DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–143–FOR]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We are approving a proposed amendment to the Pennsylvania regulatory program (the ''Pennsylvania program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Pennsylvania proposed to revise its program at 25 Pa. Code Chapters 86 and 89 regarding bonding and repair or compensation for damage to certain structures caused by subsidence due to underground mining operations and for replacement or restoration of water supplies impacted by subsidence due to underground mining operations. Through our approval of this amendment, we are also removing forty-seven required amendments to the Pennsylvania program. We required these amendments in a final rule published in the **Federal Register** on December 27, 2001 (66 FR 67010), in which we reviewed changes Pennsylvania made to its Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) and implementing regulations. Pennsylvania revised its program to be consistent with the corresponding Federal regulations and SMCRA.

DATES: *Effective Dates:* December 9, 2004.

FOR FURTHER INFORMATION CONTACT: George Rieger, Director, Pittsburgh Field Division, Telephone: (717) 782–4036, e-mail: *grieger@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.15 and 938.16.

II. Submission of the Proposed Amendment

By letter dated August 27, 2003, the Pennsylvania Department of Environmental Protection (PADEP) sent us an amendment to its program (Administrative Record No. PA 841.64) under SMCRA (30 U.S.C. 1201 *et seq.*). Pennsylvania sent the amendment in response to the required program amendments at 30 CFR 938.16(hhhh) through and including (bbbbbb). Pennsylvania is proposing to amend its regulations at 25 Pa. Code 86.1, 86.151, 86.152, 89.5, 89.141, 89.142a, 89.143a, 89.144a, 89.145a, 89.146a, and 89.152 to satisfy the required amendments. Pennsylvania is also proposing additional regulation changes that relate to, but are not specifically required by, our required amendments. By letter dated September 3, 2003, PADEP revised its response to the required amendment at 30 CFR 938.16(ccccc) and its ancillary change to bonding requirements (Administrative Record No. PA 841.65).

We announced receipt of the proposed amendment in the September 22, 2003, **Federal Register** (68 FR 55106). In the same document, we opened the public comment period and provided the public with an opportunity to speak at scheduled public hearings on the amendment's adequacy. We held public hearings in Indiana, Pennsylvania, on October 15, 2003, at 3 p.m. and at 7 p.m. and in Washington, Pennsylvania, on October 16, 2003, at 3 p.m. and at 7 p.m. We entered a transcript of the public hearings into the administrative record (the Indiana hearings under Administrative Record Nos. PA 841.91 and PA 841.92, and the Washington hearings under Administrative Record Nos. PA 841.88 and PA 841.89). In a separate proposed rulemaking on the same day, we asked for comments on a proposed action to supersede certain sections of BMSLCA (68 FR 55134). The public comment period for both proposed rulemakings ended on October 22, 2003. During the hearings, we received 19 distinct sets of comments through written and oral testimony, from the following:

Industry—Pennsylvania Coal Association (PCA), Private Citizens—eight homeowners, and Businesses—The Hothouse Floral Company.

Citizen/Environmental Groups: Citizens for Pennsylvania's Future a/k/a PennFuture, Concern About Water Loss due to Mining (CAWLM), Sierra Club/Tri-States Citizen Network, Citizen Network, Mountain Watershed Association, Ten Mile Protection Network, Wheeling Creek Watershed Conservancy, and Citizen's Coal Council.

Testimony by legal counsel for State Representative William DeWeese.

In addition, we received further written comments from the PCA, the National Mining Association (NMA), the U. S. Environmental Protection Agency, Department of Labor, Mine Safety and Health Administration, several private citizens, and from two environmental groups (CAWLM & Tri-States Citizen Network).

III. OSM's Findings

Following are the findings we made under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17 concerning approval of Pennsylvania's amendment to its program and removal of our required amendments. In this final rule, we are approving the proposed changes to Pennsylvania's regulatory program as noted below. Additionally, in a separate final rule published in today's **Federal Register** we are superseding portions of BMSLCA. Approval of PADEP's proposed regulations along with the determinations made in the December 27, 2001, final rule and the superseding of portions of BMSLCA, have enabled us to remove the required amendments at 30 CFR 938.16(hhhh) through (bbbbbb). For easy cross-reference to our final rule of December 27, 2001, our findings below are arranged in the alphabetical order of the December 27, 2001, required amendments. Please see our December 27, 2001, final rule (66 FR 67010) for a full discussion of OSM's rationale for requiring these amendments to Pennsylvania's program. The December 27, 2001, final rule is made a part of the record for this action as well.

In the December 27, 2001, final rule, the required amendments from 30 CFR

938.16(hhhh) to 30 CFR 938.16(ccccc) describe changes we required Pennsylvania to make to BMSLCA, while the required amendments from 30 CFR 938.16(ddddd) to 30 CFR 938.16(bbbbbb) describe changes we required Pennsylvania to make to its regulations. In some cases, the changes Pennsylvania proposed to its regulations in the August 27, 2003, letter were sufficient to remove amendments we required to BMSLCA. The specific sections of BMSLCA where this occurred are noted below.

Finally, in its August 27, 2003, letter, PADEP also proposed several amendments to Chapters 86 and 89 that we did not specifically require in our December 27, 2001, final rule. These changes are discussed in a separate section following our discussion on the required amendments.

30 CFR 938.16(hhhh). Reference relating to bonding requirements.

Required Amendment: We required Pennsylvania to submit a proposed amendment to Section 5(b) of BMSLCA to delete the reference to Section 6(a) of BMSLCA, which no longer exists, and replace it with a reference to 6(b).

For a full explanation of PADEP's rationale in proposing removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55107). We accept PADEP's explanation that the error in cross referencing sections of BMSLCA will not interfere with PADEP's authority to require a bond or make its bonding requirements any less effective than the Federal bonding requirements. As a result, we are removing this required amendment and approving language in 5(b) of BMSLCA that was previously not approved.

30 CFR 938.16(iiii). Prompt replacement of water supplies.

Required Amendment: We required Pennsylvania to submit a proposed amendment to Section 5.1(a)(1) of BMSLCA to require the prompt replacement of all water supplies affected by underground mining operations.

For a full explanation of PADEP's proposed action and argument for removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55107). PADEP proposed to amend its regulation at 25 Pa. Code 89.145a(b) to require the prompt replacement of water supplies. The proposed addition of the word ''prompt'' to Pennsylvania's regulations makes those regulations no less stringent than Section 720(a)(2) of SMCRA regarding prompt replacement of water supplies. Since BMSLCA was silent on when a water supply had to be replaced, the addition of the word ''prompt'' to Pennsylvania's regulations allows the removal of this required amendment to BMSLCA. Therefore, we are approving the regulatory change at 25 Pa. Code 89.145a(b) (see 30 CFR 938.16(rrrrr) below) and removing this required amendment.

30 CFR 938.16(jjjj). Two-year reporting limit on water supply effects.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove Section 5.1(b) of BMSLCA, which establishes a two-year limit on filing water supply damage claims. We made a similar finding in 30 CFR 938.16(yyyyy) with regard to the corresponding regulatory requirement in 25 Pa. Code 89.152(a)(4).

For a full explanation of PADEP's proposed action and argument for removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55107). PADEP proposed to amend its regulation at 25 Pa. Code 89.152(a) to remove the two year filing deadline with regard to claims involving water supplies protected under the Federal regulations. As discussed infra, we have determined that the changes to 25 Pa. Code 89.152(a) are no less effective than the Federal regulations regarding replacement of water supplies. However Section 5.1(b) of BMSLCA conflicts with this revised regulation in that it limits an operator's obligation to replace water supplies if the landowner's claim is not made within two years of the date of impact and, as initially determined in the December 27, 2001, final rule, is inconsistent with SMCRA and the Federal regulations. In a separate notice published in today's **Federal Register**, we are superseding Section 5.1(b) of BMSLCA to the extent that it would limit an operator's liability to restore or replace a water supply covered under Section 720 of SMCRA. Based on our approval of PADEP's proposed changes to its regulations at 25 Pa. Code 89.152(a) (see 30 CFR 938.16(yyyyy) below), coupled with the determinations made in the December 27, 2001, final rule and the superseding of Section 5.1(b) of BMSLCA as described above, we are removing this required amendment.

30 CFR 938.16(kkkk). Water supply replacement: promptness of actions.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove the clause in Section 5.2(b)(2) of BMSLCA, which acknowledges that water supply claims may exist for periods up to three years prior to PADEP enforcement action because this does not provide for prompt replacement under Section 720(a)(2) of SMCRA.

For a full explanation of PADEP's rationale and revised regulation proposed for removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55108–09). PADEP stated that the language at Section 5.2(b)(2) of BMSLCA does not prevent it from taking enforcement action sooner than three years after the date of impact and that the three years is the outer limit for permanent water restoration/replacement. Coupled with PADEP's proposed change to its regulations at 25 Pa. Code 89.145a(b) requiring prompt replacement of water supplies, we have determined that the portion of the required amendment concerning the three year period that can elapse before enforcement action is taken can be removed. As a result, we are approving the regulatory change to 25 Pa. Code 89.145(a)(b) (see 30 CFR 938.16(rrrrr) below), approving language in Section 5.2(b)(2) of BMSLCA that was previously not approved, and we are removing this required amendment.

In a matter unrelated to this required amendment, but pertaining to Section 5.2(b)(2) of BMSLCA, we approved, in the December 27, 2001, final rule, the portion of Section 5.2(b)(2) that requires PADEP to investigate claims within 10 days of notification and to make a determination within 45 days of whether an operator affected a water supply to the extent that these time frames were consistent with, or more timely than, Pennsylvania's citizen complaint procedures (66 FR at 67016). PADEP's proposed change to 25 Pa. Code 89.146a(c), which we approved below, requires it to notify citizens of its determination within 10 days of completing its investigation. This regulation ensures that the Pennsylvania program is no less effective than the Federal requirements at 30 CFR 842.12 regarding time frames for citizen complaint procedures (see 30 CFR 938.16(wwwww) below).

30 CFR 938.16(llll). Denial of access for premining survey and its effect on affirmative proof of water supply contamination, diminution or interruption.

Required Amendment: We required Pennsylvania to submit a proposed amendment to delete the phrase, ''Wherever a mine operator, upon request, has been denied access to conduct a premining survey and the mine operator thereafter served notice upon the landowner by certified mail or personal service, which notice identified the rights established by Sections 5.1 and 5.3 and this section, was denied access and the landowner

failed to provide or authorize access within ten days after receipt thereof, then such affirmative proof shall include premining baseline data, provided by the landowner or the department, relative to the affected water supply.'' from Section 5.2(d) of BMSLCA. We took this action because limiting proof to premining baseline data is less effective than 30 CFR 817.121(j).

For a full explanation of PADEP's rationale for why the required amendment should be removed, see the September 22, 2003, proposed rule (68 FR at 55109). PADEP has stated that Section 5.2(d) of BMSLCA will not interfere with its ability to use evidence other than ''premining baseline information'' and provided an interpretation of its statute and regulations that it will allow the use of all evidence in cases of water supply impacts. Generally, courts grant deference to an agency's interpretation of a statute that the agency implements. We have determined that PADEP's interpretation is reasonable. Based on this interpretation, we have determined that it is no less effective than the Federal regulations that require replacement of all drinking, domestic and residential water supplies regardless of whether premining baseline data is provided. As a result, we are removing this required amendment and approving language in Section 5.2(d) of BMSLCA that was previously not approved.

30 CFR 938.16(mmmm). Relief of liability for water supply replacement when the adverse effect occurs more than three years after mining activity.

Required Amendment: We required Pennsylvania to submit a proposed amendment to delete Section 5.2(e)(2) of BMSLCA which provides a release of liability in cases where water supply impacts occur more than three years after mining activity because it eliminated an operator's liability, leaving no recourse for landowners.

After lengthy deliberations with PADEP concerning this required amendment, we determined that this section and its implementing regulation at 25 Pa. Code 89.152(a)(2) are no less effective than the Federal regulations because: (1) The application of the three year limit will not result in release of liability prior to the time that the Federal regulations would provide for jurisdiction to terminate; (2) PADEP can reassert jurisdiction if there is fraud, collusion or misrepresentation of a material fact; and (3) the three year limit does not affect a citizen's right to sue pursuant to Section 520 of SMCRA.

For a full discussion of OSM's considerations and the explanation of PADEP's rationale proposing removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55109). PADEP maintains that the start of the three year period is at the time of the last mining activity. PADEP proposes to amend its definition of underground mining activities at 25 Pa. Code 86.1 and 89.5 to include post closure mine pool maintenance. Water supplies are usually affected at the time of subsidence or upon the advance of mine workings into or adjacent to aquifers. After the mining is completed, the development of the post closure mine pool is the only mining-related factor that is likely to affect adjacent water supplies. The mine pool may take years to reach a stable elevation and require six months to a year to verify stabilization. Thus, the three year period will not start until PADEP is convinced that the mine pool has stabilized. The Federal regulations providing for termination of jurisdiction are based on the satisfaction of reclamation standards and not necessarily on the date of pool stabilization. Thus, the Federal regulations would normally allow a State to terminate jurisdiction before pool stabilization.

PADEP has also demonstrated (as discussed fully in the proposed rule) that it has the authority to require an operator to replace a water supply if an operator uses erroneous or fraudulent information because under Section 5.2(e) of BMSLCA such an operator has failed to meet the affirmative defense requirements. Lastly, Section 13 of BMSLCA created the right of citizens to sue. PADEP interprets Section 13 as not being affected by the three-year limit described in Section 5.2(e)(2). We have determined that PADEP's interpretation is reasonable. Accordingly, based on PADEP amending its definition of ''underground mining activities,'' and based on its reasonable interpretations of its statute and regulations that there is recourse for the landowner and there is a way to require the replacement of water supplies after the three years, we find these provisions for an operator's liability for water supply replacement to be no less effective than the Federal regulations. As a result, we are removing this required amendment and approving language in Section 5.2(e)(2) of BMSLCA that was previously not approved.

30 CFR 938.16(nnnn), (oooo), (qqqq), (rrrr). Compensation in lieu of water supply replacement.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove provisions in Sections 5.2(g) and (h) and 5.3 of BMSLCA, which allow an operator to provide compensation in lieu of restoring or replacing an affected water supply.

As previously noted in the December 27, 2001, final rule, Section 720 of SMCRA and the Federal rules unequivocally require replacement of a water supply. *See,* 66 FR at 67018. PADEP proposed to amend 25 Pa. Code 89.152 to provide for situations when an operator may not be required to restore or replace a water supply protected under Section 720 of SMCRA and for situations when an operator will not be required to restore or replace a water supply outside the protections of Section 720 of SMCRA. The proposed changes to the regulations addressing those water supplies protected under SMCRA do not provide for compensation in lieu of replacement of water supplies. Instead, these changes provide that in the rare circumstances that PADEP determines that a water supply meeting the requirements of 25 Pa. Code 89.145a(f) cannot be replaced, a payment for the fair market value of the property, or a payment for the difference between the fair market value prior to and after mining, can be made to the landowner.

However, the change to 25 Pa. Code 89.152 conflicts with portions of Sections 5.2(g) and (h) of BMSLCA because the statute limits PADEP's authority to require replacement of an Energy Policy Act (EPAct) water supply when instead an operator wants to compensate an owner. For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55111). While the Federal standards do not have a provision identical to Pennsylvania's regulations, these provisions are not inconsistent with the requirements of the Federal regulations authorizing compensation for property damage because the loss of an EPAct water supply would be considered material damage to the structure, which under 30 CFR 817.121(c)(5), would require the operator to compensate the owner for reduction in the fair market value of the structure. As a result, we are approving the proposed changes to 25 Pa. Code 89.152 (see 30 CFR 938.16(zzzzz) below). In a separate notice published in today's **Federal Register**, we are superseding Section 5.2(g) of BMSLCA to the extent that it would limit an operator's liability to restore or replace a water supply covered under Section 720 of SMCRA and we are superseding Section 5.2(h) of BMSLCA to the extent it would preclude Pennsylvania from

requiring the restoration or replacement of a water supply covered under Section 720 of SMCRA. Because of the changes Pennsylvania is proposing to its regulations at 25 Pa. Code 89.152 coupled with the determinations made in the December 27, 2001, final rule and the superseding of Sections 5.2(g) and (h) of BMSLCA as noted above, we are removing these required amendments and approving language in Section 5.3 of BMSLCA that was previously not approved.

30 CFR 938.16(pppp). Permanent alternate source definition.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove the phrase, ''and of reasonable cost'' from Subsection 5.2(i) of BMSLCA because it could be interpreted to limit an operator's obligation to replace an affected water supply and could result in the landowner/water user incurring additional costs. This section provides that a permanent alternate source includes any well, spring, municipal water supply system or other supply approved by PADEP which is adequate in quantity, quality and of reasonable cost to serve the premining uses of the affected water supply.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, *see* the September 22, 2003, proposed rule (68 FR at 55113). PADEP proposes to modify its regulations at 25 Pa. Code 89.145a(f) to require that a restored or replaced drinking, domestic or residential water supply cannot cost the water user more to operate and maintain than the previous water supply. We approved this proposed regulation (see 30 CFR 938.16(uuuuu) below). Additionally, PADEP has provided an interpretation of its program that the ''reasonable cost'' standard in Section 5.2(i) of BMSLCA refers to the right of a property owner to a restored or replaced water supply that can be operated or maintained at a reasonable cost. This provision is not applied as a basis for relieving an operator of the liability for restoration or replacement of affected water supplies. With this interpretation and our approval of the proposed change to the regulation at 25 Pa. Code 89.145a(f), we have determined that Pennsylvania's program is no less effective than the Federal requirements for replacement of water supplies. Therefore, we are removing this required amendment and approving language in 5.2(i) of BMSLCA that was previously not approved.

30 CFR 938.16(ssss). Other remedies available under State law.

Required Amendment: We required Pennsylvania to submit a proposed amendment to make it clear that Section 5.3(c) of BMSLCA, relating to other remedies under State law, cannot negate or provide less protection than EPAct.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55114). PADEP provided an interpretation of this section that a landowner has full rights under BMSLCA while seeking remedies under other laws. We accept PADEP's interpretation of this portion of the statute. Because landowners or water supply users have the full protection of BMSLCA even while pursuing other avenues of redress, we have determined that this portion of the program is no less effective than the Federal regulations and we are removing this required amendment.

30 CFR 938.16(tttt). Prompt repair or compensation for structure damage.

Required Amendment: We required Pennsylvania to submit a proposed amendment to Section 5.4 of BMSLCA to require prompt repairs or compensation in cases involving damage to EPAct structures (*i.e.*, noncommercial buildings, dwellings and structures related thereto).

For a full explanation of PADEP's rationale for removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55114). PADEP proposes to amend its regulation at 25 Pa. Code 89.142a(f)(1) to provide for the prompt repair of subsidence damage from underground mining operations or for the prompt compensation thereof (see 30 CFR 938.16(kkkkk) below). We have determined that this proposed regulation is no less effective than the Federal regulations requiring prompt replacement or compensation and we approved it. Since BMSLCA was silent on when a damaged structure had to be repaired, the addition of the word ''prompt'' to Pennsylvania's regulations at 25 Pa. Code 89.142a(f)(1) makes the Pennsylvania statute and regulations no less stringent than Section 720(a)(1) of SMCRA regarding prompt repair of, or compensation for, material damage to certain structures. Therefore, we are removing this required amendment.

30 CFR 938.16(uuuu). Repair of dwellings and permanently affixed appurtenant structures or improvements.

Required Amendment: We required Pennsylvania to submit a proposed amendment to Section 5.4(a)(3) of BMSLCA to remove the phrase, ''in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application.''

The Pennsylvania statute provided for the repair or compensation of improvements to structures damaged by underground mining operations so long as the improvements were in place at the time of the permit application or at the time of the permit renewal and were completely within the boundary of the mine. The Federal definition of ''occupied residential dwelling and structures related thereto'' includes improvements related to EPAct structures. The Federal rules at 30 CFR 817.121(c)(2) protect such improvements if they were in place at the time of mining. There is no Federal requirement that the improvement be completely within the boundary of the mine. For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55115). In response to this amendment, PADEP proposes to amend its regulation at 25 Pa. Code 89.142a(f)(1)(iii) to remove the phrase corresponding to the above phrase from BMSLCA. We approved this proposed regulation (see 30 CFR 938.16(llll) below).

However, the change to 25 Pa. Code 89.142a(f)(1)(iii) conflicts with portions of Section 5.4(a)(3) of BMSLCA which still contain the above language. In a separate notice published in today's **Federal Register**, we are superseding the portion of Section 5.4(a)(3) of BMSLCA that states, ''in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application,'' to the extent it would limit an operator's liability for restoration of, or compensation for subsidence damages to, structures protected under Section 720 of SMCRA that were in existence at the time of mining. Because of our approval of Pennsylvania's proposed regulation at 25 Pa. Code 89.142a(f)(1)(iii), coupled with the determinations made in the December 27, 2001, final rule and the superseding of Section 5.4(a)(3) of BMSLCA as noted above, we have determined that the changes to Pennsylvania's program are no less effective than the Federal regulations and we are removing this required amendment.

30 CFR 938.16(vvvv). Relief of liability for structure damage repair or compensation when an operator is

denied access to conduct a premining or postmining survey.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove Section 5.4(c) of BMSLCA, which waives an operator's liability for damage repair and compensation in cases where landowners deny access for premining or postmining surveys because 30 CFR 817.121(c)(2) does not provide an exception to operator's liability for subsidence damage to EPAct structures.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55115). PADEP has proposed to revise its regulation at 25 Pa. Code 89.144a to provide that an operator's relief of liability for damage repair or compensation does not apply to EPAct structures if the landowner or PADEP can show by a preponderance of evidence that the damage resulted from the operator's underground mining operations (*see* 30 CFR 938.16(ppppp) below). We have determined that this proposed change in the regulations is no less effective than the Federal provisions relating to damage repair or compensation and we approved it. However, the change to 25 Pa. Code 89.144a conflicts with portions of Section 5.4(c) of BMSLCA which still contain this language. In a separate notice published in today's **Federal Register**, we are superseding Section 5.4(c) of BMSLCA to the extent it limits an operator's liability for repair of, or compensation for, subsidence damage to a structure covered under Section 720 of SMCRA. Based on Pennsylvania's proposed changes to 25 Pa. Code 89.144a, coupled with the determinations made in the December 27, 2001, final rule and the superseding of Section 5.4(c) of BMSLCA as described above, we are removing this required amendment.

30 CFR 938.16(wwww). Repair or compensation for damaged structures.

Required Amendment: We required Pennsylvania to submit a proposed amendment to Section 5.5(a) of BMSLCA to make it clear that operators are responsible for repair or compensation in all cases where EPAct structures are damaged by subsidence from ''underground mining operations,'' not just for damage caused by the removal of coal. Section 720(a) of SMCRA requires prompt repair or compensation for material damage caused by underground coal mining operations, which includes many activities. We made a similar requirement at 30 CFR 938.16(bbbbbb) with regard to the implementing regulations at 25 Pa. Code 89.143a(a).

For a full discussion of the various terms and an explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55116). PADEP proposes to amend its regulation at 25 Pa. Code 89.143a(a) to change the term ''underground mining'' to ''underground mining operations.'' PADEP noted that the terms ''underground mining'' and ''underground mining operations'' are not defined in the BMSLCA and are used interchangeably in the statute (for example, the term ''underground mining operations'' used in Section 5.4 of BMSLCA and the term ''underground mining'' used in Section 5.5 of BMSLCA). Since these and related sections concern the same subject matter, repair and/or compensation of damage to structures, PADEP's regulatory definitions and its interpretation of its statute and regulations must be examined to satisfy this issue. We have determined that Pennsylvania's proposed change to 25 Pa. Code 89.143a(a) is no less effective than the Federal regulations regarding repair or compensation of structures damaged by underground mining operations since its definition of underground mining operations is consistent with that portion of the Federal definition of underground mining activities regarding underground operations. As a result, we are approving it (*see* 30 CFR 938.16(bbbbbb)) below. Further, we have determined that Pennsylvania's interpretation that BMSLCA is not limiting in this regard is a reasonable one and therefore we are removing this required amendment.

30 CFR 938.16(xxxx). Structure Damage—Six-month negotiation period and two-year claim filing period.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove Section 5.5(b) of BMSLCA which describes procedures for the resolution of structure damage claims. Section 5.5(b) provides a six-month negotiation period prior to intervention of PADEP. It also establishes a two-year period for filing subsidence damage claims. We required the amendment because the language could delay enforcement action by PADEP; did not provide for prompt repair or compensation as required by SMCRA; and was inconsistent with SMCRA which does not restrict the time for filing a damage claim. We made a similar requirement at 30 CFR 938.16(nnnnn) with regard to the implementing regulations at 25 Pa. Code 89.143a(c).

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55116). To address this required amendment, PADEP has stated that under Section 9 of BMSLCA, it has the broad authority to issue enforcement orders prior to the six month negotiation period in order to carry out the enforcement provisions of BMSLCA. Additionally, PADEP amended its proposed regulation at 25 Pa. Code 89.143a(c) to eliminate the requirement that a landowner wait six months to file a claim and to eliminate the requirement that a landowner file a damage claim within two years with regard to structures protected under Federal regulations. We have determined that these changes make this regulation no less effective than the Federal regulations regarding damage repair or compensation and we approved them (see 30 CFR 938.16(nnnnn) below). We have determined that PADEP's interpretation of Section 9 of BMSLCA is reasonable since it removed the above noted regulatory language, making it clear that the six month time period does not limit earlier repair or compensation for protected structures.

However, the proposed change to 25 Pa. Code 89.143a(c) conflicts with portions of Section 5.5(b) of BMSLCA because the statute has the mandatory language that all claims shall be filed within two years. In a separate notice published in today's **Federal Register**, we are superseding the portion of Section 5.5(b) of BMSLCA that reads, ''All claims under this subsection shall be filed within two years of the date damage to the building occurred'' to the extent that it would limit an operator's liability for restoration of, or compensation for, subsidence damages to a structure covered under Section 720 of SMCRA. Based on our approval of PADEP's proposed amendment to 25 Pa. Code 89.143a(c), coupled with the determinations made in the December 27, 2001, final rule and the superseding of Section 5.5(b) of BMSLCA as noted above, we are removing this required amendment.

30 CFR 938.16(yyyy). Investigation and orders for repair of damaged structures.

Required Amendment: We required Pennsylvania to submit a proposed amendment to Section 5.5(c) of BMSLCA to do three things: (1) 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.'' We made a similar requirement in 30 CFR 938.16(ooooo) with regard to the implementing regulations at 25 Pa. Code 89.143a(d); (2) ensure that written damage determinations made by PADEP will take into account subsidence due to underground coal mining operations as required by SMCRA (we 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)); and (3) ensure that the timeframes for investigation of claims of subsidence damage are consistent with Federal procedures for response to citizen complaints.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55117). With regard to the first requirement, PADEP stated that the language in 5.5(c) of BMSLCA reads that the compliance period is ''within six months'' and not a fixed six-month compliance period so that it has the ability to require shorter compliance period than six months. To support this interpretation, PADEP proposes to remove the six month period from its regulation at 25 Pa. Code 89.143a(d)(3) and proposes to add provisions relating to the prompt performance of actions required by enforcement orders. We approved these proposed changes (see 30 CFR 938.16(ooooo) below).

With regard to the second requirement, PADEP proposes to amend 25 Pa. Code 89.143a(d) to replace the term, ''underground mining,'' with ''underground mining operations.'' We approved this proposed change (see 30 CFR 938.16(bbbbbb) below).

With regard to the third requirement, PADEP proposes to amend 25 Pa. Code 89.143a(d)(1) to require claimant notification by PADEP within ten days of PADEP completing its investigation of the subsidence damage claim. We have determined that PADEP's interpretation of BMSLCA's ''within six months'' language in conjunction with the proposed regulatory change allows PADEP to issue orders requiring prompt compliance is no less effective than the Federal regulations which require abatement of notices of violations (*i.e.*, enforcement orders) within ninety days, including extensions, unless one of the exceptions of 30 CFR 843.12(c) applies. As a result, we are approving Pennsylvania's proposed regulation at 25 Pa. Code 89.143a(d)(1). As discussed earlier with required amendment 30 CFR 938.16(wwww), we have determined that PADEP's interpretation and regulation change replacing the term ''underground mining'' with ''underground mining operations,'' no less effective than the Federal regulations.

Finally, with regard to the proposed changes made to the regulations concerning investigation and notification of subsidence damages claims, we determined that since Section 5.5(c) of BMSLCA was ambiguous on the maximum time that could elapse between the completion of the investigation and the time the complainant was notified of the results, the revised regulation is no less effective than the Federal citizen complaint rule which requires notification within ten days of completion of the inspection. As a result, we are removing this required amendment.

30 CFR 938.16(zzzz). Issuance of orders and payment of escrow when an operator fails to repair or compensate a landowner for subsidence damage.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove the following phrase from Section 5.5(f) of BMSLCA, ''* * * within six months or such longer period as the department has established or shall fail to perfect an appeal of the department's order directing such repair or compensation.''

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55118). PADEP addressed this amendment through an amendment to its regulation at 25 Pa. Code 89.143a(d) (*see* 30 CFR 938.16(ooooo) below). As discussed in the prior finding, the proposed amendment to 25 Pa. Code 89.143a(d) clarifies the requirement for prompt compliance, conditions time extensions for abatement on a determination that additional subsidence is expected to occur, and removes all references to ''six month'' compliance periods. PADEP's proposed change to 25 Pa. Code 89.143a(d) is no less effective than the Federal regulations.

We also agree with PADEP's explanation that the escrow provision found in Section 5.5(e) of BMSLCA eliminates our concern that a perfected appeal could stay an enforcement action. An enforcement action would require the operator to repair or compensate for material damage to a protected structure. Payment into the escrow account by the operator is comparable to the Federal regulation of 30 CFR 817.21(c)(2) which requires repair or compensation, thus eliminating the need for enforcement action. Based on the proposed changes to 25 Pa. Code 89.143a(d) and PADEP's explanation, we are removing this required amendment and approving language in 5.5(f) of BMSLCA that was previously not approved.

30 CFR 938.16(aaaaa). ''Pre-1994'' agreements relating to subsidence damage repair or compensation.

Required Amendment: We required Pennsylvania to submit a proposed amendment to Section 5.6(c) of BMSLCA to remove provisions relating to agreements executed between April 27, 1966, and August 21, 1994.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55119). PADEP indicated that the agreements referenced under this section are no longer a cause for concern. PADEP also indicated that it believes that these agreements no longer play a role in the settlement of structure damage cases in Pennsylvania and observed that it has encountered no situation where repairs or compensation were denied on the basis of Section 5.6(c) of BMSLCA. On this basis, PADEP asserts that there is no need to amend Section 5.6(c) of BMSLCA. In the proposed rule, we requested that the public provide copies of these agreements if they exist. While we received unsigned copies of such agreements, we received none that were signed. As a result, we have determined that PADEP's assertion that such agreements do not influence structure damage claims is accurate. As a result, we are removing this required amendment and approving language in Section 5.6(c) of BMSLCA that was previously not approved.

30 CFR 938.16(bbbbb): Reference to ''pre-1994'' agreements.

Required Amendment: We required Pennsylvania to submit a proposed amendment to ensure that the provisions of Section 5.6(d) of BMSLCA reflect our decision in regard to 30 CFR 938.16(aaaaa).

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55120). Because of our decision with regard to removing the required amendment at 30 CFR 938.16(aaaaa), we have determined that there is no need for this required amendment and we are removing it.

30 CFR 938.16(ccccc). Bonding for subsidence damage and water replacement.

Required Amendment: We required Pennsylvania to submit a proposed amendment to Section 6 of 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. Specifically, we were concerned that the Pennsylvania program did not provide for an adjustment of the bond after subsidence damage occurs or did not require a bond or a bond increase for damage to land or water resources.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55120). PADEP indicated that it requires operators to post a subsidence bond prior to mining and that the amount of this bond is based on 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, PADEP has proposed to amend 25 Pa. Code 86.152(a) to change discretionary bond adjustments to mandatory adjustments. We have approved this proposed change (see the discussion for 25 Pa. Code 86.152(a) in the section titled, ''Ancillary Changes'' below). Lastly, for damaged water resources, PADEP asserts that a bond for damaged water resources is unnecessary because its existing regulation at 25 Pa. Code 86.168 requires a permittee to have liability insurance for the loss or diminution in quantity and quality of public or private sources of waters. The Federal regulations at 30 CFR 800.14 allow liability insurance in lieu of a performance bond. We have determined that the proposed changes PADEP is making to its regulation at 25 Pa. Code 86.152(a), and its liability insurance provisions of 25 Pa. Code 86.168, coupled with PADEP's explanation of its subsidence bond program make its proposed regulations no less effective than the corresponding Federal regulations at 30 CFR 817.121(c)(5). As a result, we are removing this required amendment.

30 CFR 938.16(ddddd). Definition of de minimis cost increase.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove the definition of de minimis cost increase, which appears in 25 Pa. Code 89.5 (relating to definitions) because it could allow some increased operation and maintenance costs be passed on to the landowner or water user.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55120). PADEP proposed to eliminate the de minimis cost increase concept for water supplies protected under the Federal regulations in its regulation at 25 Pa. Code 89.145a(f). Pennsylvania's proposed regulation requires that the restored or replaced EPAct water supply shall not cost the landowner or the water user more to operate and maintain than the cost of the previous water supply. Elimination of de minimis cost increases for drinking, domestic, and residential water supplies is no less effective than the Federal regulations which require no increased operating and maintenance costs of replacement water supplies be passed on to landowners and water users. Therefore, we are removing this required amendment.

30 CFR 938.16(eeeee). Definition of fair market value.

Required Amendment: We required Pennsylvania to submit a proposed amendment to delete the definition of ''fair market value'' from 25 Pa. Code 89.5.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55121). PADEP noted that the term ''fair market value'' is used in cases where it has determined that affected water supplies cannot be replaced. We approved this concept under the required amendments at 30 CFR 938.16(nnnn), (oooo), (qqqq), and (rrrr). We determined that this definition will be necessary in providing compensation in those cases where a water supply cannot be replaced and the owner is compensated for the reduction of the fair market value of the structure due to the water loss. As a result, we are removing this required amendment and approving this definition.

30 CFR 938.16(fffff). Definition of permanently affixed appurtenant structures.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove the phrase ''securely attached to the land surface'' in the definition of ''permanently affixed appurtenant structures'' in 25 Pa. Code 89.5 because the Federal definition of ''occupied residential dwelling and structures related thereto'' does not require such structures be securely attached to the land.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55121). To address this requirement, 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 definition ''permanently affixed appurtenant structures'' from 25 Pa. Code 89.5 and by adding a description to 25 Pa. Code 89.142a(f)(1)(iii) that draws on the Federal definition of occupied residential dwellings and structures related thereto at 30 CFR 701.5, which does not have such restrictions. We have determined that these revised regulations are no less effective than the Federal requirements and as a result, we are approving them and removing this required amendment.

30 CFR 938.16(ggggg). Subsidence control plan—prevention of material damage to EPAct structures.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.141(d)(3) to expand its requirement that subsidence control plans include descriptions of the measures to be taken to prevent material damage to dwellings and related structures and noncommercial buildings when mining methods do not result in planned subsidence.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55122). PADEP proposes extensive changes to 25 Pa. Code 89.141(d) and 89.142a(d) to address our concern and to more clearly distinguish between requirements pertaining to mining that results in planned subsidence versus mining that does not result in planned subsidence. The proposed amendments establish different approaches to protecting noncommercial buildings, dwellings and related structures (EPAct structures) depending on the type of mining an operator plans to use. If plans involve mining that does not result in planned subsidence, an operator must take measures to prevent subsidence that would cause material damage to EPAct structures. If plans involve mining that is projected to result in planned subsidence, an operator must develop his plans around alternate measures, which are described in the discussion under 30 CFR 938.16(hhhhh). SMCRA and the Federal regulation at 30 CFR 784.20(b) require the permittee to describe preventative measures for EPAct structures. Since Pennsylvania's amended regulations will require preventative measures for EPAct structures, we have determined that the proposed change to 25 Pa. Code

89.141(d) and 89.142a(d) with regard to structures protected under SMCRA are no less effective than the corresponding Federal regulations. As a result, we are approving the proposed regulations and removing this required amendment.

30 CFR 938.16(hhhhh). Subsidence control plan—minimizing material damage to EPAct structures.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.141(d)(6) to require subsidence control plans to include descriptions of the measures to be taken to minimize material damage to dwellings and related structures and noncommercial buildings when mining methods are projected to result in planned subsidence because 89.141(d)(6) addressed irreparable damage but did not address situations where material damage may occur for EPAct structures as required by 30 CFR 784.20(b)(5) and (b)(7).

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55123). In response to our concern, PADEP has proposed extensive amendments to 25 Pa. Code 89.141(d) and 25 Pa. Code 89.142a(d). These changes, which are also discussed under 30 CFR 938.16(ggggg), require subsidence control plans to include descriptions of the measures to be taken when planned subsidence is projected to result in material damage to an EPAct structure. The measures, which are described in proposed 25 Pa. Code 89.142a(d), include taking measures to minimize damage to the extent technologically and economically feasible; obtaining the landowner's consent to allow damage; and evaluating the need for damage minimization measures based on cost, health, and safety considerations. We have determined that these proposed changes require, as does the Federal rule at 30 CFR 784.20(b)(7), a description of the methods to be used in areas of planned subsidence to minimize material damage for EPAct structures, unless the owner consented to the material damage or the costs of the minimization methods would exceed the cost of repairs and the material damage does not threaten health or safety. Thus, the proposed changes make Pennsylvania's regulations no less effective than the Federal requirements and we are approving them and removing this required amendment.

30 CFR 938.16(iiiii). Measures to minimize material damage.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.142a(c)(3) to make it no less effective than 30 CFR 817.121(e), which imposes on the regulatory authority the obligation to require permittees to modify subsidence control plans to ensure the prevention of further material damage in the cases where the initial plan or operator's actions fail and provides the authority to suspend mining until such a plan is approved.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55123). PADEP proposes to amend 25 Pa. Code 89.142a(c)(3) to incorporate the provisions we requested by giving PADEP the discretion to suspend mining. We have determined that these proposed changes will make Pennsylvania's program no less effective than the Federal rule at 30 CFR 817.121(e) in dealing with situations where approved measures fail to prevent material damage or reduce the reasonably foreseeable use of public buildings and facilities, churches, schools, hospitals, impoundments with storage capacities of 20 acre-feet or more, bodies of water with volumes of 20 acre-feet or more, and aquifers or bodies of water that serve as significant sources for public water supply systems. We also note that the structures or features addressed by this proposed regulation are the same as those addressed by 30 CFR 817.121(d) and (e). As a result, we are approving the proposed regulation and removing this required amendment.

30 CFR 938.16(jjjjj). Prevention of material damage.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.142a(d) to ensure the prevention of material damage to occupied residential dwellings and community or institutional buildings (*i.e.*, EPAct structures) in areas where mining is not projected to result in planned subsidence because this subsection only addressed situations where irreparable damage was predicted but did not address situations where material damage may occur for EPAct structures, as provided at 30 CFR 817.121(a).

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55124). PADEP proposes to address OSM's concern by amending 25 Pa. Code 89.142a(d) to require the prevention of material damage in cases where operators use mining methods that are not projected to result in planned subsidence. We have determined that this proposed change makes Pennsylvania's regulations no less effective than the Federal regulations in regard to the protection of EPAct structures. As a result, we are approving the proposed regulation and removing this required amendment.

30 CFR 938.16(kkkkk). Prompt repair or compensation for structure damage.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.142a(f)(1) to secure prompt repair or compensation to landowners. We made a similar requirement at 938.16(tttt) in regard to Section 5.4 of BMSLCA (*see* discussion under 30 CFR 938.16(tttt).

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55124). PADEP proposes to amend 25 Pa. Code 89.142a(f)(1) as shown under 30 CFR 938.16(tttt). Since Pennsylvania has proposed to add the word ''prompt'' to its regulations, we have determined that 25 Pa. Code 89.142(a)(f)(1) is no less effective than the Federal rule at 30 CFR 817.121(c) which requires the prompt repair or compensation to landowners for material damage caused by subsidence and we are approving it. Since these proposed changes also satisfy the required amendment, we are removing it.

30 CFR 938.16(lllll). Repair of dwellings and permanently affixed appurtenant structures or improvements.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.142a(f)(1)(iii) to remove the phrase, ''in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application.'' This section is similar to Section 5.4(a)(3) of BMSLCA. *See* discussion under 30 CFR 938.16(uuuu).

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55124). PADEP proposes to amend 25 Pa. Code 89.142a(f)(1)(iii) as shown in the proposed resolution to 30 CFR 938.16(uuuu). Since the proposed regulation no longer has the limitations that were not in the Federal regulation at 30 CFR 817.121(c)(5), we have determined that this regulation is no less effective than the Federal rule and we are approving it and removing the required amendment. Also, we are superseding the language in Section 5.4(a)(3) of BMSLCA which serves as

the basis for this condition in a separate notice published in today's **Federal Register**.

30 CFR 938.16(mmmmm). Protection of utilities from underground mining activities.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.142a(g)(1) to require all underground mining activities, not just underground mining, be conducted in a manner consistent with 30 CFR 817.180. The term ''underground mining activities'' is defined at 30 CFR 701.5 to include surface operations incident to underground coal extraction or in situ processing and underground operations.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55124). In response to the required amendment, PADEP is proposing to revise 25 Pa. Code 89.142a(g)(1) to replace the term ''underground mining'' with ''underground mining operations.'' We have determined that this change, in combination with the protections already provided under existing 25 Pa. Code 89.67 (relating to surface mining activities associated with an underground mine and various utilities), is no less effective than the Federal regulations at 30 CFR 817.180 and we are approving it. As a result, we are removing this required amendment.

30 CFR 938.16(nnnnn). Statute of limitations on damage repair or compensation—claims must be filed with PADEP within two years of damage.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove the phrase from 25 Pa. Code 89.143a(c) that states, ''* * * within 6 months of the date that the building owner sent the operator notification of subsidence damage to the structure * * *.'' Additionally, we required Pennsylvania to submit a proposed amendment to remove the phrase, ''within 2 years of the date damage to the structure occurred.'' We made a similar requirement at 30 CFR 938.16(xxxx) with regard to Section 5.5(b) of BMSLCA.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55125). Since 25 Pa. Code 89.143a(c) is substantively identical to Section 5.5(b) of BMSLCA, please see our discussion and proposed resolution under 30 CFR 938.16(xxxx), including proposed amendments to 25 Pa. Code 89.143a(c) and OSM supersession described under 30 CFR 938.16(xxxx). As noted in 30 CFR 938.16(xxxx), we have determined that the changes proposed by PADEP are no less effective than the Federal regulations and we are approving them. As a result, we are removing this required amendment.

30 CFR 938.16(ooooo). Investigation and orders for repair of damaged structures.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove the sentences from 25 Pa. Code 89.143a(d)(3) that state, ''* * * within 6 months of the date of issuance of the order. The Department may allow more than 6 months if the Department finds that further damage may occur to the same structure as a result of additional subsidence.'' We made a similar requirement at 30 CFR 938.16(yyyy) with regard to Section 5.5(c) of BMSLCA.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55125). This regulation is similar to 5.5(c) of BMSLCA. PADEP's proposal to amend 25 Pa. Code 89.143a(d)(3) as shown under 30 CFR 938.16(yyyy) is no less effective than the Federal regulations and we are approving it. The proposed regulation also satisfies the required amendment at 30 CFR 938.16(ooooo). See also the discussion under 30 CFR 938.16(yyyy) above for more information. We are removing this required amendment.

30 CFR 938.16(ppppp). Relief of liability for structure damage repair or compensation when operator is denied access to conduct a premining or postmining survey.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove 25 Pa. Code 89.144(a)(1), which provides a waiver of liability that is inconsistent with Federal regulations. This is the same issue that was raised under 30 CFR 938.16(vvvv) in regard to Section 5.4(c) of BMSLCA.

PADEP has proposed changes to 25 Pa Code 89.144(a)(1) that restrict this waiver so it cannot be raised in cases involving EPAct structures. *See* the proposed regulatory amendment and our supersession described under 30 CFR 938.16(vvvv). These amended regulations are no less effective than the Federal regulations and we are approving them. This approval satisfies the required amendment under 30 CFR 938.16(ppppp) and, as a result, we are removing it.

30 CFR 938.16(qqqqq). Water supply surveys—various issues.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.145a(a)(1) to: (1) Make it clear that the requirement that survey information need only be obtained to the extent that it can be collected without extraordinary efforts or the expenditure of excessive sums of money is only applicable as it applies to inconveniencing landowners; (2) remove the provision that allows for water supply surveys to be delayed until mining advances within 1,000 feet of a water supply; and (3) require permittees to submit information required by 25 Pa. Code 89.145a(a)(1)(i)–(vi) that is necessary to meet the provision of 30 CFR 784.20(a)(3) at the time of application for all existing drinking, domestic, or residential water supplies.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55125). With regard to the first concern, PADEP proposes to amend 25 Pa. Code 89.145a(a)(1) to replace the condition relating to ''extraordinary efforts or excessive sums of money'' with a condition relating to ''excessive inconvenience to the landowner,'' so it is clear that a survey will be conducted unless the landowner is excessively inconvenienced. This is no less effective than 30 CFR 784.20 that requires the permit applicant to conduct a water supply survey at its own expense.

With regard to the second and third concerns, state regulatory authorities must demonstrate that baseline data at the time of the permit application is adequate to develop the Probable Hydrologic Consequences and Cumulative Hydrologic Investigation Assessment documents and that any delayed water supply surveys would be completed before any adverse effect to the water supply. PADEP proposed amending 25 Pa. Code 89.145a(a)(1) to remove the 1,000-foot criterion and clarify the requirement to collect premining survey information prior to the time the water supply is susceptible to mining-related effects. The determination of when surveys must be completed will be made by PADEP technical staff based on information in the permit application, PADEP database information relating to the distances at which impacts have been documented to occur, and the reviewer's knowledge of conditions in the general area. Sampling distances specific to each mine and, if appropriate, to individual areas within a mine, will be established by permit condition. We agree that the approach that Pennsylvania proposes is reasonable since the environment of the individual permit will dictate when the

water supply will be susceptible to the effects of mining and that the entity best equipped to deal with this determination is PADEP since it has available the most unbiased experience and information.

With regard to the third concern, PADEP asserts that the proposed changes to 25 Pa. Code 89.145a, in combination with its proposal to gather appropriate premining information using the provisions of 25 Pa. Code Sections 89.34, 89.35 and 89.36, will make Pennsylvania's premining survey requirements as effective as Federal counterpart requirements. We agree that the baseline data information submitted with the permit application (25 Pa. Code 89.34–36 hydrologic information) and the changes to 25 Pa. Code 89.145a are adequate to develop the probable hydrologic consequences and cumulative hydrologic impacts of the area. Thus, we have determined that PADEP's proposed changes to 25 Pa. Code 89.145a and its interpretation to be no less effective than the Federal regulations and we are approving it. These actions satisfy the required amendment under 30 CFR 938.16(qqqqq) and as a result, we are removing it.

30 CFR 938.16(rrrrr). Water supply replacement—promptness of action and reasonably foreseeable uses.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.145a(b) to require the ''prompt'' restoration or replacement of water supplies and to clarify, if necessary, that the language at 25 Pa. Code 89.145a(b) 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.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55127). PADEP proposes to address our concern regarding prompt restoration by amending 25 Pa. Code 89.145a(b) to incorporate a requirement for ''prompt'' action. The ''prompt'' issue was raised under 30 CFR 938.16(iiii) in regard to Section 5.1(a)(1) of BMSLCA. See the proposed regulatory amendment described under 30 CFR 938.16(vvvv) for further discussion. PADEP decided to address our concern regarding reasonably foreseeable uses of water supplies 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. This is consistent with what we did when we approved the Federal definition of ''replacement of water supply,'' where we rejected a recommendation that replacement be limited to actual use. See 60 FR at 16726. Thus, we have determined that these changes are no less effective than the Federal regulations regarding the prompt replacement of water supplies and the standards for replacement of a water supply to its premining quantity and quality. As a result, we are approving the proposed regulations and removing this required amendment.

30 CFR 938.16(ssss). Water supply replacement—prompt provision of temporary water.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 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.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55127). PADEP proposes to address our 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 supply with respect to the rebuttable presumption area or the operator's rebuttal of the presumption of liability. We have determined that the proposed change to 25 Pa. Code 89.145a(e) is no less effective than the Federal regulations regarding replacement of water supplies because 30 CFR 701.5 (replacement of water supply) and 30 CFR 817.41(j) require the prompt replacement of a protected water supply on both a temporary and permanent basis, regardless of where the water supply is located. As a result, we are approving this proposed regulation and removing this required amendment.

30 CFR 938.16(ttttt). Quality and quantity of temporary water supplies.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.145a(e)(2) to require the restoration of water quantity in temporary water supplies to the same level as permanent water supplies, as noted in 25 Pa. Code 89.145a(f)(3) because the definition of ''replacement of water supply'' at 30 CFR 701.5 applies to both permanent and temporary water supplies.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55128). PADEP proposes to address OSM's requirement by amending former paragraph 25 Pa. Code 89.145(e)(2), which is paragraph (e)(3) under the current proposal, to delete the reference to premining water needs. Amended paragraph (e)(3) will require temporary water supplies to meet all needs of an affected water user, not just the water user's premining needs. We have determined that this change makes the Pennsylvania program no less effective than the Federal regulations and we are approving it. As a result, we are removing this required amendment.

30 CFR 938.16 (uuuuu). De minimis cost increase.

Required Amendment: We required Pennsylvania to submit a proposed amendment to revise 25 Pa. Code 89.145a(f)(1)(v) to make it clear that cost increases associated with the operation and maintenance of a restored or replacement water supply may not be passed on to the water user.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, *see* the September 22, 2003, proposed rule (68 FR at 55128). As explained in discussions under 30 CFR 938.16(pppp) and (ddddd), PADEP proposes to amend 25 Pa. Code 89.145a(f) to address our concern. The amendments require that, in the case of an EPAct water supply, the restored or replacement water supply shall cost no more to operate and maintain than the previous water supply. As discussed earlier, this change is no less effective than the Federal regulations regarding replacement of water supplies and we are approving it. As a result, we are removing the required amendment at 30 CFR 938.16(uuuuu).

30 CFR 938.16(vvvvv). Reasonably foreseeable use—adequate quantity.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.145a(f)(3)(i) and (ii), if necessary, to ensure 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 uses.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, *see* the September 22, 2003, proposed rule (68 FR at 55129). PADEP has addressed our concerns by affirming that it will consider all reasonably foreseeable drinking, domestic and residential uses when evaluating the adequacy of

restored EPAct water supplies or replacements for EPAct water supplies. PADEP further affirms that evaluations will be based on the location and characteristics of the property as well as the apparent and documented needs of the current water user. Pennsylvania's interpretation of its program makes it no less effective than the Federal regulations at 30 CFR 701.5 regarding replacement of water supplies. As a result, we are removing the required amendment at 30 CFR 938.16(vvvvv).

30 CFR 938.16(wwwww). Water supply problems—investigation time frames.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.146a(c) to the extent the time frames for PADEP investigations are longer than those in Pennsylvania's approved citizen complaint procedures. This issue is discussed under 30 CFR 938.16(kkkk) in regard to Section 5.2(b)(2) of BMSLCA.

For a complete discussion, please see our finding for Section 5.2(b)(2) of BMSLCA under 30 CFR 938.16(kkkk). Section 5.2(b)(2) was the basis for the investigation timeframes in 25 Pa. Code 89.146a(c)(1). PADEP's proposal to revise 25 Pa. Code 89.146a(c) to impose on itself an obligation to report water supply problem investigations to claimants within 10 days of completing the investigation is no less effective than the Federal regulations at 30 CFR 842.12 regarding time frames for investigations of citizen complaints. As a result, we are approving this proposed regulation and removing this required amendment.

30 CFR 938.16(xxxxx). Relief of liability for water supply replacement when the adverse effect occurs more than three years after the mining activity.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.152(a) to remove paragraph (2), which provides for relief of an operator's liability when water supply impacts are due to underground mining activities that took place more than three years prior to the onset of water supply problems. *See* our discussion under 30 CFR 938.16(mmmm) in regard to 5.2(e)(2) of BMSLCA. Since we determined that Pennsylvania's amended definition of ''underground mining activities'' is no less effective than the Federal regulations and PADEP's interpretation reasonable, for the reasons given in our discussion at 30 CFR 938.16(mmmm), we are removing this required amendment.

30 CFR 938.16(yyyyy). Two-year reporting limit on water supply effects.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.152(a) to remove paragraph (4), which provides a release of liability when water supply problems are reported more than two years after the date of occurrence because SMCRA does not set a time limit for when an EPAct water supply claim must be made. For further information *see* our discussion under 30 CFR 938.16(jjjj) in regard to Section 5.1(b) of BMSLCA.

PADEP has proposed changes that will eliminate the two-year statute of limitations on filing claims involving EPAct water supplies. These changes will be accomplished through amendments to 25 Pa. Code 89.152(a) and through our action superseding Section 5.1(b) of BMSLCA to the extent it applies to EPAct water supplies. We have determined that Pennsylvania's proposed regulation at 25 Pa. Code 89.152(a) is no less effective than the Federal regulations and we are approving it and we are removing this required amendment.

30 CFR 938.16(zzzzz). Compensation in lieu of water supply replacement.

Required Amendment: We required Pennsylvania to submit a proposed amendment to remove 25 Pa. Code 89.152(a)(5)(i), which provides for a release of liability in cases where operators have addressed their water supply replacement obligations through a property purchase or by compensating a landowner for the resultant reduction in fair market value of the affected property. See our discussion under 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr) regarding compensation in lieu of water supply replacement.

PADEP has proposed changes that will limit the conditions under which an EPAct water supply claim can result in compensation. PADEP proposes to amend 25 Pa. Code 89.152(a) to establish specific conditions that must be satisfied in situations where EPAct water supplies may not be restored or replaced. We have superseded conflicting provisions in Sections 5.2(g) and (h) of BMSLCA in a separate rulemaking published in today's **Federal Register**. For these reasons discussed under 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr), we have determined that the proposed changes to 25 Pa. Code 89.152(a) are not inconsistent with the Federal regulations and we are approving them. We have also determined that approval of these proposed regulations satisfies the requirements of the required amendment at 30 CFR 938.16(zzzzz) and therefore, we are removing it.

30 CFR 938.16(aaaaaa). Compensation in lieu of water supply replacement—relief of liability under voluntary agreements.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code 89.152(a)(5)(ii) to delete the provision allowing compensation in lieu of restoration or replacement of affected water supplies. We further directed that the amendment must clarify that agreements to replace a water supply or provide for replacement of an alternate supply of water must meet the requirements established in the Federal definition of ''replacement of water supply'' at 30 CFR 701.5. See discussion under 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr) regarding compensation in lieu of water supply replacement.

PADEP addressed the required amendment through proposed amendments to 25 Pa. Code 89.152 as described in the discussion under 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr). As noted earlier, we have determined that the proposed changes to 25 Pa. Code 89.152(a) are not inconsistent with the Federal regulations. We are therefore approving these changes and are removing the required amendment at 30 CFR 938.16(aaaaaa).

30 CFR 938.16(bbbbbb). ''Underground mining operations'' and notification of mining.

Required Amendment: We required Pennsylvania to submit a proposed amendment to 25 Pa. Code Sections 89.141(d), 89.141(d)(9), 89.142a(a), 89.142a(f)(1), 89.142a(f)(2)(i), 89.142a(h)(1), 89.142a(h)(2), 89.142(a)(i)(1), 89.143a(a), 89.143a(d)(1), 89.143a(d)(2), 89.143a(d)(3), 89.155(b)(1) and (2) and 89.155(c) to be no less stringent than Section 720(a) of SMCRA which uses the term ''underground mining operations'' and includes more activities than just the extraction of coal.

For a full explanation of PADEP's rationale for proposed removal of this required amendment, see the September 22, 2003, proposed rule (68 FR at 55130). PADEP proposes to address our concern by amending 25 Pa. Code Sections 89.141(d), 89.141(d)(9), 89.142a(a), 89.142a(f)(1), 89.142a(f)(2)(i), 89.142a(h)(1), 89.142a(h)(2), 89.142a(i)(1), 89.143a(a), 89.143a(d)(1), 89.143a (d)(2), 89.143a(d)(3) to incorporate the term ''underground mining operations.'' These changes will make the respective parts of Chapter 89 no less stringent than SMCRA and we are approving them.

PADEP is, however, proposing to leave 25 Pa. Code Sections 89.155(b)(1) and (2) and 89.155(c) unchanged. These requirements pertain to notifications operators must provide to overlying property owners, utilities and government entities, to inform them of planned mining. OSM was initially concerned that activities such as development activities and blasting would not be cause for operators to notify these parties. However, PADEP interprets its definition of ''underground mining'' at 25 Pa. Code 89.5 to include these activities as a part of the process of extraction of coal in an underground mine. Therefore, property owners, utilities, and political subdivisions would be notified of these activities as part of the requirements of 25 Pa. Code Sections 89.155(b)(1) and (2) and 89.155(c). Based on Pennsylvania's interpretation of its definition, which we find reasonable, these requirements make Pennsylvania's notification requirements no less effective than Federal counterpart requirements. Accordingly, we agree that there is no need to amend 25 Pa. Code Sections 89.155(b)(1) and (2) or 89.155(c) to incorporate the term ''underground mining operations'' and, based on PADEP's interpretation, we are approving the term ''underground mining'' in 25 Pa. Code 89.155(b)(1) and (2) and 89.155(c). Therefore, we are removing this required amendment.

Ancillary Changes

PADEP is proposing some changes to 25 Pa. Code Chapters 86 and 89 that we did not specifically require in the final rule of December 27, 2001, but relate to requirements imposed by the rule. These changes are as follows:

25 Pa. Code 86.1, Definitions and 25 Pa. Code 89.5, Definitions

PADEP is proposing to amend the definition of ''underground mining activities'' in 25 Pa. Code 86.1 and 89.5 to use the phrase ''support facilities located underground'' rather than ''underground support facilities.'' The change was made to insure that surface facilities in support of underground operations are not included in the term underground mining operations. This change only clarifies the existing regulation and does not limit the coverage of the definition. Therefore, we have determined that this change is no less effective than part (b) of the Federal definition of ''underground mining activities'' at 30 CFR 701.5 which also refers to underground operations. PADEP made a similar change to the definition of underground mining operations at 25 Pa. Code 89.5. We also have determined that this change to be no less effective than the Federal regulations and we are approving it.

25 Pa. Code 86.151(b)(2)

PADEP is also proposing a change to its bonding regulations at 25 Pa. Code 86.151(b)(2) in addition to the changes to that section proposed to satisfy the required amendment at 30 CFR 938.16(ccccc). This proposed change clarifies the requirement to maintain subsidence bonds for a period of 10 years after the completion of underground mining operations. The former language defined the period of liability as extending for 10 years from completion of ''mining and reclamation operations''—a vague term that was not defined in the BMSLCA or Pennsylvania's regulations. PADEP explained that this change will maintain the status quo regarding the liability period for subsidence bonds. It also avoids confusion over whether the 10 year period extends from completion of underground mining operations or underground mining activities, which includes surface operations that would not be subject to the subsidence bond. We have determined that the proposed amendment does not constitute a substantive change in Pennsylvania's approved program and is not inconsistent with Section 509 of SMCRA which requires liability for the duration of the mining and reclamation.

25 Pa. Code 86.152(a)

PADEP's proposed change to 25 Pa. Code 86.152(a) adds a provision to the end of the subsection clarifying that the requirement to periodically reevaluate and adjust the bonds is not a basis for extending the coverage of subsidence bonds beyond the requirements of Sections 5, 5.4, 5.5, and 5.6 of BMSLCA. PADEP has indicated that this provision will ensure that subsidence bonds will be recalculated on the basis of projected costs of repairing land and structure damage and not on the basis of other obligations such as water supply replacement. We have determined that PADEP's methods of assuring that water supplies will be replaced through liability insurance are no less effective than the Federal regulations (see 30 CFR 938.16(ccccc) above). As a result, we have determined that the clarification to this section about its subsidence bond does not alter that finding and is no less effective than 30 CFR 817.121(c)(5) and we are approving it.

25 Pa. Code 89.5, Definitions

PADEP is proposing to add definitions of the terms ''EPAct structures'' and ''EPAct water supplies'' under the definitions at 25 Pa. Code 89.5. In its August 27, 2003, submission to us, PADEP noted that these definitions are derived from descriptions in Section 720(a) of SMCRA and the definitions of the terms ''drinking, domestic or residential water supply,'' and ''occupied residential dwelling and structures related thereto'' in 30 CFR 701.5. PADEP is adding these definitions to identify structures and water supplies covered under the Federal program and to distinguish them from structures and water supplies covered exclusively under State law. PADEP's definition of EPAct structures refers to structures that are subject to repair and compensation requirements under Section 720(a) of SMCRA. PADEP's definition of EPAct water supplies refers to water supplies that are subject to replacement under Section 720(a) of SMCRA. Additionally, PADEP notes that wells and springs that serve only agricultural, commercial or industrial enterprises, except to the extent the water supply is for direct human consumption or human sanitation or domestic use, are not included. PADEP has used these terms throughout its proposed regulations to differentiate structures and water supplies covered under the Federal regulations from those covered exclusively under the State program. We have determined that these definitions will ensure that Pennsylvania will protect all water supplies and structures protected under the Federal regulations. Therefore, these definitions are no less effective than the Federal provisions and we are approving them.

25 Pa. Code 89.142a(c)

PADEP made an editorial correction in this section changing the term ''surface features'' to ''features listed in subparagraph (i)–(v).'' This section provides that unless the subsidence control plan demonstrates that subsidence will not cause material damage to or reduce the reasonably foreseeable use of the features listed in this section, underground mining will be prohibited beneath or adjacent to the features. PADEP made this change to assure that features such as aquifers, which are not surface features, are protected under this section. We have determined that this clarification will not limit the types of features to be protected under this provision and therefore, it is no less effective than the Federal regulations at 30 CFR 817.121(d) which also refers to features and we are approving it.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment (Administrative Record No. PA 841.68), and received responses from the groups noted above in ''Section II. Submission of the Proposed Amendment.'' On the same day that we published and opened the comment periods for this amendment, we published and opened the comment period for the proposed action to supersede certain sections of BMSLCA. Comments were submitted for both proposed actions. While the comments were considered for both actions, some comments are more appropriately addressed in the final rule superseding portions of BMSLCA than in this rule. The comments and our response to those comments are incorporated by reference into this rule. For a full discussion of PCA's comments on Sections 5.4(a)(3), 5.4(c), and 5.2(g) and (h) of BMSLCA and Tri-States' comments on Sections 5.2(g) and (h), please see the final rule (PA–141–FOR) superseding portions of BMSLCA that is published in today's **Federal Register**.

This rulemaking generated a wide range of comments in writing and at public hearings. The majority of the comments specifically addressed the proposals submitted by PADEP to satisfy the required amendments of the December 27, 2001, final rule. However, there were many comments submitted that were not responsive to this rulemaking.

We received a number of comments about the importance of replacing water supplies and repairing structures. Sometimes these comments were included with a specific point about a topic of this rulemaking, and sometimes the comments appear to have been made to emphasize the importance of meeting the basic requirements of EPAct. Because comments related to the basic requirements of EPAct were considered in the December 27, 2001, rulemaking and were addressed at that time, we have not responded to them again as part of this rulemaking.

We received many general comments expressing concerns about the potential impacts of underground mining to a range of hydrologic resources. The comments primarily mentioned impacts to streams, springs, and ponds. In addition, the comments mentioned provisions of the Federal Clean Water Act, the Pennsylvania Clean Streams Law, and Pennsylvania regulations related to the placement of fill material in waters of the Commonwealth of Pennsylvania. This rulemaking concerns proposed revisions to the Pennsylvania program submitted to address requirements under the Federal EPAct and implementing regulations. EPAct established new requirements for the replacement of drinking, domestic, and residential water supplies and the repair or compensation of damage to occupied dwellings and structures related thereto and noncommercial buildings. EPAct did not revise any of the existing SMCRA provisions concerning the protection of the overall hydrologic balance relative to streams, springs, aquifers, and ponds. In addition, EPAct did not revise any SMCRA standards related to the implementation of the Federal Clean Water Act. Because comments related to the basic hydrologic protection requirements of SMCRA were considered in the rulemaking efforts at the time they were implemented, we have not responded to them again as part of this rulemaking.

We received a number of comments expressing concerns about how property owners are not allowed to control the subsidence damage abatement process. The comments ranged from expressing a desire to be able to choose their own contractors to disappointment that mining could result in significant disruption to their lives without their approval. We also received comments alleging that coal companies delay settlements with property owners and general complaints that agencies were not meeting their regulatory responsibilities. In 1992, EPAct put into place basic requirements that mining companies repair or compensate for damage to occupied dwellings and structures related thereto and noncommercial buildings and that they replace adversely affected drinking, domestic, and residential water supplies. The Federal requirements did not address how property owners and mining companies are to agree on the selection of contractors or the timing of mining activities. Because this rulemaking concerns amendments proposed to address deficiencies noted in OSM's December 27, 2001, final rule, comments on such matters are outside the scope of this final rule.

Finally, there were several comments that characterized the December 27, 2001, rulemaking as an attempt by OSM to require the State program to be a ''mirror image'' of the Federal EPAct regulations, and indicated that we were applying the same approach for this rulemaking. The comments clearly mischaracterize the process OSM used to evaluate the adequacy of Pennsylvania's amendments and proposals to resolve identified deficiencies. Our December 27, 2001, final rule and this final rule incorporate provisions specific to the Pennsylvania program, such as protection of agricultural structures and water supplies (*e.g.*, premining uses of the supply or any reasonably foreseeable uses of the supply). In addition, this final rule acknowledges the appropriateness of BMSLCA's compensation provision for the property's diminished value in the instances where it is technically impossible to develop an equivalent replacement of the water supply. We applied ''no less stringent than'' and ''no less effective than'' review standards when evaluating proposed changes to the statute and regulations, respectively.

We will address the comments we received according to the pertinent required amendment.

30 CFR 938.16(hhhh) Reference relating to bonding requirements.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(iiii) Prompt replacement of water supplies.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(jjjj) Two-year reporting limit on water supply effects.

We received comments from three citizens expressing support for eliminating the two year limit on filing water supply damage claims requirement from Section 5.1(b) of BMSLCA and the corresponding regulation at 25 Pa. Code 89.152(a)(4) (Administrative Record Nos. PA 841.70, 841.74 and 841.79). We agree with the commenters that statute of limitations, as it applies to water supplies protected under EPAct, is not consistent with SMCRA and the Federal regulations.

PCA opposed PADEP's proposed resolution to this required amendment because it believes that Pennsylvania is authorized by Section 101(f) of SMCRA to impose reasonable conditions on the rights of property owners to pursue claims for domestic water loss. This section provides that the primary authority for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations should rest with the States. PCA indicated that further discussion of this point was included in its response to 30 CFR 938.16(nnnnn). While we agree with PCA that Pennsylvania has the right to promulgate regulations, this provision must be read in conjunction with Sections 503 and 505 of SMCRA which provide for our review of State statutes and regulations to determine if they are as effective as, and not

inconsistent with, the Federal program. For more information on our response to PCA regarding this issue, please see our response to comments on 30 CFR 938.16(nnnnn).

We also received comments from Tri-State (Administrative Record No. PA 841.94). Tri-State indicated that it did not want separate protections for EPAct and non-EPAct water supplies. Tri-State recommended that Section 5.1(b) of BMSLCA be superseded.

We acknowledge Tri-State's concerns with water supply replacement. However, Federal regulations only require restoration of drinking, domestic or residential water supplies affected by underground mining operations. If a State program provides for protection of water supplies that are outside the scope of SMCRA protection, those provisions are more stringent than SMCRA and cannot be construed as inconsistent with SMCRA. As a result, we are superseding Section 5.1(b) of BMSLCA to the extent it would apply to water supplies covered under Section 720 of SMCRA and approving PADEP's regulation change at 25 Pa. Code 89.152. For more information and response to comments regarding the superseding of Section 5.1(b) of BMSLCA, see our final rule on superseding portions of BMSLCA published today in the **Federal Register**.

30 CFR 938.16(kkkk) Water supply replacement: Promptness of actions.

The Sierra Club (Administrative Record No. PA 841.75), Tri-State (Administrative Record No. PA 841.94), and one citizen (Administrative Record No. PA 841.70) commented that a three-year period was too long for a landowner to be without a water supply. The Sierra Club also commented that even with the implementation of the proposed resolution to this required amendment, Pennsylvania's program could still allow three years for establishment of a permanent replacement water supply. These comments center around language in the BMSLCA that provides that PADEP can issue orders requiring the provision of a permanent alternate source where the contamination, diminution or interruption does not abate within three years of the date the supply was affected. The changes PADEP has made to 25 Pa. Code 89.145a(b), regarding prompt replacement of water supplies, coupled with the changes to 25 Pa. Code 89.146a(c), regarding insuring that the citizen complaint procedures are followed, will insure that water supplies are replaced as promptly as possible. We acknowledge that it may take up to three years or, in rare cases, even longer to provide permanent replacement, depending on the individual site conditions. Additionally, PADEP stated that the three year period is the outer limit for permanent water restoration or replacement and that it can take enforcement action sooner than three years. The proposed addition of the ''prompt'' standard to its regulations will give PADEP the tool it needs to insure that operators are working diligently and timely in attempting to provide a permanent water supply replacement. We have determined that PADEP's interpretation, along with the proposed regulatory amendments Pennsylvania submitted, is no less effective than the Federal requirements for water replacement because the Federal regulations have no specific time frames for providing permanent restoration or replacement of water supplies. Tri-State was also concerned that PADEP's interpretation differs from a previous interpretation and that PADEP could easily change its interpretation again. We disagree that Pennsylvania's actions are arbitrary because PADEP now is adding the ''prompt'' standard to its water supply replacement requirement, thus it is reasonable that its interpretation must be adjusted accordingly. Additionally, our approval is based on the amended regulation and its interpretation. Any significant changes would be subject to 30 CFR 732.17. As a result, we are approving the changes Pennsylvania made to 25 Pa. Code Sections 89.145a(b) and 89.146a(c).

30 CFR 938.16(llll). Denial of access for premining survey and its effect on affirmative proof of water supply contamination, diminution or interruption.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(mmmm). Relief of liability for water supply replacement when the adverse effect occurs more than three years after mining activity.

PCA opposes the proposed resolution to this required amendment because it believes that BMSLCA provides that claims must be submitted three years after mining activity has occurred (Administrative Record No. PA 841.84). Further, PCA does not agree with PADEP's interpretation that the phrase, ''3 years after mining activity occurs'' includes post closure mine pool maintenance as the change to the definition of underground mining activities in 25 Pa. Code Sections 86.1 and 89.5 indicates. According to PADEP, it has always interpreted the term ''mining activity,'' as applied to underground mines, to mean the last aspect of reclamation. PADEP has advised us that the last aspect of reclamation includes management of the post closure mine pool. PADEP is clarifying this meaning by revising its definition of underground mining activities to include specifically post closure mine pool maintenance. We have determined that PADEP's interpretation of its program with regard to when underground mining activities are completed will insure that impacts to all water supplies protected under the Federal regulations will be covered under the Pennsylvania program. As a result, we are approving the changes to the definition of underground mining activities and we are removing this required amendment. If PCA is not satisfied with Pennsylvania's change to its definitions, it must work through Pennsylvania's regulatory review process to address any concerns.

30 CFR 938.16(nnnn), (oooo), (qqqq), (rrrr). Compensation in lieu of water supply replacement.

Tri-State (Administrative Record No. PA 841.94) commented that it opposes any regulation that does not mandate replacement of a water supply or the prohibition on mining areas that provide recharge for a water source. Tri-State further commented that Sections 5.2(g) and (h) and 5.3 of BMSLCA allow operators to destroy water supplies and escape liability for replacement and the Sierra Club (Administrative Record No. PA 841.75) commented that purchase of property in lieu of replacement of water supplies should not be allowed. Additionally, legal counsel for Representative William DeWeese of Greene County recommended (Administrative Record No. PA 841.89) that where a landowner does not want his water replaced, but PADEP determined that the water supply could be replaced in the future, any compensation for the water supply should be placed into escrow for future development of the water supply.

We believe the commenters misinterpreted PADEP's change to its regulation and what we approving. We are not approving compensation to landowners in lieu of replacement of water supplies. The only time that a landowner may waive establishment of a water supply is when it is not needed for the postmining land use. Even then, the regulatory authority must determine that a supply is available for future development. What we are approving is PADEP's change to 25 Pa. Code 89.152(a) which recognizes that in rare instances a water supply cannot be replaced. While Federal requirements are silent on how property owners are to be treated when it is impossible to replace an adversely affected water

supply with a supply meeting the requirements of the EPAct, Pennsylvania's proposals to authorize a payment to the landowner are not inconsistent with Federal provisions requiring compensation to property owners for the diminution in fair market value to their property.

There is nothing in the Pennsylvania regulations that allows an operator to escape liability for water supply replacement of drinking, domestic or residential water supplies. All replaced or restored drinking, domestic or residential water supplies must meet the standards of 25 Pa. Code 89.145a regarding quality and quantity. In the rare cases where PADEP has determined that a water supply meeting the criteria at 25 Pa. Code 89.145a cannot be developed, compensation for reduction of fair market value of the affected property served by the water supply is required at a minimum. Therefore, Pennsylvania's regulations place affirmative obligations on the operator for restoration or replacement of such supplies and do not allow acceptance of a substandard drinking, domestic or residential replacement or restoration water supplies. As a result, we are approving Pennsylvania's regulation changes and we are removing this required amendment.

Please *see* our response in the final rule superseding portions of BMSLCA, published in today's **Federal Register**, regarding Tri-State's comments that Section 5.3 of BMSLCA conflicts with amended 25 Pa. Code 89.152, its opposition to two classes of water supplies, and PCA's comments on this required amendment.

30 CFR 938.16(pppp). Permanent alternate source definition.

Tri-State (Administrative Record No. PA 841.94) commented that PADEP's changes to 25 Pa. Code Sections 89.5 and 89.145a(f) conflict with Section 5.2(i) of BMSLCA which makes the Pennsylvania program less effective than the Federal regulations. We disagree with the comment. As a matter of course, PADEP must interpret statutes when creating regulations to enforce those statutes. Generally, courts grant deference to an agency's interpretation of a statute that the agency implements. The regulations, which Pennsylvania amended, clearly state a restored/replaced EPAct water supply ''shall not cost the landowner or water user more to operate and maintain than the previous water supply.'' Thus, Pennsylvania's interpretation is also part of the implementing regulations.

PCA (Administrative Record No. PA 841.84) commented that it does not oppose the proposed resolution for this required amendment, but it believes we applied the wrong standard of review to the definition of Pennsylvania's de minimis cost provisions at 89.145a(f). PCA believes litigation in Pennsylvania established the de minimis cost provisions and our requirement to modify them was unnecessary.

We disagree with PCA's characterization of the de minimis provisions of Pennsylvania's regulations. The ''de minimis'' cases decided by the Environmental Hearing Board (EHB) do not set forth law of general application across the State of Pennsylvania. Those cases only decided the issue based on the specific facts of the individual cases. While the concept of a de minimis cost increase (*i.e.* a cost that cannot be calculated) for operating and maintenance costs for replacement water supplies is acceptable in the Federal regulations, Pennsylvania's characterization of de minimis costs as $60 per year or a 15% increase of the annual operating cost of the previous water supply does not fit that concept. Under the Pennsylvania definition of de minimis cost increase, landowners could be forced to pay more operating and maintenance costs for a replacement water supply than they did for the premining water supply. Requiring a landowner to pay these costs is less effective than the Federal regulations that require operators to absorb any increased operating and maintenance costs. As a result, we are approving Pennsylvania's proposed changes to its regulations at 25 Pa. Code Sections 89.5 and 89.145a(f).

30 CFR 938.16(ssss). Other remedies available under State law.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(tttt). Prompt repair or compensation for structure damage.

We received no direct comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(uuuu). Repair of dwellings and permanently affixed appurtenant structures or improvements.

We received comments from PCA and NMA regarding the superseding of Section 5.4(a)(3) of BMSLCA with regard to this required amendment. Please see our responses to these comments in our final rule notice published in today's **Federal Register** in which we are superseding portions of BMSLCA.

30 CFR 938.16(vvvv). Relief of liability for structure damage repair or compensation when an operator is denied access to conduct a premining or postmining survey.

We received comments from a citizen (Administrative Record No. PA 841.74) indicating that operators should not be relieved of liability for subsidence damage due to underground mining where a landowner denies access to the operator for a premining survey.

With regard to structures protected by the Federal regulations, we agree in principle with the comment, but recognize the difficulty of implementing repairs when access for premining surveys has been denied. With the change to Pennsylvania's regulations at 25 Pa. Code 89.144a(b), the relief of liability for denial of operator access for a premining survey for EPAct protected structures does not apply. However, all parties involved in the repair or compensation of damage from subsidence must fully recognize the importance of a premining survey in accurately documenting the extent of damage. Without these surveys, property owners and the regulatory authority must, by a preponderance of evidence, establish the specific instances of damage that is attributed to the subsidence from underground mining. Initial Federal regulations provided that a landowner who did not allow access for a premining survey would only forfeit the presumption of liability of damage (the presumption of liability concept was later suspended from the Federal regulations). The Federal regulations did not, and still do not, provide for relief of an operator's liability when access to conduct a survey was denied. We believe that PADEP's language as amended in 25 Pa. Code 89.144a(b) is consistent with the goals of encouraging landowners to allow premining surveys while preserving their rights for repair or compensation of subsidence damage that is caused by underground mining. As a result, we are approving the changes to Pennsylvania's program and we are removing this required amendment.

30 CFR 938.16(wwww). Repair or compensation for damaged structures.

We received a comment from Tri-State (Administrative Record No. PA 841.94) that Section 5.4(c) of the BMSLCA should be changed to allow all landowners, whether or not their structures are protected under EPAct, to have the same protections as the Federal regulations.

PADEP is revising its regulations to provide protections consistent with the Federal regulations regarding EPAct structures. However, BMSLCA provides additional repair and compensation provisions that are applicable to structures not protected under EPAct. There is nothing in the Federal

regulations preventing a State from adopting different standards for non-Federally protected structures and water supplies than for Federally protected structures and water supplies.

30 CFR 938.16(xxxx). Structure Damage—Six-month negotiation period and two-year claim filing period.

We received comments from two citizens (Administrative Record Nos. PA 841.79 and 841.70), Tri-State (Administrative Record No. PA 841.94), and PCA (Administrative Record No. 841.84). The citizens and Tri-State indicated that no limit should be placed on landowners to file claims of subsidence related damage. Additionally, one of the citizens indicated that a bond should be in place to pay subsidence damage in the event that a company goes bankrupt; the bonds will then be available for damage repair. Our review determined that the revision to 25 Pa. Code 89.143a(c) is no less effective than the Federal regulations regarding current and future subsidence damage claims. Any subsidence damage to protected structures occurring from mining after the effective date of the 1994 amendments to BMSLCA must be repaired or compensated for by the operator. There is nothing in 25 Pa. Code 89.143a(c), as it is currently written, that is contrary to this requirement. As for the comment regarding bonding, Pennsylvania requires a subsidence bond to be submitted at the time of permitting and 25 Pa. Code 86.152 requires that the bond be adjusted when future reclamation changes. This bond covers the potential damage to property and will be available for damage repairs in the event of a company's bankruptcy.

PCA commented that PADEP should not have the ability to issue orders for damage repair, except for emergency situations, for six months following the first report of damage. PCA believes landowners and operator should be afforded the opportunity within the six months to resolve a subsidence claim amicably.

PCA's suggestion is not in accordance with Federal requirements for investigating citizen complaints at 30 CFR 842.12 and taking enforcement actions at 30 CFR 843.12(c), both of which may have a time period shorter than six months. As noted in the preamble to the September 22, 2003, proposed rule (68 FR at 55117), PADEP indicated that it has the authority to take enforcement action prior to the expiration of the six-month negotiation period. This authority is found in Section 9 of BMSLCA. While taking enforcement actions prior to the expiration of the six month period will focus on requirements for emergency temporary repair measures, there is no guarantee that this is the only case where enforcement actions will be taken.

As noted further in the preamble of the September 22, 2003, proposed rule regarding the proposed resolution to 30 CFR 938.16(yyyy), BMSLCA requires PADEP to make an investigation within 30 days following receipt of a claim of subsidence damage. Within 60 days of an investigation, PADEP must issue a written order directing the operator to compensate or cause repairs to be made. While there is nothing in SMCRA or the approved program prohibiting negotiations between a landowner and an operator, we expect PADEP to follow its approved procedures regarding investigation of any citizen complaint it receives. As a result, a citizen complaint investigation could require issuance of an enforcement order prior to the expiration of the six-month negotiation period. PADEP's removal of the six-month period from its regulations at 25 Pa. Code 89.143a(d)(3) makes the program no less effective than the Federal regulations for citizen complaint investigation and issuance of enforcement actions. As a result, we are approving their regulation change and removing this required amendment.

30 CFR 938.16(yyyy). Investigation and orders for repair of damaged structures.

We received a comment from PCA (Administrative Record No. PA 841.84) that it opposes the proposed resolution for this section to the extent that it would result in PADEP issuing enforcement orders requiring repair or compensation in other than emergency situations sooner than 6 months after subsidence damage was first discovered for the reasons set forth above.

See our response to PCA's comments to 30 CFR 938.16(xxxx) regarding the elimination of the six month period. For the same reasons as given in that section, we are removing this required amendment.

30 CFR 938.16(zzzz). Issuance of orders and payment of escrow when an operator fails to repair or compensate a landowner for subsidence damage.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(aaaaa). ''Pre-1994'' agreements relating to subsidence damage repair or compensation.

We received comments from CAWLM (Administrative Record Nos. PA 841.95 and PA 841.97) regarding the proposed resolution to this required amendment. CAWLM believes that we should supersede Section 5.6(c) of BMSLCA which provides for a release of duty to repair or compensate for subsidence damage if agreements for such a release were made between 1966 and 1994.

In our proposed rule, we asked for examples of such agreements because PADEP believes these agreements do not exist for either pre- or post 1966 structures. We did not receive any signed agreements in response to our request. While copies of unsigned agreements were provided, these do not establish that such agreements are in existence. As a result, we believe that Section 5.6(c) of BMSLCA will not affect the protections of the Federal program and we are removing the required amendment.

30 CFR 938.16(bbbbb): Reference to ''pre-1994'' agreements.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(ccccc). Bonding for subsidence damage and water replacement.

We received comments on the proposed resolution of this required amendment from Penn Future (Administrative Record No. PA 841.78), Tri-State (Administrative Record No. PA 841.94), legal counsel to Representative William DeWeese of Greene County (Administrative Record No. PA 841.89), and two private citizens (Administrative Record Nos. PA 841.74 and 841.79). The commenters noted that use of liability insurance in lieu of bond for replacement or restoration of water supplies is not an appropriate mechanism. Penn Future noted that citizens may be forced to sue insurance companies or mining companies to obtain their benefits and asserts that this is not as effective as having bonds for replacement or restoration. Additionally, Penn Future indicated that PADEP has historically required operators to submit liability insurance policies that provide only the minimum coverage instead of tailoring the policies to the specific potential liabilities of water supply restoration or replacement of individual mines.

Tri-State noted that the proposed resolution does not satisfy the Federal requirement of 30 CFR 817.121(c)(5) regarding an increase of bond if damage repair or compensation or water supply replacement or restoration are not completed within certain time frames. Tri-State does not believe that PADEP's change to 25 PA Code 86.152(a) requiring mandatory bond adjustments coupled with its subsidence bond requirements and use of liability insurance policies for water supply replacement are as effective as the

requirements of 30 CFR 817.121(c)(5). Tri-State indicated that PADEP's program will not require additional bond for damages if the damages are not repaired or arrangements made for compensation after 90 days. Tri-State indicated that Pennsylvania's program should be amended to require adjustment of the subsidence bond within 90 days where the amount of subsidence damage liability remaining outstanding exceeds the amount of the subsidence bond posted. Tri-State also provided comments similar to Penn Future with regard to the use of liability insurance for replacement or restoration of water supplies. In addition, Tri-State noted that liability insurance is not as effective as bonds for water supply replacement or restoration because it cannot be adjusted upward after damages have occurred as bonds can be.

The legal counsel to Representative William DeWeese (Administrative Record No. PA 841.89) indicated that Pennsylvania should conduct a financial review of operators to insure that they have sufficient capital to restore water supplies in the event of an economic downturn. If there is not sufficient capital to withstand a downturn, the operator should be required to purchase subsidence insurance.

We disagree with the commenter's position that Pennsylvania's subsidence bond and applicable adjustment requirements are in conflict with the bonding requirements at 30 CFR 817.121(c)(5) with regard to subsidence damage to occupied dwellings and surface lands. The requirement at 30 CFR 817.121(c)(5) was put into place to guarantee the repair of damage to occupied dwellings and surface lands in the event of a forfeiture by an operator. Under the provision, operators that do not complete damage repairs within 90 days must provide additional performance bond in the amount of the estimated cost of the dwelling and land repairs if the permittee will be repairing, or in the amount of the decrease in value if the permittee will be compensating the owner for the damage to an occupied dwelling. The bond must be in place until the repair, compensation, or replacement is completed.

The Pennsylvania program requires a subsidence bond prior to the issuance of the permit. The bond covers the damage to occupied dwellings, agricultural structures, businesses, and surface lands. To implement this requirement, PADEP requires a subsidence amount based upon an actual assessment of the value of the land and structures overlying the area to be undermined. At the time that the permit is issued, the subsidence bond, which must be requested after the damage under the Federal provision, is already in place under the Pennsylvania program. In terms of having an initial bond amount to cover subsidence damage to occupied dwellings and land, this approach is more effective than the minimum Federal standard.

The commenter appears to be primarily at issue with the degree to which the initial bond amount plus the periodic adjustments under the Pennsylvania program are consistent with the Federal requirements at 817.121(c)(5) which require a modification to the bond amount at 90 days following damage if repairs are not complete. To illustrate the concern, the commenter provided a hypothetical example where, under certain conditions, the amount of the unrepaired damages could exceed the Pennsylvania subsidence bond. The commenter stated that this situation would be in conflict with the 90 day adjustment requirement at 30 CFR 817.121(c)(5).

We do not agree that the commenter has applied the requirement at 30 CFR 817.121(c)(5) appropriately to the bonding process as proposed by Pennsylvania. The 90 day adjustment requirement at 30 CFR 817.121(c)(5) only applies to operations that do not have a bond that is already designed to cover the anticipated damage. Pennsylvania has chosen to require a bond prior to permit issuance that will cover the anticipated damages from subsidence to structures and land. Because there is a bond in place, the 90-day adjustment requirement of 30 CFR 817.121(c)(5) no longer applies and Pennsylvania must now conduct the appropriate reviews and adjustments required by 30 CFR 800.15(a). At 30 CFR 800.15(a), Pennsylvania is under the obligation to adjust the permittee's bond from time to time as the cost of future reclamation changes. In addition, 30 CFR 800.15(a) allows Pennsylvania to fulfill the requirement by setting a schedule. This is consistent with the proposal by Pennsylvania to adjust bonds as needed at the time of permit renewal or a change to the subsidence control plan. Under 25 Pa. Code 86.152(a), Pennsylvania also has the discretionary authority to conduct the reviews and require an adjustment sooner, if necessary. We find no reason to disapprove Pennsylvania's proposal with regard to the bonding of subsidence impacts to structures and land.

We also disagree with the commenter's position that use of liability insurance policies to cover water supply restoration or replacement is not appropriate. Both the Federal regulations and Pennsylvania's regulations allow the use of insurance policies in lieu of the increased bond provisions of 30 CFR 817.121(c)(5). The Federal regulations at 30 CFR 800.14(c) provide that ''An operator's financial responsibility under Sec. 817.121(c) of this chapter for repairing material damage resulting from subsidence may be satisfied by the liability insurance policy required under Sec. 800.60.'' Pennsylvania's regulations at 25 Pa. Code 86.168(c) provides that liability insurance shall include a rider covering loss or diminution in quantity or quality of public or private sources of water. Subsection (g) provides that a bond or an individual insurance policy as required under Subsection (c) may be provided in lieu of liability insurance to cover replacement or restoration of water supplies.

The commenter also expressed concerns regarding the proper amount of insurance an operator must carry. Pennsylvania's minimum coverage for property damage is $500,000 per person and $1 million aggregate. This amount exceeds the minimum coverage required by Federal regulations at 30 CFR 800.60 which require only $300,000 for each occurrence and $500,000 aggregate.

Pennsylvania's regulations allowing liability insurance to substitute for water supply replacement and the minimum amount of insurance the regulations require an operator to have are no less effective than the Federal regulations. The commenters' concerns regarding the mechanics of claim collection and whether specific amounts of insurance are sufficient for individual cases are issues that will be addressed in our oversight of Pennsylvania's implementation of its approved program.

Finally, there is no provision in the Federal regulations for requiring operators to purchase subsidence insurance, nor are there any provisions requiring a review of an operator's financial solvency if the operator uses a collateral or surety bond. The Federal regulations rely on bonding or liability insurance to secure repair or replacement in the event operators are unable to fulfill their obligations. We have determined that the existing provisions of Pennsylvania's statute and regulations and the changes proposed in this amendment provide to be no less effective than the bonding provisions of the Federal regulations.

30 CFR 938.16(ddddd). Definition of de minimis cost increase.

We received comments on the proposed resolution of this required amendment from a citizen (Administrative Record No. PA 841.74), Tri-State (Administrative Record No. 841.94), and CAWLM (Administrative Record No. PA 841.97). The commenters were opposed to Pennsylvania's definition of de minimis cost increases at 25 Pa. Code 89.5 and the regulations implementing it at 25 Pa. Code 89.145a. The commenters believe that costs for operation and maintenance of replacement water supplies beyond those for the premining water supplies should be paid by the operator. Tri-State further indicated the proposed resolution should be adopted for non-EPAct structures as well as for EPAct structures. CAWLM indicated that agreements between operators and landowners for a one-time payment of increased costs favors operators and can result in agreements that will not cover the additional operating and maintenance costs of a replacement supply.

We are approving Pennsylvania's proposed changes to 25 Pa. Code 89.145a(f)(5) because they are no less effective than the Federal regulations regarding payment of operating and maintenance costs of EPAct replacement water supplies. For EPAct protected water supplies, operators will be required to pay operating and maintenance costs that are in excess of the costs to operate and maintain the water supply that existed prior to mining. While Tri-State would like the Federal protections to apply to non-EPAct protected supplies, there is no Federal requirement that Pennsylvania must adopt the same protection standards for water supplies not covered by EPAct. The Federal definition of ''Replacement of water supply'' at 30 CFR 701.5 specifically recognizes that payment of the increased costs can be satisfied by a one-time payment in an amount that covers the *present* worth of the increased costs. This lump sum payment may be preferable to the water supply owner because it eliminates the possibility that the operator may not pay the annual increased costs due to bankruptcy or financial difficulties. We have determined that Pennsylvania's proposed change to its regulations requiring payment of cost increases for operating and maintaining replacement water supplies are no less effective than the Federal requirements and we are approving them. Because of these proposed regulation changes, we are removing this required amendment.

30 CFR 938.16(eeeee). Definition of fair market value.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(fffff). Definition of permanently affixed appurtenant structures.

We received comments from Tri-State (Administrative Record No. PA 841.94) and PCA (Administrative Record No. PA 841.84). Tri-State commented that it supported PADEP's deletion of ''permanently affixed appurtenant structures'' from 25 Pa. Code Section 89.5 in favor of a broader definition of structures related to occupied residential dwellings. Tri-State cautions against too narrow a definition of ''occupied'' in this context, however. Tri-State commented that it did not want Pennsylvania's regulations to give broader protection to EPAct covered structures and the structures related thereto than to non-EPAct protected.

PCA commented that landowners should be required to take steps to protect property not permanently affixed to the ground. PCA believes that structures that are easily removed are not fixtures and therefore not real property requiring protection from subsidence damage.

As we noted in an earlier response, there is nothing in the Federal regulations preventing a State from adopting different standards for non-Federally protected structures and water supplies than for Federally protected structures and water supplies. Therefore, in response to Tri-State's comment, Pennsylvania is allowed to provide protections to any structures or water supplies as long as it meets the minimum Federal standards. If Tri-State wants Pennsylvania to provide additional protections, it must work with PADEP through Pennsylvania's regulatory review process.

With regard to PCA's comment, the responsibility to move or dismantle these structures lies with the operator and not the landowner. The Federal regulations at 30 CFR 817.121(a) requires the permittee to take steps to prevent or minimize material damage, not the landowner. In many cases, structures not permanently affixed to the ground surface cannot be easily moved or dismantled by the landowner. The landowner would have to incur costs to move or dismantle these structures. One of the purposes of SMCRA was to ''assure that the rights of surface landowners and other persons with a legal interest in the land or *appurtenances* thereto are fully protected.'' 30 U.S.C. 1202(b) (emphasis added). Additionally, the definition of occupied residential dwelling and structures related thereto protects ''any building, structure or facility installed on, above or below, or a combination thereof, the land surface if that building structure or facility is adjunct to or used in connection with an occupied residential dwelling.'' This regulation describes examples of such structures to include garages, storage sheds, and greenhouses. Structures such as these may not be permanently affixed to the ground surface, yet it may be difficult to dismantle or move them. Both the Federal regulations, and now Pennsylvania's regulations, provide that operators must repair or compensate landowners for damages to these structures.

30 CFR 938.16(ggggg). Subsidence control plan—prevention of material damage to EPAct structures.

We received a comment from Tri-State (Administrative Record No. PA 841.94), indicating that regardless of whether a surface structure is located over a conventional room and pillar mine or over a longwall mine, the mine operator's subsidence control plan should not be approved unless the prevention of material damage is demonstrated.

The Federal regulations at 30 CFR 784.20(b)(7) provide the requirements for subsidence control plans. These regulations provide that for areas where planned subsidence is projected to be used (such as in a longwall mine), the subsidence control plan is to contain a description of methods to be employed to minimize damage from planned subsidence to non-commercial buildings and occupied residential dwellings and structures related thereto; or the written consent of the owner of the structure or facility that minimization measures not be taken; or, unless the anticipated damage would constitute a threat to health or safety, a demonstration that the costs of minimizing damage exceed the anticipated costs of repair. Pennsylvania's proposed regulation change at 25 Pa. Code 89.141(d) provides a similar requirement. The Federal regulations do not provide for disapproving a subsidence control plan for an area of planned subsidence because it does not provide for prevention of material damage, and therefore, we cannot require Pennsylvania to include such a provision in its program. We have determined that Pennsylvania's proposed revisions to its regulations are no less effective than the Federal regulations regarding the requirements for subsidence control plans.

30 CFR 938.16(hhhhh). Subsidence control plan—minimizing material damage to EPAct structures.

See response to comments in 938.16(jjjjj) below.

30 CFR 938.16(iiiii). Measures to minimize material damage.

See response to comments in 938.16(jjjjj) below.

30 CFR 938.16(jjjjj). Prevention of material damage.

We received comments from Tri-State (Administrative Record No. PA 841.94), and the Sierra Club (Administrative Record No. PA 841.75). Tri-State indicated that the modifications contained in the PADEP's proposed regulations are inadequate in that these regulations do not require mine operators to prevent material damage to all structures. Tri-State recommended that PADEP modify its draft regulations to make prevention of such material damage mandatory for both room and pillar and longwall mines. Tri-State also noted that regulations pertaining to longwall mining only require that a mine operator recognize material damage to surface structures and then only to the extent technologically and economically feasible. Tri-State believes that longwall mine operators must be required by regulations to develop technology to make the prevention of material damage feasible. Tri-State concluded by indicating that, until damage prevention is required, Pennsylvania's regulatory program will not be as effective as the Federal minimum requirements.

The Sierra Club noted that both State and Federal regulations now require the prevention of material damage to public buildings, such as schools, churches, hospitals, and large lakes. The rules do not distinguish between the types of mining. PADEP's proposed rule would change ''prevent'' to ''minimize'' in addressing material damage to these buildings if longwall mining is proposed. The Sierra Club objects to the change because it would allow longwall mining to cause material damage while other types of mining would have to prevent such damage.

We believe the commenters have misunderstood the Federal requirements. The Federal regulations at 30 CFR 817.121(a)(2) require that if a permittee employs mining technology that provides for planned subsidence in a predictable and controlled manner (such as longwall mining), the permittee must take necessary and prudent measures, consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to non-commercial buildings and occupied residential dwellings and structures related thereto. There is no Federal requirement that requires a permittee to take measures to prevent material damage when employing mining techniques that provide for planned subsidence.

If permittees employ mining techniques that do not result in planned subsidence (such as in conventional room and pillar mines), then the permittee must adopt measures consistent with known technology that prevent subsidence from causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands.

In response to the Sierra Club comments, the Federal regulations at 30 CFR 817.121(d) provide that underground mining activities shall not be conducted beneath or adjacent to (1) public buildings and facilities; (2) churches, schools, and hospitals; or (3) impoundments with a storage capacity of 20 acre-feet or more or bodies of water with a volume of 20 acre-feet or more, unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of, such features or facilities. Pennsylvania's regulation at 25 Pa. Code 89.142a(c) provides the same protections to these structures as do the Federal regulations. Moreover, PADEP's proposed regulation at 25 Pa. Code 89.141(d)(3) recognizes the specific protections afforded to structures under 25 Pa. Code 89.142a(c) and does not, in any way, waive those protections.

PADEP's proposed change to its regulations at 25 Pa. Code 89.142a(d) provides the same protections for EPAct structures that the Federal regulations require. As a result, we have determined that this section is no less effective than the Federal counterpart.

30 CFR 938.16(kkkkk). Prompt repair or compensation for structure damage.

We received comments from one citizen (Administrative Record No. PA 841.73) and from Tri-State (Administrative Record No. PA 841.94). The citizen commented that homeowners should be treated fairly with prompt financial compensation. Tri-State indicated it did not want us to accept as adequate PADEP's proposed change to 25 Pa. Code 89.142a(f)(l)(ii) and, instead, require an amendment to Section 5.4(a)(3) of BMSLCA. Tri-State does not believe amending the regulation without amending the corresponding statutory provision is adequate.

Our review has determined that Section 5.4(a)(3) of BMSLCA and the regulation at 25 Pa. Code 89.142a(f)(1)(ii) are not in conflict with regard to the requirement that repairs or compensation for structural damage be made promptly. While BMSLCA is silent on the promptness of repairs or compensation, there is nothing in this portion of the statute preventing prompt repairs or compensation. PADEP is proposing to include the prompt standard in its regulations interpreting this portion of BMSLCA. This interpretation will make the Pennsylvania program as effective as the Federal regulations regarding promptness of repairs or compensation.

30 CFR 938.16(lllll). Repair of dwellings and permanently affixed appurtenant structures or improvements.

PCA provided comments to the proposed resolution of this required amendment (Administrative Record No. PA 841.84). PCA opposes the proposed resolution of 30 CFR 938.16 (uuuu) and 30 CFR 938.16(lllll) and the proposed amendment to 25 Pa. Code 89.142a(f)(l) which would obligate mine operators to repair or compensate for mine subsidence damage to dwellings constructed after the owner knew or should have known that mining would be occurring beneath his property within the next 5 years. PCA believes that these provisions are designed to discourage property owners, who have knowledge that mining is imminent, from building new structures in locations where they could be damaged and to encourage such persons to build in areas which will not be undermined. PCA also noted that there is nothing unreasonable, nor is there anything in SMCRA or OSM's regulations, which would preclude local municipalities from enacting a zoning ordinance to prohibit new construction in areas that are unstable or prone to subsidence or slips. PCA maintains that such a local zoning ordinance would be reasonable and justified because it would ensure that the local tax base is not reduced by avoidable damage to new structures.

Section 720(a)(1) of SMCRA requires the prompt repair or compensation for material damage resulting from subsidence to certain structures. There is no requirement that the structure be in place at the time of permit application or renewal even though the water replacement provisions of Section 720(a)(2) are limited to only those drinking, domestic or residential water supply from wells or springs in existence prior to the application for a surface coal mining and reclamation permit. Congress saw fit to limit the provision of water supply replacement to supplies in existence at the time of permit application, but did not provide a similar restriction to structures. The

issue of what recently constructed non-commercial buildings or occupied dwellings or related structures are protected under EPAct arose when a commenter to the Federal EPAct regulations stated that a permittee is not obligated to repair subsidence-related damage to a building constructed after mining occurred. 60 FR at 16735. OSM agreed, stating ''the requirement should not apply to structures which did not exist at the time of mining.'' *Id.* This makes it clear that if the building or dwelling/structure existed at the time of mining, the operator is obligated to repair or compensate. To uphold PCA's position would effectively put a limit on a landowner's property rights for as much as five years and eliminate repair or compensation requirements to a class of structures depending on when they were built. SMCRA did not envision such a limitation.

PCA is correct in its assertion that there is no provision in SMCRA preventing local municipalities from enacting an ordinance preventing constructing of dwellings under certain circumstances. However, SMCRA would apply to protected structures even if constructed in violation of such an ordinance. As a result, we are approving PADEP's proposed changes to its regulations and we are removing this required amendment.

30 CFR 938.16(mmmmm). Protection of utilities from underground mining activities.

We received no comments in opposition to the proposed resolution of this required amendment. However, we did receive comments from the legal counsel for Representative William DeWeese of Greene County (Administrative Record No. PA 841.89) regarding a case where residents of Greene County lost access to free natural gas because of a dispute with a gas company and the inability of the homeowners to hook up to the company's distribution line. She indicated that she would like there to be language in PADEP's regulations that require PADEP to bring parties together in cases where personal gas supplies are affected to decide how the parties are going to share the costs to replace the supplies.

PADEP's changes to 25 Pa. Code 89.142a(f)(1)(iii) provide that operators must repair, restore, replace or compensate owners for material damages to customer-owned utilities.

We have determined that this proposed regulation is no less effective than the Federal regulations requiring repair or compensation for damages to occupied dwellings and structures related thereto. PADEP has the regulations in place for insuring that damages to utilities are repaired or landowners receive compensation for those damages. If there are questions regarding the compensation aspects of the case pointed out by Representative DeWeese's legal counsel, the parties involved should file a citizen's complaint with PADEP.

30 CFR 938.16(nnnnn). Statute of limitations on damage repair or compensation—claims must be filed with PADEP within two years of damage.

We received comments from PCA (Administrative Record No. PA 841.84). PCA indicated that SMCRA is completely silent on the issue of whether claims for subsidence damage to dwellings and claims for the replacement of domestic water supplies must be filed within any defined time frame. Of equal importance, OSM has never promulgated any regulation which interprets SMCRA as allowing for the filing of such claims at any time. PCA further indicated that in the absence of any express prohibition in SMCRA on placing limits on the time within which subsidence damage claims must be filed, there is no basis for OSM to conclude that Pennsylvania's decision to do so is not authorized by 30 U.S.C. 1201(f). Indeed, in the absence of any express limitation-of-action period on a Federal statutory claim the Courts will traditionally provide for one. PCA indicated that when a statute creating a right-of-action does not specify a limitation-of-action period, it cannot be assumed that Congress intended that there be no time limit on the action.

PCA further indicated that the justification for Pennsylvania creating these new statutory claims for homeowners was a desire to preserve its local ad valorem tax base. This goal is not fostered if homeowners can wait 5 or 10 or 25 years to file their claims. On the other hand, it is fostered if claimants are encouraged to file their claims promptly, and a reasonable statute of limitations certainly encourages the timely filing of subsidence damage claims.

We disagree with PCA's characterization of SMCRA and the Federal regulations with regard to a statute of limitations. Pennsylvania advanced similar arguments regarding statutes of limitations that we addressed in the December 27, 2001, final rule (66 FR at 67014, 67023–24). Our response to those comments is incorporated by reference into this rule. PCA has not provided any compelling reason for us to reassess the position stated in that final rule. For more information on this issue see our response to comments under 30 CFR 938.16(xxxx).

30 CFR 938.16(ooooo). Investigation and orders for repair of damaged structures.

For a discussion of the comments received with regard to this issue, *see* our response to comments under 30 CFR 938.16(yyyy).

30 CFR 938.16(ppppp). Relief of liability for structure damage repair or compensation when operator is denied access to conduct a premining or postmining survey.

We received comments from PCA (Administrative Record No. PA 841.84). PCA opposes the proposed resolution of 30 CFR 928.16 (vvvv) and 30 CFR 938.16 (ppppp) and the proposed amendment to 25 Pa. Code 89.144(a)(1). PCA indicated that BMSLCA and 25 Pa. Code 89.144(a)(l) do not deny any owner of a dwelling or institutional structure the right to file a subsidence damage claim. Instead, these provisions of the Pennsylvania program merely condition this right by providing that, in return for being given a right to file a statutory subsidence damage claim, the structure owner must grant the mine operator an opportunity to conduct a premining and a post-mining inspection.

PCA further noted that with respect to the pre-mining inspection condition, few dwellings or institutional structures do not have some normal damage caused by weathering and wear and tear. The nature of this damage is often indistinguishable from certain types of damage that can be caused by mine subsidence. To assure that operators are not required to pay compensation equal to the cost of repair (the Pennsylvania compensation standard which is different from OSM's) for ''damages'' they did not cause, the Pennsylvania General Assembly and the Environmental Quality Board (EQB) concluded structure owners should not be allowed to file subsidence damage claims unless they allow the mine operator access to their structures to establish a pre-mining baseline of its condition.

We recognize the importance of pre-mining surveys and encourage all landowners to obtain them. However, as we noted in the preamble to the December 27, 2001, final rule, the absolute removal of the right to repair or compensation if the operator is denied access to the property is not in accordance with the requirements of SMCRA. In the preamble, we said:

> Pennsylvania has failed to account for information that the homeowner or the regulatory authority possesses. It is possible that the homeowner may hire someone to

conduct a survey. In Pennsylvania's scenario, the homeowner would have no relief under Act 54 even though he had relevant information that showed causation.

* * * * *

Additionally, in the preamble to the March 31, 1995, Federal rules on subsidence (60 FR at 16741), OSM discussed the effect of a landowner denying access to a property and concluded that in any enforcement proceeding OSM or the regulatory authority may take the effect of the denial into account in determining what weight, if any, to give to the rebuttable presumption of causation. Even though the Federal rules concerning the presumption were suspended, this part of the preamble clearly indicates OSM's intent that enforcement actions would proceed even if landowners denied permission to operators to conduct premining surveys. There are no passages in the preamble or the regulations that relieve operators of their duty to repair or compensate landowners for subsidence damage to covered structures. 66 FR at 67022.

Pennsylvania's proposed revision of 25 Pa. Code 89.144a will eliminate the concern we expressed in the December 27, 2001, final rule. The changes to this section, as applied to EPAct structures, require that if, by a preponderance of evidence, a landowner can show damage to be caused by underground mining, the right to repair or compensation will be retained. This protects both the landowner and operator by both encouraging pre-subsidence surveys and insuring only that damages caused by underground mining are subject the repair or compensation provisions.

PCA also stated that property owners have a legal obligation to mitigate their own potential damage. The Federal regulation at 30 CFR 817.121(a)(2) allows a structure owner to waive minimization measures. However, this waiver does not eliminate ''any requirement pursuant to paragraph 817.121(c) to repair damage from subsidence.'' (60 FR at 16734).

We also received a comment from legal counsel to Representative William DeWeese of Greene County (Administrative Record No. PA 841.89) indicating that in the case where a landowner refuses an operator right of entry to conduct a premining survey, BMSLCA requires affirmative proof that an operator caused the damage, while under the regulations, the standard for proof is a preponderance of evidence. She believes that there are two standards.

We note that the reference to affirmative proof in BMSLCA was for water supplies while the preponderance of evidence reference in the regulations was for structures. Even so, we do not agree that these are two standards. Both are evidentiary terms and are consistent with each other. ''Affirmatively proving'' is a general reference to what a party must do to prove facts that are in dispute. In civil cases, the degree of proof is by a preponderance of evidence. As we noted above, the use of preponderance of the evidence is no less effective than the Federal regulations in requiring repair or compensation for damages to structures. As a result, we are approving the proposed changes to Pennsylvania's program.

30 CFR 938.16(qqqqq). Water supply surveys—various issues.

We received comments from Tri-State (Administrative Record No. PA 841.94), the Sierra Club (Administrative Record No. PA 841.75), and CAWLM (Administrative Record No. PA 841.97). Tri-State indicated that citizens have a right to have a deadline for premining sampling of water supplies before being impacted by mining. Tri-State does not agree with the proposed resolution that pre-mining sampling occur ''before the supply is susceptible to impacts from mining'' as found at 25 Pa. Code 89.145a(a)(l). Tri-State is concerned with whether water supply owners will be provided the results of the premining survey in time to have their own survey done, if they disagree with the mine operator's results. To remedy this concern, Tri-State recommends that PADEP's rule be rewritten to require that premining surveys be completed prior to the time a water supply is susceptible to mining-related effects and prior to mining within 2500 feet of the water supply.

The Sierra Club and CAWLM also suggested that premining sampling be conducted prior to mining within 2500 feet of a water supply.

We acknowledge the commenters desire to have water supplies sampled sufficiently in advance of mining to give landowners and water supply users sufficient time to prepare for adverse effects to the supply. However, we do not believe substituting one arbitrary standard for another meets the requirements of OSM's March 9, 1999, letters to Tri-State Citizens Mining Network and the Interstate Mining Compact Commission that provide for delays in water supply samples as long as the permit application contains sufficient information to develop the Probable Hydrologic Consequences and Cumulative Hydrologic Impact Assessment. The commenters give no evidence of why sampling prior to mining advancing within 2500 ft. of a water supply will give any more reliable information than PADEP's prior standard of 1000 ft. Water supplies can be impacted by underground mining far in advance of the 2500 ft. standard the commenters are proposing. We believe that PADEP's proposed language change at 25 Pa. Code 89.145a(a)(1) requiring sampling prior to the time a water supply is susceptible to mining-related effects will provide that all water supplies are adequately sampled in a timely manner regardless of their location relative to the mining operation.

30 CFR 938.16(rrrrr). Water supply replacement—promptness of action and reasonably foreseeable uses.

We received comments from Tri-State (Administrative Record No. PA 841.94), the Sierra Club (Administrative Record No. PA 841.75), CAWLM (Administrative Record No. PA 841.97), and a citizen (Administrative Record No. PA 841.74). Tri-State recommended that the reasonably foreseeable use determination of 25 Pa. Code 89.145a(b) be made by PADEP and not the operators. They also recommended that the foreseeable use determination provision be replaced with a requirement that replacement water supplies be equivalent to the supply that existed prior to mining. The Sierra Club and CAWLM echoed the citizen's comment. CAWLM also suggested that, if we accept PADEP's rule regarding reasonably foreseeable use, only a homeowner (and not PADEP or an operator) is qualified to determine what a reasonably foreseeable use would entail.

In our December 27, 2001, final rule, we determined that PADEP's concept that a replacement water supply that takes into account the reasonably foreseeable uses of that supply is no less effective than the Federal standard requiring an equivalent replacement. For a full discussion of our decision with regard to the concept of reasonably foreseeable use, see our final rule in the December 27, 2001, **Federal Register** (66 FR at 67011–12). Because reasonably foreseeable uses as a standard for water supply replacement was addressed and approved in the December 27, 2001, rulemaking, comments recommending its disapproval are not applicable to this rulemaking. In PADEP's current amendment, the only water supply replacement issue is the requirement that PADEP take into account both the premining uses of the water supply and any reasonably foreseeable uses of the supply. We disagree with CAWLM's comment that only a homeowner (and not PADEP or an operator) is qualified to determine reasonably foreseeable

uses. While homeowners are a source of information to consider when determining the reasonably foreseeable uses of a supply, there may be important domestic and residential uses that the current homeowner might not identify in determining minimum thresholds for supply replacement.

30 CFR 938.16(sssss). Water supply replacement—prompt provision of temporary water.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(ttttt). Quality and quantity of temporary water supplies.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(uuuuu). De minimis cost increase.

See comments and our responses to 30 CFR 938.16(ddddd) earlier in this rulemaking.

30 CFR 938.16(vvvvv). Reasonably foreseeable use—adequate quantity.

We received comments from the Sierra Club (Administrative Record No. PA 841.75), Tri-State (Administrative Record No. PA 841.94), and CAWLM (Administrative Record Nos. PA 841.92 and 841.97).

Tri-State recommended changing PADEP's requirement that a replacement water supply meet current and reasonably foreseeable uses be changed to require replacement water supplies to be made equivalent to premining water supplies. These comments were echoed by the Sierra Club and CAWLM. For an explanation of our approval of PADEP's standards for replacement of water supplies, please see our response to comments in 30 CFR 938.16(rrrrr) shown earlier in this rulemaking.

30 CFR 938.16(wwwww). Water supply problems—investigation time frames.

We received no comments in opposition to the proposed resolution of this required amendment.

30 CFR 938.16(xxxxx). Relief of liability for water supply replacement when the adverse effect occurs more than three years after the mining activity.

See our response to comments under 30 CFR 938.16(mmmm) shown earlier in this rulemaking.

30 CFR 938.16(yyyyy). Two-year reporting limit on water supply effects.

See our response to comments under 30 CFR 938.16(jjjj) shown earlier in this rulemaking.

30 CFR 938.16(zzzzz). Compensation in lieu of water supply replacement.

We received comments from Tri-State (Administrative Record No. PA 841.94). Tri-State recommends preservation of water resources by requiring operators to identify all actual and potential water supplies within the permit area. Tri-State further recommended that PADEP should require operators to demonstrate that a suitable replacement water source is available if identified supplies are impacted. Tri-State also indicated that compensation in lieu of water supply replacement should not be allowed.

We believe Tri-State's concerns with identifying the actual and potential water supplies in a permit are answered by the Pennsylvania program at 25 Pa. Code 89.34(a) which requires operators to submit the results of a groundwater inventory of existing wells, springs and other groundwater resources for the proposed permit and adjacent areas and by 25 Pa. Code 89.36(c) which provides that the operation plan shall include a description of the measures which will be taken to replace water supplies which are contaminated, diminished or interrupted by underground mining activities. We approved these provisions in our December 27, 2001, final rule (66 FR at 67031 and 67032). In providing for protection of water resources, the Federal regulations allow operators to affect drinking, domestic or residential water supplies as long as temporary and permanent water supply replacements are promptly provided. Regarding Tri-State's comment on compensation in lieu of water supply replacement, please *see* our response to 30 CFR 938.16(nnnn), (oooo), (qqqq), (rrrr) shown earlier in this rulemaking.

30 CFR 938.16(aaaaaa). Compensation in lieu of water supply replacement—relief of liability under voluntary agreements.

PCA commented (Administrative Record No. PA 841.84) that it opposed the proposed resolution of this required amendment to the extent that it is based on superseding of Section 5.2(h) of BMSLCA. We addressed PCA's concerns regarding superseding of Section 5.2(h) of BMSLCA in a final rule published elsewhere in today's **Federal Register** (*see* our final rule regarding PA–141–FOR).

30 CFR 938.16(bbbbbb). ''Underground mining operations'' and notification of mining.

We received no comments in opposition to the proposed resolution of this required amendment.

Comments on PADEP's ancillary changes

As we noted above, PADEP proposed some changes to its regulations at 25 Pa. Code Chapters 86 and 89 that we did not specifically require in our December 27, 2001, final rule. We received the following comments regarding these changes:

Comments on the definitions of EPAct structures and EPAct water supplies:

The legal counsel for Representative William DeWeese of Greene County (Administrative Record No. PA 841.89) indicated dissatisfaction with the distinction between EPAct and non-EPAct structures. She indicated that all structures should be treated equally and that EPAct structures should retain the same protections as non-EPAct structures. We understand these concerns. However, the Federal standard for review of State program amendments is whether they are no less effective than the Federal counterparts. In this case, PADEP's use of the definition of EPAct structures will insure protections that are no less effective than the Federal protections for these structures. Accordingly, the Federal regulations require that we approve this definition.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program (Administrative Record No. PA 841.66). On September 26, 2003 (Administrative Record No. PA 841.69), MSHA's Wilkes Barre, Pennsylvania, office wrote us indicating that it did not have any comments or concerns with the amendment. On October 21, 2003 (Administrative Record No. PA 841.86), MSHA's Arlington, Virginia, office wrote to us noting that there appears to be no conflict with the Mine Safety and Health Administration's regulation.

Environmental Protection Agency (EPA) Comments

Under 30 CFR 732.17(h)(11)(i), we requested comments on the amendment from EPA (Administrative Record No. PA 841.66). EPA responded on October 14, 2003, (Administrative Record No. PA 841.81) indicating that it has determined that there are no apparent inconsistencies with the Clean Water Act or other statutes and regulations under its jurisdiction. However, EPA further indicated that it is concerned about subsidence impacts on streams due to high extraction underground mining methods. EPA observed that some headwater streams have lost water due to subsidence cracks in stream beds causing the streams to dry up at times and changes to flow patterns. EPA encourages utilization of mining techniques that can minimize these effects or, in the alternative, mitigation

measures that restore streams to premining conditions.

While EPA's comments regarding streams are beyond the scope of the current rulemaking, we appreciate its interest in the mining program. We will forward these concerns to PADEP.

V. OSM's Decision

Based on the above findings, we approve the amendment Pennsylvania sent to us on August 27, 2003, and as revised on September 3, 2003. We are approving the rules proposed by Pennsylvania with the provision that they be fully promulgated in substantively identical form to the rules submitted to, and reviewed by, OSM and the public. We are also removing the required amendments at 30 CFR 938.16(hhhh) through and including (bbbbbb). With regard to those required amendments which required removal of, or modification to, sections of BMSLCA, we are now approving those sections that were formerly disapproved to the extent noted in this final rule and the final rule also published in today's **Federal Register** regarding supersession of certain parts of BMSLCA.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 938.12, 938.15 and 938.16 which codify decisions concerning the Pennsylvania program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting it purposes. Making this regulation effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of Subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and Section 503(a)(7) requires that State programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Pennsylvania does not regulate any Native Tribal lands.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal

regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfounded mandate.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 26, 2004.

Brent Wahlquist,

Regional Director, Appalachian Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR part 938 is amended as set forth below:

PART 938—PENNSYLVANIA

■ 1. The authority citation for part 938 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§§ 938.12, 938.15, 938.16 [Amended]

■ 2. Section 938.12 is amended as follows: Paragraphs (a)(2), (a)(3), (a)(4), (a)(7), (a)(8), (a)(9) and (a)(10) are removed and reserved. Paragraphs (a)(14) through and including (a)(30) are removed.

■ 3. Section 938.15 is amended in the table by adding a new entry in chronological order by ''*Date of final publication*'' to read as follows:

§ 938.15 Approval of Pennsylvania regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
*	*	* * * * *
August 27, 2003	December 9, 2004	25 Pa. Code 86.1 modification of definition of underground mining activities, 86.151(b)(2), 86.152(a), 89.5, Addition of definitions of EPAct structures and EPAct water supplies; removal of definition of permanently affixed appurtenant structures; modification of definitions of underground mining activities and underground mining operations, 89.141(d), 89.142a(a), (c) through (i), 89.143a(a), (c) and (d), 89.144a(a) and (b), 89.145a(a), (b), (e) and (f), 89.146a(c)(2), and 89.152(a) and (b). In BMSLCA, Sections 5.2(b)(2), 5.2(d), 5.2(e)(2), 5.2(i), 5.3(a), 5.3(b), 5.3(c), 5.5(c), 5.5(f), 5.6(c), and 5.6(d).

§ 938.16 [Amended]

■ 4. Section 938.16 is amended by removing paragraphs (hhhh) through and including (bbbbbb).

[FR Doc. 04–26928 Filed 12–8–04; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–141–FOR]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule.

SUMMARY: We are superseding portions of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) to the extent that they are inconsistent with the requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act).

EFFECTIVE DATE: December 9, 2004.

FOR FURTHER INFORMATION CONTACT: George Rieger, Director, Pittsburgh Field Division, Telephone: (717) 782–4036, e-mail: *grieger@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.'' *See* 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.15 and 938.16.

II. Background on the Action

Pursuant to Section 505(b) of SMCRA and 30 CFR 730.11(a), we are superseding portions of the following sections of BMSLCA: 5.1(b) (52 P.S. 1406.5a(b)), 5.2(g) (52 P.S. 1406.5b(g)), 5.2(h) (52 P.S. 1406.5b(h)), 5.4(a)(3) (52 P.S. 1406.5d(a)(3)), 5.4(c) (52 P.S. 1406.5d(c)), 5.5(b) (52 P.S. 1406.5e(b)) to the extent identified for each section as noted below in ''Section III. OSM's Findings.'' We are also revising our disapprovals published in the **Federal Register** on December 27, 2001 (66 FR 67010), to be consistent with this action regarding these sections of BMSLCA. We are taking these actions because we have determined that there are aspects of these sections that are inconsistent with SMCRA and the Federal regulations.

When we disapproved these sections in the final rulemaking published in the **Federal Register** on December 27, 2001 (66 FR 67010), we also imposed requirements, codified at 30 CFR 938.16, to amend BMSLCA related to these sections. Pennsylvania challenged these disapprovals and required amendments, along with others contained in that same December 27, 2001, **Federal Register** notice, by filing a lawsuit against OSM in U.S. District Court for the Middle District of