

exist, please provide them to us during the comment period.

Regulation at 30 CFR 938.16(bbbbbb): Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to ensure that the provisions of section 5.6(d) reflect OSM's decision in regard to 30 CFR 938.16(aaaaa).

Discussion: In the December 27, 2001, final rule, OSM stated that section 5.6(d) includes a reference to the "pre-1994" agreements mentioned in 5.6(c). Since OSM's earlier decision was to require removal of provisions recognizing these agreements (*see* 30 CFR 938.16(aaaaa)), it had directed Pennsylvania to amend section 5.6(d) as well.

As explained in the discussion under 30 CFR 938.16(aaaaa), PADEP maintains that these agreements no longer play a role in the settlement of subsidence damage claims and asserts that there is no need to remove the clause in 5.6(c), which recognizes the terms and conditions of "pre-1994" agreements. PADEP maintains that there is no need to change section 5.6(d).

PADEP's Proposed Resolution: In this submission, PADEP proposes that the provision regarding agreements entered into after April 27, 1966, and prior to the effective date of this section be retained pending the receipt of information showing that this provision results in remedies that are less effective than those provided under EPAct.

Regulation at 30 CFR 938.16(ccccc): Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to amend section 6 of the BMSLCA to comply with the provisions of 30 CFR 817.121(c)(5) regarding when, and under what circumstances, the regulatory authority must require permittees to obtain additional performance bond and the amount of such bond.

Discussion: In the December 27, 2001, final rule, OSM's required amendment was based upon the Federal regulation at 30 CFR 817.121(c)(5) that requires permittees to obtain additional bond for repairs or compensation for subsidence damage or restoration or replacement of water supplies if such remedies are not completed within 90 days. The 90-day period can be extended up to one year if the regulatory authority finds that subsidence is not complete and that not all damage has occurred. During the review of Act 54 and the implementing regulations, OSM stated that there was no provision in the Pennsylvania program to increase bonds for subsidence damage and that the bonds that were in place did not cover replacement or restoration of water supplies.

In this submission, PADEP asserts that the current Pennsylvania program is no less effective than the Federal requirements relative to bonding for subsidence damage to structures and land. This position is based upon the way the PADEP addresses bonding for underground mining operations as a result of a court decision; *People United to Save Homes v. Department of Environmental Protection*, 1999 EHB 457, *aff'd*, 789 A.2d 319 (Pa. Cmwlth. 2001)) (PUSH decision).

More specifically, 25 Pa. Code 86.150 provides that the minimum amount of bond for bituminous coal mining activities is to be \$10,000. Until the PUSH decision, PADEP had been requiring this amount for all underground mining activities. In the PUSH decision, the Environmental Hearing Board found this amount was only to be a minimum, not a uniform figure to be applied across-the-board with every underground mining permit. The Environmental Hearing Board also held that existing factors in 25 Pa. Code 86.149 were to be used in determining the amount of subsidence bond. As a result, PADEP began setting bond amounts based on site-specific conditions. The subsidence bond calculation procedures include the value of land, improvements, and developed water sources and projections of subsidence damage. The bonds are recalculated each time the permit is renewed and each time there is a change in the subsidence control plan area. In addition, Pennsylvania proposes to amend 25 Pa. Code 86.152(a) to change discretionary bond adjustments to mandatory adjustments. The PADEP requirements are supported by guidance dated August 1, 2000, "Procedures for Calculating Mine Subsidence Bonds," and 25 Pa. Code 86.149 (relating to determination of bond amounts).

Although BMSLCA does not contain a specific provision directing PADEP to require bonds to ensure the replacement of affected water supplies, PADEP asserts that it can apply the provisions of 25 Pa. Code 86.168 (relating to terms and conditions for liability insurance) to accomplish the same objective. Section 86.168(c) requires a permittee to have a liability insurance policy. The regulation requires the policy to include coverage for loss or diminution of quantity or quality of public or private sources of water. The liability insurance policy requirement is a minimum \$500,000 per occurrence and \$1 million aggregate. Also, 25 Pa. Code 86.168(g) provides that a bond or individual insurance policy for each permit may be provided in lieu of liability insurance to

cover replacement or restoration of water supplies. PADEP conducts reviews of permittee insurance policies both at the time of permit issuance and yearly to ensure that there is coverage for the replacement of water supplies that may be damaged and in need of replacement at any point during the mining operation. PADEP also notes that OSM has approved insurance as an acceptable means of addressing damages in at least one other State program.

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 86.152 as follows:

86.152. Bond adjustments.

(a) The amount of bond required and the terms of the acceptance of the applicant's bond will be adjusted by the Department from time to time as the area requiring bond coverage is increased or decreased, or where the cost of future reclamation changes, or where the projected subsidence damage repair liability changes. The Department may specify periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement. This requirement shall only be binding upon the permittee and does not compel a third party, including surety companies, to provide additional bond coverage and does not extend the coverage of a subsidence bond beyond the requirements imposed by sections 5, 5.4, 5.5, and 5.6 of the Bituminous Mine Subsidence and Land Conservation Act.

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In this submission, PADEP further proposes that OSM accept the insurance requirements imposed by 25 Pa. Code 86.168(c) as being as effective as the Federal requirements relating to bonding for water supply replacement.

Regulation at 30 CFR 938.16(ddddd): Amendment Required by December 27, 2001 Federal Register Notice: OSM directed Pennsylvania to remove the definition of "*de minimis* cost increase," which appears in 25 Pa. Code 89.5 (relating to definitions).

Discussion: Pennsylvania's regulations incorporate the concept of a *de minimis* cost increase to define a lower threshold below which operators will not be required to compensate for the increased cost of operating and maintaining a replacement water supply. The term is defined in 25 Pa. Code 89.5 and applied in former section 25 Pa. Code 89.145a(f)(1) (now under 89.145a(f)(5)). The term is defined to mean a cost increase that meets one of the following criteria:

(i) Is less than 15% of the annual operating and maintenance cost of the previous water supply that is restored or replaced.

(ii) Is less than \$60 per year.

In the December 27, 2001, final rule, OSM disapproved the definition of "*de minimis* cost increase," which appears