Federal Register

Monday,
September 22, 2003

Part II

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

Pennsylvania Regulatory Program; Proposed Rules

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–143–FOR]

Pennsylvania Regulatory Program

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

ACTION: Proposed rule; public comment period and notice of public hearing on a proposed action.

SUMMARY: OSM is announcing receipt of a proposed amendment to the Pennsylvania regulatory program (the ''Pennsylvania program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Pennsylvania proposes revisions to its program in response to our final rulemaking of December 27, 2001 (66 FR 67010) regarding mine subsidence control, subsidence damage repair or compensation, and water supply replacement or restoration. In that rulemaking, we required changes to the Pennsylvania program to make it no less effective than the Federal regulations. This amendment addresses those required changes. The specific changes Pennsylvania is proposing to make are detailed below. Pennsylvania has also submitted supplementary information that appears to satisfy some of the required changes without the need of additional regulations or modification to existing regulations or statutes. That information is also detailed below. Pennsylvania intends to revise its program to be consistent with the corresponding Federal regulations and/or SMCRA.

In this proposed rule, we are asking for comments regarding the changes Pennsylvania is proposing to make to its regulations related to the implementation of the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA). In a separate proposed rulemaking, also published today, we are asking for comments on proposed supersession of some of the provisions of BMSLCA. We will be holding public hearings on both the proposal for superseding certain provisions of BMSLCA and Pennsylvania's proposed changes to its regulations, as noted below, on the dates indicated below under DATES. Pennsylvania will also be holding public hearings on its proposed changes to its regulations. In order to accommodate those who wish to speak at both Pennsylvania's and our public hearings, the hearings will be held on the same days and at the same locations, but at different times.

This document gives the times and locations that the Pennsylvania program is available for your inspection, the comment period during which you may submit written comments on this proposed action, and the procedures that we will follow for the public hearings.

DATES: We will accept written comments on this proposal until 4 p.m., e.s.t. October 22, 2003. We will hold public hearings on the proposal on October 15, 2003, at the Best Western University Inn in Indiana, Pennsylvania at 3 p.m. and at 7 p.m. and on October 16, 2003, at the Holiday Inn Meadow Lands in Washington, Pennsylvania at 3 p.m. and at 7 p.m.. We will accept requests to speak at a hearing until 4 p.m., e.s.t. on October 7, 2003.

ADDRESSES: You should mail or hand deliver written comments and requests to speak at the hearing to George Rieger, Acting Field Office Director at the address listed below.

You may review copies of the Pennsylvania program, this proposal, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays.

George Rieger, Acting Director, Harrisburg Field Office, Office of Surface Mining Reclamation and Enforcement, Harrisburg Transportation Center, Third Floor, Suite 3C, 4th and Market Streets, Harrisburg, Pennsylvania 17101, Telephone: (717) 782–4036, E-mail: *grieger@osmre.gov.*

Joseph P. Pizarchik, Director, Bureau of Mining and Reclamation, Pennsylvania Department of Environmental Protection, Rachel Carson State Office Building, PO Box 8461, Harrisburg, Pennsylvania 17105–8461, Telephone: (717) 787–5103.

FOR FURTHER INFORMATION CONTACT: George Rieger, Telephone: (717) 782–4036, E-mail: *grieger@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program
II. Description of the Proposed Action
III. Public Comment Procedures
IV. Procedural Determinations

I. Background on the Pennsylvania Program

Section 503(a) of 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 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 conditions of approval of the Pennsylvania program in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania program and program amendments at 30 CFR 938.11, 938.12, 938.15 and 938.16.

II. Description of the Proposed Action

By letter dated August 27, 2003, (Administrative Record No. PA 841.64) as modified on September 3, 2003 (Administrative Record No. PA 841.65), Pennsylvania sent us a proposed amendment to its program under SMCRA (30 U.S.C. 12501 *et seq.*). Pennsylvania sent the amendment in response to the required program amendments at 30 CFR 938.16(hhhh)—(bbbbbb). We required those amendments in our December 27, 2001, final rule, (66 FR 67010) as a result of our review of Pennsylvania's amendment to the BMSLCA and its implementing regulations regarding repair or compensation for structures and restoration or replacement of water supplies damaged by underground mining operations.

Pennsylvania responded to the required amendments related to its regulations in a pre-submission assistance request dated February 25, 2002 (Administrative Record No. PA 841.49). Pennsylvania noted in the pre-submission assistance request that it was unable to address the required amendments involving changes to the BMSLCA because the Pennsylvania General Assembly is the only State entity with the authority to make statutory changes. While Pennsylvania can recommend changes to the statute it has no control over their adoption or the time frame in which the General Assembly might enact them. Accordingly, in a separate rulemaking located in this same **Federal Register** issue, OSM is proposing to supersede those sections of the BMSLCA that it found to conflict with SMCRA.

OSM reviewed the pre-submission assistance request and submitted its

written comments to Pennsylvania on April 25, 2002 (Administrative Record No. PA 841.54). Pennsylvania and OSM also conducted a series of meetings to discuss the required amendments. Both agencies believed that jointly exploring resolutions to the required amendments would be beneficial in securing any necessary program changes as quickly as possible and eliminate the uncertainty of enforcement of BMSLCA to all affected groups. The amendment that is the subject of this proposed rule reflects the outcome of those meetings. Pennsylvania's proposed amendment that is the subject of this rulemaking includes a summary of each of the required amendments from the December 27, 2001, final rule, a discussion section that reflects the results of the meetings between Pennsylvania and OSM, and Pennsylvania's proposal to resolve each of the required amendments. For organizational purposes, the regulation changes proposed by Pennsylvania and the information submitted in response to the required amendments are presented according to the required amendments at 30 CFR 938.16. Additionally, Pennsylvania is proposing several amendments to Chapters 86 and 89 that we did not specifically require. Pennsylvania contends these amendments are needed to clarify or supplement regulatory provisions that were changed in response to the required amendments. These proposed changes will be noted following the discussion on the required amendments.

Regulation at 30 CFR 938.16(hhhh). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend section 5(b) of the BMSLCA to delete the reference to section 6(a) of the BMSLCA, which no longer exists, and replace it with a reference to 6(b).

Discussion: In the December 27, 2001, final rule, OSM found this incorrect cross-reference in its review of the 1994 amendments to BMSLCA. Section 5(b), which sets forth an operator's obligation to file a bond, references section 6(a) as the site describing the scope, terms and criteria for subsidence bonds. Section 6(a) of the amended statute is a vacant site. The targeted descriptions actually appear in section 6(b). This error resulted from a failure to re-designate section 6(b) to 6(a) during the 1994 amendment process.

In this submission, the Pennsylvania Department of Environmental Protection (PADEP) asserts that the cross reference to section 6(a) is an obvious error. It is PADEP's position that when there is an obvious error in a statute, the principles governing statutory construction in Pennsylvania require that section 5(b) of the BMSLCA be read in conjunction with section 6. *Bloom* v. *Cmwlth., Dept. of Environmental Resources,* 101 Pa. Cmwlth. 8, 515 A.2d 361 (1986). Furthermore, PADEP asserts that section 1932 of the Statutory Construction Act, 1 Pa. C.S.A. section 1932, requires that parts of statutes, which are in *pari materia,* shall be construed together. The parts are in *pari materia* when they relate to the same person or things. Sections 5(b) and 6(b) both relate to the PADEP, applicants and bonding. When construing sections 5(b) and 6 together PADEP argues that it is obvious that the cross-reference in section 5(b) should be to section 6(b) and that section 5(b) can be read as cross-referencing section 6(b) and not 6(a).

PADEP further asserts that in *People United to Save Homes* v. *Department of Environmental Protection,* 1999 EHB 457, *aff'd,* 789 A.2d 319 (Pa. Cmwlth. 2001), the parties litigated the appropriate bond required under the BMSLCA. Neither the Environmental Hearing Board nor the Commonwealth Court had any difficulty with the erroneous cross reference in section 5(b).

Sections 5(b) and 6(b) both impose on Pennsylvania the duty to require the applicant to post a bond or other security. PADEP maintains that the erroneous cross-reference in section 5(b) does not negate the obligation imposed by section 6(b). In summary, Pennsylvania is proposing that this reference does not interfere with its authority to require a bond or make its bonding requirements any less effective than Federal bonding requirements.

PADEP's Proposed Resolution: PADEP proposes that sections 5(b) and 6(b) remain unchanged, as it has satisfied the requirement in 30 CFR 938.16(hhhh).

Regulation at 30 CFR 938.16(iiii). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend section 5.1(a)(1) of the BMSLCA to require the prompt replacement of all water supplies affected by underground mining operations.

Discussion: In the December 27, 2001, final rule, OSM found that neither BMSLCA nor Chapter 89 expressly require operators to achieve permanent restoration or replacement of a water supply in a ''prompt'' manner. Although sections 5.1(a) and (b) include provisions requiring the prompt provision of temporary water, there is no explicit requirement to achieve permanent restoration or replacement in a ''prompt'' manner.

In this submission, PADEP asserts that although section 5.1(a)(1) does not explicitly indicate that permanent restoration or replacement must take place in a prompt manner, it does not bar Pennsylvania from acting to require prompt restoration or replacement. It is PADEP's position that water supply claims should be resolved as quickly as possible. PADEP therefore proposes to resolve this matter by inserting the term ''promptly'' in section 89.145a(b), which sets forth the basic requirement to restore or replace an affected water supply. With this change, PADEP argues that Pennsylvania's water supply replacement requirements will be no less effective than the Federal counterpart requirements in 30 CFR 817.41(j) in regard to the timeliness of permanent restoration or replacement.

PADEP further asserts that it is unnecessary to amend section 5.1(a)(1) to accomplish this change since it is silent on what is timely.

PADEP's Proposed Resolution: PADEP proposes to resolve OSM's concern by amending 25 Pa. Code 89.145a(b), as follows:

89.145a. Water supply replacement: performance standards.

* * * * *

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

* * * * *

Regulation at 30 CFR 938.16(jjjj). Amendment Required by December 27, 2001 ***Federal Register*** *Notice:* OSM directed Pennsylvania to remove section 5.1(b) of the BMSLCA, which establishes a two-year limit on filing water supply damage claims. OSM made a similar finding in 30 CFR 938.16(yyyyy) with regard to the corresponding regulatory requirement in 25 Pa. Code 89.152(a)(4).

Discussion: In the December 27, 2001, final rule, OSM stated that section 5.1(b) provides that a mine operator shall not be liable to restore or replace a water

supply if a claim is made more than two years after the date of impact. OSM further noted that neither SMCRA nor the Federal regulations contain a similar waiver of liability.

In disapproving section 5.1(b) and the corresponding regulation, OSM found that the two-year filing deadline rendered Pennsylvania's water supply replacement requirements less effective than Federal counterpart requirements. OSM reasoned that the filing deadline could result in release from replacement liability for some EPAct water supplies. OSM also expressed concern that the two-year statute of limitations could preclude a citizen suit because the landowner would not know that the PADEP wasn't taking action until the two years had elapsed.

In this submission, PADEP acknowledges that section 5.1(b) provides a statute of limitations that could serve as a basis for releasing an operator of the obligation to replace an affected water supply. As a result, PADEP agrees that OSM must supersede this provision to the extent it is inconsistent with SMCRA. It is PADEP's position that section 5.1(b) be superseded only to remove the statute of limitation as it relates to EPAct water supplies. PADEP concludes that limiting the superseded section as described will serve to satisfy the Federal requirement in 30 CFR 938.16(jjjj), while preserving Pennsylvania law to the maximum extent possible.

In this submission, PADEP also proposes to delete the corresponding provision in 25 Pa. Code 89.152 to the extent it relates to EPAct water supplies.

Proposed Resolution: PADEP proposes to amend 25 Pa. Code 89.152(a) to remove the two-year filing deadline in regard to claims involving EPAct water supplies as follows:

89.152. Water supply replacement: special provisions.

(a) In the case of an EPAct water supply, an operator may not be required to restore or replace the water supply if one of the following has occurred:

(1) The Department has determined that a replacement water supply meeting the criteria in section 89.145a(f) (relating to water supply replacement: performance standards) cannot be developed and 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 determined immediately prior to the time the water supply was affected and the fair market value determined at the time payment is made.

(2) The landowner and operator have entered into a valid voluntary agreement under section 5.3(a)(5) of The Bituminous Mine Subsidence and Land Conservation Act (52 P.S. 1406.5) which does not require restoration or replacement of the water supply and the Department has determined that an adequate replacement water supply could feasibly be developed.

(3) The operator can demonstrate one of the following:

(i) The contamination, diminution or interruption existed prior to the underground mining activities as determined by a premining survey, and the operator's underground mining activities did not worsen the preexisting contamination, diminution or interruption.

(ii) The contamination, diminution or interruption occurred more than three years after underground mining activities occurred.

(iii) The contamination, diminution or interruption occurred as the result of some cause other than the underground mining activities.

(b) In the case of a water supply other than an EPAct water supply, an operator will not be required to restore or replace a water supply if the operator can demonstrate one of the following:

(1) The contamination, diminution or interruption existed prior to the underground mining activities as determined by a premining survey, and the operator's underground mining activities did not worsen the preexisting contamination, diminution or interruption.

(2) The contamination, diminution or interruption is due to underground mining activities which occurred more than 3 years prior to the onset of water supply contamination, diminution or interruption.

(3) The contamination, diminution or interruption occurred as the result of some cause other than the underground mining activities.

(4) The claim for contamination, diminution or interruption of the water supply was made more than 2 years after the water supply was adversely affected by the underground mining activities.

(5) That the operator has done one of the following:

(i) 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 determined immediately prior to the time the water supply was affected and the fair market value determined at the time payment is made.

(ii) The landowner and operator have entered into a valid voluntary agreement under section 5.3 of The Bituminous Mine Subsidence and Land Conservation Act (52 P.S. 1406.5c) which does not require restoration or replacement of the water supply or authorizes a lesser amount of compensation to the landowner than provided by section 5.3(a)(5) of The Bituminous Mine Subsidence and Land Conservation Act.

(c) * * *

In this submission, PADEP indicated that in order for this change to become effective, OSM must set aside the language in section 5.1(b) to the extent this provision would relieve an operator of liability to restore or replace an EPAct water supply. Section 5.1(b) provides that:

* * * * *

(b) A mine operator shall not be liable to restore or replace a water supply under the provisions of this section if a claim of contamination, diminution or interruption is made more than two years after the supply has been adversely affected.

* * * * *

The proposal to supersede section 5.1(b) appears in a separate rulemaking located in this same **Federal Register** issue.

*Regulation at 30 CFR 938.16(kkkk). Amendment Required by December 27, 2001, **Federal Register** Notice:* OSM directed Pennsylvania to remove the clause in section 5.2(b)(2), which acknowledges that water supply claims may exist for periods up to three years prior to PADEP enforcement action. Pennsylvania must also amend its program as necessary to ensure that landowners receive investigation results within 10 days of the date PADEP completes its investigation.

Discussion: In the December 27, 2001, final rule, OSM found two provisions of section 5.2(b)(2) that could potentially interfere with the prompt replacement of water supplies. One provision, which provides examples of compliance orders, includes language suggesting that PADEP could allow a claim to linger for as long as three years before taking an enforcement action. Another provision, describing PADEP responsibilities, allows PADEP as long as 45 days to report the findings of a water supply claim to an affected landowner.

Regarding the three-year period, section 5.2(b)(2) includes descriptions of some of the types of orders PADEP may issue to require compliance with BMSLCA water supply replacement provisions. Among the examples provided are ''orders requiring the provision of a permanent alternate source where the contamination, diminution or interruption does not abate within three years of the date on which the supply was adversely affected.'' OSM interpreted this clause as potentially delaying the issuance of a water supply replacement order for three years. OSM viewed this delay as interfering with the requirement to promptly restore or replace an affected water supply, and, moreover, noted that it exceeded the Federal guideline on establishing permanent water supplies within two years of the date of impact (*see* 60 FR 16727).

As explained in the discussion under 30 CFR 938.16(iiii), PADEP intends to ensure that water supplies are replaced as promptly as possible. To this end, PADEP has committed to amending 25 Pa. Code 89.145a(b) to clarify that the requirement is to ''promptly'' restore or replace the affected water supply. It is PADEP's position that the language in section 5.2(b)(2) does not prevent PADEP from taking action sooner than three years after the date of impact. In this submission, PADEP is asserting that it will not interfere with the general requirement to complete water supply replacement in a prompt manner. PADEP asserts that if anything, this language serves as guidance to PADEP that under no circumstances should permanent restoration or replacement take more than three years.

In this submission, PADEP regards OSM's concern about the ''three-year'' clause in section 5.2(b)(2) as effectively nullified by the proposed changes to 25 Pa. Code 89.145a(b). PADEP contends that there is no need to supersede this section because its primary purpose is to illustrate some of the conditions under which PADEP will issue orders and to describe the types of action PADEP will require.

Regarding the investigation time frames, section 5.2(b)(2) provides that PADEP will commence investigations of claims of water supply impacts within ten days of notification. Within 45 days of notification PADEP is to make a determination of whether mining caused the water supply problems. OSM found that the timeframes described in this section did not meet the Federal guidelines for responding to citizens' complaints. Specifically, section 5.2(b)(2) does not require PADEP to notify a claimant of the findings of investigation within 10 days of completing the investigation. OSM required PADEP to amend its program to ensure that investigation results are provided to claimants in accordance with the time frames specified in 30 CFR 842.12. OSM made a similar finding in 30 CFR 938.16(wwwww) with regard to the implementing regulations at 25 Pa. Code 89.146a(c).

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.146a(c) to require the reporting of investigation results to claimants within 10 days of completing the investigation and maintains that there is no need to amend section 5.2(b)(2).

In this submission, PADEP asserts that the proposed amendment to 25 Pa. Code 89.145a(b), which requires the prompt restoration or replacement of an affected water supply, and Pennsylvania's commitment to ensure prompt restoration or replacement, effectively nullify any concerns regarding the language in section 5.2(b)(2). (*See* proposal under 30 CFR 938.16(iiii) in this section).

PADEP also proposes to amend 25 Pa. Code 89.146a(c) to address OSM's concerns regarding the timely reporting of investigation results to claimants.

PADEP's Proposed Resolution: PADEP proposes to amend 25 Pa. Code 89.145a(b) as described under 30 CFR 938.16(iiii) and to revise 25 Pa. Code 89.146a(c). The revision to 89.146a(c) reads as follows:

89.146a. Water supply replacement: procedure for resolution of water supply damage claims.

* * * * *

(c) If the affected water supply has not been restored or an alternate water supply has not been provided by the operator or if the operator provides and later discontinues an alternate source, the landowner or water supply user may so notify the Department and request that the Department conduct an investigation in accordance with the following procedure:

(1) Within 10 days of notification, the Department will commence an investigation of landowner's or water supply user's claim.

(2) Within 45 days of notification, the Department will make a determination of whether the contamination, diminution or interruption was caused by the operator's underground mining activities. The Department will notify all affected parties of its determination within 10 days of completing the investigation.

(3) If the Department determines that the operator's underground mining activities caused the water supply to be contaminated, diminished or interrupted, the Department will issue any orders that are necessary to assure compliance with The Bituminous Mine Subsidence and Land Conservation Act (52 P.S. sections 1406.1–1406.21) and this chapter.

* * * * *

*Regulation at 30 CFR 938.16(llll). Amendment Required by December 27, 2001, **Federal Register** Notice:* OSM directed Pennsylvania 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. Pennsylvania's regulation at 25 Pa. Code 89.153 included a similar provision for denial of survey access; however, the regulations did not require ''pre-mining baseline data'' as a condition of proof.

Discussion: In this submission, PADEP proposes that OSM does not need to disapprove the statutory language in section 5.2(d) of the BMSLCA. PADEP has reviewed the statutory language at section 5.2(d) and has determined that it will use any and all evidence in cases of water supply impacts and that this section will not interfere with its ability to use any evidence other than ''premining baseline information'' in cases of water supply impacts. In conclusion, PADEP is assuring OSM that the requirements in 25 Pa. Code 89.153 are sufficient to prohibit an operator from refusing to replace an adversely affected supply and from requiring only ''premining baseline data'' as a condition of proof of adverse effect.

Proposed Resolution: PADEP proposes that section 5.2(d) of the BMSLCA remain unchanged based on its interpretation of its statute and regulations and argues that it has satisfied the requirement in 30 CFR 938.16(llll).

*Regulation at 30 CFR 938.16(mmmm). Amendment Required by December 27, 2001, **Federal Register** Notice:* Section 5.2(e)(2) allows a mine operator to seek relief from liability for water supply impacts by affirmatively proving that the impacts occurred more than three years after mining activity. This provision is also reflected in 25 Pa. Code 89.152(a)(2).

In the December 27, 2001, final rule, OSM found that this provision rendered Pennsylvania's water supply replacement requirements less effective than those of the Federal program. Federal law and regulations relating to the replacement of EPAct water supplies do not limit the obligation to replace to any specific time period. OSM further indicated that subsidence can occur any time after mining and, accordingly, that an operator's liability extends indefinitely into the future.

Discussion: During the joint meeting process, OSM noted that its regulations in 30 CFR 700.11 did provide for termination of jurisdiction over mining activities when all aspects of reclamation are observed to be complete or when the reclamation bond is released. OSM acknowledged that following bond release, it would no longer regard the former area of activity as an underground mining operation subject to the requirements of Federal law and regulation. While it is possible for water supply impacts to arise after

this point in time, OSM would not normally reassert jurisdiction unless it found that the decision to terminate jurisdiction was based on fraud, collusion, or misrepresentation of a material fact.

Also during the joint meeting process, OSM and PADEP discussed technical considerations relating to the termination of jurisdiction and release of liability. It was noted that most water supply impacts occur in close association with the time of mining. This relationship is fostered by the basic requirement to either use a mining technique that results in planned subsidence or provide sufficient support to prevent unplanned subsidence (*see* 30 CFR 817.121(a) and 25 Pa. Code 89.142a(a)(4)). PADEP asserts that water supply impacts tend to occur at the time of subsidence or upon the advance of mine workings into or adjacent to water supply aquifers. After workings are completed within an individual section of the mine, they become stable leaving little potential for additional subsidence-related impacts. At that point, the only remaining consideration is the effect of the mine pool that will develop after mine closure. In certain settings, the pool may influence adjacent aquifers causing pollution of water supplies. Impacts of this type occur within a few months to a decade after the closure of the entire mine. OSM's decision to terminate jurisdiction is based on the satisfaction of reclamation standards and not necessarily on the date of pool stabilization. PADEP considers the management of the post closure mine pool as falling within the scope of the term ''underground mining activities'' and bases its decision to release or retain liability on evidence of pool stability.

Following discussions, OSM established three criteria that PADEP must meet in order to demonstrate that Pennsylvania's application of the three-year limit does not result in outcomes that are inconsistent with the Federal regulations. Those criteria are: (1) PADEP must show that its application of the three-year limit will not result in release of liability prior to the time OSM would terminate jurisdiction under the Federal regulations. Federal termination of jurisdiction normally occurs five years after the final augmented seeding, provided the operator demonstrates fulfillment of all reclamation requirements; (2) PADEP must show that it can reassert jurisdiction if a decision to release liability is based on fraud, collusion, or misrepresentation of a material fact; and (3) PADEP must show that the three-year limit does not interfere with a citizen's right to sue as provided under section 520 of SMCRA.

In this submission, PADEP maintains that it addresses OSM's criteria. Regarding the three-year limit vs. Federal termination of jurisdiction, PADEP asserts that Pennsylvania's three-year limit will always result in a longer duration of liability than OSM's termination of jurisdiction rule. Section 5.2(e)(2) and 25 Pa. Code 89.152(a)(2) mark the start of the three-year period at the time of the last ''mining activity'' (a term that PADEP interprets to mean the last aspect of the reclamation). In every case, the last activity completed will be the management of the post closure mine pool, which, as previously noted, is the most likely cause of postmining water supply impacts. PADEP does not start the three-year period until it is convinced that the pool has stabilized. Mine pools typically take several years to a decade to reach a stable elevation and require an additional six months to a year of monitoring to verify stabilization. In the meantime, site reclamation, which is the basis for OSM's decision to terminate jurisdiction, moves forward according to a separate schedule that normally ends in advance of pool stabilization. PADEP assures OSM that its decision to release operator liability will always occur after the Federal termination of jurisdiction because the three-year period will always start at least two years after the final augmented seeding of the reclaimed surface sites. In addition, PADEP is proposing to amend the definition of ''underground mining activities'' to clarify that the term includes management of the post closure mine pool.

Regarding the authority to reassert jurisdiction, PADEP contends that section 5.2(e) clearly provides for PADEP to retain jurisdiction when an operator's defense is based on fraud, collusion, or misrepresentation of a material fact. It requires the operator to provide affirmative proof that the last mining activity occurred more than three years before the time of water supply impact. If PADEP subsequently discovers that the operator's information regarding the three-year period is incorrect, PADEP maintains that it has authority to reject the operator's ''proof'' and deny the operator's defense. Most likely, this would involve PADEP's discovery of impacts from a mine pool that was prematurely reported to be stable. If PADEP found that the pool had continued to rise after the date provided by the mine operator, it would recalculate the three-year period and, if appropriate, reject the operator's defense. PADEP asserts that the provisions of section 5.2(e) actually provide greater authority than those of 30 CFR 700.11 because they allow PADEP to retain jurisdiction until it is satisfied that an operator's assertions are correct and, moreover, jurisdiction is never terminated where an operator's assertions are incorrect regardless of the reason for the error. Consequently, there is not a need for PADEP to reassert jurisdiction. Finally, it is PADEP's position that section 5.2(e) is not a termination of jurisdiction law. Section 5.2(e) establishes the grounds an operator can affirmatively use to be relieved of the obligation to replace a water supply. PADEP asserts that if an operator uses erroneous or fraudulent information the operator has failed to meet the affirmative defense requirements and would still be liable to replace the water supply and termination of jurisdiction is never an issue.

PADEP also proposes that it has authority to deal with the submission of fraudulent information under sections 9 and 17.1 of the BMSLCA. Section 9 provides PADEP general authority to issue ''such orders as are necessary to aid in the enforcement of the provisions of this act.'' Such orders could include orders requiring replacement of water supplies in cases where an operator bases a defense against liability on fraud, collusion, or misrepresentation of a material fact. Section 17.1 defines the submission of false information as unlawful conduct under the act and exposes the person submitting the false information to enforcement proceedings and penalties.

Regarding preservation of citizens' right to sue, the right of citizens to sue for the effects of underground coal mining is described in section 13 of the BMSLCA. This section was significantly modified in 1980 for purposes of obtaining State primacy. The provisions of this section are part of Pennsylvania's approved program and PADEP interprets section 13 as not being affected by the three-year limit described in section 5.2(e)(2).

PADEP's Proposed Resolution: In summary, PADEP asserts that the three-year limit described in section 5.2(e)(2) and 25 Pa. Code 89.152(a)(2) does not render Pennsylvania's water supply replacement provisions any less effective than those of the Federal program. PADEP requests that OSM withdraw the required amendments under 30 CFR 938.16(mmmm) and 938.16(xxxxx) relating to the removal of the three-year liability limit.

PADEP also proposes to amend the definition of ''underground mining activities'' to clarify that the term

includes management of the post closure mine pool. The definition, which appears in 25 Pa. Code 86.1 and 25 Pa. Code 89.5, is proposed to be amended as follows:

Underground mining activities includes the following:

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

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

(iii) Operation of a mine including preparatory work in connection with the opening and reopening of a mine, backfilling, sealing, and other closing procedures, post closure mine pool maintenance and any other work done on land or water in connection with a mine.

* * * * *

Regulation at 30 CFR 938.16(nnnn), (oooo), (qqqq), (rrrr). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM required Pennsylvania to remove provisions in sections 5.2(g) and (h) and 5.3 of BMSLCA which allow an operator to provide compensation in lieu of restoring or replacing an affected water supply.

Discussion: Sections 5.2(g) and (h) and section 5.3 of the BMSLCA include provisions that allow water supply cases to be resolved through compensation rather than replacement of the affected water supply. They allow an operator to seek relief from liability if restoration or replacement cannot be achieved within three years of the date of impact. Compensation under sections 5.2(g) and (h) may take one of three forms: (1) An amount agreed to by the operator and landowner, (2) an amount representing the reduction in fair market value caused by the water loss, or (3) the purchase of the property at its fair market value prior to impact. Section 5.3 provides similar forms of compensation but allows the landowner or water user to take the initiative in seeking financial relief. Section 5.3 also allows the operator and landowner to agree on compensation in lieu of replacement before or after impacts occur.

In the December 27, 2001, final rule, OSM disapproved these provisions of the BMSLCA as well as corresponding regulations in Chapter 89. OSM asserted that neither the EPAct nor the Federal regulations allowed compensation to suffice in lieu of water supply replacement. Moreover, OSM promulgated regulations requiring that in every case within the scope of EPAct, the mine operator had to provide an adequate replacement water supply or, if the landowner waived replacement, demonstrate that an adequate water supply could be developed. OSM stated that Federal law requires that a property has to be provided with an equivalent water supply or the capacity to develop a suitable alternate water supply.

During the joint meeting process, PADEP presented information showing how situations could develop in which an operator was unable to provide a water supply meeting all of the criteria under 25 Pa. Code 89.145a(f) (relating to adequacy of permanently restored or replacement water supplies). PADEP stated that although it closely reviews hydrologic data in permit applications to identify situations where replacement may be difficult or impractical, there are some situations that may be impossible to predict. PADEP further stated that replacement problems, when they arise, normally occur as a result of a combination of factors and conditions that are not evident at the time of permit application. PADEP gave an example of a small residential property with a shallow well, no surface springs, no public water service, and an undetected pollution problem affecting aquifers below the well. It may be assumed that PADEP approved the operator's plan to replace the affected water supply based on the proven success of this approach in the local area and that neither the PADEP nor the operator had knowledge of the localized pollution problem affecting the deeper aquifers beneath the property. In this case, the undetected pollution problem and lack of alternate water sources would combine to prevent the development of an adequate replacement water supply if the shallow well were affected.

PADEP states that it rarely encounters cases where water supplies cannot be replaced. PADEP contends that there are, however, situations like the one in the previous example where various factors could interact to prevent the development of an adequate replacement water supply. Although public water offers a suitable remedy for many problems, it is not available in all locations, particularly rural and remote areas where underground mining operations tend to be located. PADEP asserts that it always evaluates the possibility of extending public water service into areas where affected water supplies cannot be replaced using wells and springs. These determinations include considerations of service areas, water system capacity, distribution design factors and availability of right-of-way for line installation. In the final determination, PADEP proposes that it only considers replacement to be unachievable when the affected property cannot be provided with a well or spring, meeting the criteria in 25 Pa. Code 89.145a(f), or connected to a public water line for reasons of system limitations.

During the joint meeting process, OSM acknowledged that rare cases may exist where the operator cannot develop an adequate replacement water supply. OSM indicated that upon encountering a case where an EPAct water supply cannot be replaced, it would regard the loss of supply as material damage to the dwelling or noncommercial building served by the water supply. Under these circumstances, OSM would require the operator to compensate the landowner for the reduction in fair market value of the structure according to 30 CFR 817.121(c). OSM does not equate these instances to compensation in lieu of water supply replacement.

In the joint meeting process, OSM recognized two conditions under which a water supply claim can result in compensation.

Condition 1: The operator provides a written statement from the landowner indicating that the water supply was not needed for the land use in existence at the time of loss and is not needed to achieve the postmining land use, and demonstrates that a suitable alternative water source could feasibly be developed.

Condition 2: The regulatory authority determines that an equivalent replacement water supply cannot be developed and the mine operator compensates the landowner for the reduction in fair market value of the property.

Under the BMSLCA, PADEP has advised there are several situations that could lead to compensation in lieu of water supply replacement. The first situation is where the water supply can be replaced but the operator and landowner have entered into an agreement pursuant to section 5.3 waiving the provision of a replacement water supply. The second situation is where the water supply cannot be replaced and the operator and landowner have entered into an agreement pursuant to section 5.2(g) or 5.3 waiving the provision of a replacement water supply. The third situation is where the water supply cannot be replaced and the landowner

is unwilling to accept compensation in lieu of a replacement water supply. The fourth situation is where the water supply can be replaced but the operator only offers compensation as the means of settlement.

PADEP contends that the first Pennsylvania scenario is similar to OSM's Condition 1. The landowner signs an agreement that expressly waives the provision of a replacement water source. This equates to ''indicating that the water supply was not needed for the land use in existence at the time of loss and is not needed to achieve the postmining land use.'' The Federal condition also requires the operator to demonstrate ''that a suitable alternative water source could feasibly be developed.'' Under the Pennsylvania program, this demonstration is provided at the time of permit application in accordance with 25 Pa. Code 89.36(c) and is reviewed by PADEP technical staff prior to permit issuance. PADEP states that it does not issue a permit unless it determines that all potentially affected water supplies can be replaced by the methods proposed by the operator. No additional demonstration is required at the time of settlement. In this submission, PADEP proposes that the Pennsylvania program is essentially the same as the Federal program in regard to these types of situations.

PADEP maintains that the second and third Pennsylvania scenarios must be evaluated in terms of OSM Condition 2. In these scenarios, PADEP must first determine that the operator cannot develop an adequate replacement water supply and subsequently determine that the landowner has been fairly compensated in accordance with section 5.2(g) or section 5.3(a)(5). Pennsylvania requirements for adequacy turn on a replacement water supply's capacity to meet the original water supply's premining and reasonably foreseeable uses, while Federal regulations require a replacement water supply to be equivalent to the premining water supply in terms of quality and quantity. Additional explanations of how Pennsylvania's standards for ''adequacy'' are no less effective than Federal standards for ''equivalency'' are provided in the preamble discussion at 66 FR 67012.

PADEP asserts that determinations regarding the development of a replacement water supply are based on several factors, including the replacement methods described in the permit application, the operator's efforts in replacing the water supply, the means of replacing nearby water supplies, the hydrologic resources of the property, the availability of public water and the potential for extending public water to the property. If PADEP determines that the operator cannot develop a replacement water supply meeting the criteria in 25 Pa. Code 89.145a(f), it assists the landowner in obtaining appropriate compensation under section 5.2(g) or 5.3(a)(5). In this submission, PADEP proposes that both of these situations will fall within the guidelines of OSM Condition 2.

In this submission, PADEP proposes that the fourth Pennsylvania scenario does not fall within the scope of OSM Condition 1 or 2. The existing provisions of sections 5.2(g) and (h) limit PADEP's authority to require a replacement water supply when an operator decides to pursue a settlement involving compensation. If PADEP is to have authority to require replacement water supplies in situations where it determines that a replacement water supply meeting the standards in 25 Pa. Code 89.145a(f) can be developed, PADEP asserts that OSM must supersede these provisions to the extent they would interfere with PADEP actions requiring replacement of EPAct water supplies.

In this submission, PADEP proposes that the final aspect of Pennsylvania's program that must be evaluated is whether or not the compensation provided under Pennsylvania's program is equal to that provided under the Federal program (*i.e.*, compensation equal to the reduction in fair market value of the structure). As noted earlier, section 5.2(g) provides for compensation equal to the reduction in fair market value of the property, which is at least equal to the amount required by the Federal program. Subsection (g) also provides an option to purchase the property at its fair market value prior to impact. Subsection (g) also allows compensation pursuant to other types of agreements made between the operator and landowner. Although section 5.2 is silent regarding the amount of compensation required under these agreements, section 5.3 provides the landowner a second chance at securing appropriate compensation if the amount provided under a previous agreement is less than the reduction in fair market value of the property or purchase price of the property prior to impact. Pennsylvania maintains that these provisions act together to ensure that landowners have the opportunity to obtain compensation equal to or greater than the amount provided by the Federal program.

As indicated in the foregoing discussion, PADEP is proposing that Pennsylvania's provisions relating to compensation in lieu of water supply replacement are no less effective than the Federal provisions in most respects. PADEP asserts that both Federal and State regulations allow compensation in cases where replacement is achievable but waived by the landowner and both sets of regulations recognize the existence of conditions where the loss of a water supply can result in compensation. As noted by Pennsylvania, its program does, however, include provisions limiting PADEP's authority to require replacement when an operator opts to pursue compensation without regard to the feasibility or practicality of replacing a water supply. PADEP argues that this inconsistency must be addressed through a partial supersession of various provisions of sections 5.2(g) and (h) to the extent that they would interfere with the replacement of EPAct water supplies and corresponding changes to 25 Pa. Code 89.152(a). With these changes, PADEP is proposing that Pennsylvania's provisions relating to the replacement of EPAct water supplies will be no less effective than those of the Federal regulations.

PADEP's Proposed Resolution: PADEP proposed to address OSM's concerns through amendments to 25 Pa. Code 89.152. The section as proposed to be amended reads:

89.152. Water supply replacement: special provisions.

(a) In the case of an EPAct water supply, an operator may not be required to restore or replace the water supply if one of the following has occurred:

(1) The Department has determined that a replacement water supply meeting the criteria in section 89.145a(f) (relating to water supply replacement: performance standards) cannot be developed and 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 determined immediately prior to the time the water supply was affected and the fair market value determined at the time payment is made.

(2) The landowner and operator have entered into a valid voluntary agreement under section 5.3(a)(5) of The Bituminous Mine Subsidence and Land Conservation Act (52 P.S. 1406.5) which does not require restoration or replacement of the water supply and the Department has determined that an adequate replacement water supply could feasibly be developed.

(3) The operator can demonstrate one of the following:

(i) The contamination, diminution or interruption existed prior to the underground mining activities as determined by a premining survey, and the operator's underground mining activities did not

worsen the preexisting contamination, diminution or interruption.

(ii) The contamination, diminution or interruption occurred more than three years after underground mining activities occurred.

(iii) The contamination, diminution or interruption occurred as the result of some cause other than the underground mining activities.

(b) In the case of a water supply other than an EPAct water supply, an operator will not be required to restore or replace a water supply if the operator can demonstrate one of the following:

(1) The contamination, diminution or interruption existed prior to the underground mining activities as determined by a premining survey, and the operator's underground mining activities did not worsen the preexisting contamination, diminution or interruption.

(2) The contamination, diminution or interruption is due to underground mining activities which occurred more than 3 years prior to the onset of water supply contamination, diminution or interruption.

(3) The contamination, diminution or interruption occurred as the result of some cause other than the underground mining activities.

(4) The claim for contamination, diminution or interruption of the water supply was made more than 2 years after the water supply was adversely affected by the underground mining activities.

(5) That the operator has done one of the following:

(i) 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 determined immediately prior to the time the water supply was affected and the fair market value determined at the time payment is made.

(ii) The landowner and operator have entered into a valid voluntary agreement under section 5.3 of The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. 1406.5c) which does not require restoration or replacement of the water supply or authorizes a lesser amount of compensation to the landowner than provided by section 5.3(a)(5) of The Bituminous Mine Subsidence and Land Conservation Act.

(c) This section does not apply to underground mining activities which are governed by Chapter 87 (relating to surface mining of coal).

* * * * *

In order for this change to become effective, PADEP informed OSM that the language in sections 5.2(g) and (h) of BMSLCA must be superseded. Specifically, PADEP indicated section 5.2(g) must be superseded to the extent that it would remove an operator's liability to restore or replace a water supply covered under section 720 of SMCRA. The proposal to supersede section 5.2(g) to this extent appears in a separate rulemaking in this *Federal Register* issue. Section 5.2(g) provides that:

(g) If an affected water supply is not restored or reestablished or a permanent alternate source is not provided within three years, the mine operator may be relieved of further responsibility by entering into a written agreement providing compensation acceptable to the landowner. If no agreement is reached, the mine operator, at the option of the landowner shall:

(1) Purchase the property for a sum equal to its fair market value immediately prior to the time the water supply was affected; or

(2) Make a one-time payment equal to the difference between the property's fair market value immediately prior to the time the water supply was affected and at the time payment is made; whereupon the mine operator shall be relieved of further obligation regarding contamination, diminution or interruption of an affected water supply under this act. Any measures taken under sections 5.1 and 5.3 and this section to relieve a mine operator of further obligation regarding contamination, diminution or interruption of an affected water supply shall not be deemed to bar a subsequent purchaser of the land on which the affected water supply was located or any water user on such land from invoking rights under this section for contamination, diminution or interruption of a water supply resulting from subsequent mining activity other than that contemplated by the mine plan in effect at the time the original supply was affected.

PADEP also informed OSM that it must also supersede section 5.2(h) of BMSLCA to the extent that it would bar PADEP from requiring the restoration or replacement of a water supply covered under section 720 of SMCRA. OSM's proposal to supersede this section appears in a separate rulemaking in this **Federal Register** issue. Section 5.2(h) provides that:

(h) Prior to entering into an agreement with the mine operator pursuant to subsection (g), the landowner may submit a written request to the department asking that the department review the operator's finding that an affected water supply cannot reasonably be restored or that a permanent alternate source, as described in subsection (i), cannot reasonably be provided. The department shall provide its opinion to the landowner within sixty days of receiving the landowner's request. The department's opinion shall be advisory only, including for purposes of assisting the landowner in selecting the optional compensation authorized under subsection (g). The department's opinion shall not prevent the landowner from entering into an agreement with the mine operator pursuant to subsection (g), and such opinion shall not serve as the basis for any action by the department against the mine operator or create any cause of action in a third party, provided the operator otherwise complies with subsection (g).

Regulation at 30 CFR 938.16(pppp). Amendment Required by *December 27, 2001, **Federal Register** Notice:* OSM directed Pennsylvania to remove the phrase, ''and of reasonable cost'' from subsection 5.2(i) of the BMSLCA. This section provides that a permanent alternate source includes any well, spring, municipal water supply system or other supply approved by PADEP which is adequate in quantity, quality and of reasonable cost to serve the premining uses of the affected water supply.

Discussion: Subsection 5.2(i) requires a permanent alternate water source to be adequate in quantity, quality and of reasonable cost to serve the premining uses of the affected water supply. In the December 27, 2001, rule, OSM stated the following two concerns regarding this provision: (1) The ''reasonable cost'' criterion could be interpreted to limit an operator's obligation to replace an affected water supply based on an operator's assertion that the replacement costs would be unreasonable. The Federal regulations require replacement without regard to cost; and (2) the use of the term ''reasonable costs'' implies that the landowner or water user could incur additional costs associated with the operation and maintenance of the replacement water supply. Federal regulations require the operator to pay operation and maintenance costs that exceed customary and reasonable costs associated with the premining water supply.

Regarding the first concern, OSM's December 27, 2001, final rule viewed the ''reasonable cost'' criterion as potentially setting a limit on the liability of an operator. OSM was concerned that the criterion could be applied to relieve an operator of liability if the cost of replacing an affected water supply is unreasonable. OSM noted that Federal regulations require the replacement of affected water supplies without regard to the cost of replacement.

In response to OSM's concern, PADEP asserts that the reasonable cost criterion in section 5.2(i) refers to a right of the property owner to a restored or replacement water supply that can be operated and maintained at a reasonable cost. It is not applied as a basis for relieving an operator of the liability to restore or replace an affected water supply.

PADEP noted that its position is codified in 25 Pa. Code 89.145a(f), which establishes criteria for determining the adequacy of replacement water supplies. Subsection (f) includes specific criteria relating to the quantity, quality, reliability, maintenance, control and operation costs of replacement water supplies. PADEP maintains that these criteria are clearly intended to ensure the right of a

landowner or water user to an adequate replacement water supply. Moreover, PADEP notes that 25 Pa. Code 89.152, which sets forth conditions for relief of liability, does not mention cost as a relevant factor.

In this submission, PADEP asserts that the reasonable cost criterion in section 5.2(i) does not interfere with the replacement of affected water supplies and does not make Pennsylvania's water supply replacement provisions less effective than Federal counterpart provisions.

Regarding the second concern, OSM indicated that the ''reasonable cost'' criterion could result in landowners or water users incurring operation and maintenance costs in excess of those allowed under the Federal regulations. OSM noted that the Federal definition of the term ''replacement of water supply'' indicates that replacement includes payment of operation and maintenance cost in excess of customary and reasonable delivery costs of premining water supplies. OSM raised similar concerns under 30 CFR 938.16(ddddd) and (uuuuu) in regard to Pennsylvania regulations that relieve operators of the liability to compensate for *de minimis* cost increases.

In this submission, PADEP is proposing amendments to 25 Pa. Code 89.145a(f) to specifically address the operation and maintenance costs of EPAct water supplies. The amendments require that, in the case of an EPAct water supply, the restored or replacement water supply shall cost no more to operate and maintain than the previous water supply. The amendments further provide that any increased costs associated with the operation and maintenance of an EPACT water supply are the responsibility of the mine operator. The amendments also allow an operator to satisfy its responsibility for increased costs by compensating the landowner or water user by a one-time payment in an amount which covers the present worth of the increased annual operations and maintenance cost for a period agreed to by the operator and the landowner or water user. The provisions of proposed paragraph (5)(i) mirror the Federal requirement in regard to the operation and maintenance costs of EPAct water supplies.

The proposed amendments to 25 Pa. Code 89.145a(f) as submitted retain the allowance of a *de minimis* cost increase for replacement water supplies that are outside the scope of the Federal regulations. The retention of this provision preserves Pennsylvania law to the maximum extent possible.

PADEP's Proposed Resolution: PADEP recommends that OSM accept its interpretation that the provision regarding ''reasonable cost'' in section 5.2(i) of the BMSLCA, as applied through the regulations and through the proposed changes to 25 Pa. Code 89.145a(f), does not render the Pennsylvania water supply replacement requirements less effective than the Federal counterpart requirements. Proposed amendments to 25 Pa. Code 89.145a(f) are shown in the response to 30 CFR 938.16(uuuuu).

Regulation at 30 CFR 938.16(ssss). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to make it clear that section 5.3(c) of the BMSLCA, relating to other remedies under State law, cannot negate or provide less protection than EPAct.

Discussion: Section 5.3(c) of the BMSLCA provides that nothing in the act shall prevent a landowner who claims water supply problems from seeking any other remedy that may be provided in law or equity. It goes on to indicate that in any proceedings in pursuit of a remedy other than the BMSLCA, the provisions of the Act shall not apply and the operator may assert in defense any rights or waivers from deeds, leases or agreements pertaining to mining rights or coal ownership.

In the December 27, 2001, final rule, OSM interpreted this section to mean that if a landowner sought out legal protections apart from the BMSLCA, then he would lose the protection of the BMSLCA. Section 5.3(c) was not approved to the extent that any State law negates or provides less protection than EPAct.

In this submission, PADEP has advised OSM that it interprets section 5.3(c) to allow a landowner or water user who claims contamination, diminution or interruption of a water supply to seek any other remedy that may be provided under law or in equity. PADEP further assures OSM that the landowner has full rights under the BMSLCA while seeking remedies under other laws and that this interpretation does not diminish the protections provided by EPAct.

PADEP's Proposed Resolution: PADEP proposes that section 5.3(c) of the BMSLCA remain unchanged because it has satisfied the requirement in 30 CFR 938.16(ssss).

Regulation at 30 CFR 938.16(tttt). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend section 5.4 of the BMSLCA to require prompt repairs or compensation in cases involving damage to EPAct structures (*i.e.*, noncommercial buildings, dwellings and structures related thereto).

Discussion: In the December 27, 2001, final rule, OSM found that SMCRA at section 720(a)(1) and the Federal regulations at 30 CFR 817.121(c)(2) require the prompt repair of structural damage or the payment of compensation to owners of non-commercial buildings or occupied residential dwellings. OSM found that while Pennsylvania did require the repair of, or compensation for damage to, these structures, there was no standard requiring that such repairs or compensation be performed promptly. OSM required Pennsylvania to amend section 5.4 of the BMSLCA (52 P.S. 1406.5d) to require prompt repair and compensation for structures protected under section 720(a)(1) of SMCRA and 30 CFR 817.121(c)(2). OSM made a similar requirement at 30 CFR 938.16(kkkkk) with regard to the implementing regulations at 25 Pa. Code 89.142a(f)(1).

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.142a(f)(1) to incorporate a requirement for prompt repair or compensation with the understanding that prompt means as soon as practicable. PADEP maintains that this will make Pennsylvania's requirements for repair and compensation of structure damage no less effective than Federal counterpart requirements in regard to timeliness of actions.

Because the BMSLCA is silent on the ''prompt'' standard, PADEP maintains that the aforementioned regulation change will be sufficient to meet the Federal ''prompt'' standard. PADEP does not believe that existing statutory language is conflicting with or diminishing the authority of the revised regulatory standard. Accordingly, PADEP asserts that there is no need to amend section 5.4 of the BMSLCA.

PADEP's Proposed Resolution: PADEP proposes to amend 25 Pa. Code 89.142a(f)(1). The amended language reads.

89.142a. Subsidence control: performance standards.

* * * * *

(f) Repair of damage to structures.

(1) Repair or compensation for damage to certain structures. Whenever underground mining operations conducted on or after August 21, 1994, cause damage to any of the structures listed in subparagraphs (i)—(v), the operator responsible for extracting the coal shall promptly and fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the provisions of 25 Pa. Code 89.144a (relating to subsidence control: relief

from responsibility) relieves the operator of responsibility.

* * * * *

In this submission, PADEP proposes that section 5.4 of the BMSLCA remain unchanged, as it has satisfied the requirement in 30 CFR 938.16(tttt).

Regulation at 30 CFR 938.16(uuuu). Amendment Required by December 27, 2001 ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend section 5.4(a)(3) of the BMSLCA 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.''

Discussion: Section 5.4(a)(3) of the BMSLCA refers to repair or compensation for damage to improvements that are related to dwellings. In describing the scope of these requirements, subsection (a)(3) limits repair and compensation liability to improvements that are ''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.'' In the December 27, 2001, final rule, OSM found that this qualification could potentially exclude improvements covered by Federal repair and compensation requirements. The Federal regulations cover all improvements that fall within the scope of the term ''occupied residential dwelling and structures related thereto'' as long as they are in place at the time of mining.

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.142a(f)(1)(iii) to remove the special conditions that govern the coverage of improvements related to dwellings used for human habitation. With the removal of these special qualifications, PADEP asserts that paragraph (f)(iii) will provide repair or compensation remedies for all improvements that are related to dwellings used for human habitation and in place at the time of mining. PADEP maintains that this will make the scope of Pennsylvania's repair and compensation provisions as inclusive as the Federal provisions, which address all ''occupied residential dwellings and structures related thereto.''

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.142a(f)(1)(iii) as follows:

89.142a. Subsidence control: performance standards.

* * * * *

(f) Repair of damage to structures.

(1) Repair or compensation for damage to certain structures. Whenever underground mining operations conducted on or after August 21, 1994, cause damage to any of the structures listed in subparagraphs (i)–(v), the operator responsible for extracting the coal shall promptly and fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the provisions of 25 Pa. Code 89.144a (relating to subsidence control: relief from responsibility) relieves the operator of responsibility.

* * * * *

(iii) Dwellings which are used for human habitation and permanently affixed appurtenant structures or improvements. In the context of this paragraph, the phrase permanently affixed appurtenant structures and improvements includes, but is not limited to, structures adjunct to or used in conjunction with dwellings, such as garages; storage sheds and barns; greenhouses and related buildings; customer-owned utilities and cables; fences and other enclosures; retaining walls; paved or improved patios; walks and driveways; septic sewage treatment facilities; inground swimming pools; and lot drainage and lawn and garden irrigation systems.

* * * * *

PADEP contends that in order for this change to become effective, OSM must supersede the corresponding language in section 5.4(a)(3) of the BMSLCA which serves as the basis for the existing restrictions. The proposal to supersede this section appears in a separate rulemaking in this **Federal Register** issue.

Regulation at 30 CFR 938.16(vvvv). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to remove section 5.4(c) of the BMSLCA, which waives an operator's liability for damage repair and compensation in cases where landowners deny access for premining or postmining surveys.

OSM made a similar requirement in 30 CFR 938.16(ppppp) with regard to 25 Pa. Code 89.144a (relating to subsidence control: release of liability).

Discussion: Section 5.4(c) provides that:

> A mine operator shall not be liable to repair or compensate for subsidence damage if the mine operator, upon request, is denied access to the property upon which the building is located to conduct premining and postmining surveys of the building and the surrounding property and thereafter serves notice upon the landowner by certified mail or personal service, which notice identifies the rights established by section 5.5 and 5.6 and this section, the mine operator was denied access and the landowner failed to provide or authorize access within ten days after receipt thereof.

In the December 27, 2001, final rule, OSM stated that section 5.4(c) provides a release of liability that is not provided in the Federal regulations. OSM found that this would prevent the owner of an EPAct structure from receiving repairs or compensation required by 30 CFR 817.121(c)(4)(iii). Accordingly, OSM directed PADEP to remove subsection (c) to eliminate this relief as it pertains to EPAct structures.

In this submission, PADEP stated that it regards premining survey data as important to determining where liability should begin and end. PADEP maintains that a landowner's denial of access would deprive the operator and the regulatory agency of the information needed to accurately determine the extent of subsidence damage. PADEP asserts that section 5.4(c) serves as an incentive for the landowner to provide access for the performance of surveys. PADEP regards this provision as merely conditioning a landowner's rights in a reasonable manner.

PADEP also notes that it is unaware of any case where repair or compensation was refused on the basis of section 5.4(c), but acknowledged that it could not ensure that cases would not arise in the future.

To address OSM's concerns, PADEP proposes in this submission to amend 25 Pa. Code 89.144a to provide that the release of liability may not occur if the affected structure is an EPAct structure and the damage can be shown by a preponderance of evidence to be the result of underground mining operations. It is PADEP's position that this approach preserves some incentive for landowners to allow access for premining and postmining surveys. PADEP maintains that it also serves to ensure that damages to EPAct structures will be repaired if PADEP or the landowner can show through a reasonable amount of evidence that the damage resulted from underground mining operations. Finally, it retains the release of liability in cases involving non-EPAct structures, thereby preserving, to the extent possible, the provisions of existing Pennsylvania law governing structures not covered by the Federal law.

PADEP asserts that with these changes, Pennsylvania's program will be no less effective than the Federal program in regard to repair or compensation for damage to EPAct structures. The release provided by revised 25 Pa. Code 89.144a will only apply in cases involving EPAct structures where neither PADEP nor the

landowner can prove the damage resulted from underground mining operations, and in cases involving non-EPAct structures.

PADEP further argues that it can only pursue the proposed amendments to 25 Pa. Code 89.144a if OSM supersedes section 5.4(c) of BMSLCA to the extent that it applies to EPAct structures.

PADEP's Proposed Resolution: In this submission, PADEP proposes to address this issue by revising parts of 25 Pa. Code 89.144a. The revised subsections now read:

89.144a. Subsidence control: relief from responsibility.

(a) Except as provided in (b), the operator will not be required to repair a structure or compensate a structure owner for damage to structures identified in 25 Pa. Code 89.142a(f)(1) (relating to subsidence control: performance standards) if the operator demonstrates to the Department's satisfaction one or more of the following apply:

(1) The landowner denied the operator access to the property upon which the structure is located to conduct a premining survey or a postmining survey of the structure and surrounding property, and thereafter the operator served notice upon the landowner by certified mail or personal service. The operator shall demonstrate the following:

* * * * *

(b) The relief in paragraph (a)(1) shall not apply in the case of an EPAct structure if the landowner or the Department can show, by a preponderance of evidence, that the damage resulted from the operator's underground mining operations.

PADEP asserts that in order for this change to become effective, OSM must supersede section 5.4(c) of the BMSLCA to the extent that it would relieve an operator of the liability to repair or compensate for damage to an EPAct structure. The proposal to supersede this section appears in a separate rulemaking in this **Federal Register** issue.

*Regulation at 30 CFR 938.16(wwww). Amendment Required by December 27, 2001, **Federal Register** Notice:* OSM directed Pennsylvania to amend section 5.5(a) of the BMSLCA to make it clear that operators are responsible for repair or compensation in all cases where EPAct structures are damaged by subsidence from ''underground mining operations.''

OSM made a similar requirement at 30 CFR 938.16(bbbbbb) with regard to the implementing regulations at 25 Pa. Code 89.143a(a).

Discussion: In the December 27, 2001, final rule, OSM observed that the duty to repair or compensate in section 5.5(a) is predicated on the condition that damage resulted from ''underground mining.'' OSM noted that section 720(a) of SMCRA applies to all damages resulting from ''underground coal mining operations''—a broad term, which OSM defines to include underground construction, operation and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage and blasting. OSM further observed that Pennsylvania defines the term ''underground mining'' in its regulations to include only the extraction of coal. OSM interpreted the language of section 5.5(a) in combination with Pennsylvania's regulatory definition of the term ''underground mining'' as potentially limiting the conditions under which an operator would be liable to repair or compensate for damage to EPACT structures.

In this submission, PADEP proposes to address OSM's concern by revising 25 Pa. Code 89.143a(a) to incorporate the term ''underground mining operations,'' a term that is defined in the regulations at 25 Pa. Code 89.5, in a manner consistent with the term ''underground mining operations'' as used in SMCRA. PADEP notes that the terms ''underground mining'' and ''underground mining operations'' are not defined in BMSLCA and are not used in a manner that construes any distinct differences in meaning. As a result, PADEP is proposing that this issue can be effectively addressed by simply changing the regulation.

PADEP asserts that the proposed amendment to § 89.143a.(a) will make Pennsylvania's program no less effective than the Federal program in regard to the types of activities that trigger liability for damage to EPACT structures. PADEP further asserts that it is unnecessary to make any changes to section 5.5(a) of the BMSLCA.

In this submission, PADEP is asserting that the proposed amendment to 25 Pa. Code 89.143a(a) will make Pennsylvania's program no less effective than the Federal program in regard to the types of activities that trigger liability for damage to EPAct structures. PADEP further asserts that it is unnecessary to make any changes to section 5.5(a) of the BMSLCA.

Proposed Resolution: In this submission, Pennsylvania proposes to revise 25 Pa. Code 89.143a(a) and (d) by adding the word ''operations.'' The revised subsections read as follows:

(**Note:** The other changes to this section are discussed elsewhere in this proposed rule.)

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

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

(b) If the operator agrees that mine subsidence damaged the structure, the operator shall fully repair the damage or compensate the owner for the damage in accordance with either 25 Pa. Code 89.142a(f) or a voluntary agreement between the parties authorized by section 5.6 of The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. Section 1406.5f).

(c) If the parties are unable to agree as to the cause of the damage or the reasonable cost of repair or compensation for the structure, the owner of the structure may file a claim in writing with the Department. The owner of a structure that is not an EPAct structure must file the claim within two years of the date the structure was damaged.

(d) Upon receipt of the claim, the Department will send a copy of the claim to the operator and conduct an investigation in accordance with the following procedure:

(1) Within 30 days of receipt of the claim, the Department will conduct an investigation to determine whether underground mining operations caused the subsidence damage to the structure and provide the results of its investigation to the property owner and mine operator within 10 days of completing the investigation.

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

(3) If the Department finds that the operator's underground mining operations caused the damage to the structure, the Department will either issue a written order directing the operator to promptly compensate the structure owner or issue an order directing the operator to promptly repair the damaged structure. The Department may extend the time for compliance with the order if the Department finds that further damage may occur to the same structure as a result of additional subsidence.

*Regulation at 30 CFR 938.16(xxxx). Amendment Required by December 27, 2001 **Federal Register** Notice:* OSM directed Pennsylvania to remove section 5.5(b) of the BMSLCA which describes procedures for the resolution of structure damage claims. Section 5.5(b) provides a six-month negotiation period prior to intervention of the regulatory agency. It also establishes a two-year period for filing subsidence damage claims. OSM made a similar requirement at 30 CFR 938.16(nnnnn) with regard to the implementing regulations at 25 Pa. Code 89.143a(c).

Discussion: Section 5.5(b) provides that:

* * * * *

(b) If the parties are unable to agree within six months of the date of notice as to the cause of the damage or the reasonable cost of repair or compensation, the owner of the building may file a claim in writing with the Department of Environmental Resources, a copy of which shall be sent to the operator. All claims under this subsection shall be filed within two years of the date damage to the building occurred.

* * * * *

In the December 27, 2001, final rule, OSM had two concerns regarding this section of the BMSLCA. OSM was concerned that the provision of a six-month negotiation period could delay PADEP enforcement action and result in repair or compensation that is not ''prompt.'' OSM was also concerned that the requirement to file a claim within two years of the date of damage could function as a statute of limitations depriving landowners who missed the filing deadline of the right to repair or compensation. OSM stated that EPAct requires operators to promptly provide repair or compensation and does not require landowners to file damage claims in any specified time frame.

Regarding the six-month negotiation period, PADEP asserts in this submission that it has the authority to take enforcement action, when appropriate, prior to the expiration of the six-month negotiation period. According to PADEP, section 9 of the BMSLCA gives PADEP broad authority to issue orders ''as are necessary to aid in the enforcement of the provisions of [the BMSLCA].'' PADEP states that in most cases, enforcement actions prior to the expiration of the six-month period will focus on requirements for emergency temporary repair measures because subsidence will not be complete.

PADEP notes in this submission that, under Pennsylvania's program, all concerned parties receive timely notification of the occurrence of structure damage. The PADEP surface subsidence agents will learn of the damage through field observations and communications with the property owner. The operator will learn of the damage through reports from its field agent, the landowner or the PADEP agent. Section 25 Pa. Code 89.142a(k) also requires the operator to file a report of the claim to PADEP within 10 days of being advised of a damage incident. PADEP maintains that this system of overlapping notifications serves to ensure that the landowner, operator and PADEP receive timely information regarding the occurrence and nature of damage.

In regard to OSM's second concern about the obligation to file a claim within two years, PADEP asserts that it does not interpret the two-year claim filing period in section 5.5(b) as a statute of limitations. However, PADEP acknowledges it cannot ensure that, in the event of an appeal, a court would not interpret this provision as a statute of limitations. Consequently, PADEP agrees that OSM must supersede this provision to the extent it is inconsistent with the Federal regulations. PADEP asserts that OSM should only supersede the statute of limitation as it relates to EPACT structures. A limited supersession will serve to satisfy the Federal requirement in 30 CFR 938.16(xxxx), while preserving Pennsylvania law to the maximum extent possible. The proposal to supersede section 5.5(b) appears in a separate rulemaking in this **Federal Register** issue.

In this submission, PADEP proposes to address OSM's concerns through amendments to 25 Pa. Code 89.143a(c). Under the proposal, language referring to the six-month negotiation period will be deleted. In addition, the regulation will be restructured so that the requirement to file a claim within two years of damage does not apply in cases involving EPAct structures. These changes will ensure that Pennsylvania provisions relating to the filing of structure damage claims are not inconsistent with Federal requirements.

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.143a(c). The proposed language reads:

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

* * * * *

(c) If the parties are unable to agree as to the cause of the damage or the reasonable cost of repair or compensation for the structure, the owner of the structure may file a claim in writing with the Department. The owner of a structure that is not an EPAct structure must file the claim within two years of the date the structure was damaged.

* * * * *

Regulation at 30 CFR 938.16(yyyy). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend section 5.5(c) to remove the following phrase relating to timeframes for enforcement orders, ''* * * 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.'' (OSM made a similar requirement in 30 CFR 938.16(ooooo) with regard to the implementing regulations at 25 Pa. Code 89.143a(d)).

OSM further required Pennsylvania to ensure that written damage determinations made by PADEP will take into account subsidence due to ''underground coal mining operations'' as required by SMCRA. OSM made a similar requirement at 30 CFR 938.16(bbbbbb) with regard to the implementing regulations at 25 Pa. Code 89.143a(d)(1)–(3).

Finally, OSM required Pennsylvania to insure the timeframes for investigation of claims of subsidence damage are consistent with Federal procedures for response to citizen complaints.

Discussion: Regarding the time frames in enforcement orders, section 5.5(c) of BMSLCA provides that PADEP shall make an investigation of a damage claim within 30 days following receipt of the claim. Within 60 days following the investigation, PADEP shall determine whether subsidence caused the damage and the reasonable cost of repairing or replacing the damaged structure. PADEP must issue a written order directing the operator to compensate or cause repairs to be made within six months. The six months can be extended if PADEP finds that subsidence may continue or subsequent damage may occur to the same building as a result of mining.

In the December 27, 2001, final rule, OSM was concerned that the reference to the six-month timeframe could be construed as a basis for incorporating six-month compliance periods in all PADEP orders. OSM stated that this could interfere with the requirement to promptly repair or compensate in situations where resolutions could be practically achieved in less than six months.

In response to OSM's concern, PADEP asserts in this submission, that the specified time period for compliance is ''within six months'' and not ''six months,'' per se. It is PADEP's interpretation that this language does not prohibit PADEP from writing orders that require repair or compensation in less than six months. To affirm this interpretation, PADEP proposes to amend 25 Pa. Code 89.143a(d)(3) to remove the reference to the six-month period and add provisions relating to the prompt performance of actions required by enforcement orders. PADEP can extend the time for repair or compensation when it finds that subsidence may continue or subsequent damage may occur to the same building as a result of mining.

PADEP proposes that these changes will make Pennsylvania's enforcement requirements no less effective than those required under the Federal program. In addition, PADEP maintains that these changes can be implemented

without amending the statutory language in section 5.5(c).

Regarding the issue relating to underground mining operations, OSM stated that section 5.5(c) conditions the issuance of enforcement orders upon a finding that damage was due to ''underground coal mining.'' OSM further determined that the Federal regulations require repair or compensation for all damages caused by ''underground mining operations''—a term that is more expansive than ''underground coal mining.'' On this basis, OSM found that section 5.5(c) might limit PADEP's authority to write enforcement orders for repair or compensation that would be required under the Federal program.

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.143a(d)(1)–(3) to replace the term ''underground mining'' with ''underground mining operations.'' PADEP contends that this will make Pennsylvania's repair and compensation requirements no less effective than Federal requirements in regard to the type of mining activities that trigger liability.

PADEP further asserts that there is no need to amend the language in section 5.5(c) to accomplish this change. The term ''underground coal mining'' is not defined in BMSLCA and according to PADEP, there is no consistent usage of the terms ''mining,'' ''underground mining'' or ''underground mining operations'' that would suggest any specific differences in the meaning of these terms.

Regarding the issue of citizen complaint time frames, OSM also determined that the investigation time frames in section 5.5(c) do not require PADEP to inform the claimant of the results of its investigation within 10 days of completing the investigation. OSM found this to be inconsistent with Federal requirements on responding to citizens' complaints.

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.143a(d)(1) to add a requirement regarding claimant notification. Under the proposed amendment, PADEP would be required to notify the claimant and the mine operator of its findings within 10 days of completing its investigation. PADEP contends that this provision makes Pennsylvania's complaint response time frames no less effective than those of the Federal program.

Finally, PADEP maintains that the proposed regulation change can be made without amending section 5.5(c) of the BMSLCA.

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.143a(d). The amended subsection reads as follows:

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

* * * * *

(d) Upon receipt of the claim, the Department will send a copy of the claim to the operator and conduct an investigation in accordance with the following procedure:

(1) Within 30 days of receipt of the claim, the Department will conduct an investigation to determine whether underground mining operations caused the subsidence damage to the structure and provide the results of its investigation to the property owner and mine operator within 10 days of completing the investigation.

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

(3) If the Department finds that the operator's underground mining operations caused the damage to the structure, the Department will either issue a written order directing the operator to promptly compensate the structure owner or issue an order directing the operator to promptly repair the damaged structure. The Department may extend the time for compliance with the order if the Department finds that further damage may occur to the same structure as a result of additional subsidence.

* * * * *

Regulation at 30 CFR 938.16(zzzz). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to remove the following phrase from section 5.5(f) of the BMSLCA, ''* * * within six months or such longer period as the department has established or shall fail to perfect an appeal of the department's order directing such repair or compensation, * * *''

Discussion: Section 5.5(f) provides that if a mine operator fails to repair or compensate for subsidence damage within six months or longer period or fails to perfect an appeal of PADEP's order requiring repair or compensation, PADEP shall issue the orders necessary to compel compliance. If the operator fails to repair or compensate after exhausting its right of appeal, PADEP shall pay the escrow deposit required by section 5.5(e) to the owner of the damaged building.

In disapproving the specific language, OSM found that the portion of section 5.5(f) allowing six months or longer to pass before Pennsylvania takes an enforcement action is less effective than the Federal regulation at 30 CFR 843.12(c), which requires abatement of violations within 90 days. As stated in the finding for 5.5(c), an operator's failure to promptly repair or compensate for subsidence damage is a violation that must be abated within 90 days. As a separate issue, OSM also disapproved language in section 5.5(f) that deals with perfecting an appeal of the PADEP's orders. OSM stated that the phrase prevents Pennsylvania from issuing a cessation order if an operator files an appeal, thus acting as a stay and that the 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.

In this submission, PADEP proposes to address OSM's required amendment through changes in 25 Pa. Code 89.143a(d) and by proposing that the effect of the escrow provision on staying the issuance of further orders by PADEP is no less effective than Federal regulations at 30 CFR part 843. PADEP asserts that the proposed changes and additional information eliminate any need to revise section 5.5(f) of BMSLCA.

Regarding the issue of the six-month compliance periods in enforcement orders, PADEP proposes to address OSM's concern regarding the length of the compliance period through a change in regulations. PADEP notes that section 5.5(c) uses the phrase ''within six months'' to describe the time frame in which the operator is expected to comply. PADEP asserts that this phrase can be interpreted to require compliance in less than six months in situations where it is reasonable to expect resolution within a shorter time frame. PADEP states that it clearly has authority to require repair or compensation within the 90-day period specified by OSM, since 90 days clearly falls ''within six months'' of the date an order is issued.

PADEP's position is that repair or compensation should be provided as promptly as possible based on site-specific considerations. PADEP argues that the most significant part of the determination turns on when PADEP considers subsidence to be complete. PADEP maintains that premature repair or compensation does little to minimize inconvenience to the property owner and, in some cases, may lead to more severe damage.

Based on its position, PADEP proposes to amend 25 Pa. Code 89.143a(d) to accomplish three objectives. One is to clarify PADEP's intent to require ''prompt'' compliance. The second is to condition time extensions for abatement on PADEP determinations that additional

subsidence is expected to occur. The final objective is to remove all references to ''six month'' compliance periods thereby eliminating any confusion and potential conflicts.

The proposal involves the deletion of references to ''the six-month period'' mentioned in section 5.5(c) and the addition of a requirement for ''prompt'' compliance. PADEP contends that these proposed changes will address the required amendments and eliminate any need to revise section 5.5(c) of BMSLCA. PADEP notes that the section of the regulations that most closely resembles the portion of the statute that OSM required to be deleted is 25 Pa. Code 89.143a(d)(3). [*See* discussion under 30 CFR 938.16(yyyy) for information on the disposition of 25 Pa. Code 89.143a(d).]

Regarding the issue of stays of enforcement orders, PADEP is not proposing any change in response to OSM's concern that a perfected appeal could stay additional enforcement action because it is PADEP's position that the effect of a perfected appeal is the same as a compensation remedy provided under the Federal regulations. Section 5.5(e) requires that a mine operator must ''deposit an amount equal to the cost of repair or the compensation amount ordered by the Department into an interest-bearing escrow account'' in order to perfect its appeal. Furthermore, the operator must post the escrow within 60 days of receiving the order. PADEP asserts that the deposit of the escrow constitutes the provision of compensation because the funds needed to repair the damage have been secured from the operator.

PADEP also maintains that the escrow required to perfect an appeal will always be equal to or greater than the amount of compensation required under 30 CFR 817.121(c)(2). In accordance with section 5.5(e), PADEP notes that the required escrow must be sufficient to cover all damage up to the replacement value of the structure and, if required by PADEP, temporary relocation costs and other reasonable incidental expenses incurred by the landowner.

In summary, PADEP asserts that the escrow provisions of sections 5.5(e) and (f) constitute a compensation remedy that is no less effective than that of the Federal regulations because it meets or exceeds Federal requirements regarding timeliness and the amount of compensation. Accordingly, PADEP argues that any stay of further enforcement action is of no consequence.

PADEP's Proposed Resolution: In this submission, PADEP proposes to revise 25 Pa. Code 89.143a(d)(3). The proposed language reads as follows:

> 89.143a. Subsidence control: procedure for resolution of subsidence damage claims.
>
> * * * * *
>
> (d) Upon receipt of the claim, the Department will send a copy of the claim to the operator and conduct an investigation in accordance with the following procedure:
>
> * * * * *
>
> (3) If the Department finds that the operator's underground mining operations caused the damage to the structure, the Department will either issue a written order directing the operator to promptly compensate the structure owner or issue an order directing the operator to promptly repair the damaged structure. The Department may extend the time for compliance with the order if the Department finds that further damage may occur to the same structure as a result of additional subsidence.
>
> * * * * *

In this submission, PADEP proposes that OSM accept the above revisions to 25 Pa. Code 89.143a(d)(3), and that the above demonstration that the escrow provision at section 5.5(f) is no less effective than the Federal enforcement requirements at 30 CFR part 843.

Regulation at 30 CFR 938.16(aaaaa). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM required Pennsylvania to amend section 5.6(c) to remove provisions relating to agreements executed between April 27, 1966, and August 21, 1994.

Discussion: Section 5.6(c) of BMSLCA 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.

The last two sentences of this section protect the terms and conditions of agreements executed under former section 4 of BMSLCA, which was effective from April 27, 1966, until August 21, 1994. Section 4 was repealed by Act 54 of 1994, but while in effect, required the absolute protection of dwellings and certain other structures in place on April 27, 1966. Section 4 allowed operators and landowners to enter into agreements consenting to damage of dwellings and other protected structures if the landowner was fully compensated for resultant damage. In the December 27, 2001, final rule, OSM stated that these agreements could negate an operator's liability to repair or compensate for damage to EPAct structures or provide a landowner with less compensation than would be due under EPAct. Federal regulations do not waive an operator's liability to repair or compensate for damage based on the provisions of agreements executed prior to the effective date of EPAct. Based on these concerns, OSM directed Pennsylvania to remove the last two sentences of section 5.6(c).

In this submission, PADEP asserts that the provisions under section 5.6(c), which recognize the terms and conditions of section 4 agreements, are no longer a cause for concern. This assertion is based on the following two considerations: (1) The absence of any agreements for post-1966 structures—Because post-1966 structures had no protection from subsidence damage until Act 54, it is highly unlikely there are any agreements providing for repair or compensation, and (2) Agreement under former section 4 provided for full compensation or repairs. Because pre-1966 dwellings were completely protected, post-1966 agreements for those 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.

PADEP stated that it has not encountered any case where repairs or compensation were denied on the basis of an agreement executed under former section 4. Furthermore, neither industry nor citizens' interests have come forth with any pertinent information regarding these agreements or their effect, despite specific inquiries by PADEP and OSM.

At this time, PADEP contends that these agreements no longer play a role in the settlement of structure damage cases in Pennsylvania and asserts that there is no need to amend section 5.6(c) of BMSLCA.

PADEP's Proposed Resolution: In this submission, PADEP proposes that the provisions relating to agreements entered into after April 27, 1966, and prior to the effective date of section 5.6, be retained pending the receipt of information showing that these provisions result in remedies that are less effective than those provided under EPAct. At this time, we are requesting information from the public regarding the existence of these agreements. If you know that agreements such as these

exist, please provide them to us during the comment period.

Regulation at 30 CFR 938.16(bbbbb): Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to ensure that the provisions of section 5.6(d) reflect OSM's decision in regard to 30 CFR 938.16(aaaaa).

Discussion: In the December 27, 2001, final rule, OSM stated that section 5.6(d) includes a reference to the ''pre-1994'' agreements mentioned in 5.6(c). Since OSM's earlier decision was to require removal of provisions recognizing these agreements (*see* 30 CFR 938.16(aaaaa)), it had directed Pennsylvania to amend section 5.6(d) as well.

As explained in the discussion under 30 CFR 938.16(aaaaa), PADEP maintains that these agreements no longer play a role in the settlement of subsidence damage claims and asserts that there is no need to remove the clause in 5.6(c), which recognizes the terms and conditions of ''pre-1994'' agreements. PADEP maintains that there is no need to change section 5.6(d).

PADEP's Proposed Resolution: In this submission, PADEP proposes that the provision regarding agreements entered into after April 27, 1966, and prior to the effective date of this section be retained pending the receipt of information showing that this provision results in remedies that are less effective than those provided under EPAct.

Regulation at 30 CFR 938.16(ccccc). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend section 6 of the BMSLCA 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.

Discussion: In the December 27, 2001, final rule, OSM's required amendment was based upon the Federal regulation at 30 CFR 817.121(c)(5) that requires permittees to obtain additional bond for repairs or compensation for subsidence damage or restoration or replacement of water supplies if such remedies are not completed within 90 days. The 90-day period can be extended up to one year if the regulatory authority finds that subsidence is not complete and that not all damage has occurred. During the review of Act 54 and the implementing regulations, OSM stated that there was no provision in the Pennsylvania program to increase bonds for subsidence damage and that the bonds that were in place did not cover replacement or restoration of water supplies.

In this submission, PADEP asserts that the current Pennsylvania program is no less effective than the Federal requirements relative to bonding for subsidence damage to structures and land. This position is based upon the way the PADEP addresses bonding for underground mining operations as a result of a court decision; *People United to Save Homes* v. *Department of Environmental Protection*, 1999 EHB 457, *aff'd*, 789 A.2d 319 (Pa. Cmwlth. 2001)) (PUSH decision).

More specifically, 25 Pa. Code 86.150 provides that the minimum amount of bond for bituminous coal mining activities is to be $10,000. Until the PUSH decision, PADEP had been requiring this amount for all underground mining activities. In the PUSH decision, the Environmental Hearing Board found this amount was only to be a minimum, not a uniform figure to be applied across-the-board with every underground mining permit. The Environmental Hearing Board also held that existing factors in 25 Pa. Code 86.149 were to be used in determining the amount of subsidence bond. As a result, PADEP began setting bond amounts based on site-specific conditions. The subsidence bond calculation procedures include the value of land, improvements, and developed water sources and projections of subsidence damage. The bonds are recalculated each time the permit is renewed and each time there is a change in the subsidence control plan area. In addition, Pennsylvania proposes to amend 25 Pa. Code 86.152(a) to change discretionary bond adjustments to mandatory adjustments. The PADEP requirements are supported by guidance dated August 1, 2000, ''Procedures for Calculating Mine Subsidence Bonds,'' and 25 Pa. Code 86.149 (relating to determination of bond amounts).

Although BMSLCA does not contain a specific provision directing PADEP to require bonds to ensure the replacement of affected water supplies, PADEP asserts that it can apply the provisions of 25 Pa. Code 86.168 (relating to terms and conditions for liability insurance) to accomplish the same objective. Section 86.168(c) requires a permittee to have a liability insurance policy. The regulation requires the policy to include coverage for loss or diminution of quantity or quality of public or private sources of water. The liability insurance policy requirement is a minimum $500,000 per occurrence and $1 million aggregate. Also, 25 Pa. Code 86.168(g) provides that a bond or individual insurance policy for each permit may be provided in lieu of liability insurance to cover replacement or restoration of water supplies. PADEP conducts reviews of permittee insurance policies both at the time of permit issuance and yearly to ensure that there is coverage for the replacement of water supplies that may be damaged and in need of replacement at any point during the mining operation. PADEP also notes that OSM has approved insurance as an acceptable means of addressing damages in at least one other State program.

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 86.152 as follows:

86.152. Bond adjustments.

(a) The amount of bond required and the terms of the acceptance of the applicant's bond will be adjusted by the Department from time to time as the area requiring bond coverage is increased or decreased, or where the cost of future reclamation changes, or where the projected subsidence damage repair liability changes. The Department may specify periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement. This requirement shall only be binding upon the permittee and does not compel a third party, including surety companies, to provide additional bond coverage and does not extend the coverage of a subsidence bond beyond the requirements imposed by sections 5, 5.4, 5.5, and 5.6 of the Bituminous Mine Subsidence and Land Conservation Act.

* * * * *

In this submission, PADEP further proposes that OSM accept the insurance requirements imposed by 25 Pa. Code 86.168(c) as being as effective as the Federal requirements relating to bonding for water supply replacement.

Regulation at 30 CFR 938.16(ddddd). Amendment Required by December 27, 2001 ***Federal Register*** *Notice:* OSM directed Pennsylvania to remove the definition of ''*de minimis* cost increase,'' which appears in 25 Pa. Code 89.5 (relating to definitions).

Discussion: Pennsylvania's regulations incorporate the concept of a *de minimis* cost increase to define a lower threshold below which operators will not be required to compensate for the increased cost of operating and maintaining a replacement water supply. The term is defined in 25 Pa. Code 89.5 and applied in former section 25 Pa. Code 89.145a(f)(1) (now under 89.145a(f)(5)). The term is defined to mean a cost increase that meets one of the following criteria:

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

(ii) Is less than $60 per year.

In the December 27, 2001, final rule, OSM disapproved the definition of ''*de minimis* cost increase,'' which appears

in 25 Pa. Code 89.5. OSM reasoned that this definition in combination with the performance standard in 25 Pa. Code 89.145a(f)(1) would allow some increased costs associated with the operation and maintenance of a replacement water supply to be passed along to the landowner or water user. OSM noted that a 15% increase or $60 increase could be excessive depending on the costs of operating and maintaining the original water supply. OSM explained that the intent of the Federal regulation is to ensure 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).

During the joint meeting process, PADEP explained that the purpose of the *de minimis* concept was to define a threshold below which it is impossible to tell whether a replacement water supply was more costly to operate and maintain than the original supply. PADEP noted that cost calculations are based on a number of variables and cannot be determined to the exact dollar. The thresholds described in 25 Pa. Code 89.5 represented PADEP's best estimate of where to draw the line and were based on decisions issued by Pennsylvania courts. OSM, however, reiterated its concern that the definition included specific amounts that may or may not be *de minimis* depending on the specific facts of a case.

To resolve this issue, PADEP has decided to amend its regulations so that the provisions relating to *de minimis* cost increases will not apply to EPAct water supplies. The definition and concept will be retained for restored or replacement water supplies that are outside the scope of the Federal regulations. Additional explanations and details regarding PADEP's proposed regulatory amendment are provided under 30 CFR 938.16(pppp) and (uuuuu).

Proposed Resolution: PADEP proposes to retain the definition and concept of a *de minimis* cost increase for application in cases that are outside the scope of the Federal regulations. The performance standard in 25 Pa. Code 89.145a(f) will be amended to clarify that the term does not apply in cases involving EPAct water supplies. Proposed amendments to 25 Pa. Code 89.145a(f) are shown in the response to 30 CFR 938.16(uuuuu).

Regulation at 30 CFR 938.16(eeeee). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to delete the definition of ''fair market value'' from 25 Pa. Code 89.5.

Discussion: The requirement to delete the term fair market value and its associated definition was based on OSM's disapproval of Pennsylvania statutory and regulatory provisions that allow compensation in lieu of water supply replacement. The term ''fair market value'' is used in sections 5.2 and 5.3 of the BMSLCA and 25 Pa. Code 89.152 to establish standards for compensation in cases where affected water supplies cannot be replaced.

In this submission, PADEP asserts that the term fair market value and its associated definition are needed to establish standards for adequate compensation and to conform to Federal requirements relating to situations where water supplies cannot be replaced. As indicated in the discussion under 30 CFR 938.16(nnnn), (oooo), qqqq) and (rrrr), OSM would regard the inability to replace an EPACT water supply as material damage to the property served by the affected water supply and would require the operator to compensate the landowner for the reduction in fair market value. The Department has proposed amendments to 25 Pa. Code 89.152(a)(5) to provide an equivalent remedy for these situations. Section 89.152(a)(5) also uses the term fair market value in describing the required amount of compensation. The term fair market value is needed to demonstrate that Pennsylvania's standard of compensation is no less effective than the Federal standard. PADEP asserts that the definition of ''fair market value'' should be retained.

Proposed Resolution: PADEP is proposing that this explanation satisfies the required amendment in 30 CFR 938.16(eeeee) and that the definition of ''fair market value'' be retained in 25 Pa. Code 89.5.

Regulation at 30 CFR 938.16(fffff). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to remove the phrase ''securely attached to the land surface'' in the definition of ''permanently affixed appurtenant structures'' in 25 Pa. Code 89.5.

Discussion: In the December 27, 2001, final rule, OSM 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.'' OSM viewed this requirement as a qualification that could potentially exclude some EPAct structures from repair or compensation under Pennsylvania's program.

To address OSM's required amendment, PADEP proposes to amend its regulations to delete the requirement for secure attachment to the land surface for the group of ''permanently affixed appurtenant structures'' that falls within the scope of the Federal regulations. This change will be accomplished by deleting the term and definition in 25 Pa. Code 89.5 and by adding a description to 25 Pa. Code 89.142a(f)(1)(iii). The description in amended 25 Pa. Code 89.142a(f)(1)(iii) is derived from the Federal definition of ''occupied residential dwelling and structures related thereto'' and is intended to include all ''permanently affixed appurtenant structures'' that qualify as EPACT structures. The proposed description does not require secure attachment to the land surface as a qualification for inclusion.

PADEP also proposes to identify a second group of permanently affixed appurtenant structures that are addressed solely under the BMSLCA. Structures in this group derive eligibility for repair and compensation provisions based on their relationship to buildings that are accessible to the public. This group of permanently affixed appurtenant structures is described in 25 Pa. Code 89.142a(f)(1)(i). The proposed description includes that same structure types identified in 25 Pa. Code 89.142a(f)(1)(iii), but retains the requirement for attachment to the land surface. The proposed change preserves an aspect of Pennsylvania's program, which is outside the scope of the Federal regulations.

In this submission, PADEP asserts that the proposed changes will ensure that Pennsylvania's subsidence damage repair and compensation provisions apply to all structures that fall within the scope of the Federal term ''occupied residential dwelling and structures related thereto.'' PADEP proposes that this will satisfy the requirement in 30 CFR 938.16(fffff).

PADEP's Proposed Resolution: In this submission, PADEP is proposing to delete the term ''permanently affixed appurtenant structures'' and its associated definition from 25 Pa. Code 89.5.

PADEP is also proposing to amend 25 Pa. Code 89.142a(f)(1)(i) and (iii) to distinguish between appurtenant structures covered by EPAct and other appurtenant structures covered

exclusively by BMSLCA. The proposed changes are as follows:

89.142a. Subsidence control: performance standards.

* * * * *

(f) Repair of damage to structures.

(1) Repair or compensation for damage to certain structures. Whenever underground mining operations conducted on or after August 21, 1994, cause damage to any of the structures listed in subparagraphs (i)–(v), the operator responsible for extracting the coal shall promptly and fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the provisions of section 89.144a (relating to subsidence control: relief from responsibility) relieves the operator of responsibility.

(i) Buildings that are accessible to the public including, but not limited to, commercial, industrial and recreational buildings and all structures that are securely attached to the land surface and adjunct to or used in conjunction with these buildings, including, garages; storage sheds and barns; greenhouses and related buildings; customer-owned utilities and cables; fences and other enclosures; retaining walls; paved or improved patios; walks and driveways; septic sewage treatment facilities; inground swimming pools, and lot drainage and lawn and garden irrigation systems.

* * * * *

(iii) Dwellings which are used for human habitation and permanently affixed appurtenant structures or improvements. In the context of this paragraph, the phrase permanently affixed appurtenant structures and improvements includes, but is not limited to, structures adjunct to or used in conjunction with dwellings, such as but not limited to, garages; storage sheds and barns; greenhouses and related buildings; customer-owned utilities and cables; fences and other enclosures; retaining walls; paved or improved patios; walks and driveways; septic sewage treatment facilities; inground swimming pools, and lot drainage and lawn and garden irrigation systems.

* * * * *

Regulation at 30 CFR 938.16(ggggg). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.141(d)(3) to expand its requirement that subsidence control plans include descriptions of the measures to be taken to prevent material damage to dwellings and related structures and noncommercial buildings when mining methods do not result in planned subsidence.

Discussion: Section 89.141(d)(3) requires descriptions of measures to be taken to ensure that subsidence will not cause material damage to, or reduce the reasonably foreseeable uses of, public buildings and facilities, churches, schools, hospitals, impoundments with storage capacities of 20 acre-feet or more, bodies of water with volumes of 20 acre-feet or more, and bodies of water and aquifers that serve as significant sources to public water supply systems. It also lists various measures that may be used to comply with this requirement. Section 89.141(d)(3) reflects the provisions of section 9.1(c) of the BMSLCA and is the State counterpart to 30 CFR 817.121(d).

In the December 27, 2001, final rule, OSM stated that this subsection requires that, for each structure and feature, or class of structures and features, described in 25 Pa. Code 89.142a(c) (which includes public buildings and facilities, churches, schools, 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, OSM noted that 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), PADEP must amend its program to provide the protection of 30 CFR 784.20(b)(5).

In this submission, PADEP proposes extensive changes to 25 Pa. Code 89.141(d) and 25 Pa. Code 89.142a(d) to address OSM's concern and to more clearly distinguish between requirements pertaining to mining that results in planned subsidence versus mining that does not result in planned subsidence. The proposed amendments establish different approaches to protecting noncommercial buildings, dwellings and related structures (EPAct structures) depending on the type of mining an operator plans to use. If plans involve mining that does not result in planned subsidence, an operator must take measures to prevent subsidence that would cause material damage to EPAct structures. If plans involve mining that is projected to result in planned subsidence, an operator must develop his plans around alternate measures, which are described in the discussion under 30 CFR 938.16(hhhhh).

The proposed amendments also include an editorial change relating to descriptions of measures for protecting public buildings and facilities, churches, schools, hospitals, impoundments with storage capacities of 20 acre-feet or more, bodies of water with volume of 20 acre-ft or more, and aquifers and bodies of water that serve as significant sources to public water supply systems. The amendment deletes the partial list of measures in existing 25 Pa. Code 89.141(d)(3). This change ensures that applicants will consider the full list of measures in 25 Pa. Code 89.142a(c) when preparing plans for mining beneath or adjacent to these structures.

During the joint meeting process, PADEP noted that there is an inconsistency in the Federal regulations at 30 CFR 784.20 with respect to preventing material damage when using methods of mining that do not result in planned subsidence. In describing the contents of subsidence control plans, 30 CFR 784.20(a)(5) indicates that the standard is to ''prevent or minimize'' damage. By contrast, 30 CFR 817.121 (relating to subsidence control performance standards) indicates the standard is to ''prevent'' damage. OSM advised that the requirement to prevent material damage when using methods that do not result in planned subsidence is based on section 516 of SMCRA, which uses the term ''prevent'' and requested that PADEP use this standard in amending its regulations.

PADEP's Proposed Resolution: In this submission, PADEP proposes to address OSM's concerns through amendments to 25 Pa. Code 89.141(d)(3) and 25 Pa. Code 89.142a(d). Proposed changes are as follows:

89.141. Subsidence control: application requirements.

* * * * *

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

* * * * *

(3) For each structure and feature, or class of structures and features, described in 25 Pa. Code 89.142a(c) (relating to subsidence control: performance standards), a detailed description of the measures to be taken to ensure that subsidence will not cause

material damage to, or reduce the reasonably foreseeable uses of the structures or features.

(4) A description of the anticipated effects of planned subsidence, if any.

(5) A description of the measures to be taken to correct any subsidence-related material damage to the surface land.

(6) A description of the measures to be taken to prevent irreparable 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.

(7) 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 or reduce or correct damage in accordance with 89.142a(e) and (f).

(8) A description of the measures to be taken to maximize mine stability and maintain the value and reasonably foreseeable use of the surface land.

(9) For EPAct structures other than noncommercial buildings protected under 89.142a(c), a description of the methods to be employed in areas of planned subsidence to minimize damage or otherwise comply with the requirements of 89.142a(d)(1)(i).

(10) For EPAct structures other than noncommercial buildings protected under 89.142a(c), a description of the subsidence control measures to be taken in accordance with 89.142a(d)(1)(ii) to prevent subsidence and subsidence-related damage in areas where underground mining operations are not projected to result in planned subsidence.

(Paragraphs 11 and 12 will be renumbered.)

89.142a. Subsidence control: performance standards.

* * * * *

(d) Protection of certain EPAct structures and agricultural structures.

(1) For EPAct structures other than noncommercial buildings protected under subsection (c):

(i) If an operator employs mining technology that provides for planned subsidence in a predictable and controlled manner, the operator shall take necessary and prudent measures, consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to the structure, except where one of the following applies:

(A) The structure owner has consented, in writing, to allow material damage.

(B) The costs of such measures would exceed the anticipated cost of repairs and the anticipated damage will not constitute a threat to health or safety.

(ii) If an operator employs mining technology that does not result in planned subsidence in a predictable and controlled manner, the operator shall adopt measures consistent with known technology to prevent subsidence and subsidence-related damage to the extent technologically and economically feasible to the structure. Measures may include, but are not limited to:

(A) Backstowing or backfilling of voids.

(B) Leaving support pillars of coal.

(C) Leaving areas in which no coal is removed, including a description of the overlying area to be protected by leaving coal in place.

(D) Taking measures on the surface to prevent or minimize material damage or diminution in value of the surface.

(E) Other measures approved by the Department.

* * * * *

(3) Nothing in paragraphs (1) or (2) shall be construed to prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

* * * * *

Regulation at 30 CFR 938.16(hhhhh). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.141(d)(6) to require subsidence control plans to include descriptions of the measures to be taken to minimize material damage to dwellings and related structures and noncommercial buildings when mining methods are projected to result in planned subsidence.

Discussion: Section 25 Pa. Code 89.141(d)(6) requires a description of the measures to be taken to prevent irreparable damage to structures enumerated in 25 Pa. Code 89.142a(f)(1)(iii)–(v) (*i.e.*, occupied residential dwellings and related structures and certain agricultural structures). In the December 27, 2001, final rule, OSM found that while this regulation addresses situations where irreparable damage is predicted, it does not address situations where EPAct structures may suffer material damage. OSM noted that 30 CFR 784.20(b)(5) and (7) require descriptions of measures to prevent or minimize material damage to EPAct structures depending on the type of proposed mining. OSM further stated that the required protection is not provided in other parts of Pennsylvania law or regulation.

To address this difference, OSM directed PADEP to amend 25 Pa. Code 89.141(d)(6) to incorporate the Federal requirements in 30 CFR 784.20(b)(5) and (7). Paragraph (b)(5) requires a description of the measures to be taken to prevent subsidence damage to EPAct structures in situations where mining will not result in planned subsidence. Paragraph (b)(7) requires, with certain exceptions, a description of the measures to be taken to minimize damage to EPAct structures in situations where mining is projected to result in planned subsidence.

In response to OSM's concern, PADEP has proposed extensive amendments to 25 Pa. Code 89.141(d) and 25 Pa. Code 89.142a(d). These changes, which are also discussed under 30 CFR 938.16(ggggg), require subsidence control plans to include descriptions of the measures to be taken when planned subsidence is projected to result in material damage to an EPAct structure. The measures, which are described in 25 Pa. Code 89.142a(d), include taking measures to minimize damage to the extent technologically and economically feasible; obtaining the landowner's consent to allow damage; and evaluating the need for damage minimization measures based on cost, health and safety considerations.

PADEP's Proposed Resolution: In this submission, PADEP is proposing amendments to 25 Pa. Code 89.141(d) and 89.142a(d) that will make Pennsylvania's requirements no less effective than Federal requirements in regard to the protection of EPAct structures. These amendments are presented in the proposed resolution to 30 CFR 938.16(ggggg). PADEP maintains that the proposed amendments will satisfy the required amendment at 30 CFR 938.16(hhhhh).

Regulation at 30 CFR 938.16(iiiii). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.142a(c)(3) (regarding public buildings and facilities, churches, schools, hospitals, impoundments with a storage capacities of 20 acre-feet or more, bodies of water with volumes of 20 acre-feet or more, and aquifers or bodies of water that serve as significant sources for public water supply systems) 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 provides the authority to suspend mining until such a plan is approved.

Discussion: Subsection 89.142a(c)(3) states that if the measures implemented by the operator cause material damage to or reduce the reasonably foreseeable use of structures or features listed in paragraph (1), PADEP will impose additional measures to minimize the potential for these effects. In the December 27, 2001, final rule, OSM indicated that 30 CFR 817.121(e) imposes on the regulatory authority the obligation to require a permittee to modify its subsidence control plan to ensure the prevention of further material damage in the cases where the initial plan or the operator's actions fail. In addition, 30 CFR 817.121(e) provides the authority to suspend mining until such a plan is approved. Pennsylvania did not establish that the regulations at 25 Pa. Code 89.142a(c)(3) allow it the discretion to suspend mining until the operator's subsidence control plan ensures the prevention of further

material damage. OSM concluded by indicating that Pennsylvania's regulation merely requires additional measures to minimize the effects, but does not give Pennsylvania the option to stop the mining until it reviews the additional measures and determines that the measures will minimize the effects.

In this submission, PADEP proposes to amend 25 Pa. Code 89.142a(c)(3) to incorporate the provisions requested by OSM. PADEP asserts that these changes will make Pennsylvania's program as effective as the Federal program in dealing with situations where approved measures fail to prevent material damage or reduce the reasonably foreseeable use of public buildings and facilities, churches, schools, hospitals, impoundments with a storage capacities of 20 acre-feet or more, bodies of water with volumes of 20 acre-feet or more, and aquifers or bodies of water that serve as significant sources for public water supply systems. PADEP also notes that the structures or features addressed by this regulation are the same as those addressed by 30 CFR 817.121(d) and (e). PADEP maintains that no changes to the BMSLCA are necessary to accommodate this regulation change.

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.142a(c)(3) in the following manner.

89.142a. Subsidence control: performance standards.

* * * * *

(c) Restrictions on underground mining.

* * * * *

(3) If the measures implemented by the operator cause material damage or reduce the reasonably foreseeable use of the structures or features listed in paragraph (1), the Department may suspend mining under or adjacent to these structures or features until the subsidence control plan is modified to ensure prevention of further material damage to these facilities or features.

Regulation at 30 CFR 938.16(jjjjj). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.142a(d) to ensure the prevention of material damage to occupied residential dwellings and community or institutional buildings (*i.e.*, EPAct structures) in areas where mining is not projected to result in planned subsidence.

Discussion: Subsection 89.142a(d) provides that if a proposed mining technique or extraction ratio will result in irreparable damage to certain structures (dwellings, barns, silos, and permanently affixed agricultural structures greater than 500 sq. ft. in area), the operator may not use the technique or extraction ratio unless the building owner, prior to mining, consents to the mining or the operator takes measures to minimize or reduce impacts resulting from subsidence. In the December 27, 2001, final rule, OSM found that the Federal regulations do not provide for an irreparable damage standard and while the provisions of 25 Pa. Code 89.142a(d) are no less effective than the Federal regulations regarding structures in danger of being irreparably damaged, the requirements are less effective in regard to structures that may be materially damaged because it provides no protection for those structures.

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.142a(d) to require the prevention of material damage in cases where operators use mining methods that are not projected to result in planned subsidence. PADEP asserts that this will make Pennsylvania's regulations no less effective than the Federal regulations in regard to the protection of EPAct structures.

PADEP's Proposed Resolution: In this submission, PADEP is proposing amendments to 25 Pa. Code 89.142a(d) that it maintains will address the requirement in 30 CFR 938.16(jjjjj). These changes are described in the response to 30 CFR 938.16(ggggg).

Regulation at 30 CFR 938.16(kkkkk). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.142a(f)(1) to secure prompt repair or compensation to landowners. OSM made a similar requirement at 938.16(tttt) in regard to section 5.4 of the BMSLCA.

Discussion: See discussion under 30 CFR 938.16(tttt) in regard to section 5.4 of the BMSLCA.

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.142a(f)(1) as shown under 30 CFR 938.16(tttt). PADEP maintains that these proposed changes will also satisfy the requirement in 30 CFR 938.16(kkkkk).

Regulation at 30 CFR 938.16(lllll). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend section 25 Pa. Code 89.142a(f)(1)(iii) 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.''

Discussion: This section is similar to section 5.4(a)(3) of the BMSLCA. *See* discussion under 30 CFR 938.16(uuuu).

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.142a(f)(1)(iii) as shown in the proposed resolution to 30 CFR 938.16(uuuu). PADEP asserts that this will also satisfy the required amendment at 30 CFR 938.16(llllll). In order for this change to become effective, PADEP contends that OSM must supersede the language in section 5.4(a)(3) of BMSLCA which serves as a basis for this qualification. The rule proposing to supersede this portion of BMSLCA is located elsewhere in this **Federal Register** issue.

Regulation at 30 CFR 938.16(mmmmm). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.142a(g)(1) to require that all underground mining activities be conducted in a manner consistent with 30 CFR 817.180.

Discussion: Section 89.142a(g)(1) protects utilities from adverse effects caused by ''underground mining.'' In the December 27, 2001, final rule, OSM observed that ''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. In the December 27, 2001, final rule, OSM found that the Federal rule is more inclusive of the activities that must be conducted in a manner that minimizes damage, destruction or disruption in services.

In response to the required amendment, PADEP is proposing to revise 25 Pa. Code 89.142a(g)(1) to replace the term ''underground mining'' with ''underground mining operations.'' PADEP maintains that this change, in combination with the protections already provided under existing 25 Pa. Code 89.67 (relating to support facilities), defines a scope of coverage equivalent to that in 30 CFR 817.180.

The proposal to replace the term ''underground mining'' with ''underground mining operations'' will extend the scope of 25 Pa. Code 89.142a(g)(1) to include effects arising from any activities that take place in the subsurface parts of an underground mine. The term ''underground mining operations,'' which is defined in 25 Pa. Code 89.5, includes underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining, hauling, storage and blasting. The term effectively

captures all activities included in paragraph (b) of the Federal definition of ''underground mining activities'' in 30 CFR 701.5.

In this submission, Pennsylvania indicated that its existing regulation at 25 Pa. Code 89.67(b) sets forth utility protection requirements that apply to activities at surface sites used in connection with underground mines. Section 89.67(b) uses the term ''surface mining activities'' to describe the range of activities that fall within the scope of utility protection requirements. The term ''surface mining activities'' is defined in § 86.1 to include all surface activity connected with underground mining. This, in effect, includes all activities that fall within the scope of paragraph (a) of the Federal definition of ''underground mining activities.''

Together, Pennsylvania maintains that the provisions of existing 25 Pa. Code 89.67(b) and the provisions of proposed 25 Pa. Code 89.142a(g)(1) cover all activities included within the scope of the Federal term ''underground mining activities.'' In addition, both 25 Pa. Code 89.67(b) and 89.142a(g)(1) require an operator to conduct activities in a manner that minimizes damage, destruction or disruption in services provided by oil, gas and water wells; oil, gas and coal slurry pipelines; railroads; electric and telephone lines; and water and sewerage lines which pass under, over, or through the permit area, unless otherwise approved by the owner of the facilities and the Department. Pennsylvania maintains that the protection provided by 25 Pa. Code 89.67(b) and 89.142a(g) is therefore as effective as that provided by 30 CFR 817.180.

In this submission, PADEP asserts that the requirement in 30 CFR 938.16(mmmmm) can be fully satisfied by amending § 89.142a(g)(1) to make protection requirements applicable to all ''underground mining operations.''

PADEP's Proposed Resolution: In this submission, PADEP proposes that we accept the following proposed changes to 25 Pa. Code 89.142a(g)(1) as fulfilling the requirement in 30 CFR 938.16(mmmmm).

89.142a. Subsidence control: performance standards.

* * * * *

(g) Protection of utilities.

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

* * * * *

Regulation at 30 CFR 938.16(nnnnn). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania 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.'' OSM made a similar requirement at 30 CFR 938.16(xxxx) with regard to section 5.5(b) of the BMSLCA.

Discussion: See discussion and proposed resolution under 30 CFR 938.16(xxxx), including proposed amendments to 25 Pa. Code 89.143a(c).

PADEP's Proposed Resolution: See PADEP's proposed regulatory amendment and OSM supersession action described under 30 CFR 938.16(xxxx). PADEP maintains that these changes satisfy the required amendment at 30 CFR 938.16(nnnnn).

Regulation at 30 CFR 938.16(ooooo). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania 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.'' OSM made a similar requirement at 30 CFR 938.16(yyyy) with regard to section 5.5(c) of the BMSLCA.

Discussion: See discussion under 30 CFR 938.16(yyyy).

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.143a(d)(3) as shown under 30 CFR 938.16(yyyy). PADEP asserts that this satisfies the required amendment at 30 CFR 938.16(ooooo).

Regulation at 30 CFR 938.16(ppppp). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to remove 25 Pa. Code 89.144(a)(1), which provides a waiver of liability that is inconsistent with Federal regulations.

Discussion: This is the same issue that was raised under 30 CFR 938.16(vvvv) in regard to section 5.4(c) of BMSLCA. In this submission, PADEP agreed to restrict this waiver so it cannot be raised in cases involving EPAct structures.

PADEP's Proposed Resolution: See proposed regulatory amendment and OSM supersession described under 30 CFR 938.16(vvvv). PADEP asserts that this satisfies the required amendment under OSM Rule 30 CFR 938.16(ppppp).

Regulation at 30 CFR 938.16(qqqqq). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.145a(a)(1) to address three concerns regarding the performance of premining water supply surveys.

Discussion: Section 25 Pa. Code 89.145a(a)(1) establishes requirements relating to the performance of premining water supply surveys. In the December 27, 2001, final rule, OSM had three concerns regarding the requirements of this section: (1) It provides that survey information must only be obtained to the extent that it can be collected without extraordinary efforts or the expenditure of excessive sums of money; (2) It allows premining surveys to be delayed until mining advances within 1,000 feet of a water supply; and (3) It does not indicate how Pennsylvania's premining survey requirements comply with 30 CFR 784.20(a)(3) relating to the submission of survey results for all EPAct water supplies at the time of permit application.

Regarding limitations on collection of premining survey information, OSM observed that 25 Pa. Code 89.145a(a)(1) provides that survey information is required only to the extent that it can be collected without extraordinary efforts or expenditures of excessive sums of money. OSM further observed that the Federal regulations require the collection of survey information without regard to the level of effort or expense involved in obtaining the information. Based on its analysis, OSM directed PADEP to amend 25 Pa. Code 89.145a(a)(1) to clarify that the requirement to collect survey information to the extent that collection can be accomplished without extraordinary efforts or expenditures of excessive sums of money, is only applicable when it applies to inconveniencing landowners.

In this submission, PADEP proposes to address OSM's requirement by amending 25 Pa. Code 89.145a(a)(1) to replace the condition relating to ''extraordinary efforts or excessive sums of money'' with a condition relation to ''excessive inconvenience to the landowner.'' Under the amended regulation, an operator would be required to collect all survey information listed in subparagraphs (i)–(v) to the extent that collection could be accomplished without excessive inconvenience to a property owner. The proposed amendment would relieve an

operator of the obligation to collect information that would clearly result in an excessive inconvenience to a landowner. An example of an excessive inconvenience would be the need to demolish part of a dwelling to access a well for water level measurement. Lesser inconveniences, such as the need to pump a well for several hours or the need to disconnect treatment systems for purposes of quality sampling, would not normally qualify as excessive.

Regarding the concern on use of the 1,000-foot distance parameter, OSM disapproved the provision allowing mining to advance to within 1,000 feet of a water supply before the completion of the premining survey. OSM reasoned that mining-related effects could occur at distances greater than 1,000 feet and that delaying surveys to the time mining advances to within the 1,000-foot distance could result in data that does not accurately reflect premining conditions.

In this submission, PADEP also proposes to address OSM's concern by amending 25 Pa. Code 89.145a(a)(1) to remove the 1,000-foot criterion and clarify the requirement to collect premining survey information prior to the time a water supply is susceptible to mining-related effects. The determination of when surveys must be completed will be determined by PADEP technical staff based on information in the permit application, PADEP database information relating to the distances at which impacts have been documented to occur, and the reviewer's knowledge of conditions in the general area. Sampling distances specific to each mine and, if appropriate, to individual areas within a mine, will be established by permit condition.

Regarding the concern relating to delayed premining surveys, OSM also directed PADEP to demonstrate that Pennsylvania's premining survey requirements were in compliance with its guidance regarding delayed water supply surveys. This guidance was issued in a memorandum to the Regional Directors dated February 9, 1998, titled ''Timing of Presubsidence Surveys,'' and in March 9, 1999, letters to IMCC and Tri-State Citizens Mining Network (March 1999 letters). It provided that baseline data collected at the time of permit application must be sufficient to develop the probable hydrologic impact determination (PHC) and cumulative hydrologic impact assessment (CHIA) 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. OSM committed to giving consideration to approving State program amendments that identify water supply information required under 30 CFR 784.20(a) which could be collected closer to the time when mining actually occurs instead of being submitted at the time of permit application. Finally, OSM 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's March 1999 letters were written to clarify OSM's view that a program amendment that assures that analysis of water supply data is completed sufficiently in advance of mining could be approved to provide data that isn't affected by mining. PADEP's proposed modification of 25 Pa. Code 89.145a(a)(1), removes the requirement that premining surveys be conducted prior to mining advancing within 1000 feet of a water supply and replaces it with a requirement that the premining survey be conducted prior to the time a water supply is susceptible to mining-related effects. PADEP maintains that this makes its program no less effective than the Federal requirements.

As an additional means of complying with the OSM guidance, PADEP proposes to apply the requirements of 25 Pa. Code 89.34 (relating to hydrology), 25 Pa. Code 89.35 (relating to prediction of hydrologic consequences), and 25 Pa. Code 89.36 (relating to protection of the hydrologic balance) to ensure that appropriate drinking, domestic and residential water supplies are sampled to adequately determine the hydrologic consequences at large and to identify those water supplies that may be adversely affected. Collectively, PADEP states that these information gathering requirements correspond to Federal counterpart requirements in 30 CFR 784.14(b)(1) and (e). PADEP asserts that the sample information collected and submitted with the application as baseline information satisfies the requirement for identifying the samples that will be collected at the time of permit application in accordance with OSM's March 1999 letters. PADEP asserts that the proposed language, ''premining surveys shall be conducted prior to the time a water supply is susceptible to mining related effects,'' satisfies OSM's March 9, 1999, letters' requirement that the State identify the samples that can be collected at a time closer to when mining will occur. In addition, PADEP contends that it satisfies the requirement that the surveys be completed ''sufficiently in advance of mining to avoid any adverse effects to the water supply.''

In this submission, PADEP asserts that the determination made under 25 Pa. Code 89.35 together with the samples collected during the baseline information collection effort and the presubsidence survey process provide the information required by 30 CFR 784.20(a)(3); a survey of the drinking domestic and residential water supplies that may be adversely affected.

In addition, PADEP maintains that its new language that ''premining surveys shall be conducted prior to the time a water supply is susceptible to mining related effects' satisfies OSM's March 9, 1999, requirement that the State demonstrate through the program amendment process that the delayed analyses would be completed sufficiently in advance of mining to avoid any adverse effects to the water supply.

In this submission, PADEP asserts that the proposed changes to 25 Pa. Code 89.145a, in combination with its proposal to gather appropriate premining information using the provisions of 25 Pa. Code sections 89.34, 89.35 and 89.36, will make Pennsylvania's premining survey requirements no less effective than the Federal requirements.

PADEP's Proposed Resolution: In this submission, Pennsylvania is proposing the following changes to 25 Pa. Code 89.145a(a)(1):

89.145a. Water supply replacement: performance standards.

(a) Water supply surveys.

(1) The operator shall conduct a premining survey and may conduct a postmining survey of the quantity and quality of all water supplies within the permit and adjacent areas, except when the landowner denies the operator access to the site to conduct a survey and the operator has complied with the notice procedure in this section. Premining surveys shall be conducted prior to the time a water supply is susceptible to mining-related effects. Survey information shall include the following information to the extent that it can be collected without excessive inconvenience to the landowner:

(i) The location and type of water supply.

(ii) The existing and reasonably foreseeable uses of the water supply.

(iii) The chemical and physical characteristics of the water, including, at a minimum, total dissolved solids or specific conductance corrected to 25°C, pH, total iron, total manganese, hardness, total coliform, acidity, alkalinity and sulfates. An operator who obtains water samples in a premining or

postmining survey shall utilize a certified laboratory to analyze the samples.

(iv) The quantity of the water.

(v) The physical description of the water supply, including the depth and diameter of the well, length of casing and description of the treatment and distribution systems.

(vi) Hydrogeologic data such as the static water level and yield determination.

* * * * *

Regulation at 30 CFR 938.16(rrrrr). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.145a(b) to require the ''prompt'' restoration or replacement of water supplies and to clarify, if necessary, 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.

Discussion: Regarding the issue of prompt restoration/replacement, OSM determined that in the December 27, 2001, final rule, that Pennsylvania's regulations on water supply restoration and replacement do not specify that operators must fulfill their obligations in a ''prompt'' manner. OSM found that the absence of this standard made Pennsylvania's water supply replacement provisions less effective than those in section 720(a)(2) of SMCRA and 30 CFR 817.41(j). The Federal statute and regulations require permittees to promptly replace drinking, domestic or residential water supplies affected by underground mining operations.

In this submission, PADEP has stated that it is appropriate for operators to fulfill their water supply restoration and replacement obligations as promptly as possible to minimize inconvenience to landowners and to limit the amount of liability that may accrue from unresolved water supply claims. PADEP has reviewed the applicable provisions of BMSLCA and stated that it found nothing that would interfere with requirements for prompt restoration or replacement. PADEP, therefore, proposes to address OSM's concern by amending 25 Pa. Code 89.145a(b) to incorporate a requirement for ''prompt'' action.

Regarding reasonably foreseeable uses, in the December Rule, OSM expressed concern about Pennsylvania's requirement that permanently restored or replacement water supplies must be adequate to serve the ''reasonably foreseeable uses'' of the original water supply. OSM observed that 25 Pa. Code 89.145a(b) provides that a restored or replacement water supply must be adequate to serve the landowner's premining uses or any reasonably foreseeable uses, implying that an operator may select from one of two options. OSM also noted that 25 Pa. Code 89.145a(f)(3) addresses the ''reasonably foreseeable use'' standard using slightly different language—*i.e.*, ''the water user's needs and the demands of any reasonably foreseeable uses.'' Finally, OSM noted a letter in which PADEP described ''reasonably foreseeable uses'' as ''any foreseeable uses the landowner or water user had intended to develop.'' OSM clarified that Pennsylvania's program must address all reasonably foreseeable uses and that the scope of this term cannot be limited to the documented plans of the current landowner.

In this submission, PADEP decided to address OSM's concern by amending 25 Pa. Code 89.145a(b) to require that restored or replacement water supplies must be adequate to serve the premining uses of the water supply and any reasonably foreseeable uses of the water supply. PADEP also affirms that it will not limit its application of the phrase ''reasonably foreseeable uses'' to include only those uses that can be documented by the landowner. PADEP will act to ensure that consideration is given to all drinking, domestic and residential uses that are reasonably foreseeable and within the capacity of the premining water supply.

PADEP asserts that these proposed changes make Pennsylvania's water supply replacement requirements no less effective than Federal counterpart requirements.

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.145a(b). The amended language reads as follows:

89.145a. Water supply replacement: performance standards.

* * * * *

(b) Restoration or replacement of water supplies. When underground mining activities conducted on or after August 21, 1994, affect a public or private water supply by contamination, diminution or interruption, the operator shall promptly restore or replace the affected water supply with a permanent alternate source which adequately serves the premining uses of the water supply and any reasonably foreseeable uses of the water supply. The operator shall be relieved of any responsibility under The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. sections 1406.1–1406.21) to restore or replace a water supply if the operator demonstrates that one of the provisions of 25 Pa. Code 89.152 (relating to water supply replacement: relief from responsibility) relieves the operator of further responsibility. This subsection does not apply to water supplies affected by underground mining activities which are covered by Chapter 87 (relating to surface mining of coal).

* * * * *

Regulation at 30 CFR 938.16(sssss). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.145a(e)(1) to assure the prompt supply of temporary water to all landowners whose water supplies have been affected by underground mining operations regardless of whether the water supplies are within or outside of the area of presumptive liability.

Discussion: Section 25 Pa. Code 89.145a(e)(1) provides that:

If the affected water supply is within the rebuttable presumption area and the rebuttable presumption applies and the landowner or water user is without a readily available alternate source, the operator shall provide a temporary water supply within 24 hours of being contacted by the landowner or water supply user or the Department, which ever occurs first.

In the December 27, 2001, final rule, OSM found this regulation to be less effective than Federal regulations that require the prompt provision of temporary water in all cases where EPAct water supplies are affected by underground mining operations with no limiting conditions. OSM observed that 25 Pa. Code 89.145a(e) did not provide for the prompt provision of temporary water in cases where the affected water supply was outside the rebuttable presumption area or cases where the operator rebutted the presumption of liability by demonstrating denial of access to perform a premining survey. OSM was also concerned that the rebuttal of the presumption in combination with the inability of the property owner or PADEP to come forth with premining data could relieve an operator of the obligation to provide temporary water.

PADEP acknowledges that existing 25 Pa. Code 89.145a(e) only addresses the provision of temporary water in cases where water supply effects are subject to the rebuttable presumption of section 5.2(c) of the BMSLCA. Section 89.145(e) reflects the provisions of section 5.2(a)(2) of the statute, which is similarly focused on situations where the rebuttable presumption applies.

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.145a(e) to include a paragraph that specifically addresses the provision of temporary water supplies when EPAct water supplies are affected by underground mining activities. This new requirement will apply regardless of the location of the affected water

supply with respect to the rebuttable presumption area or the operator's rebuttal of the presumption of liability. It clarifies an operator's obligation to promptly provide temporary water when it finds, or when PADEP finds, that effects are due to the operator's underground mining and the affected water supply is an EPAct water supply.

PADEP bases this amendment on the statutory provisions of section 5.1(a)(1) and 5.2(a)(3) of the BMSLCA. Section 5.1(a)(1) establishes the basic requirement to restore or replace an affected water supply, which PADEP interprets to include the prompt provision of temporary water. Section 5.2(a)(3) authorizes PADEP to take action to require temporary water in any case where temporary water is not provided within 24 hours of the time effects are reported to the operator. PADEP notes that the actions authorized by section 5.2(a)(3) are not subject to the rebuttable presumption of liability.

PADEP further affirms that it will apply the requirements of 25 Pa. Code 89.34, relating to groundwater inventory information, and 25 Pa. Code 89.35, relating to predictions of hydrologic impacts, to ensure the collection of premining quality and quantity information for all EPAct water supplies that may be affected during the term of the permit. PADEP states that this information will be collected at the time of permit application or permit renewal, or prior to the time an EPAct water supply is susceptible to mining related effects to ensure that premining information is available for all EPAct water supplies prior to the time of impact. PADEP notes that the data collection requirements in 25 Pa. Code 89.34 and 25 Pa. Code 89.35 are equivalent to those in 30 CFR 784.14.

PADEP asserts that the proposed regulatory amendment in combination with the proposed expansion of groundwater survey requirements will make Pennsylvania's requirements relating to the provision of temporary water no less effective than those of the Federal program.

PADEP's Proposed Resolution: In this submission, PADEP proposes to revise 25 Pa. Code 89.145a(e) in the following manner.

89.145a. Water supply replacement: performance standards.

(e) Temporary water supplies.

(1) If the affected water supply is within the rebuttable presumption area and the rebuttable presumption applies and the landowner or water user is without a readily available alternate source, the operator shall provide a temporary water supply within 24 hours of being contacted by the landowner or water supply user or the Department, whichever occurs first.

(2) An operator shall promptly provide a temporary water supply if the operator or the Department finds that the operator's underground mining activities have caused contamination, diminution or interruption of an EPAct water supply and the landowner or water user is without a readily available alternate source of water. This requirement applies regardless of whether the water supply is located within or outside the rebuttable presumption area.

* * * * *

Regulation at 30 CFR 938.16(ttttt). Amendment Required by the December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania 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).

Discussion: Subsection 89.145a(e)(2) requires temporary water supplies to meet the requirements of paragraph (f)(2) (relating to the quality of replacement water supplies) and to provide a sufficient amount of water to meet the water supply user's premining needs. In the December 27, 2001, final rule, OSM's concern was that the Pennsylvania program would only require temporary water supplies to provide a sufficient amount of water necessary to meet the water supply user's premining needs and not include reasonably foreseeable needs.

PADEP proposes to address OSM's requirement by amending former paragraph (e)(2), which is paragraph (e)(3) under the current proposal, to delete the reference to premining water needs. Amended paragraph (e)(3) will require temporary water supplies to meet all needs of an affected water user. This will ensure that all of a water user's premining and reasonably foreseeable needs are satisfied and will make the quantity requirements for temporary water supplies equivalent to those for permanently restored or replacement water supplies. In making this change, PADEP wishes to clarify that temporary water requirements would not extend to needs that exceed the capacity of the premining water supply.

PADEP asserts that the proposed revision to 25 Pa. Code 89.145a(e) will satisfy the requirement in 30 CFR 938.16(ttttt).

PADEP's Proposed Resolution: In this submission, PADEP proposes that OSM accept the revision to 25 Pa. Code 89.145a(e)(2) (paragraph (3) after preceding revision).

89.145a. Water supply replacement: performance standards.

* * * * *

(e) Temporary water supplies.

* * * * *

(3) The temporary water supply provided under this subsection shall meet the requirements of paragraph (f)(2) and provide a sufficient amount of water to meet the water supply user's needs.

* * * * *

Regulation at 30 CFR 938.16 (uuuuu). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to revise 25 Pa. Code 89.145a(f)(1)(v) to make it clear that cost increases associated with the operation and maintenance of a restored or replacement water supply may not be passed on to the water user.

Discussion: As explained in discussions under 30 CFR 938.16(pppp) and (ddddd), PADEP proposes to amend 25 Pa. Code 89.145a(f) to address OSM's concern. PADEP is proposing amendments to 89.145a(f) to specifically address the operation and maintenance costs of EPAct water supplies. The amendments require that, in the case of an EPAct water supply, the restored or replacement water supply shall cost no more to operate and maintain than the previous water supply. The amendments further provide that any increased costs associated with the operation and maintenance of an EPAct water supply are the responsibility of the mine operator. The amendments also allow an operator to satisfy its responsibility for increased costs by compensating the landowner or water user by a one-time payment in an amount which covers the present worth of the increased annual operations and maintenance cost for a period agreed to by the operator and the landowner or water user. Amended 25 Pa. Code 89.145a(f)(5)(i) mirrors the Federal requirement in regard to the operation and maintenance costs of EPAct water supplies.

The proposed amendments to 25 Pa. Code 89.145a(f) retain the allowance of a *de minimis* cost increase for replacement water supplies that are outside the scope of SMCRA and the Federal regulations. The retention of this provision preserves Pennsylvania law to the maximum extent possible.

PADEP maintains that the proposed changes to 25 Pa. Code 89.145a(f) will make Pennsylvania's provisions relating to the cost of restored and replacement water supplies no less effective than Federal counterpart provisions and will satisfy the requirement in 30 CFR 938.16(uuuuu).

PADEP's Proposed Resolution: PADEP proposes to amend 25 Pa. Code 89.145a(f) in the following manner:

89.145a. Water supply replacement: performance standards.

* * * * *

(f) Adequacy of permanently restored or replaced water supply. A permanently restored or replaced water supply shall include any well, spring, municipal water supply system or other supply approved by the Department, which meets the criteria for adequacy as follows:

(1) Reliability, maintenance and control. A restored or replaced water supply, at a minimum, shall:

(i) Be as reliable as the previous water supply.

(ii) Be as permanent as the previous water supply.

(iii) Not require excessive maintenance.

(iv) Provide the owner and the user with as much control and accessibility as exercised over the previous water supply.

* * * * *

(5) Cost to landowner or water user. A restored or replacement water supply shall meet the following cost criteria:

(i) The restored or replacement water supply for an affected EPAct water supply shall not cost the landowner or water user more to operate and maintain than the previous water supply. Operation and maintenance costs of the replacement water supply which exceed the operation and maintenance costs of the previous water supply are the responsibility of the operator. Upon agreement by the operator and the landowner or water user, the obligation to pay such operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance cost for a period agreed to by the operator and the landowner or water user.

(ii) The restored or replacement water supply for an affected water supply, which does not qualify as an EPAct water supply, shall not have operation and maintenance costs that exceed those of the previous water supply by more than a *de minimis* cost increase. If the operation and maintenance costs of the restored or replacement water supply are more than a *de minimis* cost increase, the operator shall provide for the permanent payment of the increased operating and maintenance cost of the restored or replacement water supply.

* * * * *

Regulation at 30 CFR 938.16(vvvvv). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania 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.

Discussion: OSM's December 27, 2001, final rule conditionally approved the Pennsylvania program with regard to the use of the ''adequate'' standard for water quantity of replacement supplies based upon statements made by PADEP during the rulemaking process. OSM remained concerned about statements indicating PADEP's intent to limit reasonably foreseeable uses to those of the current owner/supply user as documented by a plan.

In this submission, PADEP proposes to address OSM's concern by affirming that it will consider all reasonably foreseeable drinking, domestic and residential uses when evaluating the adequacy of restored EPAct water supplies or replacements for EPAct water supplies. PADEP further affirms that evaluations will be based on the location and characteristics of the property as well as the apparent and documented needs of the current water user. An example cited by PADEP would be a situation where one person resided in a three-bedroom house with a premining water supply capable of serving the needs of four people. In the event of impacts, PADEP stated that it would require a replacement water supply capable of serving the needs of four people and that the reasonably foreseeable use determination would focus on the property's premining capacity to house and provide sufficient water for four people. The replacement liability would not be limited by the fact that the property had only one resident at the time of impact. In this case, PADEP noted that the final determination regarding reasonably foreseeable uses could be based on observation alone without the need for any specific documentation from the landowner.

In this submission, PADEP also notes that determinations of adequacy will also include consideration of the capacity of the premining water supply, including the delivery system. An example provided by PADEP would be where two people resided in a four-bedroom house with a premining water supply capable of serving only two people. In this case, the reasonably foreseeable use determination would account for the fact that capacity of the house exceeded the capacity of the premining water supply. In this situation, PADEP stated that it would require the operator to provide a replacement water supply capable of serving two people.

PADEP notes that 25 Pa. Code 89.145a(a)(1)(ii) requires a mine operator to gather information regarding the existing and reasonably foreseeable use of a water supply at the time of the premining survey. This ensures that mine operators will gather information regarding reasonably foreseeable uses prior to affecting a water supply.

PADEP asserts that this affirmation satisfactorily addresses OSM's concern in regard to the reasonably foreseeable use of restored EPAct water supplies or replacements for EPAct water supplies. PADEP does, however, reserve the authority to require documented plans in cases that do not involve EPAct water supplies or agricultural water supplies.

PADEP's Proposed Resolution: In this submission, PADEP is proposing that there is no need to amend the regulations. PADEP agrees that operators must identify and account for all existing and reasonably foreseeable uses of a water supply when providing a replacement; not just those of the current owner or those documented in a plan.

Regulation at 30 CFR 938.16(wwwww). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.146a(c) to the extent the timeframes for PADEP investigations are longer than those in Pennsylvania's approved citizen complaint procedures.

Discussion: This issue is discussed under 30 CFR 938.16(kkkk) in regard to section 5.2(b) of BMSLCA. Section 5.2(b) was the basis for the investigation timeframes in 25 Pa. Code 89.146a(c)(1).

In this submission, PADEP proposes to revise 25 Pa. Code 89.146a(c) to impose on itself an obligation to report water supply problem investigations to claimants within 10 days of completing the investigation.

PADEP's Proposed Resolution: See proposed revisions to 25 Pa. Code 89.146a(c) described under 30 CFR 938.16(kkkk). PADEP maintains that this satisfies the required amendment under 30 CFR 938.16(wwwww).

Regulation at 30 CFR 938.16(xxxxx). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.152(a) to remove paragraph (2), which provides a release of liability when water supply impacts are due to underground mining activities that took place more than three years prior to the onset of water supply problems.

Discussion: See discussion under 30 CFR 938.16(mmmm).

PADEP's Proposed Resolution: In this submission, PADEP is not proposing any changes in response to 30 CFR 938.16(xxxxx) for reasons discussed under 30 CFR 938.16(mmmm).

Regulation at 30 CFR 938.16(yyyyy). Amendment Required by December 27, 2001, ***Federal Register*** *Notice:* OSM directed Pennsylvania to amend 25 Pa. Code 89.152(a) to remove paragraph (4), which provides a release of liability when water supply problems are reported more than two years after the date of occurrence.

Discussion: See discussion under 30 CFR 938.16(jjjj) in regard to section 5.1(b) of the BMSLCA. PADEP has agreed to changes that will eliminate the two-year statute of limitations on filing claims involving EPAct water supplies. These changes will be accomplished through amendments to 25 Pa. Code 89.152(a) and through an OSM s action superseding section 5.1(b) to the extent it applies to EPAct water supplies.

PADEP's Proposed Resolution: See proposed regulatory amendment and OSM supersession action described under 30 CFR 938.16(jjjj). PADEP contends that these changes satisfy the required amendment under 30 CFR 938.16(yyyyy).

*Regulation at 30 CFR 938.16(zzzzz). Amendment Required by December 27, 2001, **Federal Register** Notice:* OSM directed Pennsylvania to remove 25 Pa. Code 89.152(a)(5)(i), which provides a release of liability in cases where operators have addressed their water supply replacement obligations through a property purchase or by compensating a landowner for the resultant reduction in fair market value of the affected property.

Discussion: See discussion under 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr) regarding compensation in lieu of water supply replacement. PADEP has agreed to changes that will limit the conditions under which an EPAct water supply claim can result in compensation. PADEP proposes to amend 25 Pa. Code 89.152(a) to establish specific conditions that must be satisfied in situations where EPAct water supplies will not be restored or replaced. In order for the proposed regulatory amendments to become effective, PADEP maintains that OSM must supersede conflicting provisions in sections 5.2(g) and (h) of the BMSLCA.

PADEP's Proposed Resolution: PADEP proposes to address OSM's requirement through amendments to 25 Pa. Code 89.152(a). PADEP also asserts that OSM must supersede the provisions of sections 5.2(g) and (h) of the BMSLCA to the extent these provisions would prevent PADEP from requiring the restoration or replacement of EPAct water supplies. These changes are described in detail in the response to 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr), and PADEP maintains they will serve to satisfy the requirement in 30 CFR 938.16(zzzzz), as well. The proposal to partially supersede sections 5.2(g) and (h) appears in a separate rulemaking in this **Federal Register** issue.

*Regulation at 30 CFR 938.16(aaaaaa). Amendment Required by December 27, 2001, **Federal Register** Notice:* OSM required Pennsylvania 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.

Discussion: See discussion under 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr) regarding compensation in lieu of water supply replacement.

PADEP's Proposed Resolution: In this submission, PADEP proposes to address OSM's requirement through amendments to 25 Pa. Code 89.152 as described in the discussion under 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr).

*Regulation at 30 CFR 938.16(bbbbbb). Amendment Required by December 27, 2001, **Federal Register** Notice:* OSM directed Pennsylvania 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. This amendment required using the term ''underground mining operations,'' rather than ''underground mining'' as used by PADEP.

Discussion: In the December 27, 2001, final rule, OSM noted that several sections of the regulations implementing Act 54 use the term ''underground mining'' rather than ''underground mining operations'' as used in the Federal regulations. OSM noted that 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 Federal term ''underground coal mining operations'' is more expansive than Pennsylvania's term ''underground mining,'' that is defined in 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, in regard to the aforementioned regulations, the only activity that must meet the environmental requirements of Chapter 89 Subchapter F (relating to subsidence control and water supply replacement.) is coal extraction, while under SMCRA, all underground operations must meet the environmental requirements.

In this submission, PADEP is proposing to address OSM's concern by amending 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), 89.142a(i)(1), 89.143a(a), 89.143a(d)(1), 89.143a (d)(2), 89.143a(d)(3) to incorporate the term ''underground mining operations.'' PADEP asserts that these changes will make the respective parts of Chapter 89 no less effective than Federal counterpart requirements.

PADEP is, however, proposing to leave 25 Pa. Code sections 89.155(b)(1) and (2) and 89.155(c) unchanged. These requirements pertain to notifications, which operators must provide to overlying property owners, utilities and government entities, to inform them of planned mining. OSM was concerned that activities such as development activities and blasting would not be cause for operators to notify these parties. However, PADEP has found that all underground mining activities that OSM would be concerned with would be the subject of PADEP's notification procedures because these activities are part of the process of extraction of coal in an underground mine (see definition of the term, ''underground mining'' at 25 Pa. Code 89.5). Therefore, property owners, utilities, and political subdivisions would be notified of these activities as part of the requirements of 25 Pa. Code sections 89.155(b)(1) and (2) and 89.155(c). PADEP contends that these requirements do not make Pennsylvania's notification requirements any less effective than Federal counterpart requirements. Accordingly PADEP argues that there is no need to amend 25 Pa. Code sections 89.155(b)(1) and (2) or 89.155(c) to incorporate the term ''underground mining operations.''

PADEP's Proposed Resolution: In this submission, PADEP proposes that OSM accept the following changes to 25 Pa. Code Chapter 89. (Note that section 25 Pa. Code 89.141(d)(9) has been re-designated (d)(11) based on other proposed changes. Also note use of term ''operations'' in newly proposed 25 Pa. Code 89.141(d)(10)).

89.141 Subsidence control: application requirements.

* * * * *

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

* * * * *

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

* * * * *

89.142a. Subsidence control: performance standards.

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

* * * * *

(f) Repair of damage to structures.

(1) Repair or compensation for damage to certain structures. Whenever underground mining operations conducted on or after August 21, 1994, causes damage to any of the structures listed in subparagraphs (i)-(v), the operator responsible for extracting the coal shall promptly and fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the provisions of 25 Pa. Code 89.144a (relating to subsidence control: relief from responsibility) relieves the operator of responsibility.

* * * * *

(2) Amount of compensation.

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

* * * * *

(g) Protection of utilities.

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

* * * * *

(h) Perennial streams.

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

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

(i) Prevention of hazards to human safety.

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

* * * * *

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

(a) The owner of a structure enumerated in 25 Pa. Code 89.142a(f)(1) (relating to subsidence control: performance standards) who believes that underground mining operations caused mine subsidence resulting in damage to the structure and who wishes to secure repair of the structure or compensation for the damage shall provide the operator responsible for the underground mining with notification of the damage to the structure.

* * * * *

(d) Upon receipt of the claim, the Department will send a copy of the claim to the operator and conduct an investigation in accordance with the following procedure:

(1) Within 30 days of receipt of the claim, the Department will conduct an investigation to determine whether underground mining operations caused the subsidence damage to the structure and provide the results of its investigation to the property owner and mine operator within 10 days of completing the investigation.

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

(3) If the Department finds that the operator's underground mining operations caused the damage to the structure, the Department will either issue a written order directing the operator to promptly compensate the structure owner or issue an order directing the operator to promptly repair the damaged structure. The Department may extend the time for compliance with the order if the Department finds that further damage may occur to the same structure as a result of additional subsidence.

* * * * *

Further, PADEP recommends that OSM accept its explanation that 25 Pa. Code 89.155(b)(1) and (2) and 89.155(c) are no less effective than the Federal regulations and need no modification.

As noted earlier in this proposed rule, PADEP is proposing several amendments to Chapters 86 and 89 that were not specifically required by OSM. These changes are summarized below:

Definitions of EPACT Structures and EPACT Water Supplies

PADEP is proposing to add definitions of the terms ''EPAct structures'' and ''EPAct water supplies'' under 25 Pa. Code 89.5 (relating to definitions). These terms are used in various information and performance standards to refer to structures and water supplies covered under section 720(a) of SMCRA. The proposed definitions are derived from descriptions in section 720(a) of SMCRA and the definitions of the terms ''drinking, domestic or residential water supply'' and ''occupied residential dwelling and structures related thereto'' in 30 CFR 701.5. PADEP maintains that the proposed definitions effectively encompass all structures and water supplies covered by Federal subsidence damage repair and water supply replacement provisions.

The proposed definitions are as follows:

89.5. Definitions.

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

* * * * *

EPAct structures—Structures that are subject to repair and compensation requirements under section 720(a) of the Federal Surface Mining Control and Reclamation Act (30 U.S.C. 1201 *et seq.*). The term includes:

(a) Noncommercial buildings.

(ii) Dwellings.

(iii) Structures adjunct to or used in conjunction with dwellings, including, but not limited to, garages; storage sheds and

barns; greenhouses and related buildings; customer-owned utilities and cables; fences and other enclosures; retaining walls; paved or improved patios; walks and driveways; septic sewage treatment facilities; inground swimming pools, and lot drainage and lawn and garden irrigation systems.

EPA Act water supplies—Water supplies that are subject to replacement under section 720(a) of the Federal Surface Mining Control and Reclamation Act (30 U.S.C. 1201 *et seq.*), including drinking, domestic or residential water supplies in existence prior to the date of permit application. The term includes water received from a well or spring and any appurtenant delivery system that provides water for direct human consumption or household use. It does not include wells and springs that serve only agricultural, commercial or industrial enterprises except to the extent the water supply is for direct human consumption or human sanitation, or domestic use.

* * * * *

Scope of Subsidence Bonds

PADEP is proposing two changes to its bonding regulations in addition to those proposed in response to 30 CFR 938.16(ccccc). These changes are intended to clarify that the scope and period of liability of subsidence bonds will not change as a result of other regulatory amendments proposed in response to the OSM requirements.

One proposed change is an amendment to 25 Pa. Code 86.151(b)(2) (relating to the period of liability of subsidence bonds). This change involves replacing the undefined term ''mining and reclamation operation'' with ''underground mining operations''—a term defined in 25 Pa. Code 89.5. This change is intended to avoid confusion over whether the final 10-year period of bonded liability starts upon completion ''underground mining operations'' or upon completion of ''underground mining activities.'' This is an important distinction since the completion of underground mining operations is marked by the reclamation of the last shaft or drift opening, while the completion of underground mining activities is marked by the stabilization of the post closure mine pool, which usually occurs several years or decades after the completion of underground mining operations. The proposed amendment ties the start of the final 10-year period to the completion of underground mining operations, consistent with section 6(b) of BMSLCA.

Another proposed change is an amendment to 25 Pa. Code 86.152(a) (relating to bond adjustments). The proposed amendment adds a provision at the end of subsection (a) clarifying that the requirement to periodically re-evaluate and adjust bonds is not a basis for extending the coverage of subsidence bonds beyond the requirements of sections 5, 5.4, 5.5, and 5.6 of the BMSLCA. This provision, which is based on section 6(b) of BMSLCA, clarifies that subsidence bonds are to be evaluated and adjusted based on the projected costs of repairing land and structure damage and not on costs arising from other regulatory obligations, such as the requirement to perform surface reclamation and the requirement to replace affected water supplies.

PADEP maintains that the proposed amendments will not make Pennsylvania's bonding requirements less effective than the Federal bonding requirements. As explained in the response to 30 CFR 938.16(ccccc), Pennsylvania asserts its subsidence bonding requirements are as effective as those in 30 CFR 817.121(c)(5) in terms of assuring the availability of adequate funds for the repair of EPAct structures and land. The proposed changes to 25 Pa. Code 86.151(b)(2) will maintain the status quo regarding the period during which subsidence bonds must be maintained and will not result in a termination of liability prior to the time OSM would terminate jurisdiction over an underground mining operation. Further, since PADEP relies on other types of financial assurance to ensure the replacement of affected water supplies, it maintains there is no need to address these liabilities through subsidence bonds.

The proposed amendments to 25 Pa. Code 86.151(b)(2) and 86.152(a) are as follows:

86.151. Period of liability.

(a) Liability under bonds posted for a coal surface mining activity shall continue for the duration of the mining activities and its reclamation as provided in the acts, regulations adopted thereunder and the conditions of the permit and for 5 additional years after completion of augmented seeding, fertilization, irrigation or other work necessary to achieve permanent revegetation of the permit area.

(b) Liability under bonds posted for the surface effects of an underground mine, coal preparation activity or other long-term facility shall continue for the duration of the mining operation or use of the facility, its reclamation as provided in the acts, regulations adopted thereunder and the conditions of the permit, and for 5 years thereafter, except for:

(1) The risk of water pollution for which liability under the bond shall continue for a period of time after completion of the mining and reclamation operation. This period of time will be determined by the Department on a case-by-case basis.

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

86.152. Bond adjustments.

(a) The amount of bond required and the terms of the acceptance of the applicant's bond will be adjusted by the Department from time to time as the area requiring bond coverage is increased or decreased, or where the cost of future reclamation changes, or where the projected subsidence damage repair liability changes. The Department may specify periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement. This requirement shall only be binding upon the permittee and does not compel a third party, including surety companies, to provide additional bond coverage and does not extend the coverage of a subsidence bond beyond the requirements imposed by sections 5, 5.4, 5.5, and 5.6 of the Bituminous Mine Subsidence and Land Conservation Act.

Description of Features Protected Under 25 Pa. Code 89.142a(c)

PADEP is proposing to amend 25 Pa. Code 89.142a(c)(1) to make an editorial correction. The correction involves changing the term ''surface features'' to ''features'' in paragraph (1). The term ''features'' is more appropriate in this instance because it refers to both surface water bodies and aquifers enumerated in subparagraphs (c)(1)(iv)–(v). Since aquifers are not usually considered surface features, it is more appropriate to use the term ''features'' to refer to this group. PADEP maintains that the proposed change will not make Pennsylvania's regulations less effective than Federal counterpart regulations. The proposed amendment to 25 Pa. Code 89.142a(c) is as follows:

89.142a. Subsidence control: performance standards.

* * * * *

(c) Restrictions on underground mining.

(1) Unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of the structures and features listed in subparagraph (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.

(v) Bodies of water or aquifers which serve as significant sources to public water supply systems.

* * * * *

Support Facilities Located Underground

PADEP is proposing to amend the definition of ''underground mining operations'' and paragraph (ii) of the definition of ''underground mining activities'' to replace the term ''underground support facilities'' with

''support facilities located underground.'' The proposed changes are intended to clarify that the term ''underground mining operations'' refers only to those operations that take place in the subsurface parts of an underground coal mine. These changes will eliminate the possibility that ''underground mining operations'' could be construed to include operations at a surface support facility, such as a coal storage site, bathhouse or mine drainage treatment plant. This change is necessary to clarify the scope of the term ''underground mining operations'' which will be inserted in many information and performance standards in response to OSM requirements. PADEP contends that these changes will not make Pennsylvania's definition of ''underground mining operations'' less inclusive than the Federal definition (see paragraph (b) of the definition of ''underground mining activities'' in 30 CFR 701.5).

The proposed changes are as follows:

86.1. Definitions.

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

* * * * *

Underground mining activities includes the following:

* * * * *

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

* * * * *

89.5. Definitions.

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

* * * * *

Underground mining activities includes the following:

* * * * *

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

* * * * *

Underground mining operations—Underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining, hauling, storage and blasting.

* * * * *

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Written Comments

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (*see* **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Harrisburg Field Office may not be logged in.

Electronic Comments

Please submit Internet comments as an ASCII or Word file avoiding the use of special characters and any form of encryption. Please also include ''Attn: SATS No. PA–143'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Harrisburg Field Office at (717) 782–4036.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearings, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., e.s.t. on October 7, 2003. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard. You do not need to attend both public hearings. We will consider all comments received at either of the public hearings.

IV. Procedural Determinations

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 12866—Regulatory Planning and Review

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

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 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 because each 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 the Federal regulations at 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. Section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The basis for this determination is that the Pennsylvania program does not regulate surface coal mining and reclamation operations on Indian lands. Therefore, changes to the Pennsylvania program have no effect on federally-recognized Indian tribes.

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 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 OMB 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 regulations.

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 governmental 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: September 5, 2003.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 03–23986 Filed 9–18–03; 12:01 pm]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–141–FOR]

Pennsylvania Regulatory Program

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

ACTION: Proposed rule; public comment period and notice of public hearing on a proposed action.

SUMMARY: We are proposing to supersede portions of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) because they are inconsistent with the requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). In this proposed rule, we are asking for comments regarding the proposed supersession. In a separate proposed rulemaking also published today, we are asking for comments on changes Pennsylvania is proposing to make to its regulations related to the implementation of BMSLCA as well as clarifications to those regulations. We will be holding public hearings on both the proposal for superseding certain provisions of BMSLCA, as noted below, and Pennsylvania's proposed changes to its regulations on the dates indicated under **DATES**. Pennsylvania will also be holding public hearings on its proposed changes to its regulations. In order to accommodate those who wish to speak at both Pennsylvania's and our public hearings, the hearings will be held on the same days and at the same locations, but at different times.

This document gives the times and locations that the Pennsylvania program is available for your inspection, the comment period during which you may submit written comments on this proposed action, and the procedures that we will follow for the public hearings.

DATES: We will accept written comments on this proposal until 4 p.m., e.s.t., October 22, 2003. We will hold public hearings on the proposal on October 15, 2003, at the Best Western University Inn in Indiana, Pennsylvania,