RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 86 AND 89]

Bond Adjustment and Bituminous Mine Subsidence Control Standards

The Environmental Quality Board (Board) amends Chapters 86 and 89 (relating to surface and underground coal mining: general; and underground mining of coal and coal preparation facilities). The final-form rulemaking incorporates amendments necessary to bring the Commonwealth's regulatory program into conformance with Federal standards for State coal mining regulatory programs. The final-form rulemaking affects requirements regarding bonding, subsidence control, subsidence damage repair and water supply replacement at underground bituminous coal mines.

This order was adopted by the Board at its meeting of April 19, 2005.

A. *Effective Date*

The final-form rulemaking will become effective upon publication in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information contact Joseph G. Pizarchik, Director, Bureau of Mining and Reclamation, P. O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103; or Richard S. Morrison, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) website at www.dep.state.pa.us.

C. *Statutory Authority*

The final-form rulemaking is adopted under the authority of section 7 of The Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) (52 P. S. § 1406.7), section 5 of The Clean Streams Law (52 P. S. § 691.5); section 4.2 of the Surface Mining Conservation and Reclamation Act (52 P. S. § 1396.4b); section 3.2 of the Coal Refuse Disposal Control Act (52 P. S. § 30.53b); and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20).

Certain parts of this rulemaking are authorized under a Federal action that superseded sections 5.1(b), 5.2(g)—(h), 5.4(a)(3) and (c) and 5.5(b) of the BMSLCA (52 P. S. §§ 1406.5a(b), 1406.5b(g)—(h), 1406.5d(a)(3) and (c) and 1406.5e(b)) to the extent these statutory provisions conflicted with the Federal Surface Mining Control and Reclamation Act of 1977 (Federal SMCRA) (30 U.S.C.A. §§ 1201—1328). The Federal action effecting these changes was published at 69 FR 71551 (December 9, 2004).

D. *Background and Summary*

This final-form rulemaking satisfies requirements for maintaining a state primacy program under the Federal SMCRA. The amendments in this final-form rulemaking pertain to Federally required program changes described in 30 CFR 938.16(iiii)—(kkkk), (mmmm)—(rrrr), (tttt)—(zzzz), (ccccc)—(ddddd), (fffff)—(uuuuu) and (wwwww)—(bbbbbb) (relating to required regulatory program amendments). These requirements were imposed by the United States Office of Surface Mining and Reclamation Enforcement (OSM) on December 27, 2001, in conjunction with its partial disapproval of Pennsylvania program amendment PA-122, which consisted of the 1994 amendments to BMSLCA and associated regulatory amendments. A detailed history of the events leading up to the December 27, 2001, OSM rule is provided in the preamble to the Board's proposed rulemaking published at 33 Pa.B. 4554 (September 13, 2003).

The amendments in this final-form rulemaking represent the outcome of discussions between the Department and the OSM relative to the fulfillment of requirements in the December 27, 2001, rule. Some of the amendments represent changes made in direct response to the OSM's December 27, 2001, rule and some represent alternate solutions agreed to by the Department and the OSM during the course of discussions. Several of the amendments reflect changes that were not specifically required by the OSM but which serve to clarify or simplify regulatory requirements in the wake of required changes.

Most of the amendments in this final-form rulemaking have been formally approved by the OSM. In September 2003, the Department submitted the Board's proposed rules, published at 33 Pa.B. 4554, to the OSM as a formal program amendment. The amendment, subsequently designated as PA-143, was approved by the OSM at 69 FR 71528 (December 9, 2004). The OSM approval covered all of the amendments included in this final-form rulemaking except those that have changed between proposed and final-form rulemaking. These interim changes will be submitted to the OSM in the form of a separate program amendment.

Several of the final-form amendments are predicated on an OSM action superseding provisions of the BMSLCA that were found to be inconsistent with the Federal SMCRA. The Federal action, which is authorized by section 505(b) of the Federal SMCRA (30 U.S.C.A. § 1255) and 30 CFR 730.11(a) (relating to inconsistent and more stringent State laws and regulations), became effective on December 9, 2004. The Federal action effectively nullified the following provisions of the BMSLCA.

1) Section 5.1(b), which requires a landowner to file a water supply claim within 2 years of the date of effect, is superseded to the extent it would limit an operator's liability to restore or replace a water supply covered under section 720 of the Federal SMCRA (30 U.S.C.A. § 1309).

2) Section 5.2(g), which allows mine operators to settle water supply claims through compensation, is superseded to the extent it would limit an operator's liability to restore or replace a water supply covered under section 720 of the Federal SMCRA.

3) Section 5.2(h), which limits the Department's authority to intervene in the settlement of a water supply claim, is superseded to the extent it would preclude the Department from requiring restoration or replacement of a water supply covered under section 720 of the Federal SMCRA.

4) Section 5.4(a)(3), which requires dwellings and related structures to be in place as of certain specified dates and within certain specified areas, is superseded to the extent it would limit an operator's liability to repair or compensate for damage to structures covered under section 720 of the Federal SMCRA.

5) Section 5.4(c), which provides a release of liability if an operator is denied access to perform a premining or postmining survey of a structure, is superseded to the extent it would limit an operator's liability to repair or compensate for subsidence damage to a structure covered under section 720 of the Federal SMCRA.

6) The portion of section 5.5(b) that requires a landowner to file a structure damage claim within 2 years of the date of damage is superseded to the extent it would limit an operator's liability to repair or compensate for subsidence damage to a structure covered under section 720 of the Federal SMCRA

The following is a description of the final-form rulemaking by section.

§ 86.151(b)(2) (period of bonded liability)

Section 86.151(b)(2) (relating to period of liability) is amended to clarify that an operator's obligation to maintain a subsidence bond ends 10 years after the completion of "underground mining operations." The amendment avoids potential confusion over whether the period of bonded liability runs from the completion of "underground mining operations," an event typically marked by the reclamation of the last shaft or adit, or the completion of "underground mining activities," an event typically marked by the cessation of mine pool maintenance activities. Subsidence bonds do not cover liability for water supply replacement so there is no reason to maintain coverage for more than 10 years after completion of underground mining operations. This amendment was not required by the OSM, but is necessary to clarify subsidence bonding requirements in the wake of other changes regarding the duration of liability for water supply effects.

§ 86.152(a) (bond adjustments)

Section 86.152(a) (relating to bond adjustments) is amended to incorporate several changes regarding the periodic adjustment of reclamation and subsidence bonds. It allows the Department to specify periodic times and set schedules for reevaluation and adjustment of bond amounts. It also obligates the Department to perform periodic evaluations of bonds and to adjust bond amounts when it determines that the area requiring bond coverage has increased or decreased or that the cost of future reclamation has changed or that the projected subsidence damage repair liability has changed. These changes are in response to the OSM requirements in 30 CFR 938.16(ccccc) and in a letter dated September 22, 1999. Language is also added to clarify that the provisions of this section may not be used to expand the scope of subsidence bonds to include water supply replacement liability or other liabilities that are not expressly provided in section 6(b) of the BMSLCA (52 P. S. § 1406.6).

§§ 86.1 and 89.5 (definitions of "underground mining activities" and "underground mining operations")

The definition of "underground mining activities" is amended to clarify that management of a postclosure mine pool is an underground mining activity. The amended definition in conjunction with § 89.152(a)(3)(ii) and (b)(2) establish a period of operator liability for water supply effects extending from the time of undermining until 3 years after the mine pool has stabilized. This amendment satisfies the Federal requirements in 30 CFR 938.16(mmmm) and (xxxxx).

The definitions of "underground mining activities" and "underground mining operations" are also amended to clarify that the term "support facilities" as used in the context of "underground mining operations" refers to support facilities located underground as opposed to support facilities located at the land surface. This is an incidental change that was not required by the OSM but which serves to clarify the scope of the term "underground mining operations."

§ 89.5 (definitions of "EPACT structures" and "EPACT water supplies")

Definitions of "EPACT structures" and "EPACT water supplies" are added to § 89.5 (relating to definitions). These terms are defined to include structures and water supplies covered by section 720 of the Federal SMCRA, as amended by the Energy Policy Act of 1992 (EPACT) (42 U.S.C.A. §§ 13201—13556), and are used throughout the remainder of the chapter to distinguish structures and water supplies subject to specific requirements derived from the Federal regulations. These terms and definitions were not specifically required by the OSM but are incorporated to facilitate references of specific groups of structures and water supplies.

§ 89.5 (deleted definition of "permanently affixed appurtenant structures")

The definition of "permanently affixed appurtenant structures" is deleted from § 89.5. Coverage of "permanently affixed appurtenant structures" is described in amended § 89.142a(f) (relating to subsidence control: performance standards), regarding repair of damage to structures, which distinguishes permanently affixed appurtenant structures that qualify as EPACT structures from other types of permanently affixed appurtenant structures. This deletion of the definition of "permanently affixed appurtenant structures" from § 89.5 was not specifically required by the OSM but is indirectly related to the Federal requirement in 30 CFR 938.16(fffff).

§ 89.5 (deleted definition of "de minimis cost increase")

The definition of "de minimis cost increase" is deleted from § 89.5. The term is no longer used in Chapter 89 following amendments to § 89.145a(f)(5) (relating to water supply replacement: performance standards), which were made between proposed and final-form rulemaking. This amendment relates to Federal requirements in 30 CFR 938.16(ddddd) and (uuuuu).

§ 89.141(d) (plans for mining beneath EPACT structures)

Section 89.141(d) (relating to subsidence control: application requirements) is amended to require a description of the measures an operator will take to protect EPACT structures. The descriptions are to be based on subsidence control performance measures described in § 89.142a (d)(1)(i) if mining will result in planned subsidence or § 89.142a(d)(1)(ii) if mining will not result in planned subsidence. These amendments are incorporated to satisfy the Federal requirements in 30 CFR 938.16(ggggg) and (hhhhh).

§ 89.142a(b) (access for structure surveys)

Section 89.142a(b) is amended to incorporate a new provision which advises structure owners to allow mine operators access to conduct premining and postmining surveys of their structures and property. The subsection points out the purpose and importance of premining and

postmining surveys and is intended to encourage structure owners to allow operators access for performing surveys. Although the provisions of this subsection are not binding, the Department may consider denial of access a basis for supporting an operator's claim that damage minimization is unfeasible. This provision has been added since the publication of the proposed rulemaking.

§ 89.142a(c) (suspension of mining)

Section 89.142a(c) is amended to authorize the Department to suspend mining beneath a public building, public facility, church, school, hospital, impoundment with a storage capacity of 20 acre-feet or more, body of water with a volume of 20 acre-feet or more or body of water or aquifer that serves as a significant source to a public water supply system, if an operator's previous measures have failed to prevent material damage or failed to maintain the reasonably foreseeable use of these structures or features. This amendment is incorporated to satisfy the Federal requirement in 30 CFR 938.16((iiiii).

§ 89.142a(d) (requirements for mining beneath EPACT structures)

Amended § 89.142a(d) establishes specific standards for mining beneath EPACT structures other than those subject to the more stringent protection standards in § 89.142a(c). Subsection (d)(1)(i) sets forth standards that apply to underground mining that results in planned subsidence and subsection (d)(1)(ii) sets forth standards that apply to underground mining that does not result in planned subsidence.

An operator using a mining technology that results in planned subsidence is required to take measures to minimize material damage, unless the structure owner consents, in writing, to allow material damage or the operator demonstrates that it would cost more to perform the necessary damage minimization measures than to repair the resultant damage. An operator is not, however, relieved of the obligation to perform damage minimization measures, if the resultant damage would constitute a threat to health or safety.

An operator using a mining technology that does not result in planned subsidence is required to take measures to prevent material damage to EPACT structures using measures, such as backstowing or backfilling of voids, leaving solid coal or coal pillars in place for support or performing surface measures that will enable the structures to withstand subsidence if and when it occurs.

The amendments to § 89.142a(d)(1) are in response to the Federal requirement in 30 CFR 938.16(jjjjj). Subsection (d)(3) is also incorporated to reflect the provision in section 5(e) of the BMSLCA (52 P. S. § 1406.5) that general requirements to prevent or minimize material damage do not prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

§ 89.142a(f)(1) (prompt response to structure damage claims)

Section 89.142a(f)(1) is amended to clarify an operator's obligation to repair or compensate for structure damage in a prompt manner. The term "prompt" is not defined but is interpreted to mean as soon as practical considering site conditions, potential repair and compensation alternatives and other relevant factors. This requirement is incorporated to satisfy Federal requirements in 30 CFR 938.16(tttt) and (kkkkk).

§ 89.142a(f)(1) (coverage of permanently affixed appurtenant structures and improvements)

Section 89.142a(f)(1) is amended to incorporate several Federally required changes with respect to "permanently affixed appurtenant structures and improvements" covered by subsidence damage repair and compensation provisions.

Subsection (f)(1)(iii), which pertains solely to EPACT structures, now provides coverage for all structures and improvements that are appurtenant to dwellings used for human habitation, in place at the time of mining and susceptible to damage by underground mining operations. Former restrictions requiring structures and improvements to be in place on specific dates prior to mining and located within the mine boundaries are deleted in the final-form rulemaking. The former requirement that structures must be "securely attached to the land surface," as incorporated through the former definition of "permanently affixed appurtenant structures" in § 89.5, is also deleted. These amendments are in response to Federal requirements in 30 CFR 938.16(uuuu), (fffff) and (llllll) and the OSM's partial supersession of section 5.4(a)(3) of the BMSLCA.

Subsection (f)(10)(i) is also amended to provide that structures used in conjunction with publicly accessible commercial, industrial and recreational buildings must be "securely attached to the land surface" to qualify for damage repair and compensation. This provision retains the existing interpretation of section 5.4(a)(1) of the BMSLCA, which is not affected by the OSM requirements.

§ 89.143a(c) (filing structure damage claims)

Section 89.143a(c) (relating to subsidence control: procedure for resolution of subsidence damage claims), as amended, allows owners of damaged structures to file claims with no minimum waiting period. The amendment is in response to 30 CFR 938.16(xxxx) and (nnnnn) of the OSM rule.

§ 89.143a(c) (statute of limitations for filing structure damage claims)

Section 89.143a(c) is amended to clarify the time frames in which landowners may file claims for structure damage with the Department. The amendment deletes the 2-year claim filing deadline as it relates to EPACT structures but retains the deadline for claims involving damage to non-EPACT structures. This amendment satisfies the requirements of 30 CFR 938.16(xxxx) and (nnnnn) while retaining the provisions of section 5.5(b) of the BMSLCA, which were not affected by the OSM's supersession.

§ 89.143a(d) (investigations and orders relating to the repair of structure damage)

Amended § 89.143a(d)(1) imposes an obligation on the Department to provide investigation results to the property owner and mine operator within 10 days of completing a structure damage claim investigation. This amendment satisfies the Federal requirement in 30 CFR 938.16(yyyy).

Subsection (d)(3), which describes actions the Department will take upon finding that an operator's underground mining operations caused damage to a structure, is amended to clarify the Department's authority to require prompt repair or prompt compensation for structure damage. Amended subsection (d)(3) clarifies that the only reason for extending the time for compliance with a Department order is the Department's determination that

further subsidence damage may occur to the same structure. These amendments are in response to Federal requirements in 30 CFR 938.16(zzzz) and (ooooo).

§ 89.144a (denial of access for premining or postmining structure surveys)

Section 89.144a (relating to subsidence control: relief from responsibility) is amended to incorporate two provisions regarding the effect of denying access to an operator to perform a premining or postmining structure survey or damage minimization measures. Amendments to subsections (a) and (b) clarify that denial of access to an EPACT structure does not automatically result in a release of responsibility for damage as it does in the case of a non-EPACT structure. New subsection (b) provides that, in the case of an EPACT structure an operator is responsible for all damage that the Department or the structure owner can show, by a preponderance of evidence, to be the result of the operator's underground mining operations. This amendment is made in response to the Federal requirements in 30 CFR 938.16(ppppp) and is authorized under the OSM's partial supersession of section 5.4(c) of the BMSLCA.

The second amendment to § 89.144a pertains to damage that could have been prevented if an operator had been provided access to perform damage minimization measures. New subsection (c) provides that an operator is not responsible for the portion of structure damages, which the operator can show, by a preponderance of evidence, could have been prevented had the structure owner provided the operator access to perform a premining survey and to implement damage minimization measures. This amendment was added between proposed and final-form rulemaking in response to a public comment. It was not required by the OSM.

§ 89.145a(a) (water supply survey requirements)

Amendments to § 89.145a(a)(1) revise the deadline for performing premining water supply surveys. Under the revised standard, an operator must complete a premining survey prior to the time a water supply is susceptible to mining-related effects. This creates a flexible standard which allows the Department to establish specific time frames or distance limits based on local geologic and hydrologic conditions and the observed effects of previous mining. Requirements regarding the timing of premining surveys will be established by the Department at the time of permit issuance or permit renewal. The deadlines established by this section do not supersede the Department's authority to require water quality and quantity information at the time of permit application or permit renewal for all water supplies that may be affected during the succeeding permit term in accordance with § 89.34(a)(1)(i) (relating to hydrology).

Amended subsection (a)(1) establishes specific conditions under which the collection of some or all survey information may be waived. Under the amended paragraph, an operator is only excused from collecting information if required collection measures pose an inconvenience to the landowner. This exception is intended to address situations when an operator would have to damage a building to gain access to a well or spring.

The amendments to § 89.145a(a)(1) reflect Federal requirements set forth in 30 CFR 938.16(qqqqq).

§ 89.145a(b) (prompt replacement of water supplies)

Section 89.145a(b) is amended to clarify an operator's obligation to "promptly" restore or replace water supplies affected by underground mining operations. The term "promptly" is not defined but is intended to ensure that restoration or replacement is accomplished as soon as practical considering site-specific conditions.

Section 89.145a(b) is also amended to clarify that a restored or replacement water supply must be capable for serving both the premining and reasonably foreseeable uses of the original water supply.

The amendments to § 89.145a(b) reflect Federal requirements in 30 CFR 938.16(iiii) and (rrrrr).

§ 89.145a(e) (provision of temporary water)

Section 89.145a(e) is amended to incorporate several new requirements applicable to situations when EPACT water supplies are affected by underground mining activities. Subsection (e)(2) provides that temporary water must be provided "promptly" after the operator or the Department determines that effects are due to the operator's underground mining activities and that the landowner or water user is without a readily available alternate source of water. The requirement for prompt action applies regardless of whether the affected supply lies inside or outside the rebuttable presumption area. Amended subsection (e)(3) requires that temporary water service be sufficient to satisfy all of the affected water user's needs. A water 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. These amendments are in response to Federal requirements in 30 CFR 938.16(ssssss) and (ttttt).

§ 89.145a(f) (compensation for increased cost of restored or replacement water supply)

Section 89.145a(f) is amended to establish revised standards applicable to the costs of operating and maintaining restored or replacement water supplies. A restored or replacement water supply that is no more costly to operate and maintain than the original water supply is considered to meet the requirements of this section. If the operation and maintenance costs of the restored or replacement water supply are higher that those of the original water supply, the operator must make provisions to permanently cover the increased costs. Upon agreement with the landowner, the operator can satisfy its obligation regarding increased cost through a one time payment in an amount covering the present worth of the increased annual operation and maintenance cost for a period agreed to by both parties.

Section 89.145a(f) was amended between proposed and final rulemaking to establish the same cost criteria for all water supplies covered by BMSLCA rather than establishing separate cost criteria for EPACT and non-EPACT water supplies. The amendments with respect to EPACT water supplies were driven by the Federal requirements in 30 CFR 938.16(ddddd) and (uuuuu).

§ 89.146a(c) (department investigation of water supply claims)

Amended 86.146(c) (relating to water supply replacement: procedure for resolution of water supply damage claims) imposes an obligation on the Department to provide investigation results to the property owner and mine operator within 10 days of completing a water supply claim investigation. This amendment satisfies the Federal requirement in 30 CFR 938.16(wwwww).

§ 89.152 (special provisions relating to water supply replacement)

New § 89.152(a)(1) (relating to water supply replacement: special provisions) establishes requirements applicable to situations when an EPACT water supply has been affected and cannot be restored or replaced with a water supply meeting the criteria in § 89.145a(f). In these situations, an operator is required to compensate the property owner for the reduction in the fair market value of the property or to purchase the property for its fair market value immediately prior to the time the water supply was affected. An operator may only pursue one of the aforementioned compensation remedies if the Department determines that a suitable water supply cannot be developed.

New subsection (a)(2) provides for agreements between operators and landowners, which waive the restoration or replacement of an EPACT water supply. These agreements are subject to the Department's prior determination that a replacement water supply can be feasibly developed for the property on which the affected water supply was located. An operator may be required to submit information demonstrating the availability of water for future development if the information needed to make this determination is not included in the permit application.

New subsection (a)(3) presents three statutory defenses an operator may raise in defending against a claim of liability for contamination, diminution or interruption of an EPACT water supply. One defense is that the alleged problem existed prior to and was not worsened by the operator's underground mining activity. This defense must be based on valid premining survey results documenting that the problem existed prior to the time the water supply was susceptible to the effects of the operator's underground mining activities. Another defense is that the problem occurred more than 3 years after the completion of all "underground mining activities"—a term which includes all activities involved in the operation of an underground coal mine, including activities associated with the maintenance of the postclosure mine pool. The third defense is that the problem is due to a factor other than the operator's underground mining activity. The list of available defenses under § 89.152a(a)(3) does not include the defense based on the landowner's or water user's failure to submit a claim within 2 years of the date of contamination, diminution or interruption. This defense is no longer available in cases involving EPACT water supplies following the OSM's partial supersession of section 5.1(b) of the BMSLCA.

The amendments are incorporated in § 89.152 to satisfy Federal requirements in 30 CFR 938.16(nnnn), (oooo), (qqqq) and (rrrr). Restrictions regarding the use of compensation in settlements involving EPACT water supplies are authorized under the OSM's partial supersession of section 5.2(g) and (h) of the BMSLCA. The elimination of the 2-year statute of limitations on filing claims for effects on EPACT water supplies is authorized under the OSM's partial supersession of section 5.1(b) of the BMSLCA.

Global changes regarding effects of "underground mining operations"

Various regulations pertaining to information requirements and performance standards for the control and repair of subsidence damage are amended by replacing the term "underground mining" with "underground mining operations." The term "underground mining operations" is defined in § 89.5 to include underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining. In comparison, the term "underground mining" only includes the extraction of the coal. These changes affect § 89.141(d) and (d)(9)—(11), regarding the content of subsidence control plans; § 89.142a(a), regarding general requirements for subsidence control; § 89.142a(f)(1) and (2), regarding repair of damage to structures; § 89.142a(g)(1), regarding the protection of utilities; § 89.142a(h)(1) and (2), regarding the protection of perennial streams; § 89.142a(i), regarding prevention of hazards to human safety; § 89.143a(a), regarding claims of subsidence damage; and § 89.143a(d)(1)—(3), regarding Department investigations and enforcement actions. These amendments are incorporated to satisfy Federal requirements in 30 CFR 938.16(mmmmm) and (bbbbbb).

Editorial changes

The final-form rulemaking includes several changes that are intended to support or clarify regulations amended by this final-form rulemaking.

Section 89.141(d)(3) is amended to delete the list of measures that can be used to protect public buildings and facilities, churches, schools, hospitals, impoundments with storage capacities of 20 acre-feet or more, bodies of water with volume of 20 acre-ft or more and aquifers and bodies of water that serve as significant sources to public water supply systems. The measures in former paragraph (3) are only a subset of a larger list of measures that may be used for protecting this group of structures and features. The complete list of measures appears in the performance standard in § 89.142a(c). To avoid confusion, the incomplete list of measures is deleted from § 89.141(d)(3), which is simply an information requirement.

In § 89.142a(c)(1), the term "surface features" is replaced with the term "features" to more accurately describe the types of features within the referenced group. The features described in paragraph (1) include aquifers, which are usually not regarded as "surface features."

Section 89.142a(d) is amended to incorporate new subsection (d)(3), which reflects the provision in section 5(e) of the BMSLCA that "nothing in this subsection shall be construed to prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining." The provision is included to more fully reflect the intent of paragraph 5(e) of the BMSLCA, which serves as the statutory basis for the new damage prevention and minimization requirements in § 89.142a(d)(1).

The headings of one section and one subsection are amended to more accurately reflect their revised content. The heading of § 89.142a(d) is changed from "general measures to prevent or minimize subsidence" to "protection of certain EPACT structures and agricultural structures." The heading of § 89.152 is changed from "water supply replacement: relief from responsibility" to "water supply replacement: special provisions."

In § 89.143a, the requirement for the Department to notify a mine operator of the receipt of a structure damage claim is moved from subsection (c) to subsection (d). The purpose of this amendment is to clarify and separate Department responsibilities from the responsibilities of landowners.

The final-form rulemaking also includes various stylistic changes that were made to conform to standards for drafting regulations.

The amendments to § 86.152(a) were submitted to the Mining and Reclamation Advisory Board (MRAB) because this section applies to bond adjustments for surface mining activities as well as bond adjustments for underground mining activities. The MRAB endorsed the proposed rulemaking at its meeting on April 24, 2003, and the final-form rulemaking at its meeting on January 6, 2004. The other provisions of this final-form rulemaking were not presented to the MRAB because they pertain exclusively to underground mining activities and are outside the purview of the MRAB.

E. *Summary of Comments and Responses on the Proposed Rulemaking*

The Board approved publication of the proposed rulemaking at its meeting on July 15, 2003. The proposed rulemaking was published at 33 Pa.B. 4554. Public hearings were held on October 15, 2003, in Indiana, PA, and on October 16, 2003, in Washington, PA. Comments were accepted from September 13, 2003, to November 12, 2003.

Twenty persons submitted timely comments in response to the proposed rulemaking. Commentators included the Pennsylvania Coal Association, Citizens for Pennsylvania's Future, Wheeling Creek Watershed Conservancy, Mountain Watershed Association, Ten Mile Protection Network, Concern About Water Loss due to Mining and 14 private citizens. The Independent Regulatory Review Commission (IRRC) also submitted comments in regard to the proposed rulemaking.

The following is a discussion of the comments received during the public comment period, organized according to subject matter.

Period of liability for water supply effects

One commentator objected to changes that would expand the definition of "underground mining activities" to include "post closure mine pool maintenance." The commentator noted that this amendment would effectively extend an operator's liability for water supply effects as much as 25 years into the future. The commentator considered this amendment an attempt to invalidate the provisions of section 5.2(e)(2) of the BMSLCA, which the commentator interpreted as limiting liability to a 3-year period after mining in a specific area of a mine. The commentator also noted that this change was not specifically required by the OSM.

The Department does not agree with the commentator's assertions. The amendment to the definition of "underground mining activities" is intended to clarify that liability for water supply effects does not expire prior to the date regulatory jurisdiction would end under the Federal regulatory program. Although this amendment is not specifically required by the OSM, it clarifies a concept that is essential to demonstrating compliance with Federal requirements relating to the duration of liability. Under the Federal program, liability for water supply effects has no termination date and remains in effect for as long as the OSM maintains regulatory jurisdiction over a mine site. OSM jurisdiction normally extends for the duration of mining and reclamation operations and until 5 years after the final augmented seeding. To be as effective, the regulations must provide a period of liability that expires no sooner than the date on which the OSM would normally terminate jurisdiction. These regulations meet this requirement by clarifying that the liability created by section 5.1(a)(1) of the BMSLCA and terminated by section 5.2(e)(2) of the BMSLCA extends from the time of mining until 3 years after the completion of the last "underground mining activity." In most cases the final "mining activity" will be the maintenance of the postclosure mine pool. This period of liability is based on a reasonable interpretation of section 5.2(e)(2) of the BMSLCA, which extends liability 3 years after the occurrence of "mining activity."

The amendment to the definition is not an attempt to circumvent the intent of the General Assembly. Section 5.2(e)(2) of the BMSLCA provides a release of liability if contamination, diminution or interruption occurs more than 3 years after "mining activity." Considering that section 5.1(a) of the BMSLCA establishes liability for all water supply effects caused by "underground mining operations," there is no reason to conclude that the liability referred to in section 5.2(e)(2) of the BMSLCA would be limited to effects arising from the act of coal extraction. Water supply effects can result from various "mining activities" such as underground pumping operations, the drilling of shafts and mine entries, the removal of underground roof supports, surface support areas and the control of the postclosure mine pool. It is reasonable to conclude that the 3-year period referred to in section 5.2(e)(2) of the BMSLCA was intended to run from the time of occurrence of the last "mining activity" that could result in water supply contamination, diminution or interruption.

The interpretation that liability extends from the time of the last mining activity is not new. This interpretation was explained in the final-form rulemaking published at 28 Pa.B. 2761 (June 13, 1998) on mine subsidence control, subsidence damage repair and water supply replacement. The preamble at 28 Pa.B. 2778 clarifies that liability for water supply impacts "extends from the time of underground mining to the period ending 3 years after reclamation has been completed." The preamble discussion goes on to explain that "this [period] should be sufficient to cover virtually all water supply impacts resulting from the underground mine."

Contrary to the commentator's assertion, it is appropriate to clarify the duration of liability through regulation. As illustrated by the commentator's statements, the statutory phrase "mining activity" is subject to differing interpretations, making obvious the need to clarify this matter with a regulatory definition.

Separate from the issue of statutory interpretation, the Commonwealth's interests are best served by ensuring that operators are held liable for effects arising from the development of postclosure mine pools. These pools, which develop in mine workings after cessation of pumping, have been documented to cause contamination of adjacent water supplies many years after the time of coal extraction. It is important that the regulations provide an effective remedy for these problems.

Another commentator recommended that § 89.152(a)(2) be amended to delete all references to a 3-year period of liability. The commentator observed that some water supplies could go without replacement if losses occurred more than 3 years after mining activity ceased, even though the affects were due to underground mining activities.

Although the Department understands the commentator's concerns, it would be inappropriate to delete references to the 3-year period in section 5.2(e)(2) of the BMSLCA. In the Department's experience, the liability

period afforded by § 89.152(a)(2) should be sufficient to cover virtually all water supply problems resulting from the underground mining activities. Since this level of protection is available under the current provisions of the BMSLCA, it is the preferred means of satisfying the OSM requirements relating to the duration of liability.

Distinction between EPACT and non-EPACT structures and water supplies

Two commentators expressed overall objections to amendments that establish separate requirements for EPACT and non-EPACT structures and water supplies. The commentators regarded this "dual" system of regulation as cumbersome and overly complicated. One commentator further asserted that the distinctions were unjustified and not unauthorized under the existing law of the Commonwealth. One commentator also thought the resulting system would result in unequal protection of surface properties.

Although the Department acknowledges the commentators' concerns, a "dual" system is necessary if the Commonwealth's regulatory program is to comply with Federal requirements for state primacy programs and, at the same time, maintain conformance with the BMSLCA. The OSM action at 69 FR 71551 superseded the provisions of the BMSLCA that were in conflict with the Federal SMCRA, laying the foundation for the two class system. The OSM's action effectively nullifies certain statutes of limitations, releases of liability and compensation options as they relate to EPACT structures and water supplies. These provisions do, however, remain in effect for structures and water supplies that are covered by the BMSLCA but are outside the scope of the Federal regulations. Consequently, there is a need to distinguish between these two different classes of structures and water supplies.

Bond adjustments

One commentator recommended that bond amounts should be sufficient to cover the replacement value of individual homes and properties.

The Department does not agree with the commentator's recommendation. Neither the State nor the Federal program requires a bond covering the total replacement value of all homes and properties in advance of mining. The Department has established bond calculation procedures that take into account the fair market value of the property that is expected to be damaged during the succeeding term of the permit, the level of damage that property is expected to sustain and the amount of damage that may accumulate prior to the time enforcement is warranted. These procedures are described in Technical Guidance 563-2504-101. The OSM has reviewed the Department's bond calculation procedures and found them to be no less effective than the Federal regulations, which require bonds to be posted only in cases when damage has not been repaired within 90 days.

Two commentators asserted that bonding requirements should be revised to include the costs of water supply replacement. One of the commentators found fault with the Department's proposal to use liability insurance as the basis for assuring the replacement of affected water supplies, citing several examples of situations when insurance proved ineffective in securing timely water supply replacement.

Although the Department recognizes the commentator's concern, the BMSLCA provides no basis for requiring bonds to ensure water supply replacement. Recognizing this limitation, the Department decided to address this matter through liability insurance, which is required by § 86.168 (relating to terms and conditions for liability insurance) as a condition for maintaining a mining license. Section 86.168, which sets forth the terms and conditions for liability insurance, requires all policies to cover loss or diminution in quantity or quality of public or private sources of water in an amount at least equal to the general liability portion of the policy. Section 86.168 further provides that the amount of this coverage must be at least $500,000 per occurrence and $1 million aggregate.

In its proposal to the OSM, the Department indicated it would review permittees' insurance policies at the time of permit issuance and annually thereafter to ensure that coverage is sufficient to restore or replace all water supplies that may be damaged and need to be replaced at any point during the mining operation. After reviewing the Department's proposal and the provisions of § 86.168, the OSM concluded that the assurance of water supply replacement provided by the Commonwealth's regulations was no less effective than that provided by the Federal regulations. See 69 FR 71528. The OSM also observed that the Federal regulations in 30 CFR 800.14(c) (relating to bonding and insurance requirements) allow the use of insurance instead of bond for purposes of assuring water supply replacement.

As a matter of record, the Department recently resolved one of the cases cited as an example of the ineffectiveness of liability insurance. The case involved several water supply claims that were pending resolution when the operator declared bankruptcy. In this case, the Department successfully intervened on behalf of the affected property owners to have the insurance company pay for the replacement of all affected water supplies. This case illustrates that liability insurance can serve as an effective means of ensuring water supply replacement in cases when an operator defaults on his liability.

Since the time of the proposed rulemaking, the Department has performed an analysis to determine whether mine operators are carrying sufficient amounts of insurance to cover the replacement of affected water supplies. Based on a review of claims filed during the past 5 years, the Department found that the minimum coverage required by § 86.168 was sufficient to cover water supply replacement liability in all cases. There was one case when the Department took action to ensure that the insurance policy covered all pending and potential water supply replacement claims and there was one case when an operator's liability came close to the minimum limits (which apply to claims filed within the 1-year term of an insurance policy). The Department also annually reviews the adequacy of insurance for pending and potential future claims before renewing an operator's mining license. The results of this analysis further illustrate the effectiveness of liability insurance as a tool for ensuring water supply replacement.

Requirements for mining beneath EPACT structures

One commentator asserted that it will be impossible for operators to comply with the new damage minimization and prevention standards in § 89.142a(d)(1), if § 89.144a is amended to allow owners of EPACT structures to deny access for premining surveys.

The Department disagrees with the commentator's assertion. Section 89.142a(d)(1)(i) only requires operators to minimize material damage to the extent technologically and economically feasible. Under most circumstances,

denial of access would make it technologically and economically unfeasible to perform damage minimization measures.

One commentator recommended amending § 89.142a(d) to prevent structure damage when mining results in planned subsidence.

The Department does not agree with this recommendation. The purpose of amending § 89.142a(d) is to ensure that the protection afforded EPACT structures is no less effective than the protection afforded by the Federal regulations. The corresponding Federal regulations allow operators to minimize rather than prevent material damage when using mining technology that results in planned subsidence. The only exceptions are when underground mining operations would affect a public building, church, school or hospital in which case material damage must be prevented. The amendments to § 89.142a(d) incorporate these same provisions.

One commentator thought the amendments to § 89.142a(d) would diminish the protection afforded to public buildings, churches, schools and hospitals and certain impoundment under § 89.142a(c). The commentator observed that § 89.142a(d)(1)(i) requires operators using mining methods that result in planned subsidence to minimize rather than prevent damage to noncommercial buildings—a broad term that includes public buildings, churches and hospitals.

The commentator's concern is acknowledged; however, § 89.142a(d)(1)(i) includes language that addresses this issue. Subsection (d)(1) specifically excludes noncommercial buildings protected under § 89.142a(c). This exclusion clarifies that noncommercial buildings enumerated in § 89.142a(c) are to be protected in accordance with § 89.142a(c). This clarification was included in the proposed rulemaking and is not changed in the final-form rulemaking. It is further noted that § 89.142a(d)(1)(i) does not pertain to the impoundments and water bodies enumerated in § 89.142a(c).

One commentator recommended changing § 89.142a (d)(1)(i)(B)to place decisions regarding the feasibility of damage minimization and threats to human health and safety in the hands of the surface owner.

The Department does not agree with this recommendation. Section 89.142a(d)(i), which is based on the Federal regulation in 30 CFR 817.121(a)(2)(ii) (relating to subsidence control), does not identify the party responsible for determining the feasibility of damage minimization measures or the party responsible for identifying threats to human health and safety. In most cases, the mine operator will make preliminary decisions regarding these matters, subject to oversight and intervention by the Department. Property owners who are notified of impending mining may inquire about the operator's plans for damage minimization and, if dissatisfied, request the Department to evaluate the plans for conformance with § 89.142a(d)(i).

Prompt response to structure damage claims

One commentator asserted that it is inappropriate for the Department to cease adherence to the requirements of section 5.5(b) of the BMSLCA which provides a 6-month period for operators and homeowners to negotiate settlements without Department involvement. The commentator further asserted that there is no reason to allow owners of non-EPACT structures to file claims sooner than 6 month after damage, because these structures are outside the scope of the Federal regulations.

The Department acknowledges the commentator's position, but notes that the former regulatory provisions that barred the filing of claims prior to the end of the 6-month period were removed to comply with OSM requirements. Moreover, section 9 of the BMSLCA (52 P. S. § 1406.9) gives the Department broad authority to issue orders "as are necessary to aid in the enforcement of the provisions of this act." The Department notes that although section 9 of the BMSLCA allows the Department to issue orders prior to the expiration of the 6-month negotiation period, it rarely has cause to do so. Subsidence is typically incomplete within the 6-month time interval so the full extent of damage remains unknown. Department actions prior to the expiration of the 6-month negotiation period would involve primarily orders for emergency repairs necessary to address health, safety or nuisance concerns. It is further noted that the provisions of section 9 of the BMSLCA apply to both EPACT structures and other structures protected under the BMSLCA.

One commentator recommended that the regulations be revised to allow landowners to choose who will repair the damage to their properties.

Although the Department acknowledges the commentator's recommendation, it notes that neither the BMSLCA nor the Federal regulations give landowners the specific right to choose who will repair subsidence damage. Under both programs the mine operator is the party responsible for making or arranging for repairs or providing compensation to the landowner. If there is a dispute over the scope of repair work or the standards to be met, the Department would make the final decision after considering the wishes of both the mine operator and the landowner.

One commentator recommended revising the regulations to require the Department to pay subsidence damage claims out of the Mine Subsidence Insurance Program to ensure prompt, quality repairs and to subsequently seek reimbursement from the operator.

The Department does not support this recommendation because the intent of the BMSLCA and the regulations is to place the cost of repairs squarely on the shoulders of the mine operator who caused the damage. Moreover, implementation of this recommendation would require significant changes to the Department's Mine Subsidence Insurance program, which are beyond the scope of this final-form rulemaking.

Coverage of dwellings and related structures

One commentator objected to amendments that delete the dates on which a permanently affixed appurtenant structure or improvement has to be in place in order to qualify for damage repair and compensation.

The Department acknowledges the commentators objection. However, amendments deleting these qualifications are necessary to comply with OSM requirements. Furthermore, the OSM has superseded the statutory provisions that were the basis for these qualifications.

One commentator objected to changes that would make mine operators liable for damages to permanently affixed appurtenant structures and improvements that were not "securely attached to the ground." The commentator asserted that mine operators should not be responsible for damage to aboveground swimming pools or any other "appurtenant structures" such as small outbuildings, sheds, gazeboes and similar "structures" that could be easily dismantled and removed by the landowner before mining and reinstalled afterwards.

The Department does not agree with the commentator's argument. The provisions of 30 CFR 817.121(c)(5) (relating to subsidence control) unequivocally require repair of or compensation for all "occupied residential dwellings and structures related thereto" in place at the time of mining. The Federal regulations do not require that a structure be attached to the land surface in order to qualify for repair or compensation provisions, nor do they waive liability for damage to structures that could have been dismantled or moved by the landowner. Moreover, in situations when damage can be prevented by moving or dismantling a structure, 30 CFR 817.121(a) places this obligation squarely on the operator. For the Commonwealth's regulatory program to be no less effective than the Federal regulatory program, it is necessary to remove the qualification that the structures and improvements in § 89.142a(f)(1)(iii) be securely attached to the land surface.

One commentator recommended adding a requirement that damaged septic systems must be replaced rather than repaired.

The Department sees no reason to require replacement in all cases. Section 89.142a(f)(1) requires that damaged septic systems be promptly and fully rehabilitated, restored or replaced. The determination of whether a system should be repaired or replaced depends on the level and extent of damage. Minor damage to pipes and tanks can often be repaired or corrected by replacing the damaged component rather than replacing the entire system.

Statute of limitations on filing claims for structure damage and water supply loss

One commentator objected to amending §§ 89.143(c) and 89.152 to delete the 2-year statute of limitations for filing claims of damage to EPACT structures and water supplies.

The Department acknowledges the commentator's position, however, these changes are required to comply with the Federal requirements in 30 CFR 938.16(jjjj), (xxxx), (nnnnn) and (yyyyy). Furthermore, the OSM has superseded the statutory provisions in sections 5.1(b) and 5.5(b) of the BMSLCA, which serve as the basis for these statutes of limitations, to the extent these provisions would limit an operator's liability to repair or compensate for damage to an EPACT structure or to restore or replace an EPACT water supply.

One commentator asserted that since there are no statutes of limitations on water supply and structure claims under Federal law, there should be no statutes of limitations in State law.

The Department does not agree with the commentator's assertion. The OSM's supersession of sections 5.1(b) and 5.5(b) of the BMSLCA only nullifies statutes of limitations in regard to claims filed for EPACT structures and water supplies. The statutes of limitations in sections 5.1(b) and 5.5(b) of the BMSLCA remain in effect for non-EPACT structures and water supplies. These provisions cannot be disregarded in the final-form rulemaking.

Denial of access and release of liability

One commentator objected to amendments to § 89.144a which would remove the relief of liability that was previously available to operators who were denied access to perform premining or postmining surveys of EPACT structures. The commentator asserted that the amendments would remove the incentive for structure owners to grant operators access to perform surveys and damage minimization measures. The commentator asserted that premining surveys are necessary to distinguish between damages caused by underground mining operations and damages caused by other factors and expressed concern that, in the absence of premining survey information, operators could be held liable for damages they did not cause. The commentator also asserted that the denial of access to perform damage minimization measures could expose an operator to liability for additional damages that could have been prevented. The commentator also expressed concern that a structure owner could stop full extraction mining beneath his property by denying an operator access to perform measures needed to prevent irreparable damage. As a final point, the commentator asserted that denial of access to perform a postmining survey deprives an operator of the right to engage in reasonable discovery concerning the nature of a damage claim.

The Department acknowledges the commentator's concerns. However, the amendments to § 89.144a are necessary to comply with Federal requirements in 30 CFR 938.16(vvvv) and (ppppp). Furthermore, the OSM has superseded the statutory provision, which relieves an operator of liability if a landowner denies access for a premining or postmining survey, to the extent it applies to EPACT structures.

Contrary to the commentator's assertion, it is possible to distinguish subsidence damage from other types of damage and deterioration in the absence of recent premining survey information. The Department is often faced with the need to distinguish between subsidence damage and other types of damage or structural deterioration in its mine subsidence insurance program when baseline information may be nonexistent or many years old at the time of investigation. The Department has established procedures and criteria that it uses to identify damages caused by mine subsidence and to distinguish those damages from damages caused by other factors. The Department uses these same procedures and criteria in investigating claims filed under its subsidence regulatory program.

The Department agrees with the commentator's assertion that denial of access to perform a premining survey and damage minimization measures could result in more damage to a structure than would have otherwise occurred. In recognition of this possibility, a provision is added to § 89.144a to address situations when an operator has been denied access to perform measures necessary to minimize damage. This new provision in § 89.144a(c) provides that an operator is not responsible for that portion of structure damages, which the operator can show, by a preponderance of evidence, could have been prevented if the structure owner had provided access to conduct a premining survey and implement damage minimization measures.

The Department acknowledges the commentator's concern that some property owners could attempt to use denial of access as a means to block full extraction mining beneath a structure that is expected to incur irreparable damage. However, the Department does not regard the provisions of § 89.144a as granting structure owners the right to deny access for mitigation necessary to prevent irreparable damage. Furthermore, when the Department determines that the proposed mining will cause irreparable damage and the operator agrees to take approved measures to minimize the impacts resulting from subsidence but the structure owner denies access to implement the mitigation measures, the operator will have met the

legal requirements of section 9.1 of the BMSLCA (52 P. S. § 1406.9a) and the denial of access will not prevent the mining.

The commentator's assertion that the denial to conduct a postmining survey equates to denial of the right of a defendant to conduct reasonable discovery is incorrect. If an operator were denied access to perform either a premining or postmining survey, the Department or the property owner would still be required to assemble information needed to substantiate the extent of damage and prove that the operator's underground mining operations were the cause. This information would be discoverable in legal proceedings before the Environmental Hearing Board (EHB) or the courts, if the operator were to appeal the Department's order to repair or compensate for the alleged damage.

One commentator asserted that in no instance should an operator be relieved of liability when subsidence caused by mining is determined to be the cause of damage. The commentator also asserted that landowners who deny access should not be required to provide conclusive evidence that a company's underground mining operations were the cause of the damage.

The Department believes that the amendments to § 89.144a address the commentator's concerns. Final § 89.144a(b) provides that an operator is liable for damage to an EPACT structure if the Department or the landowner can show by a preponderance of evidence that the damage was caused by the operator's underground mining operations. The standard of evidence used in subsection (b) is less stringent than the "conclusive evidence" cited by the commentator.

One commentator recommended that landowners should be allowed to select home inspectors or contractors to perform premining and postmining surveys.

The Department notes that § 89.144a does not prevent landowners from hiring inspectors to perform premining and postmining surveys. However, landowners must allow mine operators equal access to perform premining or postmining surveys of their own. Landowners who deny access may forfeit certain rights to repair or compensation if damaged structures do not qualify as EPACT structures.

One commentator felt it was a conflict of interest to designate the mine operator as the party responsible for performing premining surveys.

The Department does not agree with the commentator's assertion. The primary obligation to perform premining surveys rests with the mine operator under both the Chapter 89 and the Federal regulations. Landowners are free to conduct their own surveys at their expense. The Department does not have the staff or resources to perform these surveys.

Water supply survey requirements

One commentator objected to the amendments in § 89.145a(a). The commentator questioned whether the Department has sufficient staff to take on this additional obligation. The commentator felt that a fixed 2,500-foot distance should be used to ensure that surveys are performed sufficiently in advance of mining.

The Department does not agree with the commentator's recommendation regarding the use of a fixed 2,500-foot distance for defining premining survey requirements. The OSM objects to using fixed separation distances for this purpose, which is why § 89.145a(a) is amended to incorporate a flexible standard.

In regard to the commentator's other concern, the Department does not regard this amendment as substantially increasing the workload on permit review staff. The determination of appropriate sampling distances is closely related to other determinations reviewers must make during the course of application review, such as the identification of water supplies which are susceptible to mining-related effects. Reviewers' determinations will be facilitated through the use of Department databases and permit files, which contain information on distances between mining and affected water supplies.

Provision of temporary water

One commentator asserted that there was no reason to distinguish between EPACT and non-EPACT water supplies in amending § 89.145a(e) to incorporate requirements relating to the prompt provision of temporary water. The commentator noted that the BMSLCA already provides comparable protection for all "domestic water supplies."

The Department does not agree with the commentator's assessment. There is a need to clarify that § 89.145a(e) applies to EPACT water supplies. The Federal requirement to promptly provide temporary water applies to a wider range of water supplies than the "domestic water supplies" acknowledged by the commentator. The Federal regulations also apply to water supplies that provide drinking water to industrial plants, commercial buildings, noncommercial buildings and recreational facilities. To be no less effective than the Federal regulations, § 89.145a(e) must require the prompt provision of temporary water in all situations when affected water supplies fall within the scope of the Federal water supply replacement requirements. It is therefore necessary to clarify that the provisions of § 89.145a(e) are applicable to all cases involving EPACT water supplies.

One commentator objected to the use of water buffaloes (temporary water storage tanks) as temporary water sources. The commentator questioned whether anyone tests the water stored in these tanks.

The Department notes that use of storage tanks and hauled water is a permissible means of providing temporary water under both State and Federal regulatory programs. In this Commonwealth, the bulk water haulers that provide temporary water service are subject to the requirements of Chapter 109 (relating to safe drinking water), which include the periodic testing of delivered water.

Standards for quantity of replacement water supplies

Two commentators recommended that § 89.145a(b) should be further revised to match the Federal standard in 30 CFR 701.5 (relating to definitions), which requires replacement water supplies to be equivalent in quantity and quality to premining water supplies. One of the commentators further asserted that if replacement standards are left unchanged, the landowner should be the one who determines the scope of existing and reasonably foreseeable uses.

The Department does not agree with the commentators' recommendations. The OSM has already determined that the Commonwealth's water supply replacement provisions, which rely on actual and reasonably foreseeable use as the standard, are no less effective than Federal standards for water supply replacement. See 66 FR 67011 (December 27, 2001). Since the BMSLCA establishes a use-based standard for determining the adequacy of replacement water supplies, it would be inappropriate to substitute alternative criteria.

In regard to the second recommendation, the existing regulations provide ample opportunity for landowners to provide input regarding the existing and reasonably foreseeable uses of water supplies. Section 89.145a(a) requires an operator to gather information on existing and reasonably foreseeable uses as part of the premining survey of a water supply. It also requires an operator to provide this information to the landowner within 30 days. At that point, the landowner can accept the operator's description or provide the Department with information that justifies consideration of additional uses.

Cost of operating and maintaining a replacement water supply

One commentator supported the amendments to § 89.145a(f)(5) that make operators liable for all increases in costs associated with the operation and maintenance of a restored or replacement water supply. However, the commentator did not support the change in paragraph (5)(i) that allows a mine operator and landowner to negotiate the time period for which compensation is to be provided. The commentator observed that even if this provision is based on 30 CFR 701.5, it represents a lower standard than the Commonwealth now has because the Department currently requires operators to pay increased costs in perpetuity. The commentator asserted that when State regulations are more effective than their Federal counterparts, the OSM cannot require that they be amended to match Federal requirements.

The Department agrees with the commentator's recommendation. Section 89.145a(f)(5) has been changed in the final-form rulemaking to clarify that the requirement to provide for the permanent payment of increased operating and maintenance costs applies to cases involving EPACT water supplies as well as cases involving other types of water supplies. Although the remaining portion of paragraph (5) tracks the language of the Federal regulation, the basic requirement to provide for the "permanent payment" of the increased cost is now clearly stated. This amendment also makes the provisions of § 89.145a(f)(5) consistent with Pennsylvania case law.

One commentator objected to the new provision in § 89.145a(f)(5)(i) which allows for agreements setting forth the terms of payment for increased operation and maintenance costs. The commentator believes that many so-called "agreements" between landowners and coal operators leave room for unfair, unchallenged settlements and that property owners are often at disadvantage in negotiating agreements with mine operators.

The Department acknowledges the commentator's concerns, but notes that voluntary agreements for the payment of increased operation and maintenance costs are permissible under both State and Federal regulations. The Department has always offered and will continue to offer assistance to property owners who are faced with signing an agreement.

One commentator indicated that it did not oppose the amendment to § 89.145a(f)(5) which would obligate our mine operators to pay all increased costs of operating and maintaining a restored or replaced domestic water supply.

The Department acknowledges the commentator's position, but notes that § 89.145a(f)(5) was changed between proposed and final rulemaking to apply to all water supplies not just EPACT water supplies.

One commentator recommended that the "de minimis" cost concept in § 89.145a(f)(5) should be deleted with respect to all water supplies covered by the BMSLCA. The commentator asserted that the EHB never intended this concept to be defined or used as it is currently. The commentator noted that what is "de minimis" to some may not be "de minimis" to others.

Section 89.145(f)(5) in this final-form rulemaking has been amended to delete the "de minimis" cost concept in regard to both EPACT and non-EPACT water supplies. The Department agrees that operators should be liable for all increased costs attributable to the operation and maintenance of a restored or replacement water supply. The Department also wishes to avoid creating two separate regulatory standards for the cost of replacement water supplies which are based on the same statutory provision. In view of this change, the term "de minimis cost increase" and its definition are deleted from § 89.5, since the term is not used elsewhere in Chapter 89.

Compensation for loss of water supply

One commentator advocated the use of improved prediction techniques and more careful permitting so that cases when water supplies cannot be replaced become rare or nonexistent.

The Department acknowledges the commentator's recommendation and notes that it continually strives to improve its predictive capabilities and to ensure that replacement options are available for all water supplies that are likely to be impacted.

One commentator asserted that the conditions under which an operator is allowed to provide compensation rather than restore or replace an affected water supply should be the same for all water supplies covered by the BMSLCA and not be restricted to EPACT water supplies.

The Department does not agree with the commentator's assertion. It is necessary to distinguish between the conditions under which compensation may be used to satisfy EPACT water supply claims and the conditions under which compensation may be used to satisfy non-EPACT water supply claims. The OSM has only superseded section 5.2(g) and (h) of the BMSLCA to the extent that this section is inconsistent with the Federal SMCRA. This being the case, the OSM's action only limits the use of compensation with respect to settlements involving EPACT water supplies. The compensation options and restrictions on Department actions remain applicable to settlements involving water supplies that are outside the scope of the Federal program. It is therefore necessary to reflect this distinction in § 89.152.

One commentator asserted that the proposed amendment to § 89.152(b), which allows a property owner to waive the provision of a restored or replacement water supply, makes the Commonwealth's regulations more liberal insofar as water replacement goes, instead of more restrictive as the OSM said they should be. The commentator recommended amending § 89.152(b) to require that a portion of the compensation paid under a waiver agreement be held in escrow to guarantee water replacement in case the property owner or a successor property owner desires such replacement in the future. The commentator believed that if waiver agreements are determined to be unconstitutional, coal companies may be deemed liable for water supply replacement irrespective of the provisions of these waiver agreements.

The Department does not agree with the commentator's recommendations. The provision in § 89.152(b) is based on Federal regulatory requirements relating to the replacement of affected water supplies. (See the definition of "replacement of water supply" in 30 CFR 701.5.) The OSM has found this provision to be no less effective than those requirements. Moreover, this provision is clearly

within the scope of section 5.3(a) of the BMSLCA (52 P. S. § 1406.5c(a)), which provides that "[n]othing contained in this act shall prohibit the mine operator and landowner at any time after the effective date of this section from voluntarily entering into an agreement establishing the manner and means by which an affected water supply is to be restored or an alternate supply is to be provided or providing fair compensation for such contamination, diminution or interruption."

The Department also notes that the commentator's recommendation concerning the use of escrow to ensure the future development of a replacement water supply is not authorized by the BMSLCA. It is also beyond the scope of the OSM's requirements.

One commentator recommended that requirements provide for replacement of all affected water supplies.

The Department believes that the amendments to § 89.152(a) adequately ensure the restoration or replacement of EPACT water supplies that are affected by underground mining operations. Section 89.152(b), which addresses non-EPACT water supplies, also promotes the restoration or replacement of affected water supplies but includes provisions that allow claims to be settled through compensation when operators decide restoration or replacement is not practical. These two distinct standards are necessary because the OSM's final rule only results in a partial supersession of section 5.2(g) and (h) of the BMSLCA, leaving intact provisions that allow claims for non-EPACT water supplies to be settled though compensation.

The Department also notes that the water supply replacement requirements in § 89.145a and the special water supply replacement provisions in § 89.152 only apply to springs with documented water supply uses. Springs that are not used for domestic, commercial industrial, recreational or agricultural purposes do not meet the definition of "water supply" in § 89.5.

One commentator asserted that mine operators should be held more accountable for the damage they cause. The commentator expressed particular concern about farms that rely on springs and ponds for agricultural uses.

The Department acknowledges the commentator's concerns and notes that the law requires restoration or replacement of affected agricultural water supplies. It is rare that a water supply cannot be repaired or replaced. The Department does not allow mining that would diminish a water supply, if it determines that restoration or replacement is unlikely to be successful. The Commonwealth's existing law and regulations include provisions designed to protect property values in cases when agricultural water supplies cannot be restored or replaced. In cases when water supplies cannot be restored or replaced, a property owner may insist that the mine operator purchase the property at its fair market value immediately prior to the time of water loss or provide compensation equal to the reduction in fair market value resulting from the water loss. These options are not in any way diminished by this rulemaking.

Availability of replacement water supply

One commentator asserted that the Department should deny permit applications that fail to demonstrate that mining operations will not pollute, disrupt or destroy the waters of this Commonwealth. The commentator cited a recent situation when the Department granted funds to pay for the expansion of a public water system necessitated by the destruction of private water supplies by an underground mining operation. The commentator felt that the economic feasibility of replacing water resources should not be a concern of citizens or the Department and that if replacement is not feasible, mining should not take place.

The Department believes that this final-form rulemaking, in combination with the Federal supersession of sections 5.2(g) and (h) of the BMSLCA, will serve to tighten requirements relating to the restoration and replacement of EPACT water supplies. Under the amended law and regulations, operators must restore or replace affected EPACT water supplies except in situations when the Department determines that a permanent replacement source meeting regulatory standards for adequacy cannot be developed. Cost alone cannot be the basis for this determination. Under the new requirements, an operator could be faced with water supply replacement expenses amounting to several times the value of the affected property. The elimination of the option to compensate rather than restore or replace affected EPACT water supplies should, in itself, cause operators to consider more carefully which supplies their operations are likely to affect and how those supplies will be restored or replaced.

The Department further notes that the partial supersession of section 5.2(h) of the BMSLCA removes restrictions that previously limited its authority to order the replacement of affected EPACT water supplies. This authority, in combination with the Department's current application preview procedures, should provide greater assurance of water supply replacement. As part of an application review, the Department ensures that suitable plans are in place for the restoration or replacement of all water supplies that are likely to be affected by proposed operations.

One commentator asserted that the feasibility of providing municipal water service to affected properties should be proven before any mining permit is issued.

The Department agrees and notes that provisions are currently in place to address the commentator's concern. Section 89.36(c) (relating to protection of the hydrologic balance) requires operators to describe how they will replace water supplies affected by their underground mining operations. The Department now requires permit applications to include information showing that all water supplies that are likely to be affected by underground mining operations can be restored or replaced. In addition, the amendments to § 89.152 adopted in this final-form rulemaking provide greater assurance that affected EPACT water supplies will be restored or replaced.

Department assistance to landowners

One commentator recommended that the Department should be responsible to handle damage claims for affected property owners to promptly restore their property, water and lives back to normal. The commentator felt that property owners should not be expected to negotiate their own settlements with the mining company unless they so choose.

The Department acknowledges the commentator's recommendation, but notes that the claim resolution provisions of the BMSLCA are predicated, for the most part, on interactions between the mine operator and affected property owner. The Department's role is to intervene at the property owner's request or upon recognition of a potentially hazardous situation. The Department is always willing to provide assistance when requested to do so.

One commentator noted that, contrary to statements in the preamble to the proposed rulemaking, the Department does not have surface subsidence agents available to assist property owners in areas when room-and-pillar mining takes place. The commentator noted that resolving problems is a huge problem for landowners in these areas.

The Department acknowledges that it has not assigned surface subsidence agents to service property owners in room-and-pillar mining areas. These agents are assigned to longwall mining areas, which tend to experience a higher number of subsidence damage claims and water supply impacts. The Department does, however, provide property owners in all underground mining areas with fact sheets explaining the remedies to which they are entitled. The fact sheets include an 800 number through which affected property owners can contact the Department and request assistance at any time.

OSM requirements and proposed rules

Several commentators submitted comments that were directed primarily at the OSM's proposed rulemakings and the Federal requirements in 30 CFR 938.16. Some commentators presented arguments against the OSM's proposal to supersede inconsistent provisions of the BMSLCA and some commentators argued that the OSM should supersede additional provisions of the BMSLCA. Some commentators also argued that the OSM should lift certain requirements in 30 CFR 938.16, while others argued that the Commonwealth's proposed rulemaking did not satisfy those requirements. The OSM considered these comments in formulating its final rulemakings at 69 FR 71528 and 71551, but made no changes in response to these arguments. Similarly the OSM did not lift any of its requirements in 30 CFR 938.16 in response to these arguments.

Issues beyond the scope of this rulemaking

A large group of comments concerned matters that were beyond the scope of this final-form rulemaking. Many commentators, representing primarily citizens interests, argued for changes in law and regulation that would provide greater protection of farms, homes, water supplies, streams and water resource in general. One commentator recommended increasing taxes on coal reserves.

Another group of comments came from private citizens who wished to report their experiences with incidents of subsidence damage and water loss or who wished to express their apprehension about the prospect of having their properties undermined. Some of these comments dealt with water supply problems that occurred prior to the effective date of the BMSLCA's water supply replacement provisions.

IRRC comments

IRRC recommended that the final-form rulemaking not be approved before the OSM finalized its action superseding the inconsistent provisions of the BMSLCA. As noted previously, the OSM rule superseding the inconsistent provisions of the BMSLCA became final on December 9, 2004. The Commission's condition is therefore deemed to be satisfied.

F. *Benefits, Costs and Compliance*

Benefits

The final-form rulemaking will benefit the Commonwealth, the underground coal mining industry and coal field residents by simplifying program requirements. Currently, a dual enforcement program exists in this Commonwealth under which the Department enforces the provisions of the BMSLCA and Chapter 89 and the OSM enforces the provisions of the Federal regulations in cases when the Federal regulations provide more effective remedies than the BMSLCA and Chapter 89. The dual enforcement arrangement has, at times, created confusion regarding the obligations of mine operators, the remedies available to affected landowners and agency jurisdiction. The final-form rulemaking will eliminate the need for dual enforcement and consolidate all requirements relating to subsidence damage repair and compensation and the replacement of water supplies affected by underground coal mining operations in Chapter 89.

The final-form rulemaking will also enable the Commonwealth to fulfill its primacy obligations and retain primary enforcement responsibility over underground coal mining operations.

Compliance Costs

The final-form rulemaking slightly increases the costs of preparing permit applications and subsidence control plans. These additional costs will affect 28 companies that operate underground bituminous coal mines in this Commonwealth. No additional cost will be imposed on government entities or the public. The final-form rulemaking simplifies mine operators' obligations in regard to the repair of subsidence damage and replacement of affected water supplies.

Compliance Assistance Plan

The Department will provide written notification to all underground coal mine operators to inform them of the final promulgation of this rulemaking. The Department will also hold roundtable meetings with mine operators and consultants to explain program changes and answer questions.

The Department will also conduct outreach to landowners in active mining areas to assist them in understanding their rights and obligations under the amended law and regulations. The Department will update its fact sheets explaining the remedies provided by the amended law and regulations and the procedures for obtaining those remedies and will distribute the revised fact sheets to landowners in active mining areas. The Department will continue to deploy surface subsidence agents to meet with affected landowners and assist them in obtaining the remedies provided by the amended law and regulations.

Paperwork Requirements

The final-form rulemaking requires the Department to update its fact sheets explaining the remedies provided by the amended law and regulations and the procedures for obtaining those remedies.

G. *Pollution Prevention*

The matters affected by this final-form rulemaking do not pertain to pollution prevention or control.

H. *Sunset Review*

This final-form rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on September 3, 2003, the Department submitted a copy of the notice of proposed rulemaking, published at 33 Pa.B. 4554, to IRRC and the Chairper-

sons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on August 24, 2005, the final-form rulemaking was deemed approved by the House and Senate Committees. IRRC met on August 25, 2005, and approved the final-form regulations in accordance with section 5(c) of the Regulatory Review Act.

J. *Findings*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) The regulations do not enlarge the purpose of the proposed rulemaking published at 33 Pa.B. 4454.

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in section C of this preamble.

K. *Order*

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapters 86 and 89, are amended by amending §§ 86.1, 86.151, 86.152, 89.5, 89.141, 89.142a, 89.143a, 89.144a, 89.145a, 89.146a and 89.152 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately.

KATHLEEN A. MCGINTY,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 5068 (September 10, 2005).)

Fiscal Note: Fiscal Note 7-385 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 86. SURFACE AND UNDERGROUND COAL MINING: GENERAL

Subchapter A. GENERAL PROVISIONS

§ 86.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Underground mining activities—Includes the following:

(i) Surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance and reclamation of roads, aboveground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities, including hoist and ventilating ducts, area used for the disposal and storage of waste and areas on which materials incident to underground mining operations are placed.

(ii) Underground operations such as underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining, hauling, storage and blasting.

(iii) Operation of a mine, including preparatory work in connection with the opening and reopening of a mine, backfilling, sealing and other closing procedures, postclosure mine pool maintenance and any other work done on land or water in connection with a mine.

* * * * *

Subchapter F. BONDING AND INSURANCE REQUIREMENTS

AMOUNT AND DURATION OF LIABILITY

§ 86.151. Period of liability.

(a) Liability under bonds posted for a coal surface mining activity shall continue for the duration of the mining activities and its reclamation as provided in the acts, regulations adopted thereunder and the conditions of the permit and for 5 additional years after completion of augmented seeding, fertilization, irrigation or other work necessary to achieve permanent revegetation of the permit area.

(b) Liability under bonds posted for the surface effects of an underground mine, coal preparation activity or other long-term facility shall continue for the duration of the mining operation or use of the facility, its reclamation as provided in the acts, regulations adopted thereunder and the conditions of the permit, and for 5 years thereafter, except for:

(1) The risk of water pollution for which liability under the bond shall continue for a period of time after completion of the mining and reclamation operation. This period of time will be determined by the Department on a case-by-case basis.

(2) The risk of subsidence from bituminous underground mines for which liability under the bond shall continue for 10 years after completion of underground mining operations.

(c) Liability under bonds posted for coal refuse disposal activities shall continue for the duration of the activities and for 5 years after the last year of augmented seeding and fertilizing and other work to complete reclamation to meet the requirements of the acts, regulations adopted thereunder, the conditions of the permit and to otherwise protect the environment. Liability under the bond related to the risk of water pollution from activities shall continue for a period of time after completion of the coal refuse disposal activities. This period of time will be determined by the Department on a case-by-case basis.

(d) The extended period of liability which begins upon completion of augmenting seeding, fertilization, irrigation or other work necessary to achieve permanent revegetation of the permit area shall include additional time taken by the permittee to repeat augmented seeding, fertilization, irrigation or other work under a requirement by the Department but may not include selective husbandry practices approved by the Department, such as pest and vermin control, pruning, repair of rills and gullies or reseeding or transplanting, or both, which constitute normal conservation practices within the region for other land with similar land uses. Augmented seeding, fertilization, irrigation and repair of rills and gullies performed at levels or degrees of management which exceed those normally applied in maintaining use or productivity of comparable unmined land in the surrounding area, would necessitate extending the period of liability.

(e) A portion of a permit area requiring extended liability may be separated from the original area and bonded separately upon approval by the Department. Before determining that extended liability should apply to only a portion of the original permit area, the Department will determine that the area portion is:

(1) Not significant in extent in relation to the entire area under bond.

(2) Limited to a distinguishable contiguous portion of the permit area.

(f) If the Department approves a long-term intensive agricultural postmining land use, in accordance with § 87.159, § 88.133, § 88.221, § 88.334, § 88.381, § 88.492, § 89.88 or § 90.165, the 5-year period of extended liability shall commence at the date of initial planting for the long-term intensive agricultural land use.

(g) If the Department issues a written finding approving a long-term intensive agricultural land use, the operation shall be exempt from the requirements of § 87.147(b), § 88.121(b), § 88.209(b), § 88.322(b), § 88.492, § 89.86 or § 90.150(b). A finding does not constitute a grant of an exception to the bond liability periods of this section.

(h) The bond liability of the permittee shall include only those actions which the operator is obliged to take under the permit, including completion of the reclamation plan so that the land will be capable of supporting a postmining land use approved under § 87.159, § 88.133, § 88.221, § 88.334, § 88.381, § 88.492, § 89.88 or § 90.166.Implementation of an alternate postmining land use approved under these sections which is beyond the control of the permittee need not be covered by the bond.

(i) If an area is separated under subsection (e), that portion shall be bonded separately, and the applicable period of liability, in accordance with this section, shall begin again. The amount of bond on the original bonded area may be adjusted in accordance with § 86.152 (relating to adjustments).

(j) Release of any bond under this section does not alleviate the operator's responsibility to treat discharges of mine drainage emanating from or hydrologically connected to the site, to the standards in the permit, the act, The Clean Streams Law, the Federal Water Pollution Control Act and the rules and regulations thereunder.

§ 86.152. Bond adjustments.

(a) The amount of bond required and the terms of the acceptance of the applicant's bond will be adjusted by the Department from time to time as the area requiring bond coverage is increased or decreased, or when the cost of future reclamation changes, or when the projected subsidence damage repair liability changes. The Department may specify periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement. This requirement shall only be binding upon the permittee and does not compel a third party, including surety companies, to provide additional bond coverage and does not extend the coverage of a subsidence bond beyond the requirements imposed by sections 5, 5.4, 5.5 and 5.6 of the Bituminous Mine Subsidence and Land Conservation Act.

(b) A permittee may request reduction of the required bond amount upon submission of evidence to the Department that warrants a reduction of the bond amount by proving that the permittee's method of operation or other circumstances will reduce the maximum estimated cost to the Department to complete the reclamation, restoration or abatement responsibilities.

(c) Bond adjustments which involve unaffected portions of a permit area upon which no reclamation liability has been incurred or permits that have not been activated and upon which no reclamation liability has been incurred, and bond adjustments which are based on revisions of the cost estimates of reclamation, are not subject to the procedures of §§ 86.170—86.172 (relating to scope; procedures for seeking release of bond; and criteria for release of bond), except as provided in § 86.172(b) and (c).

(d) The Department will notify the permittee, the surety and any person with a property interest in collateral who has requested the notification, of any proposed adjustment to the bond amount. The Department will also provide the permittee an opportunity for an informal conference on the adjustment.

CHAPTER 89. UNDERGROUND MINING OF COAL AND COAL PREPARATION FACILITIES

Subchapter A. EROSION AND SEDIMENTATION CONTROL

GENERAL PROVISIONS

§ 89.5. Definitions.

(a) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Cropland—Land used for the production of adapted crops for harvest, along or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops and other similar specialty crops.

Disturbed area—An area where vegetation, topsoil or overburden is removed or upon which topsoil, spoil, coal processing wastes, underground development wastes or noncoal waste is placed by coal mining operations.

* * * * *

Dwelling—A building or other structure that, at the time subsidence occurs, is used either temporarily, occasionally, seasonally or permanently for human habitation.

EPACT structures—

(i) Structures that are subject to repair and compensation requirements under section 720(a) of the Surface Mining Control and Reclamation Act (30 U.S.C.A. § 1309a).

(ii) The term includes:

(A) Noncommercial buildings.

(B) Dwellings.

(C) Structures adjunct to or used in conjunction with dwellings, including, but not limited to:

(I) Garages.

(II) Storage sheds and barns.

(III) Greenhouses and related buildings.

(IV) Customer-owned utilities and cables.

(V) Fences and other enclosures.

(VI) Retaining walls.

(VII) Paved or improved patios.

(VIII) Walks and driveways.

(IX) Septic sewage treatment facilities.

(X) Inground swimming pools.

(XI) lot drainage and lawn and garden irrigation systems.

EPACT water supplies—

(i) Water supplies that are subject to replacement under section 720(a) of the Surface Mining Control and Reclamation Act, including drinking, domestic or residential water supplies in existence prior to the date of permit application.

(ii) The term includes water received from a well or spring and any appurtenant delivery system that provides water for direct human consumption or household use.

(iii) The term does not include wells and springs that serve only agricultural, commercial or industrial enterprises except to the extent the water supply is for direct human consumption or human sanitation, or domestic use.

Embankment—An artificial deposit of material that is raised above the natural surface of the land and used to contain, divert or store water, support roads or railways, or for other similar purposes.

* * * * *

Permanent diversion—A diversion which is to remain after underground mining activities are completed and which has been approved for retention by the Department.

Permit area—The mine and surface areas where underground mining activities occur.

* * * * *

Underground mining activities—Includes the following:

(i) Surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance and reclamation of roads, aboveground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities, including hoist and ventilating ducts, areas used for the disposal and storage of waste and areas on which materials incident to underground mining operations are placed.

(ii) Underground operations such as underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining, hauling, storage and blasting.

(iii) Operation of a mine including preparatory work in connection with the opening and reopening of a mine, backfilling, sealing, and other closing procedures, postclosure mine pool maintenance and any other work done on land or water in connection with a mine.

Underground mining operations—Underground construction, operation and reclamation of shafts, adits, support facilities located underground, in situ processing and underground mining, hauling, storage and blasting.

* * * * *

Subchapter F. SUBSIDENCE CONTROL AND WATER SUPPLY REPLACEMENT

§ 89.141. Subsidence control: application requirements.

* * * * *

(d) *Subsidence control plan.* The permit application must include a subsidence control plan which describes the measures to be taken to control subsidence effects from the proposed underground mining operations. The plan must address the area in which structures, facilities or features may be materially damaged by mine subsidence. At a minimum, the plan must address all areas within a 30° angle of draw of underground mining operations which will occur during the 5-year term of the permit. The subsidence control plan must include the following information:

(1) A description of the method of coal removal, such as longwall mining, room and pillar mining, hydraulic mining or other extraction methods, including the size, sequence and timing for the development of underground workings.

(2) A narrative describing whether subsidence, if it is likely to occur, could cause material damage to or diminish the value or reasonably foreseeable use of any structures or could contaminate, diminish or interrupt water supplies.

(3) For each structure and feature, or class of structures and features, described in § 89.142a(c) (relating to subsidence control: performance standards), a detailed description of the measures to be taken to ensure that subsidence will not cause material damage to, or reduce the reasonably foreseeable uses of the structures or features.

(4) A description of the anticipated effects of planned subsidence, if any.

(5) A description of the measures to be taken to correct any subsidence-related material damage to the surface land.

(6) A description of the measures to be taken to prevent irreparable damage to the structures enumerated in § 89.142a(f)(1)(iii)—(v), if the structure owner does not consent to the damage.

(7) A description of the monitoring, if any, the operator will perform to determine the occurrence and extent of subsidence so that, when appropriate, other measures can be taken to prevent or reduce or correct damage in accordance with § 89.142a(e) and (f).

(8) A description of the measures to be taken to maximize mine stability and maintain the value and reasonably foreseeable use of the surface land.

(9) For EPACT structures other than noncommercial buildings protected under § 89.142a(c), a description of the methods to be employed in areas of planned subsidence to minimize damage or otherwise comply with § 89.142a(d)(1)(i).

(10) For EPACT structures other than noncommercial buildings protected under § 89.142a(c), a description of the subsidence control measures to be taken under § 89.142a(d)(1)(ii) to prevent subsidence and subsidence-related damage in areas where underground mining operations are not projected to result in planned subsidence.

(11) A description of the measures which will be taken to maintain the value and foreseeable uses of perennial streams which may be impacted by underground mining operations. The description shall include a discussion of the effectiveness of the proposed measures as related to prior underground mining operations under similar conditions.

(12) A description of the measures to be taken to prevent material damage to perennial streams and aquifers which serve as a significant source to a public water supply system.

(13) A description of utilities including type, nature of use, composition and approximate age of pipelines, and a description of the measures to be taken to minimize damage, destruction or disruption in utility service in accordance with § 89.142a(g).

(14) A description of applicable measures to be taken to control subsidence under other statutes, including:

(i) The act of December 22, 1959 (P. L. 1994, No. 729) (52 P. S. §§ 3101—3109).

(ii) The Oil and Gas Act (58 P. S. §§ 601.101—601.605).

(iii) Section 419 of the State Highway Law (36 P. S. § 670-419).

(iv) Section 1 of the act of June 1, 1933 (P. L. 1409, No. 296) (52 P. S. § 1501).

(15) Other information requested in accordance with the policies and procedures of the Department.

§ 89.142a. Subsidence control: performance standards.

(a) *General requirements.* Underground mining operations shall be planned and conducted in accordance with the following:

* * * * *

(b) *Structure surveys.*

* * * * *

(2) The operator will be relieved of the duty to conduct a premining survey if the operator submits evidence to the Department that:

(i) The operator notified the owner by certified mail or personal service of the landowner's rights as set forth in sections 5.4—5.6 of The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.5d—1406.5f).

(ii) The operator attempted to conduct a survey.

(iii) The landowner failed to provide the operator with access to the site to conduct a survey within 10 days of receipt of the operator's notice of intent to conduct the survey.

(3) A landowner, who is notified of an operator's intent to conduct a premining or postmining survey in accordance with the notification procedures described in paragraph (2), should provide the operator access to the site for the purpose of conducting the survey within the time frame specified in paragraph (2) so the operator can do the following:

(i) Document the premining condition of the structure, assess the potential for material damage and plan appropriate damage minimization measures.

(ii) Determine the extent of subsidence damage and the scope of necessary repairs.

(c) *Restrictions on underground mining.*

(1) Unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of the structures and features listed in subparagraphs (i)—(v), no underground mining may be conducted beneath or adjacent to:

(i) Public buildings and facilities.

(ii) Churches, schools and hospitals.

(iii) Impoundments with a storage capacity of 20 acre-feet (2.47 hectare-meters) or more.

(iv) Bodies of water with a volume of 20 acre-feet (2.47 hectare-meters) or more.

(v) Bodies of water or aquifers which serve as significant sources to public water supply systems.

* * * * *

(3) If the measures implemented by the operator cause material damage or reduce the reasonably foreseeable use of the structures or features listed in paragraph (1), the Department may suspend mining under or adjacent to these structures or features until the subsidence control plan is modified to ensure prevention of further material damage to these facilities or features.

(d) *Protection of certain EPACT structures and agricultural structures.*

(1) For EPACT structures other than noncommercial buildings protected under subsection (c):

(i) If an operator employs mining technology that provides for planned subsidence in a predictable and controlled manner, the operator shall take necessary and prudent measures, consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to the structure, except when one of the following applies:

(A) The structure owner has consented, in writing, to allow material damage.

(B) The costs of these measures would exceed the anticipated cost of repairs and the anticipated damage will not constitute a threat to health or safety.

(ii) If an operator employs mining technology that does not result in planned subsidence in a predictable and controlled manner, the operator shall adopt measures consistent with known technology to prevent subsidence and subsidence-related damage to the extent technologically and economically feasible to the structure. Measures may include, but are not limited to:

(A) Backstowing or backfilling of voids.

(B) Leaving support pillars of coal.

(C) Leaving areas in which no coal is removed, including a description of the overlying area to be protected by leaving coal in place.

(D) Taking measures on the surface to prevent or minimize material damage or diminution in value of the surface.

(E) Other measures approved by the Department.

(2) If the Department determines and so notifies a mine operator that a proposed mining technique or extraction ratio will result in irreparable damage to a structure enumerated in subsection (f)(1)(iii)—(v), the operator may not use the technique or extraction ratio unless the building owner, prior to mining, consents to the mining or the operator, prior to mining, takes measures approved by the Department to minimize or reduce impacts resulting from subsidence to these structures.

(3) Nothing in paragraph (1) or (2) prohibits planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

(e) *Repair of damage to surface lands.* To the extent technologically and economically feasible, the operator shall correct material damage to surface lands resulting from subsidence caused by the operator's underground mining operations.

(f) *Repair of damage to structures.*

(1) *Repair or compensation for damage to certain structures.* Whenever underground mining operations conducted on or after August 21, 1994, cause damage to any of the structures listed in subparagraphs (i)—(v), the operator responsible for extracting the coal shall promptly and fully rehabilitate, restore, replace or compensate the owner for material damage to the structures resulting from the subsidence unless the operator demonstrates to the Department's satisfaction that one of the provisions of § 89.144a (relating to subsidence control: relief from responsibility) relieves the operator of responsibility.

(i) Buildings that are accessible to the public including, but not limited to, commercial, industrial and recreational buildings and all structures that are securely attached to the land surface and adjunct to or used in conjunction with these buildings, including:

(A) Garages.

(B) Storage sheds and barns.

(C) Greenhouses and related buildings.

(D) Customer-owned utilities and cables.

(E) Fences and other enclosures.

(F) Retaining walls.

(G) Paved or improved patios.

(H) Walks and driveways.

(I) Septic sewage treatment facilities.

(J) Inground swimming pools.

(K) Lot drainage and lawn and garden irrigation systems.

(ii) Noncommercial buildings customarily used by the public, including, but not limited to, schools, churches and hospitals.

(iii) Dwellings which are used for human habitation and permanently affixed appurtenant structures or improvements. In the context of this paragraph, the phrase "permanently affixed appurtenant structures or improvements" includes, but is not limited to, structures adjunct to or used in conjunction with dwellings, such as:

(A) Garages.

(B) Storage sheds and barns.

(C) Greenhouses and related buildings.

(D) Customer-owned utilities and cables.

(E) Fences and other enclosures.

(F) Retaining walls.

(G) Paved or improved patios.

(H) Walks and driveways.

(I) Septic sewage treatment facilities.

(J) Inground swimming pools.

(K) Lot drainage and lawn and garden irrigation systems.

(iv) Barns and silos.

(v) Permanently affixed structures of 500 or more square feet (46.45 square meters) in area that are used for raising livestock, poultry or agricultural products, for storage of animal waste or for the processing or retail marketing of agricultural products produced on the farm on which the structures are located.

(2) *Amount of compensation.*

(i) If, rather than repair the damage, the operator compensates the structure owner for damage caused by the operator's underground mining operations, the operator shall provide compensation equal to the reasonable cost of repairing the structure or, if the structure is determined to be irreparably damaged, the compensation shall be equal to the reasonable cost of its replacement except for an irreparably damaged agricultural structure identified in paragraph (1)(iv) or (v) which at the time of damage was being used for a different purpose than the purpose for which the structure was originally constructed. For such an irreparably damaged agricultural structure, the operator may provide for the reasonable cost to replace the damaged structure with a structure satisfying the functions and purposes served by the damaged structure before the damage occurred if the operator can affirmatively prove that the structure was being used for a different purpose than the purpose for which the structure was originally constructed.

(ii) The operator shall compensate the occupants with an additional payment for reasonable, actual expenses incurred during their temporary relocation, if the occupants of a damaged structure are required to relocate. The operator shall also compensate the occupants for other actual, reasonable incidental costs agreed to by the parties or approved by the Department.

(g) *Protection of utilities.*

(1) Underground mining operations shall be planned and conducted in a manner which minimizes damage, destruction or disruption in services provided by oil, gas and water wells; oil, gas and coal slurry pipelines; rail lines; electric and telephone lines; and water and sewerage lines which pass under, over, or through the permit area, unless otherwise approved by the owner of the facilities and the Department.

* * * * *

(h) *Perennial streams.*

(1) Underground mining operations shall be planned and conducted in a manner which maintains the value

and reasonably foreseeable uses of perennial streams, such as aquatic life; water supply; and recreation, as they existed prior to coal extraction beneath streams.

(2) If the Department finds that the underground mining operations have adversely affected a perennial stream, the operator shall mitigate the adverse effects to the extent technologically and economically feasible, and, if necessary, file revised plans or other data to demonstrate that future underground mining operations will meet the requirements of paragraph (1).

(i) *Prevention of hazards to human safety.*

(1) The Department will suspend underground mining operations beneath urbanized areas; cities; towns; and communities and adjacent to or beneath industrial or commercial buildings; lined solid and hazardous waste disposal areas; major impoundments of 20 acre-feet (2.47 hectare-meters) or more; or perennial streams, if the operations present an imminent danger to the public.

* * * * *

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

(a) The owner of a structure enumerated in § 89.142a(f)(1) (relating to subsidence control: performance standards) who believes that underground mining operations caused mine subsidence resulting in damage to the structure and who wishes to secure repair of the structure or compensation for the damage shall provide the operator responsible for the underground mining operations with notification of the damage to the structure.

(b) If the operator agrees that mine subsidence damaged the structure, the operator shall fully repair the damage or compensate the owner for the damage in accordance with either § 89.142a(f) or a voluntary agreement between the parties authorized by section 5.6 of The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. § 1406.5f).

(c) If the parties are unable to agree as to the cause of the damage or the reasonable cost of repair or compensation for the structure, the owner of the structure may file a claim in writing with the Department. The owner of a structure that is not an EPACT structure shall file the claim within 2 years of the date the structure was damaged.

(d) Upon receipt of the claim, the Department will send a copy of the claim to the operator and conduct an investigation in accordance with the following procedure:

(1) Within 30 days of receipt of the claim, the Department will conduct an investigation to determine whether underground mining operations caused the subsidence damage to the structure and provide the results of its investigation to the property owner and mine operator within 10 days of completing the investigation.

(2) Within 60 days of completion of the investigation, the Department will determine, and set forth in writing, whether the damage is attributable to subsidence caused by the operator's underground mining operations and, if so, the reasonable cost of repairing or replacing the damaged structure.

(3) If the Department finds that the operator's underground mining operations caused the damage to the structure, the Department will either issue a written order directing the operator to promptly compensate the structure owner or issue an order directing the operator to promptly repair the damaged structure. The Department may extend the time for compliance with the order if the Department finds that further damage may occur to the same structure as a result of additional subsidence.

§ 89.144a. Subsidence control: relief from responsibility.

(a) Except as provided in subsection (b), the operator will not be required to repair a structure or compensate a structure owner for damage to structures identified in § 89.142a(f)(1) (relating to subsidence control: performance standards) if the operator demonstrates to the Department's satisfaction one or more of the following apply:

(1) The landowner denied the operator access to the property upon which the structure is located to conduct a premining survey or a postmining survey of the structure and surrounding property, and thereafter the operator served notice upon the landowner by certified mail or personal service. The operator shall demonstrate the following:

(i) The notice identified the rights established by sections 5.4—5.6 of The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.5d—1406.5f).

(ii) The landowner denied the operator access to the site to conduct the survey within 10 days after the landowner's receipt of the notice.

(2) The operator's underground mining did not cause the damage.

(3) The operator and the landowner entered into a voluntary agreement that satisfies the requirements of section 5.6 of The Bituminous Mine Subsidence and Land Conservation Act.

(b) The relief in subsection (a)(1) will not apply in the case of an EPACT structure if the landowner or the Department can show, by a preponderance of evidence, that the damage resulted from the operator's underground mining operations.

(c) The operator is not responsible for the portion of structure damages which the operator can show, by a preponderance of evidence, could have been prevented had the structure owner provided the operator access to conduct a premining survey under § 89.142a (relating to subsidence control: performance standards) and implement necessary and prudent damage minimization measures.

§ 89.145a. Water supply replacement: performance standards.

(a) *Water supply surveys.*

(1) The operator shall conduct a premining survey and may conduct a postmining survey of the quantity and quality of all water supplies within the permit and adjacent areas, except when the landowner denies the operator access to the site to conduct a survey and the operator has complied with the notice procedure in this section. Premining surveys shall be conducted prior to the time a water supply is susceptible to mining-related effects. Survey information must include the following information to the extent that it can be collected without excessive inconvenience to the landowner:

(i) The location and type of water supply.

(ii) The existing and reasonably foreseeable uses of the water supply.

(iii) The chemical and physical characteristics of the water, including, at a minimum, total dissolved solids or specific conductance corrected to 25°C, pH, total iron, total manganese, hardness, total coliform, acidity, alkalin-

ity and sulfates. An operator who obtains water samples in a premining or postmining survey shall utilize a certified laboratory to analyze the samples.

(iv) The quantity of the water.

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

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

(2) The operator shall submit copies of the results of the analyses, as well as the results of any quantitative analysis, to the Department and to the landowner within 30 days of their receipt by the operator.

(3) If the operator cannot make a premining or postmining survey because the owner will not allow access to the site, the operator shall submit evidence to the Department of the following:

(i) The operator notified the landowner by certified mail or personal service of the landowner's rights in sections 5.1—5.3 of The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.5a—1406.5c), and the effect on the landowner of the landowner's denial to the operator of access to the site as described in section 5.2(d) of The Bituminous Mine Subsidence and Land Conservation Act.

(ii) The operator's attempt to conduct a survey.

(iii) The landowner failed to authorize access to the operator to conduct a survey within 10 days of receipt of the operator's notice of intent to conduct a survey.

(b) *Restoration or replacement of water supplies*. When underground mining activities conducted on or after August 21, 1994, affect a public or private water supply by contamination, diminution or interruption, the operator shall promptly restore or replace the affected water supply with a permanent alternate source which adequately serves the premining uses of the water supply and any reasonably foreseeable uses of the water supply. The operator shall be relieved of any responsibility under The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.1—1406.21) to restore or replace a water supply if the operator demonstrates that one of the provisions of § 89.152 (relating to water supply replacement: special provisions) relieves the operator of further responsibility. This subsection does not apply to water supplies affected by underground mining activities which are covered by Chapter 87 (relating to surface mining of coal).

* * * * *

(e) *Temporary water supplies*.

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

(2) An operator shall promptly provide a temporary water supply if the operator or the Department finds that the operator's underground mining activities have caused contamination, diminution or interruption of an EPACT water supply, and the landowner or water user is without a readily available alternate source of water. This requirement applies regardless of whether the water supply is located within, or outside of, the rebuttable presumption area.

(3) The temporary water supply provided under this subsection must meet the requirements of subsection (f)(2) and provide a sufficient amount of water to meet the water supply user's needs.

(f) *Adequacy of permanently restored or replaced water supply*. A permanently restored or replaced water supply shall include any well, spring, municipal water supply system or other supply approved by the Department, which meets the criteria for adequacy as follows:

(1) *Reliability, maintenance and control*. A restored or replaced water supply, at a minimum, must:

(i) Be as reliable as the previous water supply.

(ii) Be as permanent as the previous water supply.

(iii) Not require excessive maintenance.

(iv) Provide the owner and the user with as much control and accessibility as exercised over the previous water supply.

(2) *Quality*. A restored or replaced water supply will be deemed adequate when it differs in quality from the premining water supply, if it meets the Pennsylvania Safe Drinking Water Act (35 P. S. §§ 750.1—750.20), or is comparable to the premining water supply when that water supply did not meet these standards.

(3) *Adequate quantity*. A restored or replaced water supply will be deemed adequate in quantity if it meets one of the following:

(i) It delivers the amount of water necessary to satisfy the water user's needs and the demands of any reasonably foreseeable uses.

(ii) It is established through a connection to a public water supply system which is capable of delivering the amount of water necessary to satisfy the water user's needs and the demands of any reasonably foreseeable uses.

(iii) For purposes of this paragraph and with respect to agricultural water supplies, the term reasonably foreseeable uses includes the reasonable expansion of use where the water supply available prior to mining exceeded the farmer's actual use.

(4) *Water source serviceability*. A replacement of a water supply must include the installation of any piping, pumping equipment and treatment equipment necessary to put the replaced water source into service.

(5) *Cost to landowner or water user*. A restored or replacement water supply must meet the following costs criteria:

(i) The restored or replacement water supply may not cost the landowner or water user more to operate and maintain than the previous water supply.

(ii) If the operation and maintenance costs of the restored or replacement water supply are more than the operation and maintenance costs of the previous water supply, the operator shall provide for the permanent payment of the increased operating and maintenance cost of the restored or replacement water supply.

(iii) Upon agreement by the operator and the landowner or water user, the obligation to pay the increased operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present

worth of the increased annual operation and maintenance costs for a period agreed to by the operator and the landowner or water user.

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

(a) Whenever a landowner or water supply user experiences contamination, diminution or interruption of a water supply which is believed to have occurred as a result of underground mining activities, the landowner or water user shall notify the operator. The operator shall diligently investigate the water loss. This subsection does not apply to water supplies affected by underground mining activities which are governed by Chapter 87 (relating to surface mining of coal).

(b) The Department will order the operator to provide temporary water to the landowner or water supply user within 24 hours of issuance of the order if the following apply:

(1) No alternate temporary water supply is available to the landowner or water user.

(2) The water supply is contaminated, diminished or interrupted.

(3) The water supply is located within the rebuttable presumption area.

(4) The landowner notified the operator of the water supply problem.

(c) If the affected water supply has not been restored or an alternate water supply has not been provided by the operator or if the operator provides and later discontinues an alternate source, the landowner or water supply user may so notify the Department and request that the Department conduct an investigation in accordance with the following procedure:

(1) Within 10 days of notification, the Department will commence an investigation of landowner's or water supply user's claim.

(2) Within 45 days of notification, the Department will make a determination of whether the contamination, diminution or interruption was caused by the operator's underground mining activities. The Department will notify the affected parties of its determination within 10 days of completing the investigation.

(3) If the Department determines that the operator's underground mining activities caused the water supply to be contaminated, diminished or interrupted, the Department will issue any orders that are necessary to assure compliance with The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. §§ 1406.1—1406.21) and this chapter.

§ 89.152. Water supply replacement: special provisions.

(a) In the case of an EPACT water supply, an operator may not be required to restore or replace the water supply if one of the following has occurred:

(1) The Department has determined that a replacement water supply meeting the criteria in § 89.145a(f) (relating to water supply replacement: performance standards) cannot be developed and the operator has purchased the property for a sum equal to the property's fair market value immediately prior to the time the water supply was affected or has made a one-time payment equal to the difference between the property's fair market value determined immediately prior to the time the water supply was affected and the fair market value determined at the time payment is made.

(2) The landowner and operator have entered into a valid voluntary agreement under section 5.3(a)(5) of The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. § 1406.5c(a)(5)) which does not require restoration or replacement of the water supply and the Department has determined that an adequate replacement water supply could feasibly be developed.

(3) The operator can demonstrate one of the following:

(i) The contamination, diminution or interruption existed prior to the underground mining activities as determined by a premining survey, and the operator's underground mining activities did not worsen the preexisting contamination, diminution or interruption.

(ii) The contamination, diminution or interruption occurred more than 3 years after underground mining activities occurred.

(iii) The contamination, diminution or interruption occurred as the result of some cause other than the underground mining activities.

(b) In the case of a water supply other than an EPACT water supply, an operator will not be required to restore or replace a water supply if the operator can demonstrate one of the following:

(1) The contamination, diminution or interruption existed prior to the underground mining activities as determined by a premining survey, and the operator's underground mining activities did not worsen the preexisting contamination, diminution or interruption.

(2) The contamination, diminution or interruption is due to underground mining activities which occurred more than 3 years prior to the onset of water supply contamination, diminution or interruption.

(3) The contamination, diminution or interruption occurred as the result of some cause other than the underground mining activities.

(4) The claim for contamination, diminution or interruption of the water supply was made more than 2 years after the water supply was adversely affected by the underground mining activities.

(5) That the operator has done one of the following:

(i) Has purchased the property for a sum equal to the property's fair market value immediately prior to the time the water supply was affected or has made a one-time payment equal to the difference between the property's fair market value determined immediately prior to the time the water supply was affected and the fair market value determined at the time payment is made.

(ii) The landowner and operator have entered into a valid voluntary agreement under section 5.3 of The Bituminous Mine Subsidence and Land Conservation Act which does not require restoration or replacement of the water supply or authorizes a lesser amount of compensation to the landowner than provided by section 5.3(a)(5) of The Bituminous Mine Subsidence and Land Conservation Act.

(c) This section does not apply to underground mining activities which are governed by Chapter 87 (relating to surface mining of coal).

[Pa.B. Doc. No. 05-1944. Filed for public inspection October 21, 2005, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CHS. 91 AND 92]
Concentrated Animal Feeding Operations and Other Agricultural Operations

The Environmental Quality Board (Board) by this order amends §§ 91.1, 91.35, 91.36, 92.1 and 92.5a. These amendments conform current Department of Environmental Protection (Department) regulations to the revised Federal regulations for concentrated animal feeding operations (CAFOs). The amendments also make some substantive and organizational changes to existing regulations regarding agricultural operations in this Commonwealth.

These amendments were adopted by the Board at its meeting on June 21, 2005.

A. *Effective Date*

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. *Contact Persons*

For further information, contact Cedric Karper, Chief, Division of Conservation Districts and Nutrient Management, Bureau of Watershed Management, Rachel Carson State Office Building, P. O. Box 8465, Harrisburg, PA 17105-8465, (717) 783-7577; or Douglas Brennan, Assistant Counsel, Bureau of Regulatory Counsel, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA 17101-2301, (717) 787-9373. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department's website: www.dep.state.pa.us.

C. *Statutory Authority*

The final-form rulemaking is being made under the authority of sections 5(b)(1) and 402 of The Clean Streams Law (35 P. S. §§ 691.5(b)(1) and 691.402) and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20).

D. *Background*

1. *Purpose.*

The primary purpose of these revisions to Chapter 92 (relating to National Pollutant Discharge Elimination System permitting, monitoring and compliance) is to allow the Commonwealth to maintain delegation of the National Pollutant Discharge Elimination System (NPDES) CAFO program, which was revised by the Federal government in 2003. The purpose of these revisions to Chapter 91 is to strengthen existing requirements for pollution control and prevention at agricultural operations which are not subject to the NPDES permit requirements of Chapter 92 relating to CAFOs. In particular, the proposed Chapter 91 (relating to general provisions) revisions clarified and strengthened the requirements related to agricultural discharges, including provisions for manure storage facilities and land application of manure. Those revisions included a provision which authorized the Department to establish "appropriate vegetated buffers and setbacks . . . to protect and maintain water quality." The final Chapter 91 regulation also contains a setback requirement, although it has been revised to focus on the highest risk operations.

The revisions are also intended to implement a regulatory program for livestock and poultry operations that reasonably controls the risk to the environment in a sustainable way, with due regard for the economic importance of the industry and other societal benefits, using the input from the public and important stakeholders and relying as much as possible on the existing successful CAFO program.

The most recent (2002) Commonwealth report on the quality of surface waters listed agriculture as the second leading cause of impairment. Improper management of nutrients such as manure and fertilizers, as well as lack of stormwater runoff controls, are the primary contributing factors to these water quality problems around the Commonwealth. Livestock and poultry operations, including large-scale operations whose animals generate large amounts of manure, present risks of water pollution. In addition, many of the Commonwealth's agricultural operations are in the Chesapeake Bay watershed. This requires a special focus on best management practices to protect and restore that important resource, and to meet Pennsylvania's legal obligations under the Federal Clean Water Act.

At the same time, agriculture is an important industry in this Commonwealth, providing livelihood for thousands of citizens and their families. In addition, agricultural lands provide significant aesthetic and environmental benefits to this Commonwealth. Finally, agriculture is an important part of the cultural fabric of this Commonwealth.

2. *Federal CAFO Regulations.*

To address the environmental risks posed by large-scale livestock and poultry operations, the United States Environmental Protection Agency (EPA) promulgated a comprehensive set of revised regulations governing CAFOs in February 2003. These regulations greatly expanded existing Federal rules put in place over 20 years ago, to strengthen the existing regulatory program for CAFOs. The regulations revised 40 CFR Parts 122 and 412 (relating to EPA administered permit programs: the National Pollutant Discharge Elimination system; and concentrated animal feeding operations (CAFO) point source category).

The Department already had in place NPDES permit regulations for CAFOs in § 92.5a (relating to CAFOs). These regulations were previously approved by the EPA as part of a delegation agreement to administer the Federal program in this Commonwealth. To maintain delegation of the Federal program, the Department must demonstrate that its regulations meet the new Federal requirements. In the case of the Commonwealth, the existing CAFO regulations, along with Chapter 83, Subchapter D (relating to nutrient management) promulgated by the State Conservation Commission (Commission), Chapters 91 and 102 (relating to erosion and sediment control), previously contained many of the new Federal requirements. These regulations have been in place for several years and have achieved wide acceptance in the agricultural community as well as various stakeholders such as Department regional offices, the Department of Agriculture, the Commission, the Nutrient Management Advisory Board and the county conservation districts.

3. *Public Comment.*

These final regulations reflect public comments received after the proposed changes were published in August 2004. For instance, the preponderance of comments received on manure storage and appropriate setbacks and buffers in the proposed Chapter 91 revisions urged clear, simple and enforceable standards to apply to farm operations based upon science rather than regulatory categories or Department discretion. Similar discussions arose in response to the administration's Agriculture, Communities and Rural Environment initiative (ACRE), during the public comment period for the proposed regulations. ACRE is the result of Governor Rendell's directive to the Secretaries of Agriculture and Environmental Protection to develop a comprehensive, progressive plan to support farmers' rights under the act of June 10, 1982 (P. L. 454, No. 133), known as the Right-to-Farm Law (3 P. S. §§ 951—957) and to address the concerns over animal feeding operations that spawn ordinances restricting farming. The Governor directed the agencies to require minimum buffer areas where no manure can be applied for all CAFOs and CAOs, and that farms that import manure must meet the same buffer requirements as the farm that produces the manure. Therefore, these final regulations establish a minimum 100 foot setback or 35 foot vegetated buffer for all CAFOs, CAOs and importing farms, which correspond to minimum National criteria for nutrient reduction. In addition, these final regulations require water quality management permits for new or expanded manure storage facilities based upon volume and criteria related to potential for pollution.

The CAFO Stakeholder Group (Group) that assisted the Department in developing the proposed rulemaking also assisted with these final regulations. The Department has also sought the advice of the Agricultural Advisory Board in developing these final regulations.

E. *Summary of Changes from the Proposed Rulemaking*

The regulatory scheme for agricultural operations contains several levels of requirements, which increase in stringency as the risk of impacts to water resources increases. The final rulemaking makes changes at several of those levels, and has been developed concurrently with regulation changes by the Commission under Chapter 83, Subchapter D (relating to nutrient management).

1. *CAFOs.*

One main focus of this final rulemaking is CAFOs, the largest livestock and poultry operations in this Commonwealth. The basic requirement for CAFOs will continue to be to obtain a permit under the Department's program implementing the NPDES Program. The NPDES permit program has several fundamental requirements, some of which are new or which contain new elements to conform to the new Federal requirements. Underlying the NPDES requirements are several other levels of requirements:

a. *Manure Management.* First, agricultural operations in this Commonwealth, including CAFOs, must meet construction and operation requirements for manure storage, and for land application. These broad based regulations are currently described in §§ 91.35 and 91.36 (relating to wastewater impoundments; and pollution control and prevention at agricultural operations), which are administered by the Department. The final rule consolidates them into one section, § 91.36. CAFOs, which have large and higher risk manure storage facilities, have special permitting requirements above and beyond those of most other livestock and poultry operations, and this final rule preserves that extra protection. For swine, poultry and veal operations, these protections are increased, consistent with the revised Federal CAFO regulations.

b. *Conservation Practices.* Second, all agricultural operations that conduct plowing and tilling, including CAFOs, must develop and implement an erosion and sediment control plan to limit runoff, under Chapter 102 (relating to erosion and sediment control), also administered by the Department. These plans are important to the prevention of surface water pollution by phosphorus from manure and other nutrient sources applied to the land as fertilizer. The final rule specifies that the erosion and sediment control plans must be submitted with CAFO permit applications.

c. *Nutrient Management.* Third, the approximately 840 CAOs (some of which are also CAFOs) regulated under Chapter 83 (relating to State Conservation Commission) based on their concentration of animals (as opposed to their absolute numbers of animals) must meet a series of requirements related to nutrient management. These requirements currently include testing of soils and manure for nitrogen and phosphorus, determination of agronomic needs of the crops based on nitrogen (as well as phosphorus, after a decision of the Environmental Hearing Board (EHB) in April 2004), land application of manure based on those tests and on crop needs, and stormwater runoff controls around the farmstead. These requirements, including the need to have a nutrient management plan (NMP) approved by the local county conservation district, are also imposed on CAFOs under the existing and final regulations. The NMPs are subject to appeal to the EHB.

Chapter 83 is promulgated by the Commission and is administered primarily through county conservation districts. Extensive revisions to Chapter 83 were proposed in a rulemaking at the same time the Board proposed changes to these regulations. (Editor's Note: For the document relating to those proposed revisions see 34 Pa.B. 4361 (August 7, 2004).) The Chapter 83 final regulations are expected to be approved by the Commission later in 2006.

The amendments to Chapter 83 include new, additional requirements for addressing the impacts on water quality from phosphorus (in addition to nitrogen) and more frequent soil and manure testing for nitrogen and phosphorus. They also are expected to significantly increase the regulation of the export of manure. These amendments are relevant to CAFOs because § 92.5a requires CAFOs to have an NMP under Chapter 83.

Although it has been important to keep the Chapter 83 and the CAFO and other agricultural operations regulation updates on a coordinated schedule through development, they can now proceed independently to final. These final regulations can be fully implemented and satisfy Federal CAFO requirements independent of finalization of revisions to Chapter 83. This is important because of the Federal deadlines of April 2005 for states to update their CAFO program requirements and various dates in 2006 for CAFOs to implement the new requirements, under the Federal CAFO regulations. This is possible primarily because of an EHB decision in 2004 and subsequent Commission action that required immediate implementation of phosphorus-based nutrient management planning. Other significant Federal CAFO requirements are independently addressed in these final regulations and in the existing Chapter 83 requirements.

d. *Federal CAFO Requirements.* Finally, Chapter 92 contains the Department's NPDES regulations and

§ 92.5a governs CAFOs. Section 92.5a incorporates the other requirements already applicable to agricultural operations found in Chapters 83, 91 and 102, and adds special requirements for CAFOs within the Department's NPDES permit program. These final regulations make several changes to § 92.5a, as well as the related definitions in § 92.1 (relating to definitions), to conform to the new EPA CAFO regulations:

- A revised definition of "CAFO" expands the scope of these regulations to include all Federally defined large CAFOs as well as all operations with over 1,000 animal equivalent units (AEUs) and CAOs with greater than 300 AEUs.
- A new definition of "livestock" to include horses.
- Definitions of "manure" and "agricultural process wastewater."
- A timetable for poultry operations with dry manure to apply for NPDES CAFO permits.
- Setback requirements at CAFOs from surface waters for land application of manure.
- Recordkeeping and reporting requirements that are identified in the NPDES permit and also in the Department's implementation strategy to be published later in 2005.
- A PPC plan for chemicals.
- Implementation of management controls on the export of manure away from the CAFO.
- Compliance with 3 Pa.C.S. §§ 2301—2389 (relating to Domestic Animal Law) when handling animal mortality.
- Effluent limits and conditions for treated wastewater discharges from CAFOs.
- Limits on field storage of CAFO manure and proper management of CAFO feed and supply storage areas.

e. *Definition of a "CAFO."* This final rulemaking amends the definition of a "CAFO" to alter the way in which a discharge to surface waters from the operation would trigger the CAFO requirements. The existing regulations consider any agricultural operation, no matter how small, to be a CAFO if it has a discharge to surface waters. The final rulemaking replaces this broad CAFO designation authority with an emphasis on enforcing The Clean Streams Law requirements to address unauthorized discharges. This change is based on the focus of the CAFO regulations: large animal operations. For the most part, these regulations do not allow discharges. Smaller operations that have discharges are subject to other, more basic requirements and prohibitions under The Clean Streams Law. The Board believes that the CAFO program should keep its focus on permitting (and monitoring) larger operations. The final rulemaking adds new language highlighting The Clean Streams Law general prohibitions against unpermitted discharges to surface waters including medium and small operations with discharges that would otherwise lead to a CAFO permitting process under the Federal regulations.

In addition, the Board added a category of operations that will be a CAFO—operations designated as large CAFOs by the EPA. The purpose of this provision is to satisfy the new Federal definition of a CAFO, which does not use the Pennsylvania approach of "animal equivalent units."

f. *Comparison of Federal CAFO Regulations and the Pennsylvania CAFO Program.*

The following table summarizes the requirements in the Federal regulations and the associated Pennsylvania regulations that are used in this final rulemaking to meet those requirements.

Issue	*EPA—New Rule*	*Department/Commission Regulations*
Definitions	§§ 122.23(b)(4), (6) and (7); and 412.4(b)	§ 92.1
NMP	§§ 122.42(e)(1) and 412.4(c)(1)	§ 92.5a(f)(1) and Chapter 83
—Storage	§ 122.42(e)(1)(i)	§§ 91.36(a), 92.5a(e)(1)(ii), (3) and (6) and § 92.5a(f)(4), (7)
—Dead animals	§§ 122.42(e)(1)(ii) and 412.37(a)(4)	§ 92.5a(f)(3)
—Stormwater management	§ 122.42(e)(1)(iii)	§ 92.5a(f)(1) and Chapter 83
—Animal contact with waters of the United States	§ 122.42(e)(1)(iv)	§ 92.5a(f)(1) and Chapter 83
—Chemical handling	§ 122.42(e)(1)(v)	§ 92.5a(f)(1)
—Conservation practices	§ 122.42(e)(1)(vi)	§ 92.5a(f)(1) and Chapters 83 and 102
—Testing of manure and soil	§§ 122.42(e)(1)(vii) and 412.4(c)(3)	§ 92.5a(f)(1) and Chapter 83
—Land application protocols	§§ 122.42(e)(1)(viii) and 412(c)(2)	§ 92.5a(f)(1) and Chapter 83
—Recordkeeping for NMP	§§ 122.42(e)(1)(ix) and (e)(2) and 412.37(b) and (c)	§ 92.5a(f)(5)
Manure transfer (export)	§ 122.42(e)(3)	§ 92.5a(e)(1) and (f)(1) and Chapter 83
Annual report	§ 122.42(e)(4)	§ 92.5a(f)(5)
Nitrogen and phosphorus	§ 412.4(c)(1)	§ 92.5a(f)(1) and Chapter 83 (Including 2004 EHB decision on P-Based planning)

Issue	*EPA—New Rule*	*Department/Commission Regulations*
Maintenance of land application equipment	§ 412.4(c)(4)	§ 92.5a(f)(1) and Chapter 83
Setback requirements	§ 412.4(c)(5)	§ 92.5a(e)(1)(i)
Discharge prohibition from production areas	§ 412	§§ 91.36(a)(1) and (5), 92.5a(f)(1) and (7)
Visual inspections of production area	§ 412.37(a)(1) and (3)	§ 92.5a(f)(1) and Chapter 83
Depth markers	§ 412.37(a)(2)	§§ 91.36(a) and 92.5a(f)(4)

2. *Other Agricultural Operations; Setbacks and Buffers.*

The Group that assisted the Department in the development and finalization of this final rulemaking identified smaller livestock and poultry operations as causing a substantial portion of pollution problems created by agriculture. To address this, the amendments to § 91.36(c) emphasize the responsibility of all agricultural operations to prevent the discharge of pollutants to waters of this Commonwealth under The Clean Streams Law. In addition, the amendments in § 91.36(a)(4) require permits for new or expanded liquid or semisolid manure storage at operations smaller than those currently required to obtain a permit, to minimize the risk of impacts to water resources. Section 91.36(a)(4) also establishes specific size, type and location criteria for permit requirements for new or expanded manure storage facilities.

In addition, the Board has narrowed the focus of § 91.36(b)(2), which now establishes minimum setback and buffer requirements for (1) CAOs and farms which import manure from CAOs, as well as for (2) CAFOs and their manure import sites. The setbacks and buffers for CAOs and importers only apply to certain key types of waterbodies. The Board recognizes that the scope of this provision includes farms that are also regulated under the Nutrient Management Act (3 P. S. §§ 1701—1718) which was repealed by Act 38-2005 hereinafter referred to as Act 38. Therefore, the Board has included a special provision in its Order that terminates the part of this subsection applicable to CAOs and their importers, if the Commission promulgates regulations which impose, at a minimum, the same setback and buffer requirements on CAOs and their importers. This special provision is not applicable to CAFOs or their importers, and is not intended to affect the duty of all agricultural operations to comply with The Clean Streams Law and other provisions in Chapters 91 and 92.

3. *Chapter 91.*

§ 91.1. Definitions of "CAO" and "CAFO" are added to explain key terms in the setback provision in § 91.36(b)(2). A definition of "manure storage capacity" is added to clarify the meaning of § 91.36(a)(4) regarding the volume of storage that will be used in determining if a permit is required. A definition of "agricultural process wastewater" is added to identify other wastewaters such as egg wash water and milkhouse wastewater that are part of normal farming operations and regulated under § 91.36. A definition of "manure" has been added for clarity. The proposed definition of "setback" has been deleted.

§ 91.36(a)(1). The references to the Manure Management Manual and the Pennsylvania Technical Guide in this paragraph, and in § 91.36(a)(2) and (b)(1)(i), are revised to properly describe the purpose of the practices, standards and criteria that are contained in these guidance documents. They are intended to be used as tools for agricultural operations to meet the basic regulatory requirements, and avoid the need to obtain a permit or approval from the Department.

§ 91.36(a)(2), (3) and (4). The categories of manure storage facilities requiring permits is clarified. A new requirement for operators to maintain copies of engineer certifications has been added.

§ 91.36(a)(6)(i). The freeboard requirements for manure storage facilities are simplified to be consistent with the Pennsylvania Technical Guide and to allow a minimum 6 inch freeboard for storage facilities not exposed to rainfall.

§ 91.36(a)(7). The general statement that the Department may require any manure storage facility to obtain a permit has been deleted. This authority already exists for the types of situations where this would be applied.

§ 91.36(b)(2). This subsection (b)(2) is revised from the general provision for requiring setbacks and buffers adequate to protect water quality at any agricultural operation, to target CAOs, CAFOs and CAFO/CAO manure import sites, for implementation of a 100 foot setback or 35 foot vegetated buffer. For CAOs and importers, the setbacks and buffers only apply to certain key types of waterbodies. The Board has included a special provision in its order that terminates the part of this subsection applicable to CAOs and their importers, if the Commission promulgates regulations which impose, at a minimum, the same setback and buffer requirements on CAOs and their importers. This special provision is not applicable to CAFOs or their importers, and is not intended to affect the duty of all agricultural operations to comply with The Clean Streams Law or other provisions of Chapters 91 and 92.

§ 91.36(c)(2). This provision is added to clarify that operations that would otherwise be considered small and medium CAFOs under the Federal regulations will be addressed as enforcement cases under The Clean Streams Law.

4. *Chapter 92.*

§ 92.1. The definition of "CAFO" is revised to eliminate the designation of any operation as a CAFO and to delete operations with "authorized discharges." These changes help to simplify the definition and eliminate objectionable broad authority to designate operations as CAFOs. To address concerns over consistency with the Federal definition relative to small and medium sized operations, operations with illegal discharges will be addressed as Clean Streams Law enforcement cases.

§ 92.1. The definition of "setback" is revised to specify the point from which setbacks are to be measured and examples of surface water conduits are added to be consistent with the Federal definition of "setback." Defini-

tions of "agricultural process wastewater" and "manure" are added to be consistent with the Federal definitions. A revised definition of "CAOs" is included to be consistent with the § 91.1 definitions.

§ 92.5a(d). A new provision was added to ensure that all operations that are required to obtain permits have a permit application deadline which applies to them.

§ 92.5a(e)(1)(ii). A limit of 14 days for stockpiling CAFO manure on CAFO operations without cover or protection is added. The EPA has stipulated this limit, and persons representing the category of CAFO operations that are impacted have indicated that this is manageable. Given the current "CAFO" definition, this is an appropriate requirement for management of dry manure from these operations. There are no expectations to extend this requirement to other operations. Manure stockpiling for other high-risk operations will be regulated through the Nutrient Management Act regulations and any discharge of pollutants from any manure stockpiles is subject to enforcement under The Clean Streams Law.

§ 92.5a(e)(5) and (f)(6). With the change in the CAFO definition to eliminate confusion by deleting the reference to operations with an "authorized discharge," language was added to this subsection to address the same issue—to allow CAFO permit applicants to include design plans and specifications for manure treatment systems with a treated wastewater discharge. This is to encourage innovative technologies, including energy generation projects, by consolidating water quality permitting requirements. In these cases, the permit will include effluent limits and conditions determined in the same way as they are for other NPDES discharge permits as required by § 92.2a.

§ 92.5a(e)(6) and (f)(7). For consistency with Federal requirements, a provision was added to account for runoff from CAFO feed and supply storage areas in CAFO permit applications. This runoff can be a source of pollution. Applicants may address this runoff as part of the nutrient management plan or as separate plans and practices submitted with the application.

F. *Summary of Comments and Responses on the Proposed Rulemaking*

Written comments were received from 191 commentators during the public comment period between August 7, 2004, and November 5, 2004. Oral testimony was also received at two public hearings conducted in Mechanicsburg, PA and DuBois, PA in October 2004.

Comments concerned the following general topics: the definition of a CAFO, setback and buffer requirements for land application of manure (both for CAFOs and for all other agricultural operations), manure storage facilities, economics, enforcement/accountability, CAFO permit review considerations and CAFO permit conditions. In general, as one would expect, environmental commentators advocated stricter, more expansive regulatory requirements, while farming interests wanted to limit the requirements. The comment/response document provides detailed responses to these comments, explaining the Department's position.

1. *Definition of a "CAFO"*

Based on the comments received, the definition of "CAFO" has been revised to delete language regarding: (1) the general authority for the Department to designate operations as CAFOs in certain circumstances; and (2) operations with treated discharge authorized by the Department. These provisions created unnecessary confusion and concern.

In addition, the EPA and others commented on the absence of "medium" and "small" CAFOs as described in the Federal CAFO definition, which requires that a discharge be present at the operation. In response to these comments additional language was included in § 91.36(c) to clarify the Department's intent to address these situations as violations with enforcement actions under The Clean Streams Law. CAFOs with authorized discharges—treated wastewater discharges—are now addressed in the provisions for CAFO permit applications and permit conditions.

2. *Setbacks and Buffer Requirements for Land Application of Manure*

General provisions for all agricultural operations were proposed for manure application setbacks and vegetated buffers adequate to protect water quality. Again, a wide range of comments resulted from this provision. The Federal standard, 100 foot setback or 35 foot buffer for CAFO operations, remains in the final regulation, and a parallel provision was added to § 91.36(b) for consistency. For CAOs, and for CAO and CAFO manure import sites, § 91.36(b) now contains a focused Statewide setback/buffer requirement to prevent pollution from land application of manure, using the same distances as for CAFOs. The Board has included a special provision in its order that terminates the part of this subsection applicable to CAOs and their importers, if the Commission promulgates regulations which impose, at a minimum, the same setback and buffer requirements on CAOs and their importers. This special provision is not applicable to CAFOs or their importers, and is not intended to affect the duty of all agricultural operations to comply with The Clean Streams Law or other provisions of Chapters 91 and 92. Consistent with the NPDES program, the CAFO setbacks and buffers apply to all surface waters as defined in Chapter 92, whereas the setbacks for the other operations only apply to certain key types of waterbodies.

3. *Manure Storage Facilities*

Similar comments were raised concerning general designation provisions for permit requirements for manure storage. Refinements to the Manure Management Manual under existing authority can be used to better define acceptable standards for manure and agricultural process wastewater storage in Special Protection and agriculture impaired watersheds. The specific requirement for manure storage permits—new and expanding, liquid and semisolid manure storage ponds between 1 million and 2.5 million gallons in special protection and agriculture impaired watershed and all new and expanding liquid and semisolid manure storage facilities over 2.5 million gallons—remains in these final regulations. Generally, comments were not critical of these requirements.

The proposed CAFO regulations did not have a provision for field stockpiling of manure because these provisions are being included in the nutrient management regulation revisions. CAFOs are subject to those requirements. The EPA commented that the proposed revisions in the Nutrient Management regulations did not meet their limitations on field stacking. As a result a 14-day limit of stockpiling of CAFO manure on CAFO operations was added to the final CAFO regulations. Through the work group formed to assist with this regulation development and follow up discussions with those impacted by this addition it was determined that this would be an

inconvenience but manageable. There is no expectation to expand this requirement to other operations. Other operations will fall under the requirements of the nutrient management regulations and Chapter 91. Any discharge of pollutants from any manure stockpile is subject to enforcement action under The Clean Streams Law.

4. *Economics*

A number in the regulated community raised the concern of cost. In general, the final regulations reduce these concerns. The incremental costs of meeting new requirements under the revised regulations is minimal other than the cost of obtaining a permit in some cases since most practices and standards should have already been met under existing requirements.

5. *Enforcement/Accountability*

Comments were provided on the level of enforcement of existing and new requirements. Noncompliance with existing requirements is a cause of agriculturally driven water quality impairment. Regulations alone will not solve this concern. Allocation and alignment of resources is important. A reorganization to give higher priority and focus to nonpoint sources, including agriculture, and additions to compliance resources for these programs are planned by the Department.

G. *Benefits, Costs and Compliance*

1. *Benefits*

Human health and the environment will benefit because agricultural operations, including CAFOs, will be required to effectively manage the manure and agricultural process wastewater that they produce. The largest and most concentrated operations are targeted under the CAFO program. The Department estimates that there will be a total of 350 CAFOs in this Commonwealth, as defined under this final-form rulemaking (there are approximately 160 now), mostly in the central parts of this Commonwealth. The population of the Susquehanna River Basin, in particular, will benefit from enhanced water quality and associated economic and recreational benefits. The final-form rulemaking will also complement the Commonwealth's efforts to meet its commitments to the Chesapeake Bay Program and will help to address agricultural nonpoint sources of pollution that are among the most significant sources of water quality impairment in this Commonwealth. It clarifies the regulation of agricultural process wastewater on agricultural operations. The CAFO permitting process will also help farmers critically assess the costs and benefits of developing CAFOs before they make substantial financial commitments.

2. *Compliance Costs*

There will be compliance costs for some agricultural operations around this Commonwealth, especially existing poultry producers that will be newly regulated as CAFOs, new or expanded operations which become CAFOs, some agricultural operations with manure storage capacity greater than 1 million gallons, and operations with additional costs associated with setback/buffer requirements.

The approximately 190 operations that are expected to be directly affected by the new CAFO regulations should not be surprised by the changes. The EPA began soliciting comments on the proposed Federal rule changes about 4 years ago. Fact sheets, reports and the Federal AFO/CAFO Strategy were widely circulated to both government and industry for review and comment. The large poultry and swine integrators have been expecting these changes. In addition, Department staff have met with the poultry and swine representatives during the development of the proposed rulemaking. The technical capacity in the private sector for preparing the permit applications exists, although the timeline established by the Department in § 92.5a(b)—(d) will dictate the burden placed on these resources.

The Department does not have detailed information on the anticipated CAFO compliance costs in this Commonwealth. Using information from the EPA on the average costs of obtaining an NPDES CAFO permit, costs are estimated to be no more than the following:

—Existing operation, general permit: $1,000 to $2,500.

—Existing operation, individual permit: $1,500 to $3,500.

—New or expanded operation: $10,000 to $15,000.

In addition to the costs for obtaining a CAFO permit, smaller CAFOs and some agricultural operations will incur expenses to obtain permits for large manure storage facilities. The Department estimates those costs to be up to $1,500 to $3,500 per storage facility.

3. *Compliance Assistance Plan*

To help these livestock and poultry operations meet the proposed rulemaking's requirements, Congress increased funding for land and water conservation programs in the 2002 Farm Bill by $20.9 billion Nationwide, bringing total funding for these programs to $51 billion over the next decade. The Environmental Quality Incentives Program (EQIP) was authorized at $200 million in 2002 and will ultimately go up to $1.3 billion in 2007; 60% of those funds must go to livestock operations. The Commonwealth's allocation is approximately $8 to $10 million annually. New technology is also being perfected to aid farmers in meeting the proposed rulemaking.

Several financial assistance programs are available to livestock producers in this Commonwealth. Federal grants, such as EQIP and the Conservation Reserve Enhancement Program are available. State cost share and grant programs such as the Chesapeake Bay Program, Growing Greener and the Nutrient Management Program grants and low interest loans through Agrilink are also available.

Additionally, compliance assistance efforts following the enactment of the new regulations will be in the form of education and outreach by the conservation districts, Penn State Extension and Department trainings and fact sheets.

4. *Paperwork Requirements*

The final rulemaking will cause no additional paperwork (for example, reporting forms, recordkeeping, application forms, letters, public notices, and the like) for existing CAFOs in this Commonwealth.

It should be noted that the Department has been actively endorsing electronic data reporting instead of conventional paper form reporting to water systems throughout this Commonwealth. If employed, electronic data reporting would greatly reduce a CAFO's current paperwork requirements.

H. *Pollution Prevention*

Management of agricultural manure under these regulations is based on the premise of recycling the nutrients for crop production. Properly managing and applying manure for crop growth prevents pollution and reduces the need for commercial fertilizers.

I. *Sunset Review*

The final rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on July 28, 2004, the Department submitted a copy of the notice of proposed rulemaking, published at 34 Pa.B. 4353, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on August 24, 2005, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on August 25, 2005 and approved the final-form regulations.

K. *Findings of the Board*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) These regulations do not enlarge the purpose of the proposal published at 34 Pa.B. 4353 (August 7, 2004).

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. *Order of the Board*

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapters 91 and 92, are amended by amending §§ 91.1, 91.35, 91.36, 92.1 and 92.5a to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) Section 91.36(b)(2)(i) and (ii) shall remain in effect until the effective date of regulations promulgated by the Commission that establish requirements which provide, at a minimum, the same setback and buffer requirements for concentrated animal operations, and for agricultural operations that import manure from those operations, established in § 91.36(b)(2). The Department will publish notice in the *Pennsylvania Bulletin* if those regulations are promulgated. Nothing in this order is intended to affect the duty of any agricultural operation to comply with The Clean Streams Law or any other provision of Chapters 91 and 92.

(c) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(d) The Chairperson of the Board shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(e) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(f) This order shall take effect immediately upon publication.

KATHLEEN A. MCGINTY,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 34 Pa.B. 5068 (September 10, 2005).)

Fiscal Note: Fiscal Note 7-391 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 91. GENERAL PROVISIONS

GENERAL

§ 91.1. Definitions.

The definitions in section 1 of The Clean Streams Law (35 P. S. § 691.1) apply to this article. In addition, the following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

AEU—Animal equivalent unit—One thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit, as defined in 3 Pa.C.S. § 503 (relating to definitions).

Act—The Clean Streams Law (35 P. S. §§ 691.1—691.801).

Agricultural operations—The management and use of farming resources for the production of crops, livestock or poultry as defined in 3 Pa.C.S. § 503.

Agricultural process wastewater—Wastewater from agricultural operations, including from spillage or overflow from livestock or poultry watering systems; washing, cleaning or flushing pens, milkhouses, barns, manure pits; direct contact swimming, washing or spray cooling of livestock or poultry; egg washing; or dust control.

Application—The Department's form for requesting approval to construct and operate a wastewater collection, conveyance or treatment facility under a new water quality management permit, or the modification, revision or transfer of an existing water quality management permit.

CAFO—Concentrated animal feeding operation—An agricultural operation that meets the criteria established by the Department in § 92.1 (relating to definitions).

CAO—Concentrated animal operation—An agricultural operation that meets the criteria established by the State Conservation Commission in regulations under 3 Pa.C.S.

Chapter 5 (relating to nutrient management and odor management) in Chapter 83, Subchapter D (relating to nutrient management).

Facility—A structure built to collect, convey or treat wastewater which requires coverage under a water quality management permit.

Federal Act—The Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251—1387).

General water quality management permit or *general permit*—A water quality management permit that is issued for a clearly described category of wastewater treatment facilities, which are substantially similar in nature.

Manure—

(i) Animal excrement, including poultry litter, which is produced at an agricultural operation.

(ii) The term includes materials such as bedding and raw materials which are commingled with that excrement.

Manure Management Manual—The guidance manual published by the Department that is entitled "Manure Management Manual for Environmental Protection," including its supplements and amendments. The manual describes approved manure management practices for all agricultural operations as required by § 91.36 (relating to pollution control and prevention at agricultural operations).

Manure storage capacity—The total volume in gallons of a manure storage facility, less any required freeboard, sufficient and available to contain all of the following:

(i) Accumulated manure and agricultural process wastewater during the storage period.

(ii) Normal precipitation less evaporation on the surface of the facility.

(iii) Normal runoff during the storage period.

(iv) The design storm precipitation and runoff (25 year or 100 year, as appropriate under § 91.36(a).

(v) Solids remaining after liquids have been removed.

Manure storage facility—A permanent structure or pond, a portion of a structure or pond, or a group of structures or ponds at one agricultural operation, utilized for the purpose of containing manure or agricultural process wastewater. This includes concrete, metal or other fabricated tanks and underbuilding structures, as well as earthen and synthetically-lined manure storage ponds.

NOI—Notice of Intent—A complete form submitted as a request for general water quality management permit coverage.

Operator—A person or other legal entity responsible for the operation or maintenance of a facility or activity subject to this chapter.

Owner—The person or other legal entity holding legal title to a facility or activity subject to this chapter.

Pennsylvania Technical Guide (Guide)—

(i) The Pennsylvania Soil and Water Conservation Technical Guide, including supplements and amendments, which is the primary technical guide published by the Pennsylvania office of the Natural Resources Conservation Service of the United States Department of Agriculture.

(ii) The Guide contains technical information, including design criteria, about conservation of soil, water, air, plant and animal resources specific to this Commonwealth.

(iii) The Guide is also referred to as the Field Office Technical Guide in Federal regulations and other documents.

Pollutant—A contaminant or other alteration of the physical, chemical or biological properties of surface water which causes or has the potential to cause pollution as defined in section 1 of the act (35 P. S. § 691.1).

Pollution prevention—Source reduction and other practices (for example—direct reuse or in-process recycling) that reduce or eliminate the creation of pollutants through increased efficiency in the use of raw materials, energy, water or other resources, or protection of natural resources by conservation.

Pollution prevention measures—Practices that reduce the use of hazardous materials, energy, water or other resources and that protect natural resources and human health through conservation, more efficient use, or effective pollutant release minimization prior to reuse, recycling, treatment or disposal.

Schedule of compliance—A schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with effluent limitations, other limitations, prohibitions or standards.

Single residence sewage treatment plant—A system of piping, tanks or other facilities serving a single family residence located on a single family residential lot which collects, disposes and treats solely direct or indirect sewage discharges from the residences into waters of this Commonwealth.

Stormwater—Runoff from precipitation, snow melt runoff and surface runoff and drainage.

Vegetated buffer—A permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for purposes that include slowing water runoff, enhancing water infiltration, and minimizing the risk of any potential pollutants from leaving the field and reaching surface waters.

Wastewater impoundment—A depression, excavation or facility situated in or upon the ground, whether natural or artificial and whether lined or unlined, used to store wastewater including sewage, animal waste or industrial waste.

Water quality management permit—A permit or equivalent document (Part II Permit) issued by the Department to authorize one of the following:

(i) The construction, erection and location of a wastewater collection, conveyance or treatment facility.

(ii) A discharge of wastewater to groundwaters of this Commonwealth.

MANAGEMENT OF OTHER WASTES

§ 91.35. Wastewater impoundments.

(a) Except as otherwise provided under subsections (c) and (d), a person may not operate, maintain or use or permit the operation, maintenance or use of a wastewater impoundment for the production, processing, storage, treatment or disposal of pollutants unless the wastewater impoundment is structurally sound, impermeable, protected from unauthorized acts of third parties, and is maintained so that a freeboard of at least 2 feet remains

at all times. The person owning, operating or possessing a wastewater impoundment has the burden of satisfying the Department that the wastewater impoundment complies with these requirements.

(b) A person owning, operating or in possession of an existing wastewater impoundment containing pollutants, or intending to construct or use a wastewater impoundment, shall promptly submit to the Department a report or plan setting forth the location, size, construction and contents of the wastewater impoundment and other information as the Department may require.

(c) Except when a wastewater impoundment is already approved under an existing permit from the Department, a permit from the Department is required approving the location, construction, use, operation and maintenance of a wastewater impoundment subject to subsection (a) in the following cases:

(1) If a variance is requested from the requirements in subsection (a).

(2) If the capacity of one wastewater impoundment or of two or more interconnected wastewater impoundments exceeds 250,000 gallons.

(3) If the total capacity of polluting substances contained in wastewater impoundments on one tract or related tracts of land exceeds 500,000 gallons.

(4) If the Department determines that a permit is necessary for effective regulation to insure that pollution will not result from the use, operation or maintenance of the wastewater impoundment.

(d) This section does not apply to:

(1) Manure storage facilities at agricultural operations, which are governed by § 91.36 (relating to pollution control and prevention at agricultural operations).

(2) Residual waste processing, disposal, treatment, collection, storage or transportation.

§ 91.36. Pollution control and prevention at agricultural operations.

(a) *Animal manure storage facilities.*

(1) Except when more stringent requirements are contained in paragraphs (2)—(5), a manure storage facility shall be designed, constructed, operated and maintained in accordance with current engineering and agronomic practices to ensure that the facility is structurally sound, water-tight, and located and sized properly, to prevent pollution of surface water and groundwater, including design to prevent discharges to surface waters during a storm up to and including a 25-year/24-hour storm.

(i) The Manure Management Manual and the Pennsylvania Technical Guide contain current engineering and agronomic practices which can be used to comply with the requirements in paragraph (1).

(ii) If the criteria in the Manure Management Manual and the Pennsylvania Technical Guide are not followed, the owner or operator shall obtain a water quality management permit or other approval from the Department for the manure storage facility.

(2) For liquid or semisolid manure storage facilities constructed after January 29, 2000, the owner or operator shall obtain a water quality management permit from the Department for the manure storage facility unless the design and construction of the facility are certified to meet the "Manure Management Manual" and "Pennsylvania Technical Guide" by a registered professional engineer. The owner or operator shall retain a copy of the certification at the operation and provide a copy to the Department upon request.

(3) In the case of a new or expanded liquid or semisolid manure storage facility located at an animal operation with over 1,000 AEUs for the first time after January 29, 2000, a water quality management permit is required.

(4) For a new or expanded liquid or semisolid manure storage facility after October 22, 2005:

(i) Where the manure storage capacity is between 1 million and 2.5 million gallons, a water quality management permit is required for any manure storage facility that is a pond and one of the following applies:

(A) The nearest downgradient stream is classified as a High Quality or Exceptional Value water under Chapter 93 (relating to water quality standards).

(B) The nearest downgradient stream has been determined by the Department to be impaired from nutrients from agricultural activities.

(ii) Where the manure storage capacity is 2.5 million gallons or more, a water quality management permit is required.

(5) For new or expanded CAFOs that commenced operations after April 13, 2003, and that include swine, poultry or veal calves, the CAFO shall prevent discharges to surface waters during a storm event up to and including a 100-year/24-hour storm from manure storage facilities that contain manure from those swine, poultry or veal calves.

(6) For a liquid or semisolid manure storage facility, the following minimum freeboard requirements apply and shall be maintained:

(i) For an agricultural operation with over 1,000 AEUs that was a new or expanded operation after January 29, 2000, a minimum 24-inch freeboard, except for enclosed facilities that are not exposed to rainfall, which must have a minimum freeboard of 6 inches.

(ii) For all other facilities, a minimum 12-inch freeboard for manure storage facilities that are ponds, and a minimum 6-inch freeboard for all other manure storage facilities.

(7) The requirements in this section are in addition to and do not replace any more stringent requirements in Chapter 83, Subchapter D (relating to nutrient management).

(b) *Land application of animal manure and agricultural process wastewater; setbacks and buffers.*

(1) The land application of animal manures and agricultural process wastewater requires a permit or approval from the Department unless the operator can demonstrate that the land application meets one of the following:

(i) The land application follows current standards for development and implementation of a plan to manage nutrients for water quality protection, including soil and manure testing and calculation of proper levels and methods of nitrogen and phosphorus application. The Manure Management Manual contains current standards for development and implementation of a plan to manage nutrients for water quality protection which can be used to comply with the requirements in paragraph (1).

(ii) For CAOs, the land application is in accordance with an approved nutrient management plan under Chapter 83, Subchapter D.

(iii) For CAFOs, the land application is in accordance with a CAFO permit as described in § 92.5a (relating to CAFOs).

(2) Unless more stringent requirements are established by statute or regulation, the following agricultural operations may not mechanically land apply manure within 100 feet of surface water, unless a vegetated buffer of at least 35 feet in width is used, to prevent manure runoff into surface water:

(i) A CAO.

(ii) An agricultural operation receiving manure from a CAO directly, or indirectly through a broker or other person.

(iii) An agricultural operation receiving manure from a CAFO directly, or indirectly through a broker or other person.

(3) CAFOs shall meet the setback requirements in § 92.5a(e)(1)(i).

(4) For purposes of paragraph (2) only, "surface water" means a perennial or intermittent stream with a defined bed and bank, a lake or a pond.

(c) *Discharge of pollutants.*

(1) It is unlawful for agricultural operations to discharge pollutants to waters of this Commonwealth except as allowed by regulations or a permit administered by the Department. The Department is authorized to take an enforcement action against any agricultural operation in violation of this requirement.

(2) An operation that has a discharge that is not authorized under the act and that meets the definition of either a medium or small CAFO under 40 CFR 122.23 (relating to concentrated animal feeding operations (applicable to State NPDES programs, see 123.25)) is considered to have an illegal discharge and is subject to enforcement action under the act.

(3) When an agricultural operation is found to be in violation of the act, the Department may require the agricultural operation to develop and implement a nutrient management plan under Chapter 83, Subchapter D, for abatement or prevention of the pollution.

CHAPTER 92. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITTING, MONITORING AND COMPLIANCE

GENERAL PROVISIONS

§ 92.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context indicates otherwise:

* * * * *

Agricultural process wastewater—Wastewater from agricultural operations, including from spillage or overflow from livestock or poultry watering systems; washing, cleaning or flushing pens, milkhouses, barns, manure pits; direct contact swimming, washing or spray cooling of livestock or poultry; egg washing; or dust control.

* * * * *

CAFO—Concentrated animal feeding operation—A CAO with greater than 300 AEUs, any agricultural operation with greater than 1,000 AEUs, or any agricultural operation defined as a large CAFO under 40 CFR 122.23 (relating to concentrated animal feeding operations).

CAO—Concentrated animal operation—An agricultural operation that meets the criteria established by the State Conservation Commission in regulations under the authority of 3 Pa.C.S. Chapter 5 (relating to nutrient management and odor management) in Chapter 83, Subchapter D (relating to nutrient management).

* * * * *

Livestock—

(i) Animals raised, stabled, fed or maintained on an agricultural operation with the purpose of generating income or providing work, recreation or transportation. Examples include: dairy cows, beef cattle, goats, sheep, swine and horses.

(ii) The term does not include aquatic species.

* * * * *

Manure—

(i) Animal excrement, including poultry litter, which is produced at an agricultural operation.

(ii) The term includes materials such as bedding and raw materials which are commingled with that excrement.

* * * * *

Setback—A specified distance from the top of the bank of surface waters, or potential conduits to surface waters, where manure and agricultural process wastewater may not be land applied. Examples of conduits to surface waters includes, but are not limited to:

(i) Open tile line intake structures.

(ii) Sinkholes.

(iii) Agricultural wellheads.

* * * * *

Vegetated buffer—A permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for purposes that include slowing water runoff, enhancing water infiltration, and minimizing the risk of any potential pollutants from leaving the field and reaching surface waters.

* * * * *

PERMITS

§ 92.5a. CAFOs.

(a) Except as provided in subsections (b)—(d), each CAFO shall have applied for an NPDES permit on the following schedule, and shall have obtained a permit:

(1) By May 18, 2001, for any CAFO in existence on November 18, 2000, with greater than 1,000 AEUs.

(2) By February 28, 2002, for any other CAFO in existence on November 18, 2000.

(3) Prior to beginning operation, for any new or expanded CAFO that began operation after November 18, 2000, and before October 22, 2005.

(b) A poultry operation that is a CAFO, which is in existence on October 22, 2005, and that is not using liquid manure handling systems, shall apply for an NPDES permit no later than the following, and shall obtain a permit:

(1) By April 24, 2006, for operations with 500 or more AEUs.

(2) By January 22, 2007, for all other operations.

(c) After October 22, 2005, a new operation, and an existing operation that will become a CAFO due to changes in operations such as additional animals or loss of land suitable for manure application, shall do the following:

(1) Apply for an NPDES permit at least 180 days before the operation commences or changes.

(2) Obtain an NPDES permit prior to commencing operations or making changes, as applicable.

(d) Other operations not described in subsections (a)—(c) that will become newly regulated as a CAFO for the first time due to the changes in the definition of a CAFO in § 92.1 (relating to definitions) shall apply for a permit by April 24, 2006, and obtain a permit.

(e) The NPDES permit application requirements shall include, but not be limited to, the following:

(1) A nutrient management plan meeting the requirements of Chapter 83, Subchapter D (relating to nutrient management) and approved by the county conservation district or the State Conservation Commission. The plan must include:

(i) Manure application setbacks for the CAFO of at least 100 feet, or vegetated buffers at least 35 feet in width.

(ii) A statement that manure that is stockpiled for 15 consecutive days or longer shall be under cover or otherwise stored to prevent discharge to surface water during a storm event up to and including the appropriate design storm for that type of operation under § 91.36(a)(1) and (5) (relating to pollution control and prevention at agricultural operations).

(2) An erosion and sediment control plan for plowing and tilling operations meeting the requirements of Chapter 102 (relating to erosion and sediment control).

(3) When required under § 91.36(a), a water quality management permit, permit application, approval or engineer's certification, as required.

(4) A preparedness, prevention and contingency plan for pollutants related to the CAFO operation.

(5) A water quality management permit application as required by this chapter and Chapter 91 (relating to general provisions), when treatment facilities that would include a treated wastewater discharge are proposed.

(6) Measures to be taken to prevent discharge to surface water from storage of raw materials such as feed and supplies. These measures may be included in the nutrient management plan.

(f) NPDES permits for each CAFO shall include, but not be limited to, conditions requiring the following:

(1) Compliance with the Nutrient Management Plan, the Preparedness, Prevention and Contingency Plan and the Erosion and Sediment Control Plan for plowing and tilling operations.

(2) A separate NPDES permit for stormwater discharges associated with a construction activity meeting the requirements of Chapter 102 (relating to erosion and sediment control) when applicable.

(3) Compliance with 3 Pa.C.S. §§ 2301—2389 (relating to the Domestic Animal Law).

(4) Compliance with § 91.36.

(5) Recordkeeping and reporting requirements as described in the permit.

(6) When applicable, effluent limitations and other conditions as required under § 92.2a (relating to treatment requirements) to meet water quality standards, for treated wastewater discharges.

(7) Measures needed to be taken to prevent discharge to surface water from storage of raw materials such as feed and supplies, which are not otherwise included in the nutrient management plan.

[Pa.B. Doc. No. 05-1945. Filed for public inspection October 21, 2005, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CH. 93]
Lake Redesignations

The Environmental Quality Board (Board) amends §§ 93.9e, 93.9f and 93.9m (relating to Drainage List E; Drainage List F; and Drainage List M) to read as set forth in Annex A.

A. *Effective Date*

The final-form rulemaking is effective upon publication in the *Pennsylvania Bulletin*.

B. *Contact Persons*

For further information, contact Richard Shertzer, Water Quality Assessment and Monitoring Section Chief, Bureau of Water Supply and Facility Regulation, 11th Floor, Rachel Carson State Office Building, P. O. Box 8467, (717) 787-9637; or Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P. O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) website at www.dep.state.pa.us.

C. *Statutory Authority*

This final-form rulemaking is made under the authority of sections 5(b)(1) and 402 of The Clean Streams Law (35 P. S. §§ 691.5(b)(1) and 691.402), which authorize the Board to develop and adopt rules and regulations to implement the provisions of The Clean Streams Law, and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which grants to the Board the power and duty to formulate, adopt and promulgate rules and regulations for the proper performance of the work of the Department. In addition, section 303 of the Federal Clean Water Act (33 U.S.C.A. § 1313) sets forth requirements for water quality standards and 40 CFR 131.32 (relating to Pennsylvania) sets forth certain requirements for portions of the Commonwealth's antidegradation program.

D. *Background of the Final-Form Rulemaking*

Water quality standards are in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements and effluent limits) on individual sources of pollution.

The purpose of these amendments is to provide the correct aquatic life use designation in the water quality standards for three Commonwealth lakes. In most cases within Chapter 93 (relating to water quality standards), lakes have been classified according to the aquatic life use designation of their associated streams. In many of

these cases, however, a lake is incapable of supporting the same use as the stream. One example of this is the presence of a lake in a basin designated for Cold Water Fishes (CWF). Because the impounded water is warmed by solar radiation, it is too warm to support fish species indigenous to a cold-water habitat. A lake such as this typically supports a Warm Water Fishery and is managed as such. This normal condition should be recognized in the drainage lists. In some cases, the Fish and Boat Commission (Commission) may stock a warm water lake with trout at certain times of the year to provide a put-and-take recreational fishery. Because trout cannot be supported year round, this is a seasonal fishery use. These lakes should be designated Trout Stocking (TSF) to recognize this seasonal use. For both of these types of lakes, the designated use in the water quality standards should mirror the existing use.

The three lakes included in this rulemaking are:

Blue Marsh Reservoir, Berks County
Lake Luxembourg, Bucks County
Walker Lake, Snyder County

The Department's Bureau of Water Supply and Facility Regulation reviewed fishery data on these three lakes from surveys conducted by the Commission, as well as chemical and physical data from a number of sources. A description of the conditions in each lake and the recommended use designations are as follows.

Blue Marsh Reservoir—Blue Marsh Reservoir is a multipurpose impoundment owned and operated by the United States Army Corps of Engineers and is located near Reading. The Commission manages this lake as a warm water fishery through natural reproduction of species such as largemouth bass, white and black crappie, bluegill, channel catfish and carp. They also supplement the natural population with stocking of hybrid striped bass and walleye. Physical data indicate that water temperature often exceeds levels tolerated by cold-water fish species. It is recommended that Blue Marsh Reservoir be redesignated from TSF to Warm Water Fishes. All tributaries to the lake will retain their current designations.

Lake Luxembourg—Lake Luxembourg is a primary feature in Bucks County's Core Creek County Park. The Commission has determined that this lake supports a warm water fish community that includes naturally reproducing populations of yellow perch, white and black crappie, bluegill and carp. Because the largemouth bass population is suboptimal, fingerlings are stocked. Channel catfish and walleye are stocked to supplement the population. The presence of American eel shows that Lake Luxembourg harbors migratory fishes. Physical data show temperatures inimical to survival of cold-water species. The Commission stocks adult trout in Lake Luxembourg several times each year for angler recreation. The designation of Lake Luxembourg should be changed from CWF, Migratory Fishes (MF) to TSF, MF. Tributaries to the lake will retain their CWF, MF designation.

Walker Lake—Walker Lake is owned and managed by the Commission and is located near Troxelville. This lake supports a warm water fishery with reproducing populations of largemouth bass, white and black crappie, yellow perch, bluegill and carp. These species are supplemented by stocking of fingerling northern pike by the Commission. Lake water temperatures often exceed values that can support survival of cold-water fish species. It is recommended that the use designation of Walker Lake be changed from TSF to WWF. Tributaries to the lake will retain their CWF designation.

Section 93.4(b) (relating to Statewide water uses) of the water quality standards requires that less restrictive uses may only be adopted when it is demonstrated that the designated use is more restrictive than the existing use, the use cannot be attained by implementing controls on point and nonpoint sources and one or more of a number of conditions exist. One of those conditions is that dams, diversions or other hydrologic modifications preclude the attainment of the use and it is not feasible to restore the water body to its original condition or to operate the modification in a way that would result in attainment.

The Department's review of the Commission's fishery data determined that the designated fish and aquatic life use in these three lakes is more restrictive than the existing use in all cases. The warm water conditions and the resulting warm water fish communities are the result of impoundment of the streams. The impounded water is warmed by solar radiation.

All of the lakes are managed primarily as warm water fisheries and provide recreational angling opportunities. Lake Luxembourg is stocked with adult trout by the Commission to provide a seasonal recreational fishery. Blue Marsh Reservoir is operated as a flood control impoundment to reduce the potential for downstream property damage. All of these lakes provide benefits to the citizens of this Commonwealth. In addition, it is not feasible to remove these dams or to operate them in a way that would achieve attainment of the designated use in the impoundment. As a result, the Board amends §§ 93.9e, 93.9f and 93.9m to read as set forth in Annex A.

This final-form rulemaking also corrects a minor error found while preparing the amendments to Drainage List E. During rulemaking for the Regulatory Basics Initiative (RBI), criteria for turbidity were removed from Table 3 in § 93.7 (relating to specific water quality criteria). This was done because turbidity criteria were applied to only 18 surface waters in this Commonwealth. All of these waters are in the Neshaminy Creek basin in Drainage List E. The applicable turbidity criteria were added to Drainage List E during proposed rulemaking published at 28 Pa.B. 4431 (August 29, 1998) and listed as Tur_3 and Tur_4. The designations were changed to Tur_1 and Tur_2 in the final-form rulemaking published at 30 Pa.B. 6059 (November 18, 2000). The turbidity criterion for the lower segment of Mill Creek, from Watson Creek to Mouth, was not changed between proposed and final rulemaking due to an oversight. It was still listed as Tur_3 but should have been changed to Tur_1. This error is corrected in Annex A.

E. *Summary of Comments and Responses on the Proposed Rulemaking*

The Board approved proposed rulemaking for these lake redesignations at its February 17, 2004, meeting. The proposed rulemaking was published at 34 Pa.B. 2067 (April 17, 2004) with provision for a 45-day public comment period that closed on June 1, 2004. No comments were received that related directly to the recommended redesignations.

The United States Environmental Protection Agency (EPA), Region 3 provided comments to the Board regarding data presentation in the lakes report and suggestions for the amendments. The Department worked with the EPA to address its suggestions. As a result, a separate report has been prepared for each lake that presents the lake data and recommendations in a format agreed to by the EPA. The EPA is supportive of these and future lake redesignations to properly designate waters. The recommended redesignations have not changed from the original single report or from the proposed rulemaking.

F. *Benefits, Costs and Compliance*

1. *Benefits*—Overall, the citizens of this Commonwealth will benefit from these changes because they will reflect the appropriate designated use and maintain the most appropriate degree of protection for each lake in accordance with the existing use.

2. *Compliance Costs*—Generally, the amendments should have no fiscal impact on or create additional compliance costs for the Commonwealth or its political subdivisions. No costs will be imposed directly upon local governments by these amendments.

Persons conducting or proposing activities or projects that could impact a lake must comply with the regulatory requirements relating to the designated use. For discharges, treatment costs are site-specific and depend upon the size of the discharge in relation to the size of the lake and many other factors.

3. *Compliance Assistance Plan*—The regulatory revisions have been developed as part of an established program and are consistent with water quality standards requirements established by the Federal Clean Water Act and The Clean Streams Law. All surface waters in this Commonwealth are afforded a minimum level of protection through compliance with the water quality standards, which prevent pollution and protect designated and existing water uses.

The redesignations will be implemented through the Department's permit and approval actions. For example, the National Pollutant Discharge Elimination System permitting program bases effluent limitations on the use designation of the stream or lake. These permit conditions are established to assure water quality criteria are achieved and designated and existing uses are protected. New and expanding dischargers with water quality based effluent limitations are required to provide effluent treatment according to the water quality criteria associated with existing and revised designated water uses.

4. *Paperwork Requirements*—The amendments should have no direct paperwork impact on the Commonwealth, local governments and political subdivisions or the private sector. These amendments are based on existing Department regulations.

G. *Pollution Prevention*

The water quality standards program is a major pollution prevention tool because the objective is to protect in-stream and in-lake water uses. These designated use changes will ensure protection of the existing use in these lakes.

H. *Sunset Review*

These amendments will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 7, 2004, the Department submitted a copy of the notice of proposed rulemaking, published at 34 Pa.B. 2067, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on August 24, 2005, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC, effective August 24, 2005.

J. *Findings*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 34 Pa.B. 2067.

(4) This final-form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in section C of this order.

(5) This final-form rulemaking does not contain standards or requirements that exceed requirements of the companion Federal regulations.

K. *Order*

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 93, are amended by amending §§ 93.9e, 93.9f and 93.9m to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval and review as to legality and form, as required by law.

(c) The Chairperson shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees, as required by the Regulatory Review Act.

(d) The Chairperson shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

KATHLEEN A. MCGINTY,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 35 Pa.B. 5068 (September 10, 2005).)

Fiscal Note: Fiscal Note 7-388 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 93. WATER QUALITY STANDARDS

DESIGNATED WATER USES AND WATER QUALITY CRITERIA

§ 93.9e. Drainage List E.

Delaware River Basin in Pennsylvania

Delaware River

Stream	*Zone*	*County*	*Water Uses Protected*	*Exceptions To Specific Criteria*
	* * * * *			
3—Mill Creek	Basin, Watson Creek to Mouth	Bucks	WWF, MF	*Add* Tur_1
3—Core Creek	Basin, Source to Inlet of Lake Luxembourg	Bucks	CWF, MF	*Add* Tur_2
3—Core Creek	Lake Luxembourg	Bucks	TSF, MF	*Add* Tur_2
4—Unnamed Tributaries to Lake Luxembourg	Basins, Source to Slackwater of Lake Luxembourg	Bucks	CWF, MF	*Add* Tur_2
3—Core Creek	Basin, Lake Luxembourg Dam to Mouth	Bucks	WWF, MF	*Add* Tur_1
3—Mill Creek	Basin	Bucks	WWF, MF	*Add* Tur_1
	* * * * *			

§ 93.9f. Drainage List F.

Delaware River Basin in Pennsylvania

Schuylkill River

Stream	*Zone*	*County*	*Water Uses Protected*	*Exceptions To Specific Criteria*
	* * * * *			
3—Bernhart Creek	Basin			
3—Tulpehocken Creek	Basin, Source to T 560 near Ramona	Lebanon	CWF	None
3—Tulpehocken Creek	Main Stem, T 560 to Inlet of Blue Marsh Reservoir	Berks	TSF	None
4—Unnamed Tributaries to Tulpehocken Creek	Basins, T 560 to Inlet of Blue Marsh Reservoir	Berks	TSF	None
4—Owl Creek	Basin	Lebanon	WWF	None
3—Tulpehocken Creek	Blue Marsh Reservoir	Berks	WWF	None
4—Unnamed Tributaries to Blue Marsh Reservoir	Basins, Source to Slackwater of Blue Marsh Reservoir	Berks	TSF	None
4—Northkill Creek	Basin, Source to I-78 Bridge	Berks	EV	None
4—Northkill Creek	Basin, I-78 Bridge to Slackwater of Blue Marsh Reservoir	Berks	CWF	None
4—Licking Creek	Basin, Source to Slackwater of Blue Marsh Reservoir	Berks	TSF	None
4—Spring Creek	Basin, Source to Furnace Creek	Berks	CWF	None
5—Furnace Creek	Basin, Source to Water Authority Dam	Berks	HQ-CWF	None
5—Furnace Creek	Basin, Water Authority Dam to Mouth	Berks	CWF	None
4—Spring Creek	Basin, Furnace Creek to Hospital Creek	Berks	CWF	None
5—Hospital Creek	Basin	Berks	TSF	None

Stream	*Zone*	*County*	*Water Uses Protected*	*Exceptions To Specific Criteria*
4—Spring Creek	Basin, Hospital Creek to Slackwater of Blue Marsh Reservoir	Berks	TSF	None
3—Tulpehocken Creek	Main Stem, Blue Marsh Reservoir Dam to T 921	Berks	CWF	None

* * * * *

§ 93.9m. Drainage List M.

Susquehanna River Basin in Pennsylvania

Susquehanna River

Stream	*Zone*	*County*	*Water Uses Protected*	*Exceptions To Specific Criteria*
	* * * * *			
4—North Branch Middle Creek	Main Stem, Source to Inlet of Walker Lake	Snyder	TSF	None
5—Unnamed Tributaries to North Branch Middle Creek	Basins, Source to Inlet of Walker Lake	Snyder	CWF	None
4—North Branch Middle Creek	Walker Lake	Snyder	WWF	None
5—Unnamed Tributaries to Walker Lake	Basins, Source to Slackwater of Walker Lake	Snyder	CWF	None
5—Moyers Mill Run	Basin, Source to Slackwater of Walker Lake	Snyder	CWF	None
4—North Branch Middle Creek	Main Stem, Walker Lake Dam to Mouth	Snyder	TSF	None
5—Unnamed Tributaries to North Branch Middle Creek	Basins, Walker Lake Dam to Mouth	Snyder	CWF	None
5—Swift Run	Basin	Snyder	HQ-CWF	None
5—Stony Run	Basin	Snyder	CWF	None
	* * * * *			

[Pa.B. Doc. No. 05-1946. Filed for public inspection October 21, 2005, 9:00 a.m.]