

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(wwwwww) 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.

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(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.

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Regulation at 30 CFR 938.16(lIII). 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(lIII).

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