Regulatory Analysis Form	This space for use by IRRC 2005 JUN 29 PM 4:24 REVIEW COMMISSION
(1) Agency Department of Environmental Protection	
(2) I.D. Number (Governor's Office Use) # 7-385	IRRC Number: #2358

(3) Short Title

Bond Adjustment and Bituminous Mine Subsidence Control Standards

(4) PA Code Cite	(5) Agency Contacts & Telephone Numbers
25 Pa. Code Chapters 86 and 89	Primary Contact: Marjorie Hughes, 783-8727 Secondary Contact: John Dernbach, 783-8727

(6) Type of Rulemaking (Check One)	(7) Is a 120-Day Emergency Certification Attached?
____Proposed Rulemaking __X__Final Order Adopting Regulation ____Final Order, Proposed Rulemaking Omitted	__X__ No ____ Yes: By the Attorney General ____ Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The regulation will amend regulatory requirements relating to the protection and repair of dwellings and related structures and noncommercial buildings in areas above underground coal mining operations, the replacement of water supplies affected by underground mining operations and the content of permit applications for underground coal mining operations. The regulation will also require the adjustment of bonds posted to ensure the fulfillment of subsidence damage repair obligations and reclamation obligations when the Department identifies a change in liability.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The regulation is adopted pursuant to the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA)(52 P.S. §§ 1406.1-1406.21), as amended, including amendment by a federal action that superseded §§1406.5a(b), 1406.5b(g)-(h), 1406.5d(a)(3) and (c), and 1406.5e(b) to the extent these sections are inconsistent with the Federal Surface Mining Control and Reclamation Act (Federal SMCRA) (30 U.S.C.§§1201 *et. seq.*). 69 FR 71551 (Dec. 9, 2004).

The parts of the regulation, which will affect bond adjustments for surface mining activities, coal preparation activities and coal refuse disposal, are adopted pursuant to section 5 of The Clean Streams Law (52 P.S. § 691.5); section 4.2 of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.4b); section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); and Section 1920-A of the Administrative Code of 1929 (71 P.S. 510-20).

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The regulation addresses Pennsylvania regulatory provisions that were disapproved by the U.S. Office of Surface Mining Reclamation and Enforcement (OSM), the Federal agency with oversight responsibility for state mining regulatory programs. The disapproval was published in the *Federal Register* on December 27, 2001 at 68 FR 67010-67. The identified provisions were found to be less effective than or inconsistent with federal counterpart provisions. The notice further directed the Commonwealth to correct the cited deficiencies through requirements set forth in 30 CFR 938.16(hhhh)-(bbbbbb). These changes are necessary for the Department to maintain primary authority to regulate coal mining within the Commonwealth.

The regulation will also serve to address an OSM requirement relating to mandatory bond adjustments, as set forth in a letter dated September 22, 1999.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The regulation is necessary for the Department to assume full regulatory authority over underground coal mining activities in Pennsylvania. Since 1995, the Department and OSM have shared enforcement responsibility in regard to the repair of subsidence damage to structures and the replacement of water supplies affected by underground mining operations. Under the dual enforcement program, the Department enforces the provisions of 25 Pa. Code Chapter 89, and OSM intervenes in cases where federal regulations provide greater coverage or alternate remedies. The regulation will enable Pennsylvania to obtain OSM approval, eliminating the need for dual enforcement. This will simplify the claim resolution process for mine operators and landowners, who are sometimes confused about agency jurisdictions. In addition, the regulation will enable the Commonwealth to fulfill its obligation to maintain a state primacy program that is at least as effective as and not inconsistent with the Federal SMCRA.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

Nonregulation is not an option. The provisions of this regulation will continue to be carried out under the dual enforcement program irrespective of this rulemaking.

Section § 1406.3 of the BMSLCA includes declarations by the Pennsylvania General Assembly that:
- *Damage to surface structures and the land supporting them caused by mine subsidence is against the public interest and may adversely affect the health, safety and welfare of our citizens.*
- *It is necessary to develop an adequate remedy for the restoration and replacement of water supplies affected by underground mining.*
- *It is necessary to develop a remedy for the restoration or replacement of or compensation for surface structure damaged by underground mining.*

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The regulation will benefit landowners, mine operators and Department staff, who are engaged in resolving claims of structure damage and water supply impacts in areas above underground coal mines. The regulation will consolidate all requirements relating to the repair of mine subsidence damage and the replacement of water supplies affected by underground mining activities in Chapter 89. This will eliminate the need to refer to federal regulations in order to determine the appropriate resolution of a structure damage claim or water supply complaint. The regulation will also enable the Department to assume full jurisdiction over claim resolutions, eliminating the need for a dual enforcement program in Pennsylvania.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

No one will be adversely affected by this regulation, although some mine operators view the imposition of federally mandated requirements as an upset to the balance of rights and privileges between mine operators and landowners that was created by the 1994 amendments to the BMSLCA.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

Twenty-eight companies that operate underground bituminous coal mining operations will be required to comply with the overall requirements established by this regulation. An additional 520 companies, engaged in other types of coal mining activities will be required to comply with bond adjustment requirements.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The Department and OSM met twice with groups representing underground coal mining interests and coalfield citizens' interests to discuss the proposed regulations. Meetings with coal mining interests included representatives from the Pennsylvania Coal Association and several of the Pennsylvania's larger mining companies. Meetings with citizens' interests included representatives from Tri-States Citizens Mining Network, an organization comprised of several citizens groups that are concerned about mining-related issues in western Pennsylvania.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Mine operators are already complying with requirements relating to structure damage repair and water supply replacement because of the dual enforcement program that has existed in Pennsylvania since 1995. The regulation simply incorporates requirements that were previously enforced by OSM into Chapter 89. Mine operators will be required to address additional issues relating to the protection of dwellings and related structures in the preparation of their subsidence control plans; however, the cost of providing this additional information should be negligible. Mine operators will also be required to compensate landowners for increased water supply costs that were considered de minimis and disregarded under the previous regulations. These additional costs should be negligible.

Regulatory Analysis Form
(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required. The regulation will not result in any additional costs or savings to local governments.
(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures which may be required. The regulation will not result in any additional costs or savings to state government.

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	$	$	$	$	$	$
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Savings	0	0	0	0	0	0
COSTS:						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Costs	0	0	0	0	0	0
REVENUE LOSSES:						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Revenue Losses	0	0	0	0	0	0

(20a) Explain how the cost estimates listed above were derived.

Cost estimates are based on the assumption that the subsidence damage repair and water supply replacement requirements, which comprise the largest part of this regulation, have been in place since 1995, under the dual enforcement program. The only new requirements relate to the descriptions of mining plans in permit applications. Under the regulation, mine operators that employ mining techniques that result in planned subsidence will be required to describe plans for minimizing material damage to certain structures protected under federal regulations. Mine operators that employ mining techniques that do not result in planned subsidence will be required to describe plans for preventing material damage. The cost of generating these descriptions will be negligible because the descriptions will draw from information presented in other parts of the application.

State and local governments play no role in carrying out the provisions of this regulation and will be subject to no additional requirements as a result of this regulation.

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(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY-3	FY-2	FY-1	Current FY
Env Program Mgt Acct #161	$43,354,000	43,780,000	$43,679,000	$38,294,000
Env Protection Operations	$75,074,000	$75,559,000	$76,393,000	$85,897,000

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

The regulation is not expected to result in any measurable cost increase or adverse effects.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Nonregulation is not an option. The requirements addressed by this regulation represent minimum standards for state primacy programs under the Federal SMCRA. OSM has mandated that these requirements be codified in the Commonwealth's program regulations.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No alternative regulatory schemes were considered. OSM has directed the Commonwealth to make specific changes in its mining regulations to satisfy requirements for state primacy.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

The regulation is intended to address only those matters where the Commonwealth's regulations were found to be less effective than or inconsistent with the federal regulations. Existing Commonwealth regulations that are beyond the scope of federal requirements are preserved.

(25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The regulation addresses Pennsylvania program provisions that were found to be less effective than or inconsistent with federal requirements for state primacy programs under the Federal SMCRA. It will bring Pennsylvania's program into conformance with nationwide standards for underground coal mining activities.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

Two public hearings were held during the public comment period. One hearing was held in Indiana, Pa. on October 15, 2003, and one hearing was held in Washington, Pa. on October 16, 2003.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

The regulation will require the Department to track the resolution of structure damage claims and water supply complaints more closely to ensure that operators are complying with requirements for prompt action. The additional tracking obligation will be satisfied through minor modifications to the Department's Bituminous Underground Mine Information System (BUMIS) database. It will also require minor changes to permit application forms and fact sheets.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The Department has existing outreach provisions in place to assist landowners and mine operators in understanding their rights and responsibilities. The Department sends notices and fact sheets to residents in areas of proposed underground mining operations. The Department has surface subsidence agents that meet with landowners in longwall mining areas, which have a high incidence of structure damage and water supply problems, and assist those landowners in resolving damage claims. These existing vehicles will be used to facilitate the implementation of changes resulting from the regulation.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The anticipated effective date of the regulation is June 25, 2005; however, mine operators are already required to comply with most of the performance standards under the dual enforcement system that currently exists. The regulation does not require any new permits, licenses or other approvals.

(31) Provide the schedule for continual review of the regulation.

The regulation will be revised, as needed, in accordance with the sunset review schedule published by the Department.

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Copy below is hereby approved as to form and legality. Attorney General

By:
(Deputy Attorney General)

DATE OF APPROVAL

☐ Check if applicable
Copy not approved. Objections attached.

Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-385

DATE OF ADOPTION 4/19/05

BY Kathleen A. McGinty

TITLE: KATHLEEN A. MCGINTY
CHAIRPERSON

EXECUTIVE OFFICER CHAIRMAN OR SECRETARY

Copy below is hereby approved as to form and legality Executive or Independent Agencies

BY Andrew C. Clark

ANDREW C. CLARK
6.29.05
DATE OF APPROVAL

(Deputy General Counsel)
~~(Chief Counsel—Independent Agency)~~
~~(Strike inapplicable title)~~

☐ Check if applicable. No Attorney General Approval or objection within 30 days after submission.

NOTICE OF FINAL RULEMAKING

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

Bond Adjustment and Bituminous Mine Subsidence Control and Standards

25 *Pa. Code*, Chapters 86 and 89

NOTICE OF FINAL RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 86 and 89]

Bond Adjustment and Bituminous Mine Subsidence Control Standards

The Environmental Quality Board (Board) by this order amends Chapter 86 (relating to surface and underground coal mining) and Chapter 89 (relating to the underground mining of coal and coal preparation facilities). The final form rulemaking incorporates amendments necessary to bring Pennsylvania's regulatory program into conformance with federal standards for state coal mining regulatory programs. The amendments affect requirements relating to bonding, subsidence control, subsidence damage repair and water supply replacement at underground bituminous coal mines.

This proposal was adopted by the Board at its meeting of April 19, 2005.

A. Effective Date

The proposed amendments will become effective upon publication as final rulemaking in the *Pennsylvania Bulletin.*

B. Contact Persons

For further information contact Joseph G. Pizarchik, Director, Bureau of Mining and Reclamation, P.O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103, or Richard S. Morrison, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5988 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection (Department) Web site (http://www.dep.state.pa.us).

C. Statutory Authority

The final-form rulemaking is adopted under the authority of Section 7 of the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) (52 P.S. § 1406.7), Section 5 of The Clean Streams Law (52 P.S. § 691.5); Section 4.2 of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.4b); Section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); and Section 1920-A of the Administrative Code of 1929 (71 P.S. § 510-20).

Certain parts of this rulemaking are authorized pursuant to a federal action that superseded §§ 1406.5a(b), 1406.5b(g)-(h), 1406.5d(a)(3), 1406.5d(c) and 1406.5e(b) of the BMSLCA to the extent these statutory provisions conflicted with the Federal Surface

Mining Control and Reclamation Act (Federal SMCRA). The federal action effecting these changes was published at 69 FR 71551 on December 9, 2004.

D. Background and Summary

This final-form regulation satisfies requirements for maintaining a state primacy program under the Federal SMCRA. The amendments in this rulemaking pertain to federally required program changes described in 30 CFR 938.16(iiii)-(kkkk), (mmmm)-(rrrr), (tttt)-(zzzz), (ccccc)-(ddddd), (fffff)-(uuuuu) and (wwwww)-(bbbbbb). These requirements were imposed by the U.S. Office of Surface Mining and Reclamation Enforcement (OSM) on December 27, 2001, in conjunction with its partial disapproval of Pennsylvania program amendment PA-122, which consisted of the 1994 amendments to BMSLCA and associated regulatory amendments. A detailed history of the events leading up to the December 27, 2001 OSM rule is provided in the Preamble to the Board's proposed rulemaking (33 Pa. Bulletin 4554).

The amendments in this rulemaking represent the outcome of discussions between the Department and OSM relative to the fulfillment of requirements set forth in the December 27, 2001 rule. Some of the amendments represent changes made in direct response to OSM's December 27, 2001 rule and some represent alternate solutions agreed to by the Department and OSM during the course of discussions. Several of the amendments reflect changes that were not specifically required by OSM but which serve to clarify or simplify regulatory requirements in the wake of required changes.

Most of the amendments in this rulemaking have been formally approved by OSM. In September 2003, the Department submitted the Board's proposed rules, published at 33 Pa. Bulletin 4554, to OSM as a formal program amendment. The amendment, subsequently designated as PA-143, was approved by OSM on December 9, 2004 (69 FR 71528). The OSM approval covered all of the amendments included in this final regulation except those that have changed between proposed and final rulemaking. These interim changes will be submitted to OSM in the form of a separate program amendment.

Several of the final amendments are predicated on an OSM action superseding provisions of the BMSLCA that were found to be inconsistent with the Federal SMCRA. The federal action, which is authorized by section 505(b) of the Federal SMCRA and 30 CFR 730.11(a) of the federal regulations, became effective on December 9, 2004. The federal action effectively nullified the following provisions of the BMSLCA.

1) Section 5.1(b) [52 P.S. 1406.5a(b)], which requires a landowner to file a water supply claim within two years of the date of effect, is superseded to the extent it would limit an operator's liability to restore or replace a water supply covered under section 720 of the Federal SMCRA.

2) Section 5.2(g) [52 P.S. 1406.5b(g)], which allows mine operators to settle water supply claims through compensation, is superseded to the extent it would limit an operator's liability to restore or replace a water supply covered under section 720 of the Federal SMCRA.

3) Section 5.2(h) [52 P.S. 1406.5b(h)], which limits the Department's authority to intervene in the settlement of a water supply claim, is superseded to the extent it would preclude the Department requiring restoration or replacement of a water supply covered under section 720 of the Federal SMCRA.

4) Section 5.4(a)(3) [52 P.S. 1406.5d(a)(3)], which requires dwellings and related structures to be in place as of certain specified dates and within certain specified areas, is superseded to the extent it would limit an operator's liability to repair or compensate for damage to structures covered under section 720 of the Federal SMCRA.

5) Section 5.4(c) [52 P.S. 1406.5d(c)], which provides a release of liability if an operator is denied access to perform a premining or postmining survey of a structure, is superseded to the extent it would limit an operator's liability to repair or compensate for subsidence damage to a structure covered under section 720 of the Federal SMCRA.

6) The portion of section 5.5(b) [52 P.S. 1406.5e(b)], which requires a landowner to file a structure damage claim within two years of the date of damage, is superseded to the extent it would limit an operator's liability to repair or compensate for subsidence damage to a structure covered under section 720 of the Federal SMCRA

The following is a description of the final-form regulation by section.

§ 86.151(b)(2) (period of bonded liability)

Section 86.151(b)(2) is amended to clarify that an operator's obligation to maintain a subsidence bond ends ten years after the completion of "underground mining operations." The amendment avoids potential confusion over whether the period of bonded liability runs from the completion of "underground mining operations" – an event typically marked by the reclamation of the last shaft or adit, or the completion of "underground mining activities" – an event typically marked by the cessation of mine pool maintenance activities. Subsidence bonds do not cover liability for water supply replacement so there is no reason to maintain coverage for more than 10 years after completion of underground mining operations. This amendment was not required by OSM, but is necessary to clarify subsidence bonding requirements in the wake of other changes relating to the duration of liability for water supply effects.

§ 86.152(a) (bond adjustments)

Section 86.152(a) is amended to incorporate several changes relating to the periodic adjustment of reclamation and subsidence bonds. It allows the Department to specify periodic times and set schedules for reevaluation and adjustment of bond

that results in planned subsidence and paragraph (d)(1)(ii) sets forth standards that apply to underground mining that does not result in planned subsidence.

An operator using a mining technology that results in planned subsidence is required to take measures to minimize material damage, unless the structure owner consents, in writing, to allow material damage or the operator demonstrates that it would cost more to perform the necessary damage minimization measures than to repair the resultant damage. An operator is not, however, relieved of the obligation to perform damage minimization measures, if the resultant damage would constitute a threat to health or safety.

An operator using a mining technology that does not result in planned subsidence is required to take measures to prevent material damage to EPACT structures using measures, such as backstowing or backfilling of voids, leaving solid coal or coal pillars in place for support, or performing surface measures that will enable the structures to withstand subsidence if and when it occurs.

The amendments in § 89.142a(d)(1) are in response to the federal requirement set forth at 30 CFR 938.16(jjjjj). An additional paragraph, (d)(3), is also incorporated to reflect the provision in section 5(e) of the BMSLCA that general requirements to prevent or minimize material damage do not prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

§ 89.142a(f)(1) (prompt response to structure damage claims)

Section 89.142a(f)(1) is amended to clarify an operator's obligation to repair or compensate for structure damage in a prompt manner. The term *prompt* is not defined but is interpreted to mean as soon as practical considering site conditions, potential repair and compensation alternatives and other relevant factors. This requirement is incorporated to satisfy federal requirements at 30 CFR 938.16(tttt) and (kkkkk).

§ 89.142a(f)(1) (coverage of permanently affixed appurtenant structures and improvements)

Section 89.142a(f)(1) is amended to incorporate several federally required changes with respect to "permanently affixed appurtenant structures and improvements" covered by subsidence damage repair and compensation provisions.

Subparagraph (f)(1)(iii), which pertains solely to EPACT structures, now provides coverage for all structures and improvements that are appurtenant to dwellings used for human habitation, in place at the time of mining and susceptible to damage by underground mining operations. Former restrictions requiring structures and improvements to be in place on specific dates prior to mining and located within the mine boundaries are deleted in the final regulation. The former requirement that structures must be "securely attached to the land surface," as incorporated through the former definition of *permanently affixed appurtenant structures* in § 89.5, is also removed.

These changes are in response to federal requirements in 30 CFR 938.16(uuuu), (fffff) and (lllll) and OSM's partial supersession of section 5.4(a)(3) of the BMSLCA.

Subparagraph (f)(10)(i) is also amended to provide that structures used in conjunction with publicly accessible commercial, industrial and recreational buildings must be "securely attached to the land surface" in order to qualify for damage repair and compensation. This provision retains the existing interpretation of section 5.4(a)(1) of the BMSLCA, which is not affected by OSM requirements.

§ 89.143a(c) (filing structure damage claims)

Section 89.143a(c), as amended, allows owners of damaged structures to file claims with no minimum waiting period. The change is in response to 30 CFR 938.16(xxxx) and (nnnnn) of the OSM Rule.

§ 89.143a(c) (statute of limitations for filing structure damage claims)

Section 89.143a(c) is amended to clarify the time frames in which landowners may file claims for structure damage with the Department. The amendment deletes the two-year claim filing deadline as it relates to EPACT structures but retains the deadline for claims involving damage to non-EPACT structures. This amendment satisfies the requirements of 30 CFR 938.16(xxxx) and (nnnnn), while retaining the provisions of section 5.5(b) of the BMSLCA, which were not affected by OSM's supersession.

§ 89.143a(d) (investigations and orders relating to the repair of structure damage)

Amended § 89.143a(d)(1) imposes an obligation on the Department to provide investigation results to the property owner and mine operator within 10 days of completing a structure damage claim investigation. This change satisfies the federal requirement at 30 CFR 938.16(yyyy).

Subsection (d)(3), which describes actions the Department will take upon finding that an operator's underground mining operations caused damage to a structure, is amended to clarify the Department's authority to require prompt repair or prompt compensation for structure damage. Amended (d)(3) clarifies that the only reason of extending the time for compliance with a Department order is the Department's determination that further subsidence damage may occur to the same structure. These amendments are in response to federal requirements at 30 CFR 938.16(zzzz) and (ooooo).

§ 89.144a (denial of access for premining or postmining structure surveys)

Section 89.144a is amended to incorporate two provisions relating to the effect of denying access to an operator to perform a premining or postmining structure survey or damage minimization measures. Amendments to subsections (a) and (b) clarify that denial of access to an EPACT structure does not automatically result in a release of responsibility for damage as it does in the case of a non-EPACT structure. New

subsection (b) provides that, in the case of an EPACT structure an operator is responsible for all damage that the Department or the structure owner can show, by a preponderance of evidence, to be the result of the operator's underground mining operations. This change is made in response to the federal requirements at 30 CFR 938.16(ppppp) and is authorized pursuant to OSM's partial supersession of section 5.4(c) of the BMSLCA.

The second change to § 89.144a relates to damage that could have been prevented if an operator had been provided access to perform damage minimization measures. New subsection (c) provides that an operator is not responsible for the portion of structure damages, which the operator can show, by a preponderance of evidence, could have been prevented had the structure owner provided the operator access to perform a premining survey and to implement damage minimization measures. This amendment was added between proposed and final rulemaking in response to a public comment. It was not required by OSM.

§ 89.145a(a) (water supply survey requirements)

Amendments to § 89.145a(a)(1) revise the deadline for performing premining water supply surveys. Under the revised standard an operator must complete a premining survey prior to the time a water supply is susceptible to mining-related effects. This creates a flexible standard which allows the Department to establish specific time frames or distance limits based on local geologic and hydrologic conditions and the observed effects of previous mining. Requirements relating to the timing of premining surveys will be established by the Department at the time of permit issuance or permit renewal. The deadlines established by this section do not supersede the Department's authority to require water quality and quantity information at the time of permit application or permit renewal for all water supplies that may be affected during the succeeding permit term in accordance with § 89.34(a)(1)(i).

Amended subsection (a)(1) establishes specific conditions under which the collection of some or all survey information may be waived. Under the amended language, an operator is only excused from collecting information, if required collection measures pose an inconvenience to the landowner. This exception is intended to address situations where an operator would have to damage a building to gain access to a well or spring.

The amendments to § 89.145a(a)(1) reflect federal requirements set forth at 30 CFR 938.16(qqqqq).

§ 89.145a(b) (prompt replacement of water supplies)

Section 89.145a(b) is amended to clarify an operator's obligation to "promptly" restore or replace water supplies affected by underground mining operations. The term "promptly" is not defined but is intended to ensure that restoration or replacement is accomplished as soon as practical considering site-specific conditions.

Section 89.145a(b) is also amended to clarify that a restored or replacement water must be capable for serving both the premining and reasonably foreseeable uses of the original water supply.

The changes to § 89.145a(b) reflect federal requirements set forth in 30 CFR 938.16(iiii) and (rrrrr).

§ 89.145a(e) (provision of temporary water)

Section 89.145a(e) is amended to incorporate several new requirements applicable to situations where EPACT water supplies are affected by underground mining activities. Paragraph (e)(2) provides that temporary water must be provided "promptly," after the operator or the Department determines that effects are the due to the operator's underground mining activities and that the landowner or water user is without a readily available alternate source of water. The requirement for prompt action applies regardless of whether the affected supply lies inside or outside the rebuttable presumption area. Amended paragraph (e)(3) requires that temporary water service be sufficient to satisfy all of the affected water user's needs. A water user's needs are considered to include all needs that existed prior to impact and additional needs that arise between the time of impact and the time a permanent replacement water supply is established, provided those needs were within the capacity of the original water supply. These changes are in response to federal requirements set forth at 30 CFR 938.16(sssss) and (ttttt).

§ 89.145a(f) (compensation for increased cost of restored or replacement water supply)

Section 89.145a(f) is amended to establish revised standards applicable to the costs of operating and maintaining restored or replacement water supplies. A restored or replacement water supply that is no more costly to operate and maintain than the original water supply is considered to meet the requirements of this section. If the operation and maintenance costs of the restored or replacement water supply are higher that those of the original water supply, the operator must make provisions to permanently cover the increased costs. Upon agreement with the landowner, the operator can satisfy its obligation regarding increased cost through a one time payment in an amount covering the present worth of the increased annual operation and maintenance cost for a period agreed to by both parties.

Section 89.145a(f) was amended between proposed and final rulemaking to establish the same cost criteria for all water supplies covered by the BMSLCA rather than establishing separate cost criteria for EPACT and non-EPACT water supplies. The changes with respect to EPACT water supplies were driven by the federal requirements in 30 CFR 938.16(ddddd) and (uuuuu).

§ 89.146a(c) (department investigation of water supply claims)

Amended 86.146(c) imposes an obligation on the Department to provide investigation results to the property owner and mine operator within 10 days of

completing a water supply claim investigation. This change satisfies the federal requirement at 30 CFR 938.16(wwwww).

§ 89.152 (special provisions relating to water supply replacement)

New section (a)(1) establishes requirements applicable to situations where an EPACT water supply has been affected and cannot be restored or replaced with a water supply meeting the criteria in § 89.145a(f). In these situations an operator is required to compensate the property owner for the reduction in the fair market value of the property or to purchase the property for its fair market value immediately prior to the time the water supply was affected. An operator may only pursue one of the aforementioned compensation remedies if the Department determines that a suitable water supply cannot be developed.

New section (a)(2) provides for agreements between operators and landowners, which waive the restoration or replacement of an EPACT water supply. These agreements are subject to the Department's prior determination that a replacement water supply can be feasibly developed for the property on which the affected water supply was located. An operator may be required to submit information demonstrating the availability of water for future development if the information needed to make this determination is not included in the permit application.

New subsection (a)(3) presents three statutory defenses an operator may raise in defending against a claim of liability for contamination, diminution or interruption of an EPACT water supply. One defense is that the alleged problem existed prior to and was not worsened by the operator's underground mining activity. This defense must be based on valid premining survey results documenting that the problem existed prior to the time the water supply was susceptible to the effects of the operator's underground mining activities. Another defense is that the problem occurred more than three years after the completion of all "underground mining activities" – a term which includes all activities involved in the operation of an underground coal mine, including activities associated with the maintenance of the post closure mine pool. The third defense is that the problem is due to a factor other than the operator's underground mining activity. The list of available defenses under § 89.152a(a)(3) does not include the defense based on the landowner's or water user's failure to submit a claim within two years of the date of contamination, diminution or interruption. This defense is no longer available in cases involving EPACT water supplies following OSM's partial supersession of section 5.1 of the BMSLCA.

The aforementioned amendments are incorporated in § 89.152 to satisfy federal requirement set forth at 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr). Restrictions regarding the use of compensation in settlements involving EPACT water supplies are authorized pursuant to OSM's partial supersession of section 5.2(g) and (h) of the BMSLCA. The elimination of the two year statute of limitations on filing claims for effects on EPACT water supplies is authorized pursuant to OSM's partial supersession of section 5.1(b) of the BMSLCA.

Global changes relating to effects of "underground mining operations"

Various regulations pertaining to information requirements and performance standards for the control and repair of subsidence damage are amended by replacing the term "underground mining" with "underground mining operations." The term "underground mining operations" is defined in § 89.5 to include underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining. In comparison, the term "underground mining" only includes the extraction of the coal. These changes affect § 89.141(d) and (d)(9)-(11) (relating to the content of subsidence control plans); § 89.142a(a) (relating to general requirements for subsidence control); § 89.142a(f)(1) and (2) (relating to repair of damage to structures); § 89.142a(g)(1) (relating to the protection of utilities); § 89.142a(h)(1) and (2) (relating to the protection of perennial streams); § 89.142a(i) (relating to prevention of hazards to human safety); § 89.143a(a) (relating to claims of subsidence damage) and § 89.143a(d)(1)-(3) (relating to Department investigations and enforcement actions). These changes are incorporated to satisfy federal requirements at 30 CFR 938.16(mmmmm) and (bbbbbb).

Editorial changes

The final-form regulation includes several changes that are intended to support or clarify regulations amended by this rulemaking.

Section 89.141(d)(3) is amended to delete the list of measures that can be used to protect public buildings and facilities, churches, schools, hospitals, impoundments with storage capacities of 20 acre-feet or more, bodies of water with volume of 20 acre-ft or more and aquifers and bodies of water that serve as significant sources to public water supply systems. The measures in former paragraph (3) are only a subset of a larger list of measures that may be used for protecting this group of structures and features. The complete list of measures appears in the performance standard, § 89.142a(c). To avoid confusion, the incomplete list of measures is deleted from § 89.141(d)(3), which is simply an information requirement.

In § 89.142a(c)(1), the term "surface features" is replaced with the term "features" to more accurately describe the types of features within the referenced group. The features described in paragraph (1) include aquifers, which are usually not regarded as "surface features."

Section 89.142a(d) is amended to incorporated a new paragraph (d)(3), which reflects the provision in section 5(e) of the BMSLCA that "nothing in this subsection shall be construed to prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining." The provision is included to more fully reflect the intent of paragraph 5(e), which

serves as the statutory basis for the new damage prevention and minimization requirements in § 89.142a(d)(1).

The titles of one section and one subsection are amended to more accurately reflect their revised content. The title of § 89.142a(d) is changed from "general measures to prevent or minimize subsidence" to "protection of certain EPACT structures and agricultural structures." The title of § 89.152 is changed from "water supply replacement: relief from responsibility" to "water supply replacement: special provisions."

In § 89.143a, the requirement for the Department to notify a mine operator of the receipt of a structure damage claim is moved from subsection (c) to subsection (d). The purpose of this amendment is to clarify and separate Department responsibilities from the responsibilities of landowners.

The final-form regulation also includes various stylistic changes that were made to conform to standards for drafting regulations.

The amendments to § 86.152(a) were submitted to the Mining and Reclamation Advisory Board (MRAB) because this section applies to bond adjustments for surface mining activities as well as bond adjustments for underground mining activities. The MRAB endorsed the amendments in proposed form at its meeting on April 24, 2003, and in final form at its meeting on January 6, 2004. The other provisions of this rulemaking were not presented to the MRAB because they pertain exclusively to underground mining activities and are outside the purview of the MRAB.

E. Sumary of Comments and Responses on the Proposed Rulemaking

The Board approved publication of the proposed amendments at its meeting on July 15, 2003. The proposed amendments were published at 33 Pa.B. 4554 (September 13, 2003). Public hearings were held on October 15, 2003, in Indiana, Pa. and on October 16, 2003, in Washington, Pa. Comments were accepted from September 13, 2003 to November 12, 2003.

Twenty persons submitted timely comments in response to the proposed rulemaking. Commentators included the Pa. Coal Association, Citizens for Pennsylvania's Future, Wheeling Creek Watershed Conservancy, Mountain Watershed Association, Ten Mile Protection Network, Concern About Water Loss due to Mining, and fourteen private citizens. The Independent Regulatory Review Commission also submitted comments in regard to the proposed rulemaking.

The following is a discussion of the comments received during the public comment period, organized according to subject matter.

Period of liability for water supply effects

One commentator objected to changes that would expand the definition of "underground mining activities" to include "post closure mine pool maintenance." The commentator noted that this change would effectively extend an operator's liability for water supply effects as much as 25 years into the future. The commentator considered this amendment an attempt to invalidate the provisions of section 5.2(e)(2) of the BMSLCA, which the commentator interpreted as limiting liability to a three year period after mining in a specific area of a mine. The commentator also noted that this change was not specifically required by OSM.

The Department does not agree with the commentator's assertions. The amendment to the definition of "underground mining activities" is intended to clarify that liability for water supply effects does not expire prior to the date regulatory jurisdiction would end under the federal regulatory program. Although this amendment is not specifically required by OSM, it clarifies a concept that is essential to demonstrating compliance with federal requirements relating to the duration of liability. Under the federal program, liability for water supply effects has no termination date and remains in effect for as long as OSM maintains regulatory jurisdiction over a mine site. OSM jurisdiction normally extends for the duration of mining and reclamation operations and until five years after the final augmented seeding. To be as effective, Pennsylvania's regulations must provide a period of liability that expires no sooner than the date on which OSM would normally terminate jurisdiction. Pennsylvania's regulations meet this requirement by clarifying that the liability created by section 5.1(a)(1) of the BMSLCA and terminated by section 5.2(e)(2) extends from the time of mining until three years after the completion of the last "underground mining activity." In most cases the final "mining activity" will be the maintenance of the post closure mine pool. This period of liability is based on a reasonable interpretation of section 5.2(e)(2), which extends liability three years after the occurrence of "mining activity."

The amendment to the definition is not an attempt to circumvent the intent of the Pennsylvania General Assembly. Section 5.2(e)(2) provides a release of liability if contamination, diminution or interruption occurs more than three years after "mining activity." Considering that section 5.1(a) establishes liability for all water supply effects caused by "underground mining operations," there is no reason to conclude that the liability referred to in section 5.2(e)(2) would be limited to effects arising from the act of coal extraction. Water supply effects can result from various "mining activities" such as underground pumping operations, the drilling of shafts and mine entries, the removal of underground roof supports, surface support areas and the control of the post closure mine pool. It is reasonable to conclude that the three-year period referred to in section 5.2(e)(2) was intended to run from the time of occurrence of the last "mining activity" that could result in water supply contamination, diminution or interruption.

The interpretation that liability extends from the time of the last mining activity is not new. This interpretation was explained in the Board's June 13, 1998 rulemaking on mine subsidence control, subsidence damage repair and water supply replacement. The

Preamble at 28 Pa. Bulletin 2778 clarifies that liability for water supply impacts "extends from the time of underground mining to the period ending three years after reclamation has been completed." The Preamble discussion goes on to explain that "this [period] should be sufficient to cover virtually all water supply impacts resulting from the underground mine."

Contrary to the commentator's assertion, it is appropriate to clarify the duration of liability through regulation. As illustrated by the commentator's statements, the statutory phrase "mining activity" is subject to differing interpretations, making obvious the need to clarify this matter with a regulatory definition.

Separate from the issue of statutory interpretation, the Commonwealth's interests are best served by ensuring that operators are held liable for effects arising from the development of post closure mine pools. These pools, which develop in mine workings after cessation of pumping, have been documented to cause contamination of adjacent water supplies many years after the time of coal extraction. It is important that the regulations provide an effective remedy for these problems.

Another commentator recommended that § 89.152(a)(2) be amended to delete all references to a three year period of liability. The commentator observed that some water supplies could go without replacement if losses occurred more than three years after mining activity ceased, even though the affects were due to underground mining activities.

Although the Department understands the commentator's concerns, it would be inappropriate to delete references to the three year period set forth in section 5.2(e)(2) of BMSLCA. In the Department's experience, the liability period afforded by section § 89.152(a)(2) should be sufficient to cover virtually all water supply problems resulting from the underground mining activities. Since this level of protection is available under the current provisions of the BMSLCA, it is the preferred means of satisfying OSM requirements relating to the duration of liability.

Distinction between EPACT and non-EPACT structures and water supplies

Two commentators expressed overall objections to amendments that establish separate requirements for EPACT and non-EPACT structures and water supplies. The commentators regarded this "dual" system of regulation as cumbersome and overly complicated. One commentator further asserted that the distinctions were unjustified and not unauthorized under existing Pennsylvania law. One commentator also thought the resulting system would result in unequal protection of surface properties.

Although the Department acknowledges the commentators' concerns, a "dual" system is necessary if Pennsylvania's regulatory program is to comply with federal requirements for state primacy programs and, at the same time, maintain conformance with the BMSLCA. The OSM action at 69 FR 71551 superseded those provisions of the BMSLCA that were in conflict with the Federal SMCRA, laying the foundation for the

two class system. OSM's action effectively nullifies certain statutes of limitations, releases of liability and compensation options as they relate to EPACT structures and water supplies. These provisions do, however, remain in effect for structures and water supplies that are covered by the BMSLCA but are outside the scope of the federal regulations. Consequently, there is a need to distinguish between these two different classes of structures and water supplies.

Bond adjustments

One commentator recommended that bond amounts should be sufficient to cover the replacement value of individual homes and properties.

The Department does not agree with the commentator's recommendation. Neither the state nor the federal program requires a bond covering the total replacement value of all homes and properties in advance of mining. The Department has established bond calculation procedures that take into account the fair market value of the property that is expected to be damaged during the succeeding term of the permit, the level of damage that property is expected to sustain, and the amount of damage that may accumulate prior to the time enforcement is warranted. These procedures are described in Technical Guidance 563-2504-101. OSM has reviewed the Department's bond calculation procedures and found them to be no less effective than the federal regulations, which require bonds to be posted only in cases where damage has not been repaired within 90 days.

Two commentators asserted that bonding requirements should be revised to include the costs of water supply replacement. One of the commentators found fault with the Department's proposal to use liability insurance as the basis for assuring the replacement of affected water supplies, citing several examples of situations where insurance proved ineffective in securing timely water supply replacement.

Although the Department recognizes the commentator's concern, the BMSLCA provides no basis for requiring bonds to ensure water supply replacement. Recognizing this limitation, the Department decided to address this matter through liability insurance, which is required by § 86.168 as a condition for maintaining a mining license. Section 86.168, which sets forth the terms and conditions for liability insurance, requires all policies to cover loss or diminution in quantity or quality of public or private sources of water in an amount at least equal to the general liability portion of the policy. Section 86.168 further provides that the amount of this coverage must be at least $500,000 per occurrence and $1 million aggregate.

In its proposal to OSM, the Department indicated it would review permittees' insurance policies at the time of permit issuance and annually thereafter to ensure that coverage is sufficient to restore or replace all water supplies that may be damaged and need to be replaced at any point during the mining operation. After reviewing the Department's proposal and the provisions of § 86.168, OSM concluded that the assurance of water supply replacement provided by Pennsylvania's regulations was no less effective

than that provided by the federal regulations. *See 69 FR 71528.* OSM also observed that the federal regulations at 30 CFR 811.14(c) allow the use of insurance in lieu of bond for purposes of assuring water supply replacement.

As a matter of record, the Department recently resolved one of the cases cited as an example of the ineffectiveness of liability insurance. The case involved several water supply claims that were pending resolution when the operator declared bankruptcy. In this case, the Department successfully intervened on behalf of the affected property owners to have the insurance company pay for the replacement of all affected water supplies. This case illustrates that liability insurance can serve as an effective means of ensuring water supply replacement in cases where an operator defaults on his liability.

Since the time of the proposed rulemaking, DEP has performed an analysis to determine whether mine operators are carrying sufficient amounts of insurance to cover the replacement of affected water supplies. Based on a review of claims filed during the past five years, DEP found that the minimum coverage required by § 86.168 was sufficient to cover water supply replacement liability in all cases. There was one case where DEP took action to ensure that the insurance policy covered all pending and potential water supply replacement claims and there was one case where an operator's liability came close to the minimum limits (which apply to claims filed within the one-year term of an insurance policy). DEP also annually reviews the adequacy of insurance for pending and potential future claims before renewing an operator's mining license. The results of this analysis further illustrate the effectiveness of liability insurance as a tool for ensuring water supply replacement.

Requirements for mining beneath EPACT structures

One commentator asserted that it will be impossible for operators to comply with the new damage minimization and prevention standards in § 89.142a(d)(1), if § 89.144a is amended to allow owners of EPACT structures to deny access for premining surveys.

The Department disagrees with the commentator's assertion. Section 89.142a(d)(1)(i) only requires operators to minimize material damage to the extent technologically and economically feasible. Under most circumstances, denial of access would make it technologically and economically unfeasible to perform damage minimization measures.

One commentator recommended amending § 89.142a(d) to prevent structure damage when mining results in planned subsidence.

The Department does not agree with this recommendation. The purpose of amending § 89.142a(d) is to ensure that the protection afforded EPACT structures is no less effective than the protection afforded by the federal regulations. The corresponding federal regulations allow operators to minimize rather than prevent material damage when using mining technology that results in planned subsidence. The only exceptions are where underground mining operations would affect a public building, church, school

or hospital, in which case material damage must be prevented. The amendments to § 89.142a(d) incorporate these same provisions.

One commentator thought the amendments to § 89.142a(d) would diminish the protection afforded to public buildings, churches, schools and hospitals and certain impoundment under § 89.142a(c). The commentator observed that § 89.142a(d)(1)(i) requires operators using mining methods that result in planned subsidence to minimize rather than prevent damage to noncommercial buildings – a broad term that includes public buildings, churches and hospitals.

The commentator's concern is acknowledged, however, § 89.142a(d)(1)(i) includes language that addresses this issue. Paragraph (d)(1) specifically excludes noncommercial buildings protected under § 89.142a(c). This exclusion clarifies that noncommercial buildings enumerated in § 89.142a(c) are to be protected in accordance with § 89.142a(c). This clarification was included in the proposed rulemaking and is not changed in the final regulation. It is further noted that the provisions in § 89.142a(d)(1)(i) do not pertain to the impoundments and water bodies enumerated in § 89.142a(c).

One commentator recommended changing § 89.142a(d)(1)(i)(B) to place decisions regarding the feasibility of damage minimization and threats to human health and safety in the hands of the surface owner.

The Department does not agree with this recommendation. Section 89.142a(d)(i), which is based on the federal regulation at 30 CFR 817.121(a)(2)(ii), does not identify the party responsible for determining the feasibility of damage minimization measures or the party responsible for identifying threats to human health and safety. In most cases, the mine operator will make preliminary decisions regarding these matters, subject to oversight and intervention by the Department. Property owners, who are notified of impending mining, may inquire about the operator's plans for damage minimization and, if dissatisfied, request the Department to evaluate the plans for conformance with § 89.142a(d)(i).

Prompt response to structure damage claims

One commentator asserted that it is inappropriate for the Department to cease adherence to the requirements of section 5.5(b) of the BMSLCA which provides a six month period for operators and homeowners to negotiate settlements without Department involvement. The commentator further asserted that there is no reason to allow owners of non-EPACT structures to file claims sooner than six month after damage, because these structures are outside the scope of the federal regulations.

The Department acknowledges the commentator's position, but notes that the former regulatory provisions that barred the filing of claims prior to the end of the six month period were removed to comply with OSM requirements. Moreover, section 9 of the BMSLCA gives the Department broad authority to issue orders "as are necessary to

aid in the enforcement of the provisions of this act." The Department notes that although section 9 allows the Department to issue orders prior to the expiration of the six month negotiation period, it rarely has cause to do so. Subsidence is typically incomplete within the six month time interval so the full extent of damage remains unknown. Department actions prior to the expiration of the six month negotiation period would involve primarily orders for emergency repairs necessary to address health, safety or nuisance concerns. It is further noted that the provisions of section 9 apply to both EPACT structures and other structures protected under the BMSLCA.

One commentator recommended that the regulations be revised to allow landowners to choose who will repair the damage to their properties.

Although the Department acknowledges the commentator's recommendation, it notes that neither the BMSLCA nor the federal regulations give landowners the specific right to choose who will repair subsidence damage. Under both programs the mine operator is the party responsible for making or arranging for repairs or providing compensation to the landowner. If there is a dispute over the scope of repair work or the standards to be met, the Department would make the final decision after considering the wishes of both the mine operator and the landowner.

One commentator recommended revising the regulations to require the Department to pay subsidence damage claims out of the Mine Subsidence Insurance program to ensure prompt, quality repairs and to subsequently seek reimbursement from the operator.

The Department does not support this recommendation because the intent of the BMSLCA and the regulations is to place the cost of repairs squarely on the shoulders of the mine operator who caused the damage. Moreover, implementation of this recommendation would require significant changes to the Department's Mine Subsidence Insurance program, which are beyond the scope of this rulemaking.

Coverage of dwellings and related structures

One commentator objected to amendments that delete the dates on which a permanently affixed appurtenant structure or improvement has to be in place in order to qualify for damage repair and compensation.

The Department acknowledges the commentators objection, however amendments deleting these qualifications, are necessary to comply with OSM requirements. Furthermore, OSM has superseded the statutory provisions that were the basis for these qualifications.

One commentator objected to changes that would make mine operators liable for damages to permanently affixed appurtenant structures and improvements that were not "securely attached to the ground." The commentator asserted that mine operators should not be responsible for damage to aboveground swimming pools or any other "appurtenant

structures" such as small outbuildings, sheds, gazeboes and similar "structures" that could be easily dismantled and removed by the landowner before mining and reinstalled afterwards.

The Department does not agree with the commentator's argument. The federal regulation at 30 CFR 817.121(c)(5) unequivocally requires repair of or compensation for all "occupied residential dwellings and structures related thereto" in place at the time of mining. The federal regulations do not require that a structure be attached to the land surface in order to qualify for repair or compensation provisions, nor do they waive liability for damage to structures that could have been dismantled or moved by the landowner. Moreover, in situations where damage can be prevented by moving or dismantling a structure, 30 CFR 817.121(a) places this obligation squarely on the operator. In order for Pennsylvania's regulatory program to be no less effective than the federal regulatory program, it is necessary to remove the qualification that the structures and improvements enumerated in § 89.142a(f)(1)(iii) be securely attached to the land surface.

One commentator recommended adding a requirement that damaged septic systems must be replaced rather than repaired.

The Department sees no reason to require replacement in all cases. Section 89.142a(f)(1) requires that damaged septic systems be promptly and fully rehabilitated, restored, or replaced. The determination of whether a system should be repaired or replaced depends on the level and extent of damage. Minor damage to pipes and tanks can often be repaired or corrected by replacing the damaged component rather than replacing the entire system.

Statute of limitations on filing claims for structure damage and water supply loss

One commentator objected to amending § 89.143(c) and § 89.152 to delete the two-year statute of limitations for filing claims of damage to EPACT structures and water supplies.

The Department acknowledges the commentator's position, however, these changes are required to comply with the federal requirements at 30 CFR 938.16(jjjj), (xxxx), (nnnnn) and (yyyyy). Furthermore OSM has superseded the statutory provisions in sections 5.1(b) and 5.5(b) of the BMSLCA, which serve as the basis for these statutes of limitations, to the extent these provisions would limit an operator's liability to repair or compensate for damage to an EPACT structure or to restore or replace an EPACT water supply.

One commentator asserted that since there are no statutes of limitations on water supply and structure claims under federal law, there should be no such statutes in state law.

The Department does not agree with the commentator's assertion. OSM's supersession of sections 5.1(b) and 5.5(b) of the BMSLCA only nullifies statutes of limitations in regard to claims filed for EPACT structures and water supplies. The statutes of limitations in sections 5.1(b) and 5.5(b) remain in effect for non-EPACT structures and water supplies. These provisions cannot be disregarded in the regulations.

Denial of access and release of liability

One commentator objected to amendments to § 89.144a which would remove the relief of liability that was previously available to operators who were denied access to perform premining or postmining surveys of EPACT structures. The commentator asserted that the amendments would remove the incentive for structure owners to grant operators access to perform surveys and damage minimization measures. The commentator asserted that premining surveys are necessary to distinguish between damages caused by underground mining operations and damages caused by other factors and expressed concern that, in the absence of premining survey information, operators could be held liable for damages they did not cause. The commentator also asserted that the denial of access to perform damage minimization measures could expose an operator to liability for additional damages that could have been prevented. The commentator also expressed concern that a structure owner could stop full extraction mining beneath his or her property by denying an operator access to perform measures needed to prevent irreparable damage. As a final point, the commentator asserted that denial of access to perform a postmining survey deprives an operator of the right to engage in reasonable discovery concerning the nature of a damage claim.

The Department acknowledges the commentator's concerns, however, the amendments to § 89.144a are necessary to comply with federal requirements in 30 CFR 938.16(vvvv) and (ppppp). Furthermore, OSM has superseded the statutory provision, which relieves an operator of liability if a landowner denies access for a premining or postmining survey, to the extent it applies to EPACT structures.

Contrary to the commentator's assertion, it is possible to distinguish subsidence damage from other types of damage and deterioration in the absence of recent premining survey information. The Department is often faced with the need to distinguish between subsidence damage and other types of damage or structural deterioration in its mine subsidence insurance program where baseline information may be nonexistent or many years old at the time of investigation. The Department has established procedures and criteria that it uses to identify damages caused by mine subsidence and to distinguish those damages from damages caused by other factors. The Department uses these same procedures and criteria in investigating claims filed under its subsidence regulatory program.

The Department agrees with the commentator's assertion that denial of access to perform a premining survey and damage minimization measures could result in more damage to a structure than would have otherwise occurred. In recognition of this possibility, a new provision is added to § 89.144a to address situations where an operator

has been denied access to perform measures necessary to minimize damage. This new provision, incorporated in § 89.144a(c), provides that an operator is not responsible for that portion of structure damages, which the operator can show, by a preponderance of evidence, could have been prevented if the structure owner had provided access to conduct a premining survey and implement necessary and prudent damage minimization measures.

The Department acknowledges the commentator's concern that some property owners could attempt to use denial of access as a means to block full extraction mining beneath a structure that is expected to incur irreparable damage. However, the Department does not regard the provisions of § 89.144a as granting structure owners the right to deny access for mitigation necessary to prevent irreparable damage. Furthermore, where the Department determines that the proposed mining will cause irreparable damage and the operator agrees to take approved measures to minimize the impacts resulting from subsidence but the structure owner denies access to implement the mitigation measures, the operator will have met the legal requirements of section 9.1 of the BMSLCA and the denial of access will not prevent the mining.

The commentator's assertion that the denial to conduct a postmining survey equates to denial of the right of a defendant to conduct reasonable discovery is incorrect. If an operator were denied access to perform either a premining or post mining survey, the Department or the property owner would still be required to assemble information needed to substantiate the extent of damage and prove that the operator's underground mining operations were the cause. This information would be discoverable in legal proceedings before the Environmental Hearing Board or the courts, if the operator were to appeal the Department's order to repair or compensate for the alleged damage.

One commentator asserted that in no instance should an operator be relieved of liability where subsidence caused by mining is determined to be the cause of damage. The commentator also asserted that landowners who deny access should not be required to provide conclusive evidence that a company's underground mining operations were the cause of the damage.

The Department believes that the amendments to § 89.144a address the commentator's concerns. Final § 89.144a(b) provides that an operator is liable for damage to an EPACT structure if the Department or the landowner can show by a preponderance of evidence that the damage was caused by the operator's underground mining operations. The standard of evidence used in subsection (b) is less stringent than the "conclusive evidence" cited by the commentator.

One commentator recommended that landowners should be allowed to select home inspectors or contractors to perform premining and postmining surveys.

The Department notes that § 89.144a does not prevent landowners from hiring inspectors to perform premining and postmining surveys. However, landowners must allow mine operators equal access to perform premining or postmining surveys of their

own. Landowners who deny access may forfeit certain rights to repair or compensation if damaged structures do not qualify as EPACT structures.

One commentator felt it was a conflict of interest to designate the mine operator as the party responsible for performing premining surveys.

The Department does not agree with the commentator's assertion. The primary obligation to perform premining surveys rests with the mine operator under both the Chapter 89 and the federal regulations. Landowners are free to conduct their own surveys at their expense. The Department does not have the staff or resources to perform these surveys.

Water supply survey requirements

One commentator objected to the amendments in § 89.145a(a). The commentator questioned whether the Department has sufficient staff to take on this additional obligation. The commentator felt that a fixed 2,500 foot distance should be used to ensure that surveys are performed sufficiently in advance of mining.

The Department does not agree with the commentator's recommendation regarding the use of a fixed 2,500 foot distance for defining premining survey requirements. OSM objects to using fixed separation distances for this purpose, which is why § 89.145a(a) is amended to incorporate a flexible standard.

In regard to the commenator's other concern, the Department does not regard this amendment as substantially increasing the workload on permit review staff. The determination of appropriate sampling distances is closely related to other determinations reviewers must make during the course of application review, such as the identification of water supplies which are susceptible to mining-related effects. Reviewers' determinations will be facilitated through the use of Department databases and permit files, which contain information on distances between mining and affected water supplies.

Provision of temporary water

One commentator asserted that there was no reason to distinguish between EPACT and non-EPACT water supplies in amending § 89.145a(e) to incorporate requirements relating to the prompt provision of temporary water. The commentator noted that the BMSLCA already provides comparable protection for all "domestic water supplies."

The Department does not agree with the commentator's assessment. There is a need to clarify that §89.145a(e) applies to EPACT water supplies. The federal requirement to promptly provide temporary water applies to a wider range of water supplies than the "domestic water supplies" acknowledged by the commentator. The federal regulations also apply to water supplies that provide drinking water to industrial

plants, commercial buildings, noncommercial buildings and recreational facilities. To be no less effective than the federal regulations, § 89.145a(e) must require the prompt provision of temporary water in all situations where affected water supplies fall within the scope of the federal water supply replacement requirements. It is therefore necessary to clarify that the provisions of § 89.145a(e) are applicable to all cases involving EPACT water supplies.

One commentator objected to the use of water buffaloes (temporary water storage tanks) as temporary water sources. The commentator questioned whether anyone tests the water stored in these tanks.

The Department notes that use of storage tanks and hauled water is a permissible means of providing temporary water under both state and federal regulatory programs. In Pennsylvania, the bulk water haulers that provide temporary water service are subject to the requirements of 25 Pa. Code Chapter 109, which include the periodic testing of delivered water.

Standards for quantity of replacement water supplies

Two commentators recommended that § 89.145a(b) should be further revised to match the federal standard in 30 CFR 701.5, which requires replacement water supplies to be equivalent in quantity and quality to premining water supplies. One of the commentators further asserted that if replacement standards are left unchanged, the landowner should be the one who determines the scope of existing and reasonably foreseeable uses.

The Department does not agree with the commentators' recommendations. OSM has already determined that Pennsylvania's water supply replacement provisions, which rely on actual and reasonably foreseeable use as the standard, are no less effective than federal standards for water supply replacement. *See 66 FR 67011.* Since the BMSLCA establishes a use-based standard for determining the adequacy of replacement water supplies, it would be inappropriate to substitute alternative criteria.

In regard to the second recommendation, the existing regulations provide ample opportunity for landowners to provide input regarding the existing and reasonably foreseeable uses of water supplies. Section 89.145a(a) requires an operator to gather information on existing and reasonably foreseeable uses as part of the premining survey of a water supply. It also requires an operator to provide this information to the landowner within 30 days. At that point, the landowner can accept the operator's description or provide the Department with information that justifies consideration of additional uses.

Cost of operating and maintaining a replacement water supply

One commentator supported the changes to § 89.145a(f)(5) that make operators liable for all increases in costs associated with the operation and maintenance of a

restored or replacement water supply. However, the commentator did not support the change in paragraph (5)(i) that allows a mine operator and landowner to negotiate the time period for which compensation is to be provided. The commentator observed that even if this provision is based on the federal regulation in 30 CFR 701.5, it represents a lower standard than Pennsylvania now has because DEP currently requires operators to pay increased costs in perpetuity. The commentator asserted that when state regulations are more effective than their federal counterparts, OSM cannot require that they be amended to match federal requirements.

The Department agrees with the commentator's recommendation. Section 89.145a(f)(5) has been changed in the final rulemaking to clarify that the requirement to provide for the permanent payment of increased operating and maintenance costs applies to cases involving EPACT water supplies as well as cases involving other types of water supplies. Although the remaining portion of paragraph (5) tracks the language of the federal regulation, the basic requirement to provide for the "permanent payment" of the increased cost in now clearly stated. This change also makes the provisions of § 89.145a(f)(5) consistent with Pennsylvania case law.

One commentator objected to the new provision in § 89.145a(f)(5)(i) which allows for agreements setting forth the terms of payment for increased operation and maintenance costs. The commentator believes that many so-called "agreements" between landowners and coal operators leave room for unfair, unchallenged settlements and that property owners are often at disadvantage in negotiating agreements with mine operators.

The Department acknowledges the commentator's concerns, but notes that voluntary agreements for the payment of increased operation and maintenance costs are permissible under both state and federal regulations. The Department has always offered and will continue to offer assistance to property owners who are faced with signing an agreement.

One commentator indicated that it did not oppose the amendment to § 89.145a(f)(5) which would obligate our mine operators to pay all increased costs of operating and maintaining a restored or replaced domestic water supply.

The Department acknowledges the commentator's position, but notes that § 89.145a(f)(5) was changed between proposed and final rulemaking to apply to all water supplies not just EPACT water supplies.

One commentator recommended that the "de minimis" cost concept in § 89.145a(f)(5) should be deleted with respect to all water supplies covered by the BMSLCA. The commentator asserted that the EHB never intended this concept to be defined or used as it is currently. The commentator noted that what is "de minimis" to some may not be "de minimis" to others.

The final regulation in § 89.145(f)(5) has been amended to delete the "de minimis" cost concept in regard to both EPACT and non-EPACT water supplies. The Department agrees that operators should be liable for all increased costs attributable to the operation and maintenance of a restored or replacement water supply. The Department also wishes to avoid creating two separate regulatory standards for the cost of replacement water supplies which are based on the same statutory provision. In view of this change, the term "de minimis cost increase" and its definition are deleted from § 89.5, since the term is not used elsewhere in Chapter 89.

Compensation for loss of water supply

One commentator advocated the use of improved prediction techniques and more careful permitting so that cases where water supplies cannot be replaced become rare or nonexistent.

The Department acknowledges the commentator's recommendation and notes that it continually strives to improve its predictive capabilities and to ensure that replacement options are available for all water supplies that are likely to be impacted.

One commentator asserted that the conditions under which an operator is allowed to provide compensation rather than restore or replace an affected water supply should be the same for all water supplies covered by Act 54 and not be restricted to EPACT water supplies.

The Department does not agree with the commentator's assertion. It is necessary to distinguish between the conditions under which compensation may be used to satisfy EPACT water supply claims and the conditions under which compensation may be used to satisfy non-EPACT water supply claims. OSM has only superseded sections 5.2(g) and (h) of the BMSLCA to the extent these sections are inconsistent with the Federal SMCRA. This being the case, OSM's action only limits the use of compensation with respect to settlements involving EPACT water supplies. The compensation options and restrictions on Department actions remain applicable to settlements involving water supplies that are outside the scope of the federal program. It is therefore necessary to reflect this distinction in § 89.152.

One commentator asserted that the proposed amendment to § 89.152(b), which allows a property owner to waive the provision of a restored or replacement water supply, makes Pennsylvania's regulations more liberal insofar as water replacement goes, instead of more restrictive as OSM said they should be. The commentator recommended amending § 89.152(b) to require that a portion of the compensation paid pursuant to a waiver agreement be held in escrow to guarantee water replacement in case the property owner or a successor property owner desires such replacement in the future. The commentator believed that if waiver agreements are determined to be unconstitutional, coal companies may be deemed liable for water supply replacement irrespective of the provisions of these waiver agreements.

The Department does not agree with the commentator's recommendations. The provision in § 89.152(b) is based on federal regulatory requirements relating to the replacement of affected water supplies (See 701.5, definition of *Replacement of water supply*). OSM has found this provision to be no less effective than those requirements. Moreover, this provision is clearly within the scope of section 5.3(a) of the BMSLCA, which provides that "[n]othing contained in this act shall prohibit the mine operator and landowner at any time after the effective date of this section from voluntarily entering into an agreement establishing the manner and means by which an affected water supply is to be restored or an alternate supply is to be provided or providing fair compensation for such contamination, diminution or interruption."

The Department also notes that the commentator's recommendation concerning the use of escrow to ensure the future development of a replacement water supply is not authorized by the BMSLCA. It is also beyond the scope of OSM's requirements.

One commentator recommended that requirements provide for replacement of all affected water supplies.

The Department believes that the amendments to § 89.152(a) adequately ensure the restoration or replacement of EPACT water supplies that are affected by underground mining operations. Section 89.152(b), which addresses non-EPACT water supplies, also promotes the restoration or replacement of affected water supplies but includes provisions that allow claims to be settled through compensation when operators decide restoration or replacement is not practical. These two distinct standards are necessary because OSM's final rule only results in a partial supersession of sections 5.2(g) and (h), leaving intact provisions that allow claims for non-EPACT water supplies to be settled though compensation.

The Department also notes that that water supply replacement requirements in § 89.145a and the special water supply replacement provisions in § 89.152 only apply to springs with documented water supply uses. Springs that are not used for domestic, commercial industrial, recreational or agricultural purposes do not meet the definition of "water supply" in § 89.5.

One commentator asserted that mine operators should be held more accountable for the damage they cause. The commentator expressed particular concern about farms that rely on springs and ponds for agricultural uses.

The Department acknowledges the commentator's concerns and notes that the law requires restoration or replacement of affected agricultural water supplies. It is rare that a water supply cannot be repaired or replaced. DEP does not allow mining that would diminish a water supply, if it determines that restoration or replacement is unlikely to be successful. Pennsylvania's existing law and regulations include provisions designed to protect property values in cases where agricultural water supplies cannot be restored or replaced. In cases where water supplies cannot be restored or replaced, a property owner may insist that the mine operator purchase the property at its fair market value

immediately prior to the time of water loss or provide compensation equal to the reduction in fair market value resulting from the water loss. These options are not in any way diminished by this rulemaking.

Availability of replacement water supply

One commentator asserted that the Department should deny permit applications that fail to demonstrate that mining operations will not pollute, disrupt, or destroy the waters of the Commonwealth. The commentator cited a recent situation where the Department granted funds to pay for the expansion of a public water system necessitated by the destruction of private water supplies by an underground mining operation. The commentator felt that the economic feasibility of replacing water resources should not be a concern of citizens or the Department and that if replacement is not feasible, mining should not take place.

The Department believes that this rulemaking in combination with the federal supersession of sections 5.2(g) and (h) of the BMSLCA will serve to tighten requirements relating to the restoration and replacement of EPACT water supplies. Under the amended law and regulations operators must restore or replace affected EPACT water supplies except in situations where the Department determines that a permanent replacement source meeting regulatory standards for adequacy cannot be developed. Cost alone cannot be the basis for this determination. Under the new requirements, an operator could be faced with water supply replacement expenses amounting to several times the value of the affected property. The elimination of the option to compensate rather than restore or replace affected EPACT water supplies should, in itself, cause operators to consider more carefully which supplies their operations are likely to affect and how those supplies will be restored or replaced.

The Department further notes that the partial supersession of section 5.2(h) removes restrictions that previously limited its authority to order the replacement of affected EPACT water supplies. This authority, in combination with the Department's current application preview procedures, should provide greater assurance of water supply replacement. As part of an application review, the Department ensures that suitable plans are in place for the restoration or replacement of all water supplies that are likely to be affected by proposed operations.

One commentator asserted that the feasibility of providing municipal water service to affected properties should be proven before any mining permit is issued.

The Department agrees and notes that provisions are currently in place to address the commentator's concern. Section 89.36(c) requires operators to describe how they will replace water supplies affected by their underground mining operations. The Department now requires permit applications to include information showing that all water supplies that are likely to be affected by underground mining operations can be restored or replaced. In addition, the amendments to § 89.152 adopted pursuant to this

(2) The Chairman of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(3) The Chairman of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(4) The Chairman of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(5) This order shall take effect immediately.

BY:

KATHLEEN A. McGINTY
Chairperson
Environmental Quality Board

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 86. SURFACE AND UNDERGROUND COAL MINING: GENERAL

Subchapter A. GENERAL PROVISIONS

§ 86.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Underground mining activities--Includes the following:

* * * * *

(ii) Underground operations such as underground construction, operation and reclamation of shafts, adits, [underground] support facilities LOCATED UNDERGROUND, in situ processing and underground mining, hauling, storage and blasting.

(iii) Operation of a mine, including preparatory work in connection with the opening and reopening of a mine, backfilling, sealing and other closing procedures, POSTCLOSURE MINE POOL MAINTENANCE and any other work done on land or water in connection with a mine.

* * * * *

Subchapter F. BONDING AND INSURANCE REQUIREMENTS AMOUNT AND DURATION OF LIABILITY

§ 86.151. Period of liability.

* * * * *

(b) Liability under bonds posted for the surface effects of an underground mine, coal preparation activity or other long-term facility shall continue for the duration of the mining operation or use of the facility, its reclamation as provided in the acts,

regulations adopted thereunder and the conditions of the permit, and for 5 years thereafter, except for:

* * * * *

(2) The risk of subsidence from bituminous underground mines for which liability under the bond shall continue for 10 years after completion of [the mining and reclamation operation] UNDERGROUND MINING OPERATIONS.

* * * * *

§ 86.152. Bond adjustments.

(a) [The Department may require a permittee to deposit additional bonding if the methods of mining or operation change, standards of reclamation change or the cost of reclamation, restoration or abatement work increases so that an additional amount of bond is necessary.] THE AMOUNT OF BOND REQUIRED AND THE TERMS OF THE ACCEPTANCE OF THE APPLICANT'S BOND WILL BE ADJUSTED BY THE DEPARTMENT FROM TIME TO TIME AS THE AREA REQUIRING BOND COVERAGE IS INCREASED OR DECREASED, OR WHEN THE COST OF FUTURE RECLAMATION CHANGES, OR WHEN THE PROJECTED SUBSIDENCE DAMAGE REPAIR LIABILITY CHANGES. THE DEPARTMENT MAY SPECIFY PERIODIC TIMES OR SET A SCHEDULE FOR REEVALUATING AND ADJUSTING THE BOND AMOUNT TO FULFILL THIS REQUIREMENT. This requirement shall only be binding upon the permittee and does not compel a third party, including surety companies, to provide additional bond coverage AND DOES NOT EXTEND THE COVERAGE OF A SUBSIDENCE BOND BEYOND THE REQUIREMENTS IMPOSED BY SECTIONS 5, 5.4, 5.5 AND 5.6 OF THE BITUMINOUS MINE SUBSIDENCE AND LAND CONSERVATION ACT.

* * * * *

CHAPTER 89. UNDERGROUND MINING OF COAL AND COAL PREPARATION FACILITIES

Subchapter A. EROSION AND SEDIMENTATION CONTROL GENERAL PROVISIONS

§ 89.5. Definitions.

(a) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

[*De minimis cost increase*—For purposes of § 89.145a (relating to water supply replacement: performance standards), a cost increase which meets one of the following criteria:

(i) Is less than 15% of the annual operating and maintenance costs of the previous water supply that is restored or replaced.

(ii) Is less than $60 per year.]

* * * * *

EPACT STRUCTURES--STRUCTURES THAT ARE SUBJECT TO REPAIR AND COMPENSATION REQUIREMENTS UNDER SECTION 720(A) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT (30 U.S.C.A. § 1309A). THE TERM INCLUDES:

(i) NONCOMMERCIAL BUILDINGS.

(ii) DWELLINGS.

(iii) STRUCTURES ADJUNCT TO OR USED IN CONJUNCTION WITH DWELLINGS, INCLUDING, BUT NOT LIMITED TO:

(A) GARAGES.

(B) STORAGE SHEDS AND BARNS.

(C) GREENHOUSES AND RELATED BUILDINGS.

(D) CUSTOMER-OWNED UTILITIES AND CABLES.

(E) FENCES AND OTHER ENCLOSURES.

(F) RETAINING WALLS.

(G) PAVED OR IMPROVED PATIOS.

(H) WALKS AND DRIVEWAYS.

(I) SEPTIC SEWAGE TREATMENT FACILITIES.

(J) INGROUND SWIMMING POOLS.

(K) LOT DRAINAGE AND LAWN AND GARDEN IRRIGATION SYSTEMS.

EPACT WATER SUPPLIES--

(i) WATER SUPPLIES THAT ARE SUBJECT TO REPLACEMENT UNDER SECTION 720(A) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT, INCLUDING DRINKING, DOMESTIC OR RESIDENTIAL WATER SUPPLIES IN EXISTENCE PRIOR TO THE DATE OF PERMIT APPLICATION.

(ii) THE TERM INCLUDES WATER RECEIVED FROM A WELL OR SPRING AND ANY APPURTENANT DELIVERY SYSTEM THAT PROVIDES WATER FOR DIRECT HUMAN CONSUMPTION OR HOUSEHOLD USE.

(III) THE TERM DOES NOT INCLUDE WELLS AND SPRINGS THAT SERVE ONLY AGRICULTURAL, COMMERCIAL OR INDUSTRIAL ENTERPRISES EXCEPT TO THE EXTENT THE WATER SUPPLY IS FOR DIRECT HUMAN CONSUMPTION OR HUMAN SANITATION, OR DOMESTIC USE.

* * * * *

[*Permanently affixed appurtenant structures*--A structure or facility securely attached to the land surface if that structure or facility is adjunct to and used in connection with structures listed in § 89.142a(f)(1)(i) and (iii) (relating to subsidence control: performance standards). Examples of these structures include:

(i) Garages.

(ii) Storage sheds and barns.

(iii) Greenhouses and related structures.

(iv) Customer-owned utilities and cables.

(v) Fences and other enclosures.

(vi) Retaining walls.

(vii) Paved or improved patios, walks and driveways.

(viii) Septic treatment facilities.

(ix) Inground swimming pools.

(x) Lot drainage and lawn and garden irrigation systems.]

* * * * *

Underground mining activities--[The term includes] INCLUDES the following:

(i) Surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance and reclamation of roads, aboveground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities, including hoist and ventilating ducts, areas used for the disposal and storage of waste[,] and areas on which materials incident to underground mining operations are placed.

(ii) Underground operations such as underground construction, operation[,] and reclamation of shafts, adits, [underground] support facilities LOCATED UNDERGROUND, in situ processing[,] and underground mining, hauling, storage and blasting.

(iii) Operation of [the] A mine including preparatory work in connection with the opening [or] AND reopening of a mine, backfilling, sealing, and other closing procedures, POSTCLOSURE MINE POOL MAINTENANCE and any other work done on land or water in connection with [the] A mine.

Underground mining operations--Underground construction, operation and reclamation of shafts, adits, [underground] support facilities LOCATED UNDERGROUND, in situ processing and underground mining, hauling, storage and blasting.

* * * * *

Subchapter F. SUBSIDENCE CONTROL AND WATER SUPPLY REPLACEMENT

§ 89.141. Subsidence control: application requirements.

* * * * *

(d) *Subsidence control plan.* The permit application shall include a subsidence control plan which describes the measures to be taken to control subsidence effects from the proposed underground mining OPERATIONS. The plan shall address the area in which structures, facilities or features may be materially damaged by mine subsidence. At a minimum, the plan shall address all areas within a 30° angle of draw of underground mining OPERATIONS which will occur during the 5-year term of the permit. The subsidence control plan shall include the following information:

(1) A description of the method of coal removal, such as longwall mining, room and pillar mining, hydraulic mining or other extraction methods, including the size, sequence[,] and timing for the development of underground workings.

* * * * *

(3) For each structure and feature, or class of structures and features, described in § 89.142a(c) (relating to subsidence control: performance standards), a detailed description of the measures to be taken to ensure that subsidence will not cause material damage to, or reduce the reasonably foreseeable uses of the structures or features. [The measures shall include one or more of the following:

(i) Backfilling or backstowing of voids.

(ii) Leaving support pillars of coal.

(iii) Leaving areas in which no coal extraction will occur.

(iv) Taking measures on the surface to prevent material damage or reduction of the reasonably foreseeable use of the structure or feature.

(v) Other measures approved by the Department.]

* * * * *

(9) FOR EPACT STRUCTURES OTHER THAN NONCOMMERCIAL BUILDINGS PROTECTED UNDER § 89.142a(c), A DESCRIPTION OF THE METHODS TO BE EMPLOYED IN AREAS OF PLANNED SUBSIDENCE TO MINIMIZE DAMAGE OR OTHERWISE COMPLY WITH § 89.142a(d)(1)(i).

(10) FOR EPACT STRUCTURES OTHER THAN NONCOMMERCIAL BUILDINGS PROTECTED UNDER § 89.142a(c), A DESCRIPTION OF THE SUBSIDENCE CONTROL MEASURES TO BE TAKEN UNDER § 89.142a(d)(1)(ii) TO PREVENT SUBSIDENCE AND SUBSIDENCE-RELATED DAMAGE IN AREAS WHERE UNDERGROUND MINING OPERATIONS ARE NOT PROJECTED TO RESULT IN PLANNED SUBSIDENCE.

(11) A description of the measures which will be taken to maintain the value and foreseeable uses of perennial streams which may be impacted by underground mining OPERATIONS. The description shall include a discussion of the effectiveness of the proposed measures as related to prior underground mining OPERATIONS under similar conditions.

[(10)] (12) * * *

[(11)] (13) * * *

[(12)] (14) * * *

* * * * *

[(13)] (15) * * *

§ 89.142a. Subsidence control: performance standards.

(a) *General requirements.* Underground mining OPERATIONS shall be planned and conducted in accordance with the following:

* * * * *

(b) *Structure surveys.*

* * * * *

(2) The operator will be relieved of the duty to conduct a premining survey if the operator submits evidence to the Department that:

(i) The operator notified the owner by certified mail or personal service of the landowner's rights as set forth in sections 5.4—5.6 of The Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § § 1406.5d—1406.5f).

(ii) The operator attempted to conduct a survey.

(iii) The landowner failed to provide the operator with access to the site to conduct a survey within 10 days of receipt of the operator's notice of intent to conduct the survey.

(3) **A LANDOWNER, WHO IS DULY NOTIFIED OF AN OPERATOR'S INTENT TO CONDUCT A PREMINING OR POSTMINING SURVEY IN ACCORDANCE WITH THE NOTIFICATION PROCEDURES DESCRIBED IN PARAGRAPH (2), SHOULD PROVIDE THE OPERATOR ACCESS TO THE SITE FOR THE PURPOSE OFCONDUCTING THE SURVEY WITHIN THE TIME FRAME SPECIFIED IN PARAGRAPH (2) SO THE OPERATOR CAN:**

(i) DOCUMENT THE PREMINING CONDITION OF THE STRUCTURE, ASSESS THE POTENTIAL FOR MATERIAL DAMAGE AND PLAN APPROPRIATE DAMAGE MINIMIZATION MEASURES; OR

(ii) DETERMINE THE EXTENT OF SUBSIDENCE DAMAGE AND THE SCOPE OF NECESSARY REPAIRS.

* * * * *

(c) *Restrictions on underground mining.*

(1) Unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of the structures and [surface] features listed in [subparagraph] SUBPARAGRAPHS (i)--(v), no underground mining [shall] MAY be conducted beneath or adjacent to:

* * * * *

(3) If the measures implemented by the operator cause material damage or reduce the reasonably foreseeable use of the structures or features listed in paragraph (1), the Department [will impose additional measures to further minimize the potential for these effects] MAY SUSPEND MINING UNDER OR ADJACENT TO THESE STRUCTURES OR FEATURES UNTIL THE SUBSIDENCE CONTROL PLAN IS MODIFIED TO ENSURE PREVENTION OF FURTHER MATERIAL DAMAGE TO THESE FACILITIES OR FEATURES.

(d) [*General measures to prevent or minimize irreparable damage*] *PROTECTION OF CERTAIN EPACT STRUCTURES AND AGRICULTURAL STRUCTURES.*

(1) FOR EPACT STRUCTURES OTHER THAN NONCOMMERCIAL BUILDINGS PROTECTED UNDER SUBSECTION (c):

(i) IF AN OPERATOR EMPLOYS MINING TECHNOLOGY THAT PROVIDES FOR PLANNED SUBSIDENCE IN A PREDICTABLE AND CONTROLLED MANNER, THE OPERATOR SHALL TAKE NECESSARY AND PRUDENT MEASURES, CONSISTENT WITH THE MINING METHOD EMPLOYED, TO MINIMIZE MATERIAL DAMAGE TO THE EXTENT TECHNOLOGICALLY AND ECONOMICALLY FEASIBLE TO THE STRUCTURE, EXCEPT WHERE ONE OF THE FOLLOWING APPLIES:

(A) THE STRUCTURE OWNER HAS CONSENTED, IN WRITING, TO ALLOW MATERIAL DAMAGE.

(B) THE COSTS OF THESE MEASURES WOULD EXCEED THE ANTICIPATED COST OF REPAIRS AND THE ANTICIPATED DAMAGE WILL NOT CONSTITUTE A THREAT TO HEALTH OR SAFETY.

(ii) IF AN OPERATOR EMPLOYS MINING TECHNOLOGY THAT DOES NOT RESULT IN PLANNED SUBSIDENCE IN A PREDICTABLE AND CONTROLLED MANNER, THE OPERATOR SHALL ADOPT MEASURES CONSISTENT WITH KNOWN TECHNOLOGY TO PREVENT SUBSIDENCE AND SUBSIDENCE-RELATED DAMAGE TO THE EXTENT TECHNOLOGICALLY AND ECONOMICALLY FEASIBLE TO THE STRUCTURE. MEASURES MAY INCLUDE, BUT ARE NOT LIMITED TO:

(A) BACKSTOWING OR BACKFILLING OF VOIDS.

(B) LEAVING SUPPORT PILLARS OF COAL.

(C) LEAVING AREAS IN WHICH NO COAL IS REMOVED, INCLUDING A DESCRIPTION OF THE OVERLYING AREA TO BE PROTECTED BY LEAVING COAL IN PLACE.

(D) TAKING MEASURES ON THE SURFACE TO PREVENT OR MINIMIZE MATERIAL DAMAGE OR DIMINUTION IN VALUE OF THE SURFACE.

(E) OTHER MEASURES APPROVED BY THE DEPARTMENT.

(2) If the Department determines and so notifies a mine operator that a proposed mining technique or extraction ratio will result in irreparable damage to a structure enumerated in subsection (f)(1)(iii)--(v), the operator may not use the technique or extraction ratio unless the building owner, prior to mining, consents to the mining or the operator, prior to mining, takes measures approved by the Department to minimize or reduce impacts resulting from subsidence to these structures.

(3) NOTHING IN PARAGRAPH (1) OR (2) PROHIBITS PLANNED SUBSIDENCE IN A PREDICTABLE AND CONTROLLED MANNER OR THE STANDARD METHOD OF ROOM AND PILLAR MINING.

* * * * *

(f) *Repair of damage to structures.*

(1) *Repair or compensation for damage to certain structures.* Whenever underground mining OPERATIONS conducted on or after August 21, 1994, [causes] CAUSE damage to any of the structures listed in subparagraphs (i)--(v), the operator responsible for extracting the coal shall PROMPTLY AND fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the provisions of § 89.144a (relating to subsidence control: relief from responsibility) relieves the operator of responsibility.

(i) Buildings that are accessible to the public including, but not limited to, commercial, industrial and recreational buildings and all [permanently affixed appurtenant] structures[.] THAT ARE SECURELY ATTACHED TO THE LAND SURFACE AND ADJUNCT TO OR USED IN CONJUNCTION WITH THESE BUILDINGS, INCLUDING:

(A) GARAGES.

(B) STORAGE SHEDS AND BARNS.

(C) GREENHOUSES AND RELATED BUILDINGS.

(D) CUSTOMER-OWNED UTILITIES AND CABLES.

(E) FENCES AND OTHER ENCLOSURES.

(F) RETAINING WALLS.

(G) PAVED OR IMPROVED PATIOS.

(H) WALKS AND DRIVEWAYS.

(I) SEPTIC SEWAGE TREATMENT FACILITIES.

(J) INGROUND SWIMMING POOLS.

(K) LOT DRAINAGE AND LAWN AND GARDEN IRRIGATION SYSTEMS.

* * * * *

(iii) Dwellings which are used for human habitation and permanently affixed appurtenant structures or improvements [in place on August 21, 1994, or on the date of first publication of the application for a coal mining activity permit or a 5-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in the application]. IN THE CONTEXT OF THIS PARAGRAPH, THE PHRASE "PERMANENTLY AFFIXED APPURTENANT STRUCTURES [AND] OR IMPROVEMENTS" INCLUDES, BUT IS NOT LIMITED TO, STRUCTURES ADJUNCT TO OR USED IN CONJUNCTION WITH DWELLINGS, SUCH AS:

(A) GARAGES.

(B) STORAGE SHEDS AND BARNS.

(C) GREENHOUSES AND RELATED BUILDINGS.

(D) CUSTOMER-OWNED UTILITIES AND CABLES.

(E) FENCES AND OTHER ENCLOSURES.

(F) RETAINING WALLS.

(G) PAVED OR IMPROVED PATIOS.

(H) WALKS AND DRIVEWAYS.

(I) SEPTIC SEWAGE TREATMENT FACILITIES.

(J) INGROUND SWIMMING POOLS.

(K) LOT DRAINAGE AND LAWN AND GARDEN IRRIGATION SYSTEMS.

* * * * *

(2) *Amount of compensation.*

(i) If, rather than repair the damage, the operator compensates the structure owner for damage caused by the operator's underground mining OPERATIONS, the operator shall provide compensation equal to the reasonable cost of repairing the structure or, if the structure is determined to be irreparably damaged, the compensation shall be equal to the reasonable cost of its replacement except for an irreparably damaged agricultural structure identified in paragraph (1)(iv) or (v) which at the time of damage was being used for a different purpose than the purpose for which the structure was originally constructed. For such an irreparably damaged agricultural structure, the operator may provide for the reasonable cost to replace the damaged structure with a structure satisfying the functions and purposes served by the damaged structure before the damage occurred if the operator can affirmatively prove that the structure was being used for a different purpose than the purpose for which the structure was originally constructed.

* * * * *

(g) *Protection of utilities.*

(1) Underground mining OPERATIONS shall be planned and conducted in a manner which minimizes damage, destruction or disruption in services provided by oil, gas and water wells; oil, gas and coal slurry pipelines; rail lines; electric and telephone lines; and water and sewerage lines which pass under, over, or through the permit area, unless otherwise approved by the owner of the facilities and the Department.

* * * * *

(h) *Perennial streams.*

(1) Underground mining OPERATIONS shall be planned and conducted in a manner which maintains the value and reasonably foreseeable uses of perennial streams, such as aquatic life; water supply; and recreation, as they existed prior to coal extraction beneath streams.

(2) If the Department finds that the underground mining [has] OPERATIONS HAVE adversely affected a perennial stream, the operator shall mitigate the adverse effects to the extent technologically and economically feasible, and, if necessary, file revised plans or other data to demonstrate that future underground mining OPERATIONS will meet the requirements of paragraph (1).

(i) *Prevention of hazards to human safety.*

(1) The Department will suspend underground mining OPERATIONS beneath urbanized areas; cities; towns; and communities and adjacent to or beneath industrial or commercial buildings; lined solid and hazardous waste disposal areas; major impoundments of 20 acre-feet (2.47 hectare-meters) or more; or perennial streams, if the operations present an imminent danger to the public.

* * * * *

§ 89.143a. Subsidence control: procedure for resolution of subsidence damage claims.

(a) The owner of a structure enumerated in § 89.142a(f)(1) (relating to subsidence control: performance standards) who believes that underground mining OPERATIONS caused mine subsidence resulting in damage to the structure and who wishes to secure repair of the structure or compensation for the damage shall provide the operator responsible for the underground mining with notification of the damage to the structure.

* * * * *

(c) If[, within 6 months of the date that the building owner sent the operator notification of subsidence damage to the structure,] the parties are unable to agree as to

the cause of the damage or the reasonable cost of repair or compensation for the structure, the owner of the structure may [within 2 years of the date damage to the structure occurred,] file a claim in writing with the Department. [The Department will send a copy of the claim to the operator.] THE OWNER OF A STRUCTURE THAT IS NOT AN EPACT STRUCTURE SHALL FILE THE CLAIM WITHIN 2 YEARS OF THE DATE THE STRUCTURE WAS DAMAGED.

(d) Upon receipt of the claim, the Department will SEND A COPY OF THE CLAIM TO THE OPERATOR AND conduct an investigation in accordance with the following procedure:

(1) Within 30 days of receipt of the claim, the Department will conduct an investigation to determine whether underground mining OPERATIONS caused the subsidence damage to the structure AND PROVIDE THE RESULTS OF ITS INVESTIGATION TO THE PROPERTY OWNER AND MINE OPERATOR WITHIN 10 DAYS OF COMPLETING THE INVESTIGATION.

(2) Within 60 days of completion of the investigation, the Department will determine, and set forth in writing, whether the damage is attributable to subsidence caused by the operator's underground mining OPERATIONS and, if so, the reasonable cost of repairing or replacing the damaged structure.

(3) If the Department finds that the operator's underground mining OPERATIONS caused the damage to the structure, the Department will either issue a written order directing the operator to PROMPTLY compensate the structure owner or issue an order directing the operator to PROMPTLY repair the damaged structure [within 6 months of the date of issuance of the order]. The Department may [allow more than 6 months] EXTEND THE TIME FOR COMPLIANCE WITH THE ORDER if the Department finds that further damage may occur to the same structure as a result of additional subsidence.

§ 89.144a. Subsidence control: relief from responsibility.

(a) [The] EXCEPT AS PROVIDED IN SUBSECTION (b), THE operator will not be required to repair a structure or compensate a structure owner for damage to structures identified in § 89.142a(f)(1) (relating to subsidence control: performance standards) if the operator demonstrates to the Department's satisfaction one or more of the following apply:

* * * * *

(b) THE RELIEF IN SUBSECTION (a)(1) WILL NOT APPLY IN THE CASE OF AN EPACT STRUCTURE IF THE LANDOWNER OR THE DEPARTMENT CAN SHOW, BY A PREPONDERANCE OF EVIDENCE, THAT THE DAMAGE RESULTED FROM THE OPERATOR'S UNDERGROUND MINING OPERATIONS.

(c) THE OPERATOR IS NOT RESPONSIBLE FOR THE PORTION OF STRUCTURE DAMAGES WHICH THE OPERATOR CAN SHOW, BY A

PREPONDERANCE OF EVIDENCE, COULD HAVE BEEN PREVENTED HAD THE STRUCTURE OWNER PROVIDED THE OPERATOR ACCESS TO CONDUCT A PREMINING SURVEY AND IMPLEMENT NECESSARY AND PRUDENT DAMAGE MINIMIZATION MEASURES.

§ 89.145a. Water supply replacement: performance standards.

(a) *Water supply surveys.*

(1) The operator shall conduct a premining survey and may conduct a postmining survey of the quantity and quality of all water supplies within the permit and adjacent areas, except when the landowner denies the operator access to the site to conduct a survey and the operator has complied with the notice procedure in this section. Premining surveys shall be conducted prior to [mining within 1,000 feet (304.80 meters) of] THE TIME a water supply [unless otherwise authorized or required by the Department based on site specific conditions] IS SUSCEPTIBLE TO MINING-RELATED EFFECTS. Survey information shall include the following information to the extent that it can be collected without [extraordinary efforts or the expenditure of] excessive [sums of money] INCONVENIENCE TO THE LANDOWNER:

* * * * *

(b) *Restoration or replacement of water supplies.* When underground mining activities conducted on or after August 21, 1994, affect a public or private water supply by contamination, diminution or interruption, the operator shall PROMPTLY restore or replace the affected water supply with a permanent alternate source which adequately serves the premining uses of the water supply [or] AND any reasonably foreseeable uses of the water supply. The operator shall be relieved of any responsibility under The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.1--1406.21) to restore or replace a water supply if the operator demonstrates that one of the provisions of § 89.152 (relating to water supply replacement: relief from responsibility) relieves the operator of further responsibility. This subsection does not apply to water supplies affected by underground mining activities which are covered by Chapter 87 (relating to surface mining of coal).

* * * * *

(e) *Temporary water supplies.*

* * * * *

(2) AN OPERATOR SHALL PROMPTLY PROVIDE A TEMPORARY WATER SUPPLY IF THE OPERATOR OR THE DEPARTMENT FINDS THAT THE OPERATOR'S UNDERGROUND MINING ACTIVITIES HAVE CAUSED CONTAMINATION, DIMINUTION OR INTERRUPTION OF AN EPACT WATER SUPPLY, AND THE LANDOWNER OR WATER USER IS WITHOUT A READILY AVAILABLE ALTERNATE SOURCE OF WATER. THIS REQUIREMENT

WATER SUPPLY WAS AFFECTED AND THE FAIR MARKET VALUE DETERMINED AT THE TIME PAYMENT IS MADE.

(2) THE LANDOWNER AND OPERATOR HAVE ENTERED INTO A VALID VOLUNTARY AGREEMENT UNDER SECTION 5.3(a)(5) OF THE BITUMINOUS MINE SUBSIDENCE AND LAND CONSERVATION ACT (52 P. S. § 1406.5c(a)(5)) WHICH DOES NOT REQUIRE RESTORATION OR REPLACEMENT OF THE WATER SUPPLY AND THE DEPARTMENT HAS DETERMINED THAT AN ADEQUATE REPLACEMENT WATER SUPPLY COULD FEASIBLY BE DEVELOPED.

(3) THE OPERATOR CAN DEMONSTRATE ONE OF THE FOLLOWING:

(i) THE CONTAMINATION, DIMINUTION OR INTERRUPTION EXISTED PRIOR TO THE UNDERGROUND MINING ACTIVITIES AS DETERMINED BY A PREMINING SURVEY, AND THE OPERATOR'S UNDERGROUND MINING ACTIVITIES DID NOT WORSEN THE PREEXISTING CONTAMINATION, DIMINUTION OR INTERRUPTION.

(ii) THE CONTAMINATION, DIMINUTION OR INTERRUPTION OCCURRED MORE THAN 3 YEARS AFTER UNDERGROUND MINING ACTIVITIES OCCURRED.

(iii) THE CONTAMINATION, DIMINUTION OR INTERRUPTION OCCURRED AS THE RESULT OF SOME CAUSE OTHER THAN THE UNDERGROUND MINING ACTIVITIES.

(b) IN THE CASE OF A WATER SUPPLY OTHER THAN AN EPACT WATER SUPPLY, AN operator will not be required to restore or replace a water supply if the operator can demonstrate one of the following:

* * * * *

[(b)] (c) * * *

RULEMAKING ON BOND ADJUSTMENT AND MINE SUBSIDENCE CONTROL AND STANDARDS

COMMENT/RESPONSE DOCUMENT

This document presents comments submitted in regard to the Environmental Quality Board's proposed rulemaking on Bond Adjustment and Mine Subsidence Control and Standards and the Department's responses to those comments. The proposed rulemaking was published in the *Pa. Bulletin* on September 13, 2003. Public hearings were held in Indiana, Pa. on October 15, 2003 and in Washington, Pa. on October 16, 2003. The comment period officially closed on November 12, 2003.

List of Commentators.

(1) Mrs. Peggy Clark
Concern About Water Loss due to Mining (CAWLM)
7311 Rt. 422 West
Indiana, PA 15701

(2) Mrs. Carol McQuiston
3149 Parkwood Road
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(3) Mr. George Zanin
2633 Ben Franklin Highway
Ebensberg, PA 15931

(4) Mr. Victor Prola
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(5) Mr. John Zanorecki
__ Snyders Lane
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(6) Ms. Heather Sage
Citizens for Pennsylvania's Future – Environmental Communications Center
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Pittsburgh, PA 15219

(7) Ms. Attilia Shumaker (Wheeling Creek Watershed Conservancy)
McCollough Road
Sycamore, PA 15364

(8) Mrs. Laurine Williams
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Waynesburg, PA 15370

(9) Ms. Mary Childs
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(10) Mr. George Ellis and Mr. Stan Geary
Pennsylvania Coal Association (PCA)
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(11) Ms. Camille Dzierski
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(12) Mrs. Beverly Braverman (Mountain Watershed Association and Tri-State)
P.O. Box 408
Melcroft, PA 15462

(13) Mr. Brandon Hudock
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Washington, PA 15301

(14) Mr. Donald Stark
65 Stark Spur
Eighty Four, PA 15330

(15) Mr. Gregory Lindley (Ten Mile Protection Network)
546 Lone Pine Road
Washington, PA 15301

(16) Mr. Rick Nietert
150 Greene Hill
Washington, PA 15301

(17) Mr. Lawrence Headley
(Email Comments)

(18) Ms. Sue Germanio (Office of Representative William DeWeese)

(19) Mr. Donald Kardos
729 Chestnut Ridge Road
Blairsville, PA 15717

(20) Mrs. Brenda Pizer
586 Marshall Heights Road
Blairsville, PA 15717

(21) Independent Regulatory Review Commission

Notes:

a. Mrs. Gloria Dick, a private citizen, took the stand at the 1:00 P.M. public hearing in Indiana to state her support for Mrs. Peggy Clark's comments.
b. Mr. Ted Bowser, a private citizen, took the stand at the 5:00 P.M. public hearing in Indiana, to ask for a private conference with DEP staff.
c. Mr. Richard Ehmann, representing Tri-State, submitted written comments after the comment filing deadline. These comments are not addressed in this document, but were addressed separately in a letter to Mr. Ehmann.

COMMENTS AND RESPONSES

Period of liability for water supply effects

Comment: The proposed amendments to § 86.1 would expand the definition of "underground mining activities" to include "post closure mine pool maintenance." These amendments represent an attempt to invalidate section 5.2(c)(2) of the BMSLCA, which provides that claims for water loss must be submitted to DEP within three years "after mining." The phrase "after mining" was intended by the General Assembly to mean "after coal extraction" was completed beneath or near the affected water supply. The General Assembly did not intend for the Board or DEP to allow claims for water loss to be filed 5, 10 or 25 years after mining in a specific area was completed. Moreover, providing that "mining" does not cease until a mine pool has stabilized was not necessary to satisfy OSM's concerns relating to "domestic" supplies. Instead, DEP's initial interpretation of its authority under the BMSLCA was all OSM required. *(10)*

Response: (It is inferred that the commentator's concerns relate to section 5.2(e)(2) rather than section 5.2(c)(2), since section 5.2(e)(2) is the only one that references the three-year period of liability.)

The amendment incorporating "post closure mine pool maintenance" into the definition of "underground mining activities" is intended to ensure that liability for water supply effects does not expire prior to the date regulatory jurisdiction would end under the federal regulatory program. This amendment clarifies a concept that is essential to demonstrating compliance with federal requirements relating to the duration of liability. Under the federal program, liability for water supply effects has no termination date and remains in effect for as long as OSM maintains regulatory jurisdiction over a mine site. OSM jurisdiction normally extends for the duration of mining and reclamation operations and until five years after the final augmented seeding. To be as effective, Pennsylvania's regulations must provide a period of liability that expires no sooner than the date on which OSM would normally terminate jurisdiction. Pennsylvania's regulations meet this requirement by clarifying that the liability created by section 5.1(a)(1) and terminated by section 5.2(e)(2) extends from the time of mining until three years after the completion of the last "underground mining activity." In most cases the final "mining activity" will be the maintenance of the post closure mine pool. This period of liability is based on a reasonable interpretation of section 5.2(e)(2), which extends liability three years after the occurrence of "mining activity."

The amendment to the definition is not an attempt to circumvent the intent of the Pennsylvania General Assembly. Section 5.2(e)(2) provides a release of liability if contamination, diminution or interruption occurs more than three years after "mining activity." Considering that section 5.1(a) establishes liability for all water supply effects caused by "underground mining operations," there is no reason to conclude that the liability referred to in section 5.2(e)(2) would be limited to effects arising from the act of coal extraction. Water supply effects can result from various "mining activities" such as underground pumping operations, the drilling of shafts and mine entries, the removal of

underground roof supports, surface support areas and the control of the post closure mine pool. It is reasonable to conclude that the three-year period referred to in section 5.2(e)(2) was intended to run from the time of occurrence of the last "mining activity" that could result in water supply contamination, diminution or interruption.

The interpretation that liability extends from the time of the last mining activity is not new. This interpretation was explained in the June 13, 1998 rulemaking on mine subsidence control, subsidence damage repair and water supply replacement. The Preamble at 28 Pa. Bulletin 2778 clarified that liability for water supply impacts extends from the time of underground mining to the period ending three years after reclamation has been completed." The Preamble discussion goes on to explain that "this [period] should be sufficient to cover virtually all water supply impacts resulting from the underground mine."

It is appropriate to clarify the duration of liability through regulation. As illustrated by the comment, the statutory phrase "mining activity" is subject to differing interpretations, and so there is a need to clarify this matter with a regulatory definition.

Separate from issue of statutory interpretation, the Commonwealth's interests are best served by ensuring that operators are held liable for effects arising from the development of post closure mine pools. These pools, which develop in mine workings after cessation of pumping, have been documented to cause contamination of adjacent water supplies many years after the time of coal extraction. It is important that the regulations provide an effective remedy for these problems.

Comment: DEP and OSM erred in their decision to retain the three year limit period of liability for water supply effects in § 89.152(a)(2). This allows water supplies to go unreplaced if the loss occurs more than three years after mining activity ceased, even though the loss was due to mining. The agencies reason that this would rarely happen, since liability extends until all mining and reclamation work is complete (usually at least 10 years). However, it is possible for water losses to occur over room and pillar mines in later years and these losses should be covered. If this is "not much of a problem" or just doesn't happen it would not put anyone at much disadvantage to require replacement. *(1)*

Response: The changes in this rulemaking ensure that mine operators remain liable for water supplies until three years after the reclamation of the last surface area or stabilization of the post closure mine pool, whichever occurs later. In DEP's experience virtually all water supply problems resulting from the underground mining activities will occur within this interval. Since this level of protection is available under the current provisions of the BMSLCA, it is the preferred means of satisfying OSM requirements relating to the duration of liability.

Distinction between EPACT and non-EPACT structures and water supplies

Comment: The proposed amendments attempt to create two separate surface owner protection programs for Pennsylvania – one that "mirrors" what OSM insists are

mandatory requirements of Federal law and which provide protection to dwellings used for human habitation and institutional structures and to domestic water supplies and one that follows the requirements of Act 54 and provided protection to structures and water supplies not otherwise covered by Federal law. This "dual" system is cumbersome, unjustified, unreasonable, and not authorized by existing Pennsylvania law. Furthermore, it is absurd to suggest, as the discussion in the proposed rulemaking does, that the proposed amendments will "simplify" and 'streamline" the Pennsylvania surface owner protection program. In fact, the proposed amendments have the exact opposite impact. There is no reason to distinguish between EPACT structures and water supplies and water supplies otherwise protected under Pennsylvania law. *(10)*

Response: A "two class" system is necessary if Pennsylvania's regulatory program is to comply with federal requirements for state primacy programs and, at the same time, maintain conformance with the BMSLCA. The OSM action at 69 FR 71551 supersedes those provisions of the BMSLCA that are in conflict with the Federal SMCRA, laying the foundation for the two class system. OSM's action will nullify certain statutes of limitations, releases of liability and compensation options as they relate to EPACT structures and water supplies. These provisions will, however, remain in effect for structures and water supplies that are covered by the BMSLCA but which are outside the scope of the federal regulations. Consequently, there is a need to distinguish between these two different classes of structures and water supplies.

Statements indicating that this rulemaking will simplify and streamline surface owner protection are based on the premise that all applicable protections and requirements will now be consolidated in Pennsylvania regulations. Under the previous system, landowners had to be aware of their rights under both state and federal law in order to ensure that they obtained the optimum remedy for the structure damage claim or water supply impact claim.

Comment: The proposed system, which establishes separate requirements for EPACT and non-EPACT structures and water supplies, will be confusing and difficult to administer. A big selling point for Act 54 was that the industry was willing to cover agricultural and some commercial properties. The existing law treats all protected properties equally, and that should continue to be the case. The differences between state and federal law do not seem significant enough to invite confusion and difficulty in administration caused by the EPACT/non-EPACT distinction. *(18)*

Response: As indicated in the response to a similar comment, a "two class" system is necessary if Pennsylvania's regulatory program is to comply with federal requirements for state primacy programs and, at the same time, maintain conformance with the BMSLCA.

Bonding requirements

Comment: One commentator noted that it did not oppose the amendment to § 86.152 which requires operators to maintain subsidence bonds for 10 years after mine closure. *(10)*

Response: The commentator's position is acknowledged.

Comment: Mine operators should be required to post bond to cover the replacement value of individual homes and properties. *(11)*

Response: Neither the state nor the federal program requires a bond covering the total replacement value of all homes and properties in advance of mining. The Department has established bond calculation procedures that take into account the fair market value of the property that is expected to be damaged during the succeeding term of the permit, the level of damage that property is expected to sustain, and the amount of damage that may accumulate prior to time enforcement is warranted. These procedures are described in Technical Guidance 563-2504-101. OSM has reviewed the Department's bond calculation procedures and found them to be no less effective than the federal regulations, which require bonds to be posted only in cases where damage has not been repaired within 90 days.

Comment: OSM should not approve DEP's proposal to use liability insurance as a means of guaranteeing the replacement of affected water supplies. There are at least several examples where the liability insurance required by § 86.168 has proved ineffective in securing timely water supply replacement, and there is no indication that DEP is performing the time-consuming analyses required to guarantee the replacement of every water supply potentially affected by subsidence. A review of DEP files in early 2003 revealed that DEP normally requires only the minimum amount of insurance coverage without making any effort to determine an individual operator's potential water supply replacement liability during the upcoming policy period. This minimum coverage may not be close to the amount needed. Furthermore, affected homeowners are often unaware of the existence of insurance until it is too late to file a claim. This defeats the whole purpose of requiring a financial guarantee. The proposal is less effective than the federal counterpart regulation which requires that if a water supply is not permanently replaced or restored within 90 days after experiencing mining related effects, the mine operator must provide a financial guarantee by increasing the amount of bond to cover the full cost of replacement. *(6)*

Response: This comment relates to OSM's decision on whether or not to accept liability insurance as the basis for ensuring the restoration or replacement of affected water supplies. Federal regulations require operators to post financial guarantees, ordinarily in the form of bonds, to ensure the replacement of affected water supplies. Since the BMSLCA does not authorize the use of bonds for this purpose, DEP proposed to address this matter through liability insurance, which is required as a condition for maintaining a mining license in Pennsylvania. Section 86.168, which sets forth the terms and conditions for liability insurance, requires all policies to cover loss or diminution in quantity or qualify of public or private sources of water in a amount at least equal to the

general liability portion of the policy. Section 86.168 further provides that the amount of this coverage must be at least $500,000 per occurrence and $1 million aggregate.

In its proposal to OSM, DEP indicated it would review permittees' insurance policies at the time of permit issuance and annually thereafter to ensure that coverage is sufficient to restore or replace all water supplies that may be damaged and need to be replaced at any point during the mining operation. After reviewing DEP's proposal and the provisions of § 86.168, OSM concluded that the assurance of water supply replacement provided by Pennsylvania's regulations was no less effective than that provided by the federal regulations. *See 69 FR 71528* OSM also observed that the federal regulations at 30 CFR 811.14(c) allow the use of insurance in lieu of bond for purposes of assuring water supply replacement.

In regard to other concerns raised by the commentator, DEP recently resolved one of the cases cited as an example of the ineffectiveness of liability insurance. The case involved several water supply claims that were pending resolution when the operator declared bankruptcy. In this case DEP successfully intervened on behalf the affected property owners to have the insurance company pay for the replacement of all affected water supplies. This case illustrates that liability insurance can serve as an effective means of ensuring water supply replacement in cases where an operator defaults on his liability.

Since the time of the proposed rulemaking, DEP has performed an analysis to determine whether mine operators are carrying sufficient amounts of insurance to cover the replacement of affected water supplies. Based on a review of claims filed during the past five years, DEP found that the minimum coverage required by § 86.168 was sufficient to cover water supply replacement liability in all cases. There was one case where DEP took action to ensure that the insurance policy covered all pending and potential water supply replacement claims and there was one case where an operator's liability came close to the minimum limits (which apply to claims filed within the one-year term of an insurance policy). DEP also annually reviews the adequacy of insurance for pending and potential future claims before renewing an operator's mining license. The results of this analysis further illustrate the effectiveness of liability insurance as a tool for ensuring water supply replacement.

Requirements for mining beneath EPACT structures

Comment: One commentator indicated that it did not oppose the changes to § 89.141(d), § 89.142(d)(1)(i) and (ii) and § 89.142a(c)(3), noting that the amendments merely clarify and codify what has been the practice of coal companies for many years. The commentator also noted that these changes could be implemented without the need to develop a separate definition for "EPACT Structures" or create a "dual" program of surface owner protection. The commentator further noted that it will be impossible for operators to comply with these newly codified damage minimization and prevention standards if § 89.144a is amended to allow owners of EPACT structures to deny access for premining surveys. *(10)*

Response: The commentator's position regarding the proposed changes to § 89.141(d), § 89.142a(d)(1)(i) and (ii), and § 89.142a(c)(3) is acknowledged.

Contrary to the commentator's assertion, it is appropriate to distinguish between EPACT structures and non-EPACT structures for purposes of enforcing material damage minimization and prevention requirements. The purpose of these amendments is to ensure that the protection afforded EPACT structures by Pennsylvania's program is no less effective than the protection afforded by the federal regulations. Although the commentator asserts that operators are generally willing to undertake damage minimization and prevention for both EPACT and non-EPACT structures, comments submitted in regard to other regulatory amendments indicate that this is not always the case. Comments regarding proposed amendments to § 89.142a(f) indicate that at least some operators oppose having to minimize or prevent damage to structures that are not securely attached to the land surface, even if the structures are EPACT structures. Therefore, in order to ensure adequate protection for all EPACT structures and avoid disputes as to what structures are and are not covered by damage minimization and prevention requirements, the distinction between EPACT structures and non-EPACT structure is retained in the final regulation.

In regard to the commentator's final concern, § 89.142a(d)(1)(i) only requires operators to minimize material damage to the extent technologically and economically feasible. Under most circumstances, denial of access would make it technologically and economically unfeasible to perform damage minimization measures.

Comment: One commentator expressed support for changes to § 89.142a(d), which require operators to prevent damage to EPACT structures when conducting room and pillar mining. *(1)*

Response: The commentator's support for the proposed changes is acknowledged.

Comment: Operators should be required to prevent damage rather than minimize damage when conducting mining that results in planned subsidence. *(1)*

Response: The purpose of amending § 89.142a(d) is to ensure that the protection afforded EPACT structures under Pennsylvania's program is no less effective than the protection afforded by the federal regulations. The corresponding federal regulations allow operators to minimize rather than prevent material damage when using mining technology that results in planned subsidence. The only exceptions are where underground mining operations would affect a public building, church, school or hospital, in which case material damage must be prevented. The amendments to § 89.142a(d) incorporate these same provisions.

Comment: Current state and federal regulations require an operator to "prevent material damage" to public buildings and certain surface impoundments. These requirements should not be altered. *(12)*

Response: The amended regulations do not alter requirements relating to the protection of public buildings and other structures protected under § 89.142a(c). Amendments to §§ 89.141(d)(9) and (10) and 89.142a(d)(1), are written to clarify that public buildings, churches, schools, and hospitals are to be protected in accordance with § 89.142a(c) even though they may qualify as EPACT structures. The intent is to clarify that the protection standards in § 89.142a(c) override any lesser protection standards described in §§ 89.141(d)(9), (10) or 89.142a(d)(1) when mining is proposed beneath public buildings, churches, schools, or hospitals. It is further noted that the amendments to §§ 89.141(d)(9) and (10) and 89.142a(d)(1) do not pertain to impoundments and water bodies enumerated in § 89.142a(c).

Comment: Under section § 89.142a(d)(i), the surface owner should be the one to determine the feasibility of precautionary measures to minimize subsidence damages and to decide whether his or her health or safety is being threatened. *(11)*

Response: Section 89.142a(d)(i), which is based on the federal regulation at 30 CFXR 817.121(a)(2)(ii), does not identify the party responsible for determining the feasibility of damage minimization measures or the party responsible for identifying threats to human health and safety. In most cases, the mine operator will make preliminary decisions regarding these matters, subject to oversight and intervention by the Department. Property owners, who are notified of impending mining, may inquire about the operator's plans for damage minimization and, if dissatisfied, request the Department to evaluate the plans for conformance with § 89.142a(d)(i).

Prompt resolution of structure damage claims

Comment: One commentator indicated that it does not oppose replacing "underground mining" with "underground mining operations" in § 89.142a. The commentator noted that the amendment merely clarifies what operators have been doing for many years – namely, repairing or compensating for subsidence damage caused by all underground mining activities, not just damages resulting from the actual removal of coal. *(10)*

Response: The commentator's position is acknowledged.

Comment: One commentator indicated that it does not object to amending § 89.142a(f)(1) to provide for prompt repair or compensation of subsidence damage to structures covered by BMSLCA. *(10)*

Response: The commentator's position is acknowledged.

Comment: It is inappropriate for DEP to cease adherence to the requirements of section 5.5(b) of the BMSLCA which imposes a brief six month period during which structure owners are expected to first negotiate with a mine operator without DEP's involvement. If homeowners and mine operators are afforded a brief period of time during which they can attempt to amicably resolve a subsidence claim, the interests of all parties (including the Commonwealth) in swift and amicable dispute resolution is furthered. Providing for a

reasonable period of alternative dispute resolution to accommodate local interests is something which Pennsylvania is authorized to implement pursuant to 30 U.S.C. § 1201(f). There is no reason for allow claims for damages to structures such as agricultural, industrial or commercial structures that have no federal protection to be filed sooner than six months after damage occurs because OSM has raised no objection to this enforcement approach. *(10)*

Response: The commentator is incorrect in its assertion that DEP is barred from taking enforcement action prior to the expiration of the six month negotiation period provided by section 5.5(b) of the BMSLCA. Section 9 of the act gives DEP broad authority to issue orders "as are necessary to aid in the enforcement of the provisions of this act." Generally, enforcement actions prior to the expiration of the six-month period will focus on requirements for emergency repairs. DEP rarely has cause to issue orders requiring full repair or compensation within six months of the date damage is first reported because subsidence is typically incomplete in this time interval and the full extent of damage remains unknown. Nevertheless, the provisions of section 5.5(b) do not bar DEP from ordering emergency repairs which are necessary to address health, safety or nuisance concerns. These considerations apply to both EPACT and non-EPACT structures.

Comment: Landowners should be able to choose who repairs damages to their properties. *(11)*

Response: Neither the BMSLCA nor the federal regulations give landowners the specific right to choose who will repair subsidence damage. Under both programs the mine operator is the party responsible for making or arranging for repairs or providing compensation to the landowner. If there is a dispute over the scope of repair work or the standards to be met, the Department would make the final decision after considering the wishes of both the mine operator and the landowner.

Comment: DEP should pay subsidence damage claims out of the Mine Subsidence Insurance program to ensure prompt, quality and speedy repairs of damage and thereafter seek reimbursement from the coal corporations. *(11)*

Response: The commentator's recommendation would require significant changes to the DEP's mine subsidence insurance program, which are beyond the scope of this rulemaking.

Coverage of dwellings and related structures

Comment: The proposed amendments to § 89.142a(f)(1)(iii) are inappropriate. These changes would extend repair and compensation requirements to all dwellings, permanently affixed appurtenant structures and improvements in place at the time of mining. OSM should not have required these changes. The Federal SMCRA and the courts specifically recognize that each state should be free to develop its own program of laws and regulations governing subsidence control, which is tailored to its specific needs and interests. 30 U.S.C. § 1201(f).

Section 5.4(a)(3) of the BMSLCA and § 89.142a(f)(1)(iii) do not deny any owner of a dwelling who has no control over whether or not his structure will be undermined the right to file a subsidence damage claim. Instead, this section of the BMSLCA is designed to discourage property owners, who have knowledge that mining is imminent, from building a new dwelling in a location where it could be damaged and to encourage such persons to build in areas which will not be undermined.

This section provides only that the mine operator is not responsible for any resulting damage to a dwelling that was not in place when Act 54 was passed or at the time the mine operator submitted its most recent application for a permit or permit renewal. In other words, it imposes no more than a five-year moratorium on new home construction in areas that could be undermined within this time frame.

This section of the BMSLCA takes into account several factors unique to Pennsylvania and attempts to balance them in a way that is fair to both property owners and mine operators. These include the fact that Pennsylvania mine operators are required to plan and operate their mines in areas where development is more common than in other states; the need for proper land use planning; and the general principle of Pennsylvania law that a person not be allowed to assert a claim for damage in circumstances where he or she could have mitigated or avoided the damage they now claim to have suffered.

Furthermore, nothing would preclude local municipalities from enacting a zoning ordinance which provides that new home construction is not to be permitted in areas that are unstable or prone to subsidence or slips. Such a local zoning ordinance would be completely justified on several legitimate state interest grounds. It is unclear why OSM contends that the General Assembly of Pennsylvania, for similar reasons of legitimate state concern, cannot enact a similar law. Indeed, given that OSM's own regulations only protect domestic water supplies in place when the permit is issued, it is difficult to understand why OSM is so concerned about a provision of state law which provided no protection for structures that were not in place on the same date.

Furthermore, this provision is implemented in such a manner that property owners know well in advance when mining is projected and planned. Mine operators are required to publish notice of their intent to apply for a permit in local newspapers and every person who purchased property in Pennsylvania is given a bold warning in the property deed as to whether or not they own the coal beneath their property.

It is completely proper for the General Assembly to encourage a brief moratorium on construction in areas that will be undermined in the near future. Section 5.4(a)(3) and existing § 89.142a(f)(1)(iii) do nothing more than foster several legitimate land use planning goals on a statewide rather than a municipality by municipality basis, by inserting a disincentive to development for a limited period of time. DEP should have defended Pennsylvania's right to develop "local" requirements pursuant to 30 U.S.C. § 1201(f), and the EQB lacks the authority to amend § 89.142a(f)(1)(iii) in the manner

proposed because it is in direct conflict with the provisions of section 5.4(a)(3) of the BMSLCA. *(10)*

Response: Irrespective of the commentator's assertions, the federal regulation at 30 CFR 817.121(c)(5) unequivocally requires operators to repair or compensate for damage to all "occupied residential dwellings and structures related thereto" in place at the time of mining. The only way the state program can effectively match this requirement is by removing provisions that exclude dwellings and related structures constructed after the time of permit application and permit renewal application from repair and compensation requirements. OSM has already found the provisions of section 5.4(a)(3) to be in conflict with the Federal SMCRA and taken action to supersede its provisions. It is therefore appropriate to remove these qualifications from § 89.142a(f)(1)(iii) as well.

Comment: Section 89.142a(f)(1)(iii) should not be amended to make structures that are not permanently attached to the land surface eligible for damage repair and compensation. It is inappropriate for OSM to require this change; the Federal SMCRA specifically recognizes that each state should be free to develop its own program of laws and regulations governing subsidence control.

OSM apparently construes Section 729 of the Federal SMCRA as imposing no obligation on property owners to take reasonable steps to mitigate their own potential for damage. While OSM may believe this is a reasonable rule, Pennsylvania has previously concluded that such a rule is unreasonable.

Under the current Pennsylvania regulatory program only structures appurtenant to dwellings which are securely and permanently affixed to the ground are entitled to "protection" against subsidence damage. This is the case because a structure that can be easily moved is not a "fixture" and therefore not "real property" under Pennsylvania law. States are free to define for themselves what is and what is not "real property," and 30 U.S.C. § 1201(f) gives Pennsylvania the latitude to define what is "real property" for purposes of surface owner protection.

In addition, Pennsylvania has concluded that surface owners whose land will be undermined have an obligation, like other citizens of Pennsylvania who wish to assert damage claims to take reasonable steps to mitigate their own potential losses. Mine operators should not be expected to repair or compensate for damage to an aboveground swimming pool or any other "appurtenant structures" such as small outbuildings, sheds, gazeboes and similar "structures" that can be easily dismantled and removed before mining and reinstalled afterwards.

DEP should have defended Pennsylvania's right to develop local requirements pursuant to 30 U.S.C. § 1201(f), and the EQB lacks the authority to amend § 89.142a(f) in the proposed manner because it is in direct conflict with the provisions of section 5.4 of the BMSLCA. *(10)*

Response: The Department does not agree with the commentator's arguments. The federal regulation at 30 CFR 817.121(c)(5) unequivocally requires repair of or compensation for all "occupied residential dwellings and structures related thereto" in place at the time of mining." The federal regulations do not require that a structure be attached to the land surface in order to qualify for repair or compensation provisions, nor do they waive liability for damage to structures that could have been dismantled or moved by the landowner. Moreover, in situations where damage can be prevented by moving or dismantling a structure, 30 CFR 817.121(a) places this obligation squarely on the operator. In order for Pennsylvania's regulatory program to be no less effective than the federal regulatory program, it is necessary to remove the qualification that the structures and improvements enumerated in § 89.142a(f)(1)(iii) must be securely attached to the land surface.

Comment: Damaged septic systems should be replaced rather than repaired. *(11)*

Response: Septic systems are covered by the subsidence damage repair and compensation provisions of § 89.142a(f). As provided in paragraph (f)(1), damaged systems must be promptly and fully rehabilitated, restored, or replaced or compensation must be provided to provide for the appropriate remedy. The determination of whether a system should be repaired or replaced depends on the level and extent of damage. Minor damage to pipes and tanks can often be repaired or corrected by replacing the damaged component. It is not always necessary to replace the entire system.

Statute of limitations on filing claims for structure damage and water supply loss

Comment: One commentator expressed support for changes that eliminate the two-year statute of limitations on filing claims for subsidence damage and water supply impacts. *(1)*

Response: The commentator's support of these proposed changes is acknowledged.

Comment: It is inappropriate to amend § 89.143(c) and § 89.152 to delete the two-year statute of limitations for filing claims of damage to EPACT structures and water supplies. The Federal SMCRA specifically recognizes that each state should be free to develop its own program of laws and regulations governing subsidence control which is tailored to its specific needs and interests. The BMSLCA and the EQB's current regulations provide that homeowners must file a statutory subsidence damage claim within two years of the date they discover the damage. While DEP apparently now suggests that the BMSLCA does not impose a two year statute of limitations on such claims, this is incorrect.

The Federal SMCRA and regulations are silent on the issue of whether claims for subsidence damage to dwellings and claims for the replacement of domestic water supplies must be filed within any defined time frame. Moreover, in the absence of any express prohibition in SMCRA on placing time limits on the time within which subsidence damage claims must be filed, there is no basis for OSM to conclude that Pennsylvania's decision to do so is not authorized by 30 U.S.C. § 1201(f). Indeed, in the

absence of any express limitation of action period on a federal statutory claim the Courts will traditionally provide for one. When a statute creating a right of action does not specify a limitations of action period, it is not assumed that Congress intended that there be no time limit at all on the action. When Congress fails to create a federal statute of limitations, courts generally apply the statute of limitations of the most analogous cause of action under the law of the state in which the federal cause of action arises, which in the case of Pennsylvania is a two-year period of limitations otherwise applicable to claims of property damage.

Pennsylvania has ample local interests which justify its decision to enact reasonable statutes of limitations on claims for subsidence damage. For example, Pennsylvania law currently protects more structures and water supplies than does Federal law. Moreover, Pennsylvania longwall mines tend to be located in more densely populated areas than similar mines in neighboring states. Therefore, the potential volume of claims facing the Department will be far greater than its counterparts in other jurisdictions. Establishing a reasonable basis for limiting the total number of claims that DEP might have to process is a legitimate matter of local interest, which Pennsylvania is entitled to consider.

Moreover, Pennsylvania requires that mine operators repair all subsidence damage they cause or pay the cost of repairing the damaged structure, not simply opt to pay the difference between the property's pre-mining value and its post-mining value, which is the case in other states. Therefore, if Pennsylvania homeowners are free to wait years after discovering subsidence damage before filing a claim, the mine operator would, if found liable, be required to repair the structure 5, 10 or 25 years after the damage was first discovered, at greatly inflated costs. In addition, DEP and operators will be forced to sort out, years after the fact, the amount of non-subsidence damage that naturally occurred to a structure that has aged from that which was actually caused by mining that took place 5, 10 or 25 years earlier.

In addition, Pennsylvania's program, unlike OSM's regulations, provides that if mining occurred within a certain distance of an allegedly affected water supply there exists a presumption that mining was the cause of the loss. This presumption may well have some basis in fact when the claim is pursued within two years of the date the damage is discovered but can it have any validity if the claim is filed 5, or 10 or 25 years later, when it may not even be possible to prove when the loss occurred in relationship to mining? *(10)*

Response: These are the same arguments the commentator made to OSM in regard to the federal rule superseding sections 5.1(b) and 5.5(b) of the BMSLCA. OSM was not persuaded by these arguments for reasons explained in its final rulemaking at 69 FR 71551. OSM has superseded section 5.1(b) to the extent that it limits an operator's liability to restore or replace an affected EPACT water supply and section 5.5(b) to the extent that it limits an operator's liability to repair or compensate for damage to an EPACT structure. OSM's final rule effectively eliminates the statute of limitations as it relates to filing claims for damage to EPACT structures and effects on EPACT water supplies.

In order to fully comply with OSM's requirements, it is also necessary to also remove the two year claim filing requirement from corresponding regulations in 25 Pa. Code Chapter 89. Accordingly, § 89.143a(c) is being amended to remove the two-year claim filing deadline as it relates to claims involving EPACT structures and § 89.152(a) is being amended to remove the two year filing deadline as it relates to claims involving EPACT water supplies. The amendments do, however, retain the two-year filing requirement for claims involving structures and water supplies that are outside the scope of the federal regulations.

The commentator's concerns about property owners waiting 5, 10 or 25 years to file their claims are unfounded. DEP records indicate that most property owners file their claims in a timely manner. Only a small number of claims exceed the two-year filing interval and almost all claims are filed within five years of the date of impact.

Comment: There are no statutes of limitations on water supply and structure damage claims in the federal law, and there should be no such statutes in state law. Water supply losses do not always occur immediately. Structure damage often evolves over time. These limitations put the onus on landowners, not the coal company where it belongs. *(11, 12)*

Response: The two-year statutes of limitations provided under sections 5.2(b) and 5.5(b) of the BMSLCA have been nullified in respect to EPACT structures and water supplies. These changes were effectuated though OSM action superseding Pennsylvania statutory provisions that were inconsistent with the Federal SMCRA. Regulatory changes promulgated under this rulemaking remove corresponding provisions from § 89.143a and § 89.152. The statutes of limitation do, however, remain in effect for structures and water supplies that are outside the scope of the Federal SMCRA (i.e., non-EPACT structures and water supplies), and DEP may not disregard those provisions of state law.

DEP investigation time frames

Comment: One commentator indicated that it did not oppose the amendments to § 89.143a(d)(1) relating to DEP investigations. *(10)*

Response: The commentator's position is acknowledged.

Denial of access and release of liability

Comment: One commentator expressed support for changes to § 89.144a that would eliminate the release of liability which is currently available to operators that are denied access to perform premining or postmining structure surveys. The commentator also supported the proposed provision that would allow a landowner or DEP to assert a claim of damage based on a preponderance of evidence that the damage was due to underground mining operations. *(1)*

Response: The commentator's support of the proposed amendment is acknowledged.

Comment: Existing § 89.144a should remain intact to preserve the relief of liability that is currently available to mine operators that are denied access to perform premining or post mining surveys of EPACT structures. Section § 89.144(a)(1) implements section 5.4(c) of the BMSLCA, and does not deny any owner of a dwelling or an institutional building the right to file a subsidence damage claim. Instead, these provisions merely condition this right by providing that in return for being given the right to file a statutory subsidence damage claim the structure owner must grant the mine operator an opportunity to conduct a premining and post-mining inspection. There is nothing in the Federal SMCRA or OSM's regulations that suggests a state cannot impose this type of limited condition on the statutory right to file a subsidence claim if it has valid reasons for doing so.

Most dwellings or institutional structures have normal damage caused by weathering and wear and tear that is often indistinguishable from certain types of damage that can be caused by mine subsidence. To assure that operators are not required to pay for "damages" they did not cause, the Pennsylvania General Assembly concluded that homeowners should not be allowed to file subsidence damage claims unless they allow the mine operator access to their dwelling to establish a premining baseline of its condition. Copies of the premining inspections must be submitted to the homeowner, who is, of course, free to do his own such inspection.

Pennsylvania, unlike OSM and virtually every other state where mining occurs, has had years of experience processing and resolving subsidence damage claims and was fully justified in concluding such claims are more likely to be resolved amicably if the structure owner and the mine operator have a "baseline" against which to determine what is and what is not subsidence related damage. In addition, Pennsylvania was also fully justified in concluding that its own enforcement of the subsidence damage claim provisions would be simplified if DEP had some premining "baseline" to consider when adjudicating liability. This is precisely the type of legitimate state interest (an interest in efficient and fair resolution and adjudication of disputes) which 30 U.S.C. § 1201(f) intended for the states to be free to further through special state requirements.

Moreover, this provision of the BMSLCA is not implemented by DEP in a manner which would allow homeowners to unwittingly lose their rights to assert a subsidence damage claim. If a homeowner denies access to a mine operator to conduct a premining inspection the operator is required to inform DEP that it has occurred. The operator is then required to send the property owner a written notice setting forth the consequences of continuing to refuse to allow a premining inspection. This written notice states that a claim for damage will be denied if access is not granted within a reasonable time prior to mining. Only then, can an operator rely upon this section of the BMSLCA as a "defense" to subsidence damage claim. Indeed, DEP itself has recognized that the premining inspection provisions of the BMSLCA are actually beneficial to property owners.

Unless owners and operators are encouraged to make premining inspections such mining will occur without the implementation of premining mitigation measures and likely cause more damage than would have resulted if premining mitigation measures had been implemented.

OSM's objection to this requirement (and DEP's willingness to allow it to be superseded) is particularly difficult to understand because OSM itself insists that mine operators who engage in full extraction longwall mining are required to determine if premining mitigation measures should be implemented in advance of mining under a dwelling. The only way to implement appropriate measures to comply with this Federal requirement and the proposed amendments to §§ 89.141(d) and 89.142a (relating to damage mitigation) is to have access to the property to so inspect the structures and determine what measures are appropriate. If structure owners refuse to allow a premining inspection, they are not only interfering with an operator's ability to comply with his legal obligations, but are also failing to mitigate their own potential damage.

If § 89.144a(1) is amended as proposed, in the future persons whose sole objective is to stop mining beneath their property will be able to do so simply by denying operators the right to conduct a premining inspection and access to implement mitigation. For example, had the owners of the Kent Farm been able to deny premining access to the operator who proposed to mine beneath their property, the operator would not have been able to demonstrate that mining would not result in irreparable damage and the permit would have been denied. The law should only help those who are willing to help themselves and should not encourage individuals to frustrate the ability of others to comply with their obligations or unreasonably increase another's liability.

With respect to the post mining condition of section 5.4(c), OSM's concern is equally difficult to understand. Does OSM contend that the Federal SMCRA and its regulations on surface owner protection supersede local rules relating to the adjudication of claims before administrative agencies? Section 5.4(c) provides that a person who denies a post mining inspection cannot pursue a subsidence claim. This is nothing more than a recognition by the General Assembly that a person who wants to use the Commonwealth's adjudicatory tribunals should be required to allow the "defendant" a right to engage in reasonable discovery concerning the nature of the claim.

Section § 89.144a should remain unchanged for the following reasons – OSM cannot disapprove as inconsistent with SMCRA and its own regulations a reasonable requirement of state law which clearly furthers the implementation of OSM's own regulations and one of the very purposes of the SMCRA, namely fostering the development of a strong coal industry; DEP should have "defended" Pennsylvania's right to develop "local" requirements pursuant to 30 U.S.C. § 1201(f) that are based on valid state interests unique to Pennsylvania; and (c) the EQB lacks the authority to amend § 89.144a because it is in direct conflict with the provisions of section 5.4(c) of the BMSLCA. *(10)*

Response: These are the same arguments the commentator made to OSM in regard to the federal rule superseding section 5.4(c) of the BMSLCA. OSM was not persuaded by

these arguments for reasons explained in its final rulemaking at 69 FR 71551. OSM has superseded section 5.4(c) to the extent that it limits an operator's liability to repair or compensate for damage to an EPACT structure. OSM's final rule effectively eliminates relief of liability as it relates to EPACT structures damaged by underground mining operations.

In order to fully comply with OSM's requirements, it is necessary to make corresponding changes to § 89.144a where the relief of liability is codified in regulation. The amended regulation, which was approved by OSM, provides an exception to the relief of liability that otherwise becomes effective when an operator has been denied access after following statutorily prescribed notification procedures. The exception is predicated on two conditions. One is that the damaged structure is an EPACT structure. The other is that either the Department or the landowner can show by a preponderance of evidence that the damage resulted from the operator's underground mining operations. When both conditions are satisfied, the exception, which is set forth in subsection (b), effectively negates the release of liability provided in subsection (a).

The changes to section 5.4(c) and § 89.144a do not affect cases involving structures that are outside the scope of the federal regulations. In these cases, the release of liability provided by § 89.144a(a) is still available to mine operators who are denied access to perform premining or postmining surveys irrespective of DEP's or a landowner's proof that damage was due to underground mining operations.

Contrary to the commentator's assertion, it is possible to distinguish subsidence damage from other types of damage and deterioration in the absence of recent premining survey information. DEP is often faced with the need to distinguish between subsidence damage and other types of damage or structural deterioration in its mine subsidence insurance program where baseline information may be nonexistent or many years old at the time of investigation. DEP has established procedures and criteria which it uses to identify damages caused by mine subsidence and to distinguish those damages from damages caused by other factors. DEP uses these same procedures and criteria in investigating claims filed under its subsidence regulatory program.

The Department agrees with the commentator's assertion that denial of access to perform a premining survey and damage minimization measures could result in more damage than would have otherwise occurred. To address this possibility, the Department has amended § 89.144a in the final rulemaking to incorporate a new subsection addressing situations where an operator has been denied access to perform measures necessary to minimize damage. This new subsection, designated § 89.144a(c), provides that an operator is not responsible for that portion of structure damages, which the operator can show, by a preponderance of evidence, could have been prevented if the structure owner had provided access to conduct a premining survey and implement necessary and prudent damage minimization measures.

The Department acknowledges the commentator's concern that some property owners could attempt to use denial of access as a means to block full extraction mining beneath a structure that is expected to incur irreparable damage. However, the Department does not

regard the provisions of § 89.144a as granting structure owners the right to deny access for mitigation necessary to prevent irreparable damage. Furthermore, where the Department determines that the proposed mining will cause irreparable damage and the operator agrees to take approved measures to minimize the impacts resulting from subsidence but the structure owner denies access to implement the mitigation measures, the operator will have met the legal requirements of section 9.1 of the BMSLCA and the denial of access will not prevent the mining.

The commentator's assertion that the denial to conduct a postmining survey equates to denial of the right of a defendant to conduct reasonable discovery is incorrect. If an operator were denied access to perform either a premining or post mining survey, DEP or the property owner would still be required to assemble information needed to substantiate the extent of damage and prove that the operator's underground mining operations were the cause. This information would be discoverable in legal proceedings before the Environmental Hearing Board or the courts, if the operator were to appeal DEP's order to repair or compensate for the alleged damage.

Comment: In no instance should an operator be relieved of liability where subsidence caused by mining is determined to be the cause of damage. The onus should not be placed upon the homeowner by saying that if they do not allow a premining survey, they are barred from damage claims. To hold the landowner to a level of proof similar to that required in a first degree murder case rather than a preponderance of the evidence is further indication of inequitable protections provided to the mining industry. *(12)*

Response: Final § 89.144a incorporates the preponderance of evidence standard as a basis for establishing liability in situations where an operator has been denied access to perform a premining or postmining survey of an EPACT structure.

Comment: Landowners should be able to select independent home inspectors or contractors to complete premining and postmining surveys. *(11)*

Response: Landowners are free to hire inspectors or contractors to conduct premining and postmining surveys on their behalf. However, landowners must allow mine operators equal access to perform premining or postmining surveys of their own. Landowners who deny access may forfeit certain rights to repair or compensation if damaged structures do not qualify as EPACT structures.

Comment: It seems improper to designate the mine operator as the one responsible for performing premining surveys. This is a conflict of interest. *(17)*

Response: The primary obligation to perform premining surveys rests with the mine operator under both the Chapter 89 and the federal regulations. Landowners are free to conduct their own surveys at their expense. DEP does not have the staff or resources to perform these surveys.

Water supply survey requirements

Comment: The proposed amendments to § 89.145a(a) pose several concerns relating to the timing of premining water supply surveys. The proposed change would allow permit reviewers to establish specific time frames for premining surveys on a permit-by-permit basis. It is questionable whether DEP has sufficient staff to take on this additional obligation. It would be preferable to use a fixed 2,500-foot distance to ensure that surveys are performed sufficiently in advance of mining. In addition, the use of a fixed distance seems necessary to comply with guidelines set forth in OSM's March 9, 1999 letter to the Interstate Mining Compact Commission. *(1)*

Response: OSM has found the proposed amendment which requires premining water supply surveys to be conducted prior to the time water supplies are susceptible to mining-related effects, to be in conformance with the guidelines of its March 9, 1999 letter and, moreover, to be as effective as federal counterpart requirements. OSM objects to using fixed separation distances, like the 2,500 feet recommended by the commentator, as the basis for premining survey requirements. DEP does not regard this amendment as substantially increasing the workload on permit review staff. The determination of appropriate sampling distances is closely related to other determinations reviewers must make during the course of application review, such as the identification of water supplies which are susceptible to mining-related effects. Reviewers' determinations will be facilitated through the use of DEP databases and permit files, which contain information on distances between mining and affected water supplies.

Comment: One commentator indicated that it did not oppose the proposed amendment to § 89.145a(a)(1) to the extent premining water surveys can now be conducted at a time more relevant to mining and to the extent the amendment clarifies when such samples need not be taken. *(10)*

Response: The commentator's position is acknowledged.

Prompt replacement of water supplies

Comment: Two commentators expressed support for changes to § 89.145a(b) that encourage prompt resolution of water supply problems. *(1, 10)*

Response: The commentator's support of the proposed changes is acknowledged.

Provision of temporary water

Comment: One commentator expressed support for changes to §89.145a(e) that require the prompt provision of temporary water. *(1)*

Response: The commentator's support of the proposed changes is acknowledged.

Comment: One commentator expressed support for the amendments to § 89.145a(e) to the extent the changes require prompt provision of temporary water when domestic water

supplies are affected. The commentator went on to assert that there is no need to reference EPACT water supplies in this instance, because the BMSLCA already provides comparable protection of "domestic water supplies." *(10)*

Response: The commentator's general support for this amendment is acknowledged; however, contrary to the commentator's assertion, there is a need to clarify that §89.145a(e) applies to EPACT water supplies. The federal requirement to promptly provide temporary water applies to a wider range of water supplies than the "domestic water supplies" acknowledged by the commentator. The federal regulations also apply to water supplies that provide drinking water to industrial plants, commercial buildings, noncommercial buildings and recreational facilities. To be no less effective than the federal regulations, § 89.145a(e) must require the prompt provision of temporary water in all situations where affected water supplies fall within the scope of the federal water supply replacement requirements. It is therefore necessary to clarify that the provisions of § 89.145a(e) are applicable to all cases involving EPACT water supplies.

Comment: I don't want a water buffalo as a temporary water source. I don't think anybody tests the water stored in these tanks. *(9)*

Response: The use of storage tanks ("water buffaloes") and hauled water is a permissible means of providing temporary water under both state and federal regulatory programs. In Pennsylvania, the bulk water haulers that provide temporary water service are subject to the requirements of 25 Pa. Code Chapter 109, which include the periodic testing of delivered water.

Standards for quantity of replacement water supplies

Comment: Section 89.145a(b) should be further revised to match the federal standard in 30 CFR 701.5, which requires replacement water supplies to be equivalent in quantity and quality to premining water supplies. If replacement standards are left unchanged, the landowner should be the one who determines the scope of existing and reasonably foreseeable uses. *(1)*

Response: OSM has already determined that Pennsylvania's water supply replacement provisions, which rely on actual and reasonably foreseeable use as the standard, are no less effective than federal standards for water supply replacement. *See 66 FR 67011.* Since the BMSLCA establishes a use-based standard for determining the adequacy of replacement water supplies, it would be inappropriate to substitute alternative criteria.

In regard to the commentator's second recommendation, the existing regulations provide ample opportunity for landowners to provide input regarding the existing and reasonably foreseeable uses of water supplies. Section 89.145a(a) requires an operator to gather information on existing and reasonably foreseeable uses as part of the premining survey of a water supply. It also requires an operator to provide this information to the landowner within 30 days. At that point, the landowner can accept the operator's description or provide DEP with information that justifies consideration of additional uses. *(1)*

Comment: The standards for water supply replacement should require the provision of a water supply equivalent to the premining water supply. If the replacement water supply is equivalent there is no question what the foreseeable uses are. Homeowners should not have to argue with DEP and the mining company about what the foreseeable uses are. It is our opinion that making the regulation convoluted will only be an additional burden on homeowners to prove their position. It provides an additional tool with which the company can intimidate the homeowner and hold up replacement of necessary water supplies or deprive the Commonwealth of further water resources. *(12)*

Response: Sections 5.1 and 5.2 of the BMSLCA establish standards for the restoration and replacement of water supplies affected by underground mining operations. The sections require that restored or replacement water supplies be of adequate quantity and quality to serve the premining and reasonably foreseeable uses of the original water supply. Given these statutory standards it would be inappropriate to prescribe a different standard in the regulation at § 89.154a(f). Moreover, OSM has approved these standards as being no less effective than the standards set forth in the federal regulations.

Cost of operating and maintaining a replacement water supply

Comment: One commentator supported the changes to § 89.145a(f)(5) that make operators liable for all increases in costs associated with the operation and maintenance of a restored or replacement water supply. However, the commentator did not support the change in paragraph (5)(i) that allows a mine operator and landowner to negotiate the time period for which compensation is to be provided. The commentator observed that even if this provision is based on the federal regulation in 30 CFR 701.5, it represents a lower standard than Pennsylvania now has because DEP currently requires operators to pay increased costs in perpetuity. The commentator asserted that when state regulations are more effective than their federal counterparts, OSM cannot require that they be amended to match federal requirements. *(1)*

Response: Section 89.145a(f)(5) has been changed in the final rulemaking to clarify that the requirement to provide for the permanent payment of increased operating and maintenance costs applies to cases involving EPACT water supplies as well as cases involving other types of water supplies. Although the remaining portion of paragraph (5) tracks the language of the federal regulation, the basic requirement to provide for the "permanent payment" of the increased cost in now clearly stated. This change also makes the provisions of § 89.145a(f)(5) consistent with Pennsylvania case law.

Comment: Section 89.145a(f)(5)(i) provides for agreements setting forth the terms of payment for increased operation and maintenance costs. Many so-called "agreements" between landowners and coal operators leave room for unfair, unchallenged settlements. Property owners are often at disadvantage in negotiating agreements with mine operators. *(1)*

Response: Voluntary agreements for the payment of increased operation and maintenance costs are permissible under both state and federal regulations. DEP has

always offered and will continue to offer assistance to property owners who are faced with signing an agreement.

Comment: One commentator indicated that it did not oppose the amendment to § 89.145a(f) which would obligate our mine operators to pay all increased costs of operating and maintaining a restored or replaced domestic water supply. *(10)*

Response: The commentator's position is acknowledged; however, it is important to note that the provisions of § 89.145a(f)(5)(i) apply to all water supplies, not just EPACT water supplies.

Comment: The "de minimis" cost concept should be dropped from DEP's existing regulations. Contrary to DEP's assertions, the EHB never intended this concept to be defined or used as it is currently. What is "de minimis" to some may not be "de minimis" to others. There should be no cost increase to affected surface owners and no subsidization of the coal industry by those same owners. *(12)*

Response: The final regulation in § 89.145(f)(5) has been amended to delete "de minimis" cost concept in regard to both EPACT and non-EPACT water supplies. The Department agrees that operators should be liable for all increased costs attributable to the operation and maintenance of a restored or replacement water supply. The Department also wishes to avoid creating two separate regulatory standards for the cost of replacement water supplies based on the same statutory provision. In view of this change, the term "de minimis cost increase" and its definition are deleted from § 89.5, since the term is not used elsewhere in Chapter 89.

Compensation for loss of water supply

Comment: One commentator expressed support for proposed changes that require an operator to restore or replace an affected water supply when it is possible to do so rather than opting to settle the claim through compensation or purchase of the affected property. The commentator also advocated the use of improved prediction techniques and more careful permitting so that cases where water supplies cannot be replaced become rare or nonexistent. *(1)*

Response: The commentator's position and recommendation are acknowledged. With respect to the commentator's recommendation, DEP continually strives to improve its predictive capabilities and to ensure that replacement options are available for all water supplies that are likely to be impacted.

Comment: One commentator expressed support for proposed amendments to § 89.146a which establish a mechanism whereby mine operators can be relieved of their obligation to restore or replace an adversely affected EPACT water supply in circumstances where DEP has determined it is impossible to do so. The commentator also asserted that it is unnecessary to distinguish between "EPACT water supplies" and other water supplies covered by Act 54 for this purpose. The commentator asserted that the conditions under which an operator is allowed to provide compensation rather than restore or replace an

affected water supply should be the same for all water supplies covered by Act 54 and not be restricted to EPACT water supplies. *(10)*

Response: It is presumed that the commentator is referring to § 89.152 rather than § 89.146a, since § 89.152 is the only section that addresses alternative means of settling water supply damage claims. The commentator's support of this amendment is acknowledged.

Contrary to the commentator's assertion, it is necessary to distinguish between the conditions under which compensation may be used to satisfy EPACT water supply claims and the conditions under which compensation may be used to satisfy non-EPACT water supply claims. OSM has only superseded sections 5.2(g) and (h) of the BMSLCA to the extent these sections are inconsistent with the Federal SMCRA. This being the case, OSM's action only limits the use of compensation with respect to settlements involving EPACT water supplies. The compensation options and restrictions on DEP actions remain applicable to settlements involving water supplies that are outside the scope of the federal program. It is therefore necessary to reflect this distinction in § 89.152.

Comment: The proposed amendment to § 89.152(b), which allows a property owner to waive the provision of a restored or replacement water supply, makes Pennsylvania's regulations more liberal insofar as water replacement goes, instead of more restrictive as OSM said they should be. The proposed language should be modified to require that a portion of the compensation paid pursuant to a waiver agreement be held in escrow to guarantee water replacement in case the property owner or a successor property owner desires such replacement in the future. If wavier agreements are determined to be unconstitutional, coal companies may be deemed liable for water supply replacement irrespective of the provisions of these waiver agreements. *(18)*

Response: The provision in § 89.152(b) is based on federal regulatory requirements relating to the replacement of affected water supplies (See 701.5, definition of *Replacement of water supply*). OSM has found this provision to be no less effective than those requirements. Moreover, this provision is clearly within the scope of section 5.3(a) of the BMSLCA, which provides that "[n]othing contained in this act shall prohibit the mine operator and landowner at any time after the effective date of this section from voluntarily entering into an agreement establishing the manner and means by which an affected water supply is to be restored or an alternate supply is to be provided or providing fair compensation for such contamination, diminution or interruption."

The commentator's recommendation concerning the use of escrow to ensure the future development of a replacement water supply is not authorized by the BMSLCA. It is also beyond the scope of OSM's requirements.

Comment: All affected wells and springs should be replaced. *(11)*

Response: The amendments to § 89.152(a) are intended to ensure the restoration or replacement of EPACT water supplies that are affected by underground mining operations. Section 89.152(b), which addresses non-EPACT water supplies, also

promotes the restoration or replacement of affected water supplies but includes provisions that allow claims to be settled through compensation when operators decide restoration or replacement is not practical. These two distinct standards are necessary because OSM's final rule only results in a partial supersession of sections 5.2(g) and (h), leaving intact provisions that allow claims for non-EPACT water supplies to be settled though compensation.

It is important to note that water supply replacement requirements in § 89.145a and the special water supply replacement provisions in § 89.152 only apply to springs with documented water supply uses. Springs that are not used for domestic, commercial industrial, recreational or agricultural purposes do not meet the definition of "water supply" in § 89.5.

Comment: Mine operators should be held more accountable for the damage they cause. In the future Ten Mile Creek is going to be undermined as are several farms. These farms have springs and ponds and will be worthless without water. *(16)*

Response: The law requires restoration or replacement of affected water supplies. It is rare that a water supply cannot be repaired or replaced. DEP does not allow mining that would diminish a water supply, if it determines that restoration or replacement is unlikely to be successful. Pennsylvania's existing law and regulations include provisions designed to protect property values in cases where agricultural water supplies cannot be restored or replaced. In cases where water supplies cannot be restored or replaced, a property owner may insist that the mine operator purchase the property at its fair market value immediately prior to the time of water loss or provide compensation equal to the reduction in fair market value resulting from the water loss. These options are not in any way diminished by this rulemaking.

Availability of replacement water supply

Comment: The system does not provide adequate protection of the Commonwealth's water resources. DEP recently gave Nottingham Township Supervisors $50,000 to pay for expansion of the public water system necessitated by the destruction of private water supplies by an underground mining company. The state subsidizes this industry in its destruction of the water supplies and water resources of the Commonwealth. Federal law does not permit dewatering of the countryside, and DEP has the obligation to protect the waters of the Commonwealth. Permit applications that cannot prove they will not pollute, disrupt, or destroy the waters of the Commonwealth should be denied. The economic feasibility of replacing water resources should not be a concern of citizens or DEP. If replacement is not feasible, then mining should not take place. *(12)*

Response: This rulemaking in combination with the federal supersession of sections 5.2(g) and (h) of the BMSLCA will serve to tighten requirements relating to the restoration and replacement of EPACT water supplies. Under the amended law and regulations operators must restore or replace affected EPACT water supplies except in situations where the Department determines that a permanent replacement source meeting

regulatory standards for adequacy cannot be developed. Cost alone cannot be the basis for this determination. Under the new requirements, an operator could be faced with water supply replacement expenses amounting to several times the value of the affected property. The elimination of the option to compensate rather than restore or replace affected EPACT water supplies should, in itself, cause operators to consider more carefully which supplies their operations are likely to affect and how those supplies will be restored or replaced.

The partial supersession of section 5.2(h) also removes restrictions that previously limited DEP's authority to order the replacement of affected EPACT water supplies. This authority, in combination with DEP's current application preview procedures, should provide greater assurance of water supply replacement. As part of an application review, DEP ensures that suitable plans are in place for the restoration or replacement of all water supplies that are likely to be affected by proposed operations.

Comment: An issue that seems to be overlooked when underground mining companies apply for permits is the availability of water sources to replace the wells and springs that are lost as a result of the mining process. This matter needs to be addressed for room-and-pillar mines as well as for longwall mines. (The commentator describes difficulties in establishing replacement water supplies in the Parkwood area of Indiana County which was undermined in 1985). *(2)*

Response: The problems described by the commentator are the result of underground mining operations that occurred prior to the effective date of the Act 54 amendments to the BMSLCA. Prior to 1994, state law did not require an underground mine operator to restore or replace water supplies. Section 5.2(j), which was added in 1994, requires operators to describe how they will replace water supplies affected by their underground mining operations. DEP now requires permit applications to include information showing that all water supplies that are likely to be affected by underground mining operations can be restored or replaced. In addition, the amendments to § 89.152 adopted pursuant to this rulemaking provide greater assurance that affected EPACT water supplies will be restored or replaced.

Comment: The feasibility of providing municipal water service to affected properties should be proven before any mining permit is issued. *(19)*

Response: Section 89.36(c) requires operators to describe how they will replace water supplies affected by their underground mining operations. DEP now requires permit applications to include information showing that all water supplies that are likely to be affected by underground mining operations can be restored or replaced. In addition, the amendments to § 89.152 adopted pursuant to this rulemaking provide greater assurance that affected EPACT water supplies will be restored or replaced.

Comment: The proposed regulations should be amended to require operators to post bonds to ensure the replacement of affected water supplies. *(12)*

Response: The BMSLCA does not authorize the use of bonds for ensuring the restoration of affected water supplies. Pennsylvania law already requires operators to carry insurance to cover water supply claims. Liability insurance required under § 86.168 will be used for this purpose.

General objection to OSM requirements

Comment: In the Preamble, it is suggested that the proposed amendments will eliminate the so-called condition of "Dual Enforcement" that has existed in Pennsylvania since Act 54 was passed. This justification is not reasonable. Pennsylvania has, for over nine years, been regulating the subsidence impacts of bituminous underground mining in accordance with the very provisions of Act 54 and the EQB's current subsidence control regulations which are now proposed for supersession or amendment. Since 1995, OSM has "shared" enforcement authority with DEP, reserving the right to "directly enforce' its interpretation of Federal law in circumstances where it found that citizens were being denied their "rights" under the Federal SMCRA or OSM's regulations. (See 60 Fed. Reg. 44352 (July 28, 1995).

During the years of "dual enforcement," there has been only one instance when OSM felt compelled to issue an order to a Pennsylvania mine operator for an EPACT violation. If, as OSM maintains, there are 47 provisions of Act 54's subsidence program that are less effective than or inconsistent with EPACT, logic holds that there should have been many more instances of direct OSM involvement. This record is not indicative of lax enforcement but a living testament to the fact that Act 54's objectives are consistent with EPACT and debunks OSM's assertion that the state law and negotiations are deficient when compared to their federal counterparts.

Furthermore, there have been no reported instances where the provisions of Act 54 relating to premining inspections imposed by Section 5.4(c) of the BMSLCA, or the two year statute of limitations imposed by Section 5.5(b) of the BMSLCA, or the provision of Section 5.4(a)(3) of the BMSLCA, relating to the time when a structure must have been built in order to be "protected," or any of the other provisions of the BMSLCA which OSM proposes to supersede, were found by OSM to have created any need for "federal enforcement." Pennsylvania's record speaks for itself. Nothing is "wrong" with the Pennsylvania subsidence control program by OSM's own tacit (and in some instances direct) admission. *(10)*

Response: The commentator's assertions are acknowledged, however, these matters relate more directly to OSM's decision to require changes to Pennsylvania program as set forth at 30 CFR 938.16(hhhh) – (bbbbbb). It is notable that DEP made many of these same arguments to OSM during the interagency discussions that led to this rulemaking. DEP was successful in convincing OSM that some of the requirements set forth in OSM's December 27, 2001, were already addressed in Pennsylvania's existing regulatory program or could be satisfied without changes to Pennsylvania law or regulations. However, in the final outcome, OSM decided that most of the required regulatory changes and six of the initially cited statutory changes were necessary. Although OSM acknowledged that it had seldom intervened in Pennsylvania enforcement matters during

the period of dual enforcement, it observed that the inconsistent provisions of Pennsylvania law and regulation could deprive a landowner of a federally ensured remedy at any time in the future.

Comment: The Board should not approve those amendments which are proposed for the purpose of furthering OSM's illegal and unjustified action to supersede various provisions of the BMSLCA. The Board's responsibility is to promulgate regulations that implement the duly enacted laws of the Commonwealth, not to promulgate regulations for the purpose of invalidating or superseding such laws or to implement OSM's interpretation of State of law. The Board lacks the power, under State law, to adopt regulations which are in conflict with duly enacted laws of the Commonwealth or to repeal regulations which are consistent with and required by the duly enacted laws of the Commonwealth. This is true whether or not OSM proceeds with its so-called "supersession" of certain provisions of the BMSLCA. *(10)*

Response: The regulatory changes in this rulemaking are not in conflict with the provisions of the BMSLCA that are in force and effectual. OSM has taken final action, as authorized by section 505 of the Federal SMCRA and 30 CFR 730.11, to supersede those provisions of the BMSLCA that would have conflicted with some of the regulations promulgated under this rulemaking. The superseded provisions are no longer operative state law.

Potential conflicts between BMSLCA and final regulations

Comment: The statute and the proposed regulations are in conflict in several areas. Regulations will not protect landowners if appeals are taken challenging actions supported only by these regulations, as statutes always prevail over regulations. For example, as to repairs of dwellings and structures, the current statute says the duty to repair is limited to repair and compensation of structures in place up to public notice of the permit application. OSM wants the language to say "as of the date of mining." DEP said it will comply with the OSM requirement by regulation. All it takes is one lawsuit by the mining industry the first time DEP tries to enforce the regulation in order to overturn the regulation. This effectively leaves the statutory language in place. There are other examples of this problem. While DEP proposes an amendment to require prompt repair of structural damage, it does not propose to modify the statute to reflect this changes. People in the coalfields have already suffered considerably by virtue of DEP's interpretation of regulations and by litigation of the coal industry in its efforts to circumvent its obligations to homeowners. *(12)*

Response: In regard to the commentator's first example, regarding the date structures must be in place to qualify for repair or compensation, OSM has taken action to supersede the conflicting provisions in section 5.4(a)(3) of the BMSLCA. This effectively nullifies the statutory restriction as to when structures must be in place to qualify for damage repair and compensation. After supersession, these qualifications are no longer available to serve as the basis for appeal.

In regard to the commentator's second point about the six month negotiation period, there is no reason to supersede the corresponding statutory provision. DEP will seldom, if ever, have cause to issue an order requiring full repair or compensation within this time frame. The reason is because subsidence is likely to be incomplete and the full extent of damage indeterminable. These points aside, DEP has authority under section 9 of the BMSLCA to issue orders requiring emergency repairs and other measures when circumstances warrant this type of action. To the extent the commentator is suggesting changes to statutory provision, that is a legislative matter beyond the scope of this rulemaking.

Comment: This rulemaking satisfies conditions set forth by OSM. Section 503(a) of the Federal SMCRA permits a state to assume primacy if its laws and regulations are consistent with federal laws and regulations. Pennsylvania must meet these conditions to maintain primary enforcement authority over coal mining.

OSM initiated two rulemakings to assist the Commonwealth in this task. The first OSM rulemaking (68 FR 55134-55137, (December 27, 2001)) will supersede six portions of the BMSLCA that are less effective than their federal counterparts. The second OSM rulemaking (68 FR 55106-55134, (September 22, 2003)) seeks comments on the EQB's proposed regulations related to the BMSLCA.

The EQB's existing regulations were promulgated under the statutory authority of the BMSLCA and other Pennsylvania statutes. The EQB does not have the statutory authority to promulgate this regulation until the first OSM rulemaking is in effect. Promulgation of EQB's rulemaking before the relevant portions of the BMSLCA are superseded by the first OSM rulemaking would result in a conflict between the EQB's regulations and the BMSLCA. Therefore, the EQB should not deliver this rulemaking in its final-form until the first OSM rulemaking has been finalized. *(11)*

Response: OSM has finalized its rule superseding those parts of the BMSLCA that were found inconsistent with the federal regulations. The final rule was published at 69 FR 71551 with an effective date of December 9, 2004. The federal supersession effectively removes all provisions of the BMSLCA that would otherwise conflict this regulation. (As a point of clarification, the OSM rulemaking proposing the supersession was published at (68 FR 55134-55137, (September 22, 2003))).

Pre-1994 agreements

Comment: OSM should supersede section 5.3(c) of the BMSLCA, which was originally designated for removal in OSM's December 27, 2001 rule. Section 5.3(c) provides that in any proceedings in pursuit of a remedy [for water supply effects] that may be provided at law or in equity, the provisions of this act shall not apply and the operator may assert in its defense the provisions of contained in deeds, leases or agreements pertaining to mining rights or coal ownership on the property in question. DEP has assured OSM that this provision will not interfere with a homeowner's rights under BMSLCA while seeking remedies under other laws. It is unclear how DEP can provide this assurance.

Even if DEP is correct, the ability of an operator to assert these rights is a disservice to homeowners. *(1)*

Response: This comment pertains to OSM's decision regarding the need to supersede section 5.3(c). It does not pertain directly to any of the amendments promulgated under this rulemaking.

Section 5.3(c) does not negate a property owner's right to a restored or replacement water supply as provided by sections 5.1 and 5.2 of the act. Section 5.3(c) merely provides an operator with additional defenses that can be raised in litigation if a property opts to seek a remedy other than that provided by sections 5.1 and 5.2. OSM has reviewed DEP's explanation of this provision and, upon reconsideration, has decided that it is unnecessary to supersede section 5.3(c). This matter does not relate to any of the regulations affected by the EQB rulemaking.

Comment: OSM should supersede section 5.6(c) of the BMSLCA, which was originally designated for removal in OSM's December 27, 2001 rule. Section 5.6(c) provides for agreements entered into between April 27, 1966, and the date of passage of Act 54, which for valid consideration would release an operator from obligations to repair mine subsided homes from present or future mining. DEP argues, not that these agreements would be invalid, but that such agreements are unlikely to exist. DEP reasons that since pre-Act 54 statutory provisions did not require repairs to homes built after April 27, 1966, there would be no agreements relating to these structures. DEP also reasons that since homes on April 27, 1966, were fully protected they would not be covered by agreements lapsing into this time period.

DEP is wrong on both counts. Neither industry nor affected homeowners could truthfully deny that such agreements exist. The DEP and OSM have forgotten about the "good neighbor policies" which operators touted as a reason for not having a law requiring repair of damages. Although not universal, the policy of several large companies was to provide for some repair or compensation, often based on the "cooperation" of the landowner.

The compensation was frequently, if not always, accompanied by a required agreement. Prior to 1987, DER allowed longwall mining beneath homes built before April 27, 1966, until damage occurred in the vicinity. Some owners of "pre-1966" homes gave permission to undermine their structures. In Cambria County, between 1985 and 1993, some operators offered help to owners of subsided homes on a voluntary basis. These arrangements probably involved written agreements.

The terms of these agreements are largely unknown because most of these agreements are confidential exposing homeowners who disclose their contents to legal risk. Some of the agreements reportedly forbid signatories from participating in citizens groups concerned with mining related issues. Some of these limitations would still appear to be in effect today, if an operator decided to mine other coal seams of the homeowners' properties. *(1)*

Response: This comment pertains to OSM's decision regarding the need to supersede sections 5.6(c) and (d). It does not pertain directly to any of the amendments promulgated under this rulemaking.

OSM and DEP have offered citizens interests several opportunities to come forth with evidence regarding the existence of agreements described under section 5.6(c) of BMSLCA. These offers were made and repeated on at least three occasions when DEP and OSM met with citizens interests to share the results of DEP-OSM discussions in regard to 30 CFR 938.16 (hhhh) – (bbbbbb). Most recently, OSM made a public appeal for this information as part of its proposed rule on Pennsylvania's formal program amendment. *See 68 FR 55119.* To date no one has presented any evidence of the existence of these agreements. OSM therefore decided that it was unnecessary to supersede section 5.6(c).

Comment: It is questionable whether agreements executed between April 27, 1966 and August 21, 1994, are being recorded in deeds as required by section 5.6(d) of the BMSLCA. A deed search in the Cambria County Courthouse turned up no deeds with any reference to such agreements. Since the search focused on properties with known subsidence damage it is reasonable to assume that at least some of the deeds such have contained such references. There is reason to believe that confidential agreements were made between coal operators and landowners and were not recorded as required by law. *(3)*

Response: This comment pertains to OSM's decision regarding the need to supersede sections 5.6(c) and (d). It does not pertain directly to any of the amendments promulgated under this rulemaking.

OSM and DEP have offered citizens interests several opportunities to come forth with evidence regarding the existence of agreements described under section 5.6(c) of BMSLCA. These offers were made and repeated on at least three occasions when DEP and OSM met with citizens interests to share the results of DEP-OSM discussions in regard to 30 CFR 938.16 (hhhh) – (bbbbbb). Most recently, OSM made a public appeal for this information as part of its proposed rule on Pennsylvania's formal program amendment. *See 68 FR 55119.* To date no one has presented any evidence of the existence of these agreements.

<u>DEP assistance to landowners</u>

Comment: DEP should be responsible to handle damage claims for affected property owners to promptly restore their property, water and lives back to normal. Property owners should not be expected to negotiate their own settlements with the mining company unless they so choose. *(19)*

Response: The claim resolution provisions of the BMSLCA are predicated, for the most part, on interactions between the mine operator and affected property owner. DEP's role

is to intervene at the property owner's request or upon recognition of a potentially hazardous situation. DEP is always willing to provide assistance when requested to do so.

Comment: The Preamble to the proposed rulemaking indicates that DEP sends surface subsidence agents to meet with landowners and assist them in obtaining remedies provided by the law and regulations. This is not entirely true, as DEP has yet to assign surface subsidence agents to many parts of the bituminous coal field where room-and-pillar mining takes place. Landowners in these areas are at a disadvantage in seeking prompt and fair resolutions to their water supply problems. Resolving water supply complaints is a huge problem in these areas. It is difficult for landowners to obtain fair settlements, particularly for permanent payments for public water service. Homeowners on Snyder Lane in Indiana County can attest to settlements that are drawn out, unfair and unequal. In Armstrong County, people wait for a public water line while local governments struggle with funds. The coal company should be required to have that line installed. It is a disservice to claim that subsidence agents are available to assist landowners in resolving their problems when the agent service is not available in many areas. *(1)*

Response: It is true that DEP has not assigned surface subsidence agents to service property owners in room-and-pillar mining areas. These agents are assigned to longwall mining areas, which tend to experience a higher number of subsidence damage claims and water supply impacts. DEP does, however, provide property owners in all underground mining areas with fact sheets explaining the remedies to which they are entitled. The fact sheets include an 800 number through which affected property owners can contact DEP and request assistance at any time.

Miscellaneous comments unrelated to this rulemaking

Comment: Several commentators expressed the concern that underground mining is affecting water resources by dewatering streams, ponds, springs or wells. Some commented that the laws protecting these resources should be enforced more vigorously, and some felt that legal protections should be improved. The commentators stated that these features were valuable natural resources that should be protected. *(7, 8, 11, 15)*

Response: This comment is not directly related to this rulemaking, but it does raise an important concern. Existing regulations at § 89.142a(h) and § 89.36 require underground mining to be planned and conducted in a manner that maintains the value and reasonably foreseeable uses of perennial streams and otherwise prevents or minimizes adverse effects on the hydrologic balance. Under this rulemaking, the requirements in § 89.142a(h) are expanded to address effects resulting from all aspects of "underground mining operations" and not just those effects resulting from the extraction of the coal. These changes accomplish the purpose of this rulemaking, which is to ensure that Pennsylvania's regulations are no less effective than federal mining regulations promulgated pursuant to the Federal SMCRA.

Separate from this rulemaking, DEP is developing a policy that integrates the requirements of 25 Pa. Code Chapter 89, Chapter 93 (relating to water quality standards), Chapter 96 (relating to water quality standards implementation) and Chapter 105 (relating to dam safety and waterway management) into a comprehensive strategy for protecting streams and wetlands from the adverse effects of underground mining operations. The intent of this policy is to ensure that mining-related effects are prevented or addressed through appropriate mitigation before they result in impairment of stream uses or loss of wetland resources.

It is important to understand that underground mining operations, including longwall mining operations, do not universally result in the dewatering of overlying streams. This statement is substantiated by observations of DEP field staff and the detailed study of Robinson Fork, which was commissioned by DEP in 2001. This is not to say that adverse effects do not occur is some instances. The loss of flow along segments of Laurel Run (Greene County) and the pooling in segments of Enlow Fork (Greene County) are examples of streams where adverse effects have been observed. In situations like these, DEP requires operators to take measures to restore the affected segments.

Neither the federal regulations nor the BMSLCA prohibit mining related impacts on springs. The requirement, under both programs, is to replace those springs that are impacted with alternate sources of water. It is also notable that replacement requirements only address those springs that are developed for use as water supplies.

Comment: Several commentators described their personal experiences and their neighbors' experiences in dealing with subsidence damage and water supply losses. The commentators described the stresses, frustrations and inconveniences that accompany subsidence damage and water loss. As a group these commentators advocated statutory changes that would strengthen protection of structures and water supplies. *(4, 5, 8, 14, 19, 20)*

Response: The purpose of this rulemaking is to ensure that the protections and remedies provided by Pennsylvania's regulations are no less effective than those provided by the federal regulations. The protections provided hereunder cannot exceed those authorized by the BMSLCA.

Comment: Some commentators expressed apprehension about the prospect of having their properties undermined by longwall extraction. *(9, 11)*

Response: The commentators' apprehension about impending subsidence effects is understandable. This is the reason DEP created its subsidence agent program. The subsidence agents meet with residents in longwall mining areas to answer their questions, explain their rights, and assist in resolving their problems and damage claims.

Comment: In some cases, ponds are lost due to longwall mining. These losses could presumably affect fire protection in rural areas. *(14)*

Response: Chapter 89 includes provisions that address mining related effects on ponds. Damage to ponds is regarded as land damage and must be corrected to the extent technologically and economically feasible in accordance with § 89.142a(e). In addition, if the pond is used for domestic, commercial, industrial or recreational purposes, its water source is subject to the water supply replacement requirements in § 89.145a.

Comment: The experience of longwall mining affects people psychologically. It alters their decisions, mood, confidence, motivation, ambition and self esteem. It creates stress, anxiety and even depression by imposing fear of the unknown and loss of control on affected landowners. *(13)*

Response: The commentator's concerns are acknowledged; however these matters are beyond the scope of this rulemaking. Moreover, there are no provisions in the state or federal mining law that address these concerns.

Comment: The law should be written so that all disputes are resolved prior to undermining. Coal companies should not be allowed to undermine a property without a full resolution already in place. *(15)*

Response: The commentator's recommendation is beyond the scope of this rulemaking. Implementation of this recommendation would require a change in the statute.

Comment: Taxes on coal reserves should be raised. While the coal lies dormant, the tax rate is very low. Why not increase the tax rate on un-mined coal to a level that will help school districts and other community based programs that are facing financial hardship? Real estate is taxed regardless of whether or not it is productive, and tax rates are regularly reassessed to create more revenue. *(15)*

Response: The commentator's recommendation is beyond the scope of this rulemaking. Implementation of this recommendation would require a change in the law.

Comment: DEP and our government leaders should be serious about preserving and protecting watersheds. *(11)*

Response: The commentator's recommendation relates to matters beyond the scope of this rulemaking.

Comment: DEP's sustainability initiative is practiced as well as preached. *(11)*

Response: The commentator's recommendation relates to matters beyond the scope of this rulemaking.

Comment: The Commonwealth of Pennsylvania should promote and encourage alternative fuel sources as an impetus toward economic recovery. *(11)*

Response: The commentator's recommendation relates to matters beyond the scope of this rulemaking.

Comment: The Commonwealth of Pennsylvania should promote recycling of its wastes as a source of ideology, technology, employment, industry, fuel source and backstowing flotsam. *(11)*

Response: The commentator's recommendation relates to matters beyond the scope of this rulemaking.

Comment: Pennsylvania tax codes for corporations should encourage diverse fuel sources and immediate reclamation of negative practices. *(11)*

Response: The commentator's recommendation relates to matters beyond the scope of this rulemaking.

Comment: A committee comprised of bureaucrats, corporate leaders, and longwall area citizens should be formed to monitor the personal and environmental impacts as a longwall panel is active. *(11)*

Response: The commentator's recommendation relates to matters beyond the scope of this rulemaking.

Comment: Mining methods that result in intentional subsidence of someone's property should be outlawed. *(19)*

Response: The commentator's recommendation is acknowledged, but is beyond the scope of this rulemaking. Implementation of this recommendation would require significant changes to the BMSLCA.

Comment: Many landowners in Greene County are losing the gas wells that provide free gas to their homes. These wells are plugged to make way for longwall mining beneath their properties. *(9)*

Response: The loss of a free tap in to a gas well gas taps is a complicated matter involving the landowner, the mine operator and the gas company that allowed the free service connection. Situations like these are addressed through the existing provisions in § 89.142a(g) and are beyond the scope of this rulemaking.

Comment: This area has a high rate of cancer. The cause has got to be the water. *(9)*

Response: The commentator offers no information as a basis for this assertion. DEP is unaware of any studies linking underground mining or underground mining effects with increased cancer incidence.

Pennsylvania Department of Environmental Protection

Rachel Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063
June 29, 2005

Policy Office 717-783-8727

Mr. Kim Kaufman, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

RE: Final Rulemaking – Bond Adjustment and Mine Subsidence Control Standards
(#7-385)

Dear Mr. Kaufman:

Pursuant to Section 5.1(a) of the Regulatory Review Act, enclosed is a copy of a final-form regulation for review by the Commission. The Environmental Quality Board (EQB) approved this final-form rulemaking on April 19, 2005.

This rulemaking amends existing regulations in 25 *Pa. Code* Chapter 89, relating to underground mining of coal and coal preparation facilities, and Chapter 86 relating to surface and underground mining of coal. The amendments relate to the protection and repair of dwellings and related structures and noncommercial buildings, the replacement of drinking, domestic and residential water supplies affected by underground coal mining operations and the content of subsidence control plans. The amendments also require mandatory adjustments of bonds posted to ensure the repair of subsidence damage and the reclamation of surface areas disturbed by coal mining activities when the Department identifies a change in liability.

The purpose of this rulemaking is to address those provisions of Pennsylvania regulations that the U.S. Office of Surface Mining and Reclamation Enforcement (OSM) found to be less effective than or inconsistent with Federal counterpart regulations. In general, Pennsylvania's regulations address effects on a wider range of structures and water supplies than the Federal regulations and also provide more effective remedies for those effects. However, Pennsylvania's existing regulations include certain provisions that do not meet Federal standards for state primacy programs. OSM disapproved 47 provisions of the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) and associated program regulations on December 27, 2001, and set forth requirements at 30 CFR 938.16(hhhh)-(bbbbbb), directing the Commonwealth to amend its program. The disapproval and requirements were published at 66 FR 67010.

The amendments in this final rulemaking represent the outcome of negotiations between the Department and OSM. Eight of the 47 issues were tentatively resolved without the need for statutory or regulatory revisions. The remaining 39 issues are resolved through this rulemaking. On December 9, 2004, OSM published a final rule superseding six provisions of the BMSLCA that were inconsistent with the Federal regulations and which would have conflicted with some of the regulatory amendments. This rulemaking represents the minimum necessary for the Department to maintain a state primacy program that is at least as effective as, and not inconsistent with, the Federal Surface Mining Control and Reclamation Act.

The rulemaking includes an amendment regarding bond adjustments that will apply to all coal mining activities, as well as to underground bituminous coal mining operations. It also requires periodic adjustment of bonds posted to ensure the reclamation of surface mining activities, coal preparation activities and coal refuse disposal operations, and in this context, serves to satisfy an OSM requirement.

The proposed rulemaking was approved by the EQB at their July 15, 2003 meeting and was published in the *Pennsylvania Bulletin* on September 13, 2003. A 60-day period was provided to receive public comments. Public hearings were held in Indiana, Pa. on October 15, 2003, and in Washington, Pa. on October 16, 2003.

Twenty persons submitted timely comments in response to the proposed rulemaking. Commentators included the Pa. Coal Association, Citizens for Pennsylvania's Future, Wheeling Creek Watershed Conservancy, Mountain Watershed Association, Ten Mile Protection Network, Concern About Water Loss due to Mining, and fourteen private citizens. The Independent Regulatory Review Commission (IRRC) recommended that the final-form rulemaking not be completed before OSM finalized its action superseding the inconsistent provisions of the BMSLCA. As noted, the OSM rule superseding the inconsistent provisions of the BMSLCA became final on December 9, 2004.

The Department will provide assistance as necessary to facilitate the Commission's review of this final-form regulation under Section 5.1(e) of the Regulatory Review Act. This review is tentatively scheduled for July 28, 2005. Please contact me if you would like additional information.

Sincerely,

Marjorie L. Hughes
Regulatory Coordinator

Enclosures

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

I.D. NUMBER:	7-385
SUBJECT:	Bond Adjustment and Bituminous Mine Subsidence Control and Standards
AGENCY:	DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

RECEIVED
2005 JUN 29 PM 4:24
REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
6-29-05	D Newton	HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
	C Reddecliff	
6/29/05	T Colaw	SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
6/29/05	Bonnie Costello	
6/29	Steve Hoffman	INDEPENDENT REGULATORY REVIEW COMMISSION
		~~ATTORNEY GENERAL (for Final Omitted only)~~
		~~LEGISLATIVE REFERENCE BUREAU (for Proposed only)~~

June 29, 2005