

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 938**

[PA-122-FOR]

**Pennsylvania Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Final rule.

**SUMMARY:** OSM is approving, with the exceptions noted below, an amendment to the Pennsylvania program. Pennsylvania is amending its Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) and implementing regulations at 25 Pa. Code Chapter 89 to require underground mine operators to repair or compensate landowners for subsidence damage to certain structures and facilities and to restore or replace water supplies adversely impacted by underground mining operations.

**EFFECTIVE DATE:** December 27, 2001.

**FOR FURTHER INFORMATION CONTACT:**

Beverly Brock, Acting Director, Office of Surface Mining Reclamation and Enforcement, Harrisburg Field Office, Harrisburg Transportation Center, Third Floor, Suite 3C, 4th and Market Streets, Harrisburg, Pennsylvania 17101, Telephone: (717) 782-4036.

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**I. Background on the Pennsylvania Program**

Section 503(a) of the Surface Mining Control and Reclamation Act (SMCRA or the Act) permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, " \* \* a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of

the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and the conditions of the approval in the July 30, 1982, **Federal Register** (47 FR 33050). You can find subsequent actions concerning the Pennsylvania program and previous amendments at 30 CFR 938.11, 938.12, 938.15 and 938.16.

**II. Submission of the Amendment**

By letter dated July 29, 1998 (Administrative Record Number PA 841.07), the Pennsylvania Department of Environmental Protection (PADEP) submitted an amendment to its approved permanent regulatory program pursuant to the federal regulations at 30 CFR 732.17(b).

We announced the proposed rulemaking in the August 25, 1998, **Federal Register** (63 FR 45199). The rule described Pennsylvania's proposal to modify the BMSLCA through Act 54 and also described Pennsylvania's proposal to make changes to its regulations at 25 Pa. Code Chapter 89, titled "Underground Mining of Coal and Coal Preparation Facilities." The first public comment period closed on September 24, 1998. In response to requests from three people, the comment period was reopened on September 25, 1998, (63 FR 51324). This second comment period closed on October 19, 1998. A public hearing was held on October 13, 1998, at Washington, Pennsylvania (Administrative record numbers PA 841.21, 841.22, and 841.31).

After reviewing the written comments we received, the information received at the public hearing and conducting our own review of the amendment, we sent two letters to Pennsylvania requesting clarification of numerous issues. The letters were sent on June 21, 1999, (Administrative record number PA 841.32) and June 23, 2000, (Administrative record number PA 841.40). Pennsylvania responded to the first letter on June 1, 2000, (Administrative record number PA 841.39) and to the second on July 14, 2000 (Administrative record number PA 841.41). The substance of the issues and Pennsylvania's responses are discussed below.

We reopened the public comment period on December 8, 2000, (65 FR 76954) to seek comment on Pennsylvania's response to our two letters. Two commenters responded to this reopening. Their comments and our response are found in the response to comments section.

**III. Director's Findings**

**Note:** Throughout this final rule, unless otherwise indicated, "Director" refers to the Director of OSM.

We have noted throughout this final rule that we are not approving or are requiring amendments to some of Pennsylvania's statute and regulations regarding repair or compensation for structural damage and restoration or replacement of water supplies. We wish to make it clear that any of the sections not approved or required to be amended only apply to structures and water supplies that are protected under EPAct and do not apply to structures or water supplies that are not protected by EPAct.

**A. Changes to the BMSLCA**

Set forth in the explanation below and the table that follows, pursuant to SMCRA and the federal regulations at 30 CFR 732.15 and 732.17 are the Director's findings concerning the proposed amendments to the BMSLCA. The Director's reasons for approving, conditionally approving, requiring amendments to, or not approving sections of, the BMSLCA are noted. The sections are listed in the order they appear in the BMSLCA for easy reference.

*Section 4 (52 P.S. 1406.4).* This section was repealed by Act 54. Prior to repeal, the section provided protection from subsidence from bituminous coal mining to certain structures in place as of April 27, 1966. The Director is approving the repeal of this section because it had afforded a level of protection to structures beyond that contained in the federal regulations. The repeal of section 4 means that the BMSLCA affords the same level of protection to structures regardless of when constructed, which is consistent with the federal regulations. Thus, the repeal of this section does not render the Pennsylvania program less effective than the federal program.

*Section 5(b) (52 P.S. 1406.5(b)).* The full text of section 5(b) prior to modification by Act 54 read, "The department shall require the applicant to file a bond or other security as recited in section 6(b) to insure the applicant's faithful performance of mining or mining operations in accordance with the provisions of section 4." The section was modified by Act 54 to change the reference from section 6(b) to 6(a) and to delete the phrase "in accordance with the provisions of section 4."

The Director is approving the deletion of the phrase "in accordance with the provisions of section 4" because it was made in response to the deletion of section 4, which was approved for the reasons given above. However, the reference to section 6(a) is incorrect because section 6(a) was deleted. The correct reference should have remained section 6(b). The Director is requiring Pennsylvania to correct the reference to the bonding requirements.

*Section 5.1(a)(1) (52 P.S.*

*1406.5a(a)(1)).* This section requires that a water supply adversely impacted by an underground mine be replaced "with a permanent alternate source which adequately serves the premining uses of the water supply or any reasonably foreseeable uses of the water supply." The implementing regulations at 25 Pa. Code 89.145a(b) include identical language.

Pennsylvania's implementing regulations at 25 Pa. Code 89.145a(f)(3) also specify that—

A restored or replaced water supply will be deemed adequate in quantity if it meets one of the following:

(i) It delivers the amount of water necessary to satisfy the water user's needs and the demands of any reasonably foreseeable uses.

(ii) It is established through a connection to a public water supply system which is capable of delivering the amount of water necessary to satisfy the water user's needs and any reasonably foreseeable uses.

(iii) For purposes of this paragraph and with respect to agricultural water supplies, the term reasonably foreseeable uses includes the reasonable expansion of use where the water supply available prior to mining exceeded the farmer's actual use.

The Director is approving paragraph (iii) because it provides for protection for agricultural uses that are not protected under the federal regulations and is in accordance with 505(b) of SMCRA.

By letter dated June 21, 1999, we originally expressed concern with 25 Pa. Code 89.145a(f)(3)(i), stating that:

Pennsylvania's proposed statute [and rule] appears to be less effective than the federal rules because it allows evaluation of the adequacy of a replacement water supply quantity to be based on use rather than the premining quantity. Through this statute [and rule], Pennsylvania would allow restoration to a level that is adequate for premining use, but this could be significantly less than the premining quantity and quality of the supply.

Pennsylvania responded by letter dated June 1, 2000:

OSM believes that a replacement water supply must have a yield equal to or greater than the yield of the premining water supply

in order to be considered adequate. This position allows no consideration for the quantity of water actually used by the landowner or water user.

In addition, it is important to recognize that Pennsylvania's law requires an accounting of foreseeable uses when determining the adequacy of replacement water supplies. If the water user's premining needs were only 4 gpm but the user had plans that would utilize the full 10 gpm capacity of the well, the replacement supply would have to produce the 10 gpm under the Pennsylvania program.

After reconsidering the preamble to the definition of "replacement of water supply" at 30 CFR 701.5 and our comments and Pennsylvania's responses on the proposed Pennsylvania program, we recognize that the definition of "replacement water supply" does not specify how equivalency is to be determined and that there may be alternate approaches to determining whether a water supply has been appropriately replaced. As discussed more fully below, we considered whether actual and reasonably foreseeable use, including potential uses, would be a means of determining equivalency. We then reviewed the degree to which Pennsylvania's "adequate quantity" standard under 25 Pa. Code 89.145a(f)(3)(i) and (ii) would meet actual and reasonably foreseeable use. Finally, we examined the degree to which the Pennsylvania standard would ensure that the replacement water source would be equivalent to the premining source, and the replacement delivery system would be equivalent to the premining delivery system.

*Use as a Standard:* The preamble to the definition of "replacement of water supply" at 30 CFR 701.5 contains various analyses as to the scope of the replacement requirement. The following discussion foreclosed basing replacement supply quantity on just the actual premining use:

Commenters argue that the definition should state that the replacement water supply need only provide the quantity and quality required for actual use. \* \* \* OSM maintains that the provision of water quality and quantity equivalent to that of premining supplies is plainly required by the term "replacement" [in EPAAct].

60 FR 16726.

Additional guidance is found in the preamble at 60 FR 16727, which specifies that "[w]here the spring or well also serves other purposes, the quantity of the replacement supply only needs to be equivalent to the premining water supply for drinking, domestic, or residential use." Thus, absolute equality to the premining quantity was not deemed to be required in all instances.

We then find a discussion on the requirement that replacement of the

water supply must account for uses by future owners. When we were discussing the option of not replacing the water delivery system, we said that an equivalent water source must be available for development "so that the current owner or his or her successor could *utilize* the water if desired in the future." 60 FR 16727 (emphasis added).

Finally, to harmonize these statements, we look to yet another preamble statement, which appears to endorse consideration of the level of both actual and reasonably foreseeable use as a means of determining equivalency. In discussing the portion of the definition that provides an option under which the permittee would not need to replace the water supply delivery system, the preamble states: "This provision [identification of a suitable alternative water source] would ensure that all coal mining operations must be conducted so that water resources remain to support the existing and proposed use of the land." 60 FR 16727. In the context of the definition, "proposed use" refers to the approved postmining land use. Although the postmining land use requirements of 30 CFR 817.133 generally do not apply to areas overlying underground workings, since those areas usually do not lie within the permit area, the Pennsylvania term "any reasonably foreseeable uses" is the functional equivalent of the term postmining land use for lands outside the permit area. Although this statement was not specifically addressed at the issue of interpreting equivalency, it does indicate contemplation and acceptance of the standard proposed by Pennsylvania.

Since the definition of "replacement of water supply" at 30 CFR 701.5 does not specify how equivalency is to be determined, OSM finds that it can approve a water supply replacement provision that relies on actual and reasonably foreseeable use as a standard as no less effective than the federal rules with respect to water quantity.

The Pennsylvania "Adequate Quantity" Standard: The Pennsylvania statute at section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)), requires that a water supply adversely impacted by an underground mine be replaced "with a permanent alternate source that adequately serves the premining uses of the water supply or any reasonably foreseeable uses of the water supply." The implementing regulations at 25 Pa. Code 89.145a(b) include identical language. As noted above, Pennsylvania's regulations further define a restored or replaced supply as adequate in quantity if (i) it delivers the

amount of water to satisfy the water user's needs and the demands of any reasonably foreseeable uses or (ii) is a public water supply system that delivers the amount of water to satisfy the water user's needs and the demands of any reasonably foreseeable uses. 25 Pa. Code 89.145a(f)(3)(i) and (ii). Pennsylvania limits "public water supply systems" to those defined at 25 Pa. Code 89.5.

Responding to OSM concerns on 25 Pa. Code 89.145a(f)(3)(i), Pennsylvania commented that the replacement water supply "must be capable of satisfying the premining uses \* \* \* and, in addition, any foreseeable uses the landowner or water user had intended to develop." With regard to public water supplies as a possible replacement, Pennsylvania stated that "[a] connection to a public water supply system is a reasonable means of replacement if the public water supply system can satisfy the water user's existing and reasonably foreseeable needs and is adequate for the purposes served." 28 Pennsylvania Bulletin (Pa.B.) 2777.

To the extent that Pennsylvania's letter and the Pennsylvania Bulletin language could be read to indicate that the user must have plans to demonstrate reasonably foreseeable uses of a water supply or is limited to the current user, we disagree with these interpretations. The proper standard is whether there is a reasonably foreseeable use for the premining capacity, not whether actual plans exist or the uses are limited to the current owner. Actual plans or the current owner's uses (existing and foreseeable) are merely two ways to determine foreseeable uses. As previously stated, the replaced water supply must take into account not only the actual use but also any potential uses by a future owner. As a consequence, OSM is approving the language under section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)), and 25 Pa. Code sections 89.145a(b), and 89.145a(f)(3)(i) and (ii), to the extent that Pennsylvania both interprets and implements the provisions consistent with the definition of "replacement of water supply" at 30 CFR 701.5 where an equivalent replacement would be achieved by meeting the premining uses and any reasonably foreseeable uses of the supply. Therefore, OSM is requiring Pennsylvania to amend 89.145a(b) and 89.145a(f)(i) and (ii), if necessary, to ensure that the phrase "satisfy the water user's needs and the demands of any reasonably foreseeable uses" is consistent with our discussion concerning the actual use and the reasonably foreseeable use of the supply.

Equivalent Replacement Source and Delivery System: The definition of "replacement of water supply" at 30 CFR 701.5 and the corresponding preamble make it clear that "replacement includes provision of an equivalent delivery system." 60 FR at 16726. As previously noted, the preamble discussion related to waiving the replacement of delivery systems not needed for the postmining land use require that the permittee must demonstrate the availability of a water source equivalent to premining quality and quantity. 60 FR at 16727. As a consequence, a replacement supply must be equivalent to the premining supply both in terms of a delivery system and in terms of water quantity of the source.

Pennsylvania's proposed requirements do not specifically address EPA requirements that a replacement supply must include the provision of an equivalent water delivery system and an equivalent water source in terms of quantity. Under 25 Pa. Code sections 89.145a(f)(1) and 89.145a(f)(4), Pennsylvania required that the replacement supply include a delivery system and proposed criteria for determining the adequacy of permanently restored supplies. While the proposed standards would address supply permanence, reliability, maintenance, and owner control and accessibility, we are concerned that those criteria, alone, could still require supply owners to accept water supply delivery systems that are not equivalent to the premining system to compensate for a replacement source that is not equivalent to the quantity of the premining source. A water delivery system equal to the premining system is crucial to protecting the supply owner from the practice of installing an unconventional delivery system to make up for a source that does not provide an equivalent quantity of water. Examples of such systems would be the placement of in-ground storage tanks to offset well or spring yields that, alone, do not provide an equivalent quantity of water, and the development of an elaborate delivery system from multiple low yield wells.

In conclusion, the Director is approving section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)), which requires that a water supply adversely impacted by an underground mine be replaced "with a permanent alternate source which adequately serves the premining uses of the water supply or any reasonably foreseeable uses of the water supply," to the extent that Pennsylvania both interprets and implements the provisions at section 5.1(a)(1) (52 P.S.

1406.5a(a)(1)), 25 Pa. Code 89.145a(b), and 25 Pa. Code 89.145a(f) consistent with the definition of "replacement of water supply" at 30 CFR 701.5 where an equivalent replacement would be achieved by meeting the premining uses and any reasonably foreseeable uses of the supply. Under the Pennsylvania program, an equivalent delivery system or source would be those that adequately serve the premining uses of the water supply or any reasonably foreseeable uses of the water supply. As previously noted above, OSM is requiring Pennsylvania to amend 25 Pa. Code sections 89.145a(b) and 89.145a(f)(3)(i) and (ii), if necessary, to ensure that the phrase "satisfy the water user's needs and the demands of any reasonably foreseeable uses" is consistent with our discussion concerning the actual use and the reasonably foreseeable use of the supply. Finally, OSM will evaluate implementation of the requirements through the oversight process to determine if the processes used by Pennsylvania to determine current owner's needs and demands of any reasonably foreseeable use are consistent with the definition of "replacement of water supply" at 30 CFR 701.5.

With respect to replacement timing, section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) requires restoration of water supplies but does not place an obligation on the permittee to do so promptly. In addition, section 5.2 (52 P.S. 1406.5b) and Pennsylvania regulation 25 Pa. Code 89.146a, as proposed, serve to condition replacement timing based upon supply type, location and property owner notice to the permittee. Section 720(a)(2) requires the prompt replacement of protected water supplies. The federal rules require prompt replacement of a water supply on "both a temporary and permanent basis equivalent to premining quantity and quality." (30 CFR §§ 701.5 and 817.41(j)). To ensure that all supplies are guaranteed prompt replacement consistent with EPA, the Director is requiring Pennsylvania to amend this section to require the prompt replacement on both a temporary and permanent basis of all protected water supplies. In requiring the amended language under this section, the Director expects that enforcement actions requiring prompt replacement will at a minimum be handled in conformance with chapter 86, subchapter H (Enforcement & Inspection), which requires citation and abatement of violations within a reasonable time.

Section 5.1(a)(2) (52 P.S. 1406.5a(a)(2)). This section and the

implementing regulations at 25 Pa. Code 89.145a(f)(2) that include identical language, provides that a restored or replaced water supply will be deemed adequate when it differs in quality from the premining water supply, if it meets the Pennsylvania Safe Drinking Water Act (PSDWA) (35 Pa. Stat. Sections 750.1–750.20), or is comparable to the premining water supply when that water supply did not meet these standards.

By letter dated June 21, 1999, we originally notified Pennsylvania that its statute and regulations were less effective than the federal definition of “replacement of water supply” in 30 CFR 701.5. That definition requires that a replacement supply be “equivalent to premining quantity and quality.”

We have reconsidered the position enunciated in our June 21, 1999, letter after reviewing a letter dated March 9, 1999, from then—OSM Director Kathy Karpan to Greg Conrad of the Interstate Mining Compact Commission (IMCC). In that letter, Director Karpan provided guidance for the development and evaluation of State program amendments implementing EPA Act.

Our definition of “replacement of water supply” in 30 CFR 701.5 requires that the replacement supply be equivalent in quantity and quality to the premining supply. The federal rules do not define what “equivalent” means with respect to water quality. However, the March letter to the IMCC stated that, with respect to quality, we would consider the equivalency requirement to be met if the replacement water supply was of a “quality suitable for all current and reasonably foreseeable uses.” The letter also notes that our regulations do not require replacement of the source of the premining water supply. Thus, the letter implies that “equivalent” does not translate to “identical.” Instead, it allows some differences in chemical composition, as long as the replacement supply remains suitable for the uses associated with the premining water supply and any reasonably foreseeable uses.

The preamble to our regulations clearly supports this approach by stating that our regulations do not require restoration of the source of the premining water supply. Instead, according to the preamble, replacement of the water supply may be accomplished through provision of an alternate source such as a public water supply or by pipeline from another location. See 60 FR 16727 and 16733. Since these alternative sources most likely would not be precisely identical to the premining source in terms of water chemistry, the inference is that

differences in chemical composition are acceptable as long as the premining and replacement supplies are equivalent in terms of suitability for use.

The Pennsylvania regulations at 25 Pa. Code 89.145a(b), when read in combination with 25 Pa. Code 89.145a(f)(2), require that replacement supplies meet the standards of the PSDWA whenever the quality of the replacement supply differs from that of the premining supply. The only exception occurs when the premining supply does not meet PSDWA standards, in which case the replacement supply must be at least “comparable to the premining water supply.” The rules do not specify how comparability will be determined, but 25 Pa. Code 89.145a(a)(1) requires that operators conduct premining water supply surveys prior to mining within 1000 feet of the water supplies. Paragraphs (ii) and (iii) of 25 Pa. Code 89.145a(a)(1), require that the surveys assess the existing and reasonably foreseeable uses of the water supply and the chemical and physical characteristics of the water, including total dissolved solids (or specific conductance), pH, total iron, total manganese, hardness, sulfates, total coliform, acidity, and alkalinity.

The Director finds that Pennsylvania’s provisions are no less effective than the federal requirements concerning the quality of replacement water supplies. We are approving Pennsylvania’s rules in this regard because we interpret our regulations as meaning that, with respect to water quality, an equivalency determination can be made in terms of suitability for particular uses, rather than requiring that the chemical composition of the replacement supply be identical to that of the premining supply. Pennsylvania’s public drinking water systems must meet the requirements of the PSDWA. As Pennsylvania noted in a letter dated June 1, 2000, these requirements are intended to ensure that water delivered by these systems is not only safe, but also palatable and esthetically acceptable. The PSDWA includes maximum contaminant levels for iron, manganese, and sulfates, three parameters that are of major significance in the coalfields.

Of the three types of water supplies protected under EPA Act (drinking, domestic, and residential), drinking water requires the highest standards. Since Pennsylvania’s regulations require that water supplies that meet PSDWA standards be replaced with supplies of at least that quality, they satisfy the quality aspect of the federal water supply replacement requirements.

Where premining water supplies do not meet PSDWA standards, Pennsylvania’s regulation is also no less effective than the federal definition of “replacement of water supply” in 30 CFR 701.5 with respect to water quality because the state rule requires replacement with supplies of comparable quality. “Comparable” is a synonym for “equivalent,” which is the standard in the Federal rule.

*Section 5.1(a)(3) (52 P.S. 1406.5a(a)(3)).* This section deals with the definition of “water supply.” Pennsylvania’s definition includes any existing source of water used for domestic, commercial, industrial or recreational purposes or for agricultural purposes or which serves any public building or any noncommercial structure customarily used by the public. Pennsylvania’s statutory definition is substantively identical to its regulatory definition found at 25 Pa. Code 89.5. The federal definition of “drinking, domestic or residential water supply” at 30 CFR 701.5 includes water received from a well or spring used for “direct human consumption or household use.” Clearly, Pennsylvania’s definition is not identical to the federal definition. Nonetheless, Pennsylvania’s definition includes any existing source used for domestic water, which Pennsylvania has stated would “include all water supplies covered under the Federal program.” 28 Pa.B. 2767.

Even though Pennsylvania’s definition covers the same water sources, we expressed a concern with the Pennsylvania definition because of preamble language in the Pennsylvania Bulletin that stated that the “Board does not wish to include language which could be interpreted to include investor-owned water transmission and distribution mains which are rightfully classified as utilities. The Board notes that this definition does not limit in any way the duty of an operator to provide pumping equipment and connecting piping \* \* \*” (28 Pa.B. 2767). Since the federal definition of “drinking, domestic or residential water supply” includes “any appurtenant delivery system,” we asked Pennsylvania to clarify what is meant by “connecting piping” and “investor-owned water transmission and distribution mains which are rightfully classified as utilities” in our letter dated June 21, 1999. We were concerned about how the Board’s intention not to protect investor-owned water transmission and distribution mains, which are rightfully classified as utilities, would affect the replacement of appurtenant delivery systems protected under EPA Act.

PADEP replied that the preamble discussion was made to illustrate the difference between connections from a well or spring to a residence and connections made to a water main that is part of a public water supply system. Connections from a well or spring are permanent affixed appurtenant structures that must be repaired by the mine operator if damaged. PADEP further noted that damage to a water main and that part of the connecting piping that is owned by the water company would be covered under its regulation at 25 Pa. Code 89.142a(g) relating to protection of utilities. In this case, the damage is likely to be repaired by the water company pursuant to an agreement with the mine operator. PADEP concluded that if the property owner owns the connecting piping, it would be regarded as a permanently affixed appurtenant structure, which the mine operator would be required to repair.

Based on the preamble language of the Pennsylvania Bulletin and its explanation addressed to our concerns, we find Pennsylvania's definition of water supply no less effective than the federal regulation. The Director is approving this section.

*Section 5.1(b) (52 P.S. 1406.5a(b)).* This section indicates an operator is not liable for restoration or replacement of a water supply if a landowner's claim of contamination, diminution or interruption is made more than two years after the supply was affected. In our letter to Pennsylvania dated June 23, 2000, we noted that EPAct provides that an operator is responsible for restoration or replacement of all water supplies used for domestic, drinking or residential use. We noted that the proposed changes to the Pennsylvania program are not as effective as the corresponding federal regulations because some water supplies that would be protected under EPAct may be excluded from protection simply because a user does not file a claim within two years. The federal regulations require a permittee to meet all applicable performance standards during the permit term, including the replacement of water.

In its letter to us dated July 14, 2000, Pennsylvania noted that the two-year time limit for reporting water supply impacts is explicitly stated in BMSLCA. Pennsylvania has observed no cases to date where this limitation has been used as a basis for denying water supply restoration or replacement. Additionally, Pennsylvania noted that since federal SMCRA has no statute of limitations, OSM cannot conclude Pennsylvania's provisions are less

effective than the federal regulations. Pennsylvania asserts that when a federal statute contains no limitation provisions, the most appropriate statute of limitations provided by state law should be applied unless there is a relevant federal statute of limitations or the state law would frustrate or interfere with the implementation of national policies. Pennsylvania cited a court case (*Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987)) that it believes to be relevant to its position.

Pennsylvania further states that since it notifies property owners above underground mines of their rights and the mine operator's obligations should underground mining adversely affect their water supplies, that people are unlikely to make do without water for two years without making a claim. Pennsylvania believes that this approach serves to ensure that water supply claims will be filed before the statute of limitations expires, which will effectively implement the national policy of requiring underground mine operators to address these impacts.

Finally, Pennsylvania noted that this section of BMSLCA is not contrary to 30 CFR 700.11(d) because that section of the federal regulations is purely discretionary and not required to be part of a state program. Section 700.11(d) authorizes, but does not require, regulatory authorities to terminate jurisdiction over the reclaimed site of a completed surface coal mining and reclamation operation. Federal law defines the term "surface coal mining and reclamation operations" as surface coal mining operations and all activities necessary or incidental to the reclamation of surface coal mining operations. The term "surface coal mining operations" is interpreted by OSM to not include subsidence, etc. resulting from underground coal mining. Consequently, water supplies affected by underground mining as well as restoration or replacement of such water supplies are not activities subject to 700.11(d).

The Director is not approving this portion of the BMSLCA for several reasons. First, even though there have been no cases reported to date where this provision has been used to deny restoration or replacement of affected supplies, it does not mean that it will not happen. If this provision were ever used to deny coverage that would otherwise have been provided under federal regulations, it would be less effective than the federal requirements.

Second, we disagree that the Ninth Circuit case cited by Pennsylvania is applicable. The proposition held by the court of appeals and cited by

Pennsylvania states that when a federal statute contains no limitations provisions, an applicable state statute of limitations should be applied, unless there is an analogous federal statute of limitations, or the state law would frustrate or interfere with national policies. The Ninth Circuit case is the general rule applicable to litigation involving private parties. However, this general rule and its exceptions do not control government actions brought to vindicate public interests. See, *Dole v. Local 427, International Union of Electrical, Radio and Machine Workers*, 894 F.2d 607 (3d Cir. 1990). The general rule that applies to government actions is that "no statute of limitations will be applied in civil actions brought by the Government, unless Congress explicitly imposes such time limitations." *Dole*, 894 F.2d at 610. The court of appeals in *Dole* held that no statute of limitations applies to the government so long as a public purpose is served by its action. While section 5.1(b) (52 P.S. 1406.5a(b)) of BMSLCA will benefit a private individual, this is no different than the situation in *Dole*, where the Department of Labor sued to enforce individual and public rights. The fact that a public suit may benefit a private individual does not change the application of the general rule for government actions. Under the provisions of the BMSLCA, it will be Pennsylvania that will enforce the requirement that the operator replace an affected water supply. The requirement to replace a water supply not only serves a private purpose, it also serves a public purpose as well. The replacement requirement not only protects the current owner but also his or her successor and the community by preserving property values. 60 FR at 16727.

Further, a time limit on water claims is adverse to the general scheme of SMCRA. For example, this section would limit Pennsylvania's ability to take enforcement actions and would interfere with the administrative methods established by sections 517 and 521 of SMCRA since it could be difficult to determine when the supply was initially affected. Since every state could have a different time period, this section is contrary to the public policy of section 102(a) of SMCRA that established a nationwide program and with section 101(g) of SMCRA. It could also preclude some citizen suits because in some situations a citizen wouldn't know that Pennsylvania wasn't taking action until the two years elapsed. Additionally, if a claim for water damage were not made within two years from the date the supply was affected,

Pennsylvania would not consider it a violation. Since it is not a violation, this would prevent Pennsylvania from holding operators responsible for damage to a water supply.

We disagree with Pennsylvania that this time limitation is no less effective than the federal rules. It is contrary to section 505(b) of SMCRA, which prohibits any state program from having state laws or regulations that are inconsistent with SMCRA. The statute of limitations would seem to insure that at some point a water supply would not be restored or replaced. Failure to restore or replace a water supply is in direct contrast with the purposes of EPAAct and the federal regulations that require, without a time limit, the restoration or replacement of these supplies. Finally, since our decision is based on the above, we feel it is unnecessary to address Pennsylvania's interpretation of the federal regulations describing termination of jurisdiction. As a result, the Director is not approving section 5.1(b) (52 P.S. 1406.5a(b)) of the BMSLCA.

*Section 5.2(a)(1) (52 P.S. 1406.5b(a)(1)).* This section requires a landowner to contact the operator with a claim of water loss or contamination. The section also requires the operator to investigate such claims with reasonable diligence. In our letter to Pennsylvania of June 21, 1999, we noted that this section appeared to be less effective than the federal regulations because the federal rules and statute do not require the landowner or water user to first contact the operator. We asked Pennsylvania to explain how this requirement affects a landowner's or water user's rights or PADEP's responsibilities to initiate action under citizen complaint procedures.

In its response of June 1, 2000, PADEP indicated that requiring the landowner to contact the operator has not been a problem during the first five years of the program's implementation. Pennsylvania believes that requiring the landowner to contact the operator saves time by allowing the owners to describe their problem to the operator and to schedule access to their property for the operator.

The proposal by Pennsylvania to require landowners to notify operators with a claim of water loss was carefully considered by the Director relative to the requirements for water supply replacement (30 CFR 817.41(j)) and the requirements for addressing complaints by citizens (30 CFR part 842). It is important to note that under both the federal and the proposed Pennsylvania requirements, underground mining that results in the contamination,

diminution, or interruption of a water supply is not prohibited. Once a water supply is affected, the federal requirements require prompt replacement while Pennsylvania's proposed requirements allow operators to delay permanent replacement for up to at least three years. Specifically at issue under section 5.2(a)(1) (52 P.S. 1406.5b(a)(1)) of the Pennsylvania statute is whether the requirement for landowners to notify operators with a claim of water loss is no less effective than federal requirements.

EPAAct and 30 CFR 817.41(j) are silent on how the operator is notified of the water loss. Under section 720 of SMCRA, permittees are responsible for prompt replacement regardless of whether they are contacted by property owners or by the regulatory authority in cases where the property owner failed to do so. Under section 5.2(a)(1) (52 P.S. 1406.5b(a)(1)) of the BMSLCA, Pennsylvania has elected to establish a water loss notification procedure that requires the property owner to contact the operator. The section also requires that the operator shall, with reasonable diligence, investigate the loss. The proposed changes to the Pennsylvania program are silent on any procedures that will be followed in the event that landowners choose to notify the Department rather than the operator. However, under section 5.2(b)(2) (52 P.S. 1406.5b(b)(2)) and 25 Pa. Code 89.146a(b), Pennsylvania conditioned its ability to require temporary water within 24 hours of issuance of an order to those cases where the landowner falls within the rebuttable presumption area and notified the operator.

The Director finds section 5.2(a)(1) (52 P.S. 1406.5b(a)(1)) of the BMSLCA is not inconsistent with the requirements of SMCRA and the federal regulations and is approving it. The approval is granted because even though section 5.2(b)(2) (52 P.S. 1406.5b(b)(2)) and 25 Pa. Code 89.146a(b) act to limit property owner access to the 24-hour temporary supply standard under section 5.2(a)(2) (52 P.S. 1406.5b(a)(2)), the Director's required amendment of section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) of the BMSLCA will insure the prompt replacement of all adversely affected water supplies (see required amendment discussion under section 5.1(a)(1) (52 P.S. 1406.5a(a)(1))). As a consequence, property owners that do not directly notify the operator may not receive a temporary supply within 24 hours pursuant to section 5.2(a)(2) (52 P.S. 1406.5b(a)(2)). However, they will be guaranteed a prompt replacement consistent with EPAAct because of the

amendment required by the Director at section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)).

*Section 5.2(a)(2) (52 P.S. 1406.5b(a)(2)).* This section requires operators to provide a temporary water supply to landowners with water supply problems within the rebuttable presumption area within 24 hours. However, this section does not address temporary water supply requirements for those landowners whose water supplies are outside the presumption area. The federal rules require all protected water supplies to be promptly replaced on both a temporary and permanent basis, regardless of location.

Pennsylvania's response to OSM's issue letter of June 21, 1999, stated (see finding for 25 Pa. Code 89.145a(e)(1)) that section 5.2 of the BMSLCA provided for temporary water replacement if the affected water supply is outside the rebuttable presumption area. Pursuant to 5.2, the operator's responsibility does not begin until after the PADEP issues an order. This is contrary to SMCRA and the federal regulations that indicate there is an obligation on the permittee to replace water on a temporary and permanent basis before there is enforcement by the regulatory authority (see 720(a)(2) of SMCRA and 30 CFR 817.41(j)). As a condition of a permit, a permittee must comply with all the conditions of the permit, all applicable performance standards and the requirements of the regulatory program (see 30 CFR 773.17(c)). The requirement to promptly replace protected water supplies is a performance standard. Once the operator is notified of the water problem (in Pennsylvania, by the landowner or the water user), the operator is obligated to replace the water. This occurs before there is enforcement by the regulatory authority. Enforcement by the regulatory authority commences when there is a violation of the statute, regulations, and/or applicable program. Accordingly, the Director is approving section 5.2(a)(2) (52 P.S. 1406.5b(a)(2)) for those water supplies within the rebuttable presumption area that qualify for the 24-hour temporary supply replacement standard because this portion of the statute is consistent with the federal regulations at 30 CFR 701.5 and 817.41(j) that require prompt replacement of water supplies and with 30 CFR 773.17(c). However, because there is no requirement in BMSLCA to provide temporary water in a prompt manner for those water supplies that lie outside the rebuttable presumption area, or otherwise fail to qualify for the 24-hour temporary supply replacement standard, the Director is requiring Pennsylvania to amend section 5.1(a)(1)

(52 P.S. 1406.5a(a)(1)) requiring the prompt replacement of water supplies, including temporary water, to all landowners whose water supply has been impacted by underground mining.

*Section 5.2(a)(3) (52 P.S. 1406.5b(a)(3)).* This section provides that if a temporary water supply is not provided within 24 hours, PADEP, after notice by the landowner or water user, shall order the operator to provide temporary water within 24 hours. The operator shall notify the Department of any claim of contamination, diminution or interruption made to it by a landowner or water user and its disposition. This section only applies to those supplies falling within the rebuttable presumption zone as required by section 5.2(c) (52 P.S. 1406.5b(c)).

The Director is approving this section because it provides the Department with specific authority to issue orders to require temporary water within 24 hours for those supplies that meet the requirements of section 5.2(c) (52 P.S. 1406.5b(c)), and where the operator has refused to provide the supply. This is consistent with both 30 CFR 817.41(j), which requires prompt replacement of water supplies, and the enforcement procedures of Part 843. Once an operator refuses to replace a protected water supply, a violation has occurred and the regulatory authority can then enforce this replacement requirement with an order. For those supplies that meet section 5.2(c) (52 P.S. 1406.5b(c)), this enforcement authority will assist the Department in securing prompt replacement. It should be noted that the Director is requiring Pennsylvania to amend section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) to require prompt replacement of all supplies covered by EPAAct. In requiring the amended language under section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)), the Director expects that those supplies that do not meet the conditions of section 5.2(a)(2) and (a)(3) (52 P.S. 1406.5b(a)(2) and (3)) will be addressed by the Department consistent with chapter 86, subchapter H (Enforcement & Inspection), which requires citation, and abatement, of violations within a reasonable time.

*Section 5.2(b)(1) (52 P.S. 1406.5b(b)(1)).* This section provides that a landowner may notify the Department if an alternate source has not been provided or if an operator ceases to provide an alternate source and requests an investigation be conducted. While there is no direct federal counterpart to this section, the Director is approving it because it is not inconsistent with the citizen complaint procedures in the approved Pennsylvania program (see 49 FR

10253–58) or 30 CFR 842.12, which allow citizens to bring their complaints to the regulatory authority.

*Section 5.2(b)(2) (52 P.S. 1406.5b(b)(2)).* This section provides that within 10 days of notification the Department will investigate claims and within 45 days make a determination if the operator affected the water supply. The Department can then issue orders for replacement. This section also allows three years to pass before orders requiring a permanent water supply are issued. In our letter to Pennsylvania dated June 21, 1999, we indicated that this section appeared to be less effective than the federal rules because it does not require that water supplies be promptly replaced and that it would allow three years to elapse before the Department issues an order to provide a permanent alternate source of water. We further noted that three years is inconsistent with federal SMCRA 720(a)(2) requiring prompt replacement of drinking, domestic or residential water supplies.

In their letter to us dated June 1, 2000, Pennsylvania indicated that the time periods of 5.2(b)(2) (52 P.S. 1406.5b(b)(2)) relate to PADEP actions. Pennsylvania noted that this section only pertains to situations where mine operators are apparently failing to fulfill their obligations. In these cases, PADEP may be required to establish proof of causation and operator liability before taking appropriate action. Pennsylvania believes this section of BMSLCA is more stringent because it requires the regulatory authority to act within specified time periods while the federal regulations set no deadlines for follow up action by the regulatory authority. With regard to the three-year issue, Pennsylvania responded that the three-year period is consistent with scientific literature that indicates if a water supply is going to recover it will usually do so within three years of impact. Finally, Pennsylvania noted that, in some cases, an attempt at permanent restoration in a shorter time may not be prudent because of the potential impacts of additional mining that will take place in the future.

As we stated in the preamble to the federal EPAAct rules, “existing citizen complaint procedures are adequate and appropriate to address surface owner complaints of subsidence damage.” (60 FR at 16735). While this statement was made in the context of damage to structures, it applies equally to water loss complaints. The proposal by Pennsylvania to provide a water loss claims investigation procedure for affected property owners was carefully considered by the Director relative to

the existing requirements for addressing complaints by citizens under 30 CFR Part 842. Currently, the approved Pennsylvania program regarding citizen complaint investigations and enforcement provides that if an inspection is made, the Department will notify the citizen within 10 days of completion of the inspection of the results. If no inspection is made, the Department will notify the citizen within 15 days of receipt of the complaint. Pennsylvania’s approved citizen complaint rules are consistent with 30 CFR 842.12 and allow latitude in determining what constitutes the point at which an inspection is complete to allow for the collection of necessary data (see 49 FR 10253–58). The Director recognizes that, in certain cases, citizen complaint inspection duties could be completed prior to the 45 days specified in section 5.2(b)(2) (52 P.S. 1406.5b(b)(2)). Under existing citizen complaint rules, once an inspection is completed, Pennsylvania has 10 days to describe its enforcement action or lack thereof. However, under the proposed provision, the completion of inspection duties may occur in a short time, e.g. two days, but Pennsylvania would have longer than 10 days to notify the citizen of its inspection results, e.g. 43 days. This is inconsistent with Pennsylvania’s existing rules and the federal rules regarding time requirements for responding to citizen complaints. To be consistent with the federal rules, Pennsylvania must notify the citizen of its decision within 10 days of completing all the inspection duties. Therefore, the Director is approving this portion of section 5.2(b)(2) (52 P.S. 1406.5b(b)(2)) to the extent that it is consistent with, or more timely than, its citizen complaint procedures and is requiring Pennsylvania to amend its program to the extent the time frames are longer than its citizen complaint procedures.

The Director is not approving the portion of this provision that states “\* \* \* where the contamination, diminution or interruption does not abate within three years of the date on which the supply was adversely affected.” As noted in the preamble to the federal rules, a permittee should connect the user to a satisfactory permanent water supply within two years of notification (60 FR at 16727). Pennsylvania makes reference to technical guidance that supports its standard that a permanent water supply should be replaced within three years. However, Pennsylvania failed to submit such technical information and OSM



knows of no technical guidance to support Pennsylvania's assertion. Section 5.2(b)(2) (52 P.S. 1406.5b(b)(2)) allows three years to elapse without issuance of an order requiring permanent restoration or replacement. The process of ordering a permanent restoration or replacement does not start until the three years expired. This means that permanent restoration or replacement could go well beyond three years, which is clearly not envisioned by OSM in drafting the federal rules. Pennsylvania's statute delays permanent replacement by up to 50% over the federal guidelines. Allowing an operator up to three years to replace a water supply is not a "prompt" replacement, thus it is less stringent than 720(a)(2) of SMCRA.

*Section 5.2(c) (52 P.S. 1406.5b(c)).* This section provides that an underground mine operator is presumed to be responsible for contamination, diminution or interruption of water supplies within a rebuttable presumption area. The operator may successfully rebut the presumption if the landowner denied the operator access to the property to conduct a premining survey of the water supply.

There is no federal regulation that prohibits the state from enacting a rebuttable presumption for water. In fact, by finding that operators are presumed responsible for replacement of water supplies within the presumption area, this portion of the statute will assist in insuring that operators are promptly informed of their obligation to replace affected supplies and will assure they promptly provide emergency and temporary water. Thus, the Director finds that this portion of the program is in accordance with § 720(a)(2) of SMCRA, which requires the prompt replacement of a protected water supply.

*Section 5.2(d) (52 P.S. 1406.5b(d)).* The full text of the language of this section is as follows.

Unless the presumption contained in subsection (c) applies, a landowner, the department or any affected user asserting contamination, diminution or interruption shall have the burden to affirmatively prove that underground mining activity caused the contamination, diminution or interruption. Wherever a mine operator, upon request, has been denied access to conduct a premining survey and the mine operator thereafter served notice upon the landowner by certified mail or personal service, which notice identified the rights established by sections 5.1 and 5.3 and this section, was denied access and the landowner failed to provide or authorize access within ten days after receipt thereof, then such affirmative proof shall include premining baseline data, provided by the landowner or the

department, relative to the affected water supply.

The amendment provides that the Department, or a landowner outside the rebuttable presumption area, has the burden of proof in claiming that a water supply has been contaminated, interrupted or diminished. This is consistent with enforcement actions where the regulatory authority has the initial burden, so the Director is approving this language. However, the last sentence of this portion of the amendment requires that the burden of proof for landowners who deny access to an operator to conduct a premining survey, must include premining baseline data as supplied by the landowner or the Department. The portion of the amendment requiring premining baseline data as a condition of establishing burden of proof makes it less effective than the federal regulations at 30 CFR 817.41(j). This section of the federal regulations requires the baseline hydrologic information required in 30 CFR 780.21 and 784.14 to be used to determine the impact of mining activities upon the water supply. Such information is to be supplied by the applicant. The proposed amendment requires the Department, or landowner, to provide data that is to be supplied by the operator in the permit application. Therefore, the following portion of the amendment is less effective than the federal regulations: "Wherever a mine operator, upon request, has been denied access to conduct a premining survey and the mine operator thereafter served notice upon the landowner by certified mail or personal service, which notice identified the rights established by sections 5.1 and 5.3 and this section, was denied access and the landowner failed to provide or authorize access within 10 days after receipt thereof, then such affirmative proof shall include premining baseline data, provided by the landowner or the Department, relative to the affected water supply." The Director is not approving this language.

*Section 5.2(e)(1) (52 P.S. 1406.5b(e)(1)).* This section provides that a mine operator can be relieved of liability for affecting a public or private water supply when the contamination, diminution or interruption of the supply existed prior to the mining activity. There is no direct federal counterpart to this provision. However, the federal definition of "replacement of water supply" at 30 CFR 701.5, requires the replacement of protected water supplies whenever the supplies were affected by coal mining operations. If all the

contamination, diminution or interruption existed prior to the start of coal mining operations, then the supply was not affected by the coal mining operations. If additional contamination, diminution or interruption occurred after the start of the coal mining operations, then the operator would become liable for the damage caused to the water supply by the coal mining operations. Thus, the Director finds that this subsection is consistent with 30 CFR 701.5 and is approving this portion of Pennsylvania's amendment.

*Section 5.2(e)(2) (52 P.S. 1406.5b(e)(2)).* This section provides that a mine operator can be relieved of liability for affecting a public or private water supply when the contamination, diminution or interruption occurred more than three years after mining activity occurred. In our letter of June 23, 2000, we indicated to Pennsylvania that the statute of limitations proposed by this section will allow water supplies that otherwise will be protected under federal regulations to continue to be contaminated, diminished or interrupted because mining occurred more than three years prior to the onset of water supply problems. PADEP responded in their letter to OSM dated July 14, 2000, that the same reasoning applied to the statute of limitation issue of section 5.1(b) of BMSLCA was applicable for this section. In addition, Pennsylvania indicated that based on the definition of the term "underground mining activities," the obligation to replace an affected water supply extends from the time a water supply is first undermined until three years after the mine has closed and reclamation has been completed. In essence, the period of liability is equivalent to the liability period under the federal regulations which ends at the time that jurisdiction would be terminated under the federal program. Pennsylvania contends this period should be sufficient to capture virtually all water supply impacts that occur as a result of the underground mining activity.

The Director is not approving this portion of the BMSLCA for several reasons. First, even though there have been no cases reported to date where this provision has been used to deny restoration or replacement of affected supplies, it does not mean that it will not happen. If this provision were ever used to deny coverage that would otherwise have been provided under federal regulations, it would be less effective than the federal requirements. This provision virtually assures that at some point in time, there will be a water supply that would not be restored or replaced because the landowner did not



report the contamination, diminution or interruption within the noted time frame.

Second, for the reasons discussed in our findings for section 5.1(b) (52 P.S. 1406.5a(b)), which are incorporated herein, the Director believes this section to be less effective. Additionally, Pennsylvania's three-year limit is not a normal statute of limitations because it is not tied to an injury. It ignores the legislative history of analogous § 516 of SMCRA, which acknowledges that "[s]ubsidence occurs \* \* \* on a random basis, at least up to 60 years after mining." H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977). Pennsylvania's argument that the net effect of 5.2(e)(2) is the same as the federal termination of jurisdiction rule is erroneous. According to Pennsylvania, it is eliminating an operator's liability three years after the mine has closed and reclamation is completed. However, both the termination of jurisdiction rule (30 CFR 700.11(d)) and the EAct regulations (30 CFR §§ 701.5 and 817.41(j)) recognize that a regulatory authority's jurisdiction may not end, if at all, until all the performance standards are met. The termination of jurisdiction rule, while consistent with the EAct regulations, is not applicable since subsidence can occur on a random basis at any time. Thus, an operator's liability extends indefinitely into the future. 60 FR at 16736. With section 5.2(e)(2) (1406.5b(e)(2)), once the three years have passed, there is no recourse for the landowner and no way to force an operator to restore or replace a water supply even though a water supply may be affected long after the three years.

*Section 5.2(e)(3) (52 P.S. 1406.5b(e)(3)).* This section allows a mine operator to be relieved of liability for affecting a public or private water supply when the contamination, diminution or interruption occurred as the result of some cause other than mining. A commenter noted this section could be construed as allowing an operator who is a contributing cause of the water loss, to escape responsibility for a loss for which the operator shares responsibility with another party. Based on this comment, we asked Pennsylvania in our letter of June 21, 1999, to provide a state Attorney General's opinion that the law assures that wherever the operator is partially or entirely responsible for the water loss, state law imposes liability.

Pennsylvania supplied an opinion from the Bureau of Regulatory Counsel in its letter to us dated June 1, 2000. The opinion indicates that in accordance with the rules of statutory construction,

the intent of the Pennsylvania General Assembly was to provide a remedy for water supplies affected by underground mining. This section is construed to relieve an operator of responsibility to restore or replace a water supply only where the contamination, diminution or interruption occurred solely as a result of some cause other than mining. Where mining is partly the cause of the contamination, diminution, or interruption the mine operator will not be relieved of the statutory obligation to restore or replace the affected water supply. The Rules of Practice before the Pennsylvania Environmental Hearing Board also support this intention.

There is no direct federal counterpart to this provision. However, the federal definition of "replacement of water supply" at 30 CFR 701.5, requires the replacement, etc. of protected water supplies whenever the supplies were affected by coal mining operations. Therefore, this section, as explained by the Attorney General's opinion, is consistent with the federal definition. The Director finds Pennsylvania's explanation sufficiently responds to the commenter's concerns, and is approving this portion of the amendment.

*Section 5.2(f) (52 P.S. 1406.5b(f)).* This section requires operators who obtain water samples in a premining or postmining survey to use a certified laboratory to analyze such samples. The operator must submit copies of the results of such analysis to the Department and to the landowner within 30 days of their receipt. Nothing in this section will prohibit a landowner or water user from using an independent certified laboratory to sample and analyze the water supply. This provision is no less effective than 30 CFR 784.20(a)(3), which requires a permit applicant to pay for a premining survey of the quantity and quality of all protected water supplies and to provide copies of such to the property owner and state regulatory authority. The Director is approving this portion of the amendment.

*Section 5.2(g) (52 P.S. 1406.5b(g)).* This section indicates that if an affected water supply is not restored or replaced within three years an operator may be relieved of responsibility for replacement or restoration of a water supply by (1) purchase of the property, or (2) making a one-time payment equal to the difference between the property's fair market value before the time the water supply was affected and the time the payment was made. In our letter to Pennsylvania dated June 21, 1999, we indicated that this section appears to be less effective than the federal regulations because EAct has no

provisions for relieving an operator of responsibility for water restoration or replacement. EAct also does not provide for compensation in lieu of replacement or restoration.

In its response of June 1, 2000, Pennsylvania wrote that it may be cost prohibitive to restore or replace a water supply. This section provides the landowner the option of agreeing to compensation to satisfy the mine operator's obligation to restore or replace the affected water supply. Pennsylvania believes that by affording landowners and water users monetary compensation in situations where it is not reasonably possible to afford them an equitable remedy, its program is consistent with federal law.

The Director is not approving this portion of the BMSLCA because it is less stringent than section 720 of SMCRA, which requires the prompt replacement of a protected water supply. The preamble to the federal regulations at 30 CFR 817.41(j) implementing 720 of SMCRA states:

A commenter recommended that compensation be available as an option for those limited circumstances where an impacted supply can't be restored. The commenter went on to note that Congress, in enacting the Energy Policy Act, clearly noted that these provisions were not to prohibit, or interrupt underground coal mining operations. Without the compensation option, the commenter asserted that operations would be forced to cease operating if they couldn't replace the water supplies. OSM does not agree. The terms of the Energy Policy Act *unequivocally require replacement*. Further, OSM does not anticipate that underground mining operations will be unable to comply with this *statutory mandate*. For example, if the permittee is unable to restore a spring or aquifer, the permittee should still be able to provide water from an alternative source, such as a public water supply, or by pipeline from another location. 60 FR at 16733 (emphasis added).

Clearly both SMCRA and the federal regulations require restoration, or replacement, and thus compensation in lieu of restoration or replacement is not an option.

*Section 5.2(h) (52 P.S. 1406.5b(h)).* This section allows a landowner to submit a written request asking PADEP to review an operator's finding that a water supply cannot reasonably be restored or that a permanent alternate source cannot reasonably be provided. In response to the request, the Department will issue an advisory opinion on the validity of the claim within 60 days. In our letter to Pennsylvania dated June 21, 1999, we indicated that this section appears to be less effective than the federal regulations because it allows a finding

that a permanent alternate source cannot be provided. EPAAct requires a source to be provided without exception.

In its response of June 1, 2000, Pennsylvania reiterated its argument in response to our comments on section 5.2(g) of BMSLCA. Pennsylvania notes that providing an opinion for landowners on whether they should proceed to elect a damage remedy, has done nothing more than provide a means to assure that a landowner does not accept compensation in lieu of "equitable-type" replacement relief unless it is true that a replacement water supply cannot be reasonably provided by the mine operator. Pennsylvania also indicated that BMSLCA addresses a broader array of water supplies than the federal program. The option to compensate represents a reasonable policy choice that provides a flexible approach to the water supply replacement obligation of underground operators. Finally, Pennsylvania noted that § 720 of federal SMCRA provides that the water supply replacement obligation shall not be construed to prohibit or interrupt underground mining. It is entirely possible underground mining conducted under the federal program may result in impacts to water supplies that cannot reasonably be replaced. In these situations the regulatory authority would be faced with accepting some alternative type of settlement that is reasonable and equitable to the mine operator and landowner.

As noted in the Director's decision on section 5.2(g) (52 P.S. 1406.5(b)(g)) of the BMSLCA, SMCRA and the federal regulations require the replacement or restoration of water supplies without exception. The Director is not approving this portion of the BMSLCA because it is connected with section 5.2(g) (52 P.S. 1406.5(b)(g)) that allows compensation in lieu of replacement or restoration. Section 5.2(h) (52 P.S. 1406.5(b)(h)) is not self-sustaining and is unenforceable without section 5.2(g) (52 P.S. 1406.5(b)(g)). Therefore, it is inconsistent with the requirements of SMCRA and the federal regulations.

*Section 5.2(i) (52 P.S. 1406.5b(i)).* This section defines the term "permanent alternate source" to include any well, spring, municipal water supply system or other supply approved by the Department which is adequate in quantity, quality and of reasonable cost to serve the premining uses of the affected water supply. In our letter to Pennsylvania dated June 21, 1999, we indicated that this section appears to be less effective than the federal rules because it bases the adequacy of a

permanent alternate source of water on premining uses of the water supply rather than the premining quality and quantity and that the reasonable cost provision of this section makes it appear to be less effective than federal regulations which require replacement without regard to cost.

In its response to us of June 1, 2000, Pennsylvania noted that our comments were an incorrect characterization of the statutory provision. The requirement that a replacement water supply must be of reasonable cost is intended to protect landowners and water users from being forced to accept water supplies that are unreasonably expensive to operate or maintain. Replacement water supplies with high costs to operate or maintain would only be acceptable if the mine operator provided for payment of the high costs.

The Director is not approving the portion of this provision that requires permanent alternate replacement sources to be of reasonable cost. The definition of the term "replacement of water supply" as found in the federal regulations at 30 CFR 701.5 indicates that replacement includes payment of operation and maintenance costs in excess of customary and reasonable delivery costs of premining water supplies. Pennsylvania's argument that the requirement that a replacement water supply must be of reasonable cost is intended to protect landowners is not tenable because the federal rules require operators to assume the operation and maintenance costs of the replacement delivery systems if they are "beyond those that are customary and reasonable for the premining supply." 60 FR at 16726. Therefore, the Director is not approving the phrase "and of reasonable cost" in this section. However, the Director is approving the remaining portion of this section. For a more complete discussion of the Director's decision regarding quality and quantity standards for replacement or restoration of water supplies, please see the Director's findings for sections 5.1(a)(1) and (a)(2) (52 P.S. 1406.5a(a)(1) and (a)(2)), which are incorporated into this finding.

*Section 5.2(j) (52 P.S. 1406.5b(j)).* This section requires an operator to describe how water supplies will be replaced. This section also provides that the Department cannot require a mine operator to provide a replacement water supply prior to mining as a condition of securing a permit to conduct underground mining. There is no direct federal counterpart to this section. The Director finds that this portion of the amendment is in accordance with that portion of 720(a)(2) of SMCRA which

states that "[n]othing in this section shall be construed to prohibit or interrupt underground coal mining operations." Therefore, the Director approves this portion of the amendment.

*Section 5.2(k) (52 P.S. 1406.5b(k)).* This section allows any landowner, water user, or mine operator, aggrieved by an order or determination of the department issued under this section, the right to appeal the action to the Environmental Hearing Board within 30 days of receipt of the order. This section allows an appeal right that is found within numerous other sections of Pennsylvania's approved program and therefore is no less effective than the federal regulations at 30 CFR 843.16 (implementing 30 CFR 840.13). The Director approves this section.

*Section 5.3(a) (52 P.S. 1406.5c(a)).* This section provides that the operator and the landowner may enter into an agreement that establishes the manner and means by which an affected supply will be restored or an alternative supply will be provided or providing compensation for the affected water supply. It also lists what conditions must first be met before the operator will be released from liability. Finally, it prohibits double compensation to the landowner. In our letter of June 21, 1999, to Pennsylvania, we noted that EPAAct does not allow compensation for contamination, loss or diminution of water supplies in lieu of replacement. In its response of June 1, 2000, Pennsylvania noted these concerns were the same that we noted in sections 5.2(g) and 5.2(g)(1). Pennsylvania's response for this section is the same as in those sections. In addition, Pennsylvania noted that the decision in *National Mining Assoc. v. U.S. Department of the Interior*, 172 F.3d 906 (D.C. Cir. 1999), recognizes the legitimacy of voluntary agreements for damages under the federal regulatory program.

The Director is approving this provision to the extent that the agreement to replace a water supply or provide an alternative water supply meets the requirements established in the federal definition of "Replacement of Water Supply" found at 30 CFR 701.5. The Director is not approving agreements that provide for replacement of an alternate supply of water to the extent that water supply will not meet the requirements of the federal definition.

The Director is also not approving this provision to the extent that it allows compensation in lieu of restoration or replacement of affected water supplies. The federal rules do not allow operators and landowners to enter into voluntary

agreements for compensation in lieu of restoration or replacement of affected water supplies. As previously noted, in the Director's Finding for section 5.2(g), which is incorporated herein, SMCRA and the federal rules require restoration or replacement. The terms of EPA Act *unequivocally require replacement*. 60 FR at 16733 (emphasis added). Therefore, this is less effective than SMCRA and the federal rules. The Director would note that Pennsylvania's reliance on the *National Mining Association* decision is misplaced. The voluntary agreements that are discussed in the court decision are compensation agreements for subsidence damages to any noncommercial building or occupied residential dwelling. The opinion does not extend or recognize compensation agreements for damages to water supplies.

*Section 5.3(b) (52 P.S. 1406.5c(b)).* This section provides that any agreement made under section 5.3(a) (52 P.S. 1406.5c(a)) must be included in every deed for conveyance of the property covered by the agreement. The Director is not approving this provision to the extent that section 5.3(a) (52 P.S. 1406.5c(a)) has not been approved and hence there will be no agreements providing for compensation in lieu of water supply replacement or restoration. Therefore, section 5.3(b) (52 P.S. 1406.5c(b)) is inconsistent with the requirements of SMCRA and the federal regulations to the extent that section 5.3(a) (52 P.S. 1406.5c(a)) is less effective.

*Section 5.3(c) (52 P.S. 1406.5c(c)).* This section allows a landowner or water user who claims contamination, diminution or interruption of a water supply to seek any other remedy that may be provided at law or in equity. The section further indicates that in any proceedings in pursuit of remedies other than provided in this Act, the provisions of this act shall not apply and the party or parties against whom liability is sought to be imposed may assert in defense any rights or waivers arising from provisions contained in deeds, leases or agreements pertaining to mining rights or coal ownership on the property in question.

In our letter of June 21, 1999, we asked Pennsylvania to clarify the intent of this section. In particular we wanted to know what was meant by other remedies as used in this section, and if this section allows an operator to assert rights that afford lesser protection than is provided by EPA Act.

In its response of June 1, 2000, Pennsylvania indicated that the General Assembly appeared to want to preserve any remedy a landowner or water user

had under existing law covering adverse effects to a water supply caused by underground mining. This section gives the landowner or water user the option of pursuing the remedies provided by BMSLCA for water loss, contamination or diminution or pursuing the remedies available at common law or pursuing the remedies available under federal law. Pennsylvania concluded by noting that a mine operator could only assert rights that afford lesser protection than is provided by EPA Act if the water user elects to pursue a common law remedy and the mine operator possesses such rights.

This section is inconsistent with § 720(a)(2) of SMCRA and the federal rules to the extent that any state law negates the requirements of, or provides less protection than, EPA Act. In a challenge to the federal rules (30 CFR § 817.41(j), 817.121(c)(2) and 701.5), industry plaintiffs asserted that these regulations interfered with state law water rights and that the Energy Policy Act did not preempt state law, thereby allowing a landowner's waiver of water replacement. *National Mining Association v. Babbitt*, Civil Action No. 95-0938 (D.D.C. May 29, 1998). The district court agreed with OSM that the federal rules do not interfere with state law water rights. *See also*, 60 FR 16727, 16733 (March 31, 1995). The court went on to hold that the Energy Policy Act "created federal substantive rights that may extend beyond the protections afforded by inconsistent or less protective state laws . . . Congress did not include limitations in § 720 and instead made *the duty to replace or repair a water supply absolute and without exception.*" *Id.* at 12 (emphasis added). For example, any rights or waivers found in deeds or leases or agreements that waive or reduce the protections of EPA Act are less stringent and not approved. However, any Pennsylvania law that exceeds the requirements of EPA Act is in accordance with SMCRA. Also, matters involving property rights disputes are beyond the scope of SMCRA (see § 507(b)(9) and 510(b)(6)(C) of SMCRA). Accordingly, the Director is not approving this section to the extent any state law negates or provides less protection than EPA Act.

*Section 5.4(a) (52 P.S. 1406.5d(a)).* This section requires the operator to either repair or compensate owners for damage to certain structures caused by underground mining operations. Compensation is to be made to the owner of structures overlying, or in the proximity of, the mine for the reasonable cost of its repair or the reasonable cost of its replacement where

the damage is irreparable. Section 720(a)(1) of SMCRA provides for repair of material damage, which "shall include rehabilitation, restoration, or replacement of the damaged" structure or dwelling or compensation in the full amount of the decrease in value resulting from the subsidence. Pennsylvania's statute, as implemented by its regulation at 25 Pa. Code 89.142a(f)(1), states that the operator shall fully rehabilitate, restore, replace or compensate the owner for material damage. The two standards for repair are substantively identical because they both require the operator to rehabilitate, restore, or replace the damaged structure. However, Pennsylvania's standards for compensation are different than SMCRA's because Pennsylvania's are based on the repair or replacement costs while SMCRA's are based on the decrease in value. Even though the standards are different, OSM believes that Pennsylvania's compensation standard is no less stringent than SMCRA since the standard is based on providing the amount of funds required to repair or fully replace the structure. For example, in one federal enforcement case, the construction estimate to repair the structure significantly exceeded the appraisal of the structure's diminished value. Therefore, the Director finds that Pennsylvania's compensation standard is no less effective than § 720(a)(1) of SMCRA because it provides compensation equal to the amount needed by a property owner to repair a structure or to purchase, or build, another structure.

OSM was concerned with Pennsylvania's use of the phrase "in the proximity of the mine." SMCRA has no distance limitation. Accordingly, we asked PADEP in our letter of June 21, 1999, what the phrase "in the proximity of the mine" meant in regard to the protections afforded by this section. Pennsylvania in its response of June 1, 2000, indicated that while the term was not defined in statute or regulation, it understands the term to mean the structures defined in this section do not have to be directly above the mine workings in order to be covered by repair or compensation requirements, and that the phrase recognizes the fact that subsidence effects often extend outward from points where coal is extracted in a mine. Pennsylvania stated that the phrase is not interpreted to impose any specific distance limitations. We find this explanation does not place any limits on the location of protected structures and find section 5.4(a) (52 P.S. 1406.5d(a)) no less stringent than SMCRA.

While section 5.4(a) (52 P.S. 1406.5d(a)) is no less stringent than SMCRA in terms of definition and coverage of types of structures, the Director is requiring Pennsylvania to amend section 5.4 (52 P.S. 1406.5d) to require the *prompt* repair and compensation for those structures protected under § 720(a)(1) of SMCRA and 30 CFR 817.121(c)(2). The Director is requiring this amended protection because section 5.5 (52 P.S. 1406.5e) of the BMSLCA, and its implementing regulations under 25 Pa. Code 89.143a, proposed a number of subsidence damage investigation and enforcement procedures that do not provide for prompt repair of, or compensation for, covered structures in certain situations. In requiring the added language, the enforcement actions requiring prompt repair and compensation will, at a minimum, be handled in conformance with Chapter 86, Subchapter H (Enforcement & Inspection), which requires citation and abatement of violations within a reasonable time.

Please see the Director's findings for sections 5.4(a)(1) through (3) (52 P.S. 1406.5d(a)(1) through (3)) for further information.

*Section 5.4(a)(1) and (a)(2) (52 P.S. 1406.5d(a)(1) and (a)(2)).* These sections provide restoration or compensation to owners of buildings that are accessible to the public, including commercial, industrial or recreation buildings and their permanently affixed structures as well as any noncommercial buildings customarily used by the public. The federal rule at 30 CFR 817.121(c)(3) requires that non-commercial buildings must be repaired or the owner compensated. Non-commercial building is defined at 30 CFR 701.5 as a building that is used as a public building or a community or institutional building as that term is defined in 30 CFR 761.5. Buildings used only for commercial, agricultural, industrial, or retail or other commercial enterprises are not protected in the federal rules.

While Pennsylvania's statute protects some buildings not protected by the federal rules, we were concerned that the Pennsylvania statute was not as inclusive of buildings protected by the federal regulations. In our letter to Pennsylvania of June 21, 1999, we asked for clarification. In its response to us dated June 1, 2000, Pennsylvania indicated that the regulations implementing the changes to the act define the term noncommercial building to include any community or institutional building covered by definition in section 25 Pa. Code 86.101. The definition of community or institutional building in section 25 Pa.

Code 86.101 includes scientific and correctional facilities and structures used for public services. Pennsylvania stated that its program therefore includes all noncommercial buildings covered under the federal program.

We find that Pennsylvania's explanation is reasonable and find that the approved program does cover the same structures as the federal definition describes in the term "community or institutional buildings" and is no less effective than the federal rules. The Director is approving this portion of the amendment.

*Section 5.4(a)(3) (52 P.S. 1406.5d(a)(3)).* This section reads in part:

Restoration or compensation for structures damaged by underground mining—(a) Whenever underground mining operations conducted under this act cause damage to any of the following surface buildings overlying or in the proximity of the mine:

(3) dwellings used for human habitation and permanently affixed appurtenant structures or improvements in place on the effective date of this section or on the date of the first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application; \* \* \* the operator of such coal mine shall repair such damage or compensate the owner of such building for the reasonable cost of its repair or the reasonable cost of its replacement where the damage is irreparable.

In our letter to Pennsylvania of June 21, 1999, we noted that:

There is no federal requirement that the structure be within the boundary of the entire mine. Pennsylvania does not define "improvements." The Black's Law Dictionary defines improvements as "[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally, buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc." Thus, the regulation may be internally inconsistent since it appears that "improvements" and "permanently affixed appurtenant structures," which is defined by Pennsylvania, include some of the same things.

In its response of June 1, 2000, Pennsylvania noted that DEP considers improvements to include "valuable additions" that fall outside the scope of the term *permanently affixed appurtenant structures*. Pennsylvania stated that according to the rules of statutory construction, only improvements must be completely within the boundary of the mine before

the operator has a duty to repair or compensate. Pennsylvania also declared that only improvements must be in place on the effective date of the proposed regulations or on the first publishing date of the mine permit.

The federal rules protect structures in place at the time of mining that are installed on, above or below, or a combination thereof, the land surface if that building, structure or facility is used in connection with an occupied residential dwelling (see 30 CFR 817.121(c)(2) and the definition of "occupied residential dwelling and structures related thereto" at 30 CFR 701.5).

Pennsylvania's protection of structures is more limited than the federal requirements because it requires improvements to be in place at the time of permit application or at the time of the five-year renewal and within the boundary of the mine. The federal definition protects improvements that were in place at the time of mining as long as they were related to a structure. Thus, a structure could have been built after the permit application or five-year renewal and still be protected at the time of mining under the federal rules, but not under section 5.4(a)(3) (52 P.S. 1406.5d(a)(3)) of the BMSLCA. Additionally, this section of the BMSLCA requires improvements to be located within the boundary of the mine to be protected. The federal rules do not have a similar restriction.

The Director finds that the portion of section 5.4(a)(3) (52 P.S. 1406.5d(a)(3)) that states "dwellings used for human habitation and permanently affixed appurtenant structures or improvements" is no less effective than the federal regulations and is approving it. This portion of the amendment provides protections similar to that provided by the federal definition of the term "occupied residential dwelling and structures related thereto" found at 30 CFR 701.5. However, the Director has found the following phrase in section 5.4(a)(3) (52 P.S. 1406.5d(a)(3)) to be less effective than the federal regulations in protecting some structures related to residential dwellings: " \* \* \* in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application." The Director is not approving this phrase. For the Director's findings on the term "permanently affixed appurtenant structures" please see the discussion of that term under 25 Pa. Code 89.5.

*Section 5.4(a)(4) (52 P.S. 1406.5d(a)(4)).* This section provides restoration or compensation of agricultural structures. Pursuant to 30 CFR 817.121(c)(3), repair or compensation for material damage to agricultural structures is required to the extent allowed under state law. The Director is approving this portion of the amendment because it provides for protection for structures that are not protected under the federal regulations and is consistent with 30 CFR 817.121(c)(3).

*Section 5.4(b) (52 P.S. 1406.5d(b)).* This section allows an operator to replace an irreparably damaged agricultural structure with a structure satisfying the functions and purposes served by the damaged structure before such damage occurred—if the structure was used for a purpose different from that for which it was originally constructed. Pursuant to 30 CFR 817.121(c)(3), repair or compensation for material damage to agricultural structures is required to the extent allowed under state law. The Director is approving this portion of the amendment because it provides for protection for structures that are not protected under the federal regulations and is consistent with 30 CFR 817.121(c)(3).

*Section 5.4(c) (52 P.S. 1406.5d(c)).* This section indicates the operator will not be required to repair a structure or compensate a structure owner for damage if the operator demonstrates the landowner denied access to the operator to conduct a premining survey. The section requires operators to serve notice on the landowner by certified mail or by personal service of the landowners rights established by sections 5.4, 5.5, and 5.6. In our letter to Pennsylvania dated June 21, 1999, we noted that under the federal rule at 30 CFR 817.121(c)(4)(iii), denial of access does not relieve the operator of its duty to repair or compensate landowners for subsidence damage. In its response to us dated June 1, 2000, Pennsylvania noted that:

Act 54 imposes a statutory presumption of liability on the coal operator for structural damages and consistent with OSM's rationale, a homeowner who denies access, would preclude the regulatory agency and the operator from determining where the operator's liability should begin and where it should end.

All Pennsylvania has done with respect to the right to assert a claim for compensation is to condition that right; it has not denied anyone their right to seek a repair or compensation remedy in the event their properties are damaged by mine subsidence. The requirement that persons who intend to invoke their rights to repair or compensation

allow the potentially responsible mine operator an opportunity to inspect the property prior to mining is a reasonable condition and one which does not render Pennsylvania's program less effective.

The Director finds that section 5.4(c) (52 P.S. 1406.5d(c)) is less effective than the federal regulations because the federal rules requiring repair or compensation for damage to non-commercial buildings and dwellings and related structures (30 CFR 812.121(c)(2)) do not provide exception for any reason when an operator's underground mining operation has caused subsidence damage. Pennsylvania has failed to account for information that the homeowner or the regulatory authority possesses. It is possible that the homeowner may hire someone to conduct a survey. In Pennsylvania's scenario, the homeowner would have no relief under Act 54 even though he had relevant information that showed causation. As a result, the Director is not approving this provision.

Additionally, in the preamble to the March 31, 1995, federal rules on subsidence (60 FR at 16741), OSM discussed the effect of a landowner denying access to a property and concluded that in any enforcement proceeding OSM or the regulatory authority may take the effect of the denial into account in determining what weight, if any, to give to the rebuttable presumption of causation. Even though the federal rules concerning the presumption were suspended, this part of the preamble clearly indicates OSM's intent that enforcement actions would proceed even if landowners denied permission to operators to conduct premining surveys. There are no passages in the preamble or the regulations that relieve operators of their duty to repair or compensate landowners for subsidence damage to covered structures.

*Section 5.5(a) (52 P.S. 1406.5e(a)).* This section requires owners of buildings described in section 5.4(a) (52 P.S. 1406.5d(a)), who believe removal of coal has caused mine subsidence damage, to notify the operator of the damage. In our letter to Pennsylvania dated June 21, 1999, we noted that this section appears to be less effective than the federal regulations because EPAAct does not require landowners to notify operators of damage.

In its response of June 1, 2000, Pennsylvania noted that:

This is the same concern presented in OSM Statutory Comment 5 regarding [BMSLCA's] water supply replacement provisions. The response to that comment is also applicable here. In making this comment, OSM is failing

to consider that in reality there has to be interaction between the operator and the structure owner in order to expedite the repair/compensation process. The sooner this interaction occurs, the sooner claim resolution can begin. The claim resolution procedures set forth in section 5.5 are intended to promote settlements without [PA]DEP involvement. [PA]DEP involvement is intended as a "second tier" of protection for the structure owner.

Similar to the issues discussed under section 5.2(a)(1) (52 P.S. 1406.5b(a)(1)) for water loss notifications, the Director carefully considered Pennsylvania's proposed requirement that landowners notify operators with a claim of subsidence damage. The Director considered the proposal relative to the requirements for subsidence damage protection (30 CFR 817.121) and the requirements for addressing complaints by citizens (30 CFR part 842). As with water loss, it is important to note that under both the federal and the proposed Pennsylvania requirements, material damage resulting from underground mining that employs planned subsidence is not prohibited. Once damage occurs, the federal requirements require prompt repair or compensation, while Pennsylvania's proposed requirements provide for a six-month period where the property owner and the permittee address the damage without PADEP involvement. Specifically at issue under section 5.5(a) (52 P.S. 1406.5e(a)) is whether the requirement for landowners to notify operators of mine subsidence damage is in any way less effective than federal requirements.

EPAAct and 30 CFR 817.121(c) are silent on how the operator is notified of structure damage. Under 720 of SMCRA, permittees are responsible for prompt repair or compensation regardless of whether they are contacted by property owners or by the regulatory authority in cases where the property owners fail to do so. Under section 5.5(a) (52 P.S. 1406.5e(a)) of the BMSLCA, Pennsylvania has elected to establish a subsidence damage notification procedure that requires the property owner to contact the operator. The proposed changes to the Pennsylvania program are silent on any procedures that will be followed in the event that landowners choose to notify the Department rather than the operator. However, under section 5.5(b) (52 P.S. 1406.5e(b)), 5.5(c) (52 P.S. 1406.5e(c)), and 25 Pa. Code 89.143(a), Pennsylvania established a specific procedure for

investigating and enforcing structure repair and compensation requirements for those landowners that provide notification to the operator.

The Director is approving the portion of section 5.5(a) (52 P.S. 1406.5e(a)) of the BMSLCA that deals with notification of the operator. Because EAct and the federal rules do not set a federal standard concerning structure damage notification, the proposed Pennsylvania requirement that the property owner contact the operator is not inconsistent with SMCRA and 30 CFR 817.121(c). The Director's required amendment of section 5.4(a) (52 P.S. 1406.5d(a)) will insure the prompt repair and compensation for all structures covered by EAct whether or not a landowner has contacted the operator as required by section 5.5 (52 P.S. 1406.5e) of BMSLCA or 25 Pa. Code 89.143(a).

However, the Director finds that use of the phrase "removal of coal has caused mine subsidence" when describing suspected causes of subsidence damage is not as effective as SMCRA. Section 720(a) of SMCRA provides that operators are responsible for repairing or compensating landowners for subsidence damages caused by underground coal mining operations. Underground coal mining operations include more activities than just the removal of coal. Consequently, section 5.5(a) (52 P.S. 1406.5e(a)) acts to limit the operator's responsibility for repair or compensation to subsidence damage caused by coal removal. As a result, the Director is requiring Pennsylvania to amend section 5.5(a) (52 P.S. 1406.5e(a)) to make it clear that operators are responsible for subsidence damage from underground mining operations, not just removal of coal. As a result of this amendment, structure owners who suspect subsidence damage was caused by underground coal mining operations would report such damage to the operator.

*Section 5.5(b) (52 P.S. 1406.5e(b)).* This section provides that landowners may file a claim with the Department if they cannot come to terms with the operator within six months from the date of notice as to the cause of the damage. This section also requires all claims to be filed within two years of the date damage to the building occurred. In our letter to Pennsylvania dated June 21, 1999, we indicated that the portion of this section dealing with the six-month notification period does not appear to be as effective as the federal regulation because it does not require the prompt repair or compensation of subsidence damage. In our letter to Pennsylvania dated June 23,

2000, we indicated that the portion of the statute requiring claims to be filed within two years of the date damage to the building occurs ends or limits the Department's responsibilities if a written claim was filed more than two years after the date of damage to the building. The statute does not allow the Department to conduct required investigations or require operators (via notice of violation) to promptly repair or compensate landowners for damage to structures protected by EAct, and may not be as effective as the federal regulations. While Pennsylvania does not have a termination of jurisdiction rule, these provisions are contrary to the federal rule at 30 CFR 700.11(d).

In its letter to us dated June 1, 2000, Pennsylvania indicated that section 5.5(b) (52 P.S. 1406.5e(b)) does not necessarily preclude the prompt settlement of structure damage claims, it simply gives mine operators and structure owners six months to come to terms on the means of settlement. With regard to the provision requiring claims to be filed within two years of the date damage to the building occurs, Pennsylvania wrote in its letter to us dated July 14, 2000, that the limitation only pertains to PADEP's responsibility to conduct an investigation and does not release a mine operator from the responsibility to repair or compensate for structure damage. The statute does not prohibit PADEP from becoming involved in the resolution of cases that have gone beyond the two-year claim period. Pennsylvania further noted this section does not end PADEP's responsibilities. Section 5.5(c) (52 P.S. 1406.5e(c)) requires PADEP to issue orders directing the operator to compensate the owner or cause repairs to be made. Section 9 (52 P.S. 1406.9) also authorizes the Department to issue orders necessary to aid in enforcement of BMSLCA, which includes the enforcement of the operator's obligation to compensate the owner or to repair the subsidence. With regard to the comment that this provision is contrary to the federal rule at 30 CFR 700.11(d), Pennsylvania reiterated the argument made in response to our comment on section 5.1(b) (52 P.S. 1406.5a(b)).

The proposal by Pennsylvania to provide a specific claims investigation procedure for affected property owners was carefully considered by the Director relative to the existing requirements for addressing complaints by citizens under 30 CFR part 842 and the approved Pennsylvania program (see 49 FR 10253-58, March 20, 1984). As we stated in the preamble to the federal EAct rules, "existing citizen complaint procedures are adequate and

appropriate to address surface owner complaints of subsidence damage." (60 FR at 16735). Currently, the approved Pennsylvania program contains a citizen complaint investigation and enforcement process consistent with 30 CFR part 842. That process does not prohibit citizen complaints or limit the ability of the Department to take enforcement actions based on whether a landowner has served notice to an operator alleging damage.

Pennsylvania's response with respect to the six-month delay pointed out that "it simply gives mine operators and structure owners six months to come to terms on the means of settlement." The EAct and implementing rules provide sufficient flexibility to take into account site conditions, potential repair and compensation alternatives, and other relevant factors to judge whether a permittee has met the requirement to promptly repair or compensate for structure damage.

Additionally, section 5.5(b) (52 P.S. 1406.5e(b)) ignores the requirement of 720(a)(1) of SMCRA, which requires the prompt repair of, or compensation for protected structures. It allows six months to pass without operator action even if the operators reach an early impasse with the owners. Section 5.5(b) (52 P.S. 1406.5e(b)) would prohibit Pennsylvania from issuing orders to require repair or compensation before the six months elapsed. As noted under Section 5.4(a) (52 P.S. 1406.5d(a)), the Director is requiring Pennsylvania to amend its program to require prompt repair and compensation in all cases of EAct-covered structure damage. To ensure that Pennsylvania possesses adequate authority to issue orders requiring the prompt repair and compensation, regardless of whether the structure owner has notified the Department or the permittee, the Director is not approving the portion of this provision that states " \* \* \* within six months of the date of the notice."

Additionally, the section provides that a landowner's right to a Department investigation will expire after two years. We disagree that the Ninth Circuit case cited by Pennsylvania is applicable. The proposition held by the court of appeals and cited by Pennsylvania states that when a federal statute contains no limitations provisions, an applicable state statute of limitations should be applied, unless there is an analogous federal statute of limitations, or the state law would frustrate or interfere with national policies. The Ninth Circuit case is the general rule applicable to litigation involving private parties. However, this general rule and its exceptions do not apply to government

actions brought to vindicate public interests. *Dole v. Local 427, International Union of Electrical, Radio and Machine Workers*, 894 F.2d 607 (3d Cir. 1990). The general rule that applies to government actions is that "no statute of limitations will be applied in civil actions brought by the Government, unless Congress explicitly imposes such time limitations." *Dole*, 894 F.2d at 610. The court of appeals in *Dole*, held that no statute of limitations applies to the government so long as a public purpose is served. While section 5.5(b) (52 P.S. 1406.5e(b)) of BMSLCA may benefit a private individual, this is no different than the situation in *Dole*, where the Department of Labor sued to enforce individual and public rights. The fact that a public suit may benefit a private individual does not change the application of the general rule for government actions. Under the provisions of the BMSCLA, it will be Pennsylvania that will enforce the requirement that the operator restore or compensate a protected structure. The requirement to restore a structure or compensate its owner not only serves a private purpose it also serves a public purpose as well. The requirements not only protect private structure owners but buildings owned by the government or that serve as a public building or a community or institutional building.

Further, a time limit on subsidence damage claims is adverse to the general scheme of SMCRA. For example, this section would limit Pennsylvania's ability to take enforcement actions and would interfere with the administrative methods established by 517 and 521 of SMCRA since it could be difficult to determine when the structure was initially affected. Since every state could have a different time period, this section is contrary to the public policy of § 102(a) of SMCRA, which established a nationwide program and with 101(g) of SMCRA. It could also preclude some citizen suits because in some situations, a citizen might not know that Pennsylvania was not taking action until the two years elapsed. Additionally, if a request for an investigation by Pennsylvania of possible subsidence damage was not made within two years from the date of structure damage, Pennsylvania would not consider it a violation, because Pennsylvania would not investigate the claim. Since it would not be a cited violation, this would prevent Pennsylvania from holding operators responsible for subsidence damage to structures.

We disagree with Pennsylvania that this time limitation is no less effective than the federal rules. It is contrary to

505(b) of SMCRA, which prohibits any state program from having state laws or regulations that are inconsistent with SMCRA. Failure to repair or compensate a structure owner is in direct contrast with the purposes of EAct and the federal regulations that require without a time limit, the repair or compensation of protected structures. This is evidenced by language in the Congressional House report that specifically rejected the Secretary's regulations originally promulgated in 1983. The 1983 regulations only required repair or compensation of structures to the extent allowed under state law. H.R. Rep. No. 474, 102d Cong., 2d Sess, pt. 8 at 132 (1992). This provision is also contrary to citizen complaint investigation standards.

With respect to Pennsylvania's characterization that the limitation only pertains to PADEP's responsibility to conduct an investigation, and does not release a mine operator from the responsibility to repair or compensate for structure damage, the Director observes that the net effect will be the same because the only entity, PADEP, that could enforce the obligation is prohibited from doing so. As stated in section 5.6(c) (52 P.S. 1406.5f(c)), the duty to repair or compensate for subsidence damage is the sole and exclusive remedy for such damage. If the operator refuses to acknowledge responsibility for repair or the amount of compensation, and the structure owner did not request an investigation within two years, the owner has no recourse because the state is prohibited from conducting an investigation. We also assert that Pennsylvania's characterization that the statute does not prohibit PADEP from becoming involved in the resolution of cases that have gone beyond the two-year claim period is misleading. First, Pennsylvania fails to elaborate on how this could occur. OSM interprets the statute to mean that, if the owner asks for an investigation within two years but Pennsylvania's enforcement goes beyond two years, Pennsylvania can continue its enforcement. If the owner fails to ask for an investigation, Pennsylvania is precluded from enforcement. Finally, we disagree with Pennsylvania's statement that section 5.5 (52 P.S. 1406.5e) does not end PADEP's responsibilities because of section 5.5(c) (52 P.S. 1406.5e(c)) of the BMSLCA. Section 5.5(c) (52 P.S. 1406.5e(c)) is completely reliant on section 5.5(b) (52 P.S. 1406.5e(b)). Section 5.5(c) (52 P.S. 1406.5e(c)) states that "[t]he department shall make an investigation of a claim within thirty

days of receipt of the claim." Section 5.5(b) (52 P.S. 1406.5e(b)) states if the parties are unable to agree, the owner of the building may file a claim with the Department. Thus, the reference to claim in 5.5(c) (52 P.S. 1406.5e(c)) refers to the claim discussed in 5.5(b) (52 P.S. 1406.5e(b)). Section 5.5(c) (52 P.S. 1406.5e(c)) does not discuss any other options or alternatives. Based on the above rationale, the Director finds this section less effective than the federal rules and is not approving this section.

Finally, since our decision is based on the above, we feel it is unnecessary to address Pennsylvania's interpretation of the federal regulations interpreting termination of jurisdiction.

*Section 5.5(c) (52 P.S. 1406.5e(c)).* This section provides that the Department will make an investigation of damage claims within 30 days of receipt of the claim and, within 60 days following the investigation, make a determination in writing whether the damage was caused by subsidence. This section further provides that the Department will issue a written order directing the operator to compensate the structure owner or repair the damaged structure within six months or a longer period. In our letter to Pennsylvania dated June 21, 1999, we indicated that the Department's written determination made within 60 days of the investigation appears to be less effective than the citizen complaint procedures of 30 CFR 842.12(d). The federal rule requires a response within 10 days of the inspection. We further indicated that if the term "written order" means a notice of violation, this section does not appear to be as effective as the federal regulations in that six months exceeds the total time allowed for abatement of a notice of violation. "The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon a showing \* \* \* [of] one or more of the circumstances in paragraph (f) of this section." 30 CFR 843.12(c).

In its response to us dated June 1, 2000, Pennsylvania wrote that:

The 60-day period the department is allotted to make a determination cannot be compared with the 10-day period specified in 30 CFR 842.12(d). [This section] requires PADEP to reach a final determination within 60 days of making an investigation, where the federal requirement only relates to communication with the complainant \* \* \*. There is nothing within 30 CFR 842.12(d) that specifically requires OSM to take enforcement action within the 10-day period. [A]lso \* \* \* 30 CFR 842.12(d) establishes no minimum time period in which OSM must conduct its investigation.



With regard to the term "written order" as used in this section, Pennsylvania indicated that the term does not refer to a notice of violation, but rather to an administrative order directing the operator to repair or compensate the structure owner.

As noted in the finding for section 5.2(b)(2), the preamble to the federal EPAAct rules states "existing citizen complaint procedures are adequate and appropriate to address surface owner complaints of subsidence damage." (60 FR at 16735). The proposal by Pennsylvania to provide a claims investigation procedure for affected property owners was carefully considered by the Director relative to the existing requirements for addressing complaints by citizens under 30 CFR part 842. Currently, the approved Pennsylvania program regarding citizen complaint investigations and enforcement provides that if an inspection is made, the Department will notify the citizen within 10 days of completion of the inspection of the results. If no inspection is made, the Department will notify the citizen within 15 days of receipt of the complaint. Pennsylvania's approved citizen complaint rules are consistent with 30 CFR 842.12 and allow latitude in determining what constitutes the point at which an inspection is complete to allow for the collection of necessary data (see 49 FR 10253-58). As a result, citizen complaint inspection duties could be completed prior to the 60 days specified in section 5.5(c) (52 P.S. 1406.5e(c)). Under existing citizen complaint rules, once an inspection is completed, Pennsylvania has 10 days to describe its enforcement action or lack thereof. However, under the proposed provision, an inspection may occur in a short time, e.g. two days, but Pennsylvania would have longer than 10 days to notify the citizen of its inspection results, e.g., 60 days. This is inconsistent with Pennsylvania's existing rules and the federal rules regarding time requirements for responding to citizen complaints. To be consistent with the federal rules, Pennsylvania, within 10 days of completing all the inspection duties, must notify the citizen of its decision. Therefore, the Director is approving this portion of section 5.5(c) (52 P.S. 1406.5e(c)) to the extent that it is consistent with, or more timely than, the citizen complaint procedures and is requiring Pennsylvania to amend its program to the extent the time frames are longer than the citizen complaint procedures.

Section 5.5(c) (52 P.S. 1406.5e(c)) also provides that if the Department found

that mining caused damage, it shall issue an order directing the operator to compensate or cause repairs to be made within six months or longer. The Director is not approving the use of an administrative order that allows the operator six months or longer to repair damage or compensate landowners. Federal regulations at 30 CFR 843.12(c) provide that "The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon a showing \* \* \* [of] one or more of the circumstances in paragraph (f) of this section." Because the federal rules require Pennsylvania to issue a notice of violation within an abatement date of not more than 90 days, instead of an administrative order with an abatement date of six months or longer, the Director is not approving the following phrase from section 5.5(c) (52 P.S. 1406.5e(c)), " \* \* \* within six months or a longer period if the department finds that the occurrence of subsidence or subsequent damage may occur to the same building as a result of mining." This phrase is not as effective as the federal regulations that call for orders with abatement dates less than 90 days except for the circumstances noted in section 30 CFR 843.12(c).

Finally, the Director finds that Pennsylvania's use of the term "underground coal mining" when making a damage determination is less stringent than section 720 of SMCRA. SMCRA requires underground coal mining *operations* to comply with requirements for damage repair or compensation. The term "underground coal mining operations" is more expansive than Pennsylvania's definition of underground mining, which is defined at 25 Pa. Code 89.5 to be the extraction of coal. Therefore, the Director is requiring Pennsylvania to amend this section to insure that any written damage determinations made by PADEP will take into account subsidence due to underground coal mining operations as required by SMCRA.

*Section 5.5(d) (52 P.S. 1406.5e(d)).* This section provides that the operator will not be liable for repairs or compensation in an amount exceeding the cost of replacement of the damaged structure. The section also provides that the occupants of a damaged structure shall be entitled to additional payment for reasonable actual expenses incurred for temporary relocation and for other actual reasonable incidental costs agreed to by the parties or approved by the Department. Section 720(a)(1) of SMCRA provides for repair of material damage, which "shall include

rehabilitation, restoration, or replacement of the damaged" structure or dwelling or compensation in the full amount of the decrease in value resulting from the subsidence. As previously stated in section 5.4(a) (52 P.S. 1406.5d(a)), the cost of replacement is no less stringent than section 720(a)(1) of SMCRA. There is no federal counterpart to provisions for relocation and incidental expenses provided for in this portion of the statute. However, because these provisions provide additional benefits not required by the federal regulations, the Director finds that they are not inconsistent with the requirements of SMCRA or the federal regulations and is approving this portion of the amendment.

*Section 5.5(e) (52 P.S. 1406.5e(e)).* This section requires an operator to deposit in escrow, an amount equal to the cost of repair or compensation if the operator appeals an order issued by the Department. In our letter to Pennsylvania dated June 21, 1999, we indicated that this section appears to be less effective than the federal regulations because there is no provision, in cases where the operator has not appealed an order of the Department, to insure that funds are available for the repair or compensation for damage to structures and no financial guarantees for the restoration of water supplies.

Pennsylvania responded in their letter of June 1, 2000, that section 6(b) (52 P.S. 1406.6(b)) of BMSLCA authorizes PADEP to require bonds of appropriate amounts to ensure the applicant's faithful performance of mining or mining operations, in accordance with the provisions of sections 5, 5.4, 5.5, and 5.6 (52 P.S. 1406.5, 1406.5d, 1406.5e, and 1406.5f). These requirements are in addition to the escrow requirements of section 5.5(e) (52 P.S. 1406.5e(e)). These bonds must be posted at the time of permit application and will be in place to ensure the repair of any and all structure damage that occurs during the term of the mining permit. Finally, Pennsylvania noted that the requirements to post escrow under section 5.5(e) (52 P.S. 1406.5e(e)) functions as an additional assurance that repairs or compensation will be provided by mine operators.

OSM agrees that the escrow requirements of section 5.5(e) (52 P.S. 1406.5e(e)) are separate from the requirements of section 6(b) (52 P.S. 1406.6(b)) of BMSLCA. Section 5.5(e) (52 P.S. 1406.5e(e)) allows an appeal right that is found within numerous other sections of Pennsylvania's approved program and is no less

effective than the federal regulations at 30 CFR 843.16 (implementing 30 CFR 840.13). The federal rules do not require an operator to place into escrow the cost of repair or compensation before it can appeal an order. Since an escrow account will serve to protect affected structure owners, the Director finds this section consistent with the federal rules and therefore, approves it.

*Section 5.5(f) (52 P.S. 1406.5e(f)).* This section provides for Pennsylvania to take enforcement action if an operator fails to repair or compensate for subsidence within six months or longer period as the Department has established or if the operator has failed to perfect an appeal of an order. The section further provides for payment of the escrow deposit if an operator fails to repair or compensate for damage after exhausting its right of appeal.

The Director has found that the escrow accounts provide a level of protection beyond that of the federal requirements and is approving that portion of the amendment. However, the portion of section 5.5(f) (52 P.S. 1406.5(e)(f)) allowing six months or longer to pass before the Department takes an enforcement action is less effective than the federal regulations at 30 CFR 843.12(c), which requires abatement of violations within 90 days. As stated in the finding for 5.5(c) (52 P.S. 1406.5e(c)), an operator's failure to repair or compensate for subsidence damage is a violation that must be abated within 90 days. To ensure that Pennsylvania has the ability to enforce the necessary requirements of EPAct consistent with 30 CFR part 843, the Director is not approving the portion of section 5.5(f) (52 P.S. 1406.5e(f)) that states: " \* \* \* within six months or longer or such period as the department has established or fail to perfect an appeal of the department's order directing such repair or compensation." Not approving the portion of the phrase dealing with the six-month period will remove an enforcement impediment to Pennsylvania. As noted, the Director is also not approving language in that phrase that deals with perfecting an appeal of the Department's orders. This phrase prevents Pennsylvania from issuing a cessation order if an operator takes an appeal, thus acting as a stay. This provision is not as effective as the federal regulations at 30 CFR 843.16(b), which indicate that the filing of an application for review and request for a hearing cannot operate as a stay of any notice or order.

*Section 5.5(g) (52 P.S. 1406.5e(g)).* This section provides that, with the exception of 5.5(f) (52 P.S. 1406.5e(f)), existence of unresolved claims of

subsidence damage shall not be used by the Department as a basis for withholding permits from, or suspending review of, permit applications submitted by the mine operator against whom such claims have been made. In our letter to Pennsylvania dated June 21, 1999, we asked Pennsylvania to clarify what is meant by the phrase "existence of unresolved claims."

In response, Pennsylvania indicated that the term is self-explanatory. Structure damage claims often take some time to be resolved and this section simply provides that an operator is not deemed to be in violation of its repair or compensation obligations as long as it is, in good faith, attempting to make appropriate repairs or pay appropriate compensation, or has posted the escrow amount necessary to contest its liability. Finally, Pennsylvania also noted that a claim is only an allegation, not a violation.

The Director is approving this section. The federal regulations at 30 CFR 773.12 and 773.14 prohibit the issuance of a permit if the applicant has outstanding violations unless both the abatement period for the notice of violation has not yet expired and the applicant has certified in the permit application that the violation is being satisfactorily corrected. Pennsylvania's provision is consistent with these regulations since no violation was issued.

*Section 5.6(a) (52 P.S. 1406.5f(a)).* This section deals with voluntary agreements for repair or compensation for damages to structures caused by underground mining. In our letter of June 21, 1999, to Pennsylvania we noted that several times within this section Pennsylvania refers to "releases" that could be a part of the agreements. We asked Pennsylvania to clarify what is meant by the term "release" as used in this section.

In its letter to us dated June 1, 2000, Pennsylvania responded that BMSLCA does not define release. As the term is used in section 5.6 (52 P.S. 1406.5f), it refers to a written discharge, acquittance or receipt given in exchange for consideration as part of an agreement that establishes the means and methods by which the mine operator will repair or compensate for subsidence damage. Pennsylvania noted that section 5.6(a) (52 P.S. 1406.5f(a)) recognizes that mine operators who have fully met their statutory obligations are entitled to obtain a release that precludes the landowner from seeking multiple recoveries on the same claim.

The Director is approving this portion of the amendment. While there is no direct federal counterpart to this

section, agreements were recognized in the preamble to the federal rule, so long as the agreements did not "negate the requirements of the Energy Policy Act." 60 FR at 16735. Since this section provides that "remedies shall be no less than those necessary to compensate the owner of a building for the reasonable cost of its repair," the Director finds this section not inconsistent with the requirements of SMCRA and the federal regulations.

*Section 5.6(b) (52 P.S. 1406.5f(b)).* This section provides that when a voluntary agreement for repair or compensation is executed between landowners and operators, every deed for conveyance of property covered by the agreement must contain a recital of the agreement and any release contained within the agreement. There is no federal counterpart to this portion of the amendment. Since this section provides notice of the agreement and any release, the Director finds it not inconsistent with the requirements of SMCRA and the federal regulations and is approving it.

*Section 5.6(c) (52 P.S. 1406.5f(c)).* This section provides:

The duty created by section 5.5 to repair or compensate for subsidence damage to the buildings enumerated in section 5.4(a) shall be the sole and exclusive remedy for such damage and shall not be diminished by the existence of contrary provisions in deeds, leases or agreements which relieved mine operators from such duty. Nothing herein shall impair agreements entered into after April 27, 1966, and prior to the effective date of this section, which, for valid consideration, provide for a waiver or release of any duty to repair or compensate for subsidence damage. Any such waiver or release shall only be valid with respect to damage resulting from the mining activity contemplated by such agreement.

In our letter of June 21, 1999, to Pennsylvania we noted that this section appears to be less effective than the federal regulations because the post-1966 structures may have entered into an agreement that would have provided requirements that are less effective than 30 CFR 817.121(c). OSM has determined that "[a]n underground mining operation has a statutory obligation to repair, which may not be negated by a prior agreement." 60 FR at 16736.

In its response to us dated June 1, 2000, Pennsylvania noted that:

"Post 1966 structures" or structures built after 4/27/66 had no protection from subsidence damage under BMSLCA until 8/21/94, the effective date of section 5.6. Because BMSLCA did not provide protection to these structures, it is highly unlikely there are any agreements providing for repair or compensation for "post 1966 structures." Pre 1966 dwellings were completely protected;

they could not be damaged by subsidence. Post 1966 agreements for pre 1966 dwellings would have to have provided the homeowners more than full compensation or repairs otherwise the owner would not have had any reason to enter into an agreement with a mine operator. Accordingly, this provision is at least as effective as 30 CFR 817.121(c).

The Director approves the following language:

The duty created by section 5.5 to repair or compensate for subsidence damage to the buildings enumerated in section 5.4(a) shall be the sole and exclusive remedy for such damage and shall not be diminished by the existence of contrary provisions in deeds, leases or agreements which relieved mine operators from such duty.

There is no requirement in the federal rules that Pennsylvania have a requirement in addition to the duties enumerated in sections 5.4 and 5.5 (52 P.S. 1406.5d and 1406.5e) of the BMSLCA. If Pennsylvania wishes to eliminate any common law duties, that is within its discretion. Accordingly, this language is not inconsistent with the requirements of SMCRA and the federal regulations. However, the Director does not find Pennsylvania's explanation with regard to the last two sentences of section 5.6(c) (52 P.S. 1406.5f(c)) to be persuasive, because to do so would render that portion of section 5.6(c) (52 P.S. 1406.5f(c)) meaningless. The Director finds that the last two sentences: "Nothing herein shall impair agreements entered into after April 27, 1966, and prior to the effective date of this section, which, for valid consideration, provide for a waiver or release of any duty to repair or compensate for subsidence damage. Any such waiver or release shall only be valid with respect to damage resulting from the mining activity contemplated by such agreement" are inconsistent with the federal regulations at 30 CFR 817.121(c) and the Director is not approving this portion of section 5.6(c) (52 P.S. 1406.5f(c)). While OSM recognizes that EPAct and Act 54 are not retroactive, this language seems to provide that private agreements entered into between April 27, 1966 and August 21, 1994, waiving or releasing any duty to repair or compensate for subsidence damage remain effective, including for mining activities beyond the effective date of the protections of EPAct and Act 54, if contemplated by the agreement. Thus, these sentences provide that agreements made after April 1966 and before August 21, 1994, do not have to comply with the provisions of the BMSLCA if they are written contrary to the requirements of section 5.5 (52 P.S. 1406.5e) of BMSLCA. Section 720(a)(1)

and 30 CFR 817.121(c)(2) require repair or compensation for affected structures. Agreements are acceptable if the terms of the agreement meet "the requirements under paragraph 817.121(c)(2)." 60 FR at 16735. "Any permittee/owner agreements cannot negate the requirements of the EPAct to repair or compensate for subsidence related material damage to occupied residential dwellings and related structures as well as non-commercial buildings." *Id.* Since this provision negates the requirements of section 5.5 (52 P.S. 1406.5e) of BMSLCA, it is inconsistent with the federal regulations.

*Section 5.6(d) (52 P.S. 1406.5f(d)).* This section provides that any agreement made under section 5.6(c) (52 P.S. 1406.5f(c)) must be included in every deed for conveyance of the property covered by the agreement. The Director is not approving this provision to the extent that section 5.6(c) has not been approved. Therefore, section 5.6(d) (52 P.S. 1406.5f(d)) is inconsistent with the requirements of SMCRA and the federal regulations to the extent that section 5.6(c) (52 P.S. 1406.5f(c)) is inconsistent.

*Section 6 (52 P.S. 1406.6).* This section was modified by both removing former subsection (a) and replacing references in subsection (b) to sections 4 and 5 with references to sections 5, 5.4, 5.5 and 5.6. The section now requires applicants to file bonds conditioned upon the applicant's faithful performance of mining or mining operations in accordance with sections 5, 5.4, 5.5 and 5.6. While this section requires submission of bonds at the time of application, there is no requirement similar to that found in 30 CFR 817.121(c)(5), which requires an adjustment of bond amount for subsidence damage to structures or water supplies if repair or replacement is not completed within 90 days of occurrence of damage.

In our letter of June 21, 1999, we indicated that section 5.5(e) (52 P.S. 1406.5e(e)), regarding establishment of escrow accounts appears to be less effective than the federal regulations because there is no provision in cases where the operator has not appealed an order of the Department to insure that funds are available for the repair or compensation for damage to structures and no financial guarantees for the restoration of water supplies. After reviewing Pennsylvania's response to that comment, we found that the escrow provisions of section 5.5(e) (52 P.S. 1406.5e(e)) were separate from the requirements of 30 CFR 817.121(c)(5) to increase the bond in response to

subsidence damage. However, by reviewing Pennsylvania's response to our comment in section 5.5(e) (52 P.S. 1406.5e(e)), we found that section 6 was required to be amended to include this provision.

Pennsylvania responded in their letter of June 1, 2000, that:

Section 6(b) of BMSLCA authorizes PADEP to require bonds of appropriate amounts to ensure the applicant's faithful performance of mining or mining operations, in accordance with the provisions of sections 5, 5.4, 5.5, and 5.6.

These requirements are in addition to the escrow requirements of section 5.5(e). These bonds must be posted at the time of permit application and will be in place to ensure the repair of any and all structure damage that occurs during the term of the mining permit.

As Pennsylvania noted, these bonds will be posted at the time of permit application. However, it is very difficult to predict the amount of subsidence damage that will occur to structures, therefore, it may be necessary to raise the bond amounts after damage has occurred. There is no provision in the Pennsylvania program that requires the state regulatory authority to increase bonds in response to subsidence damages that are not repaired or replaced within 90 days. Pennsylvania's only mechanism for increasing the bond amount is if a party in interest requests such an increase. The federal rules at 30 CFR 817.121(c)(5) require the regulatory authority to increase the bonding amounts for the permittee.

Pennsylvania's requirement places the burden on someone other than the state to monitor the bonding amounts. The state regulatory authority is the only appropriate entity to determine when the bonds must be adjusted. In addition, Pennsylvania's program fails to require a bond or a bond increase if damage occurs to the land or water resources. The federal rule at 30 CFR 817.121(c)(5) requires an increase in the performance bond when subsidence related material damage to land occurs, or when a protected water supply is contaminated, diminished or interrupted. Therefore, the Director is requiring Pennsylvania to amend its program to comply with the provisions of 30 CFR 817.121(c)(5).

*Section 9.1(a) (52 P.S. 1406.9a(a)).* This section requires that if the department determines, and notifies a mine operator, that a proposed mining technique or extraction ratio will result in subsidence that causes an imminent hazard to human safety, the technique or extraction ratio will not be permitted unless the mine operator, prior to mining, takes measures approved by the Department to eliminate the imminent hazard.

Even though there is no corresponding federal regulation, the Director is approving this section because it is consistent with 30 CFR 817.121(f), which requires the suspension of underground mining if imminent danger to inhabitants of urbanized areas, cities, towns or communities is found.

*Section 9.1(b) (52 P.S. 1406.9a(b)).* This section provides that a mining technique or extraction ratio that the Department determines will cause irreparable damage to buildings in section 5.4(a)(3) or (4) (52 P.S. 1406.5d(a)(3) or (4)) will not be permitted unless the building owner, prior to mining, consents to such mining or the mine operator, prior to mining, agrees to take measures approved by the Department to minimize or reduce impacts resulting from subsidence to such buildings.

The Director finds that there is no comparable provision in the federal regulations because the federal regulations do not discuss irreparable damage. The irreparable damage standard for this portion of the amendment provides a level of protection to structures threatened with irreparable damage that is not provided for in federal regulations. The Director is approving this portion of the amendment.

*Section 9.1(c) (52 P.S. 1406.9a(c)).* This section provides that underground mining activities shall not be conducted beneath or adjacent to public buildings and facilities, churches, schools and hospitals, impoundments, or bodies of water with volume of 20 acre-feet or more unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of, such facilities. The Department may limit the percentage of coal extracted under or adjacent to these features or facilities or

to any aquifer or body of water that serves as a significant water source for any public water supply system if it finds that it is necessary in order to minimize the potential for material damage. The Director finds that this portion of the amendment is no less effective than the federal regulations at 30 CFR 817.121(d), which have substantially the same requirements.

*Section 9.1(d) (52 P.S. 1406.9a(d)).* This section provides that nothing in the act shall supersede standards related to the prevailing hydrologic balance contained in federal SMCRA and regulations promulgated by Pennsylvania to obtain or maintain jurisdiction over the enforcement and administration of SMCRA or any standard contained in Pennsylvania's Clean Streams Law. Even though there is no direct federal counterpart, the Director is approving this section because it does not limit or change the rights of landowners or the responsibilities of operators as provided for in federal regulations, nor is it inconsistent with the requirements of SMCRA and the federal regulations.

*Section 15 (52 P.S. 1406.15).* This section was repealed by Act 54. The section allowed landowners to purchase enough support coal beneath a structure to provide protection from subsidence. There are no similar provisions in the federal regulations. The Director is approving repeal of this section because repealing it does not make Pennsylvania's program less effective than the federal regulations regarding protection of structures.

*Section 17.1 (52 P.S. 1406.17a).* This section lists various conducts that are unlawful under the BMSLCA. Act 54 changed the section by removing the phrase "to cause land subsidence or injury" as one of the examples of unlawful conduct.

The Director is approving this change to the BMSLCA. The federal rules anticipate that subsidence will occur and provide compensation for, or repair of, damages to homes and other structures as well as replacement of adversely affected water supplies. Subsidence in itself is not unlawful conduct under the federal regulations.

The portion of the amendment that removes injury as unlawful conduct is also approved. The Director finds that the portions of the BMSLCA that require prevention of hazards to human safety and material damage to certain buildings (section 9.1) provide a similar level of protection from injury that the federal regulations provide. The Director is approving the changes to section 17.1 because they are not inconsistent with SMCRA and the federal regulations.

*Section 18.1 (52 P.S. 1406.18a).* This section requires the Department to compile data in deep mine permit applications, monitoring reports, and other data submitted by operators, and from enforcement actions. The data are to be used to determine the effects of deep mining on subsidence of surface structures and on water resources. A report on the analysis of the data is to be presented to the Governor, the General Assembly, and the Citizen's Advisory Council every five years.

There is no direct federal counterpart to this regulation but the Director is approving this section because it does not limit or change the rights of landowners or the responsibilities of operators as provided for in federal regulations nor is it inconsistent with the requirements of SMCRA and the federal regulations.

**Summary Table**

The table below summarizes the Director's findings with regard to each section of the BMSLCA.

Sections of the BMSLCA that are approved	Sections of Act 54 that are conditionally approved or that are required to be amended	Sections of Act 54 that are not approved in whole or in part
Repeal of Section 4 (52 P.S. 1406.4))	5(b) (52 P.S. 1406.5(b))	5.1(b) (52 P.S. 1406.5a(b)).
5.1(a)(2) and (3) (52 P.S. 1406.5a(a)(2) and (3)).	5.1(a)(1) (52 P.S. 1406.5a(a)(1))	5.2(b)(2) (52 P.S. 1406.5b(b)(2)).
5.2(a)(1), (2), and (3) (52 P.S. 1406.5b(a)(1), (2), and (3)).	5.4(a) (52 P.S. 1406.5d(a))	5.2(d) (52 P.S. 1406.5b(d)).
5.2(b)(1) (52 P.S. 1406.5b(b)(1))	5.5(a) (52 P.S. 1406.5e(a))	5.2(e)(2) (52 P.S. 1406.5b(e)(2)).
5.2(c) (52 P.S. 1406.5b(c))	6 (52 P.S. 1406.6))	5.2(g), (h), and (i) (52 P.S. 1406.5b(g), (h), and (i)).
5.2(e)(1) and (3) (52 P.S. 1406.5b(e)(1) and (3)).		5.3(a), (b), and (c) (52 P.S. 1406.5c(a), (b), and (c)).
5.2(f) (52 P.S. 1406.5b(f))		5.4(a)(3) (52 P.S. 1406.5d(a)(3)).
5.2(j) (52 P.S. 1406.5b(j))		5.4(c) (52 P.S. 1406.5d(c)).
5.2(k) (52 P.S. 1406.5b(k))		5.5 (b) and (c) (52 P.S. 1406.5e(b) and (c)).
5.4(a)(1), (2) and (4) (52 P.S. 1406.5d(a)(1), (2), and (4)).		5.5(f) (52 P.S. 1406.5e(f)).
5.4(b) (52 P.S. 1406.5d(b))		5.6(c) and (d) (52 P.S. 1406.5f(c) and (d)).

Sections of the BMSLCA that are approved	Sections of Act 54 that are conditionally approved or that are required to be amended	Sections of Act 54 that are not approved in whole or in part
5.5 (d), (e) and (g) (52 P.S. 1406.5e(d), (e) and (g)). 5.6(a) and (b) (52 P.S. 1406.5f(a) and (b)). 9.1(a), (b), (c), and (d) (52 P.S. 1406.9a (a), (b), (c), and (d)). Repeal of Section 15 (52 P.S. 1406.15). 17.1 (52 P.S. 1406.17a). 18.1 (52 P.S. 1406.18a).		

*B. Changes to the Regulations at 25 Pa Code Chapter 89*

Set forth in the explanation below and the table that follows, pursuant to SMCRA and the federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the amendments to the regulations at 25 Pa. Code Chapter 89. The Director's reasons for approving, conditionally approving, requiring amendments to, or not approving regulations in 25 Pa. Code Chapter 89 are noted. The sections are listed in the order they appear in Chapter 89 for easy reference.

*Section 89.5, definition of the term "de minimis cost increase."* This definition is used in section 89.145a relating to water supply replacement performance standards. It states an increase in the cost of providing a restored or replaced water supply is acceptable if the increased cost of operating the replaced or restored water supply is de minimis. This section defines de minimis as either less than 15% of the annual operating and maintenance costs of the previous water supply that is restored or replaced, or is less than \$60 per year. In our letter to Pennsylvania dated June 21, 1999, we indicated that there was no counterpart in federal regulations to this definition. However, the preamble to the federal regulations at 60 FR 16726 provides that the payment of replacement water supply operation and maintenance costs in excess of premining costs is a logical aspect of the requirement to replace a water supply. The goal of the provision is to insure that the owner or user of the water supply is made whole, and that no additional costs are passed on to the water supply user after the replacement supply is installed, beyond those that are customary and reasonable for the premining supply. We concluded that the definition appears to be less effective than the federal regulation because it passes costs in excess of premining costs to the landowner or water supply user.

In their June 1, 2000, response to our letter, Pennsylvania indicated that:

The court decisions in Carlson Mining Co v. DER, EHB 91-547-E, Gioia Coal v. DER,

1986 EHB 82, and Buffy and Landis v. DER, 1990 EHB 1665 defined what constituted an adequate replacement water supply. These Court decisions addressed increased operation and maintenance costs, increased maintenance, control, accessibility, reliability and performance of the replacement water supply. The Court found that a property owner has been made whole if the increase in operating and maintenance costs is de minimis. The Pennsylvania case law is codified in these regulations to facilitate understanding of the law by water supply users and the regulated community.

The Pennsylvania regulations, which incorporated court determinations of what cost increases were more than de minimis and were required to be paid by the operator are as effective as OSM's provision requiring a permittee to "replace any drinking, domestic or residential water supply that is contaminated, diminished or interrupted by underground mining activities." The federal regulations do not establish any specific requirements for operating and maintenance costs \* \* \*

The Director is not approving the definition of de minimis cost increase from 25 Pa. Code 89.5 because it allows some increased costs of operating and maintaining a restored or replaced water supply system to be passed on to the landowner or water user. Depending on the original costs, both a 15% increase as well as a \$60 increase could be excessive. The increased costs are still beyond the intent of the federal regulations, that "[t]he owner or user of the water supply is made whole, and that no additional costs are passed on to the water supply user." (60 FR 16726). Only by fully subsidizing all costs associated with the replacement or restored water supply will that intent be realized.

Finally, OSM notes that the cases cited by PADEP were all issued before Act 54 and EPACT was enacted (except Carlson, which was issued 5 days after EPAct's date). Accordingly, these cases could not contemplate EPAct's requirements.

*Section 89.5, definition of the term, "dwelling."* Pennsylvania is proposing the definition of the term dwelling to be "a building or other structure that, at the time subsidence occurs, is used either temporarily, occasionally, seasonally or permanently for human habitation."

This definition is the same as OSM's definition of the phrase "occupied dwelling and structures related thereto" found in 30 CFR 701.5, except it does not include related structures. The related structure information is found in Pennsylvania's regulations at 25 Pa. Code 89.5 in the definition of "permanently affixed appurtenant structures." The Director finds that Pennsylvania's definition of the term "dwelling" when used in conjunction with the phrase "permanently affixed appurtenant structure" is no less effective than the federal definition of "occupied dwelling and structures related thereto," so long as the limitations on the definition of "permanently affixed appurtenant structure" discussed later in this rulemaking are implemented.

*Section 89.5, definition of the term, "fair market value."* Pennsylvania's definition of fair market value is the amount at which property would exchange hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. The only place this term is used in Chapter 89 is at 25 Pa. Code 89.152(a)(5)(i) with regard to an operator's purchase of a property to gain relief from the responsibility of water supply replacement. Because that section of the regulations has not been approved and is not self-sustaining, there is no need for the Pennsylvania program to contain the definition of "fair market value." As a result, the Director is not approving the definition of the term "fair market value" found in 25 Pa. Code 89.5.

*Section 89.5, definition of the term, "irreparable damage."* Through its definition of "irreparable damage," Pennsylvania has created four ways in which a structure can be classified as irreparably damaged. They include: (1) Where the cost of repair would exceed the cost of replacement; (2) the damage is so great that its repair is prohibited by law; (3) it is impossible or impractical to restore the structure to its previous strength; or (4) for structures recognized as historical or architecturally

significant, one of the following: the damage would adversely affect the structures historical or architectural value, or the cost of repair with the same craftsmanship and historically and architecturally equivalent components exceeds the cost of replacement, or it is impossible to repair or restore the historical and architectural value of the structure with the same craftsmanship and historically and architecturally equivalent components.

There is no federal counterpart to this definition. The federal rules define "material damage" at 30 CFR 701.5 as (1) Any functional impairment; (2) any physical change that has a significant adverse impact on the land; or (3) any significant change in the condition, appearance or utility. Any material damage must be corrected (for structures, the other option is compensation). Pennsylvania's irreparable damage standard, does not contemplate correction. Thus, by creating an irreparable damage standard, Pennsylvania has defined a class of damage that may be more severe than the material damage standard found in federal regulations. As discussed later, there are certain situations, where Pennsylvania does not require protection from material damage. However, the Director is approving the definition of the phrase "irreparable damage" since it is not inconsistent with the federal rules. The Director notes that this approval does not affect the requirements afforded by the material damage standard found in federal regulations.

*Section 89.5, definition of the term, "material damage."* Pennsylvania's definition is substantially the same as and therefore no less effective than the federal definition of material damage at 30 CFR 701.5. The Director is approving Pennsylvania's definition of the term "material damage."

*Section 89.5, definition of the term, "noncommercial building."* Pennsylvania's definition is substantially the same as, and therefore no less effective than, the federal definition of noncommercial building at 30 CFR 701.5. The Director is approving Pennsylvania's definition of the term "noncommercial building."

*Section 89.5, definition of the term, "permanently affixed appurtenant structures."* This term is used in conjunction with structures listed in 25 Pa. Code 89.142a(f)(1)(i) and (iii) relating to subsidence control performance standards. The term is defined as 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 25 Pa. Code 89.142a(f)(1)(i) and (iii).

In our letter to Pennsylvania dated June 21, 1999, we indicated that the federal definition of the term "occupied residential dwelling and structures related thereto" does not require that the appurtenant structure be "securely attached to the land." This is a meaningful difference in coverage for some structures that would be set on the surface but not readily removable, i.e., storage sheds that are not built on a foundation but are set in place on the surface of the ground. We asked Pennsylvania to clarify how the proposed definition will account for damage to appurtenant structures not attached to the land.

In their letter to us of June 1, 2000, Pennsylvania indicated that under Pennsylvania law, those structures which are not permanently affixed appurtenant structures would be generally classified as improvements. Accordingly, these structures would be protected under 25 Pa. Code 89.142a(f) to the extent that they were in place on August 21, 1994, or on the date of first publication of the permit application or permit renewal application and within the boundary of the entire mine as depicted in the permit application. In addition, Pennsylvania noted that structures that are not attached to the ground are less prone to experience subsidence damage. Since these structures do not have foundations, they are not subject to the stresses that result from ground movement.

The Director has found that Pennsylvania's definition of "permanently affixed appurtenant structures" is less effective than the federal regulations. The federal definition of the term "occupied residential dwelling and structures related thereto" at 30 CFR 701.5, lists examples of protected facilities. Pennsylvania has adopted a similar listing of protected facilities in its definition of "permanently affixed appurtenant structures." However, in that definition, Pennsylvania requires that these facilities be "securely attached to the land surface." Pennsylvania's protection of structures is less inclusive than the federal regulations because the federal requirements do not require structures to be attached to the land surface to be protected. This finding is acknowledged by Pennsylvania in its preamble when discussing the definition of "permanently affixed appurtenant structures" by stating that the definition does "not include all structures encompassed by the Federal definition" and it only includes those structures

permanently affixed to the ground. 28 Pa.B. 2766.

The Director is not approving the portion of the definition that requires structures to be "securely attached to the land surface." The federal regulations (definition of the term "occupied residential dwelling and structures related thereto" at 30 CFR 701.5) require protection for structures or facilities installed on, above or below, or a combination thereof, the land surface, if that building structure or facility is adjunct to or used in connection with an occupied residential dwelling. There is no requirement that such structures or facilities be securely attached to the land surface. By protecting only structures that are securely attached to the land surface, Pennsylvania is creating a class of facility or structure that will not be afforded the protections of the federal regulations.

*Section 89.5, definition of the term, "public buildings and facilities."* Pennsylvania defines "public buildings and facilities" as structures that are owned or leased and principally used by a government agency for public business or meetings and anything built, installed, assembled or used by a government agency to provide a public service. Pennsylvania then listed examples of "public buildings and facilities." In the federal program "public building" is defined at 30 CFR 761.5 to mean any structure that is owned or leased, and principally used by a governmental agency for public business or meetings. Pennsylvania's definition of "public buildings and facilities" includes everything in the federal definition. The Director finds that Pennsylvania's definition of "public buildings and facilities" is no less effective than the federal definition of "public building" and is approving the definition.

*Section 89.5, definition of the term, "public water supply system."* There is no corresponding federal definition to this term. Pennsylvania defines "public water supply system" as a water delivery system which does one of the following; serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents, or provides water to a public building, church, school, hospital or nursing home. Pennsylvania uses this term several times throughout Chapter 89 of its regulations to describe protections to public water supplies. The Director is approving this definition because it is used to protect water supplies that are protected by the federal regulations and it also could be used to protect water supplies that may

not be protected under the federal program. Therefore the definition is not inconsistent with the requirements of SMCRA and the federal regulations.

*Section 89.5, definition of term, "rebuttable presumption area."* Pennsylvania defines "rebuttable presumption area" in the context of water supply replacement, to mean the area in which an operator is presumed responsible for diminishing, contaminating or interrupting a water supply. The area is defined by projecting a 35-degree angle from the vertical from the outside of any area where the operator has extracted coal from an underground mine. There is no federal counterpart to this definition. The Director is approving the definition because landowners and water users will benefit from the presumption through a more rapid response by operators to their complaints. The Director finds that this definition is not inconsistent with the requirements of SMCRA at section 720(a)(2) and the federal regulations at 30 CFR 817.41(j) to provide prompt replacement of protected water supplies.

*Section 89.5, definition of the terms, "underground mining," and "underground mining operations."* Pennsylvania's definition of "underground mining" is the extraction of coal in an underground mine. The federal definition of the term "underground mining activities" is found at 30 CFR 701.5 and is a combination of two parts: (a) Surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, and reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining operations are placed; and (b) Underground operations such as underground construction, operation, and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage, and blasting. Pennsylvania's proposed definition of "underground mining operations" is substantially the same as (b) of the federal definition of "underground mining activities." Pennsylvania's definition of "underground mining" is consistent with how the term underground mining is used in paragraph (b) of the federal definition of "underground mining activities" since it is an underground operation. The Director finds that the definitions of the

terms "underground mining" and "underground mining operations" is consistent with the federal definition of "underground mining activities" and is approving both definitions.

*Section 89.5, definition of the term, "water supply."* Pennsylvania's definition of "water supply" includes existing sources of water used for domestic, commercial, industrial or recreational purposes or for agricultural uses. It also includes supplies that serve a public building or a noncommercial structure customarily used by the public, including churches, schools and hospitals. This definition differs from the federal definition of the term "drinking, domestic or residential water supply" found at 30 CFR 701.5. Pennsylvania has stated in the preamble to its regulations that "[t]he definition of "water supply" includes all water supplies covered under the federal program, including those which are used for irrigating noncommercial gardens and noncommercial agricultural operations." 28 Pa.B. 2767.

The Pennsylvania term is more inclusive in that it protects agricultural supplies, which the federal regulations do not protect unless they are used for direct human consumption or human sanitation, or domestic use. However, it does not appear to include the appurtenant delivery systems of the federal definition. As stated in our finding to section 5.1(a)(3) (52 P.S. 1406.5a(a)(3)), we expressed this concern to Pennsylvania in our letter of June 21, 1999. Pennsylvania responded by stating "connections from a well or spring are permanent affixed appurtenant structures that must be repaired by the mine operator." Pennsylvania went on to state that damage to a water main and its connecting piping would be regulated under 25 Pa. Code 89.142a(g) if it was owned by the water company. If the connecting piping was owned by the property owner, the mine operator would be required to repair. Additionally, Pennsylvania's proposed performance standards at 25 Pa. Code 89.145a(f)(4) indicate that replacement of a water supply shall include the installation of any piping, pumping equipment and treatment equipment necessary to put the replaced water source into service. This performance standard includes the items contemplated by the appurtenant delivery system requirements of the federal regulations.

Therefore, based on the Pennsylvania Bulletin language, Pennsylvania's explanation, and when used with the performance standards of 25 Pa. Code 89.145a(f)(4), the Director finds that the

definition of "water supply" is no less effective than the federal definition of "drinking, domestic, or residential water supply" and is approving this portion of the amendment.

*Section 89.33.* This section deals with the geologic data requirements of the permit. Pennsylvania made only two minor revisions to this section; the nonsubstantive addition of the metric equivalent of 200 feet (60.96 meters) after the term of "200 feet" in subsection (a)(1), and the requirement that the operation plan include a description of the coal seam thickness (to be added to subsection (a)(1) as item (iii)). The addition of this requirement necessitated designating former section (iii) as (iv) and designating former section (iv) as (v). The federal rule at 30 CFR 784.20(b)(3) requires a subsidence control plan to contain a description of seam thickness. Therefore, this addition is no less effective than the federal regulations and the Director is approving this portion of the amendment.

*Section 89.34.* Pennsylvania has made two minor changes in this portion of the amendment. Both are found in subsection (a)(1)(i). This section lists the information operators must submit in their application regarding groundwater. The first sentence of subsection (i) formerly read, "The results of a groundwater inventory of existing wells, springs and other groundwater resources, providing information on location, quality, quantity, depth to water and usage for the proposed permit area and potentially impacted offsite areas." The first sentence now reads, "The results of a groundwater inventory of existing wells, springs and other groundwater resources, providing information on location, ownership, quality, quantity, depth to water and usage for the proposed permit area and adjacent area." The Director finds that the changes to this section are no less effective than the requirements for ground water information found in the federal regulations at 30 CFR 784.14(b)(1) since the federal rules also require ownership information on the proposed permit and adjacent areas. The Director is approving the changes to this section.

*Section 89.35.* This section involves prediction of the hydrologic consequences of mining. The first sentence of the section was modified by adding the phrase "and whether underground mining activities may result in contamination, diminution or interruption of any water supplies within the permit or adjacent area" to the end of the sentence. The sentence now reads, "The operation plan shall



include a prediction of the probable hydrologic consequences of the proposed underground mining activities upon the quantity and quality of groundwater and surface water within the proposed permit, adjacent and general areas under seasonal flow conditions, and whether underground mining activities may result in contamination, diminution or interruption of any water supplies within the permit or adjacent area.”

The federal regulations regarding this section are found at 30 CFR 784.14(e)(3)(iv). These regulations require the probable hydrologic consequences determination to include findings on whether underground mining activities conducted after October 24, 1992, may result in contamination, diminution or interruption of a well or spring in existence at the time the permit application is submitted and used for domestic, drinking, or residential purposes within the permit or adjacent areas. The Pennsylvania amendment requires a finding for any water supplies within the permit or adjacent area. This would make the Pennsylvania program more inclusive than the federal regulation, which limits required findings for only those water supplies used for domestic, drinking or residential purposes. Since Pennsylvania’s program would require findings for those water supplies covered by the federal program, the Director finds this addition no less effective than 30 CFR 784.14(e)(3)(iv) and is approving this portion of the amendment.

*Section 89.36.* This section describes the information an operator needs to submit to ensure the protection of the hydrologic balance. Pennsylvania’s amendment adds a subsection (c) to this section. Subsection (c) states, “The operation plan shall include a description of the measures which will be taken to replace water supplies which are contaminated, diminished or interrupted by underground mining activities. An operator is not required to provide a replacement water supply prior to mining as a condition for securing a permit.”

The federal regulations regarding information to be submitted in a subsidence control plan are found at 30 CFR 784.20. Subsection (b)(8) of the federal rule requires a description of the measures to be taken in accordance with 30 CFR 817.41(j) and 817.121(c) to replace adversely affected protected water supplies or to mitigate or remedy any subsidence-related material damage to the land and protected structures. Pennsylvania’s regulation language is

substantively identical to and no less effective than the federal regulation with regard to replacement of water supplies. The Director is approving this portion of the amendment.

*Section 89.67.* Pennsylvania is amending subsection (b) by requiring surface mining activities associated with an underground mine to be conducted in a manner that minimizes damage, destruction or disruption of services provided by oil, gas and water wells; oil, gas and coal-slurry pipelines; railroads; electric and telephone lines; and water and sewage lines that pass over, under or through the permit area, unless otherwise approved by the owner of those surface facilities and the Department. Formerly, this section applied to all underground mining activities instead of surface mining activities associated with an underground mine, as it now reads.

In responding to commenters who favored retention of the existing language at 25 Pa. Code 89.67(b), Pennsylvania stated in the preamble to the proposed regulations that:

The [Environmental Quality] Board believes that it is appropriate to narrow the scope of this regulation to address only those activities which take place at surface sites associated with an underground mine. There is sufficient authority in Chapter 89, Subchapter F (relating to subsidence control) to regulate those aspects of the underground mining activity which take place underground. Together, these requirements are no less effective than the Federal regulation in 30 CFR 817.180. (28 Pa.B. 2768)

The authority in Chapter 89, Subchapter F of the Environmental Quality Board referred to was 25 Pa. Code 89.142a(g)(1). This section requires underground mining to be planned and conducted in a manner that minimizes damage, destruction or disruption in services provided by the same utilities listed in 25 Pa. Code 89.67. As noted in the Director’s findings regarding 25 Pa. Code 89.142a(g)(1), we found that 25 Pa. Code 89.142a(g)(1) did not provide the same level of protection for utilities that is required under the federal regulations at 30 CFR 817.180. The Director is requiring 25 Pa. Code 89.142a(g)(1) to be amended to insure that all underground mining activities are conducted in a manner consistent with 30 CFR 817.180. Please see the Director’s finding at 25 Pa. Code 89.142a(g)(1) for more information.

In changing the language of 25 Pa. Code 89.67(b), Pennsylvania has limited protection to utilities from surface mining activities associated with an underground mine where prior to the proposed amendment, protection was

extended from underground mining activities. However, because of Pennsylvania’s reliance on 25 Pa. Code 89.142a(g)(1) to make 25 Pa. Code 89.67(b) no less effective than the federal regulations, the Director believes that the amendment required at 25 Pa. Code 89.142a(g)(1) will serve to accomplish that goal. As a result, the Director is approving Pennsylvania’s amendment to 25 Pa. Code 89.67(b) as not inconsistent with 30 CFR 817.180.

*Section 89.141(a).* Subsection (a) deals with information operators are required to submit regarding the geology overlying the proposed permit area. Subsection (a) formerly read, “The application shall include a description of the geology overlying the proposed permit area, from the surface down to the first stratum below the coal seam to be mined. For the same strata, a detailed description and cross-section shall be provided from available test borings and core samples. A copy of the information developed for 25 Pa. Code 89.33 (relating to geology) may be submitted to meet the requirement in this subsection.”

The subsection now reads, “The application shall include a description of the geology overlying the proposed permit area, from the surface down to the first stratum below the coal seam to be mined. The description shall include geologic conditions which are relevant to the likelihood or extent of subsidence or subsidence related damage. For the same strata, a detailed description and cross-section shall be provided from available test borings and core samples. A copy of the information developed for 25 Pa. Code 89.33 (relating to geology) may be used as appropriate to meet the requirements of this section.”

The addition of the language requiring information on geologic conditions that are relevant to the likelihood or extent of subsidence or subsidence related damage makes this section no less effective than the federal regulations at 30 CFR 784.20(b)(3), which require the subsidence control plan to include a description of the physical conditions that affect the likelihood or extent of subsidence and subsidence-related damage. The Director is approving this portion of the amendment.

*Section 89.141(d).* This subsection requires the permit application to include a subsidence control plan that describes the measures that will be taken to control the subsidence effects from the proposed underground mining. In our letter of June 21, 1999, we also indicated that 25 Pa. Code 89.141(d) did not address the provisions of 30 CFR 784.20(b)(8) that require the subsidence control plan to contain a description of

the measures to be taken to replace adversely affected protected water supplies or to mitigate or remedy any subsidence-related material damage to the land and protected structures.

Pennsylvania indicated in its response to us dated June 1, 2000, that its regulations include requirements to describe the measures to be taken to replace adversely affected protected water supplies and mitigate subsidence-related material damage to the land and protected structures. Requirements relating to descriptions of water supply replacement measures are found in 25 Pa. Code 89.36(c). Descriptions of the measures to be used to correct material damage to surface land are required under 25 Pa. Code 89.141(d)(5). Descriptions of measures to prevent irreparable damage to dwellings and agricultural structures are required under 25 Pa. Code 89.141(d)(6). Requirements relating to the protection of public buildings and other specified structures are found in 25 Pa. Code 89.141(d)(3).

We agree with Pennsylvania that the requirements relating to descriptions of measures to remedy contamination, diminution, or interruption of water supplies found within 25 Pa. Code 89.36(c) and that the descriptions to prevent material damage to surface lands found at 25 Pa. Code 89.141(d)(5) are as effective as the requirements found in the federal regulations. However, we have found that Pennsylvania's amendment does not require the subsidence control plan to contain descriptions of measures to mitigate or remedy material damage to non-commercial buildings and residential structures as required by 30 CFR 784.20(b)(8). The Pennsylvania program discusses prevention of damage to structures but does not discuss the measures in the subsidence control plan to be taken once damage has occurred to structures. While the Director is able to approve the general requirements of 25 Pa. Code 89.141(d), subsection (d)(6) is required to be amended to insure that the subsidence control plan contains a description of measures to mitigate or remedy material damage to all protected structures. See the discussion at 25 Pa. Code 89.141(d)(6) for more information regarding the required amendment.

The Director is also requiring 25 Pa. Code 89.141(d) to be amended because of the use of the term "underground mining." Please see the combined finding regarding use of the term "underground mining" as opposed to "underground mining operations" at the end of the regulation section for more information.

*Section 89.141(d)(2).* Pennsylvania deleted all the existing wording of subsection (d)(2) and added the following wording which requires, "A narrative describing whether subsidence, if it is likely to occur, could cause material damage to, or diminish the value or reasonably foreseeable use of, any structures or could contaminate, diminish, or interrupt water supplies."

In our letter to Pennsylvania of June 21, 1999, we indicated that the term "if it is likely to occur" is not the same as the federal narrative requirement of 30 CFR 784.20 (a)(2) "indicating whether subsidence, if it occurred, could cause material damage \* \* \*" We indicated that the federal term requires more information because it would tell the public whether material damage or water loss would occur if subsidence occurred. PADEP regulations would only tell the public whether material damage or water loss would occur if subsidence is likely to occur. We also stated that while 30 CFR 784.20(a)(2) requires the narrative to take into account subsidence effects on "renewable resource lands," 25 Pa. Code 89.141(d)(2) fails to include "renewable resource lands."

In its response of June 1, 2000, Pennsylvania indicated that its regulation at 25 Pa. Code 89.141(d) requires a subsidence control plan for all underground mines without regard to the presence of overlying structures, water supplies or renewable resource lands or whether or not those structures and features could suffer material damage as a result of mine subsidence. In doing so, Pennsylvania noted that its regulations are as effective as 30 CFR 784.20(a)(2). Through these plans, DEP and the general public can see how planned mining interfaces with overlying structures and features.

Pennsylvania further noted that in regard to the terminology, there is no practical difference between the phrase "if it is likely to occur" and "if it occurred" for the purpose of predicting the level of damage. As a practical matter, when full extraction (either longwall mining or pillar extraction during retreat mining) is the principal method of mining, the applicant will always provide information about what will happen when subsidence occurs. In addition, by requiring descriptions of effects in areas where subsidence is "likely to occur," the Pennsylvania regulations provide information that is less speculative. Pennsylvania noted that its regulations provide the general public with more usable information. DEP can predict whether or not subsidence will occur and affect these features. DEP also evaluates the stability

of underground mine workings to ensure that subsidence will not occur in locations where it is not planned.

The Director finds that Pennsylvania's explanation is logical and makes this portion of the amendment no less effective than the federal provision at 30 CFR 784.20(a)(2).

*Section 89.141(d)(3).* This subsection requires that, for each structure and feature, or class of structures and features, described in 25 Pa. Code 89.142a(c) (which include public buildings and facilities, churches, schools and hospitals, certain sized impoundments and bodies of water, and bodies of water or aquifers which serve as a significant source to a public water supply system), there must be a 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 federal rule at 30 CFR 784.20(b)(5) requires for non-planned subsidence a description of measures that will be taken to prevent or minimize subsidence and subsidence related damage. The federal rule does not limit the descriptions to specific structures or features, while Pennsylvania's regulation does limit the description to specified structures and features. Therefore, the Director finds that to the extent a description is required of some structures and features, this section is no less effective than 30 CFR 784.20(b)(5). However, to the extent that the description is not all inclusive (for example, dwellings, buildings accessible to the public, and noncommercial buildings customarily used by the public would not be included), the Director is requiring that Pennsylvania amend its program to provide the protections of 30 CFR 784.20(b)(5).

*Section 89.141(d)(4).* This section provides that a subsidence control plan must include a description of the anticipated effects of planned subsidence, if any. The Director finds that this regulation is substantively identical to, and no less effective than, the federal regulation at 30 CFR 784.21(b)(6) and is approving it.

*Section 89.141(d)(5).* This section requires subsidence control plans to include a description of the measures to be taken to correct any subsidence-related material damage to the surface land. The Director finds that this regulation is substantively identical to, and no less effective than, the portion of the federal regulation at 30 CFR 784.21(b)(8) that requires subsidence control plans to provide a description of measures to be taken to mitigate or remedy any subsidence-related material

damage to the land. The Director is approving this portion of the amendment.

*Section 89.141(d)(6).* This section requires that the subsidence control plan include a description of measures to be taken to correct any subsidence-related material damage to the structures enumerated in 25 Pa. Code 89.142a(f)(1)(iii)–(v), if the structure owner does not consent to the damage. In our letter to Pennsylvania dated June 21, 1999, we indicated that the federal rules do not have an irreparable damage standard. For occupied dwellings and non-commercial structures, the federal rules apply a no material damage standard for non-planned subsidence and, a minimize damage standard for planned subsidence (unless waived by the owner) [see sections 30 CFR 784.20(b)(7), 817.121(a)(1), and 817.121(a)(2)]. Under OSM regulations for non-planned subsidence, subsidence-related material damage must be prevented (see 30 CFR 817.121(a)(1)) for all structures and features. We indicated that the Pennsylvania regulations do not require the prevention of material damage for occupied dwellings and non-commercial structures (except those specifically protected under 25 Pa. Code 89.142a(c): public buildings and facilities, churches, schools, etc., which is the same as OSM's list at 30 CFR 817.121(d)).

In its response letter to us dated June 1, 2000, Pennsylvania indicated that:

Section 817.121 does not unequivocally require permittees to prevent material damage to occupied dwellings. It only requires prevention of material damage to the extent technologically and economically feasible. If prevention of material damage is not technologically feasible, the permittee need not prevent material damage. More importantly, the federal regulation provides that material damage need not be prevented if it is not economically feasible. The federal regulation clearly provides for economics to determine whether preventive measures are employed instead of the repair or compensation remedy. Similarly, under Pennsylvania's regulation a permittee will prevent the material damage from occurring if it is more cost effective than paying for repairs or compensation. The Pennsylvania regulation is actually more effective at protecting homes than the federal regulation, because the federal regulation allows for economics to always be the determining factor as to whether any damage prevention measures will be employed by the permittee regardless of the magnitude of damage. The Pennsylvania regulation prohibits economics from being the determinative factor if subsidence will cause irreparable damage. If Pennsylvania determines that the proposed mining will result in irreparable damage to occupied dwellings and appurtenant

structures or agricultural structures, it will notify the operator that the proposed mining will not be allowed to occur unless the structure owner consents to the damage or the mine operator agrees to take surface measures to minimize or reduce the level of expected damage. See section 89.141(d)(6) and section 89.142a(d).

The federal regulation at 30 CFR 784.20(b)(5) requires a description of the measures to prevent or minimize subsidence damage to structures. The federal regulation at 30 CFR 784.20(b)(7) requires that, with certain exceptions, when planned subsidence is projected to be used, the subsidence control plan is to contain a description of the methods to be employed to minimize damage from subsidence to non-commercial buildings and occupied residential dwellings. Neither the Pennsylvania statute nor the Pennsylvania regulations state the requirement that an operator must prevent and/or minimize for material damage to occupied residential dwellings and community or institutional buildings not included in 25 Pa. Code 89.141(d)(3) (see Pennsylvania's response to section 9.1(b) and 28 Pa.B. 2768, "[d]wellings \* \* \* are protected against irreparable damage but not against lesser levels of damage.").

The Director is approving 25 Pa. Code 89.141(d)(6) to the extent that it provides a description of measures to prevent irreparable damage. However, to the extent the damage to occupied residential dwellings and structures related thereto and community or institutional buildings are not protected in 25 Pa. Code 89.141(d)(3) and they are materially damaged but not irreparably damaged, the Director is requiring Pennsylvania to amend 25 Pa. Code 89.141(d)(6) to insure that the requirements of 30 CFR 784.20(b)(5) and (b)(7) are met.

*Section 89.141(d)(7).* This section requires subsidence control plans to contain a description of the monitoring, if any, the operator will perform to determine the occurrence and extent of subsidence so that, when appropriate, other measures can be taken to prevent, reduce or correct damage.

The Director is approving this portion of the amendment because it is no less effective than 30 CFR 784.20(b)(4), which requires the subsidence control plans to contain a description of monitoring needed to determine the commencement and degree of subsidence so that measures can be taken to prevent, reduce or correct material damage.

*Section 89.141(d)(8).* This section requires subsidence control plans to

contain a description of the measures to be taken to maximize mine stability and maintain the value and reasonably foreseeable use of the surface land.

There is no federal regulation that directly corresponds to this provision. The Director is approving this section because its purpose is in keeping with the federal requirements that a permittee adopt measures that will maximize mine stability and maintain the value and reasonably foreseeable use of surface lands found in 30 CFR 817.121(a)(1). Additionally, the information required in the subsidence control plan by 25 Pa. Code 89.141(d)(8) is consistent with the federal regulation at 30 CFR 784.20(b)(9), which allows the regulatory authority to require information to demonstrate that the operation will be conducted in accordance with 30 CFR 817.121.

*Section 89.141(d)(9).* Under this subsection, Pennsylvania requires a description of measures, and discussion of the effectiveness of such measures, that will be taken to maintain the value and foreseeable uses of perennial streams that may be impacted by underground mining. The Director is approving this section because it provides information similar to that in previously approved 25 Pa. Code 89.141(d)(2), which required a discussion of perennial streams based on 25 Pa. Code 89.143(d)(1). Section 89.141(d)(9) is also consistent with the requirements of 30 CFR 784.20(b)(8), which calls for the permit subsidence control plan to contain a description of the measures to be taken to mitigate any subsidence-related material damage to the land (including perennial streams). However, the Director is requiring this section to be amended because of the use of the term "underground mining." Please see the combined finding regarding use of the term "underground mining" as opposed to "underground mining operations" at the end of the regulation section for more information.

*Section 89.141(d)(10).* This section requires the subsidence control plan to include a description of the measures to be taken to prevent material damage to perennial streams and aquifers that serve as a significant source to a public water supply system. The Director is approving this section because it provides information similar to that in previously approved 25 Pa. Code 89.141(d)(2), which required a discussion regarding the protection of perennial streams and aquifers that serve as a significant source to a public water supply system based on 25 Pa. Code 89.143(b). The Director also finds 25 Pa. Code 89.141(d)(10) is consistent with the requirements of 30 CFR

817.121(d), which calls for the protection of any aquifer or body of water that serves as a significant water source for a public water supply system.

*Section 89.141(d)(11).* This section requires subsidence control plans to include a description of utilities and a description of the measures to be taken to minimize damage, destruction, or disruption of utility service. There is no federal regulation that corresponds directly to this portion of Pennsylvania's program. However, it is consistent with 30 CFR 817.180, which requires that all underground mining activities must be conducted in a manner that minimizes damage, destruction or disruption of services provided by wells, pipelines, railroads, electric and telephone lines, and water and sewage lines. It is also consistent with 30 CFR 784.20(b)(9), which requires subsidence control plans to contain information specified by the regulatory authority necessary to demonstrate that the operation will be conducted in accordance with 30 CFR 817.121. The Director is approving this section.

*Section 89.142.* Pennsylvania is deleting this entire section that required a permittee to submit a general mine map and a six-month map. These provisions have been moved, with some modifications, to 25 Pa. Code 89.154. The modifications include removal of reference to structures in place as of April 27, 1966. Pennsylvania replaced those provisions with requirements that mine maps include the structures listed in 25 Pa. Code 89.142a(f)(1)(i)–(iv) as well as dwellings, public buildings and facilities, churches, schools, and hospitals. The Director is approving the deletion of 25 Pa. Code 89.142 because the deletion of references to April 27, 1966, provides protections no less effective than those found in the federal regulations and because the remaining provisions of 25 Pa. Code 89.142 can be found in 25 Pa. Code 89.154.

*Section 89.142a(a).* This section requires underground mining to be planned and conducted in accordance with requirements found in subsections (1) through (4). The Director is requiring this section to be amended because of the use of the term "underground mining." Please see the combined finding regarding use of the term "underground mining" as opposed to "underground mining operations" at the end of the regulation section for more information.

*Section 89.142a(a)(1).* This section requires underground mining to be planned and conducted in accordance with the subsidence control plan and the postmining land use requirements in

25 Pa. Code 89.88. There is no direct counterpart in federal regulations to this section. The Director is approving 25 Pa. Code 89.142a(a)(1) because it is consistent with the requirements of 30 CFR 784.20(b), which requires subsidence control plans as part of the permit application if premining surveys show that subsidence damage would occur and 30 CFR 773.11, which requires permits for operators to engage in mining operations.

*Section 89.142a(a)(2).* This section requires underground mining to be planned and conducted in accordance with the performance standards in subsections (b)–(j). There is no direct federal counterpart to this section. The Director is approving this section because it is consistent with the requirements of 30 CFR 817.121, which provide the subsidence control performance standards to be followed when conducting underground mining.

*Section 89.142a(a)(3).* This section provides that underground mining will not be authorized beneath structures where the depth of overburden is less than 100 feet unless the subsidence control plans demonstrate that the mine workings will be stable and that overlying structures will not suffer irreparable damage. There is no direct federal counterpart. The Director is approving this portion of the amendment because it is consistent with the federal regulation at 30 CFR 817.121(a)(1) that requires permittees to adopt measures consistent with known technology that prevent subsidence from causing material damage, maximize mine stability and maintain the value and reasonably foreseeable use of surface lands.

*Section 89.142a(a)(4).* This section requires mine operators to adopt measures to maximize mine stability. This section also states that it does not prohibit planned subsidence or room and pillar mining. Section 817.121(a)(1) of the federal rules requires operators to maximize mine stability. Additionally, § 720(a)(2) of SMCRA states that nothing in § 720 of SMCRA shall prohibit underground coal mining operations. Therefore, this provision is not inconsistent with the requirements of SMCRA and the federal regulations and the Director is approving it.

*Section 89.142a(b).* This section lists the requirements for conducting surveys of protected structures and the conditions that relieve an operator from conducting a survey. As noted in the December 22, 1999, **Federal Register** (64 FR 71652), OSM suspended the portion of 30 CFR 784.20(a)(3) that required a specific structural condition survey of all EPAAct protected structures. We

suspended this regulation to make our rules consistent with a decision of the U.S. Court of Appeals for the District of Columbia Circuit [*National Mining Association v. Babbitt*, 173 F.3d 906 (1999)]. However, state regulatory authorities have the option of retaining the premining surveys. Pennsylvania has not indicated that it wishes to eliminate the survey requirements. Since there is no federal counterpart and because the survey will provide additional information to the regulatory authority, the Director is approving 25 Pa. Code 89.142a(b) and the related subsections (b)(1)(i)–(v) and (b)(2)(i)–(iii). This section is not inconsistent with the requirements of SMCRA and the federal regulations. The Director does note that Pennsylvania may be required to submit a program amendment to conform with any future federal rules regarding structure surveys.

*Section 89.142a(c)(1).* This section provides that no underground mining shall be conducted beneath or adjacent to public buildings and facilities, churches, schools and hospitals, impoundments with a storage capacity of 20 acre-feet (2.47 hectare-meters) or more, or bodies of water or aquifers that serve as significant sources to public water supply systems unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the foreseeable use of, the structures. This provision is similar to section 9.1(c) (52 P.S. 1406.9a(c)) of the BMSLCA that the Director approved. However, there is a difference in the language between Pennsylvania's statute and its regulation. The regulation only restricts underground mining beneath or adjacent to the listed facilities, while the statute restricts underground mining *activities* beneath or adjacent to the listed facilities. This is significant because the federal regulations (as noted in the definition of underground mining activities at 30 CFR 701.5) restrict surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, and reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining operations are placed. The Pennsylvania regulation would restrict only underground mining which is defined in the Pennsylvania regulations

at 25 Pa. Code 89.5 as the extraction of coal in an underground mine.

However, the Director is approving this section of the regulations because the statutory language of section 9.1(c) (52 P.S. 1406.9a(c)) of the BMSLCA is controlling over the conflicting language of the regulation. Accordingly, the Director finds that 25 Pa. Code 89.142a(c)(1), when read in conjunction with section 9.1(c) (52 P.S. 1406.9a(c)) of the BMSLCA, is no less effective than the federal regulations at 30 CFR 817.121(d).

*Section 89.142a(c)(2)(i)-(v).* This section lists the measures to be adopted by the operator to comply with 25 Pa. Code 89.142a(c)(1). The requirements include limiting the percentage of coal extracted, specifications on the size and configuration of the support area, backfilling or backstowing of voids, leaving areas in which no coal extraction will occur, and initiating a monitoring program to detect surface movement. The Director is approving subsections 89.142a(c)(2)(i) (A)-(D), (ii), (iii), (iv), and (v) because these requirements are substantively the same or no less effective than the federal requirements at 30 CFR 784.20(b)(5).

*Section 89.142a(c)(2)(vi).* This subsection requires a monitoring program to detect surface movement resulting from underground mining. The monitors are to be placed sufficiently in advance of the underground mining so that it can be stopped before protected structures or features are damaged.

In our letter to Pennsylvania of June 21, 1999, we indicated that this section appears to be less effective than the federal regulations because it does not require monitoring in conformance with 30 CFR 784.20(b)(4) of occupied dwellings, non-commercial structures and surface lands.

In its response of June 1, 2000, Pennsylvania indicated that:

30 CFR 784.20(b)(4) provides that an application shall contain a description of the monitoring, if any, needed to determine the extent of subsidence that may occur so that appropriate mitigation measures can be implemented. It does not, as OSM suggests in its comment, "require" monitoring. In any event, section 89.142a(c)(2)(vi) was not intended to implement the provisions of § 784.20(b)(4). Instead, section 89.141(d)(7) (which virtually mirrors the federal regulation) is designed to do so. Clearly, section 89.141(d)(7) is as effective as § 784.20(b)(4) in regard to the monitoring of occupied dwellings, noncommercial structures and surface land.

There is no direct counterpart in federal regulations to this section. The Director agrees with Pennsylvania's explanation and is approving this section with regard to the monitoring program because the monitoring

required will help operators and Pennsylvania to determine if subsidence is likely to affect protected structures and features and is consistent with the federal regulations in providing protection to those structures or features.

*Section 89.142a(c)(3).* This subsection states that if the measures implemented by the operator cause material damage or reduce the reasonably foreseeable use of structures or features listed in paragraph (1), the department will impose additional measures to minimize the potential for these effects. In our letter to Pennsylvania dated June 21, 1999, we indicated that the federal rule at 30 CFR 817.121(e) states that if there is material subsidence damage to structures listed in 30 CFR 817.121(d), then the regulatory authority may suspend mining under or adjacent to such structures or facilities until the subsidence control plan is modified to ensure prevention of further material damage. Section 30 CFR 784.20(b)(4) requires the subsidence control plan to contain, "A description of the monitoring, if any, needed to determine the commencement and degree of subsidence so that, when appropriate, other measures can be taken to prevent, reduce or correct material damage in accordance with § 817.121(c) of this chapter." When taken together, the EPAAct sections mean that the prevention of material damage (and not "minimize the potential") standard is in place. We further indicated to Pennsylvania that this section appears to be less effective than the federal regulations because it does not include the option for Pennsylvania to suspend mining or have the subsidence control plan modified to ensure prevention of further material damage.

In its response to us of June 1, 2000, Pennsylvania indicated that:

OSM has intertwined various regulatory sections resulting in a misinterpretation of the federal regulations to assert a standard that does not exist and is not supported by the federal regulations. Although the language of section 89.142a(c)(3) differs somewhat from that of 30 CFR 817.121(e), the intended result is the same—increased protection of public buildings, etc. that are susceptible to damage by mine subsidence. Therefore, the Pennsylvania regulation is as effective as the federal regulation. In order for the provisions of section 89.142a(c)(3) to come into play, the measures previously proposed by the operator and approved by DEP must have failed to adequately protect one or more of the structures or features listed in paragraph (c)(1). At that point it is necessary to impose additional restrictions or require additional protective measures to ensure that other protected structures or features will not be materially damaged by subsidence. Since it could be argued that the failed measures were designed to "prevent

material damage," a new standard providing greater protection must be targeted. In setting this standard, DEP chose the phrase "minimize the potential for these effects" to clarify that new measures must be proposed and that these measures must be sufficient to further reduce the likelihood of effects similar to those observed.

OSM agrees with Pennsylvania that 25 Pa. Code 89.142a(c)(3) and 30 CFR 817.121(e) increase protection of the structures and surface features at 25 Pa. Code 89.142a(c)(1) and 30 CFR 817.121(d), respectively. However, 30 CFR 817.121(e) imposes on the regulatory authority the obligation to require permittees to modify subsidence control plans to ensure the *prevention* of further material damage in the cases where the initial plan or operator's actions fail. In addition, 30 CFR 817.121(e) provides the authority to suspend mining until such a plan is approved. Pennsylvania's response to OSM did not establish that the regulations at 25 Pa. Code 89.142a(c)(3) allow Pennsylvania the discretion to suspend mining until the operator's subsidence control plan ensures the prevention of further material damage. Pennsylvania's regulation merely requires additional measures to *minimize* the effects, but does not give Pennsylvania the option to stop the mining until Pennsylvania reviews the additional measures and determines that the measures will minimize the effects. The Director is requiring Pennsylvania to amend its regulations to address the requirement.

*Section 89.142a(d).* This section provides that if the Department determines and notifies a mine operator that a proposed mining technique or extraction ratio will result in irreparable damage to a structure 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 the impacts resulting from subsidence to these structures. The federal regulations at 30 CFR 817.121(a) require that operations, depending on the type, must either prevent or minimize material damage to occupied residential dwellings and community or institutional buildings. The federal regulations do not provide for an irreparable damage standard. As a result, the provisions of this section are no less effective than the federal regulations regarding structures in danger of being irreparably damaged,

but it is less effective in regard to structures that may be materially damaged because it provides no protection for those structures. While this section can be approved for structures in danger of being irreparably damaged, the Director is requiring Pennsylvania to amend its program to insure that structures in danger of being materially damaged are protected also.

*Section 89.142a(e).* This section requires operators to correct material damage to surface lands resulting from subsidence to the extent technologically and economically feasible. In our letter of June 21, 1999, to Pennsylvania we noted that this section did not require, as 30 CFR 817.121(c)(1) does, the permittee to restore the land "to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence damage."

In its response to us of June 1, 2000, Pennsylvania stated that the operator is required to correct material damage as defined by 25 Pa. Code 89.5 and that since the definition of "material" includes those components required in 30 CFR 817.121(c)(1), when 25 Pa. Code 89.142a(e) is read in conjunction with 25 Pa. Code 89.5, it is as effective as 30 CFR 817.121(c)(1).

The Director agrees with Pennsylvania's interpretation and is approving this section because when it is read in conjunction with 25 Pa. Code 89.5, it is no less effective than 30 CFR 817.121(c)(1) regarding correction of material damage to surface lands.

*Section 89.142a(f)(1).* This section requires correction of damage to protected structures from underground mining conducted on or after August 21, 1994. The federal regulations at 30 CFR 817.121(c)(1) and (2) state that the permittee must correct any material damage resulting from subsidence caused to surface lands or structures. Pennsylvania's definition of underground mining only relates to extraction of coal, therefore subsidence from other underground mining activities (such as underground construction, operation and reclamation of shafts, adits, underground support facilities, in situ processing, and underground hauling, storage, and blasting) would not be covered. As a result, this portion of the amendment is less inclusive than the federal regulations that require repair of structures damaged by subsidence. The Director is requiring Pennsylvania to amend this section to insure that protected structures damaged by subsidence are repaired. Please see the combined finding regarding use of the term "underground mining" as opposed

to "underground mining operations" at the end of the regulation section for more information.

Additionally, this section is not as effective as 30 CFR 817.121(c), which requires permittees to promptly repair or compensate owners for material damage caused by subsidence. Section 89.142a(f)(1) does not contain any standard requiring operators to show a diligent and timely effort in repairing structures or compensating landowners for subsidence damage. For further information on the standard requiring prompt repair or compensation, see the Director's decision on section 5.4 of the BMSLCA. The Director is requiring this section to be amended to be no less effective than 30 CFR 817.121(c) in requiring prompt repair or compensation to landowners.

*Section 89.142a(f)(1)(i) and (ii).* These sections list the type of structures that operators are responsible for repairing or providing compensation for damages to landowners when underground mining causes subsidence damage. Subsections (i) and (ii) are nearly identical to the statutory sections of 5.4(a)(1) and (a)(2). Therefore, the findings for 5.4(a)(1) and (a)(2) are incorporated herein by reference and the Director is approving subsection (i) and (ii).

*Section 89.142a(f)(1)(iii).* This section provides for compensation for damage to dwellings that 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. This section is similar to section 5.4(a)(3) of the BMSLCA. In section 5.4(a)(3) the Director did not approve the language " \* \* \* in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application." For the same reasons, the Director is not approving the language, " \* \* \* 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," from 25 Pa. Code 89.142a(f)(1)(iii).

*Section 89.142a(f)(1)(iv) and (v).* These sections address agricultural structures that are protected under Pennsylvania's program. Pursuant to 30

CFR 817.121(c)(3), repair or compensation for material damage to agricultural structures is required to the extent allowed under state law. The Director is approving these sections because they protect structures not covered under federal regulations and they are consistent with 30 CFR 817.121(c)(3).

*Section 89.142a(f)(2)(i).* This section provides for compensation to landowners for subsidence damages to structures rather than repair. The federal regulations require the compensation to be in the full amount of the decrease in value of the structure resulting from the subsidence. Pennsylvania's amendment provides that compensation is to be 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. These standards for compensation are the same as those in 5.4(a) (52 P.S. 1406.5d(a)) of BMSLCA. Therefore, the finding for 5.4(a) (52 P.S. 1406.5d(a)) is incorporated herein by reference and the Director is approving this portion of the regulation.

The Pennsylvania amendment also discusses damage to agricultural structures. Pursuant to 30 CFR 817.121(c)(3), repair or compensation for material damage to agricultural structures is required to the extent allowed under state law. The Director is approving this portion of the amendment because it provides for protection for structures that are not protected under the federal regulations and is consistent with 30 CFR 817.121(c)(3).

However, the Director is requiring this section to be amended because of the use of the term "underground mining." Please see the combined finding regarding use of the term "underground mining" as opposed to "underground mining operations" at the end of the regulation section for more information.

*Section 89.142a(f)(2)(ii).* This section provides for operators to compensate occupants of covered structures for payment of reasonable, actual expenses incurred during temporary relocation. The section further provides that the operator shall also compensate the occupants for other actual reasonable incidental costs agreed to by the parties or approved by the Department.

There is no direct federal counterpart for this regulation. This portion of the amendment affords a benefit to occupants of subsidence-damaged structures that goes beyond the protections in the federal regulations. The Director finds that the section is not inconsistent with the requirements of

SMCRA and the federal regulations and is approving it.

*Section 89.142a(g)(1).* Subsection (1) provides that underground mining must be planned and conducted in a manner that minimizes damage, destruction or disruption in services provided by utilities. Underground mining is defined in Pennsylvania's regulations as the extraction of coal in an underground mine. The federal rule at 30 CFR 817.180 requires that all underground mining activities, not just underground mining, must be planned and conducted in a manner that minimizes damage, destruction or disruption in services provided by utilities. The federal definition of underground mining activities is a combination of two parts. The first includes surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, are reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas upon which are sited support facilities including hoist and ventilation ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining are placed. The second part includes underground operations such as underground construction, operation and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage, and blasting. Thus, the federal rule is more inclusive of the activities that must be conducted in a manner that minimizes damage, destruction or disruption in services.

The Director is approving this section to the extent that underground mining must be planned and conducted in a manner that minimizes damage, destruction or disruption to utilities. However, the Director is requiring Pennsylvania to amend its program to require all underground mining activities be conducted in a manner consistent with 30 CFR 817.180.

*Section 89.142a(g)(2).* Subsection (2) provides a list of measures an operator may take to minimize damage, destruction or disruption in services from utilities listed in 25 Pa. Code 89.142a(g)(1). There is no direct federal counterpart to this regulation. The Director is approving this section because it lists specific measures operators may implement to insure that utilities can continue to provide their services. These measures are not inconsistent with the requirements of SMCRA and the federal regulations.

*Section 89.142a(g)(3).* This section provides that a mine owner shall take measures to minimize damage to

customer-owned gas and water service connections. In our letter of June 21, 1999, we noted that since customer-owned gas and water service connections are part of a residential dwelling (see definition of "permanently affixed appurtenant structures" at 25 Pa. Code 89.5), Pennsylvania should require the prevention of subsidence from causing material damage to the extent feasible for non-planned subsidence and minimize, repair and compensate for planned subsidence.

In its response to us of June 1, 2000, Pennsylvania noted:

Under Pennsylvania's program a mine operator must either remove enough coal to induce planned subsidence or leave support that will maximize mine stability. If mining will result in planned subsidence, a mine operator is required to take measures to minimize damage to customer-owned gas and water service connections, unless the property owner does not consent to allow the measure to be taken. If mining will not result in planned subsidence, the workings must be designed to remain stable in accordance with section 89.142a(a)(4), thereby precluding material damage that would result from unplanned subsidence.

The Director is approving this portion of the amendment. The federal rule at 30 CFR 817.121 requires the permittee to prevent (to the extent it is technologically and economically feasible) damage when the mining does not result in unplanned subsidence. The federal rule at 30 CFR 817.121(a)(2) requires minimization of subsidence damage for occupied residential dwellings and structures related thereto, which by definition includes utilities. The exception to this minimization requirement is if the permittee has the written consent of the owner. Since 25 Pa. Code 89.142a(a)(4) prohibits material damage whenever there is unplanned subsidence and 25 Pa. Code 89.142a(g)(3) requires an operator to minimize damage to customer utility connections unless the owner prohibits such measures, these sections together protect customer-owned gas and water service connections to the extent required by the federal regulations and are no less effective than the federal regulations.

*Section 89.142a(g)(4).* This section requires the Department to suspend or restrict underground mining if it determines that mining beneath or adjacent to a utility will present an imminent hazard to human safety. In our letter to Pennsylvania of June 21, 1999, we indicated that the federal rules at 30 CFR 817.121(f) do not have the option of restricting underground mining but provide only for suspension

of underground mining activities in imminent hazard situations. While the federal regulations require suspension of underground mining beneath or adjacent to a utility if it presents an imminent hazard to human safety, the Pennsylvania rules would allow the Department to restrict mining in this situation. The term "restrict" denotes that mining, in some fashion, could continue. By providing the option to allow mining to continue, this section appears to be less effective than the federal regulations.

In its response to us of June 1, 2000, Pennsylvania indicated that in writing its regulations, PADEP decided to use the term "restrict" rather than the term "suspend" in describing the appropriate action to be taken when an imminent hazard is recognized. The term "restrict" can be applied to limit the percentage of coal extracted where there is a need to prevent subsidence that would, in turn, give rise to a hazardous situation. The term "restrict" can also be applied to prevent mining from encroaching into a specified area or delay mining until damage prevention measures are taken at the land surface. By contrast, the term "suspend," as defined by Webster's Dictionary, only seems to imply a temporary cessation of mining. PADEP believes its choice of terms more clearly indicates there must be a final outcome in which there is no imminent hazard to human safety resulting from mining. Irrespective of the term used, PADEP believes that both the Pennsylvania and the federal regulation are applied in the same manner to prevent imminent hazards to human safety.

Based on Pennsylvania's interpretation of the word "restrict," the Director is approving this regulation. In effect, this would give Pennsylvania authority to suspend operations when necessary. In this manner, the Pennsylvania program will be no less effective than the federal program with regard to suspension of operations that could involve imminent harm situations.

*Section 89.142a(h)(1) and (2).* Section 89.142a(h)(1) formerly appeared at 25 Pa. Code 89.143(d)(1). Section 89.143(d)(1) was deleted by this amendment and its provisions moved, with some modification, to 25 Pa. Code 89.142a(h)(1). The provision read, prior to deletion, "[U]nderground mining activities 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 mining beneath streams." The provision



at 25 Pa. Code 89.142a(h)(1) deletes the word "activities" and changes "mining beneath streams" to "coal extraction beneath streams."

Section 89.142a(h)(2) formerly appeared at 25 Pa. Code 89.143(d)(3). Section 89.143(d)(3) was deleted by this amendment and its provisions moved, with some modifications, to 25 Pa. Code 89.142a(h)(2). The provision read, prior to deletion, "[I]f the Department finds that the measures have adversely affected a perennial stream, the operator shall meet the requirements of [section] 89.145(a) (relating to surface owner protection) and file revised plans or other data to demonstrate that future activities will meet the requirements of paragraph (1)." The section now reads, "[I]f the Department finds that underground mining has 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 will meet the requirements of paragraph (1)." As can be seen, there are two changes to this section: (1) the revised regulation defines the operator's responsibility to mitigate adverse effects to perennial streams to the extent technologically and economically feasible, and (2) substituting the phrase "underground mining" for "future activities."

The Director is approving the change in 25 Pa. Code 89.142a(h)(2) regarding the operator's responsibility to mitigate adverse effects to perennial streams. Under federal requirements, perennial streams are a component of surface lands and are regulated relative to planned and unplanned subsidence. See 60 FR at 16725. For unplanned subsidence (30 CFR 784.20(b)(5)), permittees must take measures on the surface to prevent or minimize material damage or diminution in value of the surface. For planned subsidence, material damage does not have to be prevented; however, the permittee must correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence damage (817.121(c)(1)). Since 25 Pa. Code 89.142a(h) requires underground mining to be planned and conducted in a manner that maintains the value and reasonably foreseeable use of perennial streams and for adverse effects to be mitigated to the extent technologically and economically feasible, the Director is approving this portion of the

amendment because it is no less effective than the requirements at 30 CFR §§ 784.20(b)(5), 784.20(b)(8) and 817.121(c)(1).

However, the Director is requiring both subsections (h)(1) and (h)(2) to be amended because of the use of the term "underground mining." Please see the combined finding regarding use of the term "underground mining" as opposed to "underground mining operations" at the end of the regulation section for more information.

*Section 89.142a(i).* This section provides situations where the Department will suspend underground mining if the operations present an imminent danger to the public. Pennsylvania's regulations are no less stringent than § 516(c) of SMCRA and 30 CFR 817.121(f) since they both require the suspension of underground mining under urbanized areas, cities, towns, and communities and adjacent to industrial or commercial buildings, major impoundments, or perennial streams. In addition, Pennsylvania extends the same protection to lined solid and hazardous waste disposal areas. However, the Director is requiring subsection (1) to be amended because of the use of the term "underground mining." Please see the combined finding regarding use of the term "underground mining" as opposed to "underground mining operations" at the end of the regulation section for more information.

*Section 89.142a(j).* This section provides that underground mining is prohibited under an area that is not included within a subsidence control plan that has been submitted and approved by the Department. There is no direct corresponding federal regulation to this section. The Director is approving this portion of the amendment because it is not inconsistent with the federal regulations at 30 CFR 784.20 requiring a subsidence control plan as part of the permit application.

*Section 89.142a(k).* This section provides the steps operators must take when they receive a claim of subsidence damage to a structure or surface feature. There is no direct corresponding federal counterpart to this section. Since this section establishes procedures for operators to contact the regulatory authority and will insure that any complaints that are received by an operator will be forwarded to the regulatory authority in a timely manner, the Director finds that this section is not inconsistent with the requirements of SMCRA and the federal regulations. The Director is approving this portion of the amendment.

*Section 89.142a(l).* This section prohibits the Department from adjudicating property rights disputes between mine operators and other parties. Section 507(b)(9) of SMCRA states in part that nothing in SMCRA "shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes." The Director finds that this section is in accordance with SMCRA because it does not give PADEP the authority to adjudicate property rights. The Director is approving this section.

*Section 89.143(a).* This section provided performance standards for operators to follow when conducting underground mining activities. This section has been deleted with provisions (a)(1), (2), and (4) moved, with some minor modifications, to 25 Pa. Code 89.142a(a)(1), (2), and (4) respectively. Section 89.143(a)(3) was modified and moved to 25 Pa. Code 89.142a(a)(3). Section 89.143(a)(3) stated that no underground mining activity will be authorized beneath structures where the depth of overburden is less than 100 feet, with the exception of mine-related openings to the surface such as entries, shafts and boreholes and site specific variances for entry development as approved by the Department. In moving this section, Pennsylvania kept the prohibition of mining beneath structures where the overburden is less than 100 feet, but deleted the exceptions and replaced them with the phrase "unless the subsidence control plan demonstrates to the Department's satisfaction that the mine workings will be stable and that overlying structures will not suffer irreparable damage." The Director is approving the deletion of 25 Pa. Code 89.143 because the requirements of subsections (a)(1), (2), and (4) remain as part of the Pennsylvania program and the modification of subsection (a)(3) as found in 25 Pa. Code 89.142a(a)(3) has been approved. However, the Director is requiring Pennsylvania to amend its program at 25 Pa. Code 89.142a(a) to take into account underground mining operations when describing performance standards for operators to follow.

*Section 89.143(b)(1).* This section has been deleted with its provisions modified and moved to 25 Pa. Code 89.142a(c)(1). Section 89.143(b)(1) required underground mining activities to be planned and conducted in a manner that prevents subsidence damage to: (i) public buildings and noncommercial structures customarily used by the public, including churches, schools and hospitals, (ii) dwellings, cemeteries, municipal public service

operations and municipal utilities in place on April 27, 1966, (iii) impoundments and other bodies of water with a storage capacity of 20 acre feet or more, (iv) aquifers, perennial streams and bodies of water which serve as a significant source for a public water supply system as defined in the Pennsylvania Safe Drinking Water Act (35 P.S. section 721.1–721.17), and (v) coal refuse disposal areas authorized by permits issued under Chapter 90 (relating to coal refuse disposal).

The section as it was modified and moved to 25 Pa. Code 89.142a(c)(1) now reads, “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 subparagraphs (i)–(v), no underground mining shall be conducted beneath or adjacent to: (i) Public buildings and facilities, (ii) Churches, schools and hospitals, (iii) Impoundments with a storage capacity of 20 acre-feet (2.47 hectare-meters) or more, (iv) Bodies of water with a volume of 20 acre-feet (2.47 hectare-meters) or more, and (v) Bodies of water or aquifers which serve as significant sources to public water supply systems.” The Director is approving the deletion of 25 Pa Code 89.143(b)(1) because it provided more comprehensive protections than the federal regulations.

*Section 89.143(b)(2).* This section was deleted in its entirety. Prior to deletion, this section listed the damages prohibited by this subsection, including the cracking of walls, foundations, and monuments, the draining of aquifers, perennial streams or other bodies of water that serve as a significant source for a public water supply system and the weakening of impoundments and embankments. The section further noted that damage to structures described in paragraph (1)(i) need not be prevented if done with the consent of the current owner. The Director is approving this deletion because under federal rules, such damages may be allowed to occur if the operator promptly repairs or compensates the landowners for the damages or promptly provides alternate water supplies. Deletion of this section will not make the Pennsylvania program less effective than the federal regulations.

*Section 89.143(b)(3).* This section has been deleted with several of its provisions moved to 25 Pa. Code 89.142a(c)(2). The provisions that were moved, with some minor modifications, were: 25 Pa. Code 89.143(b)(3)(i) (A) through (C). The remaining provisions that were deleted were 25 Pa. Code 89.143(b)(3)(i)(D) and (ii)(A) through

(D). Section 89.143(b)(3)(i)(D) provided that more stringent measures may be imposed or mining may be prohibited if the measures fail to prevent subsidence damage. Section (ii) allowed full extraction techniques where the operator demonstrates that the proposed measures are at least as effective in prevention of subsidence damage as those described in this subsection.

The Director is approving the deletion of this section because 25 Pa. Code 89.143(b)(3)(i)(A) through (C) still remain in the approved program and 25 Pa. Code 89.143(b)(3)(i)(D) and (ii)(A) through (D) provided protections beyond that contemplated by the federal regulations. The deletion of 25 Pa. Code 89.143(b)(3) will not make the Pennsylvania program less effective than the federal regulations.

*Section 89.143(c)(1).* This section has been deleted and the provisions moved to section 25 Pa. Code 89.142a(g)(1). The section discussed protection of utilities and requires underground mining activities to be planned and conducted in a manner that minimizes damage, destruction or disruption in services provided by utilities. When the section was moved to 25 Pa. Code 89.142a(g), Pennsylvania dropped the word “activities” from the phrase “underground mining activities.” The Director is approving the deletion of 25 Pa. Code 89.143(c)(1), but is requiring Pennsylvania to amend its program at 25 Pa. Code 89.142a(g)(1) to insure that underground mining activities are planned and conducted in a manner that minimizes damage, destruction or disruption in services provided by utilities. See the Director’s decision under 25 Pa. Code 89.142a(g)(1) for further information.

*Section 89.143(c)(2).* This section was deleted and the provisions moved with some modifications to 25 Pa. Code 89.142a(g)(2). The section originally indicated that the measures adopted to minimize damage, destruction or disruption of utility services protected by this subsection may include, in addition to those measures discussed in 25 Pa. Code 89.141(d), a program for detecting subsidence damage and avoiding disruption in services, and a notification to the owner of the facility that specifies when the mining activity beneath or adjacent to the structure will occur. When Pennsylvania moved the section it changed the phrase “avoiding disruption in services” to “minimizing disruption in services” (see 25 Pa. Code 89.142a(g)(2)(i)). The federal rules at 30 CFR 817.180 require underground mining activities to be conducted in a manner that minimizes damage, destruction, or disruption of services

provided by utilities. Therefore, the Director is approving deletion of this section because the provisions appear in 25 Pa. Code 89.142a(g)(2)(i) and (ii) and therefore deleting this section will not make the Pennsylvania program less effective than the federal regulations.

*Section 89.143(d)(1).* This section was deleted and the provisions moved to 25 Pa. Code 89.142a(h)(1). The provision required, prior to deletion, underground mining activities to be planned and conducted in a manner that maintains the value and reasonably foreseeable uses of perennial streams, such as aquatic life, water supply and recreation, as they existed prior to mining beneath streams. The provision at 25 Pa. Code 89.142a(h)(1) deleted the word “activities” and changed “mining beneath streams” to “coal extraction beneath streams.” The Director has approved the deletion of 25 Pa. Code 89.143(d)(1), but is requiring 25 Pa. Code 89.142a(h)(1) to be amended to be as effective as section 720 of SMCRA regarding underground mining operations.

*Section 89.143(d)(2).* This section was deleted in its entirety. The section, which dealt with perennial streams, read, “The measures to be adopted to comply with this subsection shall be described in the application and include a discussion of the effectiveness of the proposed measures as related to prior mining activities under similar conditions.” There is no federal counterpart to this section. The Director finds that deleting this section will not make the Pennsylvania program less effective than the federal regulations.

*Section 89.143(d)(3).* This section was deleted and the provisions moved, with some modifications, to 25 Pa. Code 89.142a(h)(2). The provision originally read, “If the Department finds that the measures have adversely affected a perennial stream, the operator shall meet the requirements of 25 Pa. Code 89.145(a) (relating to surface owner protection) and file revised plans or other data to demonstrate that future activities will meet the requirements of paragraph (1).” As found in 25 Pa. Code 89.142a(h)(2), the section now reads, “If the Department finds that the underground mining has 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 will meet the requirements of paragraph (1).” The Director is approving the deletion of 25 Pa. Code 89.143(d)(3), but is requiring 25 Pa. Code 89.142a(h)(2) to be amended to require operators to mitigate

the adverse effects of underground mining operations on perennial streams.

*Section 89.143(e).* This section requires underground mining activities to be planned and conducted in a manner that maintains the value and reasonably foreseeable use of the overlying surface land prior to mining. This section has been deleted. Pennsylvania has incorporated this provision in the amendment at 25 Pa. Code 89.141(d)(8), which requires the subsidence control plan to contain a description of the measures to be taken to maintain the value and reasonably foreseeable use of the surface land and at 25 Pa. Code 89.142a(e), which requires correction of material damage to surface lands to the extent technologically and economically feasible. The Director is approving deletion of this section because similar provisions that are as effective as the federal regulations in maintaining the value and foreseeable use of surface lands are found elsewhere in the Pennsylvania program.

*Section 89.143(f).* This section has been deleted and the provisions moved, with some modification, to 25 Pa. Code 89.142a(i)(1). Prior to deletion, this section was titled "Urbanized areas" and indicated that underground mining activities shall be suspended beneath urbanized areas, cities, towns and communities, and adjacent to or beneath industrial or commercial buildings, solid and hazardous waste disposal areas, major impoundments or perennial streams, if the activities presented an imminent danger to the inhabitants of the urbanized areas, cities, towns or communities. Section 89.142a(i)(1) now states the Department will suspend underground mining 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 (2.46 hectare-meters) or more, or perennial streams, if the operations present an imminent danger to the public. The Director finds that Pennsylvania's deletion of 25 Pa. Code 89.143(f) and moving of its provisions to 25 Pa. Code 89.142a(i)(1) did not make this section less effective than the provisions of SMCRA at section 516(c) and is approving the deletion. However, the Director is requiring 25 Pa. Code 89.142a(i)(1) to be amended to provide for the suspension of underground mining operations as per the requirements of 30 CFR 817.121(f).

*Section 89.143(g).* This section has been deleted and its provisions moved, with some modification, to 25 Pa. Code 89.142a(j). This section provides that

underground mining activities are prohibited under an area that is not included within a subsidence control plan submitted under 25 Pa. Code 89.141(d) and that has been approved by the Department. In moving the provision, Pennsylvania deleted the word "activities" from the phrase "underground mining activities." The Director finds that deletion of this section does not make the Pennsylvania program any less effective than the federal program because the provisions of the deleted section are found elsewhere in the Pennsylvania program (see the Director's finding at 25 Pa. Code 89.142a(j)).

*Section 89.143a(a).* This provision requires structure owners with subsidence damage to notify operators of the damage. This provision is similar to section 5.5(a) (52 P.S. 1406.5e(a)) of the BMSLCA. The Director is approving this provision for the same reasons as noted in regard to section 5.5(a) (52 P.S. 1406.5e(a)) of the statute found earlier in this rulemaking.

However the Director is requiring this section to be amended because of the term "underground mining." Please see the combined finding regarding use of the term "underground mining" as opposed to "underground mining operations" at the end of the regulation section for more information.

*Section 89.143a(b).* This subsection provides that if the operator agrees that mine subsidence damaged the structure, the operator shall fully repair the damage or compensate the owner for the damage under either 25 Pa. Code 89.142a(f) or under a voluntary agreement authorized by section 5.6 (52 P. S. 1406.5f) of the BMSLCA. Since this subsection requires full repair or compensation and merely cross references to other statutory or regulatory provisions, the Director finds this section no less effective than the federal regulations at 30 CFR 817.121, which require repair or compensation of material damage to structures.

*Section 89.143a(c).* This section provides that if, within six months of the date that the building owner sent the operator notification of subsidence damage, 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 may, within two years of the date damage to the structure occurred, file a claim in writing with the Department.

This section is substantively identical to section 5.5(b) (52 P.S. 1406.5e(b)) of the BMSLCA. Both the statute and the regulation provide that a landowner must wait for six months after notifying an operator of subsidence damage before

filing a claim with the Department. Section 5.5(b) (52 P.S. 1406.5e(b)) and the proposed regulation further restricts the period of time for a landowner to file a complaint by requiring complaints to be filed within two years of the date damage occurred to a structure. The Director has not approved the portion of section 5.5(b) (52 P.S. 1406.5e(b)) of the statute that states " \* \* \* within six months of the date of the notice." The reasons for not approving that language can be found under section 5.5(b) (52 P.S. 1406.5e(b)) earlier in this rulemaking. The Director is not approving the portion of the 25 Pa. Code 89.143a(c) that states, " \* \* \* within 6 months of the date that the building owner sent the operator notification of subsidence damage to the structure \* \* \*" for the same reasons as noted for section 5.5(b) (52 P.S. 1406.5e(b)) of the statute.

Additionally, the Director has not approved the portion of section 5.5(b) (52 P.S. 1406.5e(b)) of the BMSLCA requiring complaints to be filed within two years of the date damage has occurred to a structure. The Director is not approving the phrase "within 2 years of the date damage to the structure occurred \* \* \*" in 25 Pa Code 89.143a(c) for the same reasons as found in section 5.5(b) (52 P.S. 1406.5e(b)) of the statute.

*Section 89.143a(d).* This section describes the procedures the Department will follow in conducting an investigation into a subsidence damage claim. This regulation is similar to section 5.5(c) (52 P.S. 1406.5e(c)) of the BMSLCA. Both the statute and the regulation require the Department to conduct an investigation within 30 days of receipt the claim and within 60 days of completion of the investigation provide a written response.

Additionally, both the statute and regulation provide that, if the Department finds that the operator's underground mining caused the damage, the Department will either issue a written order directing the operator to compensate the structure owner or issue an order directing the operator to repair the damage structure within six months of the date of issuance of the order. More than six months may be allowed if the Department finds that further damage may occur to the same structure as a result of additional subsidence.

The Director approved the portions of section 5.5(c) (52 P.S. 1406.5e(c)) dealing with the time limitations of PADEP's inspection responsibilities. The approval was made to the extent that Pennsylvania recognizes that existing provisions of the Pennsylvania

program regarding responses to citizen complainants could require Pennsylvania to respond to a citizen more quickly than the 60 days allowed in this section. Therefore, the Director is approving 25 Pa. Code 89.143a(d)(1) and (2) to the same extent.

The Director did not approve the provision in 5.5(c) (52 P.S. 1406.5e(c)) of the BMSLCA that allowed written orders with abatement periods of six months or longer to complete repairs or compensate landowners for damages. For the same reasons, the Director is not approving the portion of 25 Pa. Code 89.143a(d)(3) that states, “ \* \* \* within 6 months of the date of issuance of the order. The Department may allow more than 6 months if the Department finds that further damage may occur to the same structure as a result of additional subsidence.”

Finally, the Director is requiring subsections (d)(1) through (3) to be amended because of the use of the term “underground mining.” Please see the combined finding regarding use of the term “underground mining” as opposed to “underground mining operations” at the end of the regulation section for more information.

*Section 89.144.* This section lists the requirements to notify the landowners of impending underground mining beneath their property. The section was deleted and its provisions moved, with some minor modifications, to 25 Pa. Code 89.155. Because all of the provisions of 25 Pa. Code 89.144 were moved to 25 Pa. Code 89.155, and those provisions were found to be as effective as the federal regulations regarding public notice at 30 CFR 817.122, the Director is approving the deletion of 25 Pa. Code 89.144.

*Section 89.144a(a)(1).* This provision provides that the operator will not be required to repair a structure or compensate a structure owner for damage to structures if the operator demonstrates that the landowner denied the operator access to the property upon which the structure is located to conduct a premining survey or postmining survey of the structure and surrounding property. This provision is similar to section 5.4(c) (52 P.S. 1406.5d(c)) of the BMSLCA. The Director is not approving this portion of the amendment for the same reasons as given for not approving section 5.4(c) (52 P.S. 1406.5d(c)) of the BMSLCA, as noted earlier in this rulemaking.

*Section 89.144a(a)(2).* This provision provides that an operator can be granted relief from responsibility to repair a structure or compensate a structure owner for damage to a structure if the operator’s underground mining did not

cause the damage. The Director is approving this portion of the amendment. There is nothing in the federal regulations requiring operators to compensate owners or repair damage that was not caused by the operator’s underground mining activities. Therefore, this provision is not inconsistent with the requirements of SMCRA and the federal regulations.

*Section 89.144a(a)(3).* This provision provides that an operator can be granted relief from responsibility to repair a structure or compensate a structure owner for damage to a structure if the operator and the landowner entered into a voluntary agreement that satisfies the requirements of section 5.6 (52 P.S. 1406.5f) of the BMSLCA. Section 5.6(a) (52 P.S. 1406.5f(a)) requires agreements to provide for “remedies [that] shall be no less than those necessary to compensate the owner of a building for the reasonable cost of its repair \* \* \* .” The Director has approved section 5.6(a) (52 P.S. 1406.5f(a)) of the BMSLCA and is approving 25 Pa. Code 89.144a(a)(3) of the regulations because it is consistent with the federal rules at 30 CFR 817.121, which require permittees to repair damage to structures or compensate the owner.

*Section 89.145(a).* This section was deleted in its entirety. This section required operators to correct material damage resulting from subsidence to surface lands, including perennial streams, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence. Pennsylvania’s program amendment provides for repair of damage to surface lands at 25 Pa. Code 89.142a(e). Please see the discussions of 25 Pa. Code sections 89.142a(e), 89.142a(h), and 89.141(d)(3) for findings on how those sections are no less effective than the federal regulations that require operators to correct material damage to surface lands (including streams) by restoration of the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence. The Director is approving the deletion of 25 Pa. Code 89.145(a) because the provisions of that section are covered by 25 Pa. Code section 89.142a(e) and 89.142a(h).

*Section 89.145(b).* This section was deleted in its entirety. The section required operators to report claims of subsidence damage to PADEP within 10 days of notification. There is no comparable federal standard requiring operators to notify the regulatory

authority of subsidence damage claims. Both the BMSLCA at section 5.5 (52 P.S. 1406.5e) and the implementing regulations at 25 Pa. Code 89.143a describe procedures for reporting subsidence damage claims to PADEP. For the Director’s findings on reporting, please see the discussions of those sections. Because there is no federal counterpart to 25 Pa. Code 89.145(b), the Director finds that Pennsylvania’s deletion of this section does not impair the effectiveness of its program. The deletion is approved.

*Section 89.145a(a)(1).* This subsection requires operators to conduct premining water surveys prior to mining within 1000 feet of a water supply. In our letter of June 21, 1999, to Pennsylvania we stated that this section contemplates that the premining water survey would be done after the permit is approved while the federal rule at 30 CFR 784.20(a)(3) requires the completion of the survey prior to permit approval. In addition, OSM’s February 9, 1998, policy memorandum provides that:

State program amendments that would delay the timing of the water supply surveys required under 30 CFR 784.20(a)(3) should not be approved.

In the June 21, 1999, letter we also noted that 25 Pa. Code 89.145a(a)(1) provides that survey information is to be submitted only to the “extent that it can be collected without extraordinary efforts or the expenditure of excessive sums of money” and that the federal rules do not allow for waiving survey information. Finally, we asked Pennsylvania to clarify whether the information required in subsections 25 Pa. Code 89.145a(a)(1)(i) through (vi) will give sufficient information to determine the premining water quality and quantity. As stated in the federal rules, “the survey should incorporate the baseline water quality and quantity information on existing water supplies required under existing rules at 30 CFR 784.14 and 784.22.” 60 FR at 16730 (2d col).

Pennsylvania’s response of June 1, 2000, noted that its regulations do not waive the requirement to conduct premining surveys and that, as required by 25 Pa. Code 89.145a(a), all water supplies that may be adversely affected by mining must be surveyed by the mine operator. Pennsylvania advised that the only exception is where the property owner will not allow the mine operator access to conduct the survey and that, fundamentally, there is no difference between the federal and state’s regulations in terms of ensuring the availability of baseline data against which to measure effects.

Pennsylvania further noted that the survey requirements of 25 Pa. Code 89.145a(a) are designed around Pennsylvania's water supply replacement requirements, which are more inclusive than federal counterpart requirements, and as a result, Pennsylvania's program must include provisions for surveying water supplies that are installed after the time of permit application. Finally, Pennsylvania advised that its program does not postpone the submission of all water supply information until mining operations have begun. Information relating to the quality and quantity of water supplies is presented at the time of permit application in accordance with the requirements of 25 Pa. Code 89.34(a)(1) relating to groundwater information.

The Director addressed this situation in a memorandum to the Regional Directors dated February 9, 1998, titled "Timing of Presubsidence Surveys," and in March 1999 letters to the Interstate Mining Compact Commission and Tri-State Citizens Mining Network (the "March 1999 letters"). Guidance from the Director provides that baseline data collected at the time of permit application must be sufficient to develop the Probable Hydrologic Consequences and Cumulative Hydrologic Investigation Assessment documents and that states may use the regulatory program amendment process to identify what additional information required under 30 CFR 784.20(a)(3) must be submitted at the time of permit application and which, if any, could be collected at a time closer to when mining would actually occur. The Director committed to giving serious consideration to approving state program amendments that identify what water supply information required under 30 CFR 784.20(a) must be submitted at the time of permit application and which, if any, could be collected at a time closer to when mining actually occurs. Finally, the Director required that states must demonstrate, through the regulatory program amendment process for any delayed water supply surveys, that those analyses would be completed sufficiently in advance of mining to avoid any adverse effect to the water supply.

OSM considered Pennsylvania's proposed amendment relative to current program requirements for baseline hydrologic surveys, information in the Pennsylvania Bulletin (28 Pa.B. 2761), and responses to OSM requests for clarification relative to the March 1999 letters. Specifically at issue is whether OSM can approve the Pennsylvania

requirement that operators conduct premining water surveys after the permit application is approved and prior to mining within 1000 feet of a water supply. The federal rule at 30 CFR 784.20(a)(3) requires a survey at the time of the permit application of each and every protected water supply, i.e. a survey of individual wells, springs, etc. Pennsylvania advised OSM that its amendment proposal does not postpone the submission of all water supply information until after the permit is approved (see the Director's finding at 25 Pa. Code 89.34(a)(1)). The Director notes that the approved Pennsylvania program at 25 Pa. Code 89.43(a)(1) contains requirements for permittees to collect baseline hydrology information in a manner no less effective than the federal requirements at 30 CFR 784.14(b)(1). The federal rules at 30 CFR 784.14 require sampling of ground water information at the time of the permit application, but there is the option to use modeling to meet the requirements for hydrologic prediction. Modeling means that not every water supply will be sampled. Pennsylvania's existing program also allows for modeling. This introduces uncertainty into predicting the type and extent of information that will be collected on each water supply at the time of the permit application. Additionally, the preamble to the Pennsylvania Bulletin stated that 25 Pa. Code 89.145a(a)(1) provides for Department technical staff to adjust the survey distance (1,000 foot limitation) based on site-specific conditions. Accordingly, it is not clear what parameters Pennsylvania would require to be collected on each individual supply as part of a permit application, and which, if any, would be subject to a delayed survey after permit approval.

Based upon the language contained in the Pennsylvania amendment, Pennsylvania's responses to OSM's comments, Pennsylvania's existing program and the Pennsylvania Bulletin, the Director is not approving the provision that allows for water supply surveys to be delayed until mining advances within 1,000 feet of a supply. Such information must be submitted by the permittee with the application. The Director is requiring Pennsylvania to amend its program to require permittees to submit the information required by 25 Pa. Code 89.145a(a)(1)(i)-(vi) that is necessary to meet the provisions of 30 CFR 784.20(a)(3) at the time of the application for all existing drinking, domestic, or residential water supplies. As part of that amendment, Pennsylvania may submit the information requested in the March

1999 letters to identify what water supply information must be submitted at the time of permit application and which, if any, could be collected at a time closer to when mining actually occurs. Along with any such request, Pennsylvania must demonstrate for any delayed water supply surveys, that those analyses would be completed sufficiently in advance of mining to avoid any adverse effect to the water supply.

Pennsylvania further noted that the proviso that survey information need only be acquired to the extent that it can be collected without extraordinary efforts or expenditures of excessive sums of money is a matter of both practicality and preventing inconvenience to property owners. PADEP noted that this proviso was based on its experience and pertains especially to situations where rigid requirements to obtain quantity information would result in tearing apart a well or digging up the floor of a structure to gain access for measurements. Although the federal regulations do not include a similar proviso, PADEP does not believe that OSM would apply them without exercising similar discretion.

The Director is requiring 25 Pa. Code 89.145a(a)(1) to be amended to include the provision that survey information need only be acquired to the extent that it can be collected without extraordinary efforts or expenditures of excessive sums of money is only applicable when it applies to inconveniencing landowners. The federal regulations require the water supply information to be collected without regard to the cost and effort applied by operators. This provision makes this portion of the Pennsylvania program less effective than the federal program, which does not include limits on efforts, or expense, operators are subjected to in the course of gathering premining survey information.

*Section 89.145a(a)(1)(i)-(vi).* These six subsections list information operators are required to include in the premining survey and, if one is desired, the postmining survey of all water supplies within the permit and adjacent areas. The Director finds these subsections no less effective than the federal rules and is approving the six subsections for the reasons noted below (please also see our finding concerning 25 Pa. Code 89.145a(a)(1)).

The requirement at subsection (i) for the location and type of water supply is consistent with the federal regulations at 30 CFR 784.20(a)(1) requiring the subsidence control map to show the location and type of drinking, domestic,

and residential water supplies that could be contaminated, diminished, or interrupted by subsidence. The Director is approving this section because it is substantially the same as the requirements found at 30 CFR 784.20(a)(1).

Subsection (ii) requires the water supply surveys to include the existing and reasonably foreseeable uses of the water supply. There is no similar provision in the federal regulations. The Director is approving this provision because requiring the operator to gather more information than is required in the federal regulations does not lessen the protections afforded by the federal regulations. Additionally, this information is essential for implementing the provisions of 25 Pa. Code 89.145a(b) and 89.145a(f).

Subsections (iii) and (iv) provide that the surveys include the chemical and physical characteristics of the water and that a certified laboratory must be used to analyze the samples and the quantity of water. These sections require substantially the same information as is required in the federal regulations at 30 CFR 780.21(b)(1). The Director is approving this portion of the amendment because it is consistent with the federal regulations. Subsection (v) requires the survey to include the physical description of the water supply and subsection (vi) requires the survey to include hydrogeologic data such as the static water level and yield determination. The Director is approving subsections (v) and (vi) because they require information similar to the ground water information required by the federal regulations at 30 CFR 780.21(b)(1).

*Section 89.145a(a)(2).* This provision requires an operator to submit copies of the results of analyses (described under 25 Pa. Code 89.145a(a)(1)) as well as the results of any quantitative analysis to the Department and the landowner within 30 days of their receipt by the operator. Since the federal regulation at 30 CFR 784.20(a)(3) requires the permit applicant to provide copies of any assessment or evaluation to the property owner and the state regulatory authority, the Director finds that this provision is no less effective than 30 CFR 784.20(a)(3).

*Section 89.145a(a)(3).* This subsection combined with subsection (a)(1) provides that the operator does not have to conduct a premining and postmining survey if the landowner does not authorize access to the site within 10 days of the operator's intent to conduct a survey.

In our letter of June 21, 1999, to Pennsylvania we noted that federal

regulations place no notice requirement on the property owner. The 10-day requirement of Pennsylvania's regulations makes it appear to be less effective than the federal regulation because under EPA Act, even though access may initially be denied, the property owner can later decide to allow a survey.

In its response to us dated June 1, 2000, Pennsylvania noted that 25 Pa. Code 89.145a(a)(3) is intended to alert PADEP to situations where property owners have denied mine operators access to conduct premining surveys. This allows PADEP to communicate with the property owners to further explain the importance of allowing premining surveys or the procedures to be followed in arranging their own surveys. Section 89.145a(a)(3) does not preclude property owners from changing their minds and subsequently authorizing operators to conduct surveys.

The Director is approving this portion of the proposed amendment based on Pennsylvania's interpretation that there is nothing in the amendment precluding a landowner from requesting a water supply survey after initially denying the operator's access to the property. Therefore, it is no less effective than 30 CFR 784.20 since it does not prevent surveys.

*Section 89.145a(b).* This provision requires operators to restore or replace affected water supplies with a permanent alternate source that adequately serves the premining uses of the water supply or any foreseeable uses of the water supply. This regulation implements section 5.1(a)(1) and 5.1(a)(2) (52 P.S. 1406.5a(a)(1) and (2)) of the BMSLCA. The Director is approving Pennsylvania's standard regarding the quality of restored or replaced water supplies and is conditionally approving its standard regarding the quantity of restored or replaced water supplies. Please see the discussion at section 5.1(a)(1) and 5.1(a)(2) (52 P.S. 1406.5a(a)(1) and (2)) for more information.

However, this section is less effective than 30 CFR 817.41(j), which requires permittees to promptly replace drinking, domestic or residential water supplies. Section 89.145a(b) does not contain any standard requiring operators to show a diligent and timely effort in replacing water supplies. For further information on the standard requiring prompt replacing of water supplies, see the Director's decision on section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) of the BMSLCA. The Director is requiring 25 Pa. Code 89.145a(b) to be amended to be no less effective than 30 CFR 817.41(j) in

requiring prompt replacement of water supplies.

*Section 89.145a(c).* This section provides that within 24 hours of an operator's receipt of a claim of water supply contamination, diminution or interruption, the operator shall notify the Department of the claim. There is no corresponding federal counterpart to this section. Since this establishes procedures for operators to contact the regulatory authority and will insure that any complaints that are received by an operator will be forwarded to the regulatory authority in a timely manner, the Director finds that this section is not inconsistent with the requirements of SMCRA and the federal regulations.

*Section 89.145a(d).* This section provides that upon receipt of a complaint that a water supply has been contaminated, diminished or interrupted, operators must diligently investigate the complaint and notify the Department in a timely manner of the results of its investigation. There is no direct federal counterpart. Since this establishes procedures for investigations by operators, the Director finds that this section is not inconsistent with the requirements of SMCRA and the federal regulations.

*Section 89.145a(e)(1).* This section provides that if an affected water supply is within the rebuttable presumption area and the presumption applies, the operator will provide a temporary water supply within 24 hours. We noted in our letter to Pennsylvania of June 21, 1999, that the proposed amendment only requires the temporary replacement of water supplies if three conditions are met: (1) If the water supply is within the rebuttable presumption area, (2) the presumption applies and, (3) if "the landowner or water user is without a readily available alternate source." The federal rules require the permittee to replace the supply that has been interrupted, etc., regardless of whether there is an available alternate source and where there is no rebuttable presumption. The federal rules do not have a rebuttable presumption standard for water supplies.

In its response of June 1, 2000, Pennsylvania noted that its program \* \* \* does provide for the provision of temporary water irrespective of whether the affected water supply lies inside or outside of the rebuttable presumption area. The BMSLCA requires the provision of temporary water within 24 hours if the water supply lies within the rebuttable presumption area. This requirement is reflected in section 89.145a(e). If the affected water supply lies outside the rebuttable presumption area, the responsibility to provide temporary water is

driven directly by section 5.2 of BMSLCA. Procedurally, in cases where a water supply has been affected outside the rebuttable presumption area, the law requires DEP to issue an order before an operator is obligated to provide temporary water. For this reason, the responsibility to provide temporary water in cases where the affected water supply lies outside the rebuttable presumption area is not stated in regulation. The requirements of section 89.145a(e) and the provisions of section 5.2 of BMSLCA act together to ensure the provision of temporary water in cases where water supply impacts occur inside and outside of the rebuttable presumption area. It is further notable that throughout its first five years in enforcing the water supply replacement requirements of BMSLCA, DEP has never had to issue an order to compel the provision of temporary water in any case where the affected water supply was outside the rebuttable presumption area.

In regard to the rebuttable presumption of causation, there is no way in which this provision can be interpreted or construed to render Pennsylvania's program any less effective than the federal program. The rebuttable presumption amounts to nothing more than shifting the burden of proof onto the mine operator.

This section is substantively identical to 5.2(a)(2) (52 P.S. 1406.5b(a)(2)) of BMSLCA. Accordingly, the finding for 5.2(a)(2) (52 P.S. 1406.5b(a)(2)) is incorporated herein by reference and the Director is approving this portion of the regulations to the extent the statutory section was approved and is requiring Pennsylvania to submit an amendment requiring the prompt supply of temporary water to all landowners whose water supply has been impacted by underground mining activities.

*Section 89.145a(e)(2).* This subsection provides that the temporary water supply shall meet the requirements of paragraph (f)(2) and provide a sufficient amount of water to meet the water supply user's premining needs. In our letter of June 21, 1999, to Pennsylvania we noted that the federal definition for "replacement of water supply" at 30 CFR 701.5 provides for a " \* \* \* water supply on both a temporary and permanent basis equivalent to premining quantity and quality." We noted that this section appears to be less effective than the federal rules, in that it provides for temporary water based on users' needs rather than the premining quality.

In its response of June 1, 2000, Pennsylvania noted that under its program, a temporary water supply is just that, temporary. It is intended to satisfy the water users' needs so that they can carry out their daily activities with minimal disruption. By contrast, a permanent water supply must be adequate to serve not only the water

user's premining needs but also any reasonably foreseeable uses of the original water supply.

Finally Pennsylvania also notes the federal terms "drinking, domestic or residential water supply" and "replacement of water supply" are defined to include water delivery systems (i.e., the pumps and piping that deliver water to the point of use). As a general observation, these systems are usually designed based on the existing uses of the water supplies. Pennsylvania believes this factor serves to further align its replacement requirements with those of the federal regulations.

The federal definition of the term "replacement of water supply" at 30 CFR 701.5 requires the provision of both permanent and temporary water supplies that are the equivalent to the premining quantity and quality. In 25 Pa. Code 89.145a(e)(2), Pennsylvania has indicated that temporary water supplies will be restored to the same quality levels as permanent supplies by requiring that temporary water supplies meet the quality requirements of 25 Pa. Code 89.145a(f)(2). However, Pennsylvania has not required temporary water supplies to meet the same quantity requirements of permanent supplies as defined in 25 Pa. Code 89.145a(f)(3)(i) and (ii), i.e., the amount of water necessary to meet the water user's needs and any reasonably foreseeable uses. Instead, Pennsylvania only requires temporary water supplies to provide a sufficient amount of water necessary to meet the water supply user's premining needs. The Director has conditionally approved 25 Pa. Code 89.145a(f)(3)(i) and (ii), as being as effective as the federal regulations regarding quantity of replacement supplies. Therefore, the Director finds that to be consistent with the federal regulations, 25 Pa. Code 89.145a(e)(2) should require the quantity of temporary water supplies to meet the requirements of 25 Pa. Code 89.145a(f)(3)(i) and (ii). Accordingly, the Director is requiring Pennsylvania to amend this section to insure that temporary water supplies are restored to the same levels as are required of permanent water supplies. Please see the discussion in section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) for more information on the Director's conditional approval regarding quantity of replacement water supplies.

*Section 89.145a(f)(1)(i)—(iv).* This section requires that a permanently restored or replaced water supply shall include any well, spring, municipal water supply system or other supply approved by the Department that meets criteria listed in subsections (1)(i)

through (iv). Section 89.145a(f)(1) talks about reliability, cost, maintenance and control. Subsection (i) requires the restored or replaced water supply to be as reliable as the previous water supply. Subsection (ii) requires the restored or replaced water supply to be as permanent as the previous water supply and subsection (iii) requires the supply to not require excessive maintenance. Subsection (iv) requires that the supply provide the owner and the user with as much control and accessibility as exercised over the previous water supply. The Director is approving 25 Pa. Code 89.145a(f)(1)(i) through (iv). There are no direct corresponding federal regulations to these sections. The Director finds that these sections are no less effective than the requirements found in the definition of the term "replacement of water supply" in the federal regulations at 30 CFR 701.5 because it helps return the water supply to its premining status.

*Section 89.145a(f)(1)(v).* This subsection provides that a restored or replaced water supply must not result in more than a de minimis cost increase to operate and maintain. The operator must pay for increased operating and maintenance costs that exceed a de minimis cost increase. As noted earlier in this rulemaking (see our finding for 25 Pa. Code 89.5, definition of "de minimis cost increase"), the Director has not approved a "de minimis cost increase." The Director does not believe that passing any increased costs to operate or maintain replacement water supply systems to landowners will fulfill the intent of the federal regulations to make the landowner whole. Accordingly the Director is not approving 25 Pa. Code 89.145a(f)(1)(v) to the extent that it passes de minimis cost increases to landowners.

*Section 89.145a(f)(2).* This section provides that a restored or replaced water supply will be deemed adequate when it differs in quality from the premining water supply if it meets the standards of the Pennsylvania Safe Drinking Water Act or is comparable to the premining water supply when that water supply did not meet those standards. This regulation is comparable to section 5.1(a)(2) (52 P.S. 1406.5a(a)(2)) of the BMSLCA. Please see our discussion regarding section 5.1(a)(2) (52 P.S. 1406.5a(a)(2)) for a discussion of the Director's approval regarding quality of replacement water supplies. The Director is approving this section for the same reasons.

*Section 89.145a(f)(3)(i).* This subsection provides that a restored or replaced water supply will be deemed adequate in quantity if it delivers the



amount of water necessary to satisfy the water user's needs and the demands of any reasonably foreseeable uses. This section of the regulations implements section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) of the BMSLCA. For a complete discussion of the Director's conditional approval of this section, please see the discussion of section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)). The Director's findings are incorporated herein and this section is approved to the extent that section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) is approved.

*Section 89.145a(f)(3)(ii).* This subsection provides that a restored or replaced water supply will be adequate in quantity if it is established through a connection to a public water supply system that is capable of delivering the amount of water necessary to satisfy the water user's needs and the demands of any reasonable foreseeable uses.

The Director is conditionally approving this portion of the amendment. For more information on the Director's conditional approval of this section, please see the discussion of section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) of the BMSLCA under the statute section.

*Section 89.145a(f)(3)(iii).* This subsection defines the term "reasonably foreseeable uses with respect to agricultural water supplies" to include the reasonable expansion of use where the water supply available prior to mining exceeded the farmer's actual use.

The Director is approving this portion of the amendment. For more information on the Director's approval of this section, please see the discussion of section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) of the BMSLCA under the statute section.

*Section 89.145a(f)(4).* This section of the regulations provides that replacement of a water supply shall include the installation of any piping, pumping equipment and treatment equipment necessary to put the replaced water source into service. The Director is approving this portion of the regulations. This section is no less effective than the requirements found in definition of the term "drinking, domestic, or residential water supply" in the federal regulations at 30 CFR 701.5. This definition provides that the drinking, domestic, or residential water supply includes appurtenant delivery systems. This portion of Pennsylvania's regulations specifies the type of equipment that would be included in appurtenant delivery systems and therefore is consistent with the federal definition and is approved. For more information on standards for delivery systems, please see the Director's

findings for section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) of the BMSLCA.

*Section 89.146a(a).* This section provides the procedures to be used for landowners or water supply users to secure resolution of water supply damage claims. Subsection (a) requires landowners to notify mine operators when they experience contamination, diminution or interruption of a water supply. The requirement for landowners to contact operators is also found in section 5.2(a)(1) of the BMSLCA. The Director has approved that requirement for the reasons noted in the discussion of section 5.2(a)(1). The Director is approving 25 Pa. Code 89.146a(a) for the same reasons.

*Section 89.146a(b).* This section provides that the Department will order the operator to provide temporary water to the landowner or water supply user within 24 hours of issuance of the order if: (1) No alternate temporary water supply is available to the landowner or water user, (2) the water supply is contaminated, diminished or interrupted, (3) the water supply is located within the rebuttable presumption area and, (4) the owner notified the operator of the water supply problem. These requirements are similar to those found in section 5.2(a)(1) through (3) of the BMSLCA. The Director is approving 25 Pa. Code 89.146a(b)(1) through (4). The requirement to provide temporary water within 24 hours is within guidelines proposed by OSM in the preamble to the federal regulations (60 FR 16727) and is consistent with the federal definition of "replacement of water supply" at 30 CFR 701.5, which requires replacement of protected water supplies on a temporary basis. It is also consistent with the enforcement procedures found in Part 843 of the federal regulations since a failure by the operator to replace the water supply as required under 25 Pa. Code 89.145a(e) is a violation of a performance standard.

Section 89.146a(b)(1), which limits PADEP's ability to issue an order requiring operators to provide temporary water within 24 hours of issuance of an order if an alternate temporary source is available to landowners, is approved based on an explanation provided by Pennsylvania. In its June 1, 2000, response to our June 21, 1999, letter regarding the same subject covered in section 89.145a(e), Pennsylvania noted that, "[PA]DEP does not interpret subsection (1) as imposing any responsibilities on property owners. If plumbing connections are required to establish a temporary water service, they must be provided by the mine operator. [T]he regulation simply

provides that if an alternate source exists and the property owner can put it into service with no more than the flip of a switch or a turn of a valve, the mine operator may be relieved of the responsibility to do any thing more in the way of providing temporary water." Since the federal rules do not allow additional costs or burdens to be placed on the water user, the Director finds Pennsylvania's explanation consistent with the federal rules and as previously stated, finds this section is no less effective than the federal regulations in securing temporary water for landowners.

Section 89.146a(b)(4) is similar to section 5.2(a)(1) of the BMSLCA, which also requires landowners to notify operators of water supply problems. The Director is approving 25 Pa. Code 89.146a(b)(4) for the same reasons as section 5.2(a)(1) was approved.

*Section 89.146a(c).* Section 89.146a(c) provides that a landowner or water user may notify the Department and request an investigation if an alternate water supply has not been provided or if the alternate source is later discontinued. This section is similar to section 5.2(b)(1) of the BMSLCA. The Director has approved section 5.2(b)(1) and for the same reasons is approving 25 Pa. Code 89.146a(c).

The procedures for securing an investigation are provided in 25 Pa. Code 89.146a(c) (1) through (3). These subsections are similar to section 5.2(b)(2) (52 P.S. 1406.5b(b)(2)) of the BMSLCA. The Director is approving section 5.2(b)(2) to the extent that Pennsylvania recognizes that the approved program may require a more timely response to complaints than that allowed by that section. The Director is approving 25 Pa. Code 89.146a(c)(1) through (3) to the same extent and with the same requirements as section 5.2(b)(2).

*Section 89.152(a)(1).* This section provides the circumstances under which an operator may be relieved from liability from water supply replacement. Subsection (1) provides that an operator will not be required to restore or replace a water supply if the contamination, diminution or interruption existed prior to the underground mining activities and the mining activities did not worsen the preexisting condition. The Director is approving this portion of the amendment. The federal regulations at 817.41(j) do not require replacement of water supplies unless contamination, diminution or interruption due to mining activities has occurred, therefore, 25 Pa. Code 89.152(a)(1) is consistent with the federal rules.

*Section 89.152(a)(2).* This section provides that the operator is not required to restore or replace a water supply if the operator can demonstrate that the contamination, diminution or interruption is due to underground mining activities that occurred more than three years prior to the onset of the water supply contamination, diminution or interruption. This subsection is similar to section 5.2(e)(2) of the BMSLCA. The Director did not approve 5.2(e)(2) because the statute of limitations provision virtually assures that at some point in time, there will be a water supply that will not be restored or replaced because the landowner did not report the contamination, diminution or interruption within the noted time frame. Further discussion on the Director's decision to not approve section 5.2(e)(2) of the BMSLCA can be found earlier in this rulemaking. The Director is not approving this section of the regulations for the same reasons.

*Section 89.152(a)(3).* This section provides that the operator will not be required to restore or replace a water supply if the contamination, diminution or interruption occurred as the result of some cause other than the underground mining activities. This section of the regulations is similar to the provisions of section 5.2(e)(3) of the BMSLCA. The Director's approval of 5.2(e)(3) can be found earlier in this rulemaking. The Director is approving this section for the same reasons.

*Section 89.152(a)(4).* This section provides that the operator will not be required to restore or replace a water supply if the claim for contamination, diminution or interruption of the water supply was made more than two years after the water supply was adversely affected by the underground mining activities. This section is similar to section 5.1(b) of the BMSLCA. The Director has not approved section 5.1(b) for the reasons found in the discussion of that section earlier in this rulemaking. The Director is not approving 25 Pa. Code 89.152(a)(4) of the regulations for the same reasons.

*Section 89.152(a)(5)(i).* This section provides that the operator will not be required to restore or replace a water supply if the operator has purchased the property for a sum equal to the property's fair market value immediately prior to the time the water supply was affected or has made a one-time payment equal to the difference between the property's fair market value prior to the time the water supply was affected and the fair market value determined at the time the payment is made. This section is similar to the provisions of section 5.2(g)(1) and (2) of

the BMSLCA. The Director has not approved 5.2(g)(1) and (2) because the federal program does not provide for compensation in lieu of replacement or restoration of water supplies. A complete discussion of the reasons for not approving sections 5.2(g)(1) and (2) can be found earlier in this rulemaking. The Director is not approving 25 Pa. Code 89.152(a)(5)(i) of the regulations for the same reasons.

*Section 89.152(a)(5)(ii).* This section provides that the operator will not be required to restore or replace a water supply if the landowner and operator have entered into a valid voluntary agreement under section 5.3 of the BMSLCA. This section is similar to a portion of section 5.3(a) of the BMSLCA. We did not approve that portion of section 5.3(a) that allowed compensation in lieu of restoration or replacement of affected water supplies. As the Director previously noted, OSM's policy as set forth in the preamble to the federal EPAAct rules, is to require restoration or replacement. The federal rules do not allow operators and landowners to enter into voluntary agreements in lieu of restoration or replacement of affected water supplies. The full discussion of the Director's reasons for not approving a part of section 5.3 of the BMSLCA can be found in the discussion of that section earlier in this rulemaking. Section 89.152(a)(5)(ii) is not approved for the same reasons.

*Section 89.152(b).* This subsection states that the section does not apply to underground mining activities that are governed by Chapter 87 (relating to surface mining of coal). In our letter of June 21, 1999, to Pennsylvania, we noted that the preamble to the federal definition of "replacement of water supply" states that the "definition is applicable to both underground coal mining operations and surface mining operations that affect water supplies." The preamble to the federal rules indicates that, "The final rule is intended to apply to replacement of water supply under both sections 717(b) and 720(a)(2) of SMCRA." 60 FR at 16726. We asked Pennsylvania to clarify how the Pennsylvania program meets the federal regulations in protecting water supplies affected by both underground and surface mining operations.

In its reply of June 1, 2000, Pennsylvania noted:

[The] water supply replacement requirements originate in two different statutes. In cases where impacts are due to operations carried out below the surface in the workings of an underground mine, replacement requirements are driven by

BMSLCA. In cases where impacts are due to activities at the land surface (i.e., surface mines, surface sites associated with underground mines, coal preparation plants and coal refuse disposal areas), requirements are driven by SMCRA. While replacement requirements are similar under both BMSLCA and SMCRA, there are subtle differences that demand separate treatment. For example, BMSLCA includes a rebuttable presumption provision that is defined by an angular projection from underground mine workings, whereas, the rebuttable presumption provision of SMCRA is defined by a horizontal projection from the area where activities take place at the surface. Due to these differences, effects resulting from surface operations at an underground mine must be treated separately from effects resulting from underground operations. In deciding the appropriate treatment, DEP first decides whether effects are due to activities at a surface site or activities in the underground mine workings. If the effects are due to operations in the underground workings, DEP applies the replacement requirements of 25 Pa Code 89.145a. If the effects are due to operations at a surface activity site, DEP applies the replacement requirements in section 87.119 or section 88.107.

There is no direct federal counterpart. The federal regulations at 30 CFR 817.41(j) require the permittee to replace any affected water supply that is affected by underground mining activities. The federal definition of "underground mining activities" at 30 CFR 701.5 includes surface operations incident to underground coal extraction and underground operations. Section 89.152(b) merely delineates which parts of the Pennsylvania program address the various underground mining activities. Accordingly, it is not inconsistent with the requirements of SMCRA and the federal regulations. The Director notes that Pennsylvania's program amendment regarding water supply replacement provisions of surface mines, including surface operations incident to underground coal extraction, has not yet been approved by OSM.

*Section 89.153(a) and (b).* This section deals with the relationship between a rebuttable presumption and water supply replacement. The provisions of subsections (a) and (b) are substantively identical to the provisions of section 5.2(c) of the BMSLCA. As we stated previously, there is no federal regulation that prohibits the state from enacting a rebuttable presumption for water supply replacement. In fact, by finding that operators are presumed responsible for replacement of water supplies, these regulations will assist in insuring that operators are promptly informed of their obligation to replace affected supplies and provide emergency and temporary water

promptly. Thus, the Director finds that these sections are in accordance with section 720(a)(2) of SMCRA, which requires the prompt replacement of a protected water supply.

*Section 89.153(c).* This subsection provides that affirmatively proving that an operator was denied access to conduct a premining or postmining survey of a water supply does not relieve the operator of liability for the contamination, diminution or interruption when the landowner, affected water user or the Department proves the operator's underground mining activities caused the contamination, diminution or interruption. There is no direct counterpart to this section in the federal regulations. However, this section is not inconsistent with the requirements of SMCRA and the federal regulations because it does not eliminate an operator's responsibility and it is not inconsistent with enforcement actions where the regulatory authority has the initial burden of going forward with evidence. Therefore, the Director is approving this section.

*Section 89.154.* This section describes the type and make up of maps to be submitted with the permit application. Subsection (a) describes the general mine map and the elements that are required to be incorporated into the map. Numerous provisions of this section were moved from 25 Pa. Code 89.142, which was previously approved by OSM. Specifically, 25 Pa. Code 89.142(a)(1) through (5) were moved to 25 Pa. Code 89.154. The Director is approving the subsections since they were previously approved by OSM and the federal rules have not changed since that approval.

Section 89.142(a)(6) was also moved to 25 Pa. Code 89.154, with the exception of the deletion of references in subsections (6)(ii) and (iii) to buildings in place as of April 27, 1966, and the deletion of the reference to cemeteries in place as of April 27, 1966, in subsection (6)(iii). These references were deleted in PADEP's rulemaking of May 10, 1997 (27 Pa.B. 2371) that was made in response to Act 54's deletion of protection to structures in place as of April 27, 1966. The May 10, 1997, rulemaking that modified subsections (6)(ii) and (iii) was not submitted to OSM for approval prior to the current amendment. The Director is approving the deletion of 25 Pa. Code 89.154 because the deletion of references to April 27, 1966, provides protections no less effective than those found in the federal regulations. The deletion will not make Pennsylvania's program less effective than the federal program.

In addition, several provisions not previously found in 25 Pa. Code 89.142 were added to 25 Pa. Code 89.154. These include 25 Pa. Code 89.154(6)(iii), (x), (xi), (xix). Section 89.154(a)(6)(iii) requires maps to contain structures or classes of structures listed in 25 Pa. Code 89.142a(f)(1)(i)-(v). Section 89.154(a)(6)(x) requires maps to depict oil, gas and coal slurry pipelines larger than 4 inches in diameter. Section 89.154(a)(6)(xi) requires maps to depict water and sewer main and transmission lines. Section 89.154(a)(6)(xix) requires maps to depict proposed underground workings, including a description of the location and extent of the areas in which planned subsidence mining methods will be used and the identification of all areas where measures will be taken to prevent or minimize subsidence and subsidence-related damage.

The Director is approving these various subsections. The federal rule at 30 CFR 784.20(a)(1) requires a map of the permit and adjacent area showing the location and type of structures, lands and water supplies that could be affected by subsidence. The Pennsylvania rules list such items, therefore they are no less effective than the federal requirements for maps found in 30 CFR 784.20(a)(1). In addition, Pennsylvania's mapping requirements include items which are required under 30 CFR sections 783.24(c), 783.25(a)(1), 783.25(a)(4) and 783.25(a)(5) and are no less effective than these federal regulations.

In our letter of June 21, 1999, to Pennsylvania, we noted that this subsection does not contain a requirement that the general mine map include renewable resource lands or drinking or domestic or residential water supplies as is required by 30 CFR 784.20(a)(1).

In its response to us of June 1, 2000, Pennsylvania noted that:

Section 89.154(a) does require the *General Mine Map* to include *water supplies* (see subparagraph (6)(vii)). The definition of *water supply* under 25 Pa Code 89.5 includes domestic water supplies and virtually all other types of developed water supplies commonly found in the bituminous coal fields. There is also a general requirement to show all water wells under subparagraph (6)(xiv). These requirements would include all water supplies within the scope of the federal term, "drinking, domestic or residential water supply."

Although section 89.154(a) does not include an explicit requirement to show *renewable resource lands* on the map, it does include requirements to map most elements that fall within the scope of the term, *renewable resource lands*. First of all, the *General Mine Map* must include the entire

surface area above the proposed mine and additional area beyond the mine boundaries where structures may be damaged and surface lands may suffer material damage. This area would include all *renewable resource lands* that exist above or adjacent to the proposed mine. It would include the recharge area of aquifers that lie above and adjacent to the mine plan. It would also include areas where agricultural operations take place.

The federal definition of "renewable resource lands" found at 30 CFR 701.5 means aquifers and areas for the recharge of aquifers and other underground waters as well as areas for agricultural or silvicultural production, production of food and fiber, and grazing lands. The Director accepts Pennsylvania's position that 25 Pa. Code 89.154 will require the requisite information on aquifers and areas for agricultural production and is approving this section.

*Section 89.154(b).* This section requires mine maps to be submitted to the Department every six months and also gives the requirements for the objects that are to be included on the maps. There is no federal counterpart to this section. The Director finds that this section is not inconsistent with the requirements of SMCRA and the federal regulations because it will not limit protection to landowners and water users and will allow them to monitor the progress of underground mining operations. The Director is approving this section.

*Section 89.154(c).* This section requires the six-month maps to be filed with the recorder of deeds for each county in which underground mining is projected and proof of filing to be submitted to the Department. There is no federal counterpart to this section. The Director finds that this section is not inconsistent with the requirements of SMCRA and the federal regulations because it will not limit protection to landowners and water users and will assure the progress maps are available to the public. The Director is approving this section.

*Section 89.154(d).* This section provides that no underground mining may occur until it is shown as projected mining on the maps required by subsection (b) and the maps have been on file with the recorder of deeds office for 10 days. There is no federal counterpart to this section. The Director finds that this section is not inconsistent with the requirements of SMCRA and the federal regulations because it will not limit protection to landowners and water users and will assure mining maps delineating mining progress are

available for inspection. The Director is approving this section.

Section 89.155. This section provides for public notice to property owners, utilities, and political subdivisions at least six months, but less than five years, prior to mining beneath the property. It also requires that the notice identify the area where underground mining will occur, the time frames for mining, the location where the maps and applications (which includes the subsidence control plan) may be inspected, and where the owners can submit complaints. These requirements are essentially the same as the requirements of the federal regulations at 30 CFR 817.122. The federal rules require at least six months notice to all owners and occupants. The notice must include the areas to be mined, the time frames and the location where the subsidence control plan may be examined. The Director is approving this public notice portion of the regulation because it is no less effective than the federal regulations at 30 CFR 817.122. However, the Director is

requiring this section to be amended because of the use of the term "underground mining." Please see the combined finding regarding use of the term "underground mining" as opposed to "underground mining operations" at the end of the regulation section for more information.

Sections 89.141(d), 89.141(d)(9), 89.142a(a), 89.142a(f)(1), 89.142a(f)(2)(i), 89.142a(h)(1), 89.142a(h)(2), 89.142a(i)(1), 89.143a(a), 89.143a(d)(1), 89.143a(d)(2), 89.143a(d)(3), 89.155(b)(1) and (2), and 89.155(c). The Director has found that these sections of 25 Pa. Code Chapter 89 are less stringent than section 720(a) of SMCRA because of their reference to underground mining. These sections require a description of the impacts of underground mining on surface features, structures and facilities and provide performance standards to remedy those impacts. Section 720(a) of SMCRA requires underground coal mining operations to comply with those requirements. The term "underground coal mining operations" is more

expansive than Pennsylvania's definition of underground mining, which is defined at 25 Pa. Code 89.5 to be the extraction of coal. The federal definition of underground coal mining activities describes underground operations as underground construction, operation and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage and blasting. Thus, under Pennsylvania's proposed sections, the only activity that must meet the environmental requirements of Chapter 89 is coal extraction, while under SMCRA, all underground operations must meet the environmental requirements. The Director is requiring the above noted sections of 25 Pa. Code to be amended to be no less stringent than section 720(a) of SMCRA.

**Summary Table**

The table below summarizes the Director's findings with regard to each section of 25 Pa. Code Chapter 89.

Sections of the regulations under 25 Pa. Code Chapter 89 that are approved	Sections of the regulations under 25 Pa. Code Chapter 89 that are conditionally approved or are required to be amended	Sections of the regulations under 25 Pa. Code Chapter 89 that are not approved in whole or in part
Section 89.5, the definitions of the following terms: "dwelling," "irreparable damage," "material damage," "noncommercial building," "public buildings and facilities," "public water supply system," "rebuttable presumption area," "underground mining," "underground mining operations," "water supply".  89.33 ..... 89.34 ..... 89.35 ..... 89.36 ..... 89.67 ..... 89.141(a) 89.141(d)(2), (d)(4), (d)(5), (d)(7), (d)(8), (d)(10) and (d)(11) Deletion of 89.142 89.142a(a)(1), (2), (3) and (4) 89.142a(b) 89.142a(c)(1) and (2)(i)-(vi) 89.142a(e) 89.142a(f)(1)(i), (ii), (iv), and (v) 89.142a(f)(2)(ii) 89.142a(g)(2), (3), and (4) 89.142a(i)(2), (j), (k), and (l) Deletion of 89.143(a) through (g) 89.143a(b) Deletion of 89.144 89.144a(a)(2), and (3) Deletion of 89.145(a) and (b) 89.145a(a)(1)(i)-(vi) 89.145a(a)(2) and (3) 89.145a(c) 89.145a(d) 89.145a(f)(1)(i)-(iv) 89.145a(f)(2) 89.145a(f)(3)(iii)	89.141(d), (d)(3), (6), and (9) ..... 89.142a(a) 89.142a(c)(3) 89.142a(d) 89.142a(f)(1) 89.142a(f)(2)(i) 89.142a(g)(1) 89.142a(h)(1) and (2) 89.142a(i)(1) 89.143a(a) 89.143a(d)(1) and (2) 89.145a(b) ..... 89.145a(e)(1) and (2) 89.145a(f)(3)(i) and (ii) 89.146a(c) 89.155(b)(1) and (2), and (c)	89.5, the definitions of the following terms: "de minimis cost increase," "fair market value," "permanently affixed appurtenant structures". 89.142a(f)(1)(iii). 89.143a(c). 89.143a(d)(3). 89.144a(a)(1). 89.145a(a)(1). 89.145a(f)(1)(v). 89.152(a)(2) and (4). 89.152(a)(5)(i) and (ii).

Sections of the regulations under 25 Pa. Code Chapter 89 that are approved	Sections of the regulations under 25 Pa. Code Chapter 89 that are conditionally approved or are required to be amended	Sections of the regulations under 25 Pa. Code Chapter 89 that are not approved in whole or in part
89.145a(f)(4) 89.146a(a), and (b) 89.152(a)(1) and (3) 89.152(b) 89.153 (a) through (c) 89.154(a) through (d) 89.155(a), (b)(3) and (4)		

**IV. Summary and Disposition of Comments**

*Federal Agency Comments*

On August 5, 1998, we asked for comments from various federal agencies that may have an interest in the Pennsylvania amendment (Administrative Record Number PA 841.08). We solicited comments in accordance with section 503(b) of SMCRA and 30 CFR 732.17(h)(11)(i) of the federal regulations.

The U.S. Department of Labor, Mine Safety and Health Administration, Coal Mine Safety and Health, Districts 1 and 2 indicated it had no comments on the proposed amendment.

The U.S. Fish and Wildlife Service (FWS) submitted comments regarding several areas. The first comments were concerned with endangered species. FWS pointed out that Pennsylvania's regulations at 25 Pa. Code, Chapter 89, Subchapters A, D, E, F, and G do not mention endangered species protection. FWS goes on to say that the provision in Subchapter C, section 89.82(e) appears to be less protective than the federal requirement found in 30 CFR 773.15(c) and appears to apply only to reclamation activities. FWS also described the requirements for protection of endangered species found in Subchapter B, section 86.37. FWS concludes its comments on endangered species by indicating it is unclear whether the provisions of Chapter 86.37(a)(15) apply to all portions of Chapter 89, including the less protective section 89.82(e). OSM did not find these comments to be relevant to the amendment submitted by Pennsylvania. Pennsylvania is requesting to change its program to deal with subsidence damage to structures and water supplies. The portions of Chapter 89 dealing with endangered species were not part of the amendment Pennsylvania submitted for approval. Neither section 86.37 nor section 89.82 were requested to be changed by Pennsylvania in this rulemaking. These sections are part of Pennsylvania's approved program and as such it would be inappropriate for

OSM to comment on them in the context of the current rulemaking.

FWS also submitted comments regarding streams. FWS noted that Pennsylvania limits subsidence protection for streams to perennial streams, which is a limitation not found in the federal program. FWS asserts that there is no similar limitation in the federal program, which generally protects "streams" or "intermittent and perennial" streams. Presumably, FWS's assertion that Pennsylvania's program provides lesser protection to intermittent and perennial streams was made relative to full extraction mining and on the basis that proposed sections 89.141(d)(9) and (10) under subsidence control application requirements only mention perennial streams.

Two points are relevant to address the FWS's concern. First, the above referenced requirements were previously included in the approved Pennsylvania program. More specifically, sections 89.141(d)(9) and (10) were previously addressed in the approved program under old section 89.141(d)(2). Old section 89.141(d)(2) required a discussion of perennial streams based on 89.143(d) and 89.143(b)(1)(iv), respectively, and addressed the specific topics found at the new 89.141(d)(9) and (10).

Second, the Pennsylvania program requires the same level of subsidence damage prevention and mitigation for streams (perennial and intermittent) that is required under the federal requirements. Federal requirements address full extraction mining impacts to surface lands through a material damage standard. As noted in the preamble to the 1995 federal EPA Act rules, "[T]he definition of "material damage" covers damage to the surface and to surface features, such as wetlands, streams, and bodies of water \* \* \*" (60 FR 16724). Under 30 CFR 784.20(b)(8), the permit subsidence control plan must contain a description of the measures to be taken to mitigate any subsidence-related material damage to the land. In addition, under 30 CFR 817.121(c)(1), the permittee must correct any material damage resulting from

subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence damage.

With regard to Pennsylvania requirements, even prior to the proposed amendment, the approved program required the protection of surface lands (including perennial and intermittent streams) in a manner no less effective than federal standards. More specifically, old section 89.141(d)(2) and subsection (d)(2)(iii) required a description of the measures (both underground and on the surface) taken to prevent, minimize or avoid subsidence from causing damage or lessening the value or reasonably foreseeable use of the surface land. Old performance standards sections 89.143(e) and 89.145(a) required operators to maintain the value and reasonably foreseeable use of surface lands and to correct material damage to surface lands to the extent technologically and economically feasible by restoring the land to a condition capable of maintaining the value or reasonably foreseeable use. The proposed Pennsylvania amendment did not alter that level of protection. Under sections 89.141(d)(8) and 89.142a(e), Pennsylvania still requires operators to provide a description of the measures to be taken to maximize mine stability and maintain the value and reasonably foreseeable use of the surface land, and when damaged by subsidence, to correct material damage to surface lands to the extent technologically and economically feasible. In conclusion, OSM does not agree with FWS that Pennsylvania limits subsidence protection to perennial streams. Rather, Pennsylvania's regulations have in the past and will continue to after this approval, contain more specific language aimed at addressing basic federal requirements for the protection of those streams identified as perennial in nature.

FWS also commented that Pennsylvania has reduced stream

protection in Chapter 89 by revising the definition of a perennial stream. While FWS admits the definition of a perennial stream in Chapter 89 closely matches the federal definition of perennial streams found in 30 CFR 701.5, it notes that Pennsylvania's implementing technical guidance document is not adequate. The technical document (TGD 563-2000-655) provides a methodology for proving a stream is not perennial that is not biology based, which could lead to a failure to protect many stream systems. FWS also questioned implementation of technical guidance document TGD 563-2000-655 with regard to evaluating restrictions on mining near streams. In this case FWS asked OSM to conduct a random sampling of streams undermined to evaluate the ability of the TGD to predict subsidence effects on streams before OSM accepts the TGD as part of Pennsylvania's program amendments. Finally FWS indicated TGD 563-2000-655 is inconsistent with SMCRA and the Clean Water Act because it does not adequately address aquatic life issues.

Pennsylvania did not amend its definition of "perennial stream" in this rulemaking. Also Pennsylvania did not submit technical document (TGD 563-2000-655) as part of this program amendment. As a result, OSM did not review it in conjunction with the amendment. Since the definition and the technical document are outside the scope of the amendment, OSM is not required to respond to this comment.

#### *Environmental Protection Agency (EPA)*

Pursuant to 30 CFR 732.17(h)(11)(i) and (ii), OSM is required to solicit comments and obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). By letter dated August 5, 1998, we requested comments and concurrence from EPA on the Commonwealth's proposed amendment of the BMSLCA and implementing regulations (Administrative Record Number PA 841.08). EPA responded on April 26, 2001 (Administrative Record Number PA 841.07), that it had no objections or specific comments on the proposed amendments. However, EPA did wish to convey its concerns about the impact of longwall mining operations on streams and noted that it supports continued evaluation of the extent of impacts and the development of solutions for

preventing, minimizing, or mitigating objectionable impacts.

OSM solicited, but did not receive, comments from the Advisory Council on Historic Preservation, and the U.S. Department of Agriculture, Soil Conservation Service.

#### *State Agency Comments*

The Pennsylvania Fish and Boat Commission (PA FBC) commented that sections 89.34, 89.35 and 89.36 are discussed in the amendment but only in relation to water supply protection. PA FBC believes these sections need to be further revised to include the protection of surface and groundwater to better protect the streams in areas of high extraction mining.

PA FBC is correct in its assertion that sections 89.34, 89.35, and 89.36 were modified to provide additional protection for water supplies. In submitting this amendment, Pennsylvania was responding to the federal rules regarding restoration or replacement of water supplies. These federal rules do not provide additional protection from subsidence to streams. As noted in our response to comments by FWS, Pennsylvania's amendment does not alter the minimum federal requirements with respect to streams.

PA FBC also commented on Pennsylvania's Technical Guidance Document (TGD 563-2000-655) regarding the definition of a perennial stream. PA FBC's comments were similar to the comments provided by FWS on the same subject. Please see the FWS comments regarding TGD 563-2000-655.

OSM solicited, but did not receive, comments from the Pennsylvania Historical and Museum Commission, Bureau of Historic Preservation.

#### *Public Comments*

Public comments were received in writing and orally at the public hearing held in Washington, Pennsylvania on October 13, 1998. Sixteen people spoke at the public hearing. Additionally, we received written public comments, before and after the public hearing, from three citizen's groups, and seven private citizens. We also received comment letters from an industry group and four coal companies. In response to our reopening of the public comment period on December 8, 2000, we received comments from a citizen's group and an industry group. We have organized these comments and our response by the section of the BMSLCA or the regulations they pertain to. We also have a section of general comments that did not pertain to any specific portion of the BMSLCA or the regulations.

One commenter incorporated by reference OSM's November 12, 1996 and November 22, 1996 preliminary comments to Pennsylvania on Act 54 and Pennsylvania's not yet finalized regulations. Pennsylvania's regulations were adopted by the Pennsylvania Environmental Quality Board on March 17, 1998, and published in the Pennsylvania Bulletin on June 13, 1998. On July 29, 1998, pursuant to 30 CFR 732.17(b), Pennsylvania submitted Act 54 and the finalized regulations to OSM for its review. Accordingly, the preliminary issues raised by OSM in the 1996 letters were either addressed in the two "issue letters" sent by OSM to Pennsylvania requesting clarification of numerous issues [letters dated June 21, 1999 (Administrative record number PA 841.32) and June 23, 2000 (Administrative record number PA 841.40)] or satisfied by either changes in Pennsylvania's regulations or by Pennsylvania's explanations that were submitted as part of the July 29th submission. Pennsylvania responded to the first issue letter on June 1, 2000 (Administrative record number PA 841.39) and to the second on July 18, 2000 (Administrative record number PA 841.41). The substance of the issue letters and Pennsylvania's responses are discussed in the findings portion of this final rule. Therefore, OSM is not addressing its own preliminary 1996 comments on a separate basis.

Comments on the changes to the BMSLCA:

#### Section 5.1(a)(1)

Commenters noted that section 5.1(a)(1) of the BMSLCA only requires operators to provide an alternate water source that adequately services in quantity and quality the premining use or the foreseeable uses of the supply, which is contrary to the provisions of section 720(a)(1) of SMCRA. The commenters believe SMCRA requires restoration of water supplies to premining quality and quantity, which could be a higher standard than the use-based standard of the BMSLCA.

Other commenters voiced similar concerns and added that Pennsylvania's "adequate for use" standard, in many cases, would not meet state or federal requirements to maintain the value and use of the land.

The Director has found that Pennsylvania's program regarding the quality of replacement water supplies is as effective as the federal regulations. For an explanation of the reasons behind the Director's decision, please see the discussion regarding section 5.1(a)(2). Regarding quantity, the Director has conditionally approved

Pennsylvania's program to insure that replacement supplies and delivery systems will be of a caliber that will maintain the value and reasonably foreseeable uses of the land.

#### Section 5.1(a)(2)

Commenters contended that this section sanctions replacement of a marginally acceptable water quality, rather than requiring replacement of equivalent quality, by requiring that the water meet minimum standards defined under the Safe Drinking Water Act.

The Director believes that with respect to water quality, an equivalency determination can be made in terms of suitability for particular uses rather than requiring that the chemical composition of the replacement supply be identical to that of the premining supply. As a result, Pennsylvania's program will insure that water quality of replacement supplies will be equivalent to premining supplies. For more information on the Director's decision to approve this portion of the amendment please see the discussion of section 5.1(a)(2) of the BMSLCA in the Director's findings.

#### Section 5.1(a)(3)

Commenters alleged that when mining damages investor-owned water supply systems, the added costs of repairs are passed to water users in the form of higher water bills. The commenters believe that operators who cause the damage should pay for the repair of utility lines.

OSM does not agree with this comment. The federal regulation at 30 CFR 817.180 regarding utilities only requires that underground mining activities be conducted in a manner that minimizes damage, destruction or disruption of services provided by utilities. The rules do not require operators to reimburse utilities for damage to utility lines.

#### Section 5.1(b)

Commenters noted that this section eliminates a mine operator's responsibility for replacement of damaged water supplies if a claim of contamination, diminution or interruption is made more than two years after the supply has been adversely affected. The commenters believe this section is contrary to SMCRA because there is no limitation of action provided under federal law, and that section 509 of SMCRA requires a performance bond that extends for a minimum of five years after reclamation. The commenters believe that the federal rules indicate that wherever and whenever it is shown

mining activity caused the loss, the operator is responsible for replacing it.

OSM agrees that this section is less stringent than SMCRA. For the reasons discussed in the finding for section 5.1(b), this section has not been approved by the Director.

#### Section 5.2

One commenter referenced the November 12, 1996 comments from OSM to Pennsylvania. As stated earlier, OSM is not addressing its own preliminary 1996 comments on a separate basis.

#### Section 5.2(a)(1)

Commenters noted that this section obligates citizens whose water supply has been damaged to first contact the operator. The commenters were concerned with the part of section 5.2(a)(1) requiring the operator to investigate reported water losses with reasonable diligence because there is no time frame limiting how long the company can take to conduct the investigation nor does the section define reasonable diligence.

The Director recognizes the commenters' concerns regarding timely investigation of citizen complaints and has approved the portion of section 5.2(b)(2) dealing with inspection to the extent that Pennsylvania recognizes that the approved program may require a more timely response to complaints than that required by this section. Additionally, the Director believes the amendment required of section 5.1(a)(1) of the BMSLCA responds to the commenters' concerns regarding the prompt replacement of all adversely affected water supplies.

#### Section 5.2(b)(2)

A commenter contended that this section allows up to 45 days for investigation of a claim of water loss, which contrasts with the federal law requiring prompt replacement of water supplies. OSM does not fully agree with this comment. In this section, Pennsylvania has placed a cap on the length of time an investigation may continue. There is no federal requirement limiting the length of time of investigations. As noted in the approval of this requirement, the Director is approving this portion of section 5.2(b)(2) to the extent that Pennsylvania recognizes that the approved program may require a more timely response to complaints than that required by this section.

A commenter also claimed that this section is not as effective as the federal regulations because it allows up to three years for permanent water supply

replacement whereas the federal law defines prompt replacement as no longer than two years. For the reasons discussed in the finding for section 5.2(b)(2), the Director also agrees that this is less effective. The time frames for water supply replacement in the preamble to the federal regulations (60 FR 16727) are “\* \* \* intended to assist regulatory authorities in deciding if water supplies have been ‘promptly’ replaced.” The guidance indicates a permanent water supply should be provided within two years. Because section 5.2(b)(2) of BMSLCA can allow three years to pass before PADEP is required to issue orders for replacement, the Director has not approved the phrase in this section that reads, “\* \* \* where the contamination, diminution or interruption does not abate within three years of the date on which the supply was adversely affected.”

A commenter further alleged that it is unclear whether the term “orders” included in section 5.2(b)(2) contemplates an enforcement order. The Director has found that the Pennsylvania program adequately defines the orders that can be written in response to violations. Section 5.2(b)(2) describes the circumstances that may result in an order, but the approved program already defines the types of orders that Pennsylvania will issue. It is unnecessary to restate the types of orders that can be issued in this section.

#### Section 5.2(d)

One commenter noted if a landowner fails to allow access for a premining survey, and the landowner has been advised of the rights established by sections 5.1 and 5.3, the operator can escape liability where damage occurs unless the injured party has baseline data relative to the affected water supply. The commenter believes that this section limits the evidence that a water supply user or landowner can introduce in a manner that is improper and inconsistent with federal law. The commenter also asserted that it improperly shifted the burden of collecting hydrologic data to the landowner, that there was inadequate notice, and that the 10 day access period was too short.

Another commenter averred that this section's response to landowners who refuse operators requests to conduct a premining inspection is punitive and not in accordance with the federal regulations.

OSM agrees with these comments. The Director is not approving a portion of section 5.2(d) regarding burden of proof. This action will respond to the commenter's concerns that this section



will limit the evidence a water supply user or landowner can introduce to prove the effects of subsidence on a water supply. For a full discussion of the specific language and the reasons for not approving part of section 5.2(d), please see the discussion of that section earlier in this rulemaking.

#### Section 5.2(e)

Commenters contended that sections 5.2(e)(1), (2) and (3) each attempt to release an operator of responsibility for water loss in ways that are improper under federal law. The commenters believe that subsection (1), which relieves an operator from liability where the premining survey shows that the contamination, diminution or interruption existed prior to mining, appears to grant conclusive effect without allowing inquiry into whether the survey is accurate or sufficient to demonstrate a lack of causation.

The Director does not agree that this section limits the rights of landowners to challenge whether the survey is accurate or sufficient to demonstrate a lack of causation. Pennsylvania responded to a similar question in the preamble to its regulations regarding subsidence damage repair and water supply replacement (28 Pa.B. 2776). Pennsylvania noted that if a landowner disagreed with the premining survey results, he or she could arrange to have a certified laboratory conduct an independent survey at their own expense or ask PADEP to conduct a review of the results of the mine operator's survey and conduct additional testing, if necessary. Clearly, Pennsylvania envisioned that the results of premining sampling could be challenged.

The commenters further noted that subsection (2) relieves the operator of liability after a three-year lapse of time after mining. The commenters were concerned because the time of mining is not directly related to the timing of water loss, and this fails to consider that subsidence may not occur immediately, or that other factors may contribute to the water loss. The commenters further stated that the three-year limit is also arbitrary and inconsistent with the federal act which reserves jurisdiction and allows reassertion of jurisdiction at any time.

Finally, a commenter maintained that bond release should not terminate operator liability.

OSM generally agrees with the commenters. The Director has not approved this section because allowing an operator to be relieved of the liability to restore or replace affected water supplies three years after underground

mining activities have ceased is inconsistent with SMCRA and the federal regulations. For a complete discussion of our reasons for not approving this section, see the discussion of section 5.2(e)(2).

With regard to the comment regarding bond release terminating operator liability, we have found that this section of the BMSLCA does not provide for termination of liability at bond release.

Finally, the commenters noted that subsection (3) appears to allow the operator to avoid responsibility by identifying another cause for the water loss. The commenters believed that OSM should seek an attorney general's opinion that the law assures that where the operator is partially or entirely responsible, state law imposes liability.

OSM did seek and receive a legal opinion from Pennsylvania regarding assignment of liability when two or more operators are responsible for water degradation, diminution or interruption. The Assistant Director for the Bureau of Regulatory Counsel wrote a memorandum dated May 15, 2000 (Administrative Record No. PA 841.39 document number 2 of 4), in which he indicated that the General Assembly's intent was to provide a remedy for water supplies affected by underground mining. This section is to be construed to relieve an operator of responsibility only where the contamination, diminution or interruption occurred solely as a result of some cause other than mining. Where mining is partly the cause of the contamination, diminution or interruption, the mine operator will not be relieved of the statutory obligation to restore or replace the affected water supply. The Director found that this opinion effectively answered the commenters' concerns.

#### Section 5.2(g)

Commenters alleged that section 5.2(g), which allows property purchase as an alternative to water supply replacement, is inconsistent with federal law because federal regulations require the operator to demonstrate that a suitable water source is available and could be feasibly developed. The commenters noted that the preamble to the federal regulations at 60 FR 16727 states that the intent of EPA is that the current owner or successor could utilize the water if desired in the future. The commenters believe that there is no opportunity under the federal law for a company to avoid demonstrating that a replacement supply could be developed even if a landowner waives replacement.

Additionally, one commenter asserted that absent a demonstration by the

operator that water quality and quantity can be protected or alternative supplies provided, a mining permit should not be issued.

OSM agrees with these comments. The Director has not approved section 5.2(g) of the BMSLCA. As noted in the preamble of the federal regulations on subsidence control (60 FR 16733), EPA requires replacement of water supplies affected by subsidence. Compensation in lieu of replacement is not an option. The intent of the federal rules is to provide a water supply for current and future landowners. Compensation for a water loss or degradation will not allow water supplies to be available for future use.

Additionally, the federal regulation at 30 CFR 784.20(b)(8) requires subsidence control plans to contain a description of the measures to be taken to replace adversely affected protected water supplies if the presubsidence survey shows, or the regulatory authority determines, that diminution, contamination or interruption could occur. Thus, this section requires the permit application to contain information on water supply replacement before the permit is issued. With this information in the permit application, there would be no need for compensation in lieu of replacement, since replacement supplies must be designated before the permit is issued.

#### Section 5.2(h)

A commenter took exception with PADEP's role in providing advisory opinions. The commenter noted that if it was PADEP's opinion a water supply could be replaced, it should be replaced instead of allowing operators to offer compensation in lieu of replacement.

OSM agrees that this section provides remedies to operators that are inconsistent with the federal rules. The Director has not approved this section because it is connected with section 5.2(g) that allows compensation for damage to water supplies in lieu of replacement or restoration. The Director found that section 5.2(h) is not self-sustaining and is unenforceable without section 5.2(g). Therefore, it is inconsistent with the requirements of SMCRA and the federal regulations.

#### Section 5.3(c)

A commenter proposed that section 5.3(c), which provides landowners and water users who pursue water replacement through the courts subject themselves to the provisions in their deeds and leases, should be removed from the BMSLCA. The commenter felt that this provision rules out most citizen's rights to pursue justice in the

courts and overrides EPA's requirement for water supply replacement wherever underground mine operations damage or disrupt water supply.

The Director has found that section 5.3(c) is inconsistent with section 720(a)(2) of SMCRA and the federal implementing rules to the extent that any state law negates the requirements of, or provides less protection than, EPA's. For a complete discussion of the matter, please see the Director's decision with regard to section 5.3(c).

#### Section 5.4

A commenter claimed that section 5.4 fails to require permittees to be responsible for subsidence damages in addition to operators and the use of the term "proximity" in section 5.4 unreasonably restricts an unqualified obligation to repair or compensate for material damage to non-commercial buildings and dwellings and related structures.

OSM disagrees that section 5.4 fails to make permittees responsible for damages in addition to operators. Under 25 Pa. Code 86.11(a) no person may operate a mine without obtaining a permit. Section 86.11(b) indicates that permits will be issued only to an operator. Since only operators can obtain a permit, Pennsylvania's use of the term "operator" is as effective as the federal definition of "permittee" at 30 CFR 701.5, which defines the term to mean a person holding or required to hold a permit to conduct surface coal mining and reclamation operations.

OSM also disagrees with the commenter on the use of the term "proximity." Section 5.4(a) of the BMSLCA extends the requirements of compensation or restoration to damaged structures that overlie or are in the proximity of the mine. OSM requested that Pennsylvania define what was meant by the term "proximity." Pennsylvania indicated that it understands the term to mean the structures defined in this section do not have to be directly above the mine workings in order to be covered by repair or compensation requirements. The phrase recognizes the fact that subsidence effects often extend outward from points where coal mining activities occur. Pennsylvania noted that the phrase is not interpreted to impose any specific distance limitations. The Director accepted this explanation of section 5.4(a).

A commenter stated that the term "building" does not include appurtenant structures and utilities annexed to those structures such as sewer lines, etc.

OSM disagrees in part with the commenter's assertion that the term "building" does not include appurtenant structures and utilities annexed to those structures such as sewer lines, etc. Pennsylvania's regulatory definition of permanently affixed appurtenant structures includes many of the structures that are within the definition of occupied dwelling and structures related thereto that is found in the federal regulations at 30 CFR 701.5. However, any structures that are not permanently affixed to the ground, Pennsylvania refers to as improvements. As noted in the findings regarding section 5.4, OSM expressed concerns with Pennsylvania's position on improvements and the same are addressed in the discussion thereof.

The same commenter noted that the requirement of "prompt" repair or replacement is absent from section 5.4. It is further alleged that this section fails to assure that the structure owner is paid the full amount of the diminution in value resulting from the subsidence-related damage. Additionally, the commenter contended that sections 5.4 and 5.5, through the use of time limits for filing claims, and agreements on compensation amounts and repair, infringes on the rights of landowners to prompt repair, replacement or compensation in full and to an unqualified right to secure immediate state and/or federal inspection of failures of the operators to provide compensation or repair.

OSM agrees with the comment that Pennsylvania's program fails to include a prompt standard for repair or compensation for subsidence damage. The Director's decision with regard to this issue can be found in the discussion of section 5.5(b).

OSM disagrees with the commenter that the section fails to assure that the structure owner is paid the full amount of the diminution in value resulting from the subsidence-related damage. As discussed in the findings regarding section 5.4(a), the Director believes that this section is consistent with SMCRA and the federal rules.

OSM agrees that the use of time limits for filing claims is less effective than the federal rules. For a complete discussion of this issue, see the Director's findings of this section.

OSM agrees in part that some agreements on compensation amounts or repair are less effective than the federal regulation requirements. As stated more fully in the Director's findings, if the agreements provide for the same protection as SMCRA then they are approvable. However, if the agreements provide for something less

than what is required by SMCRA, then they are less effective.

Finally a commenter stated that the BMSLCA should be changed to include repair or compensation for damages to improvements to occupied dwellings.

OSM agrees with this comment. The Director believes that the changes required in this rulemaking to the definition of permanently affixed appurtenant structures and to section 5.4(a)(3) of the BMSLCA will satisfy the commenter's concerns.

#### Section 5.4 and 5.5

One commenter complained that mining companies only have to place a \$10,000 bond to begin to destroy homes and water quality.

To address bonding issues, the Director has required Pennsylvania to submit an amendment to section 6 of the BMSLCA complying with 30 CFR 817.121(c)(5) which requires an adjustment of bond for subsidence damage. This provision requires an increase in bonds for damage to protected structures and water supplies if repair, compensation or replacement takes longer than 90 days.

Another commenter contended that where a homeowner's survey or an expert witness has found that damage to a structure was obviously caused by mining, an operator should be required to repair or compensate the landowner, even if no premining survey was completed.

OSM agrees that, under the federal program, the lack of a premining survey does not limit an operator's liability for repair or compensation. Accordingly, the Director has not approved the portions of the BMSLCA that limit operator's liability in those cases.

Finally, a commenter maintained that private agreements must not be allowed where they limit the protections provided in the federal regulations.

OSM agrees with this comment. The Director has found that nothing in the federal regulations prevents private agreements, however the terms of an agreement cannot diminish the protections afforded by EPA's and the federal regulations.

#### Section 5.6

One commenter stated that the BMSLCA needs to be changed to prohibit mining agreements that allow less than full compensation for repair of subsidence damage and water supply replacement. The commenter alleged that industry's use of confidential agreements and high-pressure tactics make homeowners feel they will be better off by signing these agreements. The commenter claimed that although

OSM requires full compensation, homeowners are discouraged from bringing these agreements to OSM and that Pennsylvania looks at agreements as a credible resolution and does not normally interfere with them.

As noted in the discussion of section 5.6, the Director approved the use of agreements only to the extent that any release in a voluntary agreement does not limit the protections of EPAct. There is nothing in the federal regulations prohibiting agreements between landowners and mining companies, however any agreement that provides a lesser amount of protection than is afforded by the federal regulations would not preclude enforcement of the regulatory requirements.

#### Section 5.6(c)

One commenter claimed that structures covered by requirements to repair or compensate for subsidence damage under federal law are exempt under Act 54. The commenter felt that agreements homeowners entered into after April 27, 1966, but prior to the effective date of Act 54, which provide for a waiver or release of the duty to repair or compensate, should not be valid.

OSM agrees with the commenter's concerns involving agreements made after April 27, 1966, but before the effective date of Act 54. The Director has not approved the last two sentences of this portion of the amendment. These sentences state, "Nothing herein shall impair agreements entered into after April 27, 1966, and prior to the effective date of this section, which, for valid consideration, provide for a waiver or release of any duty to repair or compensate for subsidence damage. Any such waiver or release shall only be valid with respect to damage resulting from the mining activity contemplated by such agreement." The Director found these statements could validate agreements that are not as protective as the federal regulations and therefore has not approved the language.

#### Section 6

The Pennsylvania Coal Association (PCA) commented on financial guarantees for subsidence repair. PCA indicated that although the proposed program amendment does not require adjustment of the performance bond amount if subsidence causes damage to protected structures, bond adjustment is authorized by Pennsylvania's primacy regulations at 25 Pa. Code 86.152. PCA notes that while Act 54 does not require adjustment of the bonds for subsidence damage, it mandates use of an escrow mechanism to assure funds are available

to mitigate damage. Operators are required to deposit funds in the escrow within six months if they wish to contest the repair obligations, or have not complied with the obligations. PCA asserts that the escrow option guarantees the repair or compensation obligations of section 720 of SMCRA.

Other commenters presented the opposing view that Pennsylvania's current bonding system is not sufficient to assure correction of subsidence-related damage. One commenter opined that the longwall mining regulations must be strengthened to shift the balance of power from the coal companies to a middle ground between coal operators and homeowners. The commenter discussed the disruption subsidence from longwall mining takes on personal and professional lives and felt that the bond posted should be equal to the fair market value of the home.

Two other commenters indicated that Pennsylvania has no provision for bonding for water loss and, in practice, requires only a \$10,000 bond for structure repair. The commenters further claimed that homeowners need to be assured that funds are available for complete repairs and for water supplies, which could mean extensive new water lines in some areas.

We agree with the commenter that Pennsylvania does not require a bond for water loss. Additionally, as we noted in our discussion of section 6 of Pennsylvania's statute, the bond amount at the time of application may not be sufficient to repair or compensate for structural damage if the bonds are to be used to reclaim the site as well. While the escrow payments may adequately provide for correction of damage, they are not required unless the operator appeals an order.

Finally, we do not agree with PCA's assertion that 25 Pa. Code 86.152 requires adjustment of bond for subsidence damage. The provision at that section is discretionary on the part of Pennsylvania. Accordingly, there are no provisions in the Pennsylvania program that require the submission of additional bond in the event subsidence damage is not corrected. The Director, therefore, has required Pennsylvania to amend its program to include bonding provisions as effective as those found in 30 CFR 817.121(c)(5).

#### Section 9.1(b)

A commenter stated that the term "minimize" should mean a reduction in damage to the greatest extent possible. The commenter believes PADEP uses the term "minimize" to mean a reduction of damage in any amount. The

commenter further indicated that damage should be minimized to a different level than the irreparable damage level of the Pennsylvania program.

OSM agrees that damage minimization must take place. The federal regulations at 30 CFR 817.121 require minimization of material damage to the extent economically and technically feasible except in certain circumstances. The steps to be taken to minimize damage would vary from case to case and would also depend on a judgment of the economic and technical circumstances surrounding the measures. As a result, the commenter's concern on PADEP's interpretation of the level of minimization would be largely dependent on site-specific circumstances and would have to be evaluated in that respect.

OSM agrees that Pennsylvania must minimize material damage to certain structures. The Director is requiring Pennsylvania to amend its program to require minimization of material damage.

#### Section 18.1(d)

A commenter contended that this section could be read to prevent data collection required to meet permitting requirements, rather than merely to restrict data collection solely to augment the analysis of deep mine impacts on water resources. The commenter felt that the final phrase, which refers to data collection outside of the context of this section, implies that the language of section subsection (d) is intended to have broader application.

OSM does not agree with the commenter's interpretation of this section. This section requires a compilation of information from deep mine permit applications, monitoring reports and other data submitted by operators, from enforcement actions and from any other appropriate source. As stated on Pennsylvania's website, the purpose of section 18 is to require Pennsylvania to "assess the surface impacts of underground mining on buildings, water supplies and streams every five years." See, [www.dep.state.pa.us/dep/deputate/minres/bmr/act54/index.html](http://www.dep.state.pa.us/dep/deputate/minres/bmr/act54/index.html). This section does not seek to limit information already required by the Pennsylvania program. It only requires a compilation of information already required to be submitted. Subsection (d) does not allow PADEP to request additional information (except for water loss incidents or claims) to fulfill these provisions. While there is no direct corresponding federal requirement to this section, the Director found that this

portion of the amendment does not limit the rights and protections of the federal requirements.

Comments on regulation changes at 25 Pa. Code Chapter 89:

#### Section 89.5(a), Definition of De Minimis Cost Increase

One commenter stated that this section allows the operator to forgo payment of a de minimis cost, which is less than 15% of the operating and maintenance costs or less than \$60 a year. The commenter maintained that this is a significant sum to many rural homeowners when paying over a 20 year period and that the federal rules make no such exemption.

OSM agrees with the comment. The Director has found that passing along the cost of a treatment system, even if the increased cost is de minimis, does not make a landowner or water user who has experienced water supply problems as a result of subsidence whole. The federal regulations require operators whose mining operations caused water supply contamination, interruption or diminution to replace or restore water supplies, including the cost of treatment if necessary.

#### Section 89.141(d)

A commenter noted that this section requires only a description of measures to correct damage to homes—allowing any amount of damage to homes short of irreparable damage, which PADEP must predict. The commenter pointed out the requirements to minimize damage found at 30 CFR 784.20 and 30 CFR 817.121(a)(1) and (2). The commenter felt that OSM must find sound methods for minimizing damage and use the dictionary meaning of minimize, which is to “make the least of” not just lessen or moderate.

OSM agrees that Pennsylvania’s program does not contain damage minimization requirements below the irreparable damage level. The Director is requiring Pennsylvania to amend its program to require operators to minimize material damage to homes and non-commercial structures to the extent technologically and economically feasible.

#### Section 89.142a(f)(1)(ii)

One commenter asserted that non-commercial buildings not used by, or accessible to, the public are covered in the federal rules at 30 CFR 817.121(c) but not covered in Pennsylvania’s program.

OSM does not agree with the comment regarding protection of non-commercial buildings. Pennsylvania’s definition of non-commercial buildings

is substantially the same as the federal definition at 30 CFR 701.5 and section 89.142a(f)(1)(ii) provides protection to non-commercial buildings. More information on this subject can be found in the discussion of section 5.4(a)(1) of the BMSLCA.

#### Section 89.142a(f)(1)(iii)

A commenter noted that this section provided some exemptions to protections found in federal regulations because it does not provide protection for improvements made after Act 54’s effective date or date prior to the operator’s next permit renewal. The commenter also stated that the federal rules have a rebuttable presumption of subsidence-related damage for homes with the 30-degree angle of draw from underground mining activities, but Pennsylvania’s regulations do not contain a similar presumption for damages to structures.

OSM agrees with the comment regarding limitations on protections being dependent on the date of the operator’s next permit renewal. As noted in the discussion in this rulemaking of section 5.4(a)(3) of the BMSLCA, the Director did not approve the phrase “improvements in place on the effective date of this section or on the date of the first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application.”

OSM does not agree with the comment regarding angle of draw. As noted elsewhere in this rulemaking, OSM suspended its rules regarding a rebuttable presumption of causation by subsidence (30 CFR 817.121(c)(4)(i) through (iv)) in a December 22, 1999, **Federal Register** notice (64 FR 71652). As a result of the suspension, Pennsylvania does not need to include a counterpart to this regulation in its program.

#### Section 89.142a(g)

One commenter alleged that Pennsylvania does not intend to hold coal operators responsible for damage to investor-owned utilities, an exemption not included in the federal rules at 30 CFR 817.180. The commenter felt that this lack of conformity to the federal rules would result in higher utility costs to homeowners.

OSM does not agree with this comment. The provision of section 89.142a(g)(1) protects all structures protected by the federal regulations at 30 CFR 817.180. The commenter is apparently referencing remarks made by Pennsylvania in the preamble to the

regulations on subsidence damage repair and water supply replacement. In the preamble (28 Pa.B. 2767), Pennsylvania noted that with respect to the definition of the term “water supply” it did not want to include language in that definition that could be interpreted to include investor-owned water transmission utilities.

Pennsylvania indicated that the preamble discussion was made to illustrate the difference between connections from a well or spring to a residence and connections made to a water main that is part of a public water supply system. Connections from a well or spring are permanent affixed appurtenant structures that must be repaired by the mine operator if damaged. Damage to a water main and that part of the connecting piping that is owned by the water company would be covered under Pennsylvania regulation section 89.142a(g) relating to protection of utilities.

However, even though section 89.142a(g) protects the same types of utilities as the federal program it does not provide the same level of protection as the federal program. Pennsylvania protects utilities from underground mining while the federal program protects utilities from underground mining activities. The federal definition of underground mining activities includes more activities than the Pennsylvania definition of underground mining, which only pertains to removal of coal. The federal definition of underground mining activities found at 30 CFR 701.5 includes a combination of surface operations incident to underground extraction of coal as well as underground operations. This would include construction, use, maintenance, and reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste and areas on which materials incident to underground mining operations are placed.

Another commenter suggested that the word “prevent” should be substituted for the word “minimize.” Section 89.142a(g) requires underground mining to minimize damage, destruction or disruption of utilities. The federal rules at 30 CFR 817.180 do not require prevention of damage, but rather minimization, the same as the Pennsylvania rule. Therefore, OSM does not agree that the word “minimize” should be changed.

## Section 89.142a(h)

A commenter claimed that Pennsylvania's program does not provide for the premining monitoring of flow in perennial streams, which makes it impossible to determine adverse impacts by mining operations since no standard for comparison exists.

OSM does not agree with this comment. The approved Pennsylvania program at 25 Pa. Code 89.34 requires operators to include in their operation plan a description of streams, including quantitative seasonal flow conditions. This information could be used to determine any adverse impacts to perennial streams due to underground mining activities.

## Section 89.144a

The Pennsylvania Coal Association (PCA) commented on the provisions of section 89.144a(a)(1) regarding an operator's relief from responsibility for repair or compensation for damages to structures when a landowner refuses access to an operator for conducting a premining survey. PCA contends there is no distinction between the requirements of the federal regulations where a landowner loses a rebuttable presumption of causation if access to an operator for a premining survey is denied and the state regulations that relieve an operator from repair or compensation requirements when access is denied. PCA states a landowner may be able to prove causation of subsidence damage, but that establishing the chain of causation would require extensive technical data and expert testimony. PCA further indicates that without a premining survey, there is no baseline information for determining an operator's liability, which is especially important in Pennsylvania given the extensive history of underground mining that makes damage from subsidence more likely than other states. Finally, PCA claims this portion of the program amendment should be approved because it is as effective as the federal regulations, since both the state and federal regulations are designed to encourage landowners to cooperate in premining surveys and to facilitate collection of baseline information. (Note: CONSOL, Pennsylvania Services Corporation, Maple Creek Mining, Inc. and UMC Energy, Inc. submitted letters endorsing this and all other comments made by PCA).

OSM suspended the regulations (30 CFR 817.121 (c)(4)(i) through (iv)) regarding a rebuttable presumption in response to a challenge by the National Mining Association (64 FR 71652). As a

result, 30 CFR 817.121 (c)(4)(iii), which formerly stated that landowners would lose the rebuttable presumption if they refused to let operators on their property to conduct a premining survey, is no longer valid. OSM also suspended the portion of 30 CFR 784.20(a)(3) that required a specific structural survey of all EPA-protected structures. At this time, there is no requirement that a structural survey be conducted or that a rebuttable presumption will be applied to determine if underground mining is responsible for subsidence damage to structures. However, the federal rules do require that owners of structures damaged by underground mining be compensated for the damages or that the damages be repaired by the operator. The regulations do not relieve an operator from the obligation of repair or compensation for damages caused by subsidence from underground mining. We acknowledge the difficulty of assessing the extent of subsidence damage without a presubsidence survey. But, exempting an operator from liability for repair or compensation for damages because a landowner does not allow access to the property for a premining survey does not comply with the intent of the EPA-protected provisions. As more fully discussed in our finding for 5.4(c) of the BMSLCA, premining damage surveys do not have to be conducted by an operator to be valid. The surveys can be conducted by independent parties hired by the landowners or even by the landowners themselves. This information can then be used by the regulatory authority to set the amount of compensation or assess the completeness of repairs. As stated earlier, in Pennsylvania's scenario, the homeowner would have no relief under BMSLCA even though he had relevant information that showed causation. Because the Pennsylvania program allowed relief from liability while the federal program does not contain a similar provision, we found that this provision of the Pennsylvania program is not as effective as the federal requirements.

## Section 89.144a(a)(1)

One commenter noted that Pennsylvania's rules allow operator's to be relieved of liability for damage repair or compensation if the operator was denied access to a landowner's property for pre- or post-mining surveys. The commenter argued that if the homeowner or PADEP has credible evidence that mining caused the damage, he should not be punished for refusing operator surveys of his property.

OSM agrees with the commenter. The Director is not approving this provision because the federal rules requiring repair or compensation for damage to non-commercial buildings and dwellings and related structures [30 CFR 812.121(c)(2)] does not provide exception for any reason when an operator's underground mining operation has caused subsidence damage.

## Section 89.145a(a)(1)

One commenter indicated that Pennsylvania's regulations require underground miners to take a premining survey prior to mining within a 1,000 feet of the water supply. The commenter expressed concern because water supply damage could occur from mining before the 1,000-foot distance from a home is reached.

OSM agrees with the commenter's concerns. The federal regulations at 30 CFR 784.20(a)(3) regarding presubsidence surveys require all drinking, domestic, or residential water supplies to be surveyed at the time of application. As noted in the Director's decision above, the Director is not approving the provision that allows for water supply surveys to be delayed until mining advances within 1,000 feet of a supply and is requiring Pennsylvania to amend its program to require permittees to submit the information required by 25 Pa. Code 89.145a(1)(i)-(v) that is necessary to meet the provisions of 30 CFR 784.20(a)(3) at the time of the application for all existing drinking, domestic, or residential water supplies.

## Section 89.152(a)(2)

PCA commented on subsection (2) that provides that an operator can seek relief from responsibility for water supply replacement or restoration if the contamination, diminution or interruption is due to underground mining activities that occurred more than three years prior to the onset of water supply contamination, diminution or interruption. PCA noted that the operator is required to affirmatively prove all of the elements of this defense. The Pennsylvania Environmental Quality Board has interpreted this defense as not arising until three years after the mine has closed and all reclamation is complete. PCA contends this time period is long enough that it should cover all water supplies affected by underground mining. PCA further argued that since Pennsylvania's program provides for a rebuttable presumption that water supplies have been impacted within a thirty-five degree angle of draw, many water supplies will be replaced without

any proof on the part of the landowner. Even after three years have elapsed, the burden remains on the mine operator to affirmatively prove the elements of the defense. PCA proposes that for these reasons, the Pennsylvania program is more effective in some regards and no less effective than the federal regulations.

The Director agrees with PCA's contention that using the angle of draw in determining operator liability is an effective tool to assist regulators in requiring restoration or replacement for those supplies located within the angle of draw. However, the regulation could allow operators to be relieved from liability for replacement of some water supplies whether or not they are within the angle of draw, if more than three years elapsed after mine closing before the water supply is affected. When promulgating the federal regulations requiring replacement or restoration of water supplies, OSM indicated that even in cases where the landowner did not need a restored or replaced water supply to meet the postmining land use, the permittee would still be required to demonstrate the availability of a water source equivalent to premining quantity and quality so that the current owner or his or her successor could utilize the water if desired in the future (60 FR 16727). In making this statement, OSM envisioned that water supplies would be available under all circumstances for both present and future uses. While under section 25 Pa. Code 89.152(a)(2), Pennsylvania has left open the possibility that some water supplies will not be replaced or restored, the federal regulation intended restoration or replacement of all water supplies without exception. As more fully discussed in the findings for 5.2(e)(2) of BMSLCA and 25 Pa. Code 89.152(a)(2), which are incorporated herein, the Director has not approved section 25 Pa. Code 89.152(a)(2).

Another commenter asserted that an operator does not have to replace a water supply if the loss occurred more than three years after the mining ceased and that the federal rules do not provide for this exemption. As stated above, OSM agrees.

#### Section 89.152(a)(4)

PCA commented on the provisions of this section that provide that an operator will not be liable for water supply replacement if the claim is made more than two years after the supply has been adversely affected. PCA argued that in the case of the two-year statute of limitations, the state has adopted an appropriate limitations period from existing state law. The two-year period

is the same as that provided for common law water rights claims. PCA contended that federal law would likely assume the same limitations period and cited *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983) in support of its position. PCA indicated that this case provides that in the absence of an express limitations period in federal law, the analogous provision from state law should be adopted. Because there is no statute of limitations in SMCRA or EPCRA, nor is any apparent federal policy served by a different federal limitation period, PCA asserted that the two-year period of this regulation is appropriate.

As discussed more fully in our finding regarding this section, we disagree that any statute of limitations is applicable. Additionally, the applicability of the two-year statute of limitations (generally used for torts) for water replacement has been rejected by the Commonwealth Court of Pennsylvania in *Carlson Mining Company v. Department of Environmental Resources*, 639 A.2d 1332, 1337 (1994). In *Carlson*, a coal company argued that Pennsylvania's funding mechanism for increased water operation and maintenance costs constituted damages under tort law. The court disagreed, stating that a "water supply replacement order is not a civil action based on a tort; it is based on the Commonwealth's police power." *Id.* at 1337. While this case involved a surface coal mining operation, OSM believes that the rationale is applicable to underground coal mining operations since any operator who refuses to replace a water supply covered under the provisions of Act 54, would also be issued an order by Pennsylvania. See, 5.2(a)(3) and 5.2(b)(2) of the BMSLCA. Therefore, based on our findings, the Director has not approved section 89.152(a)(4).

Another commenter contended that this section was contrary to the federal rules. As stated above, OSM agrees.

#### Section 89.152(a)(5)

PCA commented on this provision that allows compensation to landowners in lieu of water supply replacement if an affected water supply is not replaced within three years. PCA claims this option would be rarely used but would give operators and landowners flexibility in dealing with a situation where restoration of water supplies is difficult. PCA proposes that Pennsylvania's regulations generally obligate operators to provide water replacement, but provide fair and reasonable provision for where circumstances make permanent

restoration of affected water supplies impossible.

Finally, PCA noted that the buy out provision would not alter a mine operator's obligation to identify the availability of an alternative water source.

The Director does not agree with the comments. In the preamble to the federal regulations, OSM responded to a commenter with a similar viewpoint, i.e., that compensation be available as an option for those limited circumstances where an impacted supply cannot be restored (60 FR 16733). In response, OSM stated, "[t]he terms of the Energy Policy Act unequivocally require replacement. Further, OSM does not anticipate that underground mining operations will be unable to comply with this statutory mandate. For example, if the permittee is unable to restore a spring or aquifer, the permittee should still be able to provide water from an alternative source, such as a public water supply, or by pipeline from another location." The Director has not approved section 89.152(a)(5) because it provides compensation rather than restoration or replacement as required by federal regulations and SMCRA.

Another commenter stated that 25 Pa. Code 89.152(a)(5)(ii) provides for voluntary agreements and payments instead of replacement of a water supply, which is required by the federal rules. OSM agrees for the reasons stated above.

PCA also commented on financial guarantees for subsidence repair. PCA contended that although the proposed program amendment does not require adjustment of the performance bond amount if subsidence causes damage to protected structures, bond adjustment is clearly authorized by Pennsylvania's primacy regulations. PCA noted that while Act 54 does not require adjustment of the bonds for subsidence damage, it does mandate use of an escrow mechanism to assure funds are available to mitigate damage. Operators are required to deposit funds in the escrow within six months if they wish to contest the repair obligations, or have not complied with the obligations. PCA stated that the escrow option guarantees the repair or compensation obligations of section 720 of SMCRA.

Other commenters presented the opposing view that Pennsylvania's current bonding system is not sufficient to assure correction of subsidence related damage. One commenter asserted that the longwall mining regulations must be strengthened to shift the balance of power from the coal companies to a middle ground between

coal operators and homeowners. The commenter discussed the disruption subsidence from longwall mining exacts on personal and professional lives and stated that the bond posted should be equal to the fair market value of the home.

Two other commenters indicated that Pennsylvania has no provision to bond for water loss and, in practice, requires only a \$10,000 bond for structure repair. The commenters further claimed that homeowners need to be assured that funds are available for complete repairs and for water supplies, which could mean extensive new water lines in some areas.

OSM agrees with the comment regarding the federal requirement for submission of additional bond in the event subsidence related material damage occurs to protected land, structures and facilities or when contamination, diminution, or interruption occurs to protected water supplies.

The Director has required Pennsylvania to amend its program to include bonding provisions as effective as those found in 30 CFR 817.121(c)(5). Please see the Director's findings regarding section 6 of the BMSLCA for more information.

One commenter opined that if a coal operator lacks the means to post an adequate subsidence bond, then the operation should not be permitted.

OSM does not agree with this comment. The federal requirements for posting additional bond come into play only after subsidence damage has occurred and ninety days have elapsed without the operator completing the required repair, compensation, or replacement. The ninety days can be extended to one year under certain circumstances. There is no federal requirement for operators to demonstrate that additional bonds can be obtained prior to subsidence occurring. Even if premining surveys determine that subsidence damage is likely to occur at the time of the application, operators will not need to increase their bond if the repair, compensation or replacement occurs within the allotted time frames.

#### *General Public Comments*

A general comment was made regarding imminent danger. A commenter stated that the threat of danger rather than the manifestation of the damage should be sufficient to suspend operations in imminent danger situations.

OSM believes the commenter's concern is addressed by section 9.1(a) of the BMSLCA. This section requires that

if the Department determines and notifies a mine operator that a proposed mining technique or extraction ratio will result in subsidence that causes an imminent hazard to human safety, the technique or extraction ratio will not be permitted unless the mine operator, prior to mining, takes measures approved by the Department to eliminate the imminent hazard. The Director found that this section is consistent with 30 CFR 817.121(f), which requires the suspension of underground mining if imminent danger is found to inhabitants of urbanized areas, cities, towns or communities.

A commenter also indicated that OSM should require Pennsylvania to mandate that the protection of 522(e)(5) of SMCRA, regarding prohibiting mining within 300 feet of an occupied dwelling unless waived by the owner, should be applied to underground mining.

On December 17, 1999, OSM published a rule in the **Federal Register** (64 FR 70838) in which we stated that we interpret sections 522(e) and 701(28) of SMCRA and the implementing rules to provide that subsidence due to underground mining is not a surface coal mining operation. Subsidence, therefore, is not prohibited in areas protected under the Act. Neither subsurface activities that may result in subsidence, nor actual subsidence, are prohibited on lands protected by section 522(e).

During the public hearing several commenters expressed dissatisfaction with the longwall mining process in general because of the damage subsidence causes to homes and water supplies. The Director notes that one of the purposes of SMCRA as stated at section 102(k) is to "encourage the full utilization of coal resources through the development and application of underground extraction technologies." The longwall mining process has been proven to be an efficient way to insure the full utilization of coal resources. While damage to structures and water supplies is a regrettable consequence of longwall mining, the Energy Policy Act of 1992 was passed to insure that compensation for, or repair of, damages to structures and replacement of adversely affected water supplies was made. The Director finds that longwall mining is permissible under SMCRA but that operators have an obligation, as noted under the federal regulations, to minimize damage and to repair or compensate landowners for damages that occur.

Two commenters voiced concerns about protection of utilities. One of the commenters alleged that underground mining destroys natural gas wells. The

Director has specified that the federal regulations at 30 CFR 817.180 require all underground mining activities to be conducted in a manner that minimizes damage, destruction or disruption of services provided by oil, gas, and water wells, as well as additional utility installations, unless the owner of the utility and the regulatory authority approve otherwise. This regulation was not modified by the passage of EPAct. Thus, impacts to gas wells are allowed if approved by the regulatory authority and the well's owner.

The second commenter noted that a ruling made by Pennsylvania's Environmental Hearing Board concluded that mere notification of intent to longwall mine beneath a public utility installation is insufficient to prevent damage to that installation. The commenter further noted that the standard requiring prevention of damage to a public utility was based on section 4 of the BMSLCA (52 P.S. 1406.4) that has since been repealed, but that Pennsylvania's Environmental Quality Board changed the word "prevent" to "minimize" without public input.

In our review of section 4 of the BMSLCA we found that, prior to its repeal, it provided protection from subsidence to municipal utilities or municipal public service operations (and other structures) in place on April 27, 1966. The Director is approving the repeal of section 4 because the federal regulations do not contain any provisions for protection of structures and utilities in place as of April 27, 1966.

#### **V. Director's Decision**

Based on the findings above we are approving the amendments to the Pennsylvania program, except as noted below.

#### *BMSLCA*

Section 5(b) (52 P.S. 1406.5(b)) is required to be amended to change the reference to section 6(a) to section 6(b).

Section 5.1(a)(1) (52 P.S. 1406.5a(a)(1)) is required to be amended to require the prompt replacement of all water supplies.

Section 5.1(b) (52 P.S. 1406.5a(b)) is not approved.

At section 5.2(b)(2) (52 P.S. 1406.5b(b)(2)) the phrase, "\* \* \* where the contamination, diminution or interruption does not abate within three years of the date on which the supply was adversely affected" is not approved. Additionally this section is approved to the extent that Pennsylvania recognizes that the approved program regarding response to citizen complaints may



require a more timely response to complaints than that required by this section.

At section 5.2(d) (52 P.S. 1406.5b(d)) the sentence stating, "Wherever a mine operator, upon request, has been denied access to conduct a premining survey and the mine operator thereafter served notice upon the landowner by certified mail or personal service, which notice identified the rights established by sections 5.1 and 5.3 and this section, was denied access and the landowner failed to provide or authorize access within ten days after receipt thereof, then such affirmative proof shall include premining baseline data, provided by the landowner or the department, relative to the affected water supply," is not approved.

Section 5.2(e)(2) (52 P.S. 1406.5b(e)(2)) is not approved.

Section 5.2(g) (52 P.S. 1406.5b(g)) is not approved.

Section 5.2(h) (52 P.S. 1406.5b(h)) is not approved.

At section 5.2(i) (52 P.S. 1406.5b(i)) the phrase "and of reasonable cost" is not approved.

Section 5.3(a) (52 P.S. 1406.5c(a)) is approved to the extent that agreements to replace a water supply or provide an alternative water supply meet the requirements established in the federal definition of "replacement of water supply" found at 30 CFR 701.5. This provision is not approved to the extent it allows compensation in lieu of restoration or replacement of affected water supplies.

Section 5.3(b) (52 P.S. 1406.5c(b)) is not approved to the extent that section 5.3(a) (52 P.S. 1406.5c(a)) is not approved.

Section 5.3(c) (52 P.S. 1406.5c(c)) is not approved to the extent any state law negates or provides less protection than EPAAct.

Section 5.4(a) (52 P.S. 1406.5d) must be amended to require the prompt repair and compensation for the structures protected under section 720(a)(1) of SMCRA and 30 CFR 817.121(c)(2).

At section 5.4(a)(3) (52 P.S. 1406.5d(a)(3)) the phrase, "in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application" is not approved.

Section 5.4(c) (52 P.S. 1406.5d(c)) is not approved.

Section 5.5(a) (52 P.S. 1406.5e(a)) is required to be amended to make it clear that operators are responsible for repair or compensation to landowners of

structures damaged by subsidence from underground mining operations.

Section 5.5(b) (52 P.S. 1406.5e(b)) is not approved.

Section 5.5(c) (52 P.S. 1406.5e(c)) is approved to the extent that Pennsylvania recognizes the approved program regarding response to citizen complaints may require a more timely response to complaints than that required by this section. Additionally, the portion of 5.5(c) that states, "\* \* \* within six months or a longer period if the department finds that the occurrence of subsidence or subsequent damage may occur to the same building as a result of mining," is not approved. Finally, this section is required to be amended to insure that any written damage determinations made by PADEP will take into account subsidence due to underground coal mining operations, as required by SMCRA.

At section 5.5(f) (52 P.S. 1406.5e(f)) the phrase, "\* \* \* within six months or longer or such period as the department has established or fail to perfect an appeal of the department's order directing such repair or compensation" is not approved.

At section 5.6(c) (52 P.S. 1406.5f(c)) the following two sentences are not approved: "Nothing herein shall impair agreements entered into after April 27, 1966, and prior to the effective date of this section, which, for valid consideration, provide for a waiver or release of any duty to repair or compensate for subsidence damage. Any such waiver or release shall only be valid with respect to damage resulting from the mining activity contemplated by such agreement."

Section 5.6(d) (52 P.S. 1406.5f(d)) is not approved to the extent that section 5.6(c) is not approved.

Section 6 (52 P.S. 1406.6) must be amended to comply with the provisions of 30 CFR 817.121(c)(5), which requires a permittee to obtain additional performance bond when subsidence related material damage to land or structures occurs, or when a protected water supply is contaminated, diminished or interrupted. The additional bond must be in the amount of the estimated repairs or in the amount of the decrease in value of a protected structure or in the amount of the estimated cost to replace a protected water supply if the repair, compensation or replacement takes longer than 90 days.

*The Regulations at 25 Pa. Code Chapter 89*

In section 89.5, the definition of "de minimis cost increase" is not approved.

In section 89.5, the definition of "fair market value" is not approved.

In section 89.5, the phrase "securely attached to the land surface" in the definition of "permanently affixed appurtenant structures" is not approved.

Section 89.141(d)(3) is to be amended to require subsidence control plans to provide a description of the measures to be taken to ensure subsidence will not cause material damage to, or reduce the reasonably foreseeable uses of, all the structures or features protected under 30 CFR 784.20(b)(5).

Section 89.141(d)(6) is to be amended to insure the requirements of 30 CFR 784.20(b)(5) and (b)(7) are met when occupied residential dwellings and structures related thereto and community or institutional buildings are not protected by 25 Pa. Code 89.141(d)(3) and they are materially but not irreparably damaged.

Section 89.142a(c)(3) is to be amended to insure that Pennsylvania has the discretion to suspend mining in cases where the initial subsidence control plan or the operator's actions fail to prevent material damage, until the operator's subsidence control plan ensures the prevention of further material damage, as required in 30 CFR 817.121(e).

Section 89.142a(d) is required to be amended to insure the prevention or minimization of material damage to occupied residential dwellings and community or institutional buildings.

Section 89.142a(f)(1) is required to be amended to be no less effective than 30 CFR 817.121(c) in requiring prompt repair or compensation to landowners.

In section 89.142a(f)(1)(iii), the portion of the amendment that states, "\* \* \* 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" is not approved.

Section 89.142a(g)(1) is required to be amended to require all underground mining activities to be conducted in a manner consistent with 30 CFR 817.180.

In section 89.143a(c), the portion that states, "\* \* \* within 6 months of the date that the building owner sent the operator notification of subsidence damage to the structure \* \* \*" is not approved. Additionally, the phrase, "within 2 years of the date damage to the structure occurred \* \* \*" is also not approved.

In section 89.143a(d)(3), the portion which states, "\* \* \* within 6 months of the date of issuance of the order. The Department may allow more than 6

months if the Department finds that further damage may occur to the same structure as a result of additional subsidence" is not approved.

Section 89.144a(a)(1) is not approved.

Section 89.145a(a)(1) is required to be amended to include provision that the survey information that need only be acquired to the extent that it can be collected without extraordinary efforts or expenditures of excessive sums of money, is only applicable when it applies to inconveniencing landowners. The amendment must remove the provision that allows for water supply surveys to be delayed until mining advances within 1000 feet of a supply. Finally, this section must also be amended to require permittees to submit the information required by 25 Pa. Code 89.145a(a)(1)(i)-(vi) that is necessary to meet the provisions of 30 CFR 784.20(a)(3) at the time of the application for all existing drinking, domestic, or residential water supplies.

Section 89.145a(b) is required to be amended to be no less effective than 30 CFR 817.41(j) in requiring prompt replacement or restoration of water supplies. Additionally section 89.145a(b) is required to be amended, if necessary, to ensure that the phrase "satisfy the water user's needs and the demands of any reasonably foreseeable uses" is consistent with the actual use and the reasonably foreseeable use of the supply, regardless of whether the current owner has demonstrated plans for the use.

Section 89.145a(e)(1) is required to be amended to assure the prompt supply of temporary water to all landowners whose water supply has been impacted by underground mining, regardless of whether the water supply is within the area of presumptive liability.

Section 89.145a(e)(2) is required to be amended to require the restoration of water quantity in temporary water supplies to the same level as permanent water supplies, as noted in 25 Pa. Code 89.145a(f)(3).

Section 89.145a(f)(1)(v) is not approved to the extent that it passes de minimis cost increases for operation and maintenance of water supplies to landowners.

Sections 89.145a(f)(3)(i) and (ii) are required to be amended, if necessary, to ensure that the phrase "satisfy the water user's needs and the demands of any reasonably foreseeable uses" is consistent with the actual use and the reasonably foreseeable uses.

Section 89.146a(c) is approved to the extent that it is consistent with, or more timely than, the citizen complaint procedures. However, Pennsylvania is required to amend its program to the

extent the time frames are longer than the citizen complaint procedures.

Section 89.152(a)(2) is not approved.

Section 89.152(a)(4) is not approved

Section 89.152(a)(5)(i) is not approved.

Section 89.152(a)(5)(ii) is approved to the extent that the agreement to replace a water supply or provide an alternative water supply meets the requirements established in the federal definition of "replacement of water supply" found at 30 CFR 701.5. This section is not approved for agreements that provide for replacement of or an alternate supply of water to the extent that water supply will not meet the requirements of the federal definition. This section is also not approved to the extent that it allows compensation in lieu of restoration or replacement of affected water supplies.

Sections 89.141(d), 89.141(d)(9), 89.142a(a), 89.142a(f)(1), 89.142a(f)(2)(i), 89.142a(h)(1), 89.142a(h)(2), 89.142a(i)(1), 89.143a(a), 89.143a(d)(1), 89.143a(d)(2), 89.143a(d)(3), 89.155(b)(1) and (2), and 89.155(c) are required to be amended to be no less stringent than section 720(a) of SMCRA with regard to the definition of underground mining operations.

We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the state's program demonstrates that the state has the capability of carrying out the provisions of the Act and meeting its purposes. Making this regulation effectively immediately will expedite that process. Additionally, 30 CFR 732.17(h)(12) requires decisions approving or disapproving program amendments to be published in the **Federal Register** and " \* \* \* shall be effective upon publication unless the notice specifies a different effective date."

## VI. Effect of Director's Decision

Since July 28, 1995, enforcement of EPAAct requirements in Pennsylvania has occurred under 30 CFR 843.25(a)(4) with a combination of state enforcement and direct federal enforcement. This portion of the notice explains how the Director's decision on the proposed amendment affects the regulation of underground mining impacts in Pennsylvania.

Section 2504 of EPAAct added section 720 to SMCRA. Section 720(a)(1) required prompt repair or compensation for material damage to non-commercial buildings and occupied residential dwellings and related structures as a result of subsidence due to underground coal mining operations, and section 720(a)(2) required prompt replacement

of certain identified water supplies adversely affected by underground coal mining operations. Section 720 also required that these protections be in place immediately for all underground coal mining operations conducted after October 24, 1992.

To implement the water supply replacement and structure damage repair requirements, OSM solicited comments in a March 31, 1995, **Federal Register** notice (60 FR 16750-16751), and on July 28, 1995, OSM decided that initial enforcement of EPAAct requirements in Pennsylvania under 30 CFR 843.25(a)(4) would be accomplished through a combination of state and OSM enforcement (60 FR 38685-38689). Under the initial enforcement process, Pennsylvania agreed to investigate all subsidence-related complaints and take remedial action. Pennsylvania advised that it would defer to OSM in those situations where the federal rules provide greater relief for the complainant under 817.41(j), and 817.121(c)(2). Finally, under 30 CFR 843.25(b)(3), direct federal enforcement is to remain in effect in states with approved regulatory programs until OSM approves, under Part 732, provisions consistent with sections 817.41(j) and 817.121(c)(2).

*Water Supply Replacement:* As discussed in this notice, the Director is approving provisions that are no less effective than EPAAct, and several provisions that extend protection beyond the counterpart federal standards. Extended coverage includes a rebuttable presumption for temporary water supplies and protection of agricultural water supplies. However, the Director is not approving several provisions affording less protection than the minimum level required under EPAAct. These include provisions that allowed the operator to provide compensation to landowners in lieu of water supply replacement if the water supply is not restored or replaced within three years, time limits on the filing of claims for affected water supplies, and a provision that allowed up to three years to pass before an order for a permanent alternate water supply must be issued. Finally, the Director has required a number of amendments to the Pennsylvania program. The required amendments include the provision of prompt replacement of all adversely affected supplies, and that water supply surveys of existing supplies be submitted at the time of the permit application.

The Director's decision will result in continued case-by-case direct federal enforcement in Pennsylvania to carry out the requirements of 30 CFR 817.41(j)

with respect to water supply replacement provisions. For example, while Pennsylvania's provisions require prompt temporary replacement of an adversely affected supply within the rebuttable presumption zone, the provisions do not address prompt temporary or permanent water supply replacement under any other circumstances. While the Director has required Pennsylvania to submit an amendment to address this issue, the water supply replacement provisions of 30 CFR 817.41(j) will continue to be implemented by PADEP to the extent of its authority and supplemented by direct federal enforcement, as needed on a case-by-case basis to assure prompt replacement of affected supplies. For those water replacement related provisions that are now part of the approved program, OSM will monitor state performance and enforcement through the normal oversight process.

**Structure Repair and Compensation:** As discussed in this notice, the Director is approving provisions that are no less effective than EAct, and several provisions extending greater protection than the minimum federal standards. These include structure compensation provisions that provide for reimbursement based upon the cost to repair or replace, reimbursement of associated temporary relocation costs, repair or compensation for certain agricultural structures, and an irreparable damage standard requiring permission of the property owner to proceed with the subsidence related activities. However, the Director is not approving proposed provisions resulting in less protection than that afforded under EAct. These include the denial of subsidence repair and compensation based upon the refusal of access for pre-subsidence surveys, time limits on the filing of claims for subsidence damage, and a provision that would prevent PADEP from issuing orders requiring repair and compensation until six months after a property owner had notified the permittee of subsidence damage. Finally, the Director has required a number of amendments to the Pennsylvania program, including the provision of prompt repair and compensation for occupied dwellings and non-commercial buildings and the development of subsidence damage bonding requirements consistent with the federal standards.

The Director's decision will result in continued case-by-case direct federal enforcement in Pennsylvania to carry out the requirements of 30 CFR 817.121(c)(2) with respect to structure repair and/or compensation. For example, Pennsylvania's proposed

amendment did not require prompt repair and compensation for all structures covered under EAct, did not cover all underground operations, did not cover certain related structures, and placed conditions on property owners that could limit structure repair and/or compensation to levels below the minimum federal standards. The Director has not approved certain of these provisions and required Pennsylvania to submit amendments to address the aforementioned and other issues. Until such time as the required amendments are approved, the provisions of 30 CFR 817.121(c)(2) will continue to be implemented by PADEP through state provisions supplemented by direct federal enforcement, as needed on a case-by-case basis to assure prompt repair of, and or compensation for, all covered structures. For those structure damage-related provisions that are now part of the approved program, OSM will monitor state performance and enforcement through the normal oversight process.

Finally, Section 503 of SMCRA provides that a state may not exercise jurisdiction under SMCRA unless the state program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any change of an approved state program be submitted to OSM for review as a program amendment. The Federal regulations at 30 CFR 732.17(g) prohibit any changes to approved state programs that are not approved by OSM. In the oversight of the Pennsylvania program, we will recognize only the statutes, regulations and other materials we have approved, together with any consistent implementing policies, directives and other materials. We will require Pennsylvania to enforce only approved provisions.

#### **VII. Procedural Determinations**

##### *Executive Order 12866—Regulatory Planning and Review*

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

##### *Executive Order 12630—Takings*

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart federal regulation.

##### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a)

and (b) of that section. However, these standards are not applicable to the actual language of state regulatory programs and program amendments since each such program is drafted and promulgated by a specific state, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed state regulatory programs and program amendments submitted by the states must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

##### *Executive Order 13132—Federalism*

This rule does not have federalism implications. SMCRA delineates the roles of the federal and state governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that state laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that state programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

##### *Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866, and because it is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

##### *National Environmental Policy Act*

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed state regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the

National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

#### *Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

#### *Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The state submittal, which is the subject of this rule, is based upon counterpart federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart federal regulation.

#### *Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the state submittal, which is the subject of this rule, is based upon counterpart federal regulations for which an analysis was prepared and a determination made that the federal regulation was not considered a major rule.

#### *Unfunded Mandates*

This rule will not impose an unfunded mandate on state, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the state submittal, which is the subject of this rule, is based upon counterpart federal regulations for which an analysis was prepared and a determination made that the federal

regulation did not impose an unfunded mandate.

#### **List of Subjects in 30 CFR Part 938**

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 29, 2001.

**Allen D. Klein,**

*Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, Title 30, chapter VII, subchapter T of the Code of Federal Regulations is amended as set forth below:

#### **PART 938—PENNSYLVANIA**

1. The authority citation for part 938 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

2–3. Section 938.12 is added to read as follows:

#### **§ 938.12 State statutory, regulatory, and proposed program amendment provisions not approved.**

(a) We are not approving the following provisions or portions of provisions of the proposed program amendment that Pennsylvania submitted on July 29, 1998:

(1) Section 5.1(b) (52 P.S. 1406.5a(b)) of the BMSLCA.

(2) At section 5.2(b)(2) (52 P.S. 1406.5b(b)(2)) of the BMSLCA, the phrase, “\* \* \* where the contamination, diminution or interruption does not abate within three years of the date on which the supply was adversely affected.”

(3) At section 5.2(d) (52 P.S. 1406.5b(d)) of the BMSLCA the phrase, “Wherever a mine operator, upon request, has been denied access to conduct a premining survey and the mine operator thereafter served notice upon the landowner by certified mail or personal service, which notice identified the rights established by sections 5.1 and 5.3 and this section, was denied access and the landowner failed to provide or authorize access within ten days after receipt thereof, then such affirmative proof shall include premining baseline data, provided by the landowner or the department, relative to the affected water supply.”

(4) Section 5.2(e)(2) (52 P.S. 1406.5b(e)(2)) of the BMSLCA.

(5) Section 5.2(g) (52 P.S. 1406.5b(g)) of the BMSLCA.

(6) Section 5.2(h) (52 P.S. 1406.5b(h)) of the BMSLCA.

(7) At section 5.2(i) (52 P.S. 1406.5b(i)) of the BMSLCA the phrase, “and of reasonable cost.”

(8) The portion of section 5.3(a) (52 P.S. 1406.5c(a)) of the BMSLCA that allows agreements for water replacement that do not fully comply with federal requirements for restoration or replacement of water supplies.

Additionally, the portion of section 5.3(a) (52 P.S. 1406.5c(b)) that allows compensation in lieu of restoration or replacement of affected water supplies.

(9) Section 5.3(b) (52 P.S. 1406.5c(b)) of the BMSLCA is not approved to the extent that section 5.3(a) (52 P.S. 1406.5c(a)) is not approved.

(10) Section 5.3(c) (52 P.S. 1406.5c(c)) of the BMSLCA is not approved to the extent any state law negates or provides less protection than EPAct.

(11) At section 5.4(a)(3) (52 P.S. 1406.5d(a)(3)) the phrase, “in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application.”

(12) Section 5.4(c) (52 P.S. 1406.5d(c)) of the BMSLCA.

(13) Section 5.5(b) (52 P.S. 1406.5e(b)) of the BMSLCA.

(14) At section 5.5(c) (52 P.S. 1406.5e(c)) of the BMSLCA, the phrase, “\* \* \* within six months or a longer period if the department finds that the occurrence of subsidence or subsequent damage may occur to the same building as a result of mining.”

(15) At section 5.5(f) (52 P.S. 1406.5e(f)) of the BMSLCA, the phrase, “\* \* \* within six months or longer or such period as the department has established or fail to perfect an appeal of the department’s order directing such repair or compensation.”

(16) At section 5.6(c) (52 P.S. 1406.5f(c)) of the BMSLCA, the following two sentences: “Nothing herein shall impair agreements entered into after April 27, 1966, and prior to the effective date of this section, which, for valid consideration, provide for a waiver or release of any duty to repair or compensate for subsidence damage. Any such waiver or release shall only be valid with respect to damage resulting from the mining activity contemplated by such agreement.”

(17) Section 5.6(d) (52 P.S. 1406.5f(d)) of the BMSLCA is not approved to the extent that section 5.6(c) has not been approved.

(18) At 25 Pa. Code 89.5, the definition of “de minimis cost increase.”

(19) At 25 Pa. Code 89.5, the definition of “fair market value.”

(20) At 25 Pa. Code 89.5, the phrase “securely attached to the land surface”

in the definition of “permanently affixed appurtenant structures.”

(21) 25 Pa. Code 89.142a(f)(1)(iii) the portion of the amendment that states, “\* \* \* 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.”

(22) At 25 Pa. Code 89.143a(c) the portion which states, “\* \* \* within 6 months of the date that the building owner sent the operator notification of subsidence damage to the structure \* \* \*” and the portion which states, “within 2 years of the date damage to the structure occurred.”

(23) At 25 Pa. Code 89.143a(d)(3), the portion of the amendment that states, “\* \* \* within 6 months of the date of issuance of the order. The Department may allow more than 6 months if the Department finds that further damage may occur to the same structure as a result of additional subsidence.”

(24) 25 Pa. Code 89.144a(a)(1).

(25) The portion of 25 Pa. Code 89.145a(a)(1) that allows for water supply surveys to be delayed until mining advances within 1,000 feet of a supply.

(26) The portion of 25 Pa. Code 89.145a(f)(1)(v) that passes de minimis cost increases for operation and maintenance of water supplies to landowners.

(27) 25 Pa. Code 89.152(a)(2).

(28) 25 Pa. Code 89.152(a)(4).

(29) 25 Pa. Code 89.152(a)(5)(i).

(30) 25 Pa. Code 89.152(a)(5)(ii) is not approved for agreements that provide for replacement of an alternate supply of water to the extent that the water supply will not meet the federal definition of replacement of water supply. The section is also not approved to the extent it allows compensation in lieu of restoration or replacement of affected water supplies.

(b) [Reserved]

4. Section 938.15 is amended in the table by adding a new entry in chronological order by “Date of Final Publication” to read as follows:

**§ 938.15 Approval of Pennsylvania regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
* July 29, 1998	* December 27, 2001	* Bituminous Mine Subsidence and Land Conservation Act: Repeal of Section 4 (52 P.S. 1406.4); 5(b)(partial approval); 5.1(a)(1) (52 P.S. 1406.5a(a)(1) (conditional approval); 5.1(a)(2) and (3) (52 P.S. 1406.5a(a)(2) and (3)); 5.2(a)(1), (2), and (3) (52 P.S. 1406.5b(a)(1), (2), and (3)); 5.2(b)(1) (52 P.S. 1406.5b(b)(1)); 5.2(c) (52 P.S. 1406.5b(c)); 5.2(e)(1) and (3) (52 P.S. 1406.5b(e)(1) and (3)); 5.2(f) (52 P.S. 1406.5b(f)); 5.2(j) (52 P.S. 1406.5b(j)); 5.2(k) (52 P.S. 1406.5b(k)); 5.4(a) (52 P.S. 1406.5d(a))(partial approval); 5.4(a)(1), (2) and (4) (52 P.S. 1406.5d(a)(1), (2) and (4)); 5.4(b) (52 P.S. 1406.5d(b)); 5.5(a) (52 P.S. 1406.5e(a))(partial approval); 5.5(d), (e), and (g) (52 P.S. 1406.5e(d), (e) and (g)); 5.6(a) and (b) (52 P.S. 1406.5f(a) and (b)); 6 (52 P.S. 1406.6)(partial approval); 9.1(a), (b), (c), and (d) (52 P.S. 1406.9a(a), (b), (c), and (d)); Repeal of Section 15 (52 P.S. 1406.15); 17.1 (52 P.S. 1406.17a); 18.1 (52 P.S. 1406.18a) 25 Pa. Code Section: 89.5, the definitions of the following terms: “dwellling,” “irreparable damage,” “material damage,” “noncommercial building,” “public buildings and facilities,” “public water supply system,” “rebuttable presumption area,” “underground mining,” “underground mining operations,” and “water supply;” 89.33; 89.34; 89.35; 89.36; 89.141(a); 89.141(d)(2), (4), (5), (7), (8), (10) and (11); 89.141(d), (d)(3), (6), and (9)(partial approval); deletion of 89.142; 89.142a(a) (partial approval) 89.142a(a)(1), (2), (3) and (4); 89.142a(b); 89.142a(c)(1) and (2)(i) “ (v); 89.142a(c)(3) (partial approval); 89.142a(d) (partial approval); 89.142a(e); 89.142a(f)(1) (partial approval); 89.142a(f)(1)(i), (ii), (iv), and (v); 89.142a(f)(2)(i) (partial approval); 89.142a(g)(1) (partial approval); 89.142a(g)(2), and (3); 89.142a(h) (1) and (2) (partial approval); 89.142a(i)(1) (partial approval); 89.142a(i)(2), (j), (k), and (l); deletion of 89.143; 89.143a(a) (partial approval); 89.143a(b); 89.143a(d)(1) and (2) (partial approval);deletion of 89.144; 89.144a(a)(2), and (3); deletion of 89.145; 89.145a(a)(1)(i)–(vi); 89.145a(a)(2) and (3); 89.145a(b)(partial approval); 89.145a(c); 89.145a(d); 89.145a(e)(1) and (2) (partial approval); 89.145a(f)(1)(i)–(iv); 89.145a(f)(2); 89.145a(f)(3)(i) and (ii)(partial approval); 89.145a(f)(3)(iii); 89.145a(f)(4); 89.146a(a) and (b); 89.146a(c) (partial approval); 89.152(a)(1) and (3); 89.152(b); 89.153 (a), (b), and (c); 89.154(a) through (d); 89.155(a), 89.155(b)(1) and (2) (partial approval); 89.155(b)(3) and (4); 89.155(c) (partial approval).

4. Section 938.16 is amended by adding paragraphs (hhhh) through (bbbbb) to read as follows:

**§ 938.16 Required regulatory program amendments.**

\* \* \* \* \*

(hhhh) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together

with a timetable for adoption to amend section 5(b) of the BMSLCA (52 P.S. 1406.5(b)) to delete the reference to section 6(a) of the BMSLCA and replace it with a reference to 6(b) of the BMSLCA.

(iiii) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend

section 5.1(a)(1) of the BMSLCA (52 P.S. 1406.5a(a)(1)) to require the prompt replacement of all water supplies.

(jjjj) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove section 5.1(b) of the BMSLCA (52 P.S. 1406.5a(b)).

(kkkk) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to delete the phrase, “\* \* \* where the contamination, diminution or interruption does not abate within three years of the date on which the supply was adversely affected” from section 5.2(b)(2) of the BMSLCA (52 P.S. 1406.5b(b)(2)).

(llll) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to delete the phrase, “Wherever a mine operator, upon request, has been denied access to conduct a premining survey and the mine operator thereafter served notice upon the landowner by certified mail or personal service, which notice identified the rights established by sections 5.1 and 5.3 and this section, was denied access and the landowner failed to provide or authorize access within ten days after receipt thereof, then such affirmative proof shall include premining baseline data, provided by the landowner or the department, relative to the affected water supply.” from section 5.2(d) of the BMSLCA (52 P.S. 1406.5b(d)).

(mmmm) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove section 5.2(e)(2) of the BMSLCA (52 P.S. 1406.5b(e)(2)).

(nnnn) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove section 5.2(g) of the BMSLCA (52 P.S. 1406.5b(g)).

(oooo) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove section 5.2(h) of the BMSLCA (52 P.S. 1406.5b(h)).

(pppp) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the phrase, “and of reasonable cost” from section 5.2(i) of the BMSLCA (52 P.S. 1406.5b(i)).

(qqqq) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to make it clear in section 5.3(a) (52 P.S.

1406.5c(a)) that agreements to replace a water supply or provide an alternative water supply must meet the requirements established in the definition of “replacement of water supply” at 30 CFR 701.5 and that compensation in lieu of restoration or replacement of affected water supplies is prohibited.

(rrrr) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to insure the provisions of section 5.3(b) of the BMSLCA (52 P.S. 1406.5c(b)) reflect the Director’s decision on section 5.3(a) (52 P.S. 1406.5c(a)).

(ssss) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to make it clear that section 5.3(c) of the BMSLCA (52 P.S. 1406.5c(c)) cannot negate or provide less protection than EPAct.

(tttt) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend section 5.4 of the BMSLCA (52 P.S. 1406.5d) to require the prompt repair and compensation for structures protected under section 720(a)(1) of SMCRA and 30 CFR 817.121(c)(2).

(uuuu) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend section 5.4(a)(3) of the BMSLCA (52 P.S. 1406.5d(a)(3)) to remove the phrase, “in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application.”

(vvvv) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove section 5.4(c) of the BMSLCA (52 P.S. 1406.5d(c)).

(wwww) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend section 5.5(a) of the BMSLCA (52 P.S. 1406.5e(a)) to make it clear that operators are responsible for repair or compensation to landowners of structures damaged by subsidence from underground mining operations.

(xxxx) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove section 5.5(b) of the BMSLCA (52 P.S. 1406.5e(b)).

(yyyy) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the following phrase from section 5.5(c) of the BMSLCA (52 P.S. 1406.5e(c)), “\* \* \* within six months or a longer period if the department finds that the occurrence of subsidence or subsequent damage may occur to the same building as a result of mining.” Pennsylvania must also amend section 5.5(c) to insure that written damage determinations made by PADEP will take into account subsidence due to underground coal mining operations as required by SMCRA. Finally, Pennsylvania must also amend section 5.5(c) of the BMSLCA to insure the timeframes for investigation of claims of subsidence damage are consistent with citizen complaint procedures.

(zzzz) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the following phrase from section 5.5(f) of the BMSLCA (52 P.S. 1406.5e(f)), “\* \* \* within six months or longer or such period as the department has established or fail to perfect an appeal of the department’s order directing such repair or compensation.”

(aaaa) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the following two sentences from section 5.6(c) of the BMSLCA (52 P.S. 1406.5f(c)): “Nothing herein shall impair agreements entered into after April 27, 1966, and prior to the effective date of this section, which, for valid consideration, provide for a waiver or release of any duty to repair or compensate for subsidence damage. Any such waiver or release shall only be valid with respect to damage resulting from the mining activity contemplated by such agreement.”

(bbbb) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to insure the provisions of section 5.6(d) of the BMSLCA (52 P.S. 1406.5f(d)) reflect the Director’s decision on not approving

language in section 5.6(c) of the BMSLCA (52 P.S. 1406.5f(c)).

(ccccc) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend section 6 of the BMSLCA (52 P.S. 1406.6) to comply with the provisions of 30 CFR 817.121(c)(5) regarding when, and under what circumstances, the regulatory authority must require permittees to obtain additional performance bond and the amount of such bond.

(ddddd) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the definition of "de minimis cost increase," from 25 Pa. Code 89.5.

(eeee) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the definition of "fair market value," from 25 Pa. Code 89.5.

(ffff) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the phrase "securely attached to the land surface" in the definition of "permanently affixed appurtenant structures" at 25 Pa. Code 89.5.

(ggggg) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.141(d)(3) to provide the protections of 30 CFR 784.20(b)(5).

(hhhhh) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.141(d)(6) to insure the requirements of 30 CFR 784.20(b)(5) and (b)(7) are met when occupied residential dwellings and structures related thereto and community or institutional buildings are not protected by 25 Pa. Code 89.141(d)(3) and they are materially damaged but not irreparably damaged.

(iiiiii) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.142a(c)(3) to make it as effective as 30 CFR 817.121(e), which imposes on the regulatory authority the obligation to require permittees to modify subsidence control plans to

ensure the *prevention* of further material damage in the cases where the initial plan or operator's actions fail and as effective as 30 CFR 817.121(e) in providing the authority to suspend mining until such a plan is approved.

(jjjjj) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.142a(d) to insure the prevention or minimization of material damage to occupied residential dwellings and community or institutional buildings.

(kkkkk) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.142a(f)(1) to secure prompt repair or compensation to landowners.

(lllll) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the phrase from 25 Pa. Code 89.142a(f)(1)(iii), which states, "\* \* \* 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."

(mmmmm) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.142a(g)(1) to require all underground mining activities be conducted in a manner consistent with 30 CFR 817.180.

(nnnnn) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the phrase from 25 Pa. Code 89.143a(c) that states, "\* \* \* within 6 months of the date that the building owner sent the operator notification of subsidence damage to the structure \* \* \*." Additionally, the amendment must remove the phrase, "within 2 years of the date damage to the structure occurred."

(ooooo) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove the sentences from 25 Pa. Code 89.143a(d)(3) that state, "\* \* \* within 6 months of the date of issuance of the order. The Department may allow more than 6 months if the Department finds

that further damage may occur to the same structure as a result of additional subsidence."

(ppppp) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove 25 Pa. Code 89.144a(a)(1).

(qqqqq) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.145a(a)(1) to make it clear that the requirement that survey information need only be acquired to the extent that it can be collected without extraordinary efforts or expenditures of excessive sums of money, is only applicable when it applies to inconveniencing landowners. The amendment must remove the provision that allows for water supply surveys to be delayed until mining advances within 1000 feet of a supply. Finally, this section must also be amended to require permittees to submit the information required by 25 Pa. Code 89.145a(a)(1)(i)-(vi) that is necessary to meet the provisions of 30 CFR 784.20(a)(3) at the time of the application for all existing drinking, domestic, or residential water supplies.

(rrrrr) By February 25, 2002, Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to 25 Pa. Code 89.145a(b) is required to be amended to be no less effective than 30 CFR 817.41(j) in requiring prompt replacement or restoration of water supplies. Additionally, section 89.145a(b) is required to be amended, if necessary, to ensure that the phrase "satisfy the water user's needs and the demands of any reasonably foreseeable uses" is consistent with the actual use and the reasonably foreseeable use of the supply, regardless of whether the current owner has demonstrated plans for the use.

(sssss) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.145a(e)(1) to assure the prompt supply of temporary water to all landowners whose water supply has been impacted by underground mining, regardless of whether the water supply is within the area of presumptive liability.

(ttttt) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together



with a timetable for adoption to amend 25 Pa. Code 89.145a(e)(2) to require the restoration of water quantity in temporary water supplies to the same level as permanent water supplies, as noted in 25 Pa. Code 89.145a(f)(3).

(uuuuu) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.145a(f)(1)(v) to make it clear that that de minimis cost increases for operation and maintenance of water supplies are not to be passed to landowners or water users.

(vvvvv) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.145a(f)(3)(i) and (ii), if necessary, to ensure that the phrase "satisfy the water user's needs and the demands of any reasonably foreseeable uses" is consistent with the actual use and the reasonably foreseeable uses.

(wwwww) By February 25, 2002 Pennsylvania must submit either a

proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.146a(c) to the extent the time frames for the Department's investigation are longer than those in Pennsylvania's approved citizen complaint procedures.

(xxxxx) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove 25 Pa. Code 89.152(a)(2).

(yyyyy) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove 25 Pa. Code 89.152a(4).

(zzzzz) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to remove 25 Pa. Code 89.152a(5)(i).

(aaaaa) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of

an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code 89.152a(5)(ii) to remove that portion of the section allowing compensation in lieu of restoration or replacement of affected water supplies. Additionally the amendment must make it clear that agreements to replace a water supply or provide for replacement of an alternate supply of water must meet the requirements established in the federal definition of "replacement of water supply" at 30 CFR 701.5.

(bbbbbb) By February 25, 2002 Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend 25 Pa. Code sections 89.141(d), 89.141(d)(9), 89.142a(a), 89.142a(f)(1), 89.142a(f)(2)(i), 89.142a(h)(1), 89.142a(h)(2), 89.142(a)(i)(1), 89.143a(a), 89.143a(d)(1), 89.143a(d)(2), 89.143a(d)(3), 89.155(b)(1) and (2) and 89.155(c) to be no less stringent than section 720(a) of SMCRA.

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