

adequacy of those bonding program enhancements.

As such, we were effectively asking for comment as to the validity of the proposition that the first portion of the required amendment and the 1991 notice were one and the same and that, therefore, there was nothing more needed from Pennsylvania to satisfy 30 CFR 938.16(h). This question, we believe, is markedly different from the question, not open for comment, of whether actions taken as described in the program enhancements document satisfied the 1991 notice on deficiencies in the ABS.

Nevertheless, we recognize that the June 26, 2003, **Federal Register** Notice may not have presented the scope of proposed action upon which comment was invited with optimal clarity and that, as a result, members of the public may have reasonably believed that they were invited to comment not only on whether resolution of the 1991 Notice also resolved the first part of 30 CFR 938.16(h), but also on the sufficiency of actions described in the program enhancements document to address the deficiencies in the ABS, and, further, on the adequacy of Pennsylvania's bonding program as a whole. For this reason, we are addressing their comments on these latter two issues. However, we continue to maintain that they are outside the scope of this rulemaking.

The PennFuture comments dated July 28, 2003 (Administrative Record No. PA 802.36), were made on behalf of the Pennsylvania Federation of Sportsmen's Clubs, Inc., the Pennsylvania Chapter of the Sierra Club, Pennsylvania Trout, Inc., Tri-State Citizens Mining Network, Inc., and Mountain Watershed Association, Inc.

On July 25, 2003 (Administrative Record No. PA 802.35), PennFuture wrote us concerning our termination of the 1991 notice. PennFuture has requested that we incorporate the comments of its July 25 letter into the comments on removal of 30 CFR 938.16(h). We will consider those comments to the extent that they address the removal of 30 CFR 938.16(h). However, comments that pertain to whether the June 5, 2003, submission satisfies the 1991 notice and comments on the 30 CFR 732.17(c) through (e) process are considered as non-responsive to this rulemaking.

PennFuture commented that OSM is refusing to hear from the public on the adequacy of the June 5, 2003, PADEP submission of the program enhancements document and that in doing so, OSM has violated the public's right to a meaningful "opportunity to

participate" in this proceeding, as required by 5 U.S.C. 553(c). It claims this also violates our obligation to "consider all relevant information" in making our decision as required by 30 CFR 732.17(h)(7).

We disagree that we have violated the notice and comment requirements of 5 U.S.C. 553(c) and 30 CFR 732.17(h). We have provided the public a meaningful opportunity to participate in this rulemaking and have considered all relevant information in making our decision on the proposal to remove the required amendment at 30 CFR 938.16(h). Our June 26, 2003, proposed rule specifically identified that the proposal to remove 30 CFR 938.16(h) is based upon the information contained in the June 5, 2003, PADEP submission that was submitted in response to our 1991 notice. In addition, the proposed rule specifically requested comments on whether we should consider the information submitted by Pennsylvania sufficient to satisfy the required amendment at 30 CFR 938.16(h).

The June 12, 2003, administrative decision by OSM with regard to the satisfaction of the 1991 notice was a separate and distinct action not subject to the public notice and review procedures governing this rulemaking. To assist the public in commenting, OSM decided that it was appropriate to clarify in this rulemaking that it will consider comments to the extent that they address the satisfaction of 30 CFR 938.16(h) and that comments that address the 1991 notice will be considered as non-responsive to this rulemaking.

PennFuture commented that our pre-rulemaking commitment to finding that the program enhancements are adequate violate the notice and comment requirements of 5 U.S.C. 553(c) and 30 CFR 732.17(h) and is violating our obligation to serve as a fully informed, impartial decision maker.

We disagree with the comment's presumption that our involvement with the program enhancements document has violated the notice and comment requirements of 5 U.S.C. 553(c) and 30 CFR 732.17(h) or that it compromises our role as a decision maker. Interaction of our staff with State regulatory authorities in the administration of their programs or in the development of State policies and procedures and State program amendments is a routine practice. That interaction does not alter the fact that once material is submitted to us for consideration and a regulatory action is proposed in the **Federal Register**, as was done in this case, any final decision will be based upon the merits after full consideration of the

public comments, including any information provided, on that proposal.

PennFuture commented that because OSM's proposed deletion of the actuarial study requirement from 30 CFR 938.16(h) is entirely dependent on this finding that the program enhancements are adequate, it would seem indisputable that comments or data contesting its adequacy constitute relevant information for OSM to consider under 30 CFR 732.17(h)(7). PennFuture further stated that the notice of proposed rulemaking prevents such information and that OSM will not consider comments on the adequacy of the bonding program enhancements document.

PennFuture has mischaracterized the commenting opportunities provided by this rulemaking. As discussed in response to previous comments, the notice initiating this rulemaking activity specifically identified that the proposal to remove 30 CFR 938.16(h) is based upon the information contained in the June 5, 2003, PADEP submission that addressed our 1991 notice. In addition, the notice specifically requested comments on whether we should consider the information submitted by Pennsylvania sufficient to satisfy the required amendment at 30 CFR 938.16(h). While comments addressing the basis for OSM's administrative decision that the 1991 notice has been resolved are not part of this rulemaking, OSM is considering comments to the extent that they address the satisfaction of the requirements at 30 CFR 938.16(h).

PennFuture has suggested that OSM has firmly committed itself to the positions that the program enhancements are adequate and that the actuarial study requirement of 30 CFR 938.16(h) therefore may be terminated. PennFuture stated that agencies engaged in rulemaking or similar decisions that are subject to notice and comment procedures may not foreordain the results by agreement. Additionally PennFuture stated that OSM must treat the adequacy of the "program enhancements" as an open issue that it can decide only after inviting public comment on the issue and giving due consideration to the input it receives. Finally, PennFuture stated that OSM therefore should publish a new notice of proposed rulemaking, expressly invite comment on the adequacy of the program enhancements to address the concerns about the ability of the bonding program to ensure the completion of the reclamation plans for all operations on which the operators default on their obligations to reclaim, and then make its decision whether to delete the actuarial study requirement