

postmining survey shall utilize a certified laboratory to analyze the samples.

(iv) The quantity of the water.

(v) The physical description of the water supply, including the depth and diameter of the well, length of casing and description of the treatment and distribution systems.

(vi) Hydrogeologic data such as the static water level and yield determination.

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Regulation at 30 CFR 938.16(rrrrr). Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to amend 25 Pa. Code 89.145a(b) to require the "prompt" restoration or replacement of water supplies and to clarify, if necessary, that the phrase "satisfy the water user's needs and the demands of any reasonably foreseeable uses" is consistent with the actual use and the reasonably foreseeable use of the supply, regardless of whether the current owner has demonstrated plans for the use.

Discussion: Regarding the issue of prompt restoration/replacement, OSM determined that in the December 27, 2001, final rule, that Pennsylvania's regulations on water supply restoration and replacement do not specify that operators must fulfill their obligations in a "prompt" manner. OSM found that the absence of this standard made Pennsylvania's water supply replacement provisions less effective than those in section 720(a)(2) of SMCRA and 30 CFR 817.41(j). The Federal statute and regulations require permittees to promptly replace drinking, domestic or residential water supplies affected by underground mining operations.

In this submission, PADEP has stated that it is appropriate for operators to fulfill their water supply restoration and replacement obligations as promptly as possible to minimize inconvenience to landowners and to limit the amount of liability that may accrue from unresolved water supply claims. PADEP has reviewed the applicable provisions of BMSLCA and stated that it found nothing that would interfere with requirements for prompt restoration or replacement. PADEP, therefore, proposes to address OSM's concern by amending 25 Pa. Code 89.145a(b) to incorporate a requirement for "prompt" action.

Regarding reasonably foreseeable uses, in the December Rule, OSM expressed concern about Pennsylvania's requirement that permanently restored or replacement water supplies must be adequate to serve the "reasonably foreseeable uses" of the original water supply. OSM observed that 25 Pa. Code 89.145a(b) provides that a restored or

replacement water supply must be adequate to serve the landowner's premining uses or any reasonably foreseeable uses, implying that an operator may select from one of two options. OSM also noted that 25 Pa. Code 89.145a(f)(3) addresses the "reasonably foreseeable use" standard using slightly different language—i.e., "the water user's needs and the demands of any reasonably foreseeable uses." Finally, OSM noted a letter in which PADEP described "reasonably foreseeable uses" as "any foreseeable uses the landowner or water user had intended to develop." OSM clarified that Pennsylvania's program must address all reasonably foreseeable uses and that the scope of this term cannot be limited to the documented plans of the current landowner.

In this submission, PADEP decided to address OSM's concern by amending 25 Pa. Code 89.145a(b) to require that restored or replacement water supplies must be adequate to serve the premining uses of the water supply and any reasonably foreseeable uses of the water supply. PADEP also affirms that it will not limit its application of the phrase "reasonably foreseeable uses" to include only those uses that can be documented by the landowner. PADEP will act to ensure that consideration is given to all drinking, domestic and residential uses that are reasonably foreseeable and within the capacity of the premining water supply.

PADEP asserts that these proposed changes make Pennsylvania's water supply replacement requirements no less effective than Federal counterpart requirements.

PADEP's Proposed Resolution: In this submission, PADEP proposes to amend 25 Pa. Code 89.145a(b). The amended language reads as follows:

89.145a. Water supply replacement: performance standards.

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(b) Restoration or replacement of water supplies. When underground mining activities conducted on or after August 21, 1994, affect a public or private water supply by contamination, diminution or interruption, the operator shall promptly restore or replace the affected water supply with a permanent alternate source which adequately serves the premining uses of the water supply and any reasonably foreseeable uses of the water supply. The operator shall be relieved of any responsibility under The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. sections 1406.1–1406.21) to restore or replace a water supply if the operator demonstrates that one of the provisions of 25 Pa. Code 89.152 (relating to water supply replacement: relief from responsibility) relieves the operator of further responsibility. This subsection does not

apply to water supplies affected by underground mining activities which are covered by Chapter 87 (relating to surface mining of coal).

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Regulation at 30 CFR 938.16(sssss). Amendment Required by December 27, 2001, Federal Register Notice: OSM directed Pennsylvania to amend 25 Pa. Code 89.145a(e)(1) to assure the prompt supply of temporary water to all landowners whose water supplies have been affected by underground mining operations regardless of whether the water supplies are within or outside of the area of presumptive liability.

Discussion: Section 25 Pa. Code 89.145a(e)(1) provides that:

If the affected water supply is within the rebuttable presumption area and the rebuttable presumption applies and the landowner or water user is without a readily available alternate source, the operator shall provide a temporary water supply within 24 hours of being contacted by the landowner or water supply user or the Department, which ever occurs first.

In the December 27, 2001, final rule, OSM found this regulation to be less effective than Federal regulations that require the prompt provision of temporary water in all cases where EPAct water supplies are affected by underground mining operations with no limiting conditions. OSM observed that 25 Pa. Code 89.145a(e) did not provide for the prompt provision of temporary water in cases where the affected water supply was outside the rebuttable presumption area or cases where the operator rebutted the presumption of liability by demonstrating denial of access to perform a premining survey. OSM was also concerned that the rebuttal of the presumption in combination with the inability of the property owner or PADEP to come forth with premining data could relieve an operator of the obligation to provide temporary water.

PADEP acknowledges that existing 25 Pa. Code 89.145a(e) only addresses the provision of temporary water in cases where water supply effects are subject to the rebuttable presumption of section 5.2(c) of the BMSLCA. Section 89.145(e) reflects the provisions of section 5.2(a)(2) of the statute, which is similarly focused on situations where the rebuttable presumption applies.

In this submission, PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.145a(e) to include a paragraph that specifically addresses the provision of temporary water supplies when EPAct water supplies are affected by underground mining activities. This new requirement will apply regardless of the location of the affected water