

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).

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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