

in 25 Pa. Code 89.5. OSM reasoned that this definition in combination with the performance standard in 25 Pa. Code 89.145a(f)(1) would allow some increased costs associated with the operation and maintenance of a replacement water supply to be passed along to the landowner or water user. OSM noted that a 15% increase or \$60 increase could be excessive depending on the costs of operating and maintaining the original water supply. OSM explained that the intent of the Federal regulation is to ensure that "[t]he owner or user of the water supply is made whole, and that no additional costs are passed on to the water supply user." (60 FR 16726).

During the joint meeting process, PADEP explained that the purpose of the *de minimis* concept was to define a threshold below which it is impossible to tell whether a replacement water supply was more costly to operate and maintain than the original supply. PADEP noted that cost calculations are based on a number of variables and cannot be determined to the exact dollar. The thresholds described in 25 Pa. Code 89.5 represented PADEP's best estimate of where to draw the line and were based on decisions issued by Pennsylvania courts. OSM, however, reiterated its concern that the definition included specific amounts that may or may not be *de minimis* depending on the specific facts of a case.

To resolve this issue, PADEP has decided to amend its regulations so that the provisions relating to *de minimis* cost increases will not apply to EPAct water supplies. The definition and concept will be retained for restored or replacement water supplies that are outside the scope of the Federal regulations. Additional explanations and details regarding PADEP's proposed regulatory amendment are provided under 30 CFR 938.16(pppp) and (uuuuu).

Proposed Resolution: PADEP proposes to retain the definition and concept of a *de minimis* cost increase for application in cases that are outside the scope of the Federal regulations. The performance standard in 25 Pa. Code 89.145a(f) will be amended to clarify that the term does not apply in cases involving EPAct water supplies. Proposed amendments to 25 Pa. Code 89.145a(f) are shown in the response to 30 CFR 938.16(uuuuu).

Regulation at 30 CFR 938.16(eeeee).
Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to delete the definition of "fair market value" from 25 Pa. Code 89.5.

Discussion: The requirement to delete the term fair market value and its associated definition was based on OSM's disapproval of Pennsylvania statutory and regulatory provisions that allow compensation in lieu of water supply replacement. The term "fair market value" is used in sections 5.2 and 5.3 of the BMSLCA and 25 Pa. Code 89.152 to establish standards for compensation in cases where affected water supplies cannot be replaced.

In this submission, PADEP asserts that the term fair market value and its associated definition are needed to establish standards for adequate compensation and to conform to Federal requirements relating to situations where water supplies cannot be replaced. As indicated in the discussion under 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr), OSM would regard the inability to replace an EPACT water supply as material damage to the property served by the affected water supply and would require the operator to compensate the landowner for the reduction in fair market value. The Department has proposed amendments to 25 Pa. Code 89.152(a)(5) to provide an equivalent remedy for these situations. Section 89.152(a)(5) also uses the term fair market value in describing the required amount of compensation. The term fair market value is needed to demonstrate that Pennsylvania's standard of compensation is no less effective than the Federal standard. PADEP asserts that the definition of "fair market value" should be retained.

Proposed Resolution: PADEP is proposing that this explanation satisfies the required amendment in 30 CFR 938.16(eeeee) and that the definition of "fair market value" be retained in 25 Pa. Code 89.5.

Regulation at 30 CFR 938.16(fffff).
Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to remove the phrase "securely attached to the land surface" in the definition of "permanently affixed appurtenant structures" in 25 Pa. Code 89.5.

Discussion: In the December 27, 2001, final rule, OSM found that Pennsylvania's definition of "permanently affixed appurtenant structures" is less effective than the Federal regulations. The Federal definition of the term "occupied residential dwelling and structures related thereto" at 30 CFR 701.5 lists examples of protected facilities. Pennsylvania has adopted a similar listing of protected facilities in its definition of "permanently affixed appurtenant structures." However, in that definition, Pennsylvania requires

that these facilities be "securely attached to the land surface." OSM viewed this requirement as a qualification that could potentially exclude some EPAct structures from repair or compensation under Pennsylvania's program.

To address OSM's required amendment, PADEP proposes to amend its regulations to delete the requirement for secure attachment to the land surface for the group of "permanently affixed appurtenant structures" that falls within the scope of the Federal regulations. This change will be accomplished by deleting the term and definition in 25 Pa. Code 89.5 and by adding a description to 25 Pa. Code 89.142a(f)(1)(iii). The description in amended 25 Pa. Code 89.142a(f)(1)(iii) is derived from the Federal definition of "occupied residential dwelling and structures related thereto" and is intended to include all "permanently affixed appurtenant structures" that qualify as EPACT structures. The proposed description does not require secure attachment to the land surface as a qualification for inclusion.

PADEP also proposes to identify a second group of permanently affixed appurtenant structures that are addressed solely under the BMSLCA. Structures in this group derive eligibility for repair and compensation provisions based on their relationship to buildings that are accessible to the public. This group of permanently affixed appurtenant structures is described in 25 Pa. Code 89.142a(f)(1)(i). The proposed description includes that same structure types identified in 25 Pa. Code 89.142a(f)(1)(iii), but retains the requirement for attachment to the land surface. The proposed change preserves an aspect of Pennsylvania's program, which is outside the scope of the Federal regulations.

In this submission, PADEP asserts that the proposed changes will ensure that Pennsylvania's subsidence damage repair and compensation provisions apply to all structures that fall within the scope of the Federal term "occupied residential dwelling and structures related thereto." PADEP proposes that this will satisfy the requirement in 30 CFR 938.16(fffff).

PADEP's Proposed Resolution: In this submission, PADEP is proposing to delete the term "permanently affixed appurtenant structures" and its associated definition from 25 Pa. Code 89.5.

PADEP is also proposing to amend 25 Pa. Code 89.142a(f)(1)(i) and (iii) to distinguish between appurtenant structures covered by EPAct and other appurtenant structures covered