

Appendix B (continued)

Regulations for Mine Subsidence Control, Subsidence Damage Repair and Water Supply Replacement

2764

RULES AND REGULATIONS

It will then be up to the investor-owned utility to protect the utility line. If the utility line is owned by a government agency, mining beneath the utility line will not be allowed to occur if subsidence will cause material damage to the utility line or reduce its reasonably foreseeable use.

Subsection (h) is an existing regulation on perennial stream protection which has been relocated during this rulemaking. Subsection (h) requires mine operators to take measures to maintain the value and reasonably foreseeable uses of perennial streams and to restore to the extent technologically and economically feasible any streams which have been adversely impacted by mining.

Subsection (i) relates to the prevention of imminent hazards to human safety. Paragraph (1) restates the former regulation found under § 89.143(f). It requires the Department to suspend underground mining beneath urbanized areas, certain buildings and facilities and perennial streams if the mining poses an imminent hazard to human safety. Paragraph (1) was relocated from former § 89.143(f) and modified to limit protection of solid and hazardous waste disposal facilities to those which contain a liner. Paragraph (2) restates section 9.1(a) of the BMSLCA (52 P.S. § 1406.9a(a)) and gives the Department broad authority to restrict or prohibit mining if it determines that there will be an imminent hazard to human safety.

Subsection (j) is a performance standard relocated from § 89.143(g). It prohibits mining in an area that is not covered by an approved subsidence control plan.

Subsection (k) is a new performance standard which requires mine operators to report mine subsidence damage claims to the Department. This requirement will enable the Department to investigate subsidence damage incidents near the time of occurrence when details relating to causation and extent of damage are best observed.

Subsection (l) is an advisory statement that has been added at final rulemaking. It clarifies that the Department does not have the authority to resolve disputes over property rights.

§ 89.143a. Subsidence control: procedure for resolution of subsidence damage claims.

Section 89.143a is a new section which describes the responsibilities of mine operators, structure owners and the Department in resolving claims of mine subsidence damage. These responsibilities are taken directly from section 5.5 of the BMSLCA.

§ 89.144a. Subsidence control: relief from responsibility.

Section 89.144a is a new section which describes the conditions under which an operator may be relieved of responsibility to repair or compensate for damage to a structure. This section comes directly from the BMSLCA, and is included to alert operators and structure owners of their rights and responsibilities under the BMSLCA.

§ 89.145a. Water supply replacement: performance standards.

Section 89.145a is an entirely new regulatory section that pertains to the restoration or replacement of water supplies which are contaminated, diminished or interrupted by underground mining.

Subsection (a) requires mine operators to conduct premining surveys of all water supplies prior to mining in an area which could result in the water supplies being impacted. The subsection establishes a default distance of 1,000 feet (304.80 meters) for determining the timing of surveys. It further provides that the Department may

increase or decrease this distance based on site specific considerations. Paragraph (2) describes the minimum information to be obtained during the survey and limits information acquisition to that which is reasonably available. Paragraph (3) describes the procedures a mine operator must follow when the landowner or water user denies access to conduct a survey.

Subsection (b) sets forth a mine operator's basic responsibility to restore or replace a water supply that has been contaminated, diminished or interrupted by the operator's underground mining activities. The language has been revised from that of the proposed rulemaking to reference underground mining activities rather than underground mining. This change was made to conform to the language of the statute. Language has been added to clarify that this subsection does not apply to those aspects of underground mining activities that are regulated as surface mining activities under Chapter 87 (relating to surface mining of coal).

Subsection (c) requires a mine operator to notify the Department within 24 hours of receiving a complaint that the operator's underground mining activity has affected a water supply.

Subsection (d) repeats the statutory requirement to diligently investigate all complaints of water supply contamination, diminution or interruption. It also requires the operator to notify the Department of the results of investigations in a timely manner.

Subsection (e) sets forth the requirement to provide temporary water when a water supply has been impacted by underground mining activity within the rebuttable presumption zone and the landowner or water user is without a readily available alternate source of water. It also establishes basic criteria for the quality and quantity of temporary water supplies.

Subsection (f) sets forth the criteria for determining the adequacy of a permanently restored or replacement water supply. It establishes standards for quality, quantity, reliability, cost, maintenance and control. The requirements specified in this subsection are for the most part the same as those of the Department's surface mining program which is based on similar statutory language and several court decisions interpreting that language. In regard to costs, subsection (f) requires that a mine operator must provide for the permanent payment of increased operation and maintenance costs which are more than de minimis. Subsection (f) also includes a clause which provides for the assumption of reasonable expansion in determining the water needs of agricultural operations.

§ 89.146a. Water supply replacement: procedure for resolution of water supply damage claims.

Section 89.146a is a new regulatory section which summarizes the responsibilities of mine operators, landowners, water users and the Department in resolving claims of water supply contamination, diminution or interruption. The procedures described in this section are based on section 5.2 of the BMSLCA (52 P.S. § 1406.5b).

§ 89.152. Water supply replacement: relief from responsibility.

Section 89.152 is a new section which describes the conditions under which an operator may be relieved of responsibility to restore or replace a water supply. These releases are based on sections 5.1 and 5.2 of the BMSLCA.

**Regulations for
Mine Subsidence Control, Subsidence Damage Repair and Water Supply Replacement**

RULES AND REGULATIONS

2765

§ 89.153. Water supply replacement: rebuttable presumption.

Section 89.153 is a new regulatory section which describes the effect of the rebuttable presumption provision under section 5.2 of the BMSLCA, and the means by which an operator may rebut the presumption that he is liable for the contamination, diminution or interruption of a water supply.

§ 89.154. Maps.

Section 89.154 describes the contents of mine subsidence control plan maps and 6 month maps. Most of these requirements are existing and have been relocated from § 89.142. Subsection (a) describes the coverage and content of the general mine map which is submitted at the time of permit application. Subsection (b) describes the coverage and content of 6-month maps, which are submitted semiannually during permitted operations.

In subsection (a), the scope of the general mine map has been modified to comply with Federal mapping requirements in 30 CFR 784.20(a)(1). Under the proposal, the map must show all areas where structures may be damaged by mine subsidence, and at a minimum cover the area within a 30° angle of draw of the limits of underground mining. This latter provision is intended to assure that all structures covered by the rebuttable presumption under the federal program are considered in the Commonwealth's subsidence control plans.

Subsections (a) and (b) also list the details which must be shown on subsidence control maps. Many of these details are the same as those required by current regulation. Some additional details have been added in conjunction with the Act 54 amendments to the BMSLCA. The maps must now include all water supplies and all structures covered by subsidence damage repair and compensation provisions. In addition, subsection (a)(6)(x) and (xi) has been added to require the depiction of all utilities listed under § 89.142a(g).

§ 89.155. Public notice.

This section contains public notice requirements which have been relocated from § 89.144. Two additional parties have been added to the list of persons to be notified. Owners of all structures and owners of all utilities must now be notified of proposed mining.

Deleted regulations.

Sections 89.142—89.145 are deleted under this rulemaking. Many of these former provisions are incorporated in §§ 89.142a, 89.154 and 89.155.

E. Summary of Comments and Responses on the Proposed Rulemaking

At its meeting on March 18, 1997, the Board approved publication of proposed amendments. The proposed amendments were published at 27 Pa.B. 2379 (May 10, 1997). Comments were accepted from May 10 to July 9, 1997. A public hearing was held in regard to the proposed rulemaking on June 18, 1997.

Comments were received from 45 persons during the course of the public comment period. Commentators included private citizens, mining interests, utility interests and the Independent Regulatory Review Commission (IRRC). In addition, informal comments were received from the United States Office of Surface Mining Reclamation and Enforcement (OSM).

The comment period associated with the May 10 notice represents the second opportunity for the public to comment on this rulemaking package. In September 1996,

the Department conducted an advance notice of proposed rulemaking (ANPR), in which it made draft amendments available for public review and comment. The availability of the ANPR proposed amendments was published at 26 Pa.B. 4693 (September 28, 1996) and a 6-week comment period was provided.

The following is a discussion of comments received on the proposed rulemaking that was published on May 10, 1997.

Definition of "de minimis cost increase"

One comment was received regarding the proposed definition of "de minimis cost increase." The commentator recommended deleting the \$60 per year figure on the basis that it will become obsolete with time.

The Board believes that it is appropriate to retain the \$60 figure to define a minimum threshold for requiring compensation arrangements. Long term financial arrangements for amounts less than \$60 per year are difficult to maintain because of administration costs. A detailed discussion on the rationale behind the figures included in the definition is provided in the Preamble to the Board's proposed rulemaking on water supply protection/replacement, Chapter 87 and 88 at 27 Pa.B. 2246 (May 3, 1997).

Definition of "irreparable damage"

Six comments were received regarding the proposed definition of "irreparable damage." One commentator recommended that the term be tied to ability to be repaired rather than cost. Two commentators recommended deleting the reference to structural components because they believed it could be subject to a wide range of interpretations and lead to unnecessary restrictions of full extraction mining. A third commentator recommended that the definition should include damage which renders a structure less strong or less valuable than it was prior to mining. A fourth commentator recommended revising the definition to include criteria relating to the structural stability of the repaired structure and other parameters which insurance companies normally consider when selecting an approach to repair. The fourth commentator also recommended deleting the references to regulations in which the term appears, noting that the references were incomplete and unnecessary.

After reviewing these comments, the Board decided to revise the definition of "irreparable damage" based on the recommendations of the fourth commentator. The recommended definition is reasonable and addresses the concerns raised by other commentators. The revised definition includes considerations relating to structural stability, the cost of repairs, compliance with building codes and the presence of architectural characteristics which will require special craftsmanship to restore or replace. It also provides that architectural characteristics need only be considered in cases where the main structure is historically or architecturally significant. The Board believes that the revised definition will facilitate determinations relating to the occurrence or likelihood of irreparable damage.

In regard to the concern about restricting mining, the Board notes that the performance standard in § 89.142a(d) provides three options for dealing with situations when irreparable damage is predicted. An operator may take measures on the surface to reduce the level of damage. An operator may also obtain the consent of the structure owner to allow irreparable damage. As a third option, the operator may restrict mining so as to reduce the level of resultant damage.

Appendix B (continued)

Regulations for Mine Subsidence Control, Subsidence Damage Repair and Water Supply Replacement

2766

RULES AND REGULATIONS

The final definition is also revised to delete references to information requirements and performance standards where the term "irreparable damage" appears. The term only appears in reference to subsidence damage to structures, so there is no need to qualify its use.

Definition of "material damage"

One comment was received in regard to the proposed definition of "material damage." The commentator noted that the definition was inconsistent with the Federal definition in that it included physical changes which result in significant loss in production or income to the owner or user of the land. The commentator noted that the Federal definition does not include the phrase "to the owner or user of the land."

Since the objective of defining material damage is to conform to the Federal definition, the phrase is deleted in the final definition.

Definition of "noncommercial building"

One commentator noted that the term "noncommercial building" was not defined in § 89.5. The commentator believed that a definition is necessary to ensure that the term includes all structures covered by the Federal definition. The commentator also noted that the term must include "community or institutional buildings" to be as effective as the Federal regulations.

A definition of "noncommercial building" is included in the final rulemaking. The term is defined in a manner which conforms to the Federal definition.

Definition of "permanently affixed appurtenant structures"

Four comments were received regarding the proposed definition of "permanently affixed appurtenant structures". One commentator was concerned that the term may exclude some structures covered under the Federal program because they are not permanently affixed. One commentator supported the inclusion of customer-owned utilities, while another commentator proposed revising the definition to include all utilities. One commentator also noted errors in the references that were included in the definition.

In regard to the first commentator's concern, the definition of "permanently affixed appurtenant structures" includes only those structures which are attached to the ground in a permanent manner. While this definition may not include all structures encompassed by the Federal definition, it does not render the Commonwealth's program less effective than the Federal program. Structures which are not permanently affixed are rarely susceptible to subsidence damage. In addition, the Commonwealth's program addresses damage to certain "improvements," a term which covers many structures that are not "permanently affixed."

The Board does not believe it is appropriate to include all utilities in the definition of "permanently affixed appurtenant structures." This could be interpreted to require repair of damage to pipelines owned by investor-owned utilities. The Board does not believe that the BMSLCA authorizes these provisions. The responsibility for repairing damage to investor-owned utilities is governed by the respective property rights of mine operators and utility owners. The final-form regulations therefore retain the reference to customer-owned utilities.

The reference to other structures in the first sentence of the definition is corrected to include § 89.142a(f)(1)(i) and (iii).

Definition of "public water supply system"

Four comments were received regarding the proposed definition of "public water supply system". One commentator believed that the definition may be less inclusive than the Federal definition. A second commentator recommended revising the definition to clarify that hunting camps and resorts are not included. Two commentators questioned the need to include water systems serving public buildings, churches, schools, hospitals and nursing homes since water supplies serving these facilities are already covered by replacement provisions. The commentator further noted that many of the systems covered by the definition could withstand temporary losses of water without creating an imminent hazard to human safety.

No changes were made in response to these comments. In reviewing the Federal regulations, it was noted that the term "public water supply system" is not defined in the Federal regulations. Consequently, there is no basis for the assertion that the Commonwealth's definition is less inclusive than the Federal term.

Even though the term is not intended to include hunting camps and resorts, there is no reason to specifically address them in the definition. The current definition includes sufficient criteria to exclude these facilities from coverage. Generally, neither of these facilities have year round residents, nor do they qualify as public buildings, churches, schools, hospitals or nursing homes.

The fact that public water supplies are covered by water supply replacement provisions has nothing to do with the protections afforded to source aquifers and water bodies that serve public water supply systems. These aquifers and water bodies are set aside for special protection under section 9.1(a) of BMSLCA (52 P.S. § 1406.9a(a)). Also, the requirement to prevent material damage to these features is not limited by the qualification that the material damage must also create an imminent hazard to human safety.

Definition of "rebuttable presumption area"

Two comments were received regarding the proposed definition of "rebuttable presumption area." One commentator noted that the Federal regulations do not include a rebuttable presumption of causation which is applicable to water supply replacement. The commentator further asserted that there is no basis for applying a rebuttable presumption to water supply impacts. The second commentator recommended that the term be revised to reference the 3-year limitation of liability for water supply replacement provided by the BMSLCA.

In response to the first comment, the Board notes that the configuration of the rebuttable presumption area is specified in the BMSLCA. It must therefore be included without regard to its technical basis. The Board does, however, note that the 35° angle used to define the area of probable impacts is generally consistent with figures published by researchers at the Pennsylvania State University and West Virginia University.

The Board does not believe that it is appropriate to insert language relating to the 3-year period of liability. The BMSLCA does not provide for the 3-year limit to serve as the basis for rebutting the presumption of liability. Rather, it provides for an operator to be relieved of liability in cases where water supply impacts occur more than 3 years after the completion of underground mining activities. The 3-year release only applies when the mine is closed and reclamation was completed more than 3 years prior to the time the impacts occurred.