

**PROPOSED RULEMAKING
TITLE 25. ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CHS. 87, 88, 89, 90]**

Water Supply Replacement for Coal Surface Mining

The Environmental Quality Board (Board) proposes to amend the regulations at 25 Pa. Code Chapter 87 (relating to Surface Mining of Coal), 25 Pa. Code Chapter 88 (relating to Anthracite Coal), 25 Pa. Code Chapter 89 (relating to Underground Mining of Coal and Coal Preparation Facilities), and 25 Pa. Code Chapter 90 (relating to Coal Refuse Disposal), to ensure compliance with Federal requirements and developments in Pennsylvania law; provide consistency, where possible, with water supply replacement regulations relevant to underground mining; and codify existing practices developed by the Department.

The proposed rulemaking was adopted by the Board at its meeting of _____.

A. Effective Date

This proposed rulemaking will be effective upon final-form publication in the *Pennsylvania Bulletin*.

B. Contact Persons

For further information, contact Sharon Hill, Bureau of Mining Programs, Rachel Carson State Office Building, 5th Floor, 400 Market Street, P.O. Box 8461, Harrisburg, PA 17105-8461, (717) 787-5015; or Joseph Iole, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. This proposed rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.state.pa.us (select "Public Participation" then "Environmental Quality Board (EQB)").

C. Statutory Authority

This proposed rulemaking is authorized under the authority of Section 5 of The Clean Streams Law (35 P.S. § 691.5); Sections 4(a) and 4.2 of the Surface Mining Conservation and Reclamation Act (PA SMCRA) (52 P.S. §§ 1396.4(a) and 1396.4b); Section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); Section 7(b) of the Bituminous Mine Subsidence and Land Conservation Act (52 P. S. § 1406.7(b)); and Section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20).

D. Background and Purpose

This proposed rulemaking addresses inconsistencies between the Commonwealth's surface coal mining program and Federal requirements relating to water supply replacement so that the

Commonwealth may maintain primary regulatory authority over coal mining activities in Pennsylvania. This proposed rulemaking also aligns the language regarding water supply replacement for anthracite and bituminous surface mining with underground coal mining to the extent allowed by statute and ensures that the regulations are otherwise consistent with State law and Department practice. These measures will provide clarity to mine owners and operators regarding compliance standards for water supply replacement and protect the rights of water supply owners and users.

Required Consistency of the Commonwealth's Mining Program with Federal Law

The Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. §§ 1201—1328) (Federal SMCRA) “establish[ed] a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” 30 U.S.C.A. § 1202(a). Federal SMCRA authorizes the Secretary of the Interior, through the Office of Surface Mining Reclamation and Enforcement (OSM), to administer the programs for controlling surface coal mining operations, and to review and approve or disapprove State programs for controlling the same. See 30 U.S.C.A. § 1211(c)(1).

Federal SMCRA allows a State to assume jurisdiction over the regulation of surface coal mining and reclamation operations if the State can administer that program according to Federal standards. See 30 U.S.C.A. § 1253. When a State program is approved by OSM, the State achieves "primacy" over the regulation of its surface coal mining program. The Commonwealth achieved primacy in 1982. See 47 FR 33,050, 33,076 (July 30, 1982). To maintain its jurisdiction over regulation of coal surface mining activities, the Commonwealth must maintain a State program in accordance with the requirements of Federal SMCRA, and with “rules and regulations consistent with regulations issued by the Secretary.” 30 U.S.C.A. § 1253(a)(1) and (7).

State laws must be consistent with the provisions of Federal SMCRA (see 30 U.S.C.A. § 1255(a)), and any provision of State law that provides for more stringent land use and environmental controls, and regulations shall not be construed to be inconsistent with Federal SMCRA, 30 U.S.C.A. § 1255(b). In other words, a State program must be at least as effective as the requirements in Federal SMCRA but may be more stringent.

Required Program Amendments

By letter dated December 18, 1998, the Department submitted a proposed amendment of the Commonwealth’s approved coal mining regulatory program to OSM for review and approval. The proposed amendment covered various aspects of the regulatory program and consisted of both statutory changes to PA SMCRA as well as regulations under 25 Pa. Code Chapters 86-90. In May 2005, OSM approved this program amendment with certain exceptions (2005 OSM conditional approval). OSM approved most of the amendment specific to the replacement of water supplies affected by mining activities but did not approve certain provisions. The disapproved portions of the program amendment related to water supply replacement include both statutory and regulatory sections as follows:

Section 4.2(f)(4) of PA SMCRA, 52 P.S. § 1396.4b, was not approved because it allowed for final bond release when there is an outstanding water supply replacement order. See 30 CFR 938.12(c)(1). Sections 87.119(i) and 88.107(i) were not approved for the same reason. See 30 CFR 938.12(c)(7).

Sections 87.1 and 88.1 defining “*de minimis* cost increase”, and Sections 87.119(a)(1)(v) and 88.107(a)(1)(v) (requiring that a restored or replaced water supply shall not result in more than a “*de minimis* cost increase” to operate and maintain) were not approved because the Federal regulations require that no additional costs be passed along to the water supply owner. See 30 CFR 938.12(c)(4)-(5).

Sections 87.119(a) and 88.107(a) were not approved to the extent that they did not include a requirement to provide a temporary replacement water supply. See 30 CFR 938.12(c)(5). Furthermore, they allowed for the replacement supply to be of a lesser quantity and quality than the premining water supply. See 30 CFR 938.12(c)(5). The Federal definition of “replacement water supply” at 30 CFR 701.5 includes a reference to temporary replacement water supplies.

Sections 87.119(a)(3) and 88.107(a)(3) were not approved because they allowed for persons with an ownership interest in the water supply to waive the requirements to restore or replace the water supply. The basis for the disapproval was the definition of “replacement water supply” at 30 CFR 701.5, which provides for a waiver only in the limited circumstance where the water supply is not needed for the land use as it exists at the time of the loss and that there is a demonstration that a “suitable alternative water source is available and could be feasibly developed.” 30 CFR 938.12(c)(5).

Sections 87.119(g) and 88.107(g) were not approved because they allowed for operators to recover costs in the event that an operator successfully appeals a Department order to restore or replace a water supply. OSM did not approve these regulations because section 4.2(f)(5) of PA SMCRA, which provided the statutory authority for these regulations, was repealed in 2000 and replaced with 27 Pa.C.S. § 7708 (related to costs for mining proceedings), and therefore no remaining statutory authority existed to support the regulations. See 30 CFR 938.12(c)(6) and 70 FR at 25484.

In response to OSM’s disapproval of these regulations and to implement the approved program amendments, the Department developed the following technical guidance documents to address water supply replacement operation and maintenance costs: *Increased Operation and Maintenance Costs of Replacement Water Supplies on All Coal and Surface Noncoal Sites* (# 562-4000-102), issued on December 2, 2006; *Water Supply Replacement and Permitting* (# 563-2112-605), issued in 1998 and updated in 2007; and *Water Supply Replacement and Compliance* (# 562-4000-101), issued in 1999 and updated in October 2007. This proposed rulemaking would codify the procedures outlined in these technical guidance documents. This proposed rulemaking reconciles the outstanding unapproved portions of the program amendment listed above and ensures water supply replacement obligations are consistent with Federal law.

Required Consistency of the Commonwealth's Mining Program with State Law

This proposed rulemaking also ensures consistency with State law. The following proposed provisions address regulatory gaps or lack of clarity issues under PA SMCRA:

Proposed amendments to Sections 87.1 and 88.1 revise the definition of “water supply” to explain that soil moisture is not a water supply. The term “water supply” connotes a specific water resource (*e.g.*, a well or spring). Soil moisture, on the other hand, is more appropriately regulated under separate Department provisions requiring that mining activities are conducted to minimize disturbance to the prevailing hydrologic balance. See 25 Pa. Code §§ 87.101(a) and 88.291(a). These provisions also add a definition of “water supply owner” that includes landowners and water supply companies to reflect terminology used in Section 4.2(f) of PA SMCRA. See 52 P.S. 1396.4b(f).

Proposed amendments to Sections 87.47 and 88.27 clarify the regulations by using the defined term “water supply”; require that the permit application must include calculations regarding the cost of potential replacement; and state that the Department will give advance notice to water supply owners and water supply users whose water supplies are identified as potentially affected.

Sections 87.119a(a) and 88.107a(a) clarify the requirements related to sampling, laboratory analysis and notice to water supply owners and water supply users.

Sections 87.119a(b) and 88.107a(b) clarify that obligations to restore or replace an affected supply attach for *any* effect to a water supply, even if the effect is minimal, and that operators or mine owners must restore water supplies to meet reasonably foreseeable uses of the existing supply, not only existing uses of the supply.

Sections 87.119a(f) and 88.107a(f) – clarifying the concepts of “adequate quality” and “adequate quantity” of the replacement supply to more closely mirror the statutory language under Section 4.2(f)(1) of PA SMCRA. This includes clarifying that an operator must, under certain circumstances, replace an affected supply with a supply that is of better quality than Pennsylvania Safe Drinking Water Act standards (35 P.S. §§ 750.1 – 750.20).

Sections 87.119a(g) and 88.107a(g) clarify the procedure for determining operation and maintenance (“O&M”) costs of a replacement supply, and that operators or mine owners must cover O&M costs in perpetuity because the obligation attaches to the land, not to the current water supply owner. See, *e.g.*, *Carlson Mining v. DER*, 1992 EHB 1401, 1412-16 (Oct. 29, 1992).

Sections 87.119a(h) and 88.107a(h) clarify O&M requirements in situations when the current water supply owner and/or water supply user releases the obligation pursuant to a settlement agreement with the operator or mine owner that complies with the regulations and clarifies that an operator may cover O&M responsibilities for multiple water supplies under one bond.

Sections 87.119a(j) and 88.107a(j) clarify the statutory presumption of liability in PA SMCRA and the available defenses to the presumption. This presumption does not exist in Federal law.

Sections 87.119a(1) and 88.107a(1) adds an additional provision that nothing in these regulations would prevent a mine owner or operator from pursuing other legal remedies should they incur costs in restoring or replacing a supply and later determine that some other party was responsible for the pollution or diminution of the water supply.

Public Outreach

Prior to the 2005 OSM conditional approval, the Department held six open-house public meetings in May and June of 2004 to gather comments and suggestions regarding existing regulations and policies governing the replacement of private water supplies lost, diminished or degraded by mining activities. These meetings were held at Department facilities across the State after invitation letters were sent to interested parties, including individual property owners who were known to have experienced past water supply problems. Also, news media alerts were issued to promote these meetings. The issues raised at these meetings included items regarding responsibility for water supply impacts, reimbursement for replaced supplies, the rights of water supply owners to information supplied by the mining operators, correct characterization of the existing supply and reasonably foreseeable uses of the supply, and various other suggestions for improving the program to benefit those who have lost their water supply as a result of mining activities.

The Department evaluated the comments received from the public meetings in conjunction with the 2005 OSM conditional approval, and ultimately included several concepts resulting from these meetings in this proposed rulemaking. For example, Sections 87.47 and 88.27 (relating to alternative water supply information) will now require permit applications to include replacement cost calculations, and the Department will notify the water supply owner/users that their supply may be affected. Early identification and characterization of potentially affected water supplies provides the water supply owner/user with adequate notice that the supply may be interrupted; and, it informs them of their rights under the regulations for replacement of the supply. Early identification also promotes an easier path to agreement on replacement options, which is disruptive and often a point of contention between the operator and water supply owner that delays resolution of the claim.

Mining and Reclamation Advisory Board Coordination

Because the provisions concerning water supply replacement are similar across the various coal regulatory chapters, the Department and the Mining and Reclamation Advisory Board (MRAB) have spent considerable time clarifying language that may differ between surface mining and the approved underground coal mining regulations (25 Pa. Code Chapter 89) due to variations between Pennsylvania's surface mining and bituminous underground mining statutes. Policy changes to the surface mining program regarding water supply replacement were discussed in the Mining and Reclamation Advisory Board (MRAB) Regulatory, Legislative and Technical (RLT) committee meeting of January 2005 in response to concerns from the Pennsylvania Coal Association (PCA). The committee made various recommendations regarding operation and maintenance (O&M) costs calculations and payments, and replacement of a water supply to a quality and quantity necessary for current and reasonably foreseeable uses.

The presentation of concepts for this proposed rulemaking were discussed with the MRAB beginning on October 19, 2017 during a meeting of the full board. On January 11, 2018, an outline of the proposed changes was presented in a meeting of the RLT committee. Comments were provided by the Committee. On April 19, 2018, draft language and responses to previous comments were presented to the Committee. The Committee supplied verbal and written comments on this draft, some of which were incorporated into the proposed rulemaking. The summary of the primary issues raised by the MRAB follows.

The MRAB questioned the repeated use of the term “reasonably foreseeable uses” throughout the proposed rulemaking. This phrase originated in Section 5(e) of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.5(e), and has been incorporated into the Federally-approved surface mining program through the requirement that the water supply must be equivalent to the previous supply in quality and quantity. To replace the supply with a source that did not match the ability of the previously supply to support plausible future uses, based on existing and proposed land use, would be a failure to meet the standards of replacement. OSM has stated their acceptance of the “reasonably foreseeable uses” concept in this context.

The MRAB also expressed concern for the operator’s responsibility to replace a supply if the water supply owner refused access to the supply for the pre-mining survey. The MRAB stated that if the operator is denied the information from the survey, the operator (and the Department) had no basis for judging the condition of the supply. That is, there would be no baseline from which to assess claims of degradation or diminution during mining activities. While it is disadvantageous to all parties for a water supply owner to refuse the information-gathering process, this does not exempt the operator from responsibility for replacing a supply if evidence can be procured that the supply has been affected by the mining activities. It does, however, provide a rebuttal for the mining operator within the presumption zone. If the operator raises this defense to the presumption, the burden shifts to the water supply owner to present evidence that the supply has been affected by mining, and to the Department to gather additional evidence to determine if mining was the cause. If there is no baseline survey information, and a Department inquiry finds that mining activity is responsible for the disruption to the supply, the Department and water supply owner must establish adequate quantity and quality of the replacement supply based on data from similar supplies in the area, and from aquifer characteristics, as well as the existing and reasonably foreseeable uses.

The MRAB also expressed the concern that water supply owners who replace their supply on their own and then seek reimbursement from the operator will install a supply that is higher performing than the previous supply, which will exceed the cost of replacement with an equivalent supply. The proposed rulemaking makes clear that the operator is not required to replace the affected supply with a system that exceeds regulatory requirements and that the operator can dispute the water supply owner or water supply user’s reimbursement costs by obtaining comparable estimates. In this scenario, the Department determines the cost of reimbursement. The water supply user may install any system they choose, but any additional cost beyond the specifications of the previous supply will not be borne by the mining operator.

The MRAB inquired when the quality of a replacement supply would need to meet standards beyond baseline or Pennsylvania drinking water standards. While the Department concedes this would be a rare occurrence, it is justified in some cases. The Department provides an explanation for this exception, which the Department anticipates will be rare, in the summary that follows in Section E. of this preamble, below, for §§ 87.119a(f) and 88.107a(f) (relating to adequacy of permanently restored or replaced water supply).

The MRAB also questioned the basis for the calculations of O&M costs. The Department contends that these calculations, also used for underground and noncoal O&M calculations, are a fair means to determine accurate costs. Variables within the calculations that are tied to economic factors and affect current costs are subject to recalculation annually. The Department will consider proposed alternative means during the comment period for this proposed rulemaking. Having been applied for over 12 years, the existing calculations have proved to be suitable and an alternative calculation that meets the necessary criteria has not been proposed.

The RLT Committee recommended proceeding with the proposed rulemaking at the April 19, 2018 meeting and advised the MRAB of their recommendation also on this date. The MRAB was presented with the draft language on July 19, 2018 and requested a revised draft reflecting minor changes to the proposed language for clarity. In further consultation with the RLT Committee on October 11, 2018 additional revisions were incorporated. The MRAB recommended that the Department proceed with the rulemaking process for the proposed rulemaking on October 25, 2018. Subsequently, additional clarifications and modifications were made to further conform certain provisions to State and Federal law.

E. Summary of Regulatory Requirements

The respective portions of Chapters 87 and 88, Section 87.119 and Section 88.107 (relating to hydrologic balance: water rights and replacement), would be extensively reorganized for clarity. For ease of reference, these sections would be reserved and the new Sections 87.119a and 88.107a, respectively, would be inserted.

Several minor editorial changes were also made throughout.

§§ 87.1 and 88.1 – (definitions).

“*De minimis* cost increase” is proposed to be removed to address the Federal requirement that no additional cost be passed along to the water supply owner. See 30 CFR 938.12(c)(5). OSM disapproved the concept of a *de minimis* cost increase because it is not clear what costs would be non-calculable and how that criteria could be determined. As the Department had defined the term, any amount that is 15% or greater of the annual operating and maintenance costs of the previous supply, or was \$60 per year or greater, was considered more than a *de minimis* increase. Operation and maintenance (O&M) costs include all additional costs paid in order to constitute an equivalent replacement supply.

“Operation and maintenance costs” is proposed to be added as a defined term. This new definition would include all costs incurred by the water supply owner or water supply user

associated with using the water supply for the purposes served. Examples of these costs are provided in this definition.

“Water supply” is proposed to be revised to specify that natural soil moisture is not a supply for purposes of Sections 87.47 and 88.27 (relating to alternative water supply information) and Sections 87.119a and 88.107a (relating to hydrologic balance: water rights and replacement). This proposed revision clarifies that the Department does not interpret the water supply replacement provisions in PA SMCRA to apply to impacts to natural soil moisture. Impacts to natural soil moisture from mining activities are regulated under separate Department provisions requiring that mining activities are conducted to minimize disturbance to the prevailing hydrologic balance. See 25 Pa. Code §§ 87.101(a) and 88.291(a). Soil moisture is a diffuse source dependent primarily on precipitation events and soil properties, though the water table may be relevant. In contrast, the Department interprets “water supply” to include specific water resources (e.g. well or spring) used for human consumption or, in terms of agriculture, animal watering, or in other uses where the transmittal of water from an existing source to a use location is required (e.g. irrigation, washing, dust control).

A definition for “water supply owner” is proposed to be included as the term is used repeatedly throughout to avoid repetition of using both terms “landowner” and “water supply company” in each provision.

The definition of “water supply survey” is proposed to be relocated from Sections 87.1 and 88.1 to Sections 87.119a(a) and 88.107a(a) respectively. Revisions to the water supply survey requirements are described in those sections below.

§§ 87.47 and 88.27 – (alternative water supply information).

Sections 87.47 and 88.27 are proposed to be revised to specify that any “water supply” which may be affected must be identified, and that the permit application shall also include replacement cost calculations for these water supplies. There is also additional clarification that the Department will supply notice to water supply owner to those supplies that may be affected. Early identification and characterization of these potentially affected water supplies provides the water supply owner with adequate notice that the supply may be interrupted and notice of their rights under the regulations for replacement of the supply. Replacement options may cause a temporary disruption of the supply or inconvenience to the water supply owner. Agreement on the method and costs of a replacement can be contentious between the operator or mine owner and water supply owner. Early identification promotes an easier path to agreement and less inconvenience to the water supply owner.

§§ 87.119 and 88.107 – (hydrologic balance: water rights and replacement).

These sections are proposed to be reserved and replaced with § 87.119a and § 88.107a, respectively.

§§ 87.119a(a) and 88.107a(a) – Water supply surveys.

These subsections are proposed to detail the requirements for the water supply survey and are expanded from the previous definition of “water supply survey” to provide greater clarity regarding the requirements of the survey.

The chemical and physical characteristics of the water to be measured are listed in subsection (a)(1)(iii). An operator or mine owner is excused from collecting information if the required collection measures pose an excessive inconvenience to the water supply owner or water supply user, or, in the case of supplies that have existing treatment, if collecting a sample of untreated water is infeasible. These exceptions address situations such as, for example, when an operator or mine owner would have to excavate or remove a structure to gain access to a well or spring, or, for supplies with existing treatment, when there is no reasonable option to collect untreated water without risking contamination of the supply (*i.e.*, no port in the piping to obtain the water). The operator or mine owner is required to use a certified laboratory for analysis of all water samples to ensure valid results.

Subsection (a)(2) is proposed to require the operators or mine owners to submit the results of the water supply survey to the Department, the water supply owner, and water supply user prior to the issuance of a mining permit.

Under subsection (a)(3) of the proposed rulemaking, an operator or mine owner must complete a water supply survey prior to the time a water supply is susceptible to mining-related effects. All water supply surveys will likely be done during the initial surface mining application process, but some flexibility is provided in consideration of the extended duration of the life of the mine during which time additional water supplies may be developed within the original survey area.

Updates to the survey may be needed if the water uses change, a new supply replaces the original surveyed supply, or some other groundwater influence occurs throughout the life of the operation. This additional information is required under the existing regulation relating to reporting of new information.

Subsection (a)(4) of the proposed rulemaking, regarding the rejection of surveys by the water supply owner, reorganizes requirements under existing subsections (c) and (d) of §§ 87.119 and 88.107 regarding “defenses to presumption of liability” and “notification to the Department.” In order to alert operators of their requirement to document certain scenarios to preserve certain defenses, this proposed subsection reiterates and explains in an expanded form these requirements within the context of the water supply survey. In a situation where the operator is prohibited from gathering information about a water supply by the owner, the operator must show that they attempted to conduct the survey and supply evidence that the owner did not respond or denied the request.

§§ 87.119a(b) and 88.107a(b) – Water supply replacement obligations.

These subsections are proposed to be amended to include additional clarifications. There is no negligible limit to affecting a water supply and partial responsibility cannot feasibly be

determined. If any effect on the supply is presumed or demonstrated as resulting from mining, the operator or mine owner is responsible for restoring or replacing the supply with a permanent alternative source adequate for the purposes served. The purposes served include any reasonably foreseeable uses of the water supply. OSM found the “reasonably foreseeable use” requirement to be an acceptable criterion for adequacy of a replacement supply during their December 27, 2001 review of the water supply replacement amendments to the underground mining program. The concept of “reasonably foreseeable uses” is contained in the guidance document *Water Supply Replacement and Permitting* (# 563-2112-605).

§§ 87.119a(c) and 88.107a(c) – Temporary water supplies.

Sections 87.119a(c) and 88.107a(c) are proposed to include requirements for a temporary water supply that must be provided within 24 hours if the water supply owner or water supply user is without a readily available alternate source of water. The supply must be adequate to meet the premining needs. A water supply owner or water supply user's needs are considered to include all needs that existed prior to impact and additional needs that arise between the time of impact and the time a permanent replacement water supply is established, provided those needs were within the capacity of the original water supply. The Department may determine in a preliminary review that the water supply loss is not related to the mining activity in which case the operator or mine owner will not be required to install a temporary supply. This determination may not be possible, however, within a 24-hour time frame but the District Mining Office personnel who investigate water loss claims stated that they can regularly make this preliminary determination within 48 hours of notification of an impacted supply.

§§ 87.119a(d) and 88.107a(d) – Immediate replacement of water supply by the Department.

Sections 87.119a(d) and 88.107a(d) are proposed to address the immediate replacement of a water supply by the Department and the Department’s authority to recover costs is relocated verbatim from existing provisions at Sections 87.119(e) and 88.107(f), which restate Section 4.2(f)(3) of PA SMCRA, 52 P.S. § 1396.4b(f)(3).

§§ 87.119a(e) and 88.107a(e) – Reimbursement.

Sections 87.119a(e) and 88.107a(e) are new requirements that are proposed to address reimbursement. In practice, reimbursement is negotiated when the water supply owner or water supply user has replaced the supply themselves and it is later determined that the operator or mine owner is responsible for the water supply problem. The water supply owner or water supply user may not have been aware of the water replacement rights or could not wait to have a functional supply restored.

While there is no similar federal provision, OSM agrees that this reimbursement is an adequate means for the operator to achieve the purpose of Federal SMCRA to accept responsibility for a replacement of a water supply. The Department has included a process for the operator or mine owner to dispute the cost of a replacement supply if the new supply appears to be in excess of the pre-mining characteristics of the supply, the purposes served by the supply, and reasonably

foreseeable uses, that is, in excess of what the operator or mine owner would be required to replace.

The Department would then determine the fair cost of the reimbursement based on the evidence supplied by the operator or mine owner to that effect. A reasonable time period for reimbursement claims is limited to that of active mining and reclamation. The Department concluded that the 5-year period until final bond release is deemed to be adequate time for any reimbursement claims to be made known to the Department. The time limit for filing a reimbursement claim would not affect an operator's obligation to restore or replace an impacted water supply if the impact is discovered after final bond release.

§§ 87.119a(f) and 88.107a(f) – Adequacy of permanently restored or replaced water supply.

Language regarding adequacy of the replacement supply is currently located in existing regulations under Sections 87.119(a) and 88.107(a) (relating to water supply replacement obligations). The criteria for whether a restored or replaced supply is adequate in quality and quantity are proposed to be located under their own subsection, subsection (f), and the concepts of “adequate quality” and “adequate quantity” have been expanded upon. The concept of a *de minimis* cost increase is removed from the reference to operation and maintenance costs.

The replacement supply must be comparable to the premining supply as documented in the water supply survey or meet standards of the Pennsylvania Safe Drinking Water Act. There may be rare circumstances where the water supply owner or water supply user can demonstrate that water quality beyond these two standards is required. One example is where a replacement water supply includes a water softener to meet quality requirements and the resulting water would otherwise be detrimental to a water user with a low sodium dietary requirement. The Department believes that these instances would be rare and required only when compelling evidence from the water user can be provided. For a non-domestic supply, the quality must also be adequate for the reasonably foreseeable uses.

The standards for quantity must consider premining uses and the reasonably foreseeable uses of the original water supply. For example, the supply must be adequate to serve a reasonable number of residents as suitable for the home even if that many people do not reside in the home at the time of the replacement. Similarly, a non-domestic supply must be comparable to the premining supply in terms of reasonable expansion of the foreseeable uses (*e.g.*, an agricultural supply should provide quantity adequate to use the existing facilities to their reasonable capacity). Installation of storage systems/holding tanks is allowed only as a last effort after other alternatives to provide adequate quantity are attempted. These revisions are necessary to ensure that the Commonwealth's standards for replacement water supplies are no less effective than the Federal definition of “replacement of water supply” at 30 CFR 701.5 (relating to definitions), which requires that the replacement include an equivalent water delivery system. Connection to a public water supply would generally fulfill both quantity and quality requirements (with the additional O&M costs paid by the operator or mine owner) even when the water supply owner or water supply user objects to this source via personal preference.

The replacement supply must be fully functional to achieve quality and quantity, which means the operator or mine owner is responsible for all equipment and structures to put it into immediate service. This would not include, for example, replacement plumbing for reasons other than making the supply functional.

§§ 87.119a(g) and 88.107a(g) – Increased operation and maintenance costs.

Sections 87.119a(g) and 88.107a(g) are proposed to describe the procedure for determining operation and maintenance (O&M) costs and providing for these costs so that the restored or replaced water supply is no more costly to operate and maintain than the original water supply. There are no *de minimis* limits to the cost increases. If the operation and maintenance costs of the restored or replaced water supply are higher than those of the original water supply, the operator or mine owner must make provisions to permanently cover the increased costs. To not do this would render the replacement a “lesser” supply which is not allowed by Federal requirements as demonstrated by OSM’s disapproval.

The proposed regulations are consistent with existing Department policy for calculating and providing O&M costs and set time frames to accomplish the steps involved.

The duration of time for which an operator is required to pay O&M costs arose during previous discussions with stakeholders when the concept was placed into the Technical Guidance Document *Increased Operation and Maintenance Costs of Replacement Water Supplies* (562-4000-102). Commenters to this policy disagreed with the Department’s position that the costs run with the land and not the owner at the time of the replacement. The concept has also been challenged before the Environmental Hearing Board (EHB). See, e.g., *Carlson Mining v. DER*, 1992 EHB 1401, 1412-16); *Buffy and Landis v. DER*, 1990 EHB 1665, 1701; and *Lang et al. v. DEP*, 2003 EHB 145.

The EHB has explained that operators’ (or mine owners’) obligation to pay costs is *permanent* because a replacement supply which costs more to operate and maintain than the previous supply does not meet the requirements in Section 4.2(f) of PA SMCRA for adequate quantity and quality. The obligation has been described by the EHB, in both *Buffy* and *Carlson*, as “*ad infinitum*” unless the current owner executes a valid settlement that releases the operator from obligation for continued payment as provided in the proposed subsections (g)(4) and (h)(1).

If the water supply owner agrees, the operator can satisfy its obligation regarding increased cost at any time through a one-time payment to the water supply owner in an amount covering the present worth of the increased annual operation and maintenance cost for a period agreed to by both parties. Otherwise, a bond is posted for the amount calculated as specified to ensure that the water supply owner will receive the payments in the event the permit is forfeited for any reason.

§§ 87.119a(h) and 88.107a(h) – Special Provisions for operation and maintenance costs.

Sections 87.119a(h) and 88.107a(h) are proposed to clarify two provisions for O&M costs: when the ownership of the supply changes; and if there are multiple supplies that have been replaced

with associated increase in costs. As mentioned above, previous discourse on the permanent nature of the O&M costs determined that the obligation was not limited to the current water supply owner. However, the water supply owner may choose to release the obligation in lieu of a settlement as described prior to selling the parcel with the supply. The new water supply owner would then assume the present costs of operating the supply with full knowledge of the discharged responsibility agreement.

The Department determined that it is reasonable to limit the operator's or mine owner's choice to consolidate O&M responsibilities under one bond provided that the bond is sufficient for the total of all supplies determined to be covered.

§§ 87.119a(i) and 88.107a(i) – Waivers.

Sections 87.119a(i) and 88.107a(i) are proposed to address the compensation as an alternative to replacement. PA SMCRA requires replacement of the water supply, therefore, compensation as an alternative to replacing the supply is generally not allowed. A water supply owner or water supply user may waive the operator's or mine owner's responsibility to replace a water supply only in the situation where the supply is not necessary to achieve the approved post-mining land use. The operator or mine owner may not decide that the supply can be abandoned; the Department must make the determination that abandonment is appropriate and that all parties of interest knowingly and willingly agree to abandon the water supply.

§§ 87.119a(j) and 88.107a(j) – Presumption of liability.

Sections 87.119a(j) and 88.107a(j) recite provisions from PA SMCRA that provide that the operator or mine owner is presumed to be liable for water supply pollution and diminution within 1,000 feet of areas affected by mining (see 52 P.S. § 1396.4b(f)(2)). These subsections specify that the presumptive area does include support areas but does not include haul and access roads and that there are some exceptions (e.g., bacteriological contamination of a water supply is not reasonably associated with mining activity).

The existing subsections also restate five defenses to the presumption that exist in PA SMCRA, including one defense that the operation is located outside the 1,000-ft area. This proposed revision makes no changes to the statutory defenses but clarifies the criteria for the operator or mine owner to be excluded from the presumption of responsibility. First, the supply must be accurately located outside the 1,000-ft perimeter to the affected surface mining areas. Support areas are included as "surface mining activities," defined in 25 Pa. Code Chapter 86 (relating to Surface and Underground Coal Mining: General).

Other defenses to presumption of responsibility include the following:

- 1.) The water supply owner refused to allow the operator to collect information about the existing water supply (i.e., the water supply survey) prior to mining. During the application process, the water supply owner is provided with the survey and advised of their rights under the law. If they deny access to the operator or mine owner, and the operator or mine owner cannot accurately assess the condition and quality of the supply, then the presumption is rebutted.

2.) The water supply owner or water supply user refused access to the supply to determine the extent of pollution or diminution. As in the first defense, above, the operator or mine owner cannot accurately assess the claim that the condition or quality of the supply has been impacted, and therefore the presumption is rebutted.

3.) After collecting information, the operator or mine owner can demonstrate that there is some cause other than the mining activity that impacted the water supply

4.) The operator or mine owner can demonstrate that the pollution or diminution existed prior to the commencement of mining activities.

If the operator or mine owner asserts that one or more defenses apply, the operator or mine owner must provide supporting evidence to the Department.

The refusal of access to survey or investigate a water supply may only be used to nullify the *presumption* of liability. It does not negate the potential responsibility to replace the supply if mining activity is the cause of the disruption. If a water supply is within 1,000 feet, the burden is on the operator to replace the supply or rebut the presumption of liability. When outside 1,000 feet, the burden is on the water supply owner, water supply user, or the Department to show that the mining activity is the cause.

Where the affected supply lies within the 1,000-ft presumption of liability area but has been rebutted for a reason provided in this subsection, the burden of evidence shifts to the water supply owner, water supply user, or the Department to demonstrate the operator or mine owner is responsible for the disruption. The Department gathers additional information in an investigation of the complaint, just as with a claim outside the 1,000-ft area, to determine if the cause is mining-related.

§§ 87.119a(k) and 88.107a(k) – Operator cost recovery.

Sections 87.119a(k) and 88.107a(k) replace existing provisions 87.119(g) and 88.107(g) that were disapproved by OSM in 2005 due to the repeal of the underlying provision that was Section 4.2(f)(5) of PA SMCRA. See act of December 20, 2000 (P.L. 980, No. 138). These subsections are proposed to address an operator's or mine owner's ability to recover costs by referencing 27 Pa.C.S. § 7708, the current statute related to costs for mining proceedings.

§§ 87.119a(l) and 88.107a(l) – Other remedies.

Sections 87.119a(l) and 88.107a(l) are proposed to clarify that nothing in these regulations would prevent a water supply owner or water supply user from pursuing any other remedy provided in law or equity when claiming pollution or diminution of a water supply. These subsections also provide that an operator or mine owner is not prevented from pursuing other legal remedies should they incur costs in restoring or replacing a supply that experienced pollution or diminution caused by third parties.

§§ 87.119a(m) and 88.107a(m) – Issuance of new permits.

Sections 87.119a(m) and 88.107a(m) are proposed to remove language from existing Sections 87.119(i) and 88.107(i) that indicated that a Department order to restore or replace a water supply would not affect final bond release. OSM did not approve this section as previously written because it could be construed as allowing final bond release while a water supply replacement order was in effect. The Department will approve Phases 1 and 2 of bond release as requested by the operator if the reclamation standards for these areas have been met. However, final bond release (Phase 3) will not be approved if an order is outstanding because the standards of PA SMCRA will not have been fully met.

§§ 87.119a(n)-(o) and 88.107a(n)-(o) – Department authority and exceptions.

These sections are proposed to change the reference from Section 87.119(j)-(k) and 88.107(j)-(k) to the proposed designation Sections 87.119a(n)-(o) and 88.107a(n)-(o). There were no changes made to the existing provisions currently at §§ 87.119(j)-(k) and 88.107(j)-(k), respectively.

§§ 89.173 and 90.116a – Performance standards and hydrologic balance.

These sections are revised to change the reference of Section 87.119 to the proposed designation Section 87.119a.

§ 88.381– General requirements.

This section is revised to change the reference of Section 88.107 to the proposed designation Section 88.107a.

F. Benefits, Costs and Compliance

Benefits

Because the revisions incorporated in this proposed rulemaking will resolve inconsistencies between existing Department regulations and Federal requirements, they will allow the Commonwealth to maintain primary regulatory authority over coal mining activities. The proposed rulemaking will also codify mine operator responsibility that exists under State law and as articulated in Department policy documents, which will therefore provide clarity to mine operators regarding compliance standards for water supply replacement and protect the rights of water supply owners and users.

The consolidation of requirements into the surface mining chapters of the regulations promotes public understanding of these rights and responsibilities. Both water supply owners and surface coal mine operators will benefit by having these requirements in the mining regulations published in the Pennsylvania Code instead of in Department policy documents. In particular, the proposed rulemaking now clarifies that if a water supply is presumed to be affected by mining, the owner of that supply is entitled to temporary water, saving them a potential cost of around \$1000 and \$2000.

The Department surveyed the District Mining Offices for information regarding water supply replacement. The responses showed that claims for water supply replacement in association with surface mines are low in number per year and are usually easily resolved between the water supply owner and operator or mine owner. This proposed rulemaking outlines a process to ensure that water losses are anticipated in advance to the reasonable extent possible so that the water supply user is spared excessive inconvenience and interruption to the supply and that operation and maintenance cost agreements can be determined fairly and concluded expediently.

Compliance Costs

The proposed rulemaking is likely to have no impact on existing costs for compliance. The requirements included in this rulemaking are largely based on Federal requirements or developments in State law that are currently implemented through Department policy; therefore, nothing in the proposed rulemaking is likely to increase or decrease costs to the operator or mine owner.

Compliance Assistance Plan

Compliance assistance for this rulemaking will be provided through the Department's routine interaction with trade groups and individual applicants. There are about 400 licensed surface coal mining operators in Pennsylvania that will be subject to this regulation.

The Department will update program guidance and provide information on the website to assist mine operators with compliance.

Paperwork requirements

This rulemaking does not require additional paperwork. Forms already exist to collect the information requirements to be supplied by the mine operator with regards to this proposed rulemaking. The surface coal mining application sections applicable to water supplies will require minor revisions to reflect the regulatory changes. This will be done in conjunction with the MRAB at a later date. The form regarding the Abandonment of Water Supply Agreement will be revised to remove the "de minimus" language. A new form, Model Water Supply Settlement Agreement and Release, is proposed that can be used when the mine owner or operator enters into an agreement with the water supply owner to provide a replacement supply and all the requirements entailed.

G. Pollution Prevention

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving State environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with

greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This proposed rulemaking has minimal impact on pollution prevention since it is predominantly focused on updating regulations to reflect current Federal requirements, amendments to State statutes, and references to citations.

H. *Sunset Review*

The Board is not proposing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on **DATE**, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor.

J. *Public Comments*

Interested persons are invited to submit to the Board written comments, suggestions, support or objections regarding the proposed rulemaking. Comments, suggestions, support or objections must be received by the Board by **DATE**. Comments may be submitted to the Board online, by e-mail, by mail or express mail as follows.

Comments may be submitted to the Board by accessing eComment at <http://www.ahs.dep.pa.gov/eComment>.

Comments may be submitted to the Board by e-mail at RegComments@pa.gov. A subject heading of the proposed rulemaking and a return name and address must be included in each transmission.

If an acknowledgement of comments submitted online or by e-mail is not received by the sender within 2 working days, the comments should be retransmitted to the Board to ensure receipt. Comments submitted by facsimile will not be accepted.

Written comments should be mailed to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477. Express mail should be sent to the Environmental Quality Board, Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301.

Patrick McDonnell
Chairperson
Environmental Quality Board