

from 30 CFR 938.16(h) only after it appropriately considers all relevant information it receives.

We disagree with the comments. The results of this rulemaking were not foreordained by agreement. The fact that OSM staff worked with PADEP staff in developing the program enhancements document does not constitute a binding agreement on OSM as it relates to this rulemaking. As provided for under 30 CFR 732.17(c) through (e), OSM has separately exercised its decision-making authority to review actions taken by PADEP to address the issues identified in the 1991 notice and concluded that the 1991 notice has been resolved. There is no requirement for public notice before revising or terminating such notices and the basis for our June 12, 2003, decision terminating the 1991 notice is beyond the scope of this rulemaking. Separately, we published a proposed rulemaking to obtain public input on whether the information submitted by Pennsylvania in the June 5, 2003, PADEP submission provides sufficient basis for the removal of the requirements at 30 CFR 938.16(h). We are now making our final decision after reviewing all responsive comments. Therefore, further public participation in this decision is not warranted.

PennFuture requested that OSM publish a new notice that completely explains why it believes the program enhancements have been adequately addressed.

Again, we have decided not to adopt the suggestion to publish a new notice with revised discussions of how the program enhancements document addresses the requirements at 30 CFR 938.16(h). The notice of proposed rulemaking for this action provides a complete description of the events leading up to the requirements imposed at 30 CFR 938.16(h). The notice also provides a summary of the activities proposed and undertaken by PADEP that potentially satisfy the outstanding issues as well as a listing of the specific documents that form the basis for our proposal. Because it was not reasonable or practical for us to publish the voluminous documents in the **Federal Register**, we made these documents available to the public in both paper and electronic form upon request. In addition, we offered the opportunity for a public hearing where interested persons could seek clarification of any points needed to facilitate their ability to provide meaningful comment. We believe that the **Federal Register** notice, the information we made available to the public, and the opportunity for a public hearing provided sufficient information to persons interested in

commenting on the notice of proposed rulemaking. Further, PennFuture's extensive comments on this rulemaking exhibit an extensive review of the basis for proposing removal of 30 CFR 938.16(h).

PennFuture commented that PADEP has failed to provide the hard proof of financial soundness and sufficient reclamation performance required by 30 CFR 938.16(h) and that until PADEP submits an actuarial study or similar analysis showing that its bonding program actually guarantees complete reclamation of all permanent program sites, the first requirement of 30 CFR 938.16(h) will remain unresolved and therefore must remain in place.

We disagree with the comment, which misstates the scope of the required amendment. The scope of 30 CFR 938.16(h) was limited to deficiencies in the ABS. PADEP has terminated reliance upon the ABS for its regulatory program and demonstrated that the ABS did not play a role in bonding for the surface effects of underground mining. As such, the Pennsylvania regulatory program now operates consistent with 30 CFR 800.11(a) through (d) rather than under (e) as was cited in the required amendment. While there are residual issues in the transition from the ABS to conventional bonds, they are adequately addressed in the program enhancements document.

PennFuture commented that the fundamental reason PADEP still is unable to submit an actuarial study or similar information demonstrating the solvency of its bonding program is that the program remains insolvent and unable to guarantee treatment of all the post-mining discharges emanating from permanent program sites. PennFuture also indicated that in order to demonstrate the "soundness or financial solvency" of its bonding program, PADEP first would have to make its bonding program fiscally sound.

Again, the comment misstates the scope of the required amendment, which is limited to the ABS. In the case of a State operated ABS, the State's obligation to expend funds to reclaim a forfeited site extends to all assets of the ABS unless the scope of reclamation covered by the ABS is expressly limited. Where it is determined that an ABS lacks sufficient assets to cover the full cost of reclamation for which it is applicable, as was the case with Pennsylvania in the required amendment, the State must take steps to sufficiently increase the assets of the ABS to cover existing and reasonably anticipated obligations. Efforts to fix an ABS are evaluated on their ability to make the ABS solvent. However, a State

always has the option to terminate use of its ABS and require conventional bonds to replace ABS coverage. In doing so, a State does not have an obligation to make its ABS solvent before converting to a conventional bonding system (CBS) and requiring applicants to post conventional bonds and existing permittees to replace ABS coverage with conventional bonds. Such a requirement would be well beyond what is required of a CBS under 30 CFR part 800 where posted bonds are deficient or insolvent, as well as beyond anything OSM would be able to require should it withdraw approval of a State program because of an inadequate ABS. In the case of Pennsylvania, which initiated this process in 2001, terminating reliance upon the ABS and requiring all applicants and permittees to shift to conventional bonds did not require a program amendment because the program already included a CBS, which was being applied to underground mines.

PennFuture commented that the ABS Bond Forfeiture Discharge Workplan (Workplan) and the program enhancements document attempt to balance the books not by expanding the assets of the ABS to match the long-term treatment costs it must cover, but by attempting to write off many of those liabilities, and perhaps all of them.

We disagree with the comment. We can find no provisions in the Workplan where PADEP proposes to "write-off" primacy discharges forfeited under the Pennsylvania ABS. To the contrary, the Workplan provides for continued revenue to the Fund; precludes the addition of any more potential liabilities to the Fund by halting its use for new permits; reduces potential obligations to the Fund by requiring the replacement of ABS coverage with conventional bonds or other financial guarantees at existing permits; and provides a structured approach to achieving reclamation of pollutional discharges by targeting significant resources through a variety of financial and reclamation mechanisms at current primacy forfeitures which fall under the ABS. Any initiative to eliminate the revenue to the fund would be an amendment to the program, which could not be implemented without going through the program amendment process, including opportunity for public comment.

PennFuture commented that until PADEP has actually implemented all of its "program enhancements" and actually shown that they achieve the objectives applicable to all SMCRA bonding programs, it cannot satisfy the first requirement of 30 CFR 938.16(h) to "demonstrate" the adequacy and