

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.

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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