

from responsibility) relieves the operator of responsibility.

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In this submission, PADEP proposes that section 5.4 of the BMSLCA remain unchanged, as it has satisfied the requirement in 30 CFR 938.16(tttt).

*Regulation at 30 CFR 938.16(uuuu). Amendment Required by December 27, 2001 Federal Register Notice:* OSM directed Pennsylvania to amend section 5.4(a)(3) of the BMSLCA to remove the phrase, "in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application."

*Discussion:* Section 5.4(a)(3) of the BMSLCA refers to repair or compensation for damage to improvements that are related to dwellings. In describing the scope of these requirements, subsection (a)(3) limits repair and compensation liability to improvements that are "in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application." In the December 27, 2001, final rule, OSM found that this qualification could potentially exclude improvements covered by Federal repair and compensation requirements. The Federal regulations cover all improvements that fall within the scope of the term "occupied residential dwelling and structures related thereto" as long as they are in place at the time of mining.

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.142a(f)(1)(iii) to remove the special conditions that govern the coverage of improvements related to dwellings used for human habitation. With the removal of these special qualifications, PADEP asserts that paragraph (f)(iii) will provide repair or compensation remedies for all improvements that are related to dwellings used for human habitation and in place at the time of mining. PADEP maintains that this will make the scope of Pennsylvania's repair and compensation provisions as inclusive as the Federal provisions, which address all "occupied residential dwellings and structures related thereto."

*PADEP's Proposed Resolution:* In this submission, PADEP proposes to amend 25 Pa. Code 89.142a(f)(1)(iii) as follows:

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 from responsibility) relieves the operator of responsibility.

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(iii) Dwellings which are used for human habitation and permanently affixed appurtenant structures or improvements. In the context of this paragraph, the phrase permanently affixed appurtenant structures and improvements includes, but is not limited to, structures adjunct to or used in conjunction with dwellings, such as garages; storage sheds and barns; greenhouses and related buildings; customer-owned utilities and cables; fences and other enclosures; retaining walls; paved or improved patios; walks and driveways; septic sewage treatment facilities; inground swimming pools; and lot drainage and lawn and garden irrigation systems.

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PADEP contends that in order for this change to become effective, OSM must supersede the corresponding language in section 5.4(a)(3) of the BMSLCA which serves as the basis for the existing restrictions. The proposal to supersede this section appears in a separate rulemaking in this **Federal Register** issue.

*Regulation at 30 CFR 938.16(vvvv). Amendment Required by December 27, 2001, Federal Register Notice:* OSM directed Pennsylvania to remove section 5.4(c) of the BMSLCA, which waives an operator's liability for damage repair and compensation in cases where landowners deny access for premining or postmining surveys.

OSM made a similar requirement in 30 CFR 938.16(ppppp) with regard to 25 Pa. Code 89.144a (relating to subsidence control: release of liability).

*Discussion:* Section 5.4(c) provides that:

A mine operator shall not be liable to repair or compensate for subsidence damage if the mine operator, upon request, is denied access to the property upon which the building is located to conduct premining and postmining surveys of the building and the surrounding property and thereafter serves notice upon the landowner by certified mail or personal service, which notice identifies the rights established by section 5.5 and 5.6 and this section, the mine operator was

denied access and the landowner failed to provide or authorize access within ten days after receipt thereof.

In the December 27, 2001, final rule, OSM stated that section 5.4(c) provides a release of liability that is not provided in the Federal regulations. OSM found that this would prevent the owner of an EPAct structure from receiving repairs or compensation required by 30 CFR 817.121(c)(4)(iii). Accordingly, OSM directed PADEP to remove subsection (c) to eliminate this relief as it pertains to EPAct structures.

In this submission, PADEP stated that it regards premining survey data as important to determining where liability should begin and end. PADEP maintains that a landowner's denial of access would deprive the operator and the regulatory agency of the information needed to accurately determine the extent of subsidence damage. PADEP asserts that section 5.4(c) serves as an incentive for the landowner to provide access for the performance of surveys. PADEP regards this provision as merely conditioning a landowner's rights in a reasonable manner.

PADEP also notes that it is unaware of any case where repair or compensation was refused on the basis of section 5.4(c), but acknowledged that it could not ensure that cases would not arise in the future.

To address OSM's concerns, PADEP proposes in this submission to amend 25 Pa. Code 89.144a to provide that the release of liability may not occur if the affected structure is an EPAct structure and the damage can be shown by a preponderance of evidence to be the result of underground mining operations. It is PADEP's position that this approach preserves some incentive for landowners to allow access for premining and postmining surveys. PADEP maintains that it also serves to ensure that damages to EPAct structures will be repaired if PADEP or the landowner can show through a reasonable amount of evidence that the damage resulted from underground mining operations. Finally, it retains the release of liability in cases involving non-EPAct structures, thereby preserving, to the extent possible, the provisions of existing Pennsylvania law governing structures not covered by the Federal law.

PADEP asserts that with these changes, Pennsylvania's program will be no less effective than the Federal program in regard to repair or compensation for damage to EPAct structures. The release provided by revised 25 Pa. Code 89.144a will only apply in cases involving EPAct structures where neither PADEP nor the