Rulemaking on Coal Mine Reclamation Fees and Reclamation of Bond Forfeiture Sites (#7-401)

Comment/Response Document

This document presents comments submitted in regard to the Environmental Quality Board's proposed rulemaking on Coal Mine Reclamation Fees and Reclamation of Bond Forfeiture Sites and the Department's responses to those comments. The Environmental Quality Board approved publication of the proposed amendments at its meeting on May 17, 2006. The proposed rulemaking was published in the *Pa. Bulletin* on August 5, 2006. *See* 36 Pa. Bull. 4200 (August 5, 2006). Public comments were accepted from August 5, 2006 to September 5, 2006, and the public comment period officially closed on September 5, 2006. The period for comments to be received from the Independent Regulatory Review Commission closed on October 5, 2006.

List of Commenters

1. Mr. Kurt J. Wiest[1]
   Senior Attorney
   Citizens for Pennsylvania's Future
   610 North Third Street
   Harrisburg, PA 17101

[1] Mr. Wiest, representing Citizens for Pennsylvania's Future, submitted comments on behalf of a group of six organizations. The group of commenters 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.

Comments and Responses

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

Comment: Of the group of six organizations that submitted comments, five are appellants 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 federal Office of Surface Mining Reclamation and Enforcement (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* rejected commenters/appellants' arguments and granted the joint motion of the federal defendants and the Department requesting dismissal of the case. *Id*. The commenters/appellants appealed the decision of the District Court to the U.S. Court of Appeals for the Third Circuit.

Concisely stated, they argue in the litigation that it was a violation of section 509 of the Federal Surface Mining Control and Reclamation Act (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 Alternate Bonding System (ABS) when it converted to a Conventional Bonding System (CBS) in 2001. Commenters also argue that, even if the ABS was terminated in 2001, the primacy ABS forfeited sites plus any additional sites whose reclamation costs are not fully covered by CBS bonds (the ABS Legacy Sites), remain subject to the requirements of § 800.11(e)(1). As such, commenters/appellants argued that 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). These commenters incorporated the arguments from their brief filed with the Court of Appeals into their comments on the proposed repeal of § 86.17(e).

Response: 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 to the district court 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. While there still is a legacy alternative bond fund generated by collection of the reclamation fee, "there is no longer a current or prospective ABS in Pennsylvania." 497 F.3d at 349. Second, the Third Circuit did not agree with the district court that the ABS Legacy Sites are no longer subject to regulation under 30 CFR § 800.11(e). The Court explained the 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 SMCRA for a State to dissolve its ABS program, in the manner Pennsylvania has, does not lead eluctably 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 pollutional 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." 497 F.3d at 353. Under § 800.11(e) 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." 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 ABS Legacy Sites, including the treatment of any post-mining pollutional discharges at these sites.

With respect to commenters' contention that the proposed repeal of § 86.17(e) would necessarily violate federal law, the Department disagrees with this broad assertion. There is no specific requirement in federal law for Pennsylvania to impose a per-acre reclamation fee for coal surface 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 Title V of 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).

On the other hand, the Third Circuit's ruling makes clear that Pennsylvania must assure that it will have sufficient money available at any time to complete the reclamation of all ABS Legacy Sites, including the treatment of any post-mining pollutional discharges at these sites. To

comply with this mandate, Pennsylvania must assess the extent of the liability associated with all of the ABS Legacy Sites, and must identify specific sources of revenue that will generate enough money to cover the costs of reclaiming these sites, including the costs for treating any pollutional discharges at these sites. In response to comments on the proposed rulemaking and the recommendation of the Mining and Reclamation Advisory Board, and in light of the Third circuit ruling in *Kempthorne*, the Department has determined that the reclamation fee is an adjustable source of revenue that should be used for this purpose and consequently has decided not to repeal the reclamation fee 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 and the requirements of 30 CFR § 800.11(e) as applied to the ABS Legacy Sites.

Comment: Commenters contend that 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. They argue that eliminating the $100 per-acre reclamation fee in § 86.17(e) will violate federal law because the fee is a necessary component of an active ABS in Pennsylvania. (1)

Response: Conversion from the ABS to the CBS involved three basic categories of surface mine sites: (i) permitted sites which were being actively mined; (ii) permitted sites at which coal mining had ceased but operators continued to treat post-mining pollutional discharges on the sites; and, (iii) forfeited sites necessitating reclamation, some but not all of which needed both land reclamation and treatment of post-mining pollutional discharges. The conversion of all actively-mined permitted surface coal mine sites to the CBS has been completed. The Department 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. But, as the court pointed out, for practical purposes the critical question is how the Department must address the remnants of Pennsylvania's ABS—i.e., any outstanding land reclamation at primacy ABS forfeiture sites; the treatment of pollutional discharges at primacy ABS forfeiture sites; and the reclamation of any additional sites originally permitted under the primacy ABS whose reclamation costs are not fully covered by CBS bonds or fully-funded trusts. The final rulemaking devises a flexible system capable of generating sufficient revenue to cover the costs to reclaim the ABS Legacy Sites. The system includes an adjustment mechanism in the reclamation fee, as well as the mandatory dedication of certain other funding sources, in order to accommodate the fluctuations that will certainly occur in the costs to treat post-mining pollutional discharges at the ABS Legacy Sites.

As stated above, a reclamation fee is not a necessary component of an alternate bonding system. To meet the requirements of federal law, an alternate bonding system must achieve the objectives and purposes of a bonding program pursuant to section 509 of FSMCRA. 30 U.S.C. § 1259(c). The structure of an acceptable alternate bonding system can take many forms; (for example, as commenters point out, the West Virginia Legislature imposed a temporary surcharge on mine operators ranging from three to fourteen cents per ton of coal produced in the state in order to help fund its alternate bonding system). Therefore, it would not have been a violation of federal law to eliminate the per-acre reclamation fee. Nevertheless, the Department has

determined that the reclamation fee is an adjustable source of revenue which should be used for the purpose of addressing the remnants of the ABS—the ABS Legacy Sites—and therefore has decided not to repeal the reclamation fee 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 and the requirements of 30 CFR § 800.11(e) as applied to the ABS Legacy Sites.

Comment: Commenters argue that the ABS cannot be legally terminated until all sites for which bonds were forfeited during administration of the ABS have been fully reclaimed, including provision for perpetual treatment of post-mining discharges on the ABS forfeiture sites. (1)

Response: The Department's position that the ABS could legally be terminated under the relevant circumstances was upheld by the federal District Court, and the Third Circuit affirmed that aspect of the lower court decision. But, as stated above, termination of the ABS is no longer the real issue; the critical question is how the Department must address the remnants of Pennsylvania's ABS, which includes all sites for which bonds were forfeited during administration of the primacy ABS. The Third Circuit determined that 30 CFR § 800.11(e) continues to apply to primacy ABS forfeiture sites and that under § 800.11(e) Pennsylvania "must assure" that it will have "available sufficient money to complete the reclamation plan for any" primacy ABS sites which may be in default at any time. Thus, Pennsylvania must assure that it will have sufficient money available at any time to complete the reclamation of all primacy ABS forfeiture sites, including the treatment of any post-mining pollutional discharges at these sites.

To comply with this mandate, Pennsylvania must assess the extent of the liability associated with the ABS Legacy Sites, and must identify specific sources of revenue that will generate enough money to cover the costs of reclaiming these sites, including the ongoing costs for treating discharges at these sites. The Department has determined that the reclamation fee is an adjustable source of revenue which should be used for this purpose, and has decided not to repeal the reclamation fee 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 and the requirements of 30 CFR § 800.11(e) as applied to the ABS Legacy Sites. The Department has also identified other sources of funding for performing reclamation of the ABS Legacy Sites—including the interest earned by the reclamation fee monies, civil penalties assessed pursuant to SMCRA, and interest on other moneys in the SMCRA Fund. Further amendments to §§ 86.17(e) and 86.187 were made in response to comments on the proposed rulemaking; the regulatory amendments will require the Department to dedicate the identified funding sources to paying the reclamation costs for ABS Legacy Sites. 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 Reclamation Fee O&M 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. 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.

Discontinuing Collection of the Reclamation Fee Imposed by § 86.17(e) Would be Unwise and Inappropriate

Comment: Commenters suggest that it would be unwise to discontinue collection of the $100 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. (1)

Response: 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 is properly calculated in order to 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 Mining and Reclamation Advisory Board as part of this effort. *See* 36 Pa. Bull. 7178 (Nov. 25, 2006). In addition, the Pennsylvania Surface Mining Conservation and Reclamation Act (PASMCRA) established the Surface Mining Conservation and Reclamation Fund (SMCR Fund). *See* 52 P.S. § 1396.18. Moneys from permit and license fees, penalties, fines and other moneys received pursuant to PASMCRA are placed into the SMCR Fund and may be used as a supplement to bond forfeiture funds. *Id*.; 25 Pa. Code § 86.187. It has been and will continue to be an unusual situation in which a conventionally-bonded active surface coal mine site is forfeited and turns out to have inadequate bond to complete the reclamation plan. In these rare cases, alternative enforcement and other mechanisms are used to make up the shortfall or the site will be reclaimed with the available bond.

Comment: 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, and that this money would be productively used by the Department for this purpose. 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 and foregoing the revenue generated by that fee for reclamation of bond forfeiture sites. (1)

Response: 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. In fact, 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 Department must assess the extent of the liability associated with all of the ABS Legacy Sites, and must identify specific sources of revenue that will generate enough money to cover the costs of reclaiming these sites, including the costs for treating any discharges at these sites.

There is no single source of funds adequate to treat all of the discharges, which generally will require perpetual treatment. Moreover, the necessary 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. The Department has determined that the reclamation fee is an adjustable source of revenue which should be used for this purpose. 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. In addition, the final rulemaking includes a provision requiring the Department to use moneys collected from civil penalties assessed under SMCRA for the same purposes. Finally, there are provisions authorizing the Department to use interest earned on other moneys in the SMCRA Fund to pay treatment costs at ABS Legacy Sites. These revenue sources will assure that the Department has sufficient money available at any time to complete the reclamation of all ABS Legacy Sites, including the treatment of any post-mining pollutional discharges at these sites.

Comment: 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). (1)

Response: 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, an interpretive question the Department quickly encountered was how to apply § 86.17(e) to permits issued under the CBS. The regulation had to be applied in an entirely new context—a circumstance which presented a classic problem of regulatory interpretation. 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 under the circumstances 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. An administrative agency's interpretation of its own regulations is to be given great weight unless the interpretation is plainly erroneous. *See, e.g., Carlson Mining Co. v. Dept. of Environmental Protection*, 639 A.2d 1332 (Pa. Cmwlth.), *appeal*

denied, 538 Pa. 675 (1994). 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. 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. Assuming that the reclamation fee were maintained at $100 per acre, applying the reclamation fee to all of the permitted acreage covered by surface mining permits would generate additional revenue because the operational area is a subset of the total acreage permitted. The Department has decided, in accordance with the recommendation of the Mining and Reclamation Advisory Board, to continue its practice of applying the reclamation fee to the operational area only, and has amended § 86.17(e) in the final rulemaking to clarify this manner of assessing the fee. The final rulemaking identifies and dedicates various sources of revenue—in addition to the reclamation fee—for treating discharges at ABS Legacy Sites. The combined funding sources will assure that the Department has sufficient money to cover the costs to perform reclamation at all of the ABS Legacy Sites, including the annual operation and maintenance costs for treating post-mining discharges. In addition, the final rulemaking establishes a procedure for adjusting the amount of the reclamation fee in order to accommodate increases (or decreases) in the annual operation and maintenance costs for ABS Legacy Sites.

Comment: Commenters assert that the Department has broad authority under PASMCRA 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 per-acre 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 commenters—from a Special Reclamation Tax assessed on each ton of coal extracted in the State. (1)

Response: 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. Pennsylvania "must assure" that it will have "available sufficient money to complete the reclamation plan for any" primacy ABS sites which may be in default at any time. See 30 CFR § 800.11(e). 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 Mining and Reclamation Advisory Board 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 its obligations under 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.

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

Comment: Commenters challenge the rationale 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 all actively-mined permitted surface coal mine sites to the CBS, the reclamation fee would be eliminated. Commenters assert that any "commitment" made by the Department to industry to eliminate the reclamation fee is not binding on the Environmental Quality Board (EQB). They also assert that the EQB may not legally consider any such commitment when determining whether to adopt the proposed repeal of § 86.17(e) and the consequent elimination of the $100 per-acre reclamation fee. (1)

Response: The Department agrees with commenters that the EQB is not bound by any commitment that the Department may make with respect to proposed rulemaking. Under the law, the EQB is a separate legal entity from the Department, *see* 71 P.S. §§ 180-1, 510-20, and the EQB decides whether to promulgate regulations that the Department has proposed to the EQB for adoption.

With respect to the reclamation fee specifically, the Department's commitment to eliminate 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 that the system was already in deficit and that the system would inevitably fail completely. 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 problem under the ABS posed by forfeitures and inadequate funds for reclamation of forfeited sites. The Department's purpose in converting to the CBS was to find solutions to the problem of unreclaimed forfeited and abandoned surface coal mine sites under the ABS—without bankrupting industry and thereby making Pennsylvania's mining reclamation problems worse. Consequently, the decision to convert 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 conventional bonds, 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 eliminate 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. No commitment to a particular outcome of a proposed rulemaking has been, or could be, made and the EQB has discretion under the law to disapprove the Department's proposal to repeal § 86.17(e).

Comment: Commenters also challenge the rationale stated in the proposed rulemaking's preamble that the conversion to a CBS is essentially complete and therefore elimination of the reclamation fee is now appropriate. Commenters assert that the conversion to a CBS is not complete unless every ABS site that was permitted as of August 2001 has replaced its ABS bond coverage with financial guarantees covering the full costs of reclamation, including perpetual treatment of any post-mining discharges. They contend that this condition has not been met and therefore the reclamation fee should not be eliminated. (1)

Response: The Department disagrees with commentators' assertion that conversion to the CBS is not complete until every single site permitted as of August 2001, including sites with no active mining, has 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 *Kempthorne* agreed that the Department terminated the ABS in 2001.

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. 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. These agreements cover 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; and, one agreement has been reached for a trust that has not yet been funded but will total $253,000 when 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 is expected that about 124 agreements would be needed to fund the entire set of 270 treatment facilities. 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. Moreover, 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.

As to the forfeited primacy ABS sites, land reclamation on all forfeited primacy ABS sites will likely be completed in the next two years, primarily with funds remaining from the $5.5 million appropriated by the Legislature in 2001, coupled with money from forfeited ABS bonds. Discharge treatment facilities must be constructed for some of the forfeited primacy ABS sites at an estimated cost of approximately $2.8 million, and the estimated annual operation and maintenance costs for all these sites is approximately $1.2 million.

The Department had planned to address the discharges on primacy ABS forfeiture sites as part of its comprehensive approach to all mining discharge sites, as outlined in its Discharge Abatement Workplan. Given the successful conversion to the CBS and the Department's decision to take a comprehensive approach to all mining discharge sites, the Department believed it was appropriate to propose the elimination of the reclamation fee. However, the proposed rulemaking generated significant comments regarding the specific financial means that would be used by the Department to address the remnants of the ABS and whether it was appropriate to eliminate the reclamation fee before reclamation of all the ABS Legacy Sites was completed. In response to the comments raised and the recommendation of the Mining and Reclamation Advisory Board, and in light of the Third Circuit ruling in *Kempthorne*, the Department has determined that the reclamation fee remains an adjustable funding source that should be used for the operation and maintenance costs associated with treating post-mining pollutional discharges at the ABS Legacy Sites. Consequently, the Department has decided not to repeal the reclamation fee 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 and the requirements of 30 CFR § 800.11(e) as applied to the ABS Legacy Sites.

Impact of Outstanding Litigation on the Proposed Rulemaking

Comment: Commenters contend 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. Kempthorne* case because the adequacy of funding of Pennsylvania's ABS is the main issue in that appeal. (1)

Response: The Third Circuit rendered its decision in the *Kempthorne* 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 *Kempthorne,* 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 *Kempthorne* and the requirements of 30 CFR § 800.11(e).