

solvency of its bonding program. PennFuture further stated that because the program enhancements document does not (and cannot) provide that proof, OSM must leave the first requirement of 30 CFR 938.16(h) in place, and must institute Part 733 proceedings based on PADEP's failure to satisfy it.

Again, the comment misstates the scope of the required amendment, which is limited to the ABS. In fact, if we were to accept the comment and initiate a Part 733 action and ultimately take over all or a portion of Pennsylvania's approved program or substitute a Federal Program, we couldn't begin to address the problems caused by the deficiencies in the ABS as well as the program enhancements document does. PADEP has provided a credible approach to addressing outstanding bond program reclamation responsibilities and OSM has concluded that the required amendment at 30 CFR 938.16(h) is satisfied. Therefore, OSM has no basis for initiating proceedings under 30 CFR part 733.

PennFuture raised questions on PADEP's June 5, 2003, letter regarding the payment of reclamation fees by underground mine operators.

The 1991 rulemaking at 30 CFR 938.16(h) required Pennsylvania to clarify the procedures to be used for bonding the surface impacts of underground mines and the procedures to reclaim underground mining permits where the operator has defaulted on the obligation to reclaim. OSM imposed the requirement to clarify bonding forfeiture funding procedures and the responsibilities of the ABS. Bond program shortfalls have been documented by the 1993 Milliman & Robertson actuarial study and the February 2000 PADEP Assessment Report. Because PADEP has clarified that it has not been relying on the ABS for bond coverage for the surface effects of underground mines that portion of the required amendment has been satisfied.

PennFuture commented that statements that underground mines are bonded under a CBS is erroneous because, lacking a mandatory site-specific bond adjustment provision, Pennsylvania's approved program has never included a conventional SMCRA bonding system.

We do not agree with this comment. The fact that Pennsylvania did not have a mandatory adjustment provision does not alter the fact that, under its approved program, it had been accepting conventional bonds as providing full bond coverage, separate from the ABS, for the surface effects of

underground mines. We agree that Pennsylvania needs to modify its program to include a mandatory bond adjustment provision. However, imposing such a required amendment is beyond the scope of 30 CFR 938.16(h). In any case, a commitment to propose such an amendment was included in the program enhancement document. In fact, the proposed amendment has now been received by OSM and we have published it for comment in a separate FR notice.

PennFuture commented that because the authorization in 25 Pa. Code 86.17(e) to use reclamation fees on all bond forfeiture sites is part of the OSM-approved State regulatory program, PADEP may not deviate from the terms of that program through an unwritten policy or a mere letter to OSM. PennFuture asserted that the plain terms of the permit fee regulation at 25 Pa. Code 86.17(b), approved at primacy, required payment of the \$50 per acre fee by everyone planning to engage in surface mining activities (a term that included surface activities associated with an underground mining operation). That provision was deleted in 1991 and replaced with 25 Pa. Code 86.17(e), which expressly exempts underground operators from the permit fee requirement, but does not expressly prohibit the use of fee moneys to reclaim surface effects of underground mining. PennFuture further stated that if PADEP wants to place such a restriction on the use of the funds, the only way it can do so is through a program amendment. PennFuture believes that the explanation presented in PADEP's June 5, 2003, letter does not resolve, but rather highlights, an inconsistency between the terms of the approved Pennsylvania program and its implementation and that the inconsistency can be "clarified" in only one of two ways: (1) PADEP's elimination of the unpermitted and unapproved restriction on the use of the ABS reclamation fees, or (2) PADEP's submission and our approval of a program amendment incorporating the restriction that PADEP claims to apply in practice.

We do not agree with PennFuture's assertion that 25 Pa. Code 86.17(b) prevented PADEP from establishing and operating within the boundaries of the Pennsylvania ABS. Pennsylvania's regulation at 25 Pa. Code 86.17(b) provided the authority to collect a permit application fee. When Pennsylvania deleted subsection (b) and added subsection (e) in 1990, it stated that "[s]ection 86.17 is changed to clarify that the \$50 per acre reclamation fee does not apply to the surface effects

of underground mining." Volume 18, *Pennsylvania Bulletin*, 3385, June 16, 1990. (Emphasis added) Since the 1990 changes "clarified," rather than "created," the reclamation fee exemption for underground operators, PADEP's June 5, 2003 assertion that "[b]onding of surface impacts of underground mines has always been under a conventional bonding system" is consistent with previously approved and currently approved regulations. The discretionary authority under 25 Pa. Code 86.152 and 86.149(b)(7) provided PADEP with the option of adjusting bonds on sites it determined were covered by the ABS. In addition, there were no program restrictions preventing PADEP from allocating the reclamation fees collected to those sites where bonds were adjusted pursuant to the discretionary authority. The required amendment at 30 CFR 938.16(h) requested that Pennsylvania clarify its existing procedures with regard to that process. PADEP has done so, by stating in its June 5, 2003, letter that underground mines are not subject to the reclamation fee, and that the ABS moneys are not used for reclaiming underground mines. We believe these statements are legally supported by the flexible language contained in the State's regulations at 25 Pa. Code 86.17 and 86.152. Moreover, and as stated above, PADEP is now requiring all mine permits to post a full cost reclamation bond and PADEP has proposed a number of enhancements, as well as an amendment making it clear that bond adjustment will be mandatory when adjustment is needed.

PennFuture commented that the PADEP technical guidance document that remains in effect provides that the mine drainage treatment component for an underground anthracite (see PADEP Technical Guidance Document No. 563-2504-45 1, "Bonding: Anthracite Underground Mines" (February 15, 1997)) is limited to the cost of replacing the treatment system.

We appreciate the commenter pointing out that Pennsylvania's 1997 guidance document is not consistent with our 1997 acid mine drainage (AMD) policy statement issued shortly after their guidance document (while the Pennsylvania guidance document reflects Federal bonding requirements for underground mines promulgated in 1980, those requirements were simplified with that express provision limiting bonding to the cost of removing or replacing the treatment system being removed in 1983). However, that inappropriate limitation in the guidance document is not germane to the requirements of 30 CFR 938.16(h) nor