

is unwilling to accept compensation in lieu of a replacement water supply. The fourth situation is where the water supply can be replaced but the operator only offers compensation as the means of settlement.

PADEP contends that the first Pennsylvania scenario is similar to OSM's Condition 1. The landowner signs an agreement that expressly waives the provision of a replacement water source. This equates to "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." The Federal condition also requires the operator to demonstrate "that a suitable alternative water source could feasibly be developed." Under the Pennsylvania program, this demonstration is provided at the time of permit application in accordance with 25 Pa. Code 89.36(c) and is reviewed by PADEP technical staff prior to permit issuance. PADEP states that it does not issue a permit unless it determines that all potentially affected water supplies can be replaced by the methods proposed by the operator. No additional demonstration is required at the time of settlement. In this submission, PADEP proposes that the Pennsylvania program is essentially the same as the Federal program in regard to these types of situations.

PADEP maintains that the second and third Pennsylvania scenarios must be evaluated in terms of OSM Condition 2. In these scenarios, PADEP must first determine that the operator cannot develop an adequate replacement water supply and subsequently determine that the landowner has been fairly compensated in accordance with section 5.2(g) or section 5.3(a)(5). Pennsylvania requirements for adequacy turn on a replacement water supply's capacity to meet the original water supply's premining and reasonably foreseeable uses, while Federal regulations require a replacement water supply to be equivalent to the premining water supply in terms of quality and quantity. Additional explanations of how Pennsylvania's standards for "adequacy" are no less effective than Federal standards for "equivalency" are provided in the preamble discussion at 66 FR 67012.

PADEP asserts that determinations regarding the development of a replacement water supply are based on several factors, including the replacement methods described in the permit application, the operator's efforts in replacing the water supply, the means of replacing nearby water supplies, the hydrologic resources of the property, the availability of public water

and the potential for extending public water to the property. If PADEP determines that the operator cannot develop a replacement water supply meeting the criteria in 25 Pa. Code 89.145a(f), it assists the landowner in obtaining appropriate compensation under section 5.2(g) or 5.3(a)(5). In this submission, PADEP proposes that both of these situations will fall within the guidelines of OSM Condition 2.

In this submission, PADEP proposes that the fourth Pennsylvania scenario does not fall within the scope of OSM Condition 1 or 2. The existing provisions of sections 5.2(g) and (h) limit PADEP's authority to require a replacement water supply when an operator decides to pursue a settlement involving compensation. If PADEP is to have authority to require replacement water supplies in situations where it determines that a replacement water supply meeting the standards in 25 Pa. Code 89.145a(f) can be developed, PADEP asserts that OSM must supersede these provisions to the extent they would interfere with PADEP actions requiring replacement of EPAct water supplies.

In this submission, PADEP proposes that the final aspect of Pennsylvania's program that must be evaluated is whether or not the compensation provided under Pennsylvania's program is equal to that provided under the Federal program (*i.e.*, compensation equal to the reduction in fair market value of the structure). As noted earlier, section 5.2(g) provides for compensation equal to the reduction in fair market value of the property, which is at least equal to the amount required by the Federal program. Subsection (g) also provides an option to purchase the property at its fair market value prior to impact. Subsection (g) also allows compensation pursuant to other types of agreements made between the operator and landowner. Although section 5.2 is silent regarding the amount of compensation required under these agreements, section 5.3 provides the landowner a second chance at securing appropriate compensation if the amount provided under a previous agreement is less than the reduction in fair market value of the property or purchase price of the property prior to impact. Pennsylvania maintains that these provisions act together to ensure that landowners have the opportunity to obtain compensation equal to or greater than the amount provided by the Federal program.

As indicated in the foregoing discussion, PADEP is proposing that Pennsylvania's provisions relating to compensation in lieu of water supply

replacement are no less effective than the Federal provisions in most respects. PADEP asserts that both Federal and State regulations allow compensation in cases where replacement is achievable but waived by the landowner and both sets of regulations recognize the existence of conditions where the loss of a water supply can result in compensation. As noted by Pennsylvania, its program does, however, include provisions limiting PADEP's authority to require replacement when an operator opts to pursue compensation without regard to the feasibility or practicality of replacing a water supply. PADEP argues that this inconsistency must be addressed through a partial supersession of various provisions of sections 5.2(g) and (h) to the extent that they would interfere with the replacement of EPAct water supplies and corresponding changes to 25 Pa. Code 89.152(a). With these changes, PADEP is proposing that Pennsylvania's provisions relating to the replacement of EPAct water supplies will be no less effective than those of the Federal regulations.

*PADEP's Proposed Resolution:* PADEP proposed to address OSM's concerns through amendments to 25 Pa. Code 89.152. The section as proposed to be amended reads:

89.152. Water supply replacement: special provisions.

(a) In the case of an EPAct 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