

**PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS**

■ 4. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 5. In appendix B to part 4044, a new entry, as set forth below, is added to the

table. (The introductory text of the table is omitted.)

**Appendix B to Part 4044—Interest Rates Used to Value Benefits**

\* \* \* \* \*

For valuation dates occurring in the month—	The values of $i_t$ are:					
	$i_t$	for t =	$i_t$	for t =	$i_t$	for t =
June 2005 .....	.0370	1–20	.0475	>20	N/A	N/A

Issued in Washington, DC, on this 6th day of May 2005.

**Vincent K. Snowbarger**,  
Deputy Executive Director, Pension Benefit Guaranty Corporation.  
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**DEPARTMENT OF THE INTERIOR  
Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 938  
[PA–124–FOR]**

**Pennsylvania Regulatory Program**

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

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are approving, with certain exceptions, a proposed amendment to the Pennsylvania program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Pennsylvania proposed to revise its Surface Mining Conservation and Reclamation Act (PASMCR) and implementing regulations at 25 Pa Code Chapters 86–90 with regard to various issues including bonding, re-mining and reclamation, postmining discharges, and water supply protection/replacement. Pennsylvania revised its program to provide additional safeguards and clarify ambiguities.

**DATES:** Effective Date: May 13, 2005.

**FOR FURTHER INFORMATION CONTACT:** George Rieger, Director, Pittsburgh Field Division; Telephone: (717) 782–4036; e-mail: [grieger@osmre.gov](mailto:grieger@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Pennsylvania Program
- II. Submission of the Amendment
- III. OSM's Findings
- IV. Summary and Disposition of Comments
- V. OSM's Decision

- VI. Effect of Director's Decision
- VII. Procedural Determinations

**I. Background on the Pennsylvania Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.” See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.15 and 938.16.

**II. Submission of the Proposed Amendment**

By letter dated December 18, 1998 (Administrative Record No. PA 853.01), the Pennsylvania Department of Environmental Protection (PADEP) submitted a proposed amendment to its program covering various issues including bonding, re-mining and reclamation, postmining discharges, and water supply protection/replacement. The proposal included two documents: “Provisions of Pennsylvania's Statute—Surface Mining Conservation and Reclamation Act—Submitted for Program Amendment” and “Provisions of Pennsylvania's Regulations—25 Pa. Code Chapters 86–90—Submitted for Program Amendment.”

We announced receipt of the proposed amendment in the March 12, 1999 **Federal Register** (64 FR 12269), and in the same document invited public comment and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on April 12, 1999. Please refer to the March 12, 1999, **Federal Register** for additional background information. In the July 8, 1999 **Federal Register** (64 FR 36828), we reopened the comment period in response to a June 1, 1999, letter (Administrative Record No. PA 853.11) from PADEP regarding deletion of the definition of the term “best professional judgment” at 25 Pa. Code 87.202 and 25 Pa. Code 88.502, and the deletion of subsections 25 Pa. Code 87.207(b) and 25 Pa. Code 88.507(b). The reopened public comment period ended on July 23, 1999. We received comments from: the Pennsylvania Historical and Museum Commission dated January 14, 1999 (Administrative Record No. PA 853.03); the United States Department of Agriculture, Natural Resources Conservation Service dated January 19, 1999 (Administrative Record No. PA 853.04); the U.S. Department of Labor, Mine Safety and Health Administration (MSHA), New Stanton, Pennsylvania, Office dated January 20, 1999 (Administrative Record No. PA 853.05); MSHA's Wilkes-Barre, Pennsylvania, Office dated January 26, 1999 (Administrative Record No. PA 853.06); Amerikohl Mining, Inc. dated March 29, 1999 (Administrative Record No. PA 853.08); the Pennsylvania Coal Association dated April 9, 1999 (Administrative Record No. PA 853.09); Schmid and Company Inc., Consulting Ecologists dated April 9, 1999 (Administrative Record No. PA 853.10); and, the U.S. Environmental Protection Agency dated May 25, 2000 (Administrative Record No. PA 853.19).

By letters dated September 22, 1999 (Administrative Record No. PA 853.14), and April 6, 2000 (Administrative Record No. PA 853.17), we requested

clarification from Pennsylvania on various aspects of its amendment. In an October 3, 2002, letter to Pennsylvania (Administrative Record No. PA 853.22), we indicated that some of the issues in our September 22, 1999, and April 6, 2000, letters were no longer valid and that we were withdrawing them. The conclusions in this letter were the result of our internal deliberations and the issues were not removed as the result of information from any other source. Since the issuance of the October 3, 2002, letter, we have had numerous meetings with Pennsylvania to discuss the items remaining from the September 22, 1999, and the April 6, 2000, letters.

The meetings with Pennsylvania resulted in Pennsylvania providing us with information to clarify the meaning of various parts of its amendment. We prepared a document listing those clarifications and placed it in the administrative record (Administrative Record No. PA 853.25). Additionally, Pennsylvania submitted two letters to us modifying the December 18, 1998, amendment. Those letters were dated December 23, 2003 (Administrative Record No. PA 853.23), and April 13, 2004 (Administrative Record No. PA 853.24). Based on Pennsylvania's revisions and additional explanatory information for its amendment, we reopened the public comment period in the November 24, 2004, **Federal Register** (69 FR 68285) (Administrative Record No. PA 853.26). The public comment period ended on December 9, 2004. In response to the November 24, 2004, request for comments, we received letters from: the U.S. Environmental Protection Agency dated December 27, 2004 (Administrative Record No. PA 853.29); MSHA's Arlington, Virginia, Office dated December 20, 2004 (Administrative Record No. PA 853.28); MSHA's Wilkes-Barre, Pennsylvania, Office dated January 7, 2005 (Administrative Record No. PA 853.30); and, Citizens for Pennsylvania's Future dated January 18, 2005 (Administrative Record No. PA 853.31).

### III. OSM's Findings

In the amendment, Pennsylvania modified its Surface Mining Conservation and Reclamation Act (PASMCRRA) and portions of its regulations at 25 Pa. Code Chapter 86, Surface and Underground Coal Mining: General; 25 Pa. Code Chapter 87, Surface Mining of Coal; 25 Pa. Code Chapter 88, Anthracite Coal; 25 Pa. Code Chapter 89, Underground Mining of Coal and Coal Preparation Facilities; and, 25 Pa. Code Chapter 90, Coal Refuse Disposal. In some cases,

Pennsylvania made the same modifications to regulations in several different Chapters. In those cases, we discussed all the similar regulations together. Our discussion of the amendment appears below by the applicable sections of PASMCRRA followed by the applicable sections of the Pennsylvania regulations.

#### *PASMCRRA*

Section 3, Definitions of the terms "government financed reclamation contract," "no-cost reclamation contract," and "surface mining activities" were previously approved in the March 26, 1999, and June 8, 1999, editions of the **Federal Register** (64 FR 14610, 64 FR 30387, respectively). Therefore, these statutory provisions are not a part of this rulemaking.

Section 3, Definition of the term "total project costs." Pennsylvania added this definition for use in Section 4.8 of PASMCRRA. Pennsylvania defines the term to mean the entire cost of performing a government financed reclamation contract as determined by Pennsylvania even if the cost is assumed by the contractor pursuant to a no-cost contract with PADEP. When we reviewed the statutory provisions listed above in 1999, we should also have requested that PADEP separately submit the definition of "total project costs," but inadvertently neglected to do so. There is no comparable definition in the Federal regulations. However, so long as it is applied in a manner consistent with our March 26, 1999, decision (64 FR 14610), as amended by our June 8, 1999, decision (64 FR 30387), the definition is not inconsistent with the Federal regulations at 30 CFR part 707 that provide for government-financed construction. Therefore, we are approving it.

Section 3.1. This section contains the requirements for obtaining a license to mine coal. Section 3.1(a) was amended to require anyone mining coal to obtain a license and to provide the requirements for obtaining a license. Section 3.1(b) which provides the circumstances under which Pennsylvania will not issue or renew a mining license was amended to specify that it applies to any person who mines coal by the surface mining method. Section 3.1(c) which requires an application for a license, renewal or permit to be accompanied by a certificate of public liability insurance was amended to change references from surface mining operations to surface mining activities. The changes Pennsylvania made make it clear that certain licensing provisions apply to all who mine coal where formerly they

only applied to surface mine operators. There are no licensing requirements in the Federal regulations. However, these requirements are not inconsistent with the application and permitting requirements of the Federal regulations. Therefore, we are approving them.

Section 3.1(d) was amended to add a provision that a permit will be denied to certain entities engaged in mining coal if they control or have controlled mining operations with a demonstrated pattern of willful violations. This provision is no less stringent than the corresponding portion of Section 510(c) of SMCRA, and we are therefore approving it.

Section 4(a) was modified to require that before anyone can mine coal, a permit must be obtained. Previously, the requirement was that anyone wishing to mine minerals was required to obtain a permit. This provision, as amended, remains no less stringent than Section 506(a) of SMCRA, 30 U.S.C. 1256(a), and therefore, we are approving it.

Section 4(a)(2)(C) was modified to provide that for areas previously disturbed by surface mining activities that were not reclaimed to the standards of PASMCRRA and are proposed to be mined, Pennsylvania may approve a vegetative cover which may not be less than the vegetative cover existing before the redisturbance and must be adequate to control erosion and achieve the postmining land use. This subsection is no less effective than the ground cover revegetation requirements of the Federal regulations at 30 CFR 816.116(a) and (b)(5). Therefore, we are approving this subsection.

Section 4(d) was modified by deleting existing language and adding language that expressly describes other forms of collateral or bonds that are acceptable. The amendment adds life insurance policies to the list of acceptable forms of collateral bonds. The life insurance policy must be fully paid and noncancelable with a cash surrender value irrevocably assigned to PADEP at least equal to the amount of the required bonds. In addition, the policy cannot be borrowed against and cannot be utilized for any purpose other than assuring reclamation. While the Federal regulations at 30 CFR 800.21, governing collateral bonds, do not specifically provide for the use of insurance policies, we find that these policies present no greater risks than those inherent in other forms of collateral bonding. Therefore, we conclude that the addition of life insurance policies as collateral bonds to Section 4(d) will not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509

of SMCRA, and this addition is hereby approved.

Section 4(d) also expressly adds annuities and trust funds to the list of acceptable collateral bonds. The annuity or trust fund must irrevocably name PADEP as beneficiary. The implementing regulations at 25 Pa. Code 86.158(f) expressly provide additional conditions on the use of trust funds and annuities. As is the case with whole life insurance policies, there are no specific provisions addressing trust funds or annuities in the Federal collateral bonding regulations at 30 CFR 800.21. However, they are an acceptable form of collateral and, with the safeguards included in the State's regulations, trust funds and annuities present no greater risks, and are, therefore, no less effective than the forms of collateral bonding expressly contained in 30 CFR 800.21. Therefore, we conclude that the addition of annuities or trust funds as types of collateral bond to Section 4(d) will not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509 of SMCRA, and the addition is hereby approved.

Section 4(d.2) expressly provides for the establishment of alternative financial assurance mechanisms including site-specific trust funds for the perpetual treatment of post mining discharges. Again, while Federal rules do not expressly include site-specific trust funds, we have determined that a fund that provides for the perpetual treatment of post mining discharges functions as a collateral bond and, as such, is no less effective than the Federal regulations regarding collateral bonds. Therefore, we are approving Section 4(d.2). For a more detailed analysis of site-specific trust funds, please refer to our finding below pertaining to 25 Pa. Code 86.158(f).

Section 4(g) was modified to provide that any person having an interest in the bond (including PADEP) may request bond release. While the Federal regulations do not explicitly provide for the filing of release applications by persons other than the permittee, it is not unreasonable to allow such applications, and to grant the request where the permittee has met all of the criteria for bond release. Therefore, we have determined that this change is no less effective than the Federal requirements at 30 CFR 800.40 regarding bond release and we are approving it.

Section 4(g)(1) was modified to provide that operators may receive Stage 1 bond release if, among other things, they have provided for the treatment of pollutional discharges. While this

provision has no precise Federal counterpart, it is consistent with Section 519(b) of SMCRA which requires the regulatory authority to evaluate "whether pollution of surface and subsurface water is occurring, the probability of continuance of such pollution, and the estimated cost of abating such pollution." Therefore, we are approving the change to Section 4(g)(1).

Section 4(g)(3) was modified to expressly indicate that the remaining portion of the bond could be released in whole or part at Stage 3 when the operator has completed successfully all mining and reclamation activities and has made provisions with PADEP for the sound future treatment of any pollutional discharges. That portion of the permit required for post-mining water treatment remains under bond as part of the provisions for future treatment of any pollutional discharges. Therefore, this is a form of partial bond release as provided for in 30 CFR 800.40(c) and can be approved.

Additionally, Pennsylvania's regulations at 25 Pa. Code 86.151(j), which provides that release of bonds does not alleviate the operator's responsibility to treat discharges of mine drainage emanating from, or hydrologically connected to, the site to the standards in the permit, PASMCR, the Clean Stream Law, the Federal Water Pollution Control Act (or Clean Water Act) and the rules and regulations thereunder, provides guidance as to what qualifies as sound future treatment.

Section 4(g)(3) was also amended by deleting bond release language applicable to noncoal surface mining operations. Since SMCRA contains no counterpart to this language, the deletion of the language does not render the Pennsylvania program inconsistent with SMCRA or the implementing Federal regulations.

For the above noted reasons, we are approving the amendments to Section 4(g)(3).

Sections 4(g.1), (g.2), and (g.3). These new sections pertain to Stage 2 bond release at sites with pollutional discharges, and bond release at sites with "minimal-impact post-mining discharges." In its letter of December 23, 2003, Pennsylvania requested that we remove these sections from this program amendment, because its definition of "minimal impact postmining discharges" and the regulations for postmining discharges were not included in the proposed program amendment. We are hereby granting that request; therefore, we will take no further action in this rulemaking with

respect to proposed Sections 4(g.1), (g.2), and (g.3).

Section 4(h) is amended to require that in the event of bond forfeiture, payment of the forfeited bond must be made to PADEP within 30 days of notice of forfeiture, with the bond then being held in escrow with any interest accruing to PADEP pending resolution of any appeals. If any portion of the bond is determined by a court to have been improperly forfeited, the interest accruing proportionately to that amount shall be returned to the surety. While neither SMCRA nor the Federal regulations provide specifically for the return of funds to the surety in the event that a court decides that the regulatory authority was not entitled to the entire amount of the bond, we find this provision to be consistent with the Federal regulation at 30 CFR 800.50(d)(2) which requires the return of the portion of the bond in excess of that needed for reclamation. Section 4(h) is also amended to allow for surety reclamation of a site in lieu of paying the bond amount to PADEP. This portion of the amendment is no less effective than the Federal regulations governing surety reclamation at 30 CFR 800.50(a)(2)(ii). For these reasons, we are approving the changes to Section 4(h).

Section 4.2(f) was modified to include provisions for restoration or replacement of water supplies affected by surface mining activities. Formerly, this section only required surface mine operators to restore or replace water supplies they affect. Subsection (f)(1) now requires that, in addition to surface mine operators, any person engaged in government financed reclamation must restore or replace a water supply when they adversely affect the supply. Section 528 of SMCRA provides that the requirements of the Act are not applicable to sites where coal removal is part of government financed construction. Therefore, that portion of Pennsylvania's statute requiring restoration or replacement of water supplies by persons engaged in government financed reclamation is more stringent than the Federal provisions and we are approving these provisions as it applies to persons engaged in government financed reclamation.

Section 4.2(f)(1) also provides that adversely affected water supplies must be replaced with an alternate source of water adequate in quantity and quality for the purposes served by the supply. This language is no less stringent than the Federal statutory provisions contained in sections 717(b) of SMCRA that requires a surface coal mine

operator to replace a water supply that has been affected by surface coal mine operations. Therefore, it can be approved even though it lacks the specificity contained in the Federal regulations at 30 CFR 701.5, which define the term, "replacement of water supply," to include the provision of water supply on both a temporary and permanent basis equivalent to premining quality and quantity. Pennsylvania's implementing regulation to this statutory provision is addressed later in this rulemaking (see 25 Pa. Code 87.119 and 88.107 below).

Section 4.2(f)(2) provides that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacterial contamination, and diminution of public or private water supplies within 1000 linear feet of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal, and storage and support areas except for haul and access roads. This section also provides for five defenses to the presumption of liability: (1) The mine operator or owner was denied access to conduct a pre-mining water supply survey; (2) the water supply is not within 1,000 linear feet of the boundaries of the areas bonded and affected by coal mining operations, overburden removal/storage areas and support areas [excluding haul and access roads]; (3) a pre-permit water supply survey shows that the pollution/diminution existed prior to the surface mining activities; (4) the pollution/diminution occurred as a result of some cause other than surface mining activities; and, (5) the mine operator or owner was denied access to determine the cause of the pollution/diminution or to replace/restore the water supply.

Neither SMCRA nor the Federal regulations provide for a similar presumption. In its amendment submission, Pennsylvania indicated that with or without the rebuttable presumption of liability, a mine operator is liable for replacing or restoring a water supply contaminated or diminished by the operator's surface mining activities. We are approving this subsection because it is not inconsistent with Section 717(b) of SMCRA and the Federal regulations in that it does not diminish an operator's obligation to restore or replace water supplies affected by surface mining.

Section 4.2(f)(3) provides for the immediate replacement of a water supply used for potable or domestic purposes when that supply is required to protect public health or safety. If an operator has appealed or failed to

comply with an order issued under this section, PADEP may use money from the Surface Mining Conservation and Reclamation Fund to restore or replace the affected water supply. The section also requires the Secretary of PADEP to recover the costs of restoration or replacement from the responsible owners or operators. Section 525(c) of SMCRA, 30 CFR 843.16 and 35 Pa. Stat. 7514 (d) provide that an appeal of an order does not stay that order unless a request for temporary relief is granted. While there is no provision in the Federal program expressly allowing an agency to fund the restoration/replacement of temporary water supplies, we are approving this provision because it is not inconsistent with SMCRA and the Federal regulations in ensuring the restoration or replacement of affected water supplies and because it holds the operator responsible for replacing water supplies affected by coal mining operations through a cost recovery action.

Section 4.2(f)(4) allows an operator or an owner thirty days to appeal an order to replace a water supply. This language is no less effective than the Federal regulations at 30 CFR 843.16 (implementing 30 CFR 840.13), which allow a person issued an order to file an appeal within 30 days after receiving the order.

Section 4.2(f)(4) also provides that an order issued under this section which is appealed will not be used to block issuance of new permits. This provision is no less effective than the Federal regulation at 30 CFR 773.14(b)(4), which provides that a regulatory authority may issue a provisional permit if an operator is pursuing a good faith administrative or judicial appeal contesting the validity of a violation.

Section 4.2(f)(4) also provides that an order to replace an affected water supply which is appealed by the operator cannot be used to block the release of bonds when a stage of reclamation is completed.

Pennsylvania's provision allows bond release even though an order to restore or replace the water supply remains unabated. Section 519(c)(3) of SMCRA and 30 CFR 800.40(c)(3) prohibit the release of the Phase 3 bond (the final portion of the bond) before the reclamation requirements of SMCRA and the permit are fully met.

Pennsylvania's proposed changes do not specify or limit what stage of bond may be released, which we find is less stringent than SMCRA and less effective than the Federal regulations. Accordingly, to the extent that these changes allow Phase 3 bond release, the

changes to Section 4.2(f)(4) are not approved and to the extent these changes allow Phase 1 or Phase 2 bond release after successful completion of the reclamation requirements of the applicable Phase, they are approved.

Section 4.2(f)(5) has been subsequently repealed by Pennsylvania in House Bill 393 (see 66 FR 57662, 57664 [November 16, 2001] for OSM's approval of Pennsylvania's repeal of this section). Therefore, this section is not a part of this rulemaking.

Section 4.2(f)(6) provides that nothing in this section prevents anyone who claims water pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or equity. There is no Federal counterpart to this provision. The affected parties have the full protection of PASMCRRA while they are pursuing other remedies. Since the protections of PASMCRRA are not affected by this subsection, we have determined that this provision is not inconsistent with SMCRA or the Federal regulations and we are approving it.

Section 4.2(f)(7) provides that a surface mining operation conducted under a permit issued before the effective date of this Act shall not be subject to the provisions of clauses (2), (3), (4), (5), and (6) of Section 4.2(f) but shall be subject to clause (1). Because Subsection (1) requires the replacement of water supplies, we have determined that Section 4.2(f)(7) is no less stringent than Section 717(b) of SMCRA and we are approving it to the extent noted in our discussions above.

Section 4.2(i) was added to provide access for PADEP and its agents to places where surface mining activities are being conducted to conduct inspections and take any materials for analysis. This provision, in concert with Section 18.9 of PASMCRRA, is no less effective than the Federal regulations at 30 CFR 840.12(a), which provide for right of entry. Therefore, we are approving this section.

Section 4.6(i) provides bond release requirements for mining of previously affected areas. This section was modified in several respects. The modifications render this bond release provision the same as specified elsewhere in PASMCRRA. At Stage 1, up to sixty percent of the bond may be released, whereas before it was up to fifty percent. At Stage 2, the amount of bond permitted to be released is amended from thirty-five percent to "[a]n additional amount of bond but retaining an amount sufficient to cover the cost to the Commonwealth of reestablishing vegetation if completed by a third party \* \* \*." A Stage 2

release criterion was modified to allow an operator to get such a release where it can show, among other things, that it has not caused the baseline pollution load of a discharge to be exceeded for a twelve month period prior to the date of bond release application and until the release is approved. While some of these changes have no precise Federal counterparts, they are all consistent with the bond release requirements of the Federal regulations at 30 CFR 800.40. Moreover, the bond release amount modifications for Stages 1 and 2 are no less effective than corresponding portions of the Federal regulations at 30 CFR 800.40(c)(1) and (c)(2), respectively. Therefore, we are approving the changes to this section.

Section 4.6(j) provides the standards of success for vegetative cover as a result of the reclamation of a previously mined site. The section was modified to allow PADEP to require a higher standard of vegetation success where it determines that such a standard is integral to the proposed pollution abatement plan. Pennsylvania's modification of this section makes it more stringent than the Federal requirements because it allows PADEP to set a higher standard than that contained in the Federal regulations at 30 CFR 816.116(a) and (b)(5) if it deems it necessary. Therefore, we are approving this section.

Section 4.7 provides for the anthracite mine operators emergency bond fund. This section was modified by Pennsylvania to open the emergency bond fund to anthracite surface mine operators. Among other things, these amendments will require anthracite surface mine operators that are unable to post bond for certain reasons to pay a twenty-five cents per ton fee, which is used to reclaim their operations if they are subsequently abandoned. No permits may be issued to an anthracite operator who does not post an adequate bond until the operator files at least \$1,000.00 with PADEP and borrows from the emergency bond fund an amount sufficient to cover the remainder of the bond obligation.

Significantly, fees paid by an operator may only be used to secure the reclamation obligations of that operator. Thus, the emergency bond fund is not an alternative bonding system; rather, it is an adjunct to the conventional bonding system for anthracite mining operations. This section was formerly approved by OSM, and allowing anthracite surface mine operators to use the fund does not make it inconsistent with Section 509 of SMCRA, since no permit may be issued without adequate bonds being posted, in the form of a

loan from the emergency bond fund. Therefore, we are approving the amendments to this section.

Section 4.8 was added to PASMCR by this amendment. This section was submitted separately by PADEP, at our request, in conjunction with our review of Pennsylvania's 1997 revisions to its Abandoned Mine Land Reclamation (AMLR) Plan. Our decisions on this provision were announced in the March 26, 1999, and June 8, 1999, editions of the **Federal Register** (64 FR 14610, 64 FR 30387, respectively). Therefore, this section is not a part of this rulemaking.

Section 4.10 establishes the Remining Operator's Assistance Program (ROAP). While this section was not part of Pennsylvania's original 1998 amendment submission, Pennsylvania requested that it be added in its letter to us of April 13, 2004 (Administrative Record No. PA 853.24). The ROAP, which is funded by Pennsylvania's Remining Environmental Enhancement Fund, will allow PADEP to assist and pay for the preparation of applications for licensed mine operators to obtain permits for remining abandoned mine land, including land subject to bond forfeitures, and coal refuse piles. Section 4.10 also authorized the Pennsylvania Environmental Quality Board (EQB) to promulgate regulations to expand the ROAP beyond its interim scope, which was coextensive with assistance provided under the State's Small Operator Assistance Program (SOAP). While Section 4.10 has no Federal counterpart, we find that its addition to the Pennsylvania program should further the State's goal of promoting the remining and subsequent reclamation of previously mined, unreclaimed areas, and will not render the program inconsistent with SMCRA or the implementing Federal regulations. Therefore, we are approving Section 4.10.

Section 4.11 authorizes the EQB to promulgate regulations that will constitute an interim reclamation and remining program that provides incentives and assistance to reclaim abandoned mine lands and lands subject to bond forfeiture. PADEP is authorized to expend moneys from the Remining Environmental Enhancement Fund for this program. Proposed and final regulations must include, without limitation, the following elements: Encouragement of reclamation of abandoned mine lands by active surface coal mine operators; encouragement of the recovery of remaining coal resources on abandoned mine lands and maximization of reclamation of such lands; development of an operator qualification system; and,

encouragement of local government participation in abandoned mine land agreements. Section 4.11 requires PADEP to prepare an annual report to the environmental committees of the Pennsylvania Senate and House of Representatives. The report must include, without limitation, the following components: The number and names of operators participating in the programs created by Sections 4.8, 4.9, 4.10, 4.12, 4.13, and 18; the number of acres of reclaimed abandoned mine land, reclaimed coal refuse piles, and reclaimed bond forfeiture land; the dollar value of this reclamation; recommendations for providing additional incentives for reclamation of previously mined areas; and, any comments on the annual report submitted by the Mining and Reclamation Advisory Board. This section was not part of Pennsylvania's original 1998 amendment submission, but Pennsylvania requested that it be added in its letter to us of April 13, 2004 (Administrative Record No. PA 853.24). While Section 4.11 has no Federal counterpart, we find that its addition to the Pennsylvania program should further the State's goal of promoting the remining and subsequent reclamation of previously mined, unreclaimed areas, and will not render the program inconsistent with SMCRA or the implementing Federal regulations. Therefore, we are approving Section 4.11.

Section 4.12 provides for financial guarantees to insure reclamation. Pursuant to this section, Pennsylvania has established a Remining Financial Assurance Fund to financially assure bonding obligations for an operator engaged in remining. The section requires the EQB to promulgate regulations providing criteria for operator and site eligibility, methods for paying into the fund, the limits of use of the fund, and the procedures to follow in the event of bond forfeiture. Under this incentives program, PADEP will reserve a portion of the financial guarantees special account in the Remining Financial Assurance Fund as collateral for reclamation obligations on the remining area. Payments cannot be made from the fund until the fund is actuarially sound. The special account is funded by an initial deposit of \$5 Million, as specified in Section 18(a.2) of PASMCR, which is discussed below, and by annual payments from participating operators, as set forth in 25 Pa. Code 86.283(a). Operators making such payments are excused from the requirement to post a bond with respect to any permit for which the payments

are made. We find that these remining incentives are not inconsistent with the provisions of SMCRA, since they do not alter the basic Pennsylvania program requirement to secure a bond for surface and underground coal mining operations. Therefore, we are approving this section except for Section 4.12(b) as noted below.

Because of Section 4.12(b), which states that payments to the Remining Environmental Enhancement Fund will be reserved in a special account to be used in case of operator forfeiture and 25 Pa. Code 86.281(e), as discussed below, which states that "additional funds from the Remining Financial Assurance Fund will be used to complete reclamation" where the actual reclamation cost exceeds the financial guarantee amount reserved for a given permit, the remining incentives program is a type of alternative bonding system. As we note in our discussion below of 25 Pa. Code 86.281(e), neither the statute nor the regulations meets OSM's criteria for an alternative bonding system. Therefore we are not approving Section 4.12(b) to the extent it creates an alternative bonding system.

Section 4.13 provides for reclamation bond credits. A "bond credit" may be issued by PADEP to a licensed mine operator as a reward for the successful completion of voluntary reclamation of abandoned mine lands. The credits may be used against any reclamation bond obligation, in combination with surety or collateral bonds, except as specified in this section and in the implementing regulations at 25 Pa. Code 86.291–86.295. Credits will not be issued to operators who fail to successfully complete the reclamation as set forth in the voluntary reclamation agreements. Credits also may not be issued to operators if the operators, entities directed or controlled by the operators, or entities the operator directs or controls bear any Federal or State reclamation responsibilities for an area proposed to be reclaimed. Bond credit amounts will be underwritten solely with funds from the Remining Financial Assurance Fund established in Section 18(a) of PASMCRRA, which is discussed below. The bond credit program is not an alternative bonding system, because PADEP is not obligated to expend more than the permit-specific bond credit amount reserved from the Remining Financial Assurance Fund in the event of forfeiture. Therefore, the program is essentially an adjunct to the State's conventional bonding system. While there is no Federal counterpart to this provision, we find that the allowance of financially guaranteed bond credits within a conventional bonding system

does not render the Pennsylvania program less stringent than Section 509 of SMCRA, so long as all applicable bonding requirements contained in the State counterparts to Section 509 and the implementing Federal regulations at 30 CFR part 800 are met. For this reason, we are approving Section 4.13.

Section 18(a) was amended to provide for the Remining Environmental Enhancement Fund and the Remining Financial Assurance Fund. These funds were created for use in the remining and reclamation incentives created by this amendment. Specifically, the Remining Environmental Enhancement Fund is to be used to pay the costs of designating areas suitable for reclamation by remining, and operating the ROAP created in Section 4.10. The Remining Financial Assurance Fund is to be used to pay the costs of the financial guarantees program created in Section 4.12, and the bond credit program created in Section 4.13. Operator qualifications for participating in these programs are also set forth in Section 18(a.3.) There are no equivalent Federal counterparts to these funds. However, because we have found that Sections 4.10, 4.12, 4.13 and all of those sections' implementing regulations do not render the Pennsylvania program inconsistent with SMCRA, we are likewise approving the amendments to Section 18(a), including 18(a.1), (a.2) and (a.3). In its April 13, 2004, letter (Administrative Record No. PA 853.24) to us, PADEP requested the withdrawal of Subsection 18(a.4) from the amendment, because the program it creates, pertaining to areas designated suitable for reclamation through remining, has not yet been developed. Therefore, subsection 18(a.4) is not a part of this rulemaking.

Section 18(f) was amended to allow any licensed mine operator to propose reclamation of a bond forfeiture site. There are no Federal counterparts to Pennsylvania's licensing procedures and there are no restrictions in the Federal regulations on who may propose reclamation of a bond forfeiture site. The amended provisions of Section 18(f) are not inconsistent with SMCRA or the Federal regulations and therefore we are approving them.

Section 18(g) provides the internal rules for Pennsylvania's Mining and Reclamation Advisory Board (Board). This amendment modified rules pertaining to conduct of the Board. There is no Federal counterpart for this provision. However, this section is not inconsistent with the provisions of SMCRA and therefore we are approving it.

Section 18.7 provides for the Small Operator's Assistance Fund. This section was modified to limit Pennsylvania's use of SOAP funds to those uses authorized by SMCRA and OSM. This provision is not inconsistent with Section 507 (c) of SMCRA or the provisions of 30 CFR Part 795 and therefore, we are approving it.

Section 18.9 provides for search warrants. This section was added by this amendment and provides the circumstances under which an agent of PADEP may apply for a search warrant and the conditions under which a warrant may be issued. This section provides that an agent of PADEP may apply for a search warrant to examine any property, premise, place, building, book, record or other physical evidence or to conduct tests and take samples or of seizing books, records or other physical evidence. The Federal regulations at 30 CFR 840.12 provide that a search warrant is not necessary for inspection of mine operations, except that States may require warrants for building searches, nor is a warrant necessary to access or copy records required under the State program. Under the revised Section 18.9, a warrant is not necessary for these activities, but that section gives Pennsylvania the ability to secure a warrant if necessary, such as where the permittee refuses to allow entry. Additionally, Section 4.2(i) provides full entry authorization to employees of PADEP to places where surface mining activities are being conducted and also provides the ability to take samples of materials for analysis without use of a warrant. For these reasons, we have determined that this section is no less effective than the Federal regulations at 30 CFR 840.12(b) and we are approving it.

Section 18.10 was added to PASMCRRA to indicate that it shall not be construed to violate any of the requirements of the Clean Water Act of 1977 or SMCRA. This provision is not inconsistent with SMCRA and therefore, we are approving it.

#### *Pennsylvania's Regulations*

25 Pa. Code 86.142 Definitions. Pennsylvania added definitions of the terms, "annuity," "trustee," and "trust fund." "Annuity" is a "financial instrument which provides a sum payable periodically over a length of time." "Trustee" is "[o]ne in whom some estate, interest or power in or affecting property of any description is vested for the benefit of another." "Trust fund" is a "fund held by a trustee which provides moneys to address specific reclamation or

pollution abatement requirements, or both, associated with a mining activity.” Pennsylvania noted that these terms define new bonding instruments for bonding of surface coal mining operations. While there are no comparable instruments specifically provided for in SMCRA or the Federal regulations, we are approving the addition of trust funds and life insurance policies for use as collateral bonding instruments. The reasons for the approval are more fully set forth in our findings above with respect to PASMCR Sections 4(d) and 4(d.2), and below at 25 Pa. Code 86.158(e) and (f).

25 Pa. Code 86.151(b). This subsection was modified to add coal preparation plants to the list of operations for which the bond liability period is specified. We are approving this section with the understanding that the period of liability for water pollution will be no less than that required by the Federal regulations at 30 CFR 800.13.

25 Pa. Code 86.151(c). This subsection was modified to clarify the liability provisions for water pollution from coal refuse disposal activities. We are approving this subsection with the same understanding as noted in 25 Pa. Code 86.151(b).

25 Pa. Code 86.151(j). This subsection was added to make it clear that an operator’s responsibility to treat discharges is not affected by the release of bond. While this provision has no Federal counterpart, we are approving it pursuant to Section 505(b) of SMCRA, which states that more stringent environmental control and regulation of surface coal mining operations than is provided for by SMCRA or the Federal regulations will not be construed to be inconsistent with the Act.

25 Pa. Code 86.152. This section provides for bond adjustments under the Pennsylvania program. In the amendment, Pennsylvania added a phrase to Subsection (a) that makes it clear that PADEP may require additional bonding if the cost of reclamation, restoration or abatement work increases so that an additional amount of bond is necessary. Additionally, Pennsylvania added a phrase to Subsection (b) that clarifies that a permittee may request a reduction of the required bond amount if the estimated cost to PADEP to complete restoration or abatement responsibilities is reduced.

Pennsylvania subsequently proposed to modify 25 Pa. Code 86.152(a) as part of the changes made in response to our review of its subsidence control regulations. We approved those proposed changes in our December 9, 2004, final rule (69 FR 71528, 71534).

The change we approved in the December 9, 2004, final rule eliminates the language change to Subsection (a) that Pennsylvania proposed in its December 18, 1998, submission. Therefore, subsection 86.152(a) is not a part of this rulemaking. Please see the December 9, 2004, final rule for more information on the changes made to 25 Pa. Code 86.152(a).

The changes Pennsylvania proposed at 25 Pa. Code 86.152(b) are no less effective than the bond adjustment requirements of 30 CFR 800.15(c) which provide that a permittee may request reduction of the amount of bond on submission of evidence to the regulatory authority proving that the permittee’s method of operation or other circumstances reduces the estimated cost for the regulatory authority to reclaim the bonded area. Therefore, we are approving the changes to 25 Pa. Code 86.152(b).

25 Pa. Code 86.156(b). This section, which requires financial or other institutions to notify PADEP of bankruptcy of the institution or permittee, was expanded to include the new types of collateral bonds allowed by the amendments to PASMCR (e.g., annuities, trust funds, life or property and casualty insurance). This section contains the same requirements as 30 CFR 800.16(e)(1). The addition of Pennsylvania’s new bonding instruments to the notification requirements does not make those requirements any less effective than the requirements in the Federal counterpart and therefore we are approving it.

25 Pa. Code 86.157. Pennsylvania made two changes to this section, which provides terms and conditions for surety bonds. The first change was made to Subsection (3) which now provides that PADEP will not accept a single bond from a surety company for a permittee if the single bond is in excess of the surety company’s maximum single risk exposure. Pennsylvania added the phrase, “\* \* \* from a surety company for a permittee if the single bond \* \* \*” Pennsylvania also replaced a requirement that PADEP not accept a bond in excess of the surety’s maximum single obligation unless the surety company satisfies the law exceeding that limit and replaced it with the requirement that PADEP not accept a bond that exceeds the surety company’s maximum single risk exposure. While the provisions of 25 Pa. Code 86.157(3) have no specific Federal counterpart, we find that the provisions are not inconsistent with Section 509 of SMCRA or the bonding regulations at 30 CFR part 800. Therefore, we are approving this subsection.

The second change Pennsylvania made to this section was to delete former Subsection (4). This requirement provided that PADEP will not accept surety bonds from a surety company for any permittee on all permits held by that permittee in excess of three times the company’s maximum single obligation. The provisions of former Section 25 Pa. Code 86.157(4) have no Federal counterpart. Therefore, we have determined that deleting that provision will not make the Pennsylvania program inconsistent with SMCRA and as a result we are approving its deletion.

Finally, Pennsylvania modified Subsection (8), formerly known as Subsection (9). This subsection allows a surety the option, subject to approval of PADEP, to perform reclamation under the bond after forfeiture, in lieu of paying the bond amount. The amendment provides that a surety that wishes to avail itself of this option must so notify PADEP within 30 days of receiving the notice of forfeiture, or PADEP may proceed to collect the bond. While this amendment has no specific Federal counterpart, we find that it is consistent with the Federal regulations at 30 CFR 800.50(a)(2)(ii), and it is therefore approved.

25 Pa. Code 86.158. Pennsylvania made three changes to this section which provides terms and conditions for collateral bonds. In Subsection (c)(6), Pennsylvania previously required that PADEP accept certificates of deposit from banks or banking institutions licensed or chartered to do business in Pennsylvania. Pennsylvania is now expressly allowing certificates of deposit from banks or banking institutions licensed or chartered in the United States. There is no Federal counterpart to this requirement and we have determined that the change will not make this section inconsistent with SMCRA, or with the Federal regulations at 30 CFR 800.21. Therefore, we are approving it.

The second change Pennsylvania made to 25 Pa. Code 86.158 adds Subsection (e), which provides the requirements for the use of life insurance policies as collateral bonds. Among other things, Subsection (e) requires the policy to be fully paid, with a cash surrender value at least equal to the amount of the required bond. The policy must be irrevocably assigned to PADEP, and cannot be borrowed against or used for any purpose, nor may it bear any existing liens, loans or encumbrances at the time it is assigned to PADEP. While the Federal regulations at 30 CFR 800.21, governing collateral bonds, do not specifically provide for the use of insurance policies, we find

that these policies present no greater risks than those inherent in other forms of collateral bonding. Therefore, we conclude that the addition of Subsection (e) will not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509 of SMCRA, and the subsection is hereby approved.

The third change Pennsylvania made to 25 Pa. Code 86.158 adds Subsection (f), which expressly provides the requirements for the use of annuities or trust funds as collateral bonds. Among other things, this subsection requires that the trust fund or annuity be in an amount determined by PADEP to be sufficient to meet the bonding requirements for the permittee. The trust fund or annuity must irrevocably establish PADEP as its beneficiary. Any financial institution serving as the trustee or issuing the annuity must be a State-chartered or National bank or other financial institution with trust powers, or a trust company with offices in Pennsylvania and examined or regulated by a State or Federal agency. An insurance company issuing an annuity shall be licensed or authorized to do business in Pennsylvania or shall be designated by the Insurance Commissioner as an eligible surplus lines insurer. Trust funds and annuities shall be the property of the Commonwealth of Pennsylvania. Termination of the trust fund or annuity, or release of any funds from either instrument to the permittee may occur only if permitted by PADEP. As is the case with whole life insurance policies, there are no specific provisions for trust funds or annuities in the Federal collateral bonding regulations at 30 CFR 800.21. However, with the safeguards included in the State's provision, it appears that trust funds and annuities present no greater risks than those inherent in those forms of collateral bonding expressly named in 30 CFR 800.21. Therefore, we conclude that the addition of Subsection (f) will not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509 of SMCRA, and the subsection is hereby approved.

25 Pa. Code 86.161. Pennsylvania made one change to this section, which provides the requirements for phased deposits of collateral for long term operations or facilities. Pennsylvania added a sentence to the end of Subsection (3), which expressly allows interest accumulated by phased deposits of collateral to become part of the bond, and to use the interest to reduce the amount of the final phased deposit. While this provision has no precise

Federal counterpart, it is consistent with 30 CFR 800.21(d)(2), which provides that interest paid on a cash account shall be applied to the bond value of the account. Also, the addition of this requirement does not make this section less effective than the provisions of 30 CFR 800.17 relating to bonding of long term facilities and structures. Therefore, we are approving the amendment to this section.

25 Pa. Code 86.168. This section provides the terms and conditions for liability insurance. Pennsylvania made several changes to this section. Among the proposed changes are the following requirements: the permittee must submit proof of liability insurance before a surface coal mining license is issued; the insurance must be written on an occurrence basis, and provide protection against bodily, rather than personal, injury; the limits of the rider for protection against explosives must be at least equivalent to the general liability limits of the policy; notification of any substantive policy changes must be made 30 days in advance; the minimum bodily injury and property damage coverages are increased from \$300,000 to \$500,000 per person and \$1 million aggregate; and, that failure to maintain insurance will result in issuance of a notice of intent to suspend the license or permit, followed by 30 days opportunity to submit proof of coverage prior to suspension, rather than issuance of a notice of violation. The changes do not make this section any less effective than the Federal provisions of 30 CFR 800.60. Therefore, we are approving the changes to this section.

25 Pa. Code 86.171. This section provides procedures for seeking bond release. Pennsylvania's change to this section requires operators to include in the advertisement of bond release application whether any postmining pollutional discharges have occurred and requires a description of the type of treatment provided for the discharges. Pennsylvania also changed this regulation to reflect the requirement in PASMCR that a person other than the permittee may apply for bond release, and that PADEP may release the bond after such an application if all release requirements are met. The changes to the bond release advertisement will ensure that a complete description of the minesite is available to the public for comment. While the Federal regulations do not explicitly provide for the filing of release applications by persons other than the permittee, it is not unreasonable to allow such applications, and to grant the request where the permittee has met all of the

criteria for bond release. Therefore, we have determined that these changes are no less effective than the Federal requirements at 30 CFR 800.40 regarding bond release and we are approving them.

25 Pa. Code 86.174. This regulation provides the standards for release of bonds. In Subsection (a), the word "and" was changed to "or," and consequently stated that Stage 1 bond release standards were met when, among other things, "the entire permit area or a permit area has been backfilled or graded to the approximate original contour \* \* \*." Because the Federal regulations at 30 CFR 800.40 require that backfilling *and* grading occur prior to the granting of a Stage 1 release, OSM asked Pennsylvania to explain the reason for the change from "and" to "or" (Administrative Record No. PA 853.17). PADEP responded that the change was made in error, and that a corrective amendment was published in the January 17, 2004, Pennsylvania bulletin. The change to Subsection (d) merely clarifies the point that the bond release standards contained therein are in addition to the release standards contained in subsections (a), (b), and (c) of this section. We find that the change to Subsection (d) does not render 25 Pa. Code 86.174 less effective than the Federal regulations at 30 CFR 800.40, and we are therefore approving it.

25 Pa. Code 86.175. This regulation provides standards for release of bonds. Under Subsection (a), Pennsylvania has replaced a general reference to the provisions permittees must comply with to secure bond release with the specific sections of the regulations permittees must comply with. In Subsection (b)(3), Pennsylvania removed language that indicated amount of bonds remaining at Stage 3 may be released after final inspection and procedures of 25 Pa. Code 86.171 (relating to procedures for seeking release of bond) have been satisfied.

We have found that Pennsylvania has clarified its program by adding the specific sections of the regulations for operator compliance to Subsection (a). Since the referenced regulatory sections are the approved Pennsylvania bond release provisions, the references to them do not render this section less effective than the Federal regulations and we are approving it. Additionally, we have found that the removal of the language from Subsection (b)(3) does not make the release of Stage 3 bonds less effective than the requirements at 30 CFR 800.40(c)(3). Therefore, we are approving these changes.

25 Pa. Code 86.182. This regulation provides procedures for bond



forfeitures. Pennsylvania added new subsections (a)(3) and (d) and renumbered some existing subsections. Pennsylvania added the new subsections to provide requirements for surety reclamation of forfeiture sites. Subsection (a)(3) requires that if forfeiture of the bond is necessary, PADEP must notify the surety to pay the amount of the forfeited bond to PADEP. The money is to be held in escrow with any interest accruing to PADEP pending resolution of any appeals. If a court decides the Commonwealth is not entitled to either a portion of, or the entire amount forfeited, the interest shall accrue proportionately to the surety in the amount determined to be improperly forfeited. Subsection (d) provides that a surety may reclaim the forfeited sites in lieu of paying the amount of the forfeited bond. This section provides time frames for the surety to notify PADEP of its intentions and requires the surety to enter into a consent order and agreement with PADEP if it approves the surety's proposal for reclamation.

While the new Subsection (a)(3), requiring the return of funds to the surety in the event that a court decides that PADEP was not entitled to the entire amount of the bond, has no direct Federal counterpart, we find that it is consistent with the provision at 30 CFR 800.50(d)(2) which requires the return of bond in excess of that needed for reclamation. The new Subsection (d) is no less effective than the Federal regulations governing surety reclamation at 30 CFR 800.50(a)(2)(ii). Therefore, we are approving the amendments to Section 86.182.

25 Pa. Code 86.195. This section of the regulations provides for civil penalties against corporate officers. In Subsection (b), a cross reference was revised from 25 Pa. Code 87.14 to 25 Pa. Code 86.353 (relating to identification of ownership). This change clarifies the intent of PADEP to serve notice of orders for failing to abate violations to each corporate officer listed in the surface mine operator's license application. We have determined that this section is no less effective than the requirements of 30 CFR 843.11(g) which provides for notification of corporate officers of the issuance of cessation orders. Therefore, we are approving this section.

25 Pa. Code 86.251–253, 86.261–270, and 86.281–284. These regulations under Subchapter J, Remining and Reclamation Incentives, were added by Pennsylvania to provide incentives for active coal mine operators to conduct remining and reclamation of abandoned mine lands and bond forfeiture sites by

assisting the operators in meeting their obligation to bond these activities. Sections 86.251–86.253 provide definitions of terms used in the programs, the qualifications for operators to participate in the program, and the qualifications for eligibility of projects.

In 25 Pa. Code 86.261–86.270, Pennsylvania has established a Remining Operator Assistance Program (ROAP). While these sections were not part of Pennsylvania's original 1998 amendment submission, Pennsylvania requested that they be added in its letter to us of April 13, 2004 (Administrative Record No. PA 853.24). In the ROAP, which is funded by Pennsylvania's Remining Environmental Enhancement Fund, Pennsylvania will assist operators in preparing applications for remining an area by paying consultants to describe existing resources that could be affected by the remining activities, determine the probable hydrologic consequences on the proposed remining area and the adjacent area, prepare a detailed description of the proposed remining activities, and collect and provide general hydrologic information on the watershed areas. The regulations provide for a description of program services, criteria for an operator's eligibility for participation in the program, PADEP responsibilities, criteria for operator's eligibility for assistance, requirements for applications for assistance, provisions for application approval, notice of approval or denial, requirements for data collection, public records, basic qualifications for consultants and laboratories, and circumstances under which an operator must reimburse Pennsylvania for the cost of the services performed. While these provisions have no Federal counterparts, we find that their addition to the Pennsylvania program should further the State's goal of promoting the remining and subsequent reclamation of previously mined, unreclaimed areas, and will not render the program inconsistent with SMCRA or the implementing Federal regulations.

In 25 Pa. Code 86.281–86.284, Pennsylvania has established a Remining Financial Assurance Fund to financially assure bonding obligations for an operator engaged in remining. The section provides the requirements for an operator's participation, the limits of use of the fund, and the procedures to be followed in the event of bond forfeiture. Under this incentives program, PADEP will reserve a portion of the financial guarantees special account in the Remining Financial Assurance Fund as collateral for

reclamation obligations on the remining area. The reserved amount will be the average cost per acre for PADEP to reclaim a mine site multiplied by the number of acres in the remining area. The special account is funded by an initial deposit of \$5 million, as specified in Section 18(a.2) of PASMCR, which is discussed above, and by annual payments from participating operators, as set forth in Section 86.283(a). Operators may not substitute these financial guarantees for existing collateral or surety bonds. Operators approved to participate in the financial guarantees program are not required to pay Pennsylvania's per acre reclamation fee required by 25 Pa. Code 86.17(e) for the remining area. Released bond amounts from a financial guarantee may not be used to cover reclamation obligations on another section of a permit.

We have found that these remining incentives are not inconsistent with the provisions of SMCRA. The basic Pennsylvania program requirement to secure a bond for surface and underground coal mining operations has not been altered by these incentives. As a result we are approving sections 86.251–86.253 (with the following explanation for the definition of "remining area" at 25 Pa. Code 86.252), 86.261–270, and 86.281–86.284, except for 25 Pa. Code 86.281(e).

Pennsylvania defines "remining area," at 25 Pa. Code 86.252, as "[a]n area of land on which remining will take place, *including that amount of previously undisturbed area up to 300 feet from the edge of the unreclaimed area which must be affected to achieve a final grade compatible with adjacent areas. Additional undisturbed land may be within a remining area if the permittee demonstrates that a larger area is needed to accomplish backfilling and grading of the unreclaimed area or is needed for support activities for the remining activity.* (Emphasis added) In its April 6, 2000 letter to PADEP, OSM stated this concern with the underlined language:

As long as this definition applies only to the incentives provisions enacted at Section 4.12 of the statute, and 25 Pa. Code §§ 86.251–86.284, it is not inconsistent with the Federal regulations at 30 CFR § 816.102. However, it may be inconsistent with this Federal provision if it allows previously unmined areas to be backfilled and graded only in accordance with standards applicable to previously mined areas \* \* \* What reclamation standards apply on the margin area? (Administrative Record No. PA 853.17).

PADEP responded to OSM's concerns by stating that the 300 feet or greater "margin area" is solely a financial

incentive for an applicant to consider remining an abandoned mine area. According to PADEP, all normal permitting requirements and performance standards, including backfilling, regrading and revegetation provisions, still apply to the "margin area." With this clarification in hand, we find that the definition of "remining area" in 25 Pa. Code 86.252 does not render the Pennsylvania program less effective than the Federal regulations at 30 CFR 816.102, and we are therefore approving it.

25 Pa. Code 86.281(e) provides that on declaration of forfeiture "additional funds from the Remining Financial Assurance Fund will be used to complete reclamation" where the actual reclamation cost exceeds the financial guarantee amount reserved for a given permit. This appears to present, as part of a remining incentives program, a type of alternative bonding system (ABS). An ABS can be approved under 30 CFR 800.11(e) if two objectives are met: (1) The 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, and (2) the ABS must provide a substantial economic incentive for the permittee to comply with all reclamation provisions. With regard to participation in the Remining Financial Assurance Fund as envisioned under 25 Pa. Code 86.281, Pennsylvania's regulations fail the second objective because the program does not provide any economic incentives for permittees to comply with all reclamation provisions. While the statute and regulations provide numerous qualifying criteria for operators to enter the program, once approved for the program there are no criteria for removal from the program nor any other incentive to ensure that operators comply with all reclamation provisions. As a result, this portion of 25 Pa. Code 86.281(e) is less effective than the Federal regulations regarding an ABS and we are not approving the last sentence which states, "If the actual cost of reclamation by the Department exceeds the amount reserved, additional funds from the Remining Financial Assurance Fund will be used to complete reclamation."

With removal of the last sentence of 25 Pa. Code 86.281(e), the remainder of the regulation provides that on declaration of forfeiture, reserved funds will be used by PADEP to complete reclamation of the remining area in accordance with the procedures and criteria in 25 Pa. Code 86.187–86.190. The regulations at 25 Pa. Code 86.187–86.190 provide procedures to be

followed in the case of bond forfeiture and require, among other things, that moneys received from the forfeiture will be used only for reclamation and water supply restoration affected by the bonded operation. Thus, without the last sentence, 25 Pa. Code 86.281(e) presents the Remining Financial Assurance Fund as a conventional bond. Our disapproval of the last sentence of 25 Pa. Code 86.281(e) renders the remainder of the regulation no less effective than the Federal regulations regarding bonding and therefore, we are approving it.

25 Pa. Code 86.291–86.295. These regulations contain the procedures for the use of an account in the Remining Financial Assurance Fund to financially assure bond obligations of an operator who has voluntarily completed a reclamation project approved by PADEP under the bond credit program. The regulations govern financial assurance for bond credit-general (86.291), bond credit application procedures and requirements, and operator qualifications (86.292), bond credit issuance (86.293), bond credit uses and limitations (86.294), and forfeiture (86.295). A "bond credit" will be issued to a qualified operator from the bond credit special account in the Remining Financial Assurance Fund. The credit amount reserved will be the lesser of the operator's or PADEP's cost of reclamation of the abandoned mine lands to be reclaimed under the agreement. The operator may apply the bond credit to an original or additional bond for a permit for surface or underground coal mining operations. Bond credits or parts thereof may be used on single or multiple permits, and may be used two times. However, the second use of the credit may not commence until the credit is released from its first use. Bond credits may not be used to bond water loss or long-term water treatment. Bond credits will be released prior to any other bond release on a permit area. Credits not used within 5 years of issuance will expire. Forfeited bond credit reserved amounts will be used to complete reclamation of the mine site. For a more detailed discussion of the "bond credit" concept, please see the finding for Section 4.13 of PASMCR. As we noted with our finding on the statute, there are no Federal counterparts to these regulations and we find that the allowance of financially guaranteed bond credits within a conventional bonding system does not render the Pennsylvania program less stringent than Section 509 of SMCRA, so long as all applicable bonding requirements

contained in the State counterparts to Section 509 and the implementing Federal regulations at 30 CFR part 800 are met. Therefore, we are approving these regulations.

25 Pa. Code 86.351–86.359 (formerly 87.12–87.21). These regulations were revised by Pennsylvania to require all coal mine operators to obtain a mine operator's license. In its program amendment submittal, Pennsylvania indicated that because of revisions to PASMCR that require anyone mining coal to secure a license (formerly, only surface coal mine operators were required to be licensed), it moved the requirements for a mine operator's license from Chapter 87 Surface Mining of Coal to Chapter 86 Surface and Underground Coal Mining; General. Pennsylvania further noted that when moving these regulations to Chapter 86, it made minor changes in wording and punctuation for clarity. Most of these minor changes were necessary to render the licensing requirements applicable to all coal mining operations. In addition, the following substantive changes were made.

25 Pa. Code 86.353 (formerly 87.14). This regulation was amended to delete the requirement that license applications provide information pertaining to "persons owning or controlling the coal to be mined under the proposed permit under a lease, sublease or other contract, and having the right to receive the coal after mining or having authority to determine the manner in which the proposed surface mining activity is to be conducted."

25 Pa. Code 86.355 (formerly 87.17). The regulation was amended to require PADEP to deny a license, renewal or amendment to an applicant where:

[t]he applicant has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has shown a lack of ability or intention to comply with an adjudicated proceeding, cessation order, consent order and agreement or decree, or as indicated by a written notice from the Department of a declaration of forfeiture of a person's bonds.

25 Pa. Code 86.358 (formerly 87.20). This regulation was amended by deleting failure to comply with a notice of violation as a basis upon which PADEP may suspend or revoke a license, and by adding failure to maintain public liability insurance as a permissible basis for license suspension or revocation.

Finally, Section 86.359 (formerly 87.21) was amended to provide for varying licensing fee amounts, depending on the tonnage of marketable coal per year.

As part of the license application, operators must provide information on: Identification of ownership, public liability insurance, and compliance information. These regulations provide the requirements for submitting a license application and criteria for approval of mining licenses. Section 86.355 was revised to make the criteria for approval of licenses applicable to license amendments.

The Federal regulations do not require mine operators to be licensed. However, many of the reporting requirements of Pennsylvania's license application are required by the Federal regulations (*e.g.*, ownership and compliance information and liability insurance requirements). As Pennsylvania noted, OSM had previously approved these requirements when they were part of Chapter 87. By moving these requirements to Chapter 86, with only minor changes, Pennsylvania has made it clear that these requirements apply to all those who mine coal in the State. As such, the revisions do not render these regulations inconsistent with SMCRA or the implementing regulations; therefore, we are approving them.

25 Pa. Code Chapter 87.1 and 88.1 Definitions of “*de minimis* cost increase,” “water supply,” and “water supply survey.” Pennsylvania has added these definitions to its program. The term “*de minimis* cost increase” was added to define requirements of 25 Pa. Code 87.119 related to water supply replacement for water supplies affected by surface coal mining activities and to 25 Pa. Code 88.1 related to water supply replacement for water supplies affected by anthracite coal mining operations (both underground and surface). This definition is the same as the definition of “*de minimis* cost increase” found at 25 Pa. Code 89.5. When we considered the water supply replacement requirements for 25 Pa. Code Chapter 89 relating to water supplies affected by underground mining activities, we determined that the definition of “*de minimis* cost increase” was not as effective as the Federal regulation at 30 CFR 701.5 (definition of the term, “replacement of water supply”); because the intent of the Federal regulations was to insure that the owner or user of the water supply was made whole and that no additional costs were passed on to the water supply user. For additional rationale on why we did not approve the definition of “*de minimis* cost increase” as it applies to underground mining, the December 27, 2001, **Federal Register** (66 FR 67010, 67029) is incorporated by reference. Because the term “replacement of water supply” at 30 CFR 701.5 applies to

water supplies affected by both surface and underground coal mining operations, including anthracite coal mining operations, we are not approving the definition of “*de minimis* cost increase” at 25 Pa. Code 87.1 and 88., as it applies to operations subject to SMCRA, for the same reasons that we did not approve the definition at 25 Pa. Code 89.5.

Pennsylvania also added and defined the term, “water supply” in this amendment to 25 Pa. Code 87.119 related to water supply replacement for water supplies affected by surface mining activities and to 25 Pa. Code 88.1 related to water supply replacement for water supplies affected by anthracite coal mining operations. Pennsylvania defined “water supply” as an existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses. Section 717(b) of SMCRA requires an operator to replace the water supply of owners who obtain all or part of their supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source when the supply has been affected by surface coal mine operations. As noted above, Pennsylvania's anthracite definitions do not distinguish between surface and underground coal mining activities. For underground coal mining activities, Section 720(b) of SMCRA is more limited than 717(b) of SMCRA in that it only requires the replacement of drinking, domestic or residential water. Pennsylvania's definition of water supply is as inclusive in the types of water supplies that are protected as those in 717(b) and 720(b) of SMCRA. As a result, we are approving this definition in both sections.

Pennsylvania also defined the term, “water supply survey.” Water supply survey is defined as the collection of reasonably available information for a water supply to establish certain physical characteristics of the supply. Pennsylvania only uses this term in its regulations at 25 Pa. Code 87.119 and 88.107 with regard to those circumstances that operators can rebut the presumption of liability for pollution as established in Subsection (b) of those regulations. The Federal regulations do not define the term, “water supply survey.” Since Pennsylvania only uses the term in conjunction with an operator's ability to rebut the presumption of liability of pollution, and as we stated earlier, rebutting the presumption of liability does not relieve operators of liability for

replacement or restoration of water supplies that were impacted by their mining operations, use of the term does not make Pennsylvania's program less effective than the Federal regulations and we are approving this definition.

Finally, in the amendment submission of December 18, 1998, Pennsylvania proposed to delete the definition of the term, “dry weather flow” from 25 Pa. Code 87.1, 88.1, 89.5, and 90.1. However, in a letter dated December 23, 2003 (Administrative Record No. PA 853.23), Pennsylvania revised the proposed amendment to retain the definition of “dry weather flow” at 25 Pa. Code 87.1 as well as at 25 Pa. Code Sections 88.1, 89.5 and 90.1. As a result of Pennsylvania's December 23, 2003, letter, this rulemaking does not address this definition.

25 Pa. Code 87.11. Pennsylvania deleted this section which provided definitions of the terms, “owned or controlled or owns or controls,” “principal shareholder,” and “surface mining.” These terms were defined in this section for use in Pennsylvania's licensing procedures. The definitions of the terms “owned or controlled or owns or controls” and “principal shareholder” are in the regulations at 25 Pa. Code 86.1. There were some differences in the definitions of “owned or controlled or owns or controls” between 25 Pa. Code 87.11 and 25 Pa. Code 86.1. We approved the differences to the definition in the November 3, 2000, **Federal Register** (65 FR 66170). Since these terms appear elsewhere in the Pennsylvania program and OSM does not require the licensing of operators, we are approving their removal from 25 Pa. Code 87.11.

The definition of “surface mining” at 25 Pa. Code 87.11 does not appear elsewhere in the Pennsylvania program. However it was defined in this section only for Pennsylvania's use in licensing procedures. Since OSM does not require licensing of operators, we are approving the removal of this definition from the program.

25 Pa. Code 87.12–87.15 and 87.17–87.21. Pennsylvania has deleted these regulations which provide the requirements for obtaining a mining license from 25 Pa. Code Chapter 87 and moved them to 25 Pa. Code Chapter 86 (please see our findings for 25 Pa. Code 86.351–86.359 above). We are approving the deletion of these regulations from Chapter 87 for the reasons noted in our findings for 25 Pa. Code 86.351–86.359 above.

25 Pa. Code 87.16. In this amendment, Pennsylvania deleted this provision which was in place as part of the

requirements for obtaining a mine operator's license. The compliance information provisions of this section are located in 25 Pa. Code 86.63. Since these provisions appear elsewhere in the Pennsylvania program and OSM does not require the licensing of operators, we are approving the deletion of 25 Pa. Code 87.16.

25 Pa. Code 87.102, 87.103, 88.92, 88.93, 88.187, 88.188, 88.292, 88.293, 89.52, 89.53, 90.102 and 90.103. In the original amendment, Pennsylvania proposed to delete these sections from the approved program. However, in a letter dated December 23, 2003 (Administrative Record No. PA 853.23), Pennsylvania revised its proposed amendment to retain these regulations. Therefore, these sections are not addressed in this rulemaking.

25 Pa. Code 87.119, 88.107. Pennsylvania substantially modified these sections which provide for the replacement of water supplies affected by surface coal mining activities or government financed reclamation. Subsection (a) provides for water supply replacement obligations and indicates that a water supply affected by the operator of any mine or a person engaged in government financed reclamation must restore or replace the affected supply with an alternate source adequate in water quantity and quality for the purpose served by the water supply. Under the Federal regulations at 30 CFR 701.5 defining the term, "replacement of water supply," an operator must restore or replace an affected water supply, on both a temporary and permanent basis with one that is equivalent to premining quantity and quality. While Pennsylvania's proposed regulation under Subsection (a) does not expressly include temporary replacement of water supplies, it does not preclude Pennsylvania from requiring temporary replacement where a permanent replacement cannot be readily implemented. To the extent the proposed provision would not require temporary replacement of water supplies when needed, it is less effective than the Federal rules and is not approved. Also, the phrase "adequate in water quantity and quality for the purpose served by the water supply" differs from the Federal phrase "equivalent to premining quantity and quality." To the extent the proposed provision would allow the replaced water supply to be of a lesser quality and/or quantity than the premining quality and quantity, it is less effective than the Federal requirements. Therefore, we are not approving Subsection (a) for water supplies

affected by surface coal mining activities to the extent that it would allow the replaced water supply to be of a lesser quantity and quality than the premining water supply or would not require temporary replacement of water supplies where needed. Otherwise, it is approved.

Subsection (a)(1) requires that a restored or replaced water supply meet the criteria listed in subsections (1)(i) through (iv), which talks about reliability, cost, maintenance and control. Subsection (i) requires the restored or replaced water supply to be as reliable as the previous water supply. Subsection (ii) requires the restored or replaced water supply to be as permanent as the previous water supply and Subsection (iii) requires the supply to not require excessive maintenance. Subsection (iv) requires that the supply provide the owner and the user with as much control and accessibility as exercised over the previous water supply. This subsection also provides that the use of a public water supply as a replacement water supply provides as much control and accessibility as the previous supply. We are approving 25 Pa. Code 87.119(a)(1)(i) through (iv) and 88.107(a)(1)(i) through (iv). There are no direct corresponding Federal regulations to these sections. We find that these sections are no less effective than the requirements found in the definition of the term "replacement of water supply" in the Federal regulations at 30 CFR 701.5 because they help return the water supply to its premining status.

Subsection (a)(1)(v) provides that to be adequate a restored or replaced water supply must not result in more than a de minimis cost increase to operate and maintain. As noted earlier in this rulemaking (see our finding for 25 Pa. Code 87.1 and 88.1, definition of "de minimis cost increase"), the Director has not approved a "de minimis cost increase." Accordingly, we are not approving Subsection (a)(1)(v) for the reasons noted above in 25 Pa. Code 87.1 and 88.1, the definition of the term "de minimis cost increase." This disapproval is only to the extent the rule applies to surface coal mining operations.

Similarly, Subsection (a)(2) provides that operators are only required to provide for the permanent payment of increased operating and maintenance costs if those costs represent more than a de minimis cost increase. We are not approving this section to the extent that it limits an operator's obligations by use of the term "de minimis cost increase."

Subsection (a)(3) provides that the requirement to restore or replace an affected water supply may be waived.

The Federal regulations regarding restoration or replacement of water supplies at 30 CFR 701.5, the definition of the term, "replacement of water supply," indicates that replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. However this satisfaction of a water supply replacement requirement is acceptable only if the affected water supply is not needed for the land use in existence at the time it was affected by surface mining and the supply is not needed to achieve the postmining land use. Pennsylvania's regulation at 25 Pa. Code 87.119(a)(3) allows a waiver from the restoration or replacement obligations without requiring a demonstration that a suitable alternative water source is available and could feasibly be developed. Additionally, this section could allow a waiver for water supply replacement under circumstances other than those described in the Federal definition of the term, "replacement of water supply," (i.e., the water supply is not needed for the land use in existence at the time it was affected by surface mining and the supply is not needed to achieve the postmining land use). Therefore, we are not approving 25 Pa. Code 87.119(a)(3) and 88.107(a)(3) to the extent they would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, "replacement of water supply."

Subsections (b), (c) and (d) provide for the presumption of liability for pollution. Essentially, Subsection (b) provides that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacterial contamination, and diminution of public or private water supplies within 1000 linear feet of the boundaries of the areas bonded and affected by coal mining operations except for haul and access roads. The operator or owner must affirmatively prove these defenses by a preponderance of the evidence. Subsection (c) only allows for five defenses to the presumption: (1) The mine operator or owner was denied access to conduct a pre-mining water supply survey; (2) the water supply is not within 1,000 linear feet of the coal mining operations, support areas [excluding haul and access roads] and overburden removal/storage areas or areas affected by surface mining activities but not bonded; (3) a pre-permit water supply survey, that is documented in the permit application,

which shows that the pollution/diminution [sic] existed prior to the surface mining activities; (4) the pollution/diminution occurred as a result of some cause other than surface mining activities; and (5) the mine operator or owner was denied access to determine the cause of the pollution/diminution. Subsection (d) requires the mine operator or owner to notify Pennsylvania of the possible defenses, providing all information including proof of service to the landowner or water supply company that denying access for a survey could rebut the presumption.

In its amendment submission, Pennsylvania indicated that with or without the rebuttable presumption of liability, a mine operator is liable for replacing or restoring a water supply contaminated or diminished by the operator's surface mining activities. The Federal regulations do not provide for a similar presumption and do not prohibit Pennsylvania from enacting a rebuttable presumption for water. These subsections are not inconsistent with the requirements of SMCRA and the Federal regulations because they do not eliminate an operator's responsibility under Section 717(b) of SMCRA. If all the pollution or diminution existed prior to the start of the coal mining operations, then the supply was not affected by the coal mining operations. If additional pollution or diminution occurred after the start of the coal mining operations, then the operator would become liable for the damage caused to the water supply by the coal mining operations. The presumptions and the defenses to rebut the presumptions, do not relieve the regulatory authority of its initial burden. If the evidence demonstrates that a water supply is affected within the presumption area, then the operator has the burden to rebut the presumption with one of the five defenses. The ultimate burden remains with the regulatory authority. Therefore, we are approving subsections (b), (c), and (d).

Subsection (e) allows Pennsylvania to use money from the Surface Mining Conservation and Reclamation Fund for the immediate replacement of a water supply used for potable or domestic purposes when that supply is required to protect public health or safety. This section is the implementing regulation for Section 4.2(f)(3) of PASMCRRA that we discussed above. We are approving this provision for the same reason that we are approving Section 4.2(f)(3) of PASMCRRA.

Subsection (f) provides that PADEP will recover costs associated with restoration or replacement water

supplies from the operator or mine owner. There is no similar provision in the Federal regulations. We have found that this section is not inconsistent with the requirements of SMCRA and the Federal regulations because under SMCRA an operator is responsible for replacing a water supply that was affected by the mining operations; this is just another means to achieving that purpose. Thus we are approving this subsection.

Subsection (g) provides for operator cost recovery. This section provides that if an operator successfully appeals a PADEP order, the operator may recover reasonable costs incurred in the appeal. Subsection (g) is the implementing regulation for Section 4.2(f)(5) of PASMCRRA. Section 4.2(f)(5) of PASMCRRA was repealed by Pennsylvania in House Bill 393 (see 66 FR 57662, 57664 [November 16, 2001] for OSM's approval of Pennsylvania's repeal of this section). Because the regulations at 25 Pa. Code 87.119(g) and 88.107(g) implement the section of the statute that was repealed, there is no statutory authority for Subsection (g) of the regulation. Therefore, we are not approving the regulations at 25 Pa. Code 87.119(g) and 88.107(g).

Subsection (h) provides that nothing in this section prevents anyone who claims water pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or equity. There is no Federal counterpart to this provision. Nonetheless, landowners or water supply users have the full protection of Chapters 87 and 88 even while pursuing other avenues of redress. Since all the protections of Chapter 87 and 88 remain available, we have determined that this provision is not inconsistent with the requirements of SMCRA or the Federal regulations and we are approving it.

Subsection (i) provides that an order issued under this section which is appealed will not be used to block issuance of new permits or the release of bonds when a stage of reclamation work is completed. This subsection is the implementing regulation for Section 4.2(f)(4) of PASMCRRA that we discussed above. Please see our findings regarding that section of the statute. We are approving 25 Pa. Code 87.119(i) and 88.107(i) to the extent noted in our discussion on Section 4.2(f)(4) and not approving these regulations to the extent noted in that same discussion.

Subsection (j) provides that nothing in this section limits PADEP's authority under Section 4.2(f)(1) of PASMCRRA. Section 4.2(f)(1) provides for the replacement of water supplies. Subsection (j) is not inconsistent with

SMCRA or the Federal regulations and we are approving it.

Subsection (k) provides that a surface mining operation conducted under a permit issued before February 16, 1993, is not subject to subsections (b)–(i) but is subject to subsections (a) and (j). Because subsections (a) and (j) require the replacement of water supplies, we have determined that Subsection (k) is no less effective than the Federal regulations and we are approving it to the extent noted in our discussions of subsections (a) and (j).

25 Pa. Code 87.147(b)(1), 88.121(b) and 88.209(b). These subsections are the implementing regulations for the amended language of Section 4(a)(2)(C) of PASMCRRA that we discussed above. As with that section, these regulations are no less effective than the ground cover revegetation requirements of the Federal regulations at 30 CFR 816.116(a) and (b)(5). Therefore, we are approving these provisions.

25 Pa. Code 87.202, the definition of the term, "best professional judgment," 25 Pa. Code 87.207(b), 25 Pa. Code 88.502, the definition of the term, "baseline pollution load," and 25 Pa. Code 87.207(b). These were all proposed for removal. However, in its December 23, 2003 letter, Pennsylvania informed us that it wishes to retain these provisions as part of the approved program. Accordingly, they are not a part of this rulemaking.

#### IV. Summary and Disposition of Comments

##### *Public Comments*

We first asked for public comments on the amendment in the March 12, 1999, **Federal Register** (64 FR 12269) (Administrative Record No. PA 853.07). We reopened the comment period in the July 8, 1999, **Federal Register** (64 FR 36828) and again in the November 24, 2004 **Federal Register** (69 FR 68285). We received public comments from: Amerikohl Mining, Inc., dated March 29, 1999 (Administrative Record No. PA 853.08); the Pennsylvania Coal Association (PCA), dated April 9, 1999 (Administrative Record No. PA 853.09); Schmid & Company Inc. (Schmid), Consulting Ecologists, dated April 9, 1999 (Administrative Record No. PA 853.10); and Citizens for Pennsylvania's Future (PennFuture), dated January 18, 2005 (Administrative Record No. 853.31).

Amerikohl Mining indicated that it was writing in support of the referenced amendment and further indicated that adoption of the proposed changes is a practical attempt to encourage significant amounts of abandoned mine

reclamation and coal recovery which would otherwise not happen.

We appreciate Amerikohl's comments and believe our approval of this amendment will lead to benefits such as those described by Amerikohl.

PCA indicated that it supports the amendment and believes the legislative and regulatory changes are important to the continued efforts to enhance remaining opportunities and to encourage the reclamation of abandoned mine lands by industry. Additionally, PCA indicated that the water supply protection and replacement regulations are important for clear and consistent regulatory interpretation and enforcement.

We appreciate PCA's comments with regard to enhancing remaining of abandoned mine lands. We believe our approval of this portion of the amendment will lead to additional reclamation of abandoned mine lands. With regard to PCA's comments concerning water supply replacement, we have determined that portions of Pennsylvania's submission as noted previously are not consistent with SMCRA and the Federal regulations. As a result, we have not approved portions of the water supply replacement regulations for supplies affected by surface mining operations. We have determined that changes noted above for the regulations concerning water supplies affected by surface coal mining will make Pennsylvania's program consistent and will lead to PCA's goals of consistent regulatory interpretation and enforcement.

Schmid provided numerous comments on various sections of the amendment. The comments are listed by the sections of PASMCR and the implementing regulations that were the subject of the comments.

25 Pa. Code 86.174(a). Schmid indicates that Stage 1 reclamation standards are assumed to have been met when, among other things, drainage controls have been installed. Schmid suggests that this standard should be expanded to require some period of follow up (6 months to a year) to ensure that the installed controls are working effectively.

The only change to this section proposed by Pennsylvania was to replace a roman numeral I with the Arabic 1 (regarding Stage 1) in Subsection (a) and to insert the word "additional" at the beginning of Subsection (d). Neither of these changes substantively modifies this section which was previously approved by OSM. Therefore, Schmid's comment is not responsive to the amendment. Moreover, since we had previously

determined that this section was no less effective than the Federal regulations and since the amendment did not substantively modify this section, we do not have a reason to require Pennsylvania to make the suggested change.

25 Pa. Code 86.251. Schmid indicates that this section is a very positive and commendable addition to Pennsylvania's program.

We appreciate Schmid's comment in this regard.

25 Pa. Code 87.1 and 88.1. Schmid commented that the definition of "reasonably available information" in terms of its input to a water supply survey is too subjective. Schmid questions what constitutes an extraordinary effort or an excessive sum of money.

As we noted above, Pennsylvania only uses the term "water supply survey" in its regulations at 25 Pa. Code 87.119 and 88.107 with regard to those circumstances that operators can rebut the presumption of liability for pollution as established in Subsection (b) of those regulations. The Federal regulations do not define the term, "water supply survey." Since Pennsylvania only uses the term in conjunction with an operator's ability to rebut the presumption of liability of pollution, and rebutting the presumption of liability does not relieve operators of liability for the replacement or restoration of water supplies that were impacted by their mining operations, use of the term does not make Pennsylvania's program less effective than the Federal regulations.

Also under 25 Pa. Code 87.1, 88.1, 89.5, and 90.1, Schmid noted that the definition of dry weather flow is proposed for deletion because water discharges are believed to be more appropriately regulated by State and Federal water quality laws and by EPA regulations. Schmid agrees in part but is not confident that the two-step review process will work. Additionally, Schmid is not convinced that the mining agencies are doing a competent job of applying and enforcing water quality controls. Schmid would prefer to see all of the regulatory requirements imposed by a single regulatory entity that should be willing to accept and carry out all of its responsibilities.

In its December 23, 2003, letter to us, Pennsylvania indicated that it wished to retain the definitions of both dry weather flow and best professional judgment. OSM had previously approved the inclusion of this definition in Pennsylvania's approved program. Because Pennsylvania has rescinded its desire to remove those definitions from

the approved program, it is no longer a part of the amendment and Schmid's comment is no longer responsive to the amendment as revised.

25 Pa. Code 87.102, 88.92, 88.187, 89.52, 90.102. Schmid indicated that these sections are proposed to be deleted because water discharges are believed to be more appropriately regulated by State and Federal water quality laws and by EPA regulations. Schmid also referenced its previous comments regarding the definition of dry weather flow.

As we noted in the November 24, 2004, proposed rule in which we reopened the public comment period for this amendment, Pennsylvania informed us in a December 23, 2003, letter (Administrative Record No. PA 853.23) that it wished to retain 25 Pa. Code 87.102, 88.92, 88.187, 89.52, and 90.102 as part of its approved program (69 FR at 68286-7). We have accepted Pennsylvania's request and therefore, Schmid's comment is no longer responsive to the amendment as revised.

25 Pa. Code 87.119, 88.107, and 88.292. Schmid noted that the new provisions presume a mine operator is responsible for impacts to water supplies located within 1,000 feet of the areas bonded and affected by surface mining. Schmid was concerned that these areas could not be accurately delineated and indicated that if a water supply is impacted by a mining activity, even if it is outside the 1,000 foot zone, it is within an area affected by the mining.

The Federal regulations require replacement or restoration of water supplies affected by surface mining activities regardless of the distance from the water supply to the mine. Pennsylvania's regulations require the same thing. However, Pennsylvania's regulations are more stringent than the Federal regulations in that they provide for a presumption of liability for restoration or replacement if the supply falls within the 1,000 foot zone described above. The Federal regulations do not have a presumption of liability with regard to water supplies. We have determined that this provision is not inconsistent with SMCRA and the Federal regulations and we have approved it.

25 Pa. Code 87.147(b) and 88.121(b). Schmid commented on the portion of 25 Pa. Code 87.147(b) which indicates that introduced species may be used in the revegetation process when desirable and necessary to achieve the postmining land use. Schmid indicated that PADEP should not be encouraging the use of nonnative, alien or introduced species. Schmid suggests that this section should

instead indicate that native species are to be used in the revegetation process to achieve postmining land uses, except in exceptional circumstances as determined by PADEP.

The Federal regulations at 30 CFR 816.111, like Pennsylvania's regulation at 25 Pa. Code 87.147(b), provide that introduced species may be used for establishing revegetation on disturbed areas where desirable and necessary to achieve the post mining land use. We have determined that Pennsylvania's regulation is no less effective than the Federal requirement and we are approving it.

Schmid also commented on the proposal that states that plants used for revegetation should be capable of self-regeneration and plant succession. Schmid supports this provision, but noted that to determine whether the plants in the revegetated area are capable of self-regeneration and plant succession could take several years. Schmid believes that it would be appropriate to impose a monitoring requirement to ensure that the goal of a diverse, effective, and permanent vegetative cover is achieved.

The Pennsylvania program contains monitoring requirements, such as those recommended by Schmid, in its bond release requirements at 25 Pa. Code 86.151 and 86.175. The regulations at 25 Pa. Code 86.151 provide that liability under bonds posted for a surface mine continue for five years after completion of augmented seeding, fertilization, irrigation or other work necessary to achieve permanent vegetation of the site. The regulations at 25 Pa Code 86.175 provide that Stage 3 bonds cannot be released until that liability period has expired. Pennsylvania conducts periodic inspections of reclaimed sites to monitor the vegetation success and also conducts bond release inspections prior to any final bond release. Therefore, Schmid's concerns are addressed by the approved program.

Section 4(a) of PASMCR. Schmid indicated that the amendment requires that the permit application fee not exceed the cost of reviewing, administering, and enforcing such permit. Schmid commented that the environmental review of permit applications and the enforcement of environmental permit requirements have been woefully inadequate and that PADEP typically responds to this complaint by pointing to a lack of staff and resources. Schmid suggests that the application fees be raised as they have been too small for too long.

The only change that Pennsylvania made to Section 4(a) of PASMCR is to

change the word "minerals" to "coal" in the first sentence. The sentence now requires a person who wishes to mine coal by the surface mining method to apply for a permit. While Schmid correctly notes that Section 4(a) of PASMCR requires that permit fees not exceed the cost of reviewing, administering and enforcing a permit, this portion of PASMCR was not the subject of the amendment and therefore, Schmid's comment is not responsive to the amendment. Schmid submitted the same comments for Subsection 4(a)(2). However, the only amendment to that subsection establishes a ground cover standard for previously mined areas proposed to be remined. Schmid's comment is not responsive to the amended portion of Subsection 4(a)(2).

Section 4(g)(1) of PASMCR. Schmid suggested that phase 1 bond release not occur until the operator has demonstrated, through follow-up monitoring for at least six months, that pollution treatment provisions are being effective.

As we noted in our finding on Section 4(g)(1), this provision has no precise Federal counterpart. However, we found it to be consistent with Section 519(b) of SMCRA, which requires the regulatory authority to evaluate "whether pollution of surface and subsurface water is occurring, the probability of continuance of such pollution, and the estimated cost of abating such pollution." Therefore, we approved the change to Section 4(g)(1).

Section 4(g)(2) of PASMCR. Schmid indicates that this section proposes that no bond be released so long as the lands are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements of law or until soil productivity for prime farmlands has returned. Schmid commented that for Pennsylvania to determine whether either of these conditions exists suggests that monitoring is being done, but none is mentioned. Schmid indicated that monitoring for suspended solids and soil productivity should be required as a prerequisite to bond release. Further, Schmid recommends that there not be an either/or situation (either no suspended solids in the water or the return of productive soil); the word "or" should be changed to "and." Schmid also noted that this section proposes that a portion of a bond may be released as long as provisions for sound future maintenance by the operator or landowner have been made with PADEP. Schmid commented that the type of provisions that qualify as sound future management should be defined.

The only change that Pennsylvania made to Section 4(g)(2) of PASMCR was to preface the requirements for bond release of this section with the phrase "At Stage 2." Our review of this section found that the addition of this phrase clarified that the bond release requirements of this section only apply to Stage 2. The actual requirements for bond release were not changed. Therefore, Schmid's comments questioning the requirements for release is not responsive to this amendment.

Section 4(g)(3) of PASMCR. Schmid noted that this section requires that the remainder of the bond be released when the operator has made provisions for the sound future treatment of pollutional discharges, if any. Schmid commented that the type of provisions that qualify as sound future treatment of pollutional discharges should be specified.

Pennsylvania noted in the amendment submission that this portion of PASMCR allows bond release on the remaining area in a situation where there is a postmining discharge associated with the permit and the permittee provides financial assurance for long-term treatment of the discharge to include areas used for water treatment. Pennsylvania also noted that in practice this involves replacing a reclamation bond with a financial assurance instrument that guarantees continued treatment of the postmining discharge. Finally, Pennsylvania noted that replacement of all or part of a reclamation bond can take place only when the permittee meets the appropriate standards for bond release at a stage of reclamation.

In its comments submitted as part of the amendment, Pennsylvania made it clear that all bond release requirements must be met before any replacement of bonds with a financial assurance instrument can take place. Finally, Pennsylvania noted that replacement of a standard bond with a financial assurance for the cost of long term treatment is in practical terms a bond adjustment. Since all bond release standards will be met, and since one such standard is compliance with applicable water pollution requirements, Pennsylvania has effectively defined the term "sound future treatment of pollutional discharges." Therefore, Pennsylvania has addressed the subject of Schmid's concerns.

Sections 4(g.1), (g.2), and (g.3) of PASMCR. Schmid submitted several comments on these sections. However, as noted above, Pennsylvania requested that we remove these sections from this program amendment, because its definition of "minimal impact

postmining discharges” and the regulations for postmining discharges were not included in the proposed program amendment. Since we are granting that request, and taking no further action in this rulemaking with respect to proposed sections 4(g.1), (g.2), and (g.3), Schmid’s comments on these sections likewise need not be addressed in this rulemaking.

Section 4.2(f)(2). Schmid had several concerns with the presumption of liability provisions of this section. Schmid was concerned about delineating the areas bonded and affected by mining. Schmid was also concerned because the presumption applies to areas that are not permitted and bonded. Finally, Schmid indicated that the five defenses for presumption of liability can exonerate an operator of liability for water supply replacement.

The areas bonded and affected are determined through the mining permit maps and visual observation if the operator has affected areas beyond those delineated on the permit maps. The presumption of liability extends beyond all areas affected even if they are not permitted. While the Federal regulations do not provide for presumption of liability with regard to water supply diminution or contamination, there is nothing in the regulations prohibiting a State from enacting such presumption.

The regulations for presumption of liability for water supply replacement apply only to the presumption that an operator caused the water supply problems. These regulations do not release the operator from liability to replace water supplies damaged by their mining activities. If the operator prevails on one or more of the five defenses from presumption, it simply means that PADEP must investigate the causes of the water supply problems. The operator has only rebutted the presumption that he caused the problems. If PADEP finds, through its investigation, that the operator is responsible for the water supply problems, even after a successful presumption rebuttal, the liability for restoration or replacement remains with the operator.

Section 4.2(i) and 18(a). Schmid agreed with Pennsylvania’s provisions regarding authority for entering property and the incentives for remining previously affected areas. We appreciate Schmid’s comments with regard to these provisions.

Section 18(a.1)(1). Schmid indicated that the title Secretary of Environmental Resources should be changed to the Secretary of Environmental Protection.

Pennsylvania is aware of the need to change the title. In this case, use of the

incorrect title does not make this provision any less effective than the Federal regulations. Therefore, we did not require Pennsylvania to make the change to the statute.

In its letter of January 18, 2005, PennFuture asked that we reopen the comment period for two weeks or in the alternative consider comments attached to the letter. The comments attached to the letter were comments that PennFuture submitted to OSM on October 15, 2002, in response to an OSM advance notice of proposed rulemaking. We decided to accept the comments attached to PennFuture’s January 18, 2005, letter.

PennFuture’s first comment concerned the substitution of alternative financial guarantees for traditional SMCRA bonds and how their use would affect termination of jurisdiction.

PennFuture was concerned that use of a financial guarantee (such as a trust fund established to treat acid mine drainage) would lead to bond release and therefore termination of the regulatory authority’s jurisdiction over a minesite. PennFuture commented that the Federal regulations allow release of a bond upon its replacement with another bond that provides equivalent coverage, but this substitution does not constitute a bond release. PennFuture also notes that an existing bond could be released upon establishment of a trust fund or other adequate financial guarantee of perpetual treatment, but that the substitute guarantee must be treated as the equivalent of a performance bond under Section 509 of SMCRA. Section 509 does not permit bond release and the termination of jurisdiction over a site where mine drainage treatment operations are occurring.

The provision at 25 Pa. Code 86.152(j), which we are approving in this rulemaking, provides that no bond release relieves the operator of the “responsibility to treat discharges of mine drainage emanating from or hydrologically connected to the site, to the standards in the permit, the act, the Clean Streams Law, the Federal Water Pollution Control Act and the rules and regulations thereunder.” Further, there is no bond release for that portion of the permit required for water treatment operations. Therefore, water treatment operations remain surface mining activities covered by the regulatory program. Thus, jurisdiction is not terminated.

We agree with PennFuture that bonds can be released upon establishment of a trust fund or other financial guarantee if those instruments are treated as the equivalent of a performance bond under Section 509 of SMCRA. Pennsylvania

regulations at 25 Pa. Code 86.158(f) provide for the use of trust funds as collateral bonds and as we noted in our discussion of that section, these provisions make Pennsylvania’s regulations regarding trust funds no less effective than any other form of collateral bond.

PennFuture’s next comment concerned the form or characteristics of alternative financial guarantees. PennFuture indicated that an NPDES permit alone (as allegedly suggested by some Pennsylvania regulatory officials) would not suffice as an enforcement mechanism that could lead to bond release under the Federal termination of jurisdiction rule. PennFuture further indicated that alternative financial mechanisms must be sufficient to cover treatment costs as well as related expenses.

As we noted earlier, Pennsylvania’s regulations have established annuities or trust funds as collateral bonds as noted in 25 Pa. Code 86.158(f). Those regulations provide that trust funds are established to guarantee that money is available for PADEP to pay for the treatment of postmining pollutional discharges. Through these regulations, Pennsylvania has satisfied PennFuture’s concerns by requiring a form of collateral bond for treatment of discharges that will guarantee sufficient funds for treatment.

PennFuture also commented that both PADEP and citizens of Pennsylvania should be named beneficiaries of the proceeds from financial assurance mechanisms.

Pennsylvania’s regulation at 25 Pa. Code 86.158(f)(2), that we approved in this rulemaking, provides that collateral bonds in the form of annuities or trust funds must, among other things, provide that PADEP is irrevocably established as the beneficiary of the trust fund or of the proceeds from the annuity. Because PADEP is a government entity serving the citizens of Pennsylvania, this provision satisfies PennFuture’s concerns.

PennFuture commented that alternative bonding systems could be established to ensure treatment of discharges. While new Section 4(d.2) of PASMCR allows PADEP to “establish alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program,” the only such “alternatives” contained in this amendment are site-specific trust funds, and life insurance policies. Neither of these mechanisms constitutes a true “alternative bonding system,” but rather both are additional forms of collateral bonds that can be used in Pennsylvania’s conventional



bonding system. Therefore, this comment is not responsive to the amendment.

PennFuture commented that alternative financial mechanisms for treatment of discharges will not work if there are insufficient funds in those instruments. As we noted above, the Pennsylvania regulations require that sufficient funds be placed in the alternative financial mechanisms to guarantee that sufficient funds are in place for treatment of discharges.

#### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program (Administrative Record No. PA 853.02). We received a letter dated January 19, 1999, from the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) (Administrative Record No. PA 853.04) with two comments. The first comment indicated that the proposed re-establishment of vegetative cover appears to be adequately covered. NRCS recommended that a provision be made to insure erosion and sedimentation is adequately controlled during stabilization and afterwards if such a provision is not covered elsewhere in the existing program.

In our review of Pennsylvania's program, we found that NRCS's first comment has been addressed. The comment appears to be directed to Pennsylvania's changes to its regulations at 25 Pa. Code 87.147 and 88.121. In both cases, Pennsylvania added language that allows a reduced vegetative cover for reclamation of areas that were previously mined and not reclaimed to the standards of PASMCR and the regulations at 25 Pa. Code Chapter 87. As noted above, we have determined that Pennsylvania's revised regulation is no less effective than the requirements of the Federal regulations at 30 CFR 816.116(a) and (b)(5). The revised language requires the vegetative cover to be adequate to control erosion and achieve the approved postmining land use. In addition, Pennsylvania's regulation at 25 Pa. Code 87.106 provides for the construction of sediment control measures to prevent runoff outside the affected area and to minimize erosion to the extent possible. Therefore, these provisions respond to NRCS's concerns that erosion and sedimentation are adequately controlled.

In its second comment, NRCS requested that the definition of the term "water supply" include agricultural use

if it is not already covered. We have determined that Pennsylvania's program for the replacement of water supplies affected by surface mines includes those water supplies used for agricultural purposes. Our review of Pennsylvania's regulations found that the term "water supply," as defined at 25 Pa. Code 87.1 and 88.1, includes an existing or currently designated or currently planned source of water or facility or system for the supply of water for agricultural uses, among others.

We received letters from the U.S. Department of Labor, Mine Safety and Health Administration's (MSHA) New Stanton Office dated January 20, 1999 (Administrative Record No. PA 853.05), and its Wilkes-Barre Office dated January 26, 1999 (Administrative Record No. PA 853.06). Both offices indicated that they did not identify any conflicts with existing MSHA regulations.

In response to the request for comments we made in the November 24, 2004, **Federal Register** Notice, MSHA's Arlington, Virginia, Office wrote us a letter dated December 20, 2004 (Administrative Record No. PA 853.28) which indicated that if the amendment were adopted, it would have no impact on the activities of the agency. We also received a letter from MSHA's Wilkes-Barre, Pennsylvania, Office dated January 7, 2005 (Administrative Record No. PA 853.30), in which MSHA indicated that it did not have any comments or concerns with the amendment.

#### *Environmental Protection Agency (EPA) Concurrence and Comments*

Pursuant to 30 CFR 732.17(h)(11)(i) and (ii), OSM is required to solicit comments and obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

On December 22, 1998, we asked for concurrence on the amendment (Administrative Record No. PA 853.02). EPA responded in a letter dated May 25, 2000 (Administrative Record No. PA 853.19), by indicating that it determined that the proposed amendment complies with the Clean Water Act with one exception; deletion of 25 Pa. Code sections 87.102, 88.92, 88.292, 89.52, and 90.102 that require compliance with 40 CFR part 424, Federal effluent standards for the coal mining industry. EPA noted that while comments in the amendment made it clear that Pennsylvania intends to continue to

require compliance with Federal standards, a statement to that effect must be included in the text of the amendment itself. EPA provided its concurrence under the condition that either the sections requiring compliance with 40 CFR part 434 effluent standards not be deleted, or the 40 CFR part 434 effluent standards be included in the text of the amendment by reference.

As we noted in the November 24, 2004, proposed rule in which we reopened the public comment period for this amendment, Pennsylvania informed us in a December 23, 2003, letter (Administrative Record No. PA 853.23), that it wished to retain as part of its approved program the above referenced regulations which provide effluent limits. We have accepted Pennsylvania's request and therefore, the conditions of EPA's concurrence have been met.

EPA had two other comments regarding the amendment. The first comment involved the deletion of remining standards for treatment of preexisting discharges. EPA noted that the amendment deletes the requirement for applying best professional judgment (BPJ) treatment to preexisting discharges from abandoned mines during remining. EPA indicated that although Pennsylvania requires compliance with BPJ requirements under Section 301(p) of the Clean Water Act, it recommends that Pennsylvania retain the BPJ requirements in its mining regulations in order to provide guidance to remining applicants.

In its letter to us dated December 23, 2003, Pennsylvania revised the proposed amendment to retain, as part of its approved program, the regulations dealing with BPJ. Therefore, EPA's concerns in this regard have been addressed.

EPA's second comment involved Stage 3 bond release criteria. EPA noted that the proposed revisions in Sections 4(g.1) and (g.2) of PASMCR specify the conditions for allowing Stage 3 bond release for reclaimed mines that have minimal-impact post mining discharges. EPA indicated that although the terms "minimal impact post mining discharges" and "substantially improved water quality" are somewhat vague, it does not object to the proposed revisions for Stage 3 release as long as the discharges comply with applicable National Pollutant Discharge Elimination System (NPDES) regulations and water quality standards for the receiving stream. EPA further noted that prior to final bond release, groundwater discharges from underground mines and surface water discharges from surface or underground mines are required to meet 40 CFR part

434 limit. Discharges for ground water seeps from surface mines may be addressed by BPJ rather than 40 CFR part 434 requirements in accordance with the January 28, 1992, guidance memorandum from EPA's NPDES Program Branch. EPA concluded by noting that determination of BPJ limits must be based on criteria established in 40 CFR 125.3(d) and more stringent limits may be necessary to comply with water quality standards. After reclamation and final bond release, recurrence of pollutants to waters of the U.S. through seeps or surface runoff may be considered as point sources, subject to NPDES permitting and compliance with BPJ limits and water quality standards.

As we noted above, in its letter of December 23, 2003, Pennsylvania removed Sections 4(g.1)-(g.3) from its amendment because its definition of "minimal impact postmining discharges" and the regulations for postmining discharges were not included in the proposed program amendment. Since Pennsylvania has removed these provisions from the amendment, there is no further action required on our part. Pennsylvania's removal of these sections addresses EPA's concerns.

In response to our request for comments in the November 24, 2004, **Federal Register** Notice, EPA wrote us a letter dated December 27, 2004 (Administrative Record No. PA 853.27) indicating that it was pleased that Pennsylvania had decided to retain the language regarding effluent limits for discharges from areas disturbed by coal mining activities that originally was proposed to be removed from the Pennsylvania program. EPA further indicated that it did not have any other comments.

We appreciate EPA's review of the amendment.

*State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)*

Under 30 CFR 732.17(h)(4), we are required to request comments from the SHPO and the ACHP on amendments that may have an effect on historic properties. On December 22, 1998, we requested comments on Pennsylvania's amendment (Administrative Record No. PA 853.02). The Pennsylvania Historical and Museum Commission (PHMC) responded on January 14, 1999 (Administrative Record No. PA 853.03). PHMC indicated that it is primarily concerned with surface mining and reclamation projects that might impact cultural resources. PHMC noted that most reclamation projects impact areas

already disturbed by mining activities and thus, this amendment to Pennsylvania's program will generally have little impact on important cultural resources. However, PHMC noted that there is potential for historic mining or industrial structures (e.g., coke ovens, etc.) to be impacted by such work.

PHMC further indicated that the definition of the term "remining area" at 25 Pa. Code 86.252 includes a statement that additional undisturbed land may be within a remining area if the permittee demonstrates that a larger area is needed to accomplished backfilling and grading of the unreclaimed area or is needed for support activities for the remining activity. PHMC is concerned that the ability of a reclamation project to include previously undisturbed land suggests that there could be impacts to cultural resources not identified during the original mining operation. PHMC suggests that an addition be made to 25 Pa. Code 86.252 to indicate that cultural resources on previously mined and on undisturbed property within the project area must be identified and evaluated as part of the reclamation plan.

We have determined that PHMC's concerns have been addressed through areas of the approved Pennsylvania program. The Pennsylvania program provides that permittees must identify archaeological, cultural and historic resources in their permit applications. For surface mines, this requirement is found at 25 Pa. Code 87.42(2), for anthracite mines at 25 Pa. Code 88.22(2), for underground mines at 25 Pa. Code 89.38(a), and for coal refuse disposal at 25 Pa. Code 90.11(a)(3). The areas discussed under Pennsylvania's definition of "remining area" must be permitted and therefore, must be evaluated for the presence of archaeological, cultural and historic resources as noted in the above noted sections of the approved program. As a result, we have determined that there is no need for Pennsylvania to revise its definition of "remining area."

#### V. OSM's Decision

Based on the above findings we approve, with certain exceptions, the amendment Pennsylvania sent us on December 22, 1998, and as revised on December 23, 2003, and April 13, 2004. We are not approving the following sections to the extent noted:

4.2(f)(4) of PASMCR. We are not approving Subsection (4) to the extent that it would allow Phase 3 bond release.

4.12(b) of PASMCR. We are not approving Subsection (b) to the extent that it creates an alternative bonding system.

In 25 Pa. Code Chapter 86.281(e), the last sentence which states, "If the actual cost of reclamation by PADEP exceeds the amount reserved, additional funds from the Remining Financial Assurance Fund will be used to complete reclamation" is not approved.

25 Pa. Code Chapter 87.1 and 88.1. Definition of "de minimis cost increase." The definition is not approved as it applies to coal mining activities.

25 Pa. Code 87.119, 88.107. We are not approving Subsection (a) to the extent that it would allow the replaced water supply to be of a lesser quantity and quality than the premining water supply or not provide for temporary replacement of water supplies. We are not approving Subsection (a)(1)(v) to the extent it would pass on operating and maintenance costs of a replacement water supply in excess of the operating and maintenance costs of the premining water supply to the landowner or water supply user. We are not approving Section (a)(2) to the extent that an operator is not required to provide for all increased operating and maintenance costs of a restored or replaced water supply. Finally, we are not approving Subsection (a)(3) to the extent it would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, "replacement of water supply." We are approving 87.119 (a), (a)(1)(v), (a)(2) and (a)(3) and 88.107(a), (a)(1)(v), (a)(2) and (a)(3) to the extent it applies to government financed reclamation.

25 Pa. Code 87.119(g) and 88.107(g). These sections are not approved.

25 Pa. Code 87.119(i) and 88.107(i). We are not approving Subsection (i) to the extent that it would allow Phase 3 bond release.

To implement this decision, we are amending the Federal regulations at 30 CFR 938.12, 938.15 and 938.16 which codify decisions concerning the Pennsylvania program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### VI. Effect of Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly,

30 CFR 732.17(a) requires that any change of an approved State program must be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved State programs that are not approved by OSM. In the oversight of the Pennsylvania program, we will recognize only the statutes, regulations, and other materials we have approved, together with any consistent implementing policies, directives, and other materials. We will require Pennsylvania to enforce only approved provisions.

## VII. Procedural Determinations

### *Executive Order 12630—Takings*

The provisions in the rule based on counterpart Federal regulations do not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulations. The revisions made at the initiative of the State that do not have Federal counterparts have also been reviewed and a determination made that they do not have takings implications. This determination is based on the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

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

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of Subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

### *Executive Order 13132—Federalism*

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be “in accordance with” the requirements of SMCRA, and Section 503(a)(7) requires that State programs contain rules and regulations “consistent with” regulations issued by the Secretary pursuant to SMCRA.

### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Pennsylvania does not regulate any Native Tribal lands.

### *Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

### *National Environmental Policy Act*

This rule does not require an environmental impact statement because Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

### *Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

### *Regulatory Flexibility Act*

The Department of the Interior certifies that a portion of the provisions in this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because they are based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations. The Department of the Interior also certifies that the provisions in this rule that are not based upon counterpart Federal regulations will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This determination is based on the fact that the provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

### *Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that a portion of the State provisions are based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are

administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that a portion of the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate. For the portion of the State provisions that is not based upon counterpart Federal regulations, this determination is based upon the fact that the State provisions are administrative and procedural in nature and are not expected to have a substantive effect on the regulated industry.

**List of Subjects in 30 CFR Part 938**

Intergovernmental relations, Surface mining, Underground mining.

Dated: March 14, 2005.

**Brent Wahlquist,**

*Regional Director, Appalachian Region.*

■ For the reasons set out in the preamble, 30 CFR part 938 is amended as set forth below:

**PART 938—PENNSYLVANIA**

■ 1. The authority citation for part 938 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

■ 2. Amend Section 938.12 to add paragraph (c) to read as follows:

**§ 938.12 State statutory, regulatory, and proposed program amendment provisions not approved.**

\* \* \* \* \*

(c) We are not approving the following portions of provisions of the proposed program amendment that Pennsylvania submitted on December 18, 1998:

(1) 4.2(f)(4) of PASMCR. We are not approving Subsection (4) to the extent that it would allow Phase 3 bond release.

(2) 4.12(b) of PASMCR. We are not approving Subsection (b) to the extent that it creates an alternative bonding system.

(3) 25 Pa. Code 86.281(e). The last sentence which states, "If the actual cost of reclamation by the Department exceeds the amount reserved, additional funds from the Reclaiming Financial Assurance Fund will be used to complete reclamation" is not approved.

(4) 25 Pa. Code 87.1 and 88.1, Definition of "de minimis cost increase." The definition is not approved as it applies to coal mining activities.

(5) 25 Pa. Code 87.119 and 88.107. With regard to coal mining activities, we are not approving Subsection (a) to the

extent that it would allow the replaced water supply to be of a lesser quantity and quality than the premining water supply or does not provide for temporary replacement of water supplies. We are not approving Subsection (a)(1)(v) to the extent it would pass on operating and maintenance costs of a replacement water supply in excess of the operating and maintenance costs of the premining water supply to the landowner or water supply user. We are not approving Section (a)(2) to the extent that an operator is not required to provide for all increased operating and maintenance costs of a restored or replaced water supply. Finally, we are not approving Subsection (a)(3) to the extent it would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, "replacement of water supply."

(6) 25 Pa. Code 87.119(g) and 88.107(g). These sections are not approved.

(7) 25 Pa. Code 87.119(i) and 88.107(i). We are not approving Subsection (i) to the extent that it would allow Phase 3 bond release.

■ 3. Section 938.15 is amended in the table by adding a new entry in chronological order by "Date of final publication" to read as follows:

**§ 938.15 Approval of Pennsylvania regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
December 18, 1998	May 13, 2005	In PASMCR, Section 3 Definition of "Total Project Costs;" Sections 3.1; 4(a), (d), (d.2), (g), and (h); 4.2(f) (partial approval); 4.2(i); 4.6(i) and (j); 4.7; 4.10; 4.11; 4.12 (partial approval); 4.13; 18(a), (a.1), (a.2), and (a.3); 18(f), (g)(4) and (5); 18.7; 18.9; 18.10. 25 Pa. Code 86.142 Definitions of "Annuity," "Trustee," and "Trust Fund;" 25 Pa. Code 86.151(b), (c), and (j); 86.152(a) and (b); 86.156(b); 86.157(3), (4), (5), (6), (7), and (8); 86.158(c)(6), (e), (f), and (g); 86.161(3); 86.168; 86.171(a), (b)(6) and (7), (f)(4), (g), and (h); 86.174(a) and (d); 86.175(a) and (b)(3); 86.182(a)(3) and (4), (d), (e), (f), (g); 86.195(b), 86.251–253; 86.261–86.270; 86.281(a)–(d); 86.281(e) (partial approval); 86.282–284; 86.291–295; 86.351–359. 25 Pa. Code 87.1 Definitions of "Water Supply," "Water Supply Survey"; deletion of 87.11–21; 87.119 (partial approval); 87.147(b). 25 Pa. Code 88.1 Definitions of "Water Supply," "Water Supply Survey"; 88.107 (partial approval); 88.121(b); 88.209(b).