 1982."

The Department drafted changes to this rulemaking in response to the MRAB and OSM recommendations, and to the public comments received on the proposed rulemaking. The Department then sought public comment on the changes being made between proposed and final rulemaking through an Advanced Notice of Final Rulemaking. 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. See 38 Pa. Bull. 80 (Jan. 5, 2008). A summary of the comments and responses to the Advanced Notice of Final Rulemaking is set forth in Section F.1 below.

At the MRAB meeting on January 10, 2008 members of the MRAB commented on the draft of the final rulemaking issued as part of the Advanced Notice of Final Rulemaking and suggested several changes to the draft. First, the MRAB recommended strengthening the text of the provisions establishing the Reclamation Fee O&M Account and ABS Legacy Sites Account to better prevent the funds in these accounts from being used for some purpose other than paying costs associated with the treatment of discharges on the ABS Legacy Sites. The MRAB did not think that the provisions limiting how the Department could use the money were a sufficient protection. Second, the MRAB asked that the \$50 minimum amount set for the reclamation fee be removed from the draft issued with the Advanced Notice of Final Rulemaking. Third, they requested that only “excess” moneys in the Reclamation Fee O&M Account should be available for transfer to the ABS Legacy Sites Account. Finally, the MRAB recommended that a provision be added expressly stating that an alternate source of funding in lieu of the reclamation fee could be used if that alternate funding source was sufficient to maintain the \$3 million balance and cover the annual costs of treating the discharges at all ABS Legacy Sites. The final rulemaking was formally presented for consideration by the MRAB at its meeting on January 10, 2008, at which time the Department requested the MRAB’s approval of the final rulemaking. After making the recommendations for changes described above, the MRAB voted unanimously to recommend this final rulemaking for approval. The Department incorporated changes in response to these MRAB recommendations into the final rulemaking.

The Department also met individually with representatives of the surface mining industry, OSM, and interested citizens groups in order to solicit comments on the final rulemaking as proposed in the Advanced Notice of Final Rulemaking. The amendments made to the reclamation-fee section (§ 86.17(e)) and the use-of-money section (§ 86.187) in this final rulemaking respond to recommendations made by the MRAB, to public comments made in response to the Advanced Notice of Final Rulemaking, and to comments made by OSM, the regulated industry and interested citizens groups. *See* Summary of Changes to the Proposed Rulemaking in Section E below.

Bond Forfeiture Program Corrections

The amendments to the bond forfeiture regulations in §§ 86.187(b)--86.190 will make these sections consistent with Federal regulations, and are necessary to satisfy conditions for maintaining primacy of the Commonwealth’s regulatory program. OSM previously disapproved certain aspects of these regulations and required amendments to make the regulations as effective as Federal law. *See* 30 CFR § 938.16(mm)-(qq) (required program amendments for Pennsylvania); 56 FR 55080 (October 24, 1991). These amendments will satisfy the requirements set forth in 30 CFR § 938.16(mm)-(qq). No changes were made to these bond-forfeiture amendments between proposed and final rulemaking.

E. Summary of Changes to the Proposed Rulemaking

The following sections have been revised or added in the final rulemaking.

§ 86.1 (definition of “ABS Legacy Sites”)

The term *ABS Legacy Sites* has been added to the list of terms in § 86.1 because it is used throughout the amendments to § 86.17(e) and § 86.187 made as part of this final rulemaking. The term *ABS Legacy Sites* connotes a certain class of surface coal mine sites which were permitted under the Department’s primacy alternate bonding system. These sites have post-mining pollutional discharge(s), the operator has defaulted on its obligation to adequately treat the discharge(s), and the operator’s financial guarantee for reclamation is insufficient to cover the cost of treating the discharge in perpetuity. The Department’s means for addressing reclamation of the ABS Legacy Sites, including the cost of treating the discharges in perpetuity, is the subject of the ruling of the Third Circuit Court of Appeals in the *Kempthorne* case discussed above, and the focus of public comments on the proposed rulemaking. The cost of treating the discharges at these sites is being addressed by the amendments to § 86.17(e) and § 86.187 made as part of this final rulemaking.

§ 86.1 (definition of “Operational Area”)

The term *Operational Area* is being added to § 86.1 in order to help clarify the amendments to § 86.17(e) concerning the manner in which the reclamation fee is assessed in the context of a conventional bonding system. Following conversion to the CBS, the Department’s practice has been to assess the per-acre reclamation fee on each acre of the approved operational area, as opposed to all acreage covered by the surface mining permit. Amendments to § 86.17(e) clarifying that the reclamation fee is assessed only for the operational area, and the definition for the term *Operational Area*, are being added in response to public comments regarding the Department’s practice of assessing the reclamation fee and the textual ambiguities in § 86.17(e) created by the Department’s conversion to the conventional bonding system.

§ 86.1 (definition of “Operation and Maintenance Costs”)

The term *Operation and Maintenance Costs* is being added to § 86.1 in order to help clarify the amendments to § 86.17(e) and § 86.187 concerning how certain moneys are to be used to treat discharges on a certain class of bond forfeiture sites – the ABS Legacy Sites. The definition for the term *Operation and Maintenance Costs* is being added in response to public comments and comments of the MRAB.

§ 86.1 (definition of “Primacy Alternate Bonding System”)

The term *Primacy Alternate Bonding System* is being added to § 86.1. The ABS Legacy Sites, which are the focus of the *Kempthorne* case and the public comments received in response to the proposed rulemaking, are a class of coal mine sites which were permitted under the “primacy alternate bonding system” and have certain additional characteristics described in the definition for “ABS Legacy Sites.” It is necessary to distinguish sites permitted under the Department’s alternate bonding system from those converted to, or originally permitted under, the conventional bonding system in order to accurately identify the ABS Legacy Sites. It is also necessary to distinguish further between the “primacy” alternate bonding system and the alternate bonding system that was employed by Pennsylvania for surface coal mine sites prior to

Pennsylvania obtaining primacy in July 1982, because the pre-primacy ABS sites are not subject to the requirements of 30 CFR § 800.11(e). This term and its definition are needed to accurately identify the class of mine sites being addressed by the amendments to § 86.17(e) and § 86.187 made as part of this final rulemaking.

§ 86.1 (definition of “Recapitalization Costs”)

The term *Recapitalization Costs* is being added to the list of terms in § 86.1. When calculating the costs to treat post-mining pollutional discharges at mine sites in perpetuity, the Department must include an amount to cover the costs to replace discharge treatment facility components over time (as such components simply wear out or otherwise need to be replaced). It may also be cost effective to replace a particular treatment system with another system that costs substantially less to operate and maintain in the long run. This term is needed to assure that these specific equipment-replacement costs are identified as part of the ongoing costs for treating post-mining discharges at the ABS Legacy Sites. Recapitalization costs are expressly included as part of the operation and maintenance costs for treating discharges at ABS Legacy Sites in changes being made to § 86.17(e) and § 86.187.

§ 86.17(e) (reclamation fees)

The proposed rulemaking amended this subsection to discontinue collection of the per-acre reclamation fee for surface mining activities upon publication of the rulemaking as final in the *Pennsylvania Bulletin*. In response to public comments and the Third Circuit ruling in *Kemphorne*, and in accordance with the recommendation of the MRAB, the Department determined that the reclamation fee is an adjustable source of revenue that should be used to help cover the costs of treating discharges at the ABS Legacy Sites. Consequently, the Department decided not to repeal the reclamation fee as proposed. The final rulemaking retains the reclamation fee, and amends the text of § 86.17(e) to clarify the application of this subsection in the context of the conventional bonding system. The amended text clarifies that the fee is assessed for each acre of the approved operational area of the permit, reflecting the Department’s current practice. The amendments that clarify the manner the reclamation fee is assessed were made in response to public comments concerning the Department’s practice and the textual ambiguities in § 86.17(e) created by conversion to the conventional bonding system. Provisions in this subsection pertaining to deposit of the reclamation fee in the SMCR Fund and its use for reclaiming forfeited mine sites have been deleted and reworked into a new paragraph (1) which is being added in this final rulemaking. Finally, minor editorial changes were made by adding references to § 86.143 (relating to the requirement to file a bond) and to the exception for remaining areas provided in § 86.283(c).

§ 86.17(e)(1) (deposit and use of reclamation fees)

This provision, in conjunction with § 86.187(a)(1), establishes a separate subaccount within the SMCR Fund called the Reclamation Fee O&M Trust Account, and requires the Department to deposit all reclamation fees it collects into the Reclamation Fee O&M Trust Account. This subsection also requires that the Department use the reclamation fees only for the purpose of paying the costs associated with treating post-mining pollutional discharges at ABS

Legacy Sites. In addition, this paragraph requires that all interest earned on the moneys in the Reclamation Fee O&M Trust Account be deposited into the account and be used only to pay the costs associated with treating post-mining pollutional discharges at ABS Legacy Sites. The name of this account reflects that it is a trust established by this rulemaking and that the funds contained in the account are held in trust by the Commonwealth for the benefit of the people to be used by the Commonwealth to treat post mining pollutional discharges at ABS Legacy Sites. In response to the public comments on the proposed rulemaking, and the Third Circuit ruling in *Kemphorne*, the Department determined that the reclamation fee is an adjustable source of revenue that should be used to help cover the costs of treating discharges at the ABS Legacy Sites. Moreover, to comply with the Court's ruling, the Department must identify and dedicate specified sources of revenue that will generate enough money to cover the costs for treating discharges at these sites. This subsection has been added to the final rulemaking as part of an enforceable regulatory mechanism for assuring that the Department always has sufficient funds to cover the costs of reclamation, including the costs of treating post-mining pollutional discharges in perpetuity, at all the ABS Legacy Sites.

§ 86.17(e)(2) (preparation of fiscal-year report on Reclamation Fee O&M Trust Account)

This provision requires the Department to prepare a report after the end of each fiscal year containing financial analysis and projections of the revenues and expenditures of the Reclamation Fee O&M Trust Account. The report must be made available for review by the MRAB and the general public. This provision establishes a process by which the MRAB and the general public can examine the Department's expenditure of funds from the Reclamation Fee O&M Trust Account for the treatment of discharges at the ABS Legacy Sites, the amount of revenue deposited into the account during the prior fiscal year from the various dedicated revenue sources, and the projected expenditures and projected revenue. This provision will assist OSM, the MRAB, affected persons in the industry, and interested members of the public, with their oversight of the Department's compliance with the requirements of 30 CFR § 800.11(e) as applied to the ABS Legacy Sites, the Court ruling in *Kemphorne*, and the required program amendment at 30 CFR § 938.16(h). The fiscal year-end report will also serve as the vehicle by which the Department will provide these same stakeholders with an opportunity to review and comment on the calculation of the amount of the reclamation fee pursuant to §§ 86.17(e)(3) and (4).

§ 86.17(e)(3) (amount of the reclamation fee)

The amount of the reclamation fee is currently set at \$100 per acre. Section 86.17(e)(3) requires the fee amount to be maintained at \$100 per acre until December 31, 2009. After this initial period at \$100 per acre, the reclamation fee will be annually adjusted based on criteria specified in §§ 86.17(e)(3) and (4). Members of the regulated industry expressed their intention to seek the establishment of a permanent alternative funding source which could take the place of the reclamation fee by providing all the funds needed to pay the annual operation and maintenance costs for the ABS Legacy Sites. The MRAB recommended that the regulations include express provisions regarding the use of a permanent alternative funding source in lieu of the reclamation fee. In response to this recommendation of the MRAB and to comments made by the regulated industry on the Advanced Notice of Final Rulemaking, this section also includes

provisions concerning the potential for a permanent alternative source of funding to be used in lieu of the reclamation fee—if that alternative funding source meets the conditions in §§ 86.17(e)(3)(i) and (ii). Section 86.17(e)(3) provides that the Department will begin annually adjusting the amount of the reclamation as of January 1, 2010, and will continue to do so, until either a permanent alternative funding source is established or the ABS Legacy Sites Trust Account becomes actuarially sound. Section 86.17(e)(3)(i) makes clear that the reclamation fee will be adjusted annually until the ABS Legacy Sites Trust Account is actuarially sound, unless a permanent alternative funding source in place of the reclamation fee is used to fund the Reclamation Fee O&M Trust Account. Section 86.17(e)(3)(ii) establishes the conditions that a permanent alternative funding source must meet before the reclamation fee could be discontinued and the permanent alternative source used in its stead. Such an alternative funding source must be permanent; must provide sufficient revenues to maintain a balance in the Reclamation Fee O&M Trust Account of at least \$3,000,000; and, must provide sufficient revenue to pay the annual operation and maintenance costs for all the ABS Legacy Sites.

§ 86.17(e)(4) (amount of the reclamation fee)

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

The Department recognizes the reclamation fee as a flexible source of funding for the operation and maintenance costs associated with treating discharges at the ABS Legacy Sites. Sections 86.17(e)(3) and (4) establish a mechanism for annually adjusting the amount of the reclamation fee. The adjustment procedure is necessary to accommodate the fluctuations in the operation and maintenance costs for treating pollutional discharges at the ABS Legacy Sites that will occur over time. The adjustment procedure is also necessary in order to maintain a sufficient cushion in the Reclamation Fee O&M Trust Account to prevent pollution and assure that the Department has sufficient money at any time to treat the discharges at the ABS Legacy Sites. A flexible mechanism for adjusting the fee, up or down, will assure that the Department always has sufficient funds on hand to cover the costs of treating the discharges at all the ABS Legacy Sites—thereby enabling Pennsylvania's bonding program to meet the requirements of 30 CFR § 800.11(e)—while simultaneously avoiding collection of excessive reclamation fee amounts from mine operators.

§ 86.17(e)(5) (publishing amount of the adjusted reclamation fee; calculation appealable)

Section 86.17(e)(5) is added to prescribe a procedure for the Department to publish the amount of the adjusted reclamation fee. The Department must review its calculation of the adjusted reclamation fee amount at a public meeting of the MRAB (most likely in October of each year), where the members of the MRAB, affected persons in the industry, and the general public, will have an opportunity to comment on the Department's financial report and its calculation of the adjusted amount of the fee. The Department will subsequently publish the adjusted amount of the reclamation fee in the Pennsylvania Bulletin, the adjusted amount to be effective upon publication. This provision also states that the Department's calculation of the adjusted reclamation fee is a final action appealable to the Environmental Hearing Board, which the MRAB recommended be included as an express provision in the changes to the final rulemaking. Section 86.17(e)(5) balances the Department's need for a flexible mechanism to assure funding to treat discharges at the ABS Legacy Sites with the interests of the industry and the public in reviewing, commenting on, and challenging (before an independent forum) the Department's administration of the Reclamation Fee O&M Trust Account and the calculation of the new reclamation fee.

§ 86.17(e)(6) (conditions for ceasing collection of reclamation fee)

Section 86.17(e)(6) requires the Department to cease assessment and collection of the reclamation fee when the ABS Legacy Sites Trust Account, established pursuant to § 86.187(a)(i), is actuarially sound. The conditions which must be met for the ABS Legacy Account to become actuarially sound are prescribed here and in § 86.187(a)(2)(ii). The Department's current estimate of the annual operation and maintenance costs for treating the discharges at the ABS Legacy Sites is approximately \$1.2 million. However, the ultimate annual amount for operation and maintenance costs may change significantly depending upon the number of additional underfunded sites which go into default and other relevant factors. When financial guarantees sufficient to cover reclamation costs have been approved for all mine sites permitted under the primacy ABS, no additional sites will need to be added to the class of ABS Legacy Sites. Once the Department completes construction of all necessary discharge treatment systems for all of the ABS Legacy Sites, the Department will ascertain the amount of annual operation and maintenance costs, including recapitalization costs, which will be necessary to treat the discharges at all of the ABS Legacy Sites. This provision allows the Department to cease collection of the reclamation fee when the ABS Legacy Account contains funds which generate interest at a rate sufficient to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at all the ABS Legacy Sites. At that point, the Department will always have sufficient funds on hand in the ABS Legacy Sites Account to cover the costs of treating the discharges at all the ABS Legacy Sites, and Pennsylvania will have met the requirements of 30 CFR § 800.11(e) without the need for additional revenue from the reclamation fee.

§ 86.187(a)(1) (deposit of reclamation fee into Reclamation Fee O&M Trust Account)

This provision, in conjunction with § 86.17(e)(1), has been amended to establish a separate subaccount within the SMCR Fund called the Reclamation Fee O&M Trust Account,

and to require that the reclamation fees collected by the Department pursuant to § 86.17(e) must be deposited into the Reclamation Fee O&M Trust Account. The provision also directs that the interest accrued on collected reclamation fees must be deposited into the Reclamation Fee O&M Trust Account. Section 86.187 (relating to use of money) specifies the purposes for which the Department must use moneys from fees, fines, penalties, bond forfeitures and other moneys received under PASMCR, as well as interest earned on these moneys. By requiring through regulations that certain identified funding sources must be used to pay the costs of treating the discharges at the ABS Legacy Sites, the Department is establishing an enforceable regulatory mechanism for assuring that the Department always has sufficient funds to cover the costs of reclamation, including the costs of treating post-mining pollutional discharges in perpetuity, at all the ABS Legacy Sites. The enforceable regulatory mechanism created by the amendments to the final rulemaking will enable Pennsylvania's bonding program to meet the requirements of 30 CFR § 800.11(e).

§ 86.187(a)(1)(i) (deposit of civil penalties into Reclamation Fee O&M Trust Account)

Under § 18(a) of PASMCR, civil penalties collected pursuant to that statute may be used by the Department for reclamation of surface coal mine sites, restoration of water supplies affected by surface coal mining, or for any other conservation purposes provided by PASMCR. 52 P.S. § 1396.18(a). The Department is thus authorized to use civil penalty moneys, as a supplement to forfeited bonds, for purposes of reclaiming the ABS Legacy Sites including treatment of post-mining pollutional discharges at these sites. New § 86.187(a)(1)(i) will require the Department to deposit into the Reclamation Fee O&M Trust Account the moneys collected from civil penalties assessed pursuant to PASMCR, and to use those moneys deposited into the account to pay the costs associated with treating discharges at the ABS Legacy Sites. This provision responds to public comments on the proposed rulemaking regarding assurance of adequate funding to treat the discharges at the ABS Legacy Sites, as well as to the court ruling in the *Kempthorne* case regarding the obligation of the Department to meet the requirements of 30 CFR § 800.11(e). To comply with the Court's ruling, the Department must identify and dedicate specified sources of revenue that combined will generate enough money to cover the costs for treating discharges at all the ABS Legacy Sites. This subsection identifies a source of revenue—civil penalties collected pursuant to PASMCR—and *requires* the Department to use this source of revenue to fund the discharge-treatment costs of the ABS Legacy Sites. As such, this provision is added to the final rulemaking as part of an enforceable regulatory mechanism for assuring that the Department always has sufficient funds to cover the costs of reclamation, including the costs of treating post-mining pollutional discharges in perpetuity, at all the ABS Legacy Sites.

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

§ 86.187(a)(1)(ii) (deposit of interest earned on other moneys in the SMCR Fund into the Reclamation Fee O&M Trust Account)

Similar to the deposit of civil penalties required by § 86.187(a)(1)(i), this section is being added to authorize the Department to deposit into the Reclamation Fee O&M Trust Account a portion of the interest which is earned on other moneys in the SMCR Fund. The SMCR Fund contains moneys from released bonds, license fees, and other sources; these moneys earn interest which may be used by the Department for the purposes specified by § 18(a) of PASMCR. See 52 P.S. § 1396.18(a); 25 Pa. Code § 86.187(a). This provision identifies another source of revenue to be used to fund the discharge-treatment costs of the ABS Legacy Sites. Section 86.187(a)(1)(ii), like § 86.187(a)(i), is being added to the final rulemaking as part of an enforceable regulatory mechanism for assuring that the Department always has sufficient funds to cover the costs of reclamation, including the costs of treating post-mining pollutional discharges in perpetuity, at all the ABS Legacy Sites. Notably, this provision gives the Department discretion as to the amount of the interest earned on other moneys in the SMCR Fund which will be deposited into the Reclamation Fee O&M Trust Account during any given fiscal year.

§ 86.187(a)(1)(iii) (deposit of other moneys into the Reclamation Fee O&M Trust Account)

Section 86.187(a)(1)(iii) will give the Department regulatory authority to deposit other monies from sources such as legislative appropriations or donations into the Reclamation Fee O&M Trust Account. In addition, in the event a change in the applicable law provides for it, this provision will give the Department regulatory authority to deposit into the Reclamation Fee O&M Trust Account the fees that will be collected for “sum-certain financial guarantees needed to facilitate full-cost bonding” (colloquially called “conversion assistance financial guarantees” or “conversion assistance bonds”). Pursuant to § 213 of the General Appropriation Act of 2001 (P.L. 979, No. 2001-6A), the Legislature appropriated \$7 Million to the Department for purposes of establishing a financial guarantee program to assist with the conversion to full-cost bonding. Section 213 of the General Appropriation Act of 2001 also authorized the Department to collect fees for the conversion assistance financial guarantees issued by the Department as part of the program, although the law requires these fees be used to help finance reclamation of the sites participating in the conversion assistance financial guarantee program which have been forfeited. See General Appropriation Act of 2001 (P.L. 979, No. 2001-6A) at § 213 (appropriating \$7,000,000 for “the conservation purpose of providing sum-certain financial guarantees needed to facilitate 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 financial guarantee”). In response to the recommendation of the MRAB, the Department added § 86.187(a)(1)(iii) to the final rulemaking in order to provide explicit regulatory authority for the Department to deposit moneys from other sources into the Reclamation Fee O&M Trust Account where the moneys will be used to fund the costs associated with treating discharges at the ABS Legacy Sites.

§ 86.187(a)(1)(iv) (restriction on use moneys in the Reclamation Fee O&M Trust Account)

Section 86.187(a)(1)(iv) specifies that all moneys deposited into the Reclamation Fee O&M Trust Account must be used to pay the costs associated with treating the post-mining pollutional discharges at the ABS Legacy Sites. As with the other amendments to § 86.187(a)(1) added for the final rulemaking, this provision creates an enforceable regulatory mechanism for assuring that the Department always has sufficient funds to cover the costs of reclamation, including the costs of treating post-mining pollutional discharges in perpetuity, at all the ABS Legacy Sites. As part of its approval of this final rulemaking, the MRAB recommended that the Department strengthen the text of the regulations to make it clear that the moneys in the Reclamation Fee O&M Trust Account and the ABS Legacy Sites Trust Account may only be used for the purpose of paying the costs associated with discharges at the ABS Legacy Sites. In response to the MRAB's recommendation, the Department is declaring through this final rulemaking that the Department is establishing the Reclamation Fee O&M Trust which is an account in the SMCR Fund. The Department has included language in § 86.187(a)(1)(iv) that specifically establishes the trust called the Reclamation Fee O&M Trust Account. This provision explicitly states that the moneys held in the Reclamation Fee O&M Trust Account are being held by the Commonwealth *in trust* for the benefit of all the people of the Commonwealth in order to protect their rights under Article I, § 27 of the Pennsylvania Constitution. The Commonwealth's exercise of its fiduciary duties to manage and use these moneys for the purposes specified will assure the Department has sufficient funds to cover the annual treatment costs at ABS Legacy Sites until the ABS Legacy Sites Trust Account is actuarially sound which will meet the court ruling in the *Kemphorne* case regarding the obligation of the Department to meet the requirements of 30 CFR § 800.11(e).

§ 86.187(a)(2) (use of moneys received from forfeiture of bonds)

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

§ 86.187(a)(2)(i) (deposit of moneys from bonds forfeited on ABS Legacy Sites into separate subaccount)

Section 86.187(a)(2)(i) establishes a separate subaccount within the SMCR Fund called the ABS Legacy Sites Trust Account. The moneys received from the bonds forfeited on ABS Legacy Sites, and all interest accrued on such moneys, must be deposited into the ABS Legacy Sites Trust Account according to new § 86.187(a)(2)(i). Section 86.187(a)(2)(i) will also provide regulatory authorization for the Department to deposit moneys from other sources, such as appropriations, donations, or interest earned on other moneys in the SMCR Fund, into this account. Finally, § 86.187(a)(2)(i) authorizes the Department to transfer "excess" moneys from the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account, upon review and recommendation of the MRAB. The MRAB recommended that the Department's authority to transfer funds from the Reclamation Fee O&M Trust Account be limited to "excess"

moneys in the Reclamation Fee O&M Trust Account. The MRAB did not explain what would constitute “excess” funds; this provision requires the Department to seek the MRAB’s review and recommendation prior to transferring any “excess” funds. Section 86.187(a)(2)(i) responds to public comments on the proposed rulemaking regarding assurance of adequate funding to treat the discharges at the ABS Legacy Sites, as well as to the court ruling in the *Kemphorne* case regarding the obligation of the Department to meet the requirements of 30 CFR § 800.11(e).

Section 86.187(a)(2)(i) will establish a kind of savings account for moneys ultimately to be used to pay the annual operation and maintenance costs associated with all of the ABS Legacy Sites. The Department currently has approximately \$4.8 Million in forfeited bonds held for primacy ABS forfeited discharge sites; these funds will constitute the initial principal in the ABS Legacy Sites Trust Account. Section 86.187(a)(2)(iii), discussed below, prohibits the Department from making any disbursements from the ABS Legacy Sites Trust Account until the account becomes actuarially sound. The Reclamation Fee O&M Trust Account will be used to pay the ongoing operation and maintenance costs on a pay-as-you-go basis, while funds in the ABS Legacy Sites Trust Account accumulate from earned interest and other potential income sources. The amendments to § 86.17(e) in this final rulemaking will enable the Department to annually replenish and maintain funds in the Reclamation Fee O&M Trust Account sufficient to cover the annual operation and maintenance costs for treating discharges at the ABS Legacy Sites for the foreseeable future. In the meantime, the ABS Legacy Sites Trust Account will grow to the point that the interest earned on that account will be enough to cover all the annual operation and maintenance costs for the ABS Legacy Sites, without the need to generate any additional revenue from other sources such as the reclamation fee.

§ 86.187(a)(2)(ii) (restriction on use of moneys in ABS Legacy Sites Trust Account)

This provision requires that all moneys deposited into the ABS Legacy Sites Trust Account be used only to pay the operation and maintenance costs for treating discharges at the ABS Legacy Sites. As in § 86.187(a)(1)(iv), and in response to the MRAB’s comments, the Department is declaring through this final rulemaking that it is establishing the ABS Legacy Sites Trust as an account in the SMCR Fund. The Department has included language in § 86.187(a)(2)(ii) that specifically establishes the trust called the ABS Legacy Sites Trust Account. This regulation explicitly states that all moneys deposited in the ABS Legacy Sites Trust Account are held by the Commonwealth *in trust* for the benefit of the people of the Commonwealth to protect their rights under Article 1, Section 27 of the Pennsylvania Constitution, and these funds may only be used to pay the costs associated with treating discharges at the ABS Legacy Sites. The Commonwealth’s exercise of its fiduciary duties to manage and use these moneys for the purposes specified will assure the Department has sufficient funds to cover annual treatment costs at ABS Legacy Sites which will meet the court ruling in the *Kemphorne* case regarding the obligation of the Department to meet the requirements of 30 CFR § 800.11(e).

§ 86.187(a)(2)(iii), (A), (B), (C) (restrictions on ABS Legacy Sites Trust Account)

Section 86.187(a)(2)(iii) prohibits the Department from making any disbursements from the ABS Legacy Sites Trust Account until the account becomes actuarially sound. The

conditions which must be met for the ABS Legacy Sites Trust Account to become actuarially sound are prescribed here. Three conditions must be met before the ABS Legacy Sites Trust Account will be actuarially sound. First, financial guarantees sufficient to cover all reclamation costs must have been approved by the Department for all mine sites permitted under the primacy ABS. At the time of conversion to the CBS there were some surface coal mining sites, permitted under the primacy ABS, that were not being actively mined but had post-mining pollutional discharges and the operators were continuing to treat the discharges. The bonds for these sites were not sufficient to cover the costs to perpetually treat the discharges. These sites remain part of the ABS legacy until the costs to treat the discharges in perpetuity are covered by fully-funded financial guarantees, at which time they will be full cost bonded under the conventional bonding system. The Department has been working to obtain fully-funded financial guarantees for these ABS-permitted discharge sites, but some of these continue to be underfunded. The operator may ultimately default on its obligation at some of these underfunded sites and such defaulted sites would become part of the class of ABS Legacy Sites for which the Department must assure long-term funding for discharge treatment. When financial guarantees sufficient to cover reclamation costs have been approved for all mine sites permitted under the primacy ABS, no additional sites will need to be added to the class of ABS Legacy Sites. Second, the Department must have completed construction of all necessary discharge treatment systems for all of the ABS Legacy Sites. Once the entire class of ABS Legacy Sites is known, and all necessary discharge treatment systems have been constructed for these sites, the Department will be able to ascertain the amount of annual operation and maintenance costs, including recapitalization costs, which will be necessary to treat all the discharges at all of the ABS Legacy Sites. Once this figure is known, the third condition precedent may be satisfied, i.e., the ABS Legacy Sites Trust Account must contain funds which generate interest at a rate and amount sufficient to pay the annual operation and maintenance costs for treating all post-mining pollutional discharges at all the ABS Legacy Sites. When the ABS Legacy Sites Trust Account becomes actuarially sound, the Department will always have sufficient funds on hand in the ABS Legacy Sites Trust Account to cover the costs of treating the discharges at all the ABS Legacy Sites, and Pennsylvania's bonding program will meet the requirements of 30 CFR § 800.11(e) without the need for any revenue from the reclamation fee or the other revenue sources dedicated to the Reclamation Fee O&M Trust Account.

§ 86.187(a)(2)(iv) (transfer of remaining funds in Reclamation Fee O&M Trust Account to ABS Legacy Sites Trust Account)

Section 86.187(a)(2)(iv) provides for termination of the Reclamation Fee O&M Trust Account when the ABS Legacy Sites Trust Account becomes actuarially sound. This provision authorizes the Department to transfer the remaining funds in the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account when that account, combined with the Reclamation Fee O&M Trust Account, contains sufficient funds to pay the annual operation and maintenance costs for the ABS Legacy Site discharges. At that point, the Reclamation Fee O&M Trust Account will no longer be necessary and will terminate. In addition, the reclamation fee (or an alternative permanent funding source established in lieu of the reclamation fee) will no longer be needed and will cease to be collected, and the deposit of civil penalty moneys into the Reclamation Fee O&M Trust Account pursuant to § 86.186(a)(1)(i) will also cease.

§ 86.283(c) (exception to paying reclamation fees for remining areas)

The proposed rulemaking would have repealed this subsection which provides an exception to requirement to the pay per-acre reclamation fees in § 86.17(e) for remining areas for mine operators approved to participate in the remining financial guarantees program. This change was proposed for consistency with the change proposed in Section 86.17(e). The final rulemaking will retain this subsection in its current form, given that the Department has determined in response to public comments and the ruling of the Court in *Kempthorne* that the reclamation fee in § 86.17(e) should be retained. The exception for remining areas provided by this subsection is an incentive to remining in the Commonwealth which the Department believes should be continued.

F. Summary of Comments and Responses on the Proposed Rulemaking

The Board approved publication of the proposed amendments at its meeting on May 17, 2006. The proposed amendments were published at 36 Pa. Bull. 4200 (August 5, 2006). Public comments were accepted from August 5, 2006 to September 5, 2006.

One organization, Citizens for Pennsylvania's Future, acting on behalf of a group of six organizations (including itself), submitted timely comments in response to the proposed rulemaking. The group of commentators included the Pennsylvania Federation of Sportsmen's Clubs, Inc., Pennsylvania Chapter Sierra Club, Pennsylvania Trout, Inc., Tri-State Citizens Mining Network, Inc., Mountain Watershed Association, Inc. and Citizens for Pennsylvania's Future. The Independent Regulatory Review Commission did not submit comments in regard to the proposed rulemaking.

The following is a summary of the comments received during the public comment period, organized according to subject matter.

1) *Commenters Submitted Arguments They Presented to the U.S. Court of Appeals for the Third Circuit in Related Litigation as Comments on the Proposed Rulemaking*

(C) Of the group of six organizations that submitted comments, five are plaintiffs in a federal lawsuit currently pending before the United States District Court for the Middle District of Pennsylvania called *Pennsylvania Federation of Sportsmen's Clubs, Inc. et al. v. Kempthorne, et al.*, (No. 03-cv-0220) and a related case in the same court called *Pennsylvania Federation of Sportsmen's Clubs, Inc. et al. v. McGinty, et al.*, (No. 99-cv-1791). The *Kempthorne* (previously called *Norton*) case names the U.S. Department of the Interior and OSM as defendants; the Department 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). The U.S. District Court in *Norton* granted the joint motion of the federal defendants and the Department requesting dismissal of the case, and the commenters appealed the decision to the U.S. Court of Appeals for the Third Circuit.

Commenters argued in the litigation that it was a violation of section 509 of FSMCRA, 30 U.S.C. § 1259, and the regulations implementing FSMCRA issued by OSM, specifically 30

CFR § 800.11(e)(1), for the Department to terminate its ABS when it converted to a CBS in 2001. Commenters 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 CBS bonds, remain subject to the requirements of § 800.11(e)(1). As such, the commenters argued that Pennsylvania remains obligated to provide for the complete reclamation and treatment of the ABS Legacy Sites and their pollutorial discharges by assuring the Department has available sufficient money to complete reclamation for these sites at any time. These commenters submitted the arguments in their brief filed with the Court of Appeals as comments on the proposed repeal of § 86.17(e).

(R) The Third Circuit decided commenters/appellants' appeal and issued an opinion on August 7, 2007 in which the court reversed, in part, the district court and remanded the case for further proceedings in accordance with the appellate decision. *See Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337 (3d Cir. 2007). The Third Circuit reached two essential conclusions. First, the appellate court agreed with the district court that Pennsylvania terminated its ABS in August 2001 and effectively converted to a CBS at that time, and that OSM did not abuse its discretion in approving that conversion. *Kempthorne*, 497 F.3d at 349. Second, the Third Circuit 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." *Kempthorne*, 497 F.3d at 353. To meet the requirements of federal law, Pennsylvania must assure (through a legally enforceable mechanism) that it will have sufficient money available at any time to complete the reclamation of all the ABS Legacy Sites, including the treatment of any postmining pollutorial discharges at these sites.

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. The final rulemaking restructures the reclamation fee as part of the Department's compliance with the mandate of the Third Circuit ruling and the requirements of 30 CFR § 800.11(e). Further amendments to § 86.17(e) and § 86.187 were made in the final rulemaking in response to these comments and the ruling of the Court in *Kempthorne*; these regulatory amendments will require the Department to dedicate certain identified funding sources to help pay the reclamation costs for ABS Legacy Sites. The final rulemaking will also establish a procedure for adjusting the reclamation fee amount. As a result of the amendments, this final rulemaking will establish an enforceable regulatory mechanism to address the remnants of the primacy ABS in a manner that meets the requirements of § 800.11(e), the Third Circuit's application of the law to Pennsylvania's bonding program, and the OSM program amendment at issue in the litigation.

2) *Eliminating the Reclamation Fee Required by § 86.17(e) Would Violate Federal Law*

(C) Commenters assert that eliminating the per-acre reclamation fee in § 86.17(e) would violate federal law because the fee is a necessary component of an active ABS in Pennsylvania and Pennsylvania must maintain an active ABS concurrently with the CBS until every site bonded under the ABS that remains permitted has completely converted to a CBS by

posting reclamation guarantees covering the full cost of the remaining reclamation, including perpetual mine drainage treatment.

(R) The Department disagrees with commenters' broad assertion that the proposed repeal of § 86.17(e) would necessarily have violated federal law. There is no specific requirement in federal law for Pennsylvania to impose a per-acre reclamation fee for surface coal mining activities conducted in the Commonwealth. To maintain its jurisdiction over regulation of coal surface mining activities, Pennsylvania must maintain a State program in accordance with the requirements of FSMCRA. *See* 30 U.S.C. § 1253. State laws may not be inconsistent with the provisions of FSMCRA, 30 U.S.C. § 1255(a), and, in general, a State program must be at least as effective as the requirements in FSMCRA. 30 U.S.C. § 1255. There is no specific provision in FSMCRA regarding imposition of a per-acre reclamation fee like that imposed by § 86.17(e). FSMCRA states a general requirement that before a coal mining permit is issued an operator must post a performance bond sufficient to assure completion of the reclamation plan if the work had to be performed by the regulatory authority. 30 U.S.C. § 1259(a). Section 509 of FSMCRA also allows OSM to approve as part of a state program an "alternative bonding system that will achieve the objectives and purposes of the bonding program pursuant" to section 509. 30 U.S.C. § 1259(c). The precise details of an acceptable alternative bonding system are not specified by federal law; thus, a State's alternative bonding system is not specifically required by federal law to include a per-acre reclamation fee of the type found in § 86.17(e), and it would not have been a violation of federal law to eliminate the per-acre reclamation fee.

The Department also disagrees with commenters' assertion that Pennsylvania must maintain an active ABS concurrently with the CBS implemented in 2001. This question was resolved by the Third Circuit in *Kempthorne* when it decided that Pennsylvania terminated its active ABS in August 2001.

3) *Discontinuing Collection of the § 86.17(e) Reclamation Fee Would be Unwise*

(C) Commenters suggest that it would be unwise to discontinue collection of the per-acre reclamation fee imposed by § 86.17(e) because the revenue from the reclamation fee could be used to supplement the CBS. The revenue could be particularly helpful for any actively-mined permitted sites with long-term mine drainage treatment or substantial land-reclamation liabilities that are currently under-bonded, in the event that such sites are ultimately abandoned and the bonds forfeited.

(R) The Department disagrees with commenters that the reclamation fee should be used to supplement the CBS. The CBS internalizes the costs of mining and reclamation first and foremost on a site-by-site/operator-by-operator basis. The most equitable manner of implementing the CBS is to assure that the conventional bond for each individual permitted site will cover the cost for the Department to complete the site reclamation plan, including treatment of all post-mining discharges in perpetuity. The Department has actively pursued this goal by undertaking frequent and continuous study of its methods for calculating conventional bonds. A refinement of Technical Guidance Document No. 563-2504-001, *Conventional Bonding for Land Reclamation—Coal*, was recently completed with input from the MRAB. *See* 36 Pa. Bull. 7178 (Nov. 25, 2006).

(C) Commenters suggest that the Department should enhance the revenues which could be used to reclaim sites that were forfeited during administration of the ABS but have not been fully reclaimed because the sites have untreated post-mining discharges. Referring to the list of 63 ABS primacy bond forfeiture sites with 99 long-term discharges found in the Department's 2003 Program Enhancements Document, commenters contend that maintaining the § 86.17(e) reclamation fee could yield several hundred thousand dollars which could help pay the costs of long-term treatment facilities at the ABS bond forfeiture discharge sites. They further contend that the cost-benefit analysis included with the proposed rulemaking failed to account for the benefits to the Commonwealth and the public that would be lost by eliminating the reclamation fee.

(R) The Department agrees that revenues used for reclaiming the ABS Legacy Sites should be enhanced. The final rulemaking will greatly enhance the revenues available for reclaiming sites forfeited during administration of the primacy ABS that were not fully reclaimed because the sites have untreated post-mining discharges. The provisions added to the final rulemaking are designed to ensure that the Department meets the requirements of § 800.11(e), as applied by the Third Circuit and subject to OSM's oversight and enforcement.

The fee will be maintained at its current level of \$100 per acre of operational area until December 31, 2009 and will then be annually adjusted as necessary to assure that the Department continually has sufficient funds to cover the operation and maintenance costs for treating discharges at all ABS Legacy Sites. The final rulemaking will also require, by enforceable regulation, that any interest earned by the reclamation fee moneys be used to pay operation and maintenance costs associated with treating discharges at ABS Legacy Sites.

4) *The Department Has Improperly Applied the Reclamation Fee Regulation After Conversion to the CBS*

(C) Commenters contend that the Department drastically cut the amount of revenue generated by the \$100 per-acre reclamation fee following conversion to the CBS because the Department unlawfully applied the reclamation fee only to the operational area of sites permitted under the CBS. They further contend that if the Department applied the reclamation fee to the entire permitted acreage of CBS permitted surface coal mine sites, the Department could be collecting \$600,000 to \$800,000 per year in reclamation fees imposed by § 86.17(e).

(R) The Department disagrees with commenters' argument that the Department's application of § 86.17(e) in the context of the CBS is unlawful. Upon implementation of the CBS in late 2001, a question the Department encountered was how to apply § 86.17(e) to permits issued under the CBS. The text of § 86.17(e) provides no indication of how to apply the per-acre reclamation fee to permits issued under the CBS. Exercising its discretion in applying its own regulations, the Department decided that a reasonable method of applying the reclamation fee requirement to surface coal mine permits issued under the CBS was to impose the fee solely for the acreage of the operational area. The Department's application of § 86.17(e) in the context of the CBS is neither plainly erroneous nor unreasonable, and therefore is not unlawful. However, in order to squarely address the issue, the final rulemaking will amend the text of § 86.17(e) to

expressly provide that the reclamation fee will be applied to the operational area. The final rulemaking will also include a definition for “operational area” in § 86.1 as further clarification.

With respect to the potential revenue that could be generated from the \$100 per-acre reclamation fee, in fiscal year 2001-02, (the last year the reclamation fee was collected for all acreage permitted in surface mining permits), the Department collected \$529,813. Following conversion to the CBS, and application of the reclamation fee solely to the operational area of permitted surface mining sites, the Department collected \$148,936 in fiscal year 2002-03; \$221,620 in fiscal 2004-05; and \$201,467 in 2005-06. If the reclamation fee had been collected for all surface coal mine acreage permitted, the average yield would have been approximately \$600,000 annually for the past five years.

5) *The Department Should Retain the Reclamation Fee and Impose a Per-Ton Severance Fee Funding Mechanism for ABS Discharge Sites*

(C) Commenters assert that the Department has broad authority under PASMCRRA to establish other revenue-generating mechanisms in addition to the per-acre reclamation fee, such as a fee for each ton of coal severed in the State. They recommend that the Department expand the ABS, concurrent with operation of the CBS, by retaining the reclamation fee in § 86.17(e) and by proposing a regulation that would impose a per-ton severance fee funding mechanism for treating discharges on ABS forfeiture sites. Commenters point to West Virginia as an illustrative example because West Virginia generated significant revenue for its ABS—approximately \$94 million since January 2002 according to commentators—from a Special Reclamation Tax assessed on each ton of coal extracted in the State.

(R) The Department terminated the ABS and there is no need to continue to operate an ABS concurrently with the CBS that has been implemented in Pennsylvania. The question is how to address the remnants of Pennsylvania’s ABS, i.e., the ABS legacy sites. The Department considered whether a per-ton fee should be imposed as a funding mechanism for addressing mine discharges in Pennsylvania, and this option was discussed in public meetings with the MRAB in response to comments received on the proposed rulemaking. The Department has determined that the funding source structure established by the final rulemaking will enable the Department to meet the requirements of federal law through an enforceable regulatory mechanism, as required by the Third Circuit ruling in *Kempthorne* and the program amendment issued by OSM concerning Pennsylvania’s ABS.

6) *Challenges to the Stated Rationale for Repeal of § 86.17(e)*

(C) Commenters challenge the rationales for eliminating the reclamation fee stated in the proposed rulemaking’s preamble. They first challenge the Department’s “commitment” to industry that, following conversion of actively-mined permitted surface coal mine sites to the CBS, the reclamation fee would be proposed for elimination. Commenters assert that any “commitment” made by the Department to eliminate the reclamation fee is not legally binding on the Environmental Quality Board (EQB).

(R) The Department agrees that the EQB is not bound by any commitment the Department may make with respect to proposed rulemaking. Under the law, the EQB is a separate legal entity from the Department, and the EQB decides whether to promulgate regulations the Department has proposed.

The Department's "commitment" to propose the elimination of the reclamation fee was made in the overall context of the conversion from the ABS to the CBS—an enormous administrative undertaking. Financial analyses of the ABS found the system was in deficit and would inevitably fail. Because of the substantial costs for operators to convert to conventional bonds, an overnight conversion to a conventional bonding system would only have exacerbated the inadequate funding problems of the ABS. The Department's purpose in converting to the CBS was to find solutions to the problem of unreclaimed ABS surface coal mine sites—without bankrupting industry and thereby making Pennsylvania's mine reclamation problems worse.

Consequently, the conversion to a CBS required a complex approach by the Department in coordination with the legislature and the mining industry. The main components of the approach included: (1) a comprehensive analysis by the Department of the existing ABS deficit for land reclamation; (2) appropriation of \$5.5 million by the legislature to cover that land reclamation deficit; (3) Department development of a conversion assistance financial guarantee program by which the Department 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 the CBS and thereby preventing bankruptcies and/or abandonment of sites; (4) appropriation of \$7 million by the General Assembly to underwrite the conversion assistance financial guarantee program; (5) development of a detailed conventional bonding guidance document that set forth the mechanics of the conventional bonding process; (6) implementation of conventional bonding for all ABS actively-mined permitted surface coal mine sites; (7) development of a workable plan to address all post-mining pollutional discharges on the ABS forfeiture sites—resulting in the Program Enhancement Document and the Discharge Abatement Workplan; (8) termination of the ABS; (9) a "commitment" to propose the elimination of the reclamation fee once the conversion of all actively-mined permitted surface coal mining sites to the CBS was completed; and (10) implementation of conventional bonding for under bonded sites that have a post-mining pollutional discharge.

(C) Commentators assert that the conversion to a CBS is not complete unless every ABS site permitted as of August 2001 has replaced its ABS bond coverage with financial guarantees covering the full cost of reclamation, including perpetual treatment of any postmining discharges. They contend that this condition has not been met and therefore the reclamation fee imposed by § 86.17(e) should not be eliminated.

(R) The Department disagrees with commenters' assertion that conversion to the CBS is not complete until every single site permitted as of August 2001, including sites with no active mining, have posted fully-funded financial guarantees. The ABS was discontinued and terminated in 2001 and the process of converting surface coal mining permits was undertaken. By 2002, all permitted surface coal mining sites actively mining coal were converted to the CBS through the posting of full-cost reclamation bonds. All new surface coal mining permits issued after August 2001 are part of the CBS and have posted conventional full-cost reclamation bonds.

The Department has operated only a CBS—not a dual system of CBS and ABS—for surface coal mine sites since 2001, and the Third Circuit in *Kemphorne* agreed that the Department terminated the ABS in 2001.

7) *Impact of Outstanding Litigation on the Proposed Rulemaking*

(C) Commenters contended that the reclamation fee in § 86.17(e) should not be eliminated until after the U.S. Court of Appeals for the Third Circuit issues its decision in the *PSFC v. Kemphorne* case because the adequacy of funding of Pennsylvania’s ABS is the main issue in that appeal.

(R) The Third Circuit rendered its decision in the *Kemphorne* case before the Department sought approval of the Environmental Quality Board of the final rulemaking. The proposed elimination of the reclamation fee generated significant public comment. In response to comments raised, the recommendation of the MRAB, and the Third Circuit ruling in *Kemphorne*, the Department determined that the reclamation fee remains an adjustable funding source which should be used for the operation and maintenance costs associated with treating post-mining pollutional discharges at ABS Legacy Sites. Consequently, the Department decided not to repeal the reclamation fee as proposed. The final rulemaking restructures the reclamation fee as part of the Department’s compliance with the Third Circuit ruling in *Kemphorne* and the requirements of 30 CFR § 800.11(e).

F.1. Summary of Comments and Responses for the Advanced Notice of Final Rulemaking

(C) The Advanced Notice of Final Rulemaking (ANFR) was presented to the MRAB for consideration at its January 10, 2008 meeting. The regulatory changes presented by the ANFR provided that the moneys received from the reclamation fee could only be used by the Department to pay construction, operation and maintenance and recapitalization costs associated with treating post mining pollutional discharges on ABS Legacy Sites. Various members of the MRAB commented that the amendments proposed with the ANFR did not do enough to ensure that the money being deposited into the Reclamation Fee O&M Account and the ABS Legacy Sites Account was not used for some other purpose. These MRAB members requested that the final rulemaking provide more protection to ensure the reclamation fee money was used for its intended purpose—treatment of mine drainage on ABS legacy sites.

(R) The Department revised the final rulemaking to address this concern of the MRAB. The final rulemaking now follows the example set by the General Assembly when it specified in PASMCR and in The Clean Streams Law that certain types of collateral bonds posted by surface mine operators were to be held in trust. The final rulemaking creates two trust accounts. This final rulemaking serves as a declaration of trust which provides that funds held in the Reclamation Fee O&M Trust Account and in the ABS Legacy Sites Trust Account are held in trust by the Commonwealth. The Commonwealth includes the Department, other offices of the executive branch, the General Assembly and the state Treasurer. The money that is held in these two trusts is being held for the benefit of all of the people to effectuate their right to pure water and the preservation of natural and esthetic values of the environment as specified in

Article 1, Section 27 of the Pennsylvania Constitution. The Commonwealth, collectively, will have a fiduciary duty to manage and use the moneys in the Reclamation Fee O&M Trust Account and in the ABS Legacy Sites Trust Account to treat pollutional mine drainage emanating from ABS legacy sites. Should the Commonwealth ever violate this fiduciary duty by using or attempting to use the moneys for another purpose, any resident of Pennsylvania with an interest in pure water could initiate proceedings in the appropriate forum to enforce the terms of the trust.

(C) The MRAB commented on § 86.17(e)(2) of the ANFR that provided for adjusting the reclamation fee, but provided the reclamation fee could not be less than \$50.00 per acre. The MRAB recommended the minimum of \$50.00 be deleted as the MRAB did not think the fee should be collected if it was not needed for annual operation and maintenance treatment costs that year. Other commenters also made this recommendation.

(R) The Department has followed the MRAB's advice and deleted the \$50.00 minimum reclamation fee provision. The final rulemaking now provides the fee will be adjusted annually based upon need and can be zero if the funding is not needed for that years' projected operation and maintenance costs.

(C) The MRAB wanted the regulation to specify that if , instead of the reclamation fee, an alternative source of funding to pay all of the annual costs covered by the Reclamation Fee O&M Account is established, then the \$100.00 reclamation fee will not be adjusted up or continue to be collected. Other commenters also made this recommendation.

(R) The Department followed the MRAB's advice. Section 86.17(e)(3) of the final rulemaking now contains express language that provides for the reclamation fee to be used until an alternative funding source in lieu of the reclamation fee is established to pay all of the costs covered by the Reclamation Fee O&M Trust Account.

(C) The MRAB recommended that § 86.187(a)(2)(i) be revised to limit the Department's authority to transfer funds from the Reclamation Fee O&M Account into the ABS Legacy Sites Account. The MRAB wanted the regulation to specify that only excess funds could be transferred. Other commenters also made this recommendation.

(R) The Department followed the MRAB's advice. Section 86.187(a)(2)(i) of the final rule provides that the Department may, upon review and recommendation of the MRAB, transfer excess moneys from the Reclamation Fee O&M Trust Account into the ABS Legacy Sites Trust Account.

(C) The MRAB advised that the ANFR should be revised to provide that the ABS Legacy Sites Account will be actuarially sound when the money in it, together with the money in the Reclamation Fee O&M Account, will generate enough interest to pay all ABS Legacy Sites treatment costs forever. The MRAB also recommended that the money in the Reclamation Fee O&M Account then be transferred into the ABS Legacy Sites Account, the Reclamation Fee O&M Account be closed, and, the reclamation fee be terminated.

(R) The Department followed the advice of the MRAB. A new subsection has been added as Section 86.187(a)(2)(iv) which provides for the transfer of the money from the Reclamation O&M Fee Trust Account into the ABS Legacy Sites Trust Account, termination of the Reclamation Fee O&M Trust Account, cessation of the reclamation fee, and cessation of the transfer of civil penalties into the Reclamation Fee O&M Trust Account.

(C) If the legislature approves the use of premiums collected for conversion assistance financial guarantees for Reclamation costs at ABS sites, then those funds should be deposited into the Reclamation Fee O & M Trust account and considered during the annual review of the reclamation fee amount.

(R) Section 86.187 (a)(1)(iii) has been modified to allow for the deposit of the “fees collected for sum-certain financial guarantees needed to facilitate full-cost bonding.”

(C) If a permanent alternate funding stream is approved, then that funding must be dedicated to cover the O & M costs at the ABS Legacy sites.

(R) The final rule has been modified to specify that an alternate funding source must provide “sufficient revenues to maintain a balance in the Reclamation Fee O&M Trust Account of at least \$3,000,000 and to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at all ABS Legacy Sites.” § 86.17 (e)(3)(ii).

(C) The draft final-form regulations fail to guarantee that all discharges from all ABS Legacy Site will be treated in perpetuity.

(R) The regulations are designed to address the federal requirement for the Department to have available sufficient money to complete reclamation for the ABS Legacy Sites at any time. This rulemaking will provide sufficient funds to treat the discharges. The regulations establish a mandatory process to adjust the revenue stream to pay the cost of reclamation that could become due at any time. The Department does not have the authority to commit the full faith and credit of the Commonwealth to “guarantee” funding.

(C) The short-term, pay-as-you-go system of the Reclamation Fee O & M Account does not provide a guarantee of perpetual discharge treatment at all ABS Legacy Sites.

(R) The Department disagrees. The regulations will provide the Department with the money needed to meet the requirement to have sufficient money to complete reclamation for these sites at any time. The revenue stream is to be annually adjusted to pay the cost of treatment and a financial reserve will be maintained to pay unexpected treatment costs.

(C) The draft final-form rule does not guarantee that the ABS Legacy Account will ever contain sufficient funds to be actuarially sound, or that it will remain solvent in perpetuity.

(R) The federal regulations do not require a “guarantee” that the ABS Legacy Account will become actuarially sound but require the Department to have available sufficient money to complete reclamation. The regulations do provide for the Department to have the

needed funds. The ABS Legacy Sites Account is a tool that, once it contains sufficient money, can replace the pay-as-you-go approach.

(C) The funding for the Reclamation Fee O & M Account and the ABS Legacy Account must come from the coal mining industry.

(R) The Department disagrees. West Virginia was faced with a similar problem of how to fund the treatment for forfeited discharges. In the preamble for OSM's approval of their program amendment addressing this matter, OSM stated:

Congress was not specific on how alternative bonding programs such as West Virginia's should be financed. The only test applicable is whether the proposed alternative system achieves the objectives and purposes of a conventional bonding system as expressed in section 509 of SMCRA and as implemented by 30 CFR 800.11 (e). (60 FR 51901, October 4, 1995)

The regulation meets this standard.

(C) The final regulations must include an enforceable commitment for timely construction of adequate treatment system at all ABS Legacy Sites currently lacking them.

(R) The regulations address the federal requirement to have available sufficient money to complete reclamation for these sites at any time. While a purpose of federal SMCRA is to "assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations," there is no federal requirement for a regulatory construction schedule.

(C) The regulation must specify in greater detail the standard for determining whether the ABS Legacy Account contains sufficient funds to be actuarially sound.

(R) The Department disagrees. The regulation provides a complete description of the concept of being actuarially sound. There is no need to specify in the regulation additional standards such as the suggestion to require an actuary with specific qualifications.

(C) The regulations must require, as a fourth condition for finding the ABS Legacy Account is "actuarially sound," that all construction, recapitalization, and operation and maintenance costs at ABS Legacy Sites paid by Non SMCRA government funding programs have been refunded from the Reclamation Fee O & M Account.

(R) The Department disagrees. The primary approach that the Department has taken to managing the treatment of abandoned and forfeited discharges is to utilize all available resources. The approach of this rulemaking is to protect the environment while meeting the requirements of the federal regulation.

(C) PADEP should delete the provision of the draft final-form regulations purporting to declare PADEP's annual determination of the required amount of the reclamation fee to be appealable to the Environmental Hearing Board.

(R) The Department disagrees. The Department is confident that the Environmental Hearing Board will find that the determination of the reclamation fee amount is a final action of the Department as defined at 25 Pa. Code § 1021.2.

(C) Where possible, the final-form regulations should use the active voice and the word "will" to express duties.

(R) The Department agrees and has made this change in various places in the final-form regulations.

(C) The definition of "ABS Legacy Sites" should be revised to delete the phrase "and is sufficient to cover the cost of treating the discharge."

(R) The Department disagrees with this comment. The entire definition is needed to be consistent with the concept of full cost conventional bonding and to avoid ambiguity.

(C) Definitions of "Operation and Maintenance Costs" and "OM & R" should be added.

(R) The Department has added a definition for "Operation and Maintenance Costs." A definition of "operation, maintenance and recapitalization" costs is not needed.

(C) The specific date (August 4, 2001) should be added to the definition of the "Primacy Alternate Bonding System."

(R) The Department agrees and has made this change.

(C) The reclamation fee should apply to the entire permit area, not just the operational area, and should apply to permit transfers.

(R) The final rule addresses the application of the reclamation fee in a manner that is consistent with conventional bonding. Furthermore, it would be against the public interest to apply the fee to permit transfers because it could discourage a mine operator from accepting a transfer from a troubled firm which could then lead to bond forfeiture instead of the reclamation being completed by the transferee.

(C) PADEP should retain the minimum reclamation fee rate in Section 86.17 (3) of the regulations, but should set the minimum rate at \$100 per acre.

(R) Based upon the advice of the MRAB, the Department decided to eliminate the minimum fee amount and adjust the fee pursuant to the procedures established in the regulations.

(C) PADEP should make clear that the \$3 million minimum balance target for the reclamation fee O & M Account would have no effect on authorized expenditures for discharge treatment.

(R) The Department has concluded it is clear that there is no spending restriction in the regulation as it is written.

(C) The regulation does not account for inflation. Therefore, it is questionable whether the \$3 million cushion and the Reclamation Fee O&M Account will cover the cost of treatment in the long term.

(R) The Department disagrees. The regulation contains provisions that require the revenue stream to be adjusted annually. The annual adjustment will enable the needed revenue to keep pace with inflation. It is not necessary for the \$3 million reserve to be adjusted for inflation over the long term. The \$3 million reserve is needed most for the short term to address unexpected operation and maintenance costs that might be incurred before the reclamation fee can be adjusted and to pay the cost of maintaining treatment at ABS sites that may be forfeited in the near future.

(C) The provisions that authorize the Department to deposit “other moneys, including appropriations” into the Reclamation Fee O&M Account and into the ABS Legacy Account go beyond the scope of the proposed rulemaking and should not appear in the regulations in order to help steer clear of a legal challenge that might unnecessarily interfere with the approval and implementation of the regulation as the costs should be borne by the industry.

(R) The Department disagrees. The final regulation is within the scope of the proposed regulation as it encompassed the funding mechanism for the former alternate bonding system and addresses the concerns raised by the commentators in comments submitted on the proposed rulemaking.

G. Benefits, Costs and Compliance

Benefits

Pennsylvania’s citizens will benefit from these amendments because the pollution from the Primacy ABS legacy sites will have a dedicated funding source to provide for the treatment of the post-mining discharges.

Owners of coal mined lands where bonds have been forfeited and alternate reclamation plans have been approved will benefit by having their land restored to conditions for supporting the uses the mined land was capable of supporting prior to the mining, or to a higher or better use.

The amendments will also enable the Commonwealth to fulfill its primacy obligations, retain primary enforcement responsibility for coal mining operations, and to continue to receive the federal abandoned mine land funds.

Compliance Costs

The final-form rulemaking may increase compliance costs on the regulated community should the per acre reclamation fee increase. The amended regulations will not result in increased costs to the regulated community through at least January 1, 2010. Until then, the reclamation fee will continue to be calculated in the same way it is under the current regulation. The amount of fees, and other dedicated funding sources, will be available for addressing post-mining discharges on sites forfeited under the former ABS. After January 1, 2010, whether the fee increases, decreases or stays the same will be determined by the actual and projected costs of the treatment of the ABS discharges and whether other funding becomes available. It is not possible to determine how the fee will have to be adjusted in the future. It is possible that a substantial increase in the fee will be required. This would be the result of some unexpected circumstances (e.g., many additional ABS forfeitures, dramatic increases in costs or erroneous estimates). Eventually, the reclamation fee can be eliminated, when adequate funds have accumulated to provide for the operation and maintenance costs.

The Department will incur additional cost in implementing this final rule making. In order to manage the funding sources, the Department must track revenues and expenses specifically related to the Primacy ABS discharge sites. This is expected to initially cost about \$60,000 per year for personnel for the accounting of the revenues and expenses, with the cost increasing as personnel costs increase. This amount is in addition to the costs incurred as a result of the management of the completion of reclamation and treatment that the Department already performs.

Compliance Assistance Plan

The Department will provide written notification of the changes to the coal mining industry.

Paperwork Requirements

There are no paperwork requirements imposed on the regulated community by this final form rulemaking. The Department will be required to prepare an annual report on actual and projected annual revenues and expenditures, and any proposed adjustment of the reclamation fee.

H. Pollution Prevention

The matters affected by this final-form regulation do not pertain to pollution prevention or control.

I. Sunset Review

This regulation will be reviewed in accordance with the Sunset Review Schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

J. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. §§ 745.5(a)), the Department submitted a copy of this proposed amendment on July 19, 2006, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In compliance with Section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments, as well as other documentation.

In preparing this final-form regulation, the Department has considered the comments by the public that it has received. These comments are addressed in the comment and response document and in Section F and F.1 of this preamble. The IRRC and the Committees did not provide comments on the proposed rulemaking.

This final-form regulation was deemed approved by the House Environmental Resources and Energy Committee on _____ and was deemed approved by the Senate Environmental Resources and Energy Committee on _____. The IRRC met on _____ and approved the regulation in accordance with Section 5(c) of the Act.

K. Findings of the Board

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at *1 Pennsylvania Code* §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) The regulations do not enlarge the purpose of the proposal published at *36 Pennsylvania Bulletin* 4200 (August 5, 2006).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (1) The regulations of the Department of Environmental Protection, *25 Pennsylvania Code*, Chapter 86, are amended by amending §§ 86.1, 86.17, 86.187, 86.188, 86.189, 86.190, and 86.283 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

- (2) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (3) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (4) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (5) This order shall take effect immediately.

By:

KATHLEEN A. McGINTY
Chairperson
Environmental Quality Board