

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 EAct 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 It is PADEP's position that section 5.1(b) be superseded only to remove the statute of limitation as it relates to EAct water supplies. PADEP concludes that limiting the superseded section as described will serve to satisfy the Federal requirement in 30 CFR 938.16(jjjj), while preserving Pennsylvania law to the maximum extent possible.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 EAct 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 EAct water supplies as follows:

89.152. Water supply replacement: special provisions.

(a) In the case of an EAct 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 EAct 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 EAct water supply. Section 5.1(b) provides that:

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(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.

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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).