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addition, survey results may not be released to anyone other than the structure owner or the Department without the structure owner's consent.

Mining beneath and adjacent to public buildings and other protected structures and features

One commentator noted that the Federal regulations in 30 CFR 817.121 do not allow mining beneath public buildings and other protected structures unless the subsidence control plan demonstrates that there will be no material damage or reduction in reasonably foreseeable uses. The commentator questioned the adequacy of 50% coal support and recommended that the support area be configured around a 30° angle of draw. The commentator also questioned whether support areas should be rectangular or conical in shape.

The Board notes that the Department has used the 15° angle of draw, 50% support standard and rectangular support area for protecting structures for over 30 years, and that these criteria have proven effective in preventing material damage. These criteria are already part of Commonwealth's approved program for protecting the structures listed under Federal regulation in 30 CFR 817.121(d). In regard to the shape of support areas, a rectangular support area will be larger and, therefore, offer greater protection than one computed by conical projection. Section 89.142a(c) also includes provisions allowing the Department to increase support area requirements in cases where it believes that the basic standards will not provide sufficient protection.

Two commentators questioned how full extraction could meet the standard for protecting public buildings and other structures.

The Board believes that in some situations full extraction mining could be conducted beneath public buildings and other structures without causing material damage or reductions in reasonably foreseeable uses. In some cases, surface measures could be taken to protect the structures during the occurrence of planned and controlled subsidence. In other cases, an operator may be able to demonstrate that planned and controlled subsidence will not cause material damage based on observations at a comparison site.

One commentator noted that proposed § 89.142a(c) required all alternative mining plans to be supported by engineering reports, geologic information and elevation surveys. The commentator further noted that the previous regulation allowed technical reviewers to determine what information was necessary. The Board has revised § 89.142a(c) to delete this language and simply require the submission of a report demonstrating that the structure or feature will not be materially damaged by mine subsidence.

One commentator recommended deleting the requirement to prevent material damage to the structures listed in § 89.142a(c), noting that some of these structures were listed among those covered by repair and compensation provisions under the BMSLCA.

The Board did not adopt this recommendation because the structures listed in § 89.142a(c) have been identified for special protection under the BMSLCA. The directive in these cases is to prevent material damage or prevent a reduction in the reasonably foreseeable use of the structure. Accordingly, the Board has retained permanent coal support as the default standard for protecting these structures. Mine operators may use alternative measures, but they must first demonstrate that those alternative measures will not allow the onset of material damage or

reductions in reasonably foreseeable uses. The statutory requirement to repair these structures only serves to ensure repairs if damage occurs despite the operator's efforts to prevent it.

One commentator noted that the BMSLCA does not necessarily prohibit full extraction mining beneath a perennial stream or aquifer that serves as a significant source to a public water supply system. The Board acknowledges the commentator's observation but notes that the Department has technical guidances which aid permit reviewers in determining when to apply restrictions.

One commentator recommended reinstating coal refuse disposal areas to the list of protected structures and features. The Board did not adopt this recommendation because coal refuse disposal areas are not listed under section 9.1 of the BMSLCA.

One commentator questioned whether contamination would constitute material damage to an aquifer. The Board notes that the contamination of an aquifer is regarded as a hydrologic impact covered by The Clean Streams Law. In addition, the contamination of an aquifer which serves as a significant source to a public water supply system would constitute material damage under § 89.142a(c).

Irreparable damage to dwellings and agricultural structures

Three comments were received in regard to § 89.142a(d).

One commentator recommended that damage to homes should be prevented and another recommended that damage minimization measures should be required when even material damage is predicted. The Board did not adopt these recommendations because the BMSLCA allows for homes to be damaged as long as the damages are repaired or the structure owner is compensated. In addition, the act only specifically provides for damage minimization when a structure is likely to be irreparably damaged.

One commentator noted that the BMSLCA does not require a mine operator to take damage minimization measures unless the Department notifies the operator that irreparable damage is likely to occur. After considering this comment, the Board revised § 89.142a(d) to more closely conform to the BMSLCA. Subsection (d) now requires the Department to notify the mine operator that irreparable damage will occur prior to requiring the operator to take damage minimization measures. Subsection (d) also provides for irreparable damage to occur if the structure owner consents.

Repair of damage to surface lands

One comment was received regarding proposed § 89.142a(e). The commentator recommends that there should be a requirement to restore the land to a condition capable of supporting the value and reasonably foreseeable uses that it was capable of supporting prior to subsidence damage.

The Board believes that the commentator's concern is addressed by the language of the regulation. The concept of restoring the land to its premining value and reasonably foreseeable uses is implicit in the responsibility to correct material damage. The definition of "material damage" includes considerations relating to the affected land's capability to support any current or reasonably foreseeable uses and significant losses in production or income.

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Repair of subsidence damage to dwellings and other structures

Numerous comments were received regarding § 89.142a(f) relating to the repair of subsidence damage to dwellings and other structures under section 5.4 of the BMSLCA.

Two commentators observed that the dwellings and permanently affixed appurtenant structures built after August 21, 1994, and after the first public notice of the mine permit application were excluded from subsidence damage repair and compensation requirements. The commentators further noted that these structures are not excluded from repair and compensation under the Federal program.

In considering this comment, the Board researched the rules of statutory construction and concluded that appropriate application of the rules directly addresses the commentator's concern. Under the rule of statutory construction known as the "rule of the last antecedent," section 5.4(a) of BMSLCA and § 89.142a(f) are to be interpreted to require an operator to repair all dwellings in place at the time of underground mining and all permanently affixed appurtenant structures in place at the time of underground mining. The dates in section 5.4(a) of the BMSLCA and § 89.142a(f) which limit an operator's repair obligations only apply to improvements. As a result of this interpretation, dwellings and permanently affixed appurtenant structures are subject to repair and compensation requirements equivalent to those required by Federal law.

One commentator also observed that repair and compensation requirements only apply to those dwellings and permanently affixed appurtenant structures which are within the boundary of the mine.

Under the rule of statutory construction known as "the rule of the last antecedent," only the "improvements" must be within the boundary of the entire mine as depicted in the permit application. Dwellings and permanently affixed appurtenant structures are not subject to this qualification.

One commentator questioned whether structures that are installed beneath the ground would qualify for protection. The Board believes that all structures which are installed beneath the ground would qualify as permanently affixed appurtenant structures. The very aspect of being in the ground causes these structures to be considered permanently affixed.

One commentator questioned whether the requirement to compensate for the reasonable cost of repair would be equal to the Federal requirement to fully repair or compensate. The commentator also questioned who makes the determination as to what is reasonable.

The Board believes that the compensation provided under § 89.142a(f) will equal or exceed that provided by the Federal program in all cases. Both programs should provide equal compensation up to the point when damage is irreparable. In cases involving irreparable damage, the Commonwealth's program offers greater compensation because the amount is determined on the basis of replacement value rather than fair market value. In regard to determining what is reasonable, the Department has the final say.

Two commentators noted that the Commonwealth's regulations do not contain a rebuttable presumption relating to subsidence damage to structures like the Federal program. The Board acknowledges that

§ 89.142a(f) does not contain a rebuttable presumption relating to subsidence damage. The reason is because the BMSLCA does not provide for one. The Board has, however, made provisions to bring the Commonwealth's program closer to the Federal program on this matter. The premining survey requirements in § 89.142a(b) include provisions for obtaining baseline information prior to the time mining enters the rebuttable presumption area defined in the Federal regulations. The availability of baseline information of structures will facilitate enforcement of subsidence damage repair and compensation requirements.

One commentator questions whether dwellings which are used temporarily, occasionally or seasonally for human habitation qualify for subsidence damage repair and compensation provisions. The Board believes that all dwellings mentioned in the commentator would be covered under § 89.142a(f) if they meet the criteria for being in place at the time underground mining occurs.

One commentator noted that § 89.142a(f) does not provide for prompt repair or compensation in a manner similar to the Federal program. The Board acknowledges that the BMSLCA does not provide for the Department to become involved until the mine operator and structure owner have had 6 months to come to terms. The Board notes, however, that final repairs cannot be completed until subsidence is complete and the land has stabilized. Based on this consideration, final repairs should be completed within the same time frames under both State and Federal programs.

One commentator expressed concern that § 89.142a(f) did not specifically address multilevel mining. The commentator was concerned that once a home is undermined in one seam, operators of future mines in overlying or underlying seams could be relieved of responsibility to repair future damage.

The Board acknowledges the commentator's concern, but believes that this matter is covered by the regulations. Section 89.142a(f) is applicable to individual mines and their associated damages. The only potential problem is the situation when a landowner signs a voluntary agreement releasing a mine operator from damages caused by future mining. In the absence of these agreements, the mine operator would be liable to repair or compensate for subsequent damage resulting from mining additional coal seams.

One commentator noted that the proposed regulation in § 89.142a(f)(2)(i) was missing a reference to structures covered in § 89.142a(f)(1)(i)-(v). The Board has revised the final-form regulation to correct this oversight.

One commentator recommended revising § 89.142a(f)(2)(ii) to require a mine operator to promptly notify a landowner of its decision to replace a damaged agricultural structure with an alternate type structure. The commentator noted that this would allow the mine operator and landowner to work matters out prior to the end of the 6-month negotiation period. While the Board agrees that this recommendation has some merit, it notes that the regulation, as written, allows the mine operator and landowner to work matters out prior to the end of the 6-month period.

One commentator pointed out that subsidence does not necessarily cease within a few months. There are some cases where subsidence continues after 12 years. The Board acknowledges the commentator's concern and notes that § 89.142a(f) does not limit the time frame in which a mine operator is responsible to repair or compensate for

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subsidence damage. Likewise, there is no limit on the number of times an operator must repair or compensate for damage resulting from successive episodes of subsidence.

One commentator recommended that § 89.142a(f) should include facilities that are associated with buildings which are accessible to the public and noncommercial buildings customarily used by the public. The Board notes that permanently affixed appurtenant structures are covered in association with buildings that are accessible to the public. Other than this specific provision, the BMSLCA does not provide repair or compensation for facilities associated with either of these types of structures.

One commentator noted that §§ 89.142a(f) and 89.143a(b) seem to give the mine operator the choice of repairing or compensating for structural damage. The commentator believed this choice should be left to the landowner. The Board notes that the BMSLCA is silent on which party gets the choice in the matter. In cases when there is a dispute regarding which remedy to apply, the Department would make the final determination after considering the wishes of both the mine operator and landowner. The Board has revised § 89.143(d)(3) to correct this matter.

One commentator noted that the construction of § 89.142a(f)(2)(ii) did not provide compensation for relocation expenses when a structure owner's home was being repaired. The Board acknowledges this error and has corrected this matter in the final-form regulation.

One commentator questioned who is responsible for the safety of livestock and any injury to livestock when agricultural buildings are damaged. The Board acknowledges the commentator's concern, but notes that the BMSLCA does not address this matter. Consequently, any claims relating to injury to livestock would have to be settled through the courts.

Protection of utilities

Over 100 comments were received regarding proposed §§ 89.141(d)(11) and 89.142a(g) relating to the protection of utilities. These comments came primarily from mining and utility interests including gas companies, water companies, sewer authorities and railroads. IRRC also provided comments on these aspects of the regulations.

Utility interests focused on several basic issues. They were concerned that the proposed revisions would strip them of protections afforded in the recent EHB decision in *P.U.S.H.* Commentators were especially concerned about the deletion of regulations which in their opinion required mine operators to provide coal support or take surface measures to protect utility lines. The utility interests also expressed concern that the proposed revisions could subject their lines and facilities to even more damage than previously allowed. Many commentators believed that the proposed amendments would allow mine operators to fulfill utility protection requirements by merely notifying the utility company of planned mining. Some commentators recommended preventing material damage to vital utilities such as gas and water lines.

In support of their contentions, utility interests submitted information relating to the need to provide additional protection to utilities. Some commentators asserted that the safety of their customers is jeopardized when gas mains and transmission lines and rail lines are undermined. Some commentators representing gas and water utilities asserted that service to large areas can be disrupted when large mains and transmission lines are

damaged or must be shut down. Some commentators noted that some utility pipelines are difficult to protect because of their construction, or because they run through streets, buildings or other areas where conventional means of protection will not work. Utility interests also indicated that they incur considerable expenses in taking precautionary measures to prevent damage and in repairing lines which are damaged by mine subsidence and that some of these costs must be passed on to utility customers. Some commentators also felt the language of proposed § 89.142a(g) could make the Commonwealth's regulation less effective than the Federal counterpart regulation.

Mining interests were generally concerned that the proposed revisions could force them to assume a larger role in protecting utilities than they had assumed in the past. Some commentators favored simply reinstating the language of the Federal regulation in 30 CFR 817.180. Mining interests were especially concerned that the proposed amendments could upset the system of rights and responsibilities which existed between mining operators and utility companies for many years. Mining interests also recommended that amendments should focus primarily on maintaining utility service rather than preventing damage to utility lines.

In support of their position, mining interests described situations when tens of thousands of feet of utility lines had been undermined without incident under the current arrangement where mine operators notified utility companies of planned mining and utility companies took precautionary measures at the surface. Some commentators cited examples of situations when utility pipelines were kept in service and left undamaged by subsidence even in the absence of surface precautions. Some commentators also pointed out that certain utilities have the right to acquire coal support by eminent domain. Commentators also noted that the requirement to protect utilities is derived from the Federal regulations and there is nothing in the BMSLCA which affords utilities any specific right to protection. One commentator also noted that courts in Ohio have upheld a miner's right to mine the coal.

IRRC also presented comments in regard to utility protection. IRRC noted that the issue has arisen as to which party is responsible for the cost of mitigating damages incurred by investor-owned utilities. In the IRRC's view, the Department has no authority to make this determination. Rather, the issue is between two parties that would have to be resolved through litigation if an agreement could not be reached. IRRC also recommended that the Preamble to the final-form regulations address the measures mine operators are expected to take in protecting utilities, and that the final-form regulation in § 89.155 requires mine operators to notify utilities of planned mining by certified mail.

One commentator also asked to what extent mine operators were required to protect customer-owned utilities.

The traditional system in which mine operators and utility companies carried out their respective duties in accordance with their respective property rights appears to have been effective in preventing hazards to human safety. Over the past 15 years, the Department has received only two or three reports of significant damage due to the undermining of utility lines. While the occurrence of any incident is unfortunate, the Board believes