

landowner can prove the damage resulted from underground mining operations, and in cases involving non-EPA structures.

PADEP further argues that it can only pursue the proposed amendments to 25 Pa. Code 89.144a if OSM supersedes section 5.4(c) of BMSLCA to the extent that it applies to EPA structures.

PADEP's Proposed Resolution: In this submission, PADEP proposes to address this issue by revising parts of 25 Pa. Code 89.144a. The revised subsections now read:

89.144a. Subsidence control: relief from responsibility.

(a) Except as provided in (b), the operator will not be required to repair a structure or compensate a structure owner for damage to structures identified in 25 Pa. Code 89.142a(f)(1) (relating to subsidence control: performance standards) if the operator demonstrates to the Department's satisfaction one or more of the following apply:

(1) The landowner denied the operator access to the property upon which the structure is located to conduct a premining survey or a postmining survey of the structure and surrounding property, and thereafter the operator served notice upon the landowner by certified mail or personal service. The operator shall demonstrate the following:

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(b) The relief in paragraph (a)(1) shall not apply in the case of an EPA structure if the landowner or the Department can show, by a preponderance of evidence, that the damage resulted from the operator's underground mining operations.

PADEP asserts that in order for this change to become effective, OSM must supersede section 5.4(c) of the BMSLCA to the extent that it would relieve an operator of the liability to repair or compensate for damage to an EPA structure. The proposal to supersede this section appears in a separate rulemaking in this **Federal Register** issue.

Regulation at 30 CFR 938.16(www). Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to amend section 5.5(a) of the BMSLCA to make it clear that operators are responsible for repair or compensation in all cases where EPA structures are damaged by subsidence from "underground mining operations."

OSM made a similar requirement at 30 CFR 938.16(bbbbbb) with regard to the implementing regulations at 25 Pa. Code 89.143a(a).

Discussion: In the December 27, 2001, final rule, OSM observed that the duty to repair or compensate in section 5.5(a) is predicated on the condition that damage resulted from "underground mining." OSM noted that section 720(a)

of SMCRA applies to all damages resulting from "underground coal mining operations"—a broad term, which OSM defines to include underground construction, operation and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage and blasting. OSM further observed that Pennsylvania defines the term "underground mining" in its regulations to include only the extraction of coal. OSM interpreted the language of section 5.5(a) in combination with Pennsylvania's regulatory definition of the term "underground mining" as potentially limiting the conditions under which an operator would be liable to repair or compensate for damage to EPA structures.

In this submission, PADEP proposes to address OSM's concern by revising 25 Pa. Code 89.143a(a) to incorporate the term "underground mining operations," a term that is defined in the regulations at 25 Pa. Code 89.5, in a manner consistent with the term "underground mining operations" as used in SMCRA. PADEP notes that the terms "underground mining" and "underground mining operations" are not defined in BMSLCA and are not used in a manner that construes any distinct differences in meaning. As a result, PADEP is proposing that this issue can be effectively addressed by simply changing the regulation.

PADEP asserts that the proposed amendment to § 89.143a(a) will make Pennsylvania's program no less effective than the Federal program in regard to the types of activities that trigger liability for damage to EPA structures. PADEP further asserts that it is unnecessary to make any changes to section 5.5(a) of the BMSLCA.

In this submission, PADEP is asserting that the proposed amendment to 25 Pa. Code 89.143a(a) will make Pennsylvania's program no less effective than the Federal program in regard to the types of activities that trigger liability for damage to EPA structures. PADEP further asserts that it is unnecessary to make any changes to section 5.5(a) of the BMSLCA.

Proposed Resolution: In this submission, Pennsylvania proposes to revise 25 Pa. Code 89.143a(a) and (d) by adding the word "operations." The revised subsections read as follows:

(Note: The other changes to this section are discussed elsewhere in this proposed rule.)

89.143a. Subsidence control: procedure for resolution of subsidence damage claims.

(a) The owner of a structure enumerated in section 89.142a(f)(1) (relating to subsidence control: performance standards) who believes

that underground mining operations caused mine subsidence resulting in damage to the structure and who wishes to secure repair of the structure or compensation for the damage shall provide the operator responsible for the underground mining with notification of the damage to the structure.

(b) If the operator agrees that mine subsidence damaged the structure, the operator shall fully repair the damage or compensate the owner for the damage in accordance with either 25 Pa. Code 89.142a(f) or a voluntary agreement between the parties authorized by section 5.6 of The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. Section 1406.5f).

(c) If the parties are unable to agree as to the cause of the damage or the reasonable cost of repair or compensation for the structure, the owner of the structure may file a claim in writing with the Department. The owner of a structure that is not an EPA structure must file the claim within two years of the date the structure was damaged.

(d) Upon receipt of the claim, the Department will send a copy of the claim to the operator and conduct an investigation in accordance with the following procedure:

(1) Within 30 days of receipt of the claim, the Department will conduct an investigation to determine whether underground mining operations caused the subsidence damage to the structure and provide the results of its investigation to the property owner and mine operator within 10 days of completing the investigation.

(2) Within 60 days of completion of the investigation, the Department will determine, and set forth in writing, whether the damage is attributable to subsidence caused by the operator's underground mining operations and, if so, the reasonable cost of repairing or replacing the damaged structure.

(3) If the Department finds that the operator's underground mining operations caused the damage to the structure, the Department will either issue a written order directing the operator to promptly compensate the structure owner or issue an order directing the operator to promptly repair the damaged structure. The Department may extend the time for compliance with the order if the Department finds that further damage may occur to the same structure as a result of additional subsidence.

Regulation at 30 CFR 938.16(www). Amendment Required by December 27, 2001 Federal Register Notice: OSM directed Pennsylvania to remove section 5.5(b) of the BMSLCA which describes procedures for the resolution of structure damage claims. Section 5.5(b) provides a six-month negotiation period prior to intervention of the regulatory agency. It also establishes a two-year period for filing subsidence damage claims. OSM made a similar requirement at 30 CFR 938.16(nnnnn) with regard to the implementing regulations at 25 Pa. Code 89.143a(c). *Discussion:* Section 5.5(b) provides that:

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