

landowner or water user to an adequate replacement water supply. Moreover, PADEP notes that 25 Pa. Code 89.152, which sets forth conditions for relief of liability, does not mention cost as a relevant factor.

In this submission, PADEP asserts that the reasonable cost criterion in section 5.2(i) does not interfere with the replacement of affected water supplies and does not make Pennsylvania's water supply replacement provisions less effective than Federal counterpart provisions.

Regarding the second concern, OSM indicated that the "reasonable cost" criterion could result in landowners or water users incurring operation and maintenance costs in excess of those allowed under the Federal regulations. OSM noted that the Federal definition of the term "replacement of water supply" indicates that replacement includes payment of operation and maintenance cost in excess of customary and reasonable delivery costs of premining water supplies. OSM raised similar concerns under 30 CFR 938.16(ddddd) and (uuuuu) in regard to Pennsylvania regulations that relieve operators of the liability to compensate for *de minimis* cost increases.

In this submission, PADEP is proposing amendments to 25 Pa. Code 89.145a(f) to specifically address the operation and maintenance costs of EPAct water supplies. The amendments require that, in the case of an EPAct water supply, the restored or replacement water supply shall cost no more to operate and maintain than the previous water supply. The amendments further provide that any increased costs associated with the operation and maintenance of an EPAct water supply are the responsibility of the mine operator. The amendments also allow an operator to satisfy its responsibility for increased costs by compensating the landowner or water user by a one-time payment in an amount which covers the present worth of the increased annual operations and maintenance cost for a period agreed to by the operator and the landowner or water user. The provisions of proposed paragraph (5)(i) mirror the Federal requirement in regard to the operation and maintenance costs of EPAct water supplies.

The proposed amendments to 25 Pa. Code 89.145a(f) as submitted retain the allowance of a *de minimis* cost increase for replacement water supplies that are outside the scope of the Federal regulations. The retention of this provision preserves Pennsylvania law to the maximum extent possible.

PADEP's Proposed Resolution: PADEP recommends that OSM accept its interpretation that the provision regarding "reasonable cost" in section 5.2(i) of the BMSLCA, as applied through the regulations and through the proposed changes to 25 Pa. Code 89.145a(f), does not render the Pennsylvania water supply replacement requirements less effective than the Federal counterpart requirements. Proposed amendments to 25 Pa. Code 89.145a(f) are shown in the response to 30 CFR 938.16(uuuuu).

Regulation at 30 CFR 938.16(ssss). Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to make it clear that section 5.3(c) of the BMSLCA, relating to other remedies under State law, cannot negate or provide less protection than EPAct.

Discussion: Section 5.3(c) of the BMSLCA provides that nothing in the act shall prevent a landowner who claims water supply problems from seeking any other remedy that may be provided in law or equity. It goes on to indicate that in any proceedings in pursuit of a remedy other than the BMSLCA, the provisions of the Act shall not apply and the operator may assert in defense any rights or waivers from deeds, leases or agreements pertaining to mining rights or coal ownership.

In the December 27, 2001, final rule, OSM interpreted this section to mean that if a landowner sought out legal protections apart from the BMSLCA, then he would lose the protection of the BMSLCA. Section 5.3(c) was not approved to the extent that any State law negates or provides less protection than EPAct.

In this submission, PADEP has advised OSM that it interprets section 5.3(c) to allow a landowner or water user who claims contamination, diminution or interruption of a water supply to seek any other remedy that may be provided under law or in equity. PADEP further assures OSM that the landowner has full rights under the BMSLCA while seeking remedies under other laws and that this interpretation does not diminish the protections provided by EPAct.

PADEP's Proposed Resolution: PADEP proposes that section 5.3(c) of the BMSLCA remain unchanged because it has satisfied the requirement in 30 CFR 938.16(ssss).

Regulation at 30 CFR 938.16(tttt). Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to amend section 5.4 of the BMSLCA to require prompt repairs or compensation in cases involving damage to EPAct structures

(i.e., noncommercial buildings, dwellings and structures related thereto).

Discussion: In the December 27, 2001, final rule, OSM found that SMCRA at section 720(a)(1) and the Federal regulations at 30 CFR 817.121(c)(2) require the prompt repair of structural damage or the payment of compensation to owners of non-commercial buildings or occupied residential dwellings. OSM found that while Pennsylvania did require the repair of, or compensation for damage to, these structures, there was no standard requiring that such repairs or compensation be performed promptly. OSM required Pennsylvania to amend section 5.4 of the BMSLCA (52 P.S. 1406.5d) to require prompt repair and compensation for structures protected under section 720(a)(1) of SMCRA and 30 CFR 817.121(c)(2). OSM made a similar requirement at 30 CFR 938.16(kkkkk) with regard to the implementing regulations at 25 Pa. Code 89.142a(f)(1).

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.142a(f)(1) to incorporate a requirement for prompt repair or compensation with the understanding that prompt means as soon as practicable. PADEP maintains that this will make Pennsylvania's requirements for repair and compensation of structure damage no less effective than Federal counterpart requirements in regard to timeliness of actions.

Because the BMSLCA is silent on the "prompt" standard, PADEP maintains that the aforementioned regulation change will be sufficient to meet the Federal "prompt" standard. PADEP does not believe that existing statutory language is conflicting with or diminishing the authority of the revised regulatory standard. Accordingly, PADEP asserts that there is no need to amend section 5.4 of the BMSLCA.

PADEP's Proposed Resolution: PADEP proposes to amend 25 Pa. Code 89.142a(f)(1). The amended language reads.

89.142a. Subsidence control: performance standards.

* * * * *

(f) Repair of damage to structures.

(1) Repair or compensation for damage to certain structures. Whenever underground mining operations conducted on or after August 21, 1994, cause damage to any of the structures listed in subparagraphs (i)–(v), the operator responsible for extracting the coal shall promptly and fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the provisions of 25 Pa. Code 89.144a (relating to subsidence control: relief