

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 EPAAct 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) This section does not apply to underground mining activities which are governed by Chapter 87 (relating to surface mining of coal).

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In order for this change to become effective, PADEP informed OSM that the language in sections 5.2(g) and (h) of BMSLCA must be superseded. Specifically, PADEP indicated section 5.2(g) must be superseded to the extent that it would remove an operator's liability to restore or replace a water supply covered under section 720 of SMCRA. The proposal to supersede section 5.2(g) to this extent appears in a separate rulemaking in this *Federal*

Register issue. Section 5.2(g) provides that:

(g) If an affected water supply is not restored or reestablished or a permanent alternate source is not provided within three years, the mine operator may be relieved of further responsibility by entering into a written agreement providing compensation acceptable to the landowner. If no agreement is reached, the mine operator, at the option of the landowner shall:

(1) Purchase the property for a sum equal to its fair market value immediately prior to the time the water supply was affected; or

(2) Make a one-time payment equal to the difference between the property's fair market value immediately prior to the time the water supply was affected and at the time payment is made; whereupon the mine operator shall be relieved of further obligation regarding contamination, diminution or interruption of an affected water supply under this act. Any measures taken under sections 5.1 and 5.3 and this section to relieve a mine operator of further obligation regarding contamination, diminution or interruption of an affected water supply shall not be deemed to bar a subsequent purchaser of the land on which the affected water supply was located or any water user on such land from invoking rights under this section for contamination, diminution or interruption of a water supply resulting from subsequent mining activity other than that contemplated by the mine plan in effect at the time the original supply was affected.

PADEP also informed OSM that it must also supersede section 5.2(h) of BMSLCA to the extent that it would bar PADEP from requiring the restoration or replacement of a water supply covered under section 720 of SMCRA. OSM's proposal to supersede this section appears in a separate rulemaking in this *Federal Register* issue. Section 5.2(h) provides that:

(h) Prior to entering into an agreement with the mine operator pursuant to subsection (g), the landowner may submit a written request to the department asking that the department review the operator's finding that an affected water supply cannot reasonably be restored or that a permanent alternate source, as described in subsection (i), cannot reasonably be provided. The department shall provide its opinion to the landowner within sixty days of receiving the landowner's request. The department's opinion shall be advisory only, including for purposes of assisting the landowner in selecting the optional compensation authorized under subsection (g). The department's opinion shall not prevent the landowner from entering into an agreement with the mine operator pursuant to subsection (g), and such opinion shall not serve as the basis for any action by the department against the mine operator or create any cause of action in a third party, provided the operator otherwise complies with subsection (g).

Regulation at 30 CFR 938.16(pppp). Amendment Required by December 27, 2001, Federal Register Notice: OSM

directed Pennsylvania to remove the phrase, "and of reasonable cost" from subsection 5.2(i) of the BMSLCA. This section provides that a permanent alternate source includes any well, spring, municipal water supply system or other supply approved by PADEP which is adequate in quantity, quality and of reasonable cost to serve the premining uses of the affected water supply.

Discussion: Subsection 5.2(i) requires a permanent alternate water source to be adequate in quantity, quality and of reasonable cost to serve the premining uses of the affected water supply. In the December 27, 2001, rule, OSM stated the following two concerns regarding this provision: (1) The "reasonable cost" criterion could be interpreted to limit an operator's obligation to replace an affected water supply based on an operator's assertion that the replacement costs would be unreasonable. The Federal regulations require replacement without regard to cost; and (2) the use of the term "reasonable costs" implies that the landowner or water user could incur additional costs associated with the operation and maintenance of the replacement water supply. Federal regulations require the operator to pay operation and maintenance costs that exceed customary and reasonable costs associated with the premining water supply.

Regarding the first concern, OSM's December 27, 2001, final rule viewed the "reasonable cost" criterion as potentially setting a limit on the liability of an operator. OSM was concerned that the criterion could be applied to relieve an operator of liability if the cost of replacing an affected water supply is unreasonable. OSM noted that Federal regulations require the replacement of affected water supplies without regard to the cost of replacement.

In response to OSM's concern, PADEP asserts that the reasonable cost criterion in section 5.2(i) refers to a right of the property owner to a restored or replacement water supply that can be operated and maintained at a reasonable cost. It is not applied as a basis for relieving an operator of the liability to restore or replace an affected water supply.

PADEP noted that its position is codified in 25 Pa. Code 89.145a(f), which establishes criteria for determining the adequacy of replacement water supplies. Subsection (f) includes specific criteria relating to the quantity, quality, reliability, maintenance, control and operation costs of replacement water supplies. PADEP maintains that these criteria are clearly intended to ensure the right of a