

primacy discharges. PennFuture stated that in the meantime, the primacy forfeiture discharges will continue to flow without treatment, and the list of them will grow longer.

While we do not believe it is within the scope of this rulemaking, we agree with the comment that collecting the appropriate scientific information and developing effective abatement plans may require a considerable amount of time. However, PADEP and we have committed to a joint agency cooperative approach to developing watershed plans that will successfully abate forfeiture discharges. We acknowledge that until such time as a discharge abatement plan becomes effective, certain discharges may go untreated.

PennFuture commented that the program enhancements document fails to show that sufficient financial guarantees have been or will be posted for active and inactive discharge sites to prevent the discharges from going untreated after forfeiture occurs.

Again, while we believe this comment is outside the scope of this rulemaking, we will respond. PADEP has invested a great deal of effort in developing a remedy to the inadequacies of the classic bonding approach to long-term discharges. In the short-term, it has used its enforcement and compliance process to initiate a number of treatment trusts on active mine sites. It has invested staff resources in the development of a workable trust approach. For the long-term, PADEP has committed a process where operators will have to put up a separate bond that will provide for long-term treatment in the event of a forfeiture. If operators refuse or are unable to come up with the bond, PADEP will use its enforcement and compliance process to have the operator commit to building a financial assurance (trust) over a specified period of time. PADEP's approach is within their approved statutory and regulatory requirements and will take some time to be fully implemented. We agree that it is possible that certain sites may forfeit their bonds leaving insufficient funds for the immediate treatment of any pollutional discharges. In such cases, PADEP has committed to addressing the sites as part of their watershed approach under the Workplan.

PennFuture commented that the bond conversion program was a misdirected effort because instead of focusing on the major problem of mine drainage treatment guarantees, PADEP conducted a multi-year effort to revamp parts of its program for guaranteeing land reclamation, which consumed considerable resources of both mine operators and PADEP staff.

We do not agree with the comment. PADEP's plan for converting existing operations from the ABS to conventional bonds was designed to maximize the number of sites obtaining conventional bonds and minimize the number of forfeitures that might be triggered by the conversion process. It also addresses the water treatment component in a manner consistent with OSM's 1997 AMD policy statement as applied under programs with conventional bonds.

PennFuture submitted a list of activities ongoing in the Pennsylvania regulatory program, in support of a contention that Pennsylvania's transition to a CBS is not complete. PennFuture commented that based upon the submitted reasons, Pennsylvania is still operating an ABS.

We acknowledge that the Fund still exists. However, with regard to the comment and its relevance to the removal of the required amendment at 30 CFR 938.16(h), we note that PADEP, rather than continuing efforts to make the ABS solvent, is now requiring all mine permits to post a full cost reclamation bond. We also acknowledge that, through implementation of the workplan described in the enhancements document, PADEP is continuing efforts to further reduce the residual potential obligations to the Fund by obtaining other forms of financial guarantees for those potential obligations where possible. However, that does not alter the fact that the required actions described in 30 CFR 938.16(h) are now moot because Pennsylvania chose a different course to address the issues raised.

PennFuture commented that the Workplan is inconsistent with SMCRA because it allows primacy discharges to be lumped with all other post mining discharges under a prioritized reclamation approach. That process, PennFuture contends, is inconsistent with SMCRA. PennFuture further stated that, under SMCRA, primacy sites are legally distinctive and are not supposed to be thrown in with every other abandoned coal mine in the State and that the Workplan explicitly allows for primacy forfeiture discharges to go without treatment based on the unavailability of funds, and it effectively writes off some primacy discharges permanently because they fall below the treatment threshold on the priority list.

We do not agree that the Workplan is inconsistent with SMCRA. As we have stated in a previous decision on a Pennsylvania bonding amendment, SMCRA does not prevent regulatory authorities from prioritizing reclamation

efforts to effectively allocate staff resources or to improve the environmental outcome of program operations. See 56 FR 55080, 55084 (October 24, 1991) ("To the extent that [State programs] provide only for a ranking of sites for reclamation without compromising the requirement that all sites for which bonds were posted be properly reclaimed, however, they are not inconsistent with * * * SMCRA * * *") Likewise, there are no provisions under SMCRA or the 30 CFR part 800 bonding regulations that prevent the regulatory authority implementing discharge abatement activities in the context of an entire watershed. OSM supports PADEP's approach to address all mine drainage problems in the Commonwealth, including those from primacy forfeitures, on a watershed basis. As we noted above, PADEP must carefully consider each primacy forfeiture discharge in the context of all pollution in the watershed. Without such an approach, programmatic and technical resources could be wasted. We disagree that the discharge Workplan would allow PADEP to "write-off" sites based upon a treatment threshold established on a priority list. We expect that some discharges will be addressed under abatement plans where treatment may not be at the specific discharge location or may be carried out in combination with non-primacy forfeiture discharges. However, we anticipate that all primacy forfeiture pollutional discharges will be addressed by PADEP.

PennFuture commented that OSM has previously ruled on the prioritization of bond forfeiture reclamation in the October 24, 1991, **Federal Register** (56 FR 55080), when it stated that "neither SMCRA nor the Federal regulations provide for prioritizing sites for reclamation, since both presume that site-specific bonds, together with necessary supplemental funding from alternative bonding systems, will be immediately available and adequate to cover reclamation costs for each site." 56 FR at 55084.

In response, we note that our October 24, 1991, finding, also stated that prioritization would be inconsistent with SMCRA where it "would allow high priority sites to be reclaimed while neglecting lower priority sites." *Id.* The Workplan calls for reclamation, including water treatment, for all permanent program sites, even though some will have to wait longer than others, and some will be treated on a watershed basis. Neither of these approaches equates to a "write-off" of permanent program site reclamation costs.