

## **EXECUTIVE SUMMARY**

### **FINAL RULEMAKING COAL MINE RECLAMATION FEES AND RECLAMATION OF BOND FORFEITED SITES (25 Pa Code, Chapter 86)**

This final rulemaking amends existing provisions of Chapter 86 relating to reclamation standards for coal mine sites where bonds have been forfeited, and it amends provisions relating to reclamation fees, definitions, and to the Department's use of money for reclamation of forfeited surface coal mine sites. The proposed rulemaking was published in the *Pa. Bulletin* on August 5, 2006. *See* 36 Pa. Bull. 4200 (Aug. 5, 2006). Public comments were accepted from August 5, 2006 to September 5, 2006 and the comment period officially closed on November 5, 2006.

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. The federal Office of Surface Mining (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). Changes to § 86.187(c) and § 86.189 clarify that alternative reclamation plans for bond forfeiture sites must comply with all applicable performance standards. Revisions to § 86.188 address OSM's concern that present regulations may allow the Department to neglect reclamation of lower priority sites. Amendments to § 86.190 limit the Department's discretion to determine that reclamation of a bond forfeiture site is unreasonable. 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.

The regulatory amendments in this final rulemaking primarily address Pennsylvania's obligation, under federal law, to provide for the complete reclamation of a certain class of mine sites (defined as 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. The U.S. Third Circuit Court of Appeals, in related litigation, decided that Pennsylvania must demonstrate that it has sufficient funds, and the Court determined that the Department must meet its obligation to assure sufficient funds for reclamation of these sites through legally enforceable means. Amendments in this final rulemaking 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.

The rulemaking amends § 86.1 (definitions), § 86.17(e) (reclamation fees) and § 86.187 (use of money) in order to comply with the ruling of the U.S. Court of Appeals for the Third Circuit and with a required program amendment issued by OSM pertaining to the Department's

former alternate bonding system (ABS). *See* 30 CFR § 938.16(h). The changes being made to § 86.1, § 86.17(e) and § 86.187 between proposed and final rulemaking also respond directly to public comments on the proposed rulemaking and to recommendations from the Mining and Reclamation Advisory Board (MRAB)—the Department’s advisory body for regulations pertaining to the surface mining of coal.

From 1982 until 2001, the Commonwealth employed an ABS for surface coal mines, coal refuse reprocessing operations and coal preparation plants. In 2001, the Department terminated the ABS and converted active surface mine sites to a conventional bonding system (CBS). Under a CBS, mine operators 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 change in bonding systems was the ultimate result of OSM notifying the Department that the ABS failed to meet applicable requirements of federal law and requiring the Department to take appropriate actions to remedy the situation. *See* 30 CFR § 938.16(h). The adequacy of Pennsylvania’s ABS was also challenged in a citizens’ suit in federal court, which is still pending. *Pennsylvania Federation of Sportsmen’s Clubs, Inc. et al. v. Kempthorne, et al.*, (M.D. Pa., No. 03-cv-0220). In that lawsuit, Plaintiffs argued that, even if the ABS was lawfully terminated in 2001, ABS bond forfeiture sites plus any additional sites whose reclamation costs are not fully covered by conventional bonds (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 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. *See* 30 CFR § 800.11(e)(1) (an alternate bonding system “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”).

In August 2007, after the proposed regulations were published for comment, the U.S. Third Circuit Court of Appeals issued an opinion in the lawsuit in which the court partly reversed the district court and remanded the case for further proceedings. *Pennsylvania Federation of Sportsmen’s Clubs, Inc. v. Kempthorne*, 497 F.3d 337 (3d Cir. 2007). The Third Circuit decision in *Kempthorne* directly impacted this rulemaking because the Department had proposed to eliminate the per-acre reclamation fee in § 86.17(e), given that the ABS had been terminated and the active mine sites permitted under the ABS had been converted to full-cost bonding. The Court decided that, in order to comply with applicable federal law, Pennsylvania must demonstrate that it has sufficient funds to deal with the legacy of the ABS, including the ongoing operation and maintenance costs to treat post-mining pollutorial discharges in perpetuity.

As part of the proposed rulemaking, the Department had proposed to eliminate the per-acre reclamation fee in § 86.17(e), which was an integral component of the ABS. In response to public comments and the Court ruling, 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 will restructure the reclamation fee as part of the Department’s compliance with the mandate of the Third Circuit ruling, the requirements of 30 CFR § 800.11(e) as applied to the ABS Legacy Sites, and the required program amendment codified by OSM in 30 CFR § 938.16(h). In addition, the Department has identified supplemental sources of funding

for performing reclamation of the ABS Legacy Sites—including the interest earned by the reclamation fee moneys, civil penalties assessed pursuant to the Surface Mining Conservation and Reclamation Act (SMCRA), and interest on other moneys in the Surface Mining Conservation and Reclamation Fund (SMCR Fund). Further amendments to § 86.17(e) and § 86.187 were made in the final rulemaking in response to public comments on the proposed rulemaking and the ruling of the Court in *Kemphorne*. These amendments will require the Department to dedicate certain funding sources to pay the reclamation costs for ABS Legacy Sites by depositing the moneys into special accounts where the moneys are held in trust.

The final rulemaking will also establish a procedure for adjusting the reclamation fee amount. The adjustment procedure is necessary to accommodate the fluctuations in operation and maintenance costs that will occur over time and to maintain a sufficient cushion in the account. The cushion will make funds available to continue treatment of discharges at underfunded ABS sites forfeited in the future and added to the class of ABS Legacy Sites, thus preventing water pollution at these sites and helping to assure that the Department has sufficient money at any time to treat the discharges at all the ABS Legacy Sites. Finally, several pertinent definitions were added to § 86.1. As a result of the amendments, this final rulemaking will establish an enforceable regulatory mechanism to address the remnants of the 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 required program amendment.

This final-form rulemaking was reviewed and thoroughly discussed with the MRAB at a series of meetings held by the MRAB in October and November 2007. These MRAB meetings were held specifically so that the Department could obtain advice and recommendations from the MRAB on how to proceed based upon the Third Circuit Court decision, the outstanding required program amendment issued by OSM, and the public comments on the proposed rulemaking objecting to elimination of the reclamation fee and raising concerns about the adequacy of funds to complete reclamation (water treatment) at ABS Legacy Sites. On January 5, 2008 an Advanced Notice of Final Rulemaking was published in the *Pennsylvania Bulletin* seeking comments on the changes from proposed to final rulemaking and providing thirty days to submit such comments. The Department also met individually with representatives of the surface mining industry, OSM, and interested citizens groups in order to solicit comments on this final rulemaking. The amendments being made to the reclamation-fee section (§ 86.17(e)) and the use-of-money section (§ 86.187), and the definitions section (§ 86.1) respond directly 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. This final rulemaking was recommended for approval by the MRAB at the January 10, 2008 meeting.