

(b) If the parties are unable to agree within six months of the date of notice as to the cause of the damage or the reasonable cost of repair or compensation, the owner of the building may file a claim in writing with the Department of Environmental Resources, a copy of which shall be sent to the operator. All claims under this subsection shall be filed within two years of the date damage to the building occurred.

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In the December 27, 2001, final rule, OSM had two concerns regarding this section of the BMSLCA. OSM was concerned that the provision of a six-month negotiation period could delay PADEP enforcement action and result in repair or compensation that is not "prompt." OSM was also concerned that the requirement to file a claim within two years of the date of damage could function as a statute of limitations depriving landowners who missed the filing deadline of the right to repair or compensation. OSM stated that EPAct requires operators to promptly provide repair or compensation and does not require landowners to file damage claims in any specified time frame.

Regarding the six-month negotiation period, PADEP asserts in this submission that it has the authority to take enforcement action, when appropriate, prior to the expiration of the six-month negotiation period. According to PADEP, section 9 of the BMSLCA gives PADEP broad authority to issue orders "as are necessary to aid in the enforcement of the provisions of [the BMSLCA]." PADEP states that in most cases, enforcement actions prior to the expiration of the six-month period will focus on requirements for emergency temporary repair measures because subsidence will not be complete.

PADEP notes in this submission that, under Pennsylvania's program, all concerned parties receive timely notification of the occurrence of structure damage. The PADEP surface subsidence agents will learn of the damage through field observations and communications with the property owner. The operator will learn of the damage through reports from its field agent, the landowner or the PADEP agent. Section 25 Pa. Code 89.142a(k) also requires the operator to file a report of the claim to PADEP within 10 days of being advised of a damage incident. PADEP maintains that this system of overlapping notifications serves to ensure that the landowner, operator and PADEP receive timely information regarding the occurrence and nature of damage.

In regard to OSM's second concern about the obligation to file a claim

within two years, PADEP asserts that it does not interpret the two-year claim filing period in section 5.5(b) as a statute of limitations. However, PADEP acknowledges it cannot ensure that, in the event of an appeal, a court would not interpret this provision as a statute of limitations. Consequently, PADEP agrees that OSM must supersede this provision to the extent it is inconsistent with the Federal regulations. PADEP asserts that OSM should only supersede the statute of limitation as it relates to EPAct structures. A limited supersession will serve to satisfy the Federal requirement in 30 CFR 938.16(xxxx), while preserving Pennsylvania law to the maximum extent possible. The proposal to supersede section 5.5(b) appears in a separate rulemaking in this **Federal Register** issue.

In this submission, PADEP proposes to address OSM's concerns through amendments to 25 Pa. Code 89.143a(c). Under the proposal, language referring to the six-month negotiation period will be deleted. In addition, the regulation will be restructured so that the requirement to file a claim within two years of damage does not apply in cases involving EPAct structures. These changes will ensure that Pennsylvania provisions relating to the filing of structure damage claims are not inconsistent with Federal requirements.

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.143a(c). The proposed language reads:

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

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(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 EPAct structure must file the claim within two years of the date the structure was damaged.

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Regulation at 30 CFR 938.16(yyyy).
Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to amend section 5.5(c) to remove the following phrase relating to timeframes for enforcement orders, " * * * within six months or a longer period if the department finds that the occurrence of subsidence or subsequent damage may occur to the same building as a result of mining." (OSM made a similar requirement in 30 CFR 938.16(ooooo) with regard to the implementing regulations at 25 Pa. Code 89.143a(d)).

OSM further required Pennsylvania to ensure that written damage

determinations made by PADEP will take into account subsidence due to "underground coal mining operations" as required by SMCRA. OSM made a similar requirement at 30 CFR 938.16(bbbbbb) with regard to the implementing regulations at 25 Pa. Code 89.143a(d)(1)–(3).

Finally, OSM required Pennsylvania to insure the timeframes for investigation of claims of subsidence damage are consistent with Federal procedures for response to citizen complaints.

Discussion: Regarding the time frames in enforcement orders, section 5.5(c) of BMSLCA provides that PADEP shall make an investigation of a damage claim within 30 days following receipt of the claim. Within 60 days following the investigation, PADEP shall determine whether subsidence caused the damage and the reasonable cost of repairing or replacing the damaged structure. PADEP must issue a written order directing the operator to compensate or cause repairs to be made within six months. The six months can be extended if PADEP finds that subsidence may continue or subsequent damage may occur to the same building as a result of mining.

In the December 27, 2001, final rule, OSM was concerned that the reference to the six-month timeframe could be construed as a basis for incorporating six-month compliance periods in all PADEP orders. OSM stated that this could interfere with the requirement to promptly repair or compensate in situations where resolutions could be practically achieved in less than six months.

In response to OSM's concern, PADEP asserts in this submission, that the specified time period for compliance is "within six months" and not "six months," per se. It is PADEP's interpretation that this language does not prohibit PADEP from writing orders that require repair or compensation in less than six months. To affirm this interpretation, PADEP proposes to amend 25 Pa. Code 89.143a(d)(3) to remove the reference to the six-month period and add provisions relating to the prompt performance of actions required by enforcement orders. PADEP can extend the time for repair or compensation when it finds that subsidence may continue or subsequent damage may occur to the same building as a result of mining.

PADEP proposes that these changes will make Pennsylvania's enforcement requirements no less effective than those required under the Federal program. In addition, PADEP maintains that these changes can be implemented