

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(mmmmm) and 938.16(xxxxxx) relating to the removal of the three-year liability limit.

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