

subsidence is expected to occur. The final objective is to remove all references to "six month" compliance periods thereby eliminating any confusion and potential conflicts.

The proposal involves the deletion of references to "the six-month period" mentioned in section 5.5(c) and the addition of a requirement for "prompt" compliance. PADEP contends that these proposed changes will address the required amendments and eliminate any need to revise section 5.5(c) of BMSLCA. PADEP notes that the section of the regulations that most closely resembles the portion of the statute that OSM required to be deleted is 25 Pa. Code 89.143a(d)(3). [See discussion under 30 CFR 938.16(yyyy) for information on the disposition of 25 Pa. Code 89.143a(d).]

Regarding the issue of stays of enforcement orders, PADEP is not proposing any change in response to OSM's concern that a perfected appeal could stay additional enforcement action because it is PADEP's position that the effect of a perfected appeal is the same as a compensation remedy provided under the Federal regulations. Section 5.5(e) requires that a mine operator must "deposit an amount equal to the cost of repair or the compensation amount ordered by the Department into an interest-bearing escrow account" in order to perfect its appeal. Furthermore, the operator must post the escrow within 60 days of receiving the order. PADEP asserts that the deposit of the escrow constitutes the provision of compensation because the funds needed to repair the damage have been secured from the operator.

PADEP also maintains that the escrow required to perfect an appeal will always be equal to or greater than the amount of compensation required under 30 CFR 817.121(c)(2). In accordance with section 5.5(e), PADEP notes that the required escrow must be sufficient to cover all damage up to the replacement value of the structure and, if required by PADEP, temporary relocation costs and other reasonable incidental expenses incurred by the landowner.

In summary, PADEP asserts that the escrow provisions of sections 5.5(e) and (f) constitute a compensation remedy that is no less effective than that of the Federal regulations because it meets or exceeds Federal requirements regarding timeliness and the amount of compensation. Accordingly, PADEP argues that any stay of further enforcement action is of no consequence.

*PADEP's Proposed Resolution:* In this submission, PADEP proposes to revise

25 Pa. Code 89.143a(d)(3). The proposed language reads as follows:

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

\* \* \* \* \*

(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:

\* \* \* \* \*

(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.

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In this submission, PADEP proposes that OSM accept the above revisions to 25 Pa. Code 89.143a(d)(3), and that the above demonstration that the escrow provision at section 5.5(f) is no less effective than the Federal enforcement requirements at 30 CFR part 843.

*Regulation at 30 CFR 938.16(aaaaa).*  
*Amendment Required by December 27, 2001, Federal Register Notice:* OSM required Pennsylvania to amend section 5.6(c) to remove provisions relating to agreements executed between April 27, 1966, and August 21, 1994.

*Discussion:* Section 5.6(c) of BMSLCA provides:

The duty created by section 5.5 to repair or compensate for subsidence damage to the buildings enumerated in section 5.4(a) shall be the sole and exclusive remedy for such damage and shall not be diminished by the existence of contrary provisions in deeds, leases or agreements which relieved mine operators from such duty. Nothing herein shall impair agreements entered into after April 27, 1966, and prior to the effective date of this section, which, for valid consideration, provide for a waiver or release of any duty to repair or compensate for subsidence damage. Any such waiver or release shall only be valid with respect to damage resulting from the mining activity contemplated by such agreement.

The last two sentences of this section protect the terms and conditions of agreements executed under former section 4 of BMSLCA, which was effective from April 27, 1966, until August 21, 1994. Section 4 was repealed by Act 54 of 1994, but while in effect, required the absolute protection of dwellings and certain other structures in place on April 27, 1966. Section 4 allowed operators and landowners to enter into agreements consenting to damage of dwellings and other

protected structures if the landowner was fully compensated for resultant damage. In the December 27, 2001, final rule, OSM stated that these agreements could negate an operator's liability to repair or compensate for damage to EPAct structures or provide a landowner with less compensation than would be due under EPAct. Federal regulations do not waive an operator's liability to repair or compensate for damage based on the provisions of agreements executed prior to the effective date of EPAct. Based on these concerns, OSM directed Pennsylvania to remove the last two sentences of section 5.6(c).

In this submission, PADEP asserts that the provisions under section 5.6(c), which recognize the terms and conditions of section 4 agreements, are no longer a cause for concern. This assertion is based on the following two considerations: (1) The absence of any agreements for post-1966 structures—Because post-1966 structures had no protection from subsidence damage until Act 54, it is highly unlikely there are any agreements providing for repair or compensation, and (2) Agreement under former section 4 provided for full compensation or repairs. Because pre-1966 dwellings were completely protected, post-1966 agreements for those dwellings would have to have provided the homeowners more than full compensation or repairs otherwise the owner would not have had any reason to enter into an agreement with a mine operator.

PADEP stated that it has not encountered any case where repairs or compensation were denied on the basis of an agreement executed under former section 4. Furthermore, neither industry nor citizens' interests have come forth with any pertinent information regarding these agreements or their effect, despite specific inquiries by PADEP and OSM.

At this time, PADEP contends that these agreements no longer play a role in the settlement of structure damage cases in Pennsylvania and asserts that there is no need to amend section 5.6(c) of BMSLCA.

*PADEP's Proposed Resolution:* In this submission, PADEP proposes that the provisions relating to agreements entered into after April 27, 1966, and prior to the effective date of section 5.6, be retained pending the receipt of information showing that these provisions result in remedies that are less effective than those provided under EPAct. At this time, we are requesting information from the public regarding the existence of these agreements. If you know that agreements such as these