

RULES AND REGULATIONS

Title 10—BANKING AND SECURITIES

DEPARTMENT OF BANKING AND SECURITIES

[10 PA. CODE CHS. 19 AND 55]

Repeal or Amendment of Assorted Sections

The Department of Banking and Securities (Department) issues this final-omitted rulemaking to delete portions of its regulations in §§ 19.4 and 55.1—55.3, and amends §§ 19.1 and 19.6 as set forth in Annex A.

Statutory Authority

The Department issues this final-omitted rulemaking under the authority provided in section 506 of the Administrative Code of 1929 (71 P.S. § 186) and section 202(C) of the Department of Banking and Securities Code (code) (71 P.S. § 733-202(C)).

Omission of Proposed Rulemaking

Public notice of intention to amend or rescind regulations under the procedures set forth in sections 201 and 202 of the Commonwealth Documents Law (CDL) (45 P.S. §§ 1201 and 1202) has been omitted for good cause as authorized under section 204(3) of the CDL (45 P.S. § 1204(3)), which permits an agency to omit these procedures based on a finding that the procedures are, under the circumstances, impracticable, unnecessary or contrary to the public interest.

The Department finds that the rescissions and amendments are necessitated by the repeal or amendment of statutes governing the Department that render the affected sections either obsolete or inaccurate.

Purpose

This final-omitted rulemaking deletes or amends selected provisions in the Department's regulations that are obsolete or inaccurate due to subsequent statutory enactments, which make unnecessary the public notice provisions of the CDL.

Summary of the Final-Omitted Rulemaking

This final-omitted rulemaking deletes or amends sections of its regulations as follows:

Chapter 19—Money Transmitters

Two amendments and one rescission are needed due to statutory changes, as follows:

§ 19.1—*Definition of “act.”* This definition is amended to identify the act as the “Money Transmitter Act,” as it is called in the Synopsis to Act 129 of 2016, the most recent amendment to the statute. This title conforms to the *Pennsylvania Code & Bulletin Style Manual* in § 5.1 (relating to Pennsylvania statutes), regarding the naming of an unconsolidated statute that lacks an official short title. The amended definition cites only to sections 1—18, which are the sections of Chapter 53 of Title 7 (7 P.S. §§ 6101—6118) that relate to the business of transmitting money or credit by means of a transmittal instrument for a fee or other consideration. Four additional sections of Chapter 53 (7 P.S. §§ 6121—6122.1) concern the separate subject area of electronic funds transfer systems, and therefore are not being included in the citation for the Money Transmitter Act.

§ 19.4—*Securities deposited.* Section 6(a) of the Money Transmitter Act (7 P.S. § 6106(a)) provides that, among other things, a bond shall accompany an application for license. Prior to the enactment of Act 129 of 2016, section 6 contained a subsection (b) that allowed for the deposit of securities in lieu of a bond. Section 19.4 of the regulations references section 6(b) and sets forth requirements relating to the deposit of securities in lieu of the bond. Section 19.4 is deleted because Act 129 of 2016 deleted subsection (b), thus eliminating the statutory authority for the deposit of securities in lieu of a bond.

§ 19.6—*Advertisements.* The agency name “Department of Banking” is amended to read “Department of Banking and Securities,” as set forth in section 1 of the Money Transmitter Act (7 P.S. § 6101). Act 86 of 2012 changed the agency name in section 2 of the code (71 P.S. § 733-2(A)), and section 1102-A of the code consolidated the regulation of banking and securities (71 P.S. § 733-1102-A).

Chapter 55—Financing Sales of Mobile Homes

This regulation deletes all three sections of Chapter 55 because they are obsolete due to the enactment of the act of November 27, 2013, (P.L. 1081, No. 98) (Act 98) (12 Pa.C.S. §§ 6101—6355). Chapter 55, which was promulgated in 1978, defines “installment sales contract” as “[a] contract for the retail sale of a mobile home executed under the provisions of the act,” and defines “act” as “[t]he Motor Vehicle Sales Finance Act (MVSFA) (69 P.S. §§ 601—637).” 10 Pa. Code § 55.1. Chapter 55 is obsolete because Act 98 repealed the MVSFA and created the “Consumer Credit” part of Title 12 of the Pennsylvania Consolidated Statutes, incorporating the subject matter of the MVSFA into 12 Pa.C.S. Part V as Chapter 61 and Chapter 62 (relating to general provisions; and motor vehicle sales finance) (12 Pa.C.S. §§ 6101—6275). Section 6262 of 12 Pa.C.S. is entitled “Procedures for manufactured homes.”

§ 55.1—*Definitions.* This section defines “act” as the MVSFA, a definition that is obsolete because Act 98 repealed the MVSFA. Moreover, this section contains other definitions superseded by those set forth statutorily at 12 Pa.C.S. § 6202 (relating to definitions).

§ 55.2—*Disclosures to installment buyers.* Regulatory requirements for disclosures are superseded by the requirements of 12 Pa.C.S., Part V, Chapters 61 and 62. See, for example, 12 Pa.C.S. §§ 6103(b), 6221, 6228, 6254, and 6259.

§ 55.3—*Contractual provisions.* Regulatory requirements about prepayment, attorney fees and waiver are superseded by 12 Pa.C.S. §§ 6246, 6253(b) and 6234(a) (relating to refund for prepayment of contract; legal proceedings; and waiver of statutory protection prohibited), respectively.

Persons Likely to be Affected

The rescissions or amendments to the regulations will not affect any group or entity. The continuing presence of obsolete or inaccurate regulations serves no purpose and may cause confusion.

Fiscal Impact

Because this final-omitted rulemaking only repeals or amends obsolete or inaccurate regulations, there will be no fiscal impact.

Paperwork Requirements

This final-omitted rulemaking will not result in an increase in paperwork for any individuals or entities.

Effective Date

The final-omitted rulemaking will be effective upon final publication in the *Pennsylvania Bulletin*.

Public Comment Period

Public notice of intention to repeal or amend the regulations under the procedures set forth in sections 201 and 202 of the CDL (45 P.S. §§ 1201 and 1202) is omitted for good cause under section 204(3) of the CDL (45 P.S. § 1204(3)) because the Department finds that these procedures are, under the circumstances, unnecessary. The repeal or amendment of the regulations is based on statutes enacted subsequent to the promulgation of the regulations and that supersede them.

Contact Person

Individuals interested in further information may contact Stefanie Hamilton, Chief Counsel, Department of Banking and Securities, 17 North Second Street, Suite 1300, Harrisburg, PA 17101, (717) 787-1471, shamilton@pa.gov.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P.S. § 745.5a(c)), on April 7, 2021, the Department submitted a copy of the final-omitted rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC), the Chairpersons of the Senate Banking and Insurance Committee and the House Commerce Committee. On the same date, the regulations were submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101—732-506).

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on May 19, 2021, the final-omitted rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act (71 P.S. § 745.5a (e)), IRRC met on May 20, 2021, and approved the final-omitted rulemaking.

Findings

The Department finds that:

(1) Public notice of the Department's intention to repeal or amend its regulations under the procedures in sections 201 and 202 of the CDL (45 P.S. §§ 1201 and 1202) has been omitted for good cause as authorized under section 204(3) of the CDL because the Department finds that these procedures are, under the circumstances, unnecessary.

(2) The deletion or amendment of the Department's regulations in the manner provided in this order is necessary and appropriate.

Order

The Department, acting under its authorizing statutes, orders that:

(a) The regulations of the Department, 10 Pa. Code are amended by deleting §§ 19.4 and 55.1—55.3, and amending §§ 19.1 and 19.6 to read as set forth in Annex A.

(b) The Department shall submit this final-omitted regulation to the Office of General Counsel and OAG for approval as to form and legality as required by law.

(c) The Department shall submit this final-omitted regulation to IRRC and the House and Senate Committees as required by law.

(d) The Department shall certify this final-omitted regulation and deposit them with the Legislative Reference Bureau as required by law.

(e) This final-omitted regulation shall take effect upon publication in the *Pennsylvania Bulletin*.

RICHARD VAGUE,
Secretary

Fiscal Note: 3-57. No fiscal impact; (8) recommends adoption.

Annex A**TITLE 10. BANKING AND SECURITIES****PART II. BUREAU OF BANKS****CHAPTER 19. MONEY TRANSMITTERS****§ 19.1. Definition of "act."**

The term act, when used in this chapter, shall mean the act of September 2, 1965 (P.L. 490, No. 249) (7 P.S. §§ 6101—6118), referred to as the Money Transmission Business Licensing Law and commonly known as the Money Transmitter Act.

* * * * *

§ 19.4. (Reserved).**§ 19.6. Advertisements.**

(a) Licensees may advertise their activities in such form as they desire, but in no instance shall any reference to supervision or licensing be made other than by the following phrase: "Transmit Money By Check, Draft or Money Order By The Department of Banking and Securities, Commonwealth of Pennsylvania."

(b) Agents and subagents shall clearly indicate the name of the licensee in a sign publicly displayed in the place of business issuing and selling transmittal instruments.

PART IV. BUREAU OF CONSUMER CREDIT AGENCIES**CHAPTER 55. (Reserved)****§§ 55.1—55.3. (Reserved).**

[Pa.B. Doc. No. 21-987. Filed for public inspection June 25, 2021, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 87, 88, 89 AND 90]

Water Supply Replacement for Coal Surface Mining

The Environmental Quality Board (Board) amends Chapters 87—90, to read as set forth in Annex A. This final-form rulemaking fulfills the following purposes: to ensure compliance with Federal requirements and developments in State law; provide consistency, where possible, with water supply replacement regulations relevant to underground mining; and codify existing practices developed by the Department of Environmental Protection (Department).

This order was adopted by the Board at its meeting of November 17, 2020.

A. *Effective Date*

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

B. *Contact Persons*

For further information, contact Sharon Hill, Environmental Group Manager, Bureau of Mining Programs, Rachel Carson State Office Building, P.O. Box 8461, Harrisburg, PA 17105-8461, (717) 787-5015; or Christopher Minott, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-9372. This final-form rulemaking is available on the Department's web site at www.dep.pa.gov (select "Public Participation," then "Environmental Quality Board").

C. *Statutory Authority*

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

D. *Background and Purpose*

This final-form rulemaking addresses inconsistencies between the Commonwealth's Surface Coal Mining Program and Federal requirements relating to water supply replacement so that the Commonwealth may maintain primary regulatory authority over coal mining activities in this Commonwealth. This final-form rulemaking also aligns the language regarding water supply replacement for anthracite and bituminous surface mining with underground coal mining to the extent allowed by statute and ensures that the regulations are otherwise consistent with State law and Department practice. These measures will provide clarity to mine owners and operators regarding compliance standards for water supply replacement and protect the rights of water supply owners and users.

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

The Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. §§ 1201—1328) (Federal SMCRA) "establish[ed] a nationwide program to protect

society and the environment from the adverse effects of surface coal mining operations." See 30 U.S.C.A. § 1202(a). The Federal SMCRA authorizes the Secretary of the Interior, through the Office of Surface Mining Reclamation and Enforcement (OSM), to administer the programs for controlling surface coal mining operations, and to review and approve or disapprove state programs for controlling the same. See 30 U.S.C.A. § 1211(c)(1).

The Federal SMCRA allows a state to assume jurisdiction over the regulation of surface coal mining and reclamation operations if the state can administer that program according to Federal standards. See 30 U.S.C.A. § 1253. When a state program is approved by OSM, the state achieves "primacy" over the regulation of its surface coal mining program. The Commonwealth achieved primacy in 1982. See 47 FR 33050, 33076 (July 30, 1982). To maintain its jurisdiction over regulation of coal surface mining activities, the Commonwealth must maintain a state program in accordance with the requirements of the Federal SMCRA, and with "rules and regulations consistent with regulations issued by the Secretary." See 30 U.S.C.A. § 1253(a)(1) and (7).

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

Coal Mining Regulatory Program Amendments Required by OSM

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

Section 4.2(f)(4) of the PA SMCRA was not approved, because it allowed for final bond release when there is an outstanding water supply replacement order. See 30 CFR 938.12(c)(1) (relating to state statutory, regulatory, and proposed program amendment provisions not approved). Sections 87.119(i) and 88.107(i) (relating to hydrologic balance: water rights and replacement) were not approved for the same reason. See 30 CFR 938.12(c)(7).

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

Sections 87.119(a) and 88.107(a) were not approved to the extent that they did not include a requirement to provide a temporary replacement water supply. See

30 CFR 938.12(c)(5). Furthermore, they allowed for the replacement supply to be of a lesser quantity and quality than the premining water supply. See 30 CFR 938.12(c)(5). The Federal definition of “replacement water supply” at 30 CFR 701.5 (relating to definitions) includes a reference to temporary replacement water supplies.

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

Sections 87.119(g) and 88.107(g) were not approved because they allowed for operators to recover costs in the event that an operator successfully appeals a Department order to restore or replace a water supply. OSM did not approve these regulations, because section 4.2(f)(5) of the PA SMCRA, which provided the statutory authority for these regulations, was repealed in 2000 and replaced with 27 Pa.C.S. § 7708 (relating to costs for mining proceedings). Therefore, no remaining statutory authority existed to support the regulations. See 30 CFR 938.12(c)(6) and 70 FR 25472, 25484 (May 13, 2005).

In response to OSM’s disapproval of these regulations and to implement the approved Program amendments, the Department developed the following technical guidance documents to address water supply replacement operation and maintenance costs: Increased Operation and Maintenance Costs of Replacement Water Supplies on All Coal and Surface Noncoal Sites (DEP ID # 562-4000-102), issued on December 2, 2006; Water Supply Replacement and Permitting (DEP ID # 563-2112-605), issued in 1998 and updated in 2007; and Water Supply Replacement and Compliance (DEP ID # 562-4000-101), issued in 1999 and updated in October 2007.

This final-form rulemaking codifies the procedures outlined in these technical guidance documents, reconciles the outstanding unapproved portions of the Program amendment listed previously and ensures water supply replacement obligations are consistent with Federal law.

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

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

Amendments to §§ 87.1 and 88.1 revise the definition of “water supply” to explain that soil moisture is not a water supply. The term “water supply” connotes a specific water resource (for example, a well or spring). Soil moisture, on the other hand, is more appropriately regulated under separate Department provisions requiring that mining activities are conducted to minimize disturbance to the prevailing hydrologic balance. See §§ 87.101(a) and 88.291(a) (relating to hydrologic balance: general requirements). These provisions add a definition of “water supply owner” that includes landowners and water supply companies to reflect terminology used in section 4.2(f) of the PA SMCRA. See 52 P.S. § 1396.4b(f).

Amendments to §§ 87.47 and 88.27 (relating to alternative water supply information) clarify the regulations by using the defined term “water supply”; requiring that the permit application must include calculations regarding

the cost of potential replacement; and stating that the Department will give advanced notice to water supply owners whose water supplies are identified as potentially affected.

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

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

Sections 87.119a(f) and 88.107a(f) clarify the concepts of “adequate quality” and “adequate quantity” of the replacement supply to more closely mirror the statutory language under section 4.2(f)(1) of the PA SMCRA. This includes clarifying that an operator must, under certain circumstances, replace an affected supply with a supply that is of better quality than the Pennsylvania Safe Drinking Water Act standards (35 P.S. §§ 721.1—721.17).

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

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

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

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

Amendments Made in Response to Public Outreach

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

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

Mining and Reclamation Advisory Board Coordination

The Department collaborated with the Mining and Reclamation Advisory Board (MRAB), which is composed of representation from anthracite surface mine operators, the Pennsylvania Coal Alliance, the Pennsylvania Anthracite Council, the County Conservation Districts, the Citizens Advisory Council, the Pennsylvania House of Representatives and the Pennsylvania Senate to develop this final-form rulemaking.

Because the provisions concerning water supply replacement are similar across the various coal regulatory chapters, the Department and the MRAB spent considerable time clarifying language that may differ between surface mining and the approved underground coal mining regulations in Chapter 89 (relating to underground mining of coal and coal preparation facilities) due to variations between the Commonwealth's surface mining and bituminous underground mining statutes. Policy changes to the Surface Mining Program regarding water supply replacement were discussed at the MRAB Regulation, Legislation and Technical (RLT) committee meeting of January 2005 in response to concerns from the Pennsylvania Coal Association. The RLT committee made various recommendations regarding O&M costs calculations and payments, and replacement of a water supply to a quality and quantity necessary for current and reasonably foreseeable uses.

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

The MRAB questioned the repeated use of the term "reasonably foreseeable uses" throughout this final-form rulemaking. This phrase originated in section 5(e) of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.5(e)) and has been incorporated into the Federally-approved Surface Mining Program through the requirement that the water supply must be equivalent to the previous supply in quality and quantity. To replace the supply with a source that did not match the ability of the previous supply to support plausible future uses, based on existing and proposed land use, would be a failure to meet the standards of

replacement. OSM has stated their acceptance of the "reasonably foreseeable uses" concept in this context.

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

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

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

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

The RLT committee recommended proceeding with the proposed rulemaking at the April 19, 2018, meeting and

advised the MRAB of their recommendation also on this date. The MRAB was presented with the draft language on July 19, 2018, and requested a revised draft reflecting minor changes to the proposed language for clarity. In further consultation with the RLT committee on October 11, 2018, additional revisions were incorporated. The MRAB voted to concur with the Department's recommendation that the proposed rulemaking move forward in the regulatory process on October 25, 2018. Subsequently, additional clarifications and modifications were made to further conform certain provisions to State and Federal law.

The RLT committee reviewed the proposed minor changes from the proposed to this final-form rulemaking and, on March 16, 2020, recommended the MRAB adopt the changes and proceed with this final-form rulemaking. At its April 2, 2020, meeting, the MRAB voted to concur with the Department's recommendation that this final-form rulemaking move forward in the regulatory process.

E. Summary of Final-Form Rulemaking and Changes from Proposed to Final-Form Rulemaking

Sections 87.119 and 88.107 required extensive reorganization for clarity. For ease of reference, these sections have been reserved, and the new §§ 87.119a and 88.107a, respectively, will be adopted. Several minor editorial changes were also made throughout. Substantive changes are summarized as follows.

Definitions

"De minimis cost increase" is deleted as required by OSM. "Operation and maintenance costs" is added to ensure consistency with State law. "Water supply" is amended to specify that natural soil moisture is not a water supply. A definition for "water supply owner" is added, and the term is now used repeatedly throughout this final-form rulemaking to avoid repetition of using both "landowner" and "water supply company" in each provision. The definition of "water supply survey" is relocated from the "Definitions" section to its own specific section in each chapter.

Alternative water supply information

Sections 87.47 and 88.27 are revised to specify that any "water supply" that may be affected must be identified as part of a permit application, and that the permit application shall also include replacement cost calculations for these water supplies. There is also additional clarification that the Department will supply notice to water supply owners for those supplies that may be potentially affected prior to permit issuance, codifying the notification process as currently outlined in the Department's technical guidance document, Water Supply Replacement and Permitting (DEP ID # 563-2112-605). This notification will be by means of certified mail and will address how the supply will be replaced if affected by the mining operation.

Water supply surveys

Subsections 87.119a(a) and 88.107a(a) detail the requirements for the water supply survey. Subsection (a)(1) was expanded to explain what information is required as part of the survey. This includes the location and type of water supply; the existing and reasonably foreseeable uses of the supply; the chemical and physical characteristics of the water; historic and recent quantity measurements; and sufficient sampling to document seasonal variation in hydrologic conditions of the water supply. Under subsection (a)(1), an operator or mine owner is excused from collecting survey information if the required collection measures pose an excessive inconvenience to

the water supply owner or water supply user, or in the case of supplies that have existing treatment, if collecting a sample of untreated water is infeasible. These exceptions address situations such as when an operator or mine owner would have to excavate or remove a structure to gain access to a well or spring, or for supplies with existing treatment when there is no reasonable option to collect untreated water without risking contamination of the supply (that is, no port in the piping to obtain the water). The Department will make its determination that a scenario constitutes an excessive inconvenience or that collection is infeasible on a case-by-case basis.

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

Subsection (a)(3) clarifies that an operator or mine owner must complete a water supply survey prior to the time a water supply is susceptible to mining-related effects and that the survey shall be included as part of the application for a surface mining permit submitted to the Department.

Subsection (a)(4) explains what evidence an operator or mine owner must supply to the Department if a water supply owner has rejected a premining or postmining survey, and reorganizes requirements under previous subsections (c) and (d) of §§ 87.119 and 88.107 regarding "defenses to presumption of liability" and "notification to the Department."

Two changes, both under §§ 87.119a(a) and 88.107a(a), were made from proposed to final. First, a grammatical change was made to change "analyses" to "analysis." Second, under subsection (a)(4), in response to a public comment, the window for an operator to claim a non-response to the operator's water supply survey request from a water supply owner was extended from 10 days from the owner's receipt of the survey request to any time "prior to commencing mining activity."

Water supply replacement obligations

Sections 87.119a(b) and 88.107a(b) are amended to include additional clarifications concerning an operator's or mine owner's obligations to replace an affected water supply. If any effect on the supply is presumed to occur from proposed mining, the operator or mine owner is responsible for providing a replacement supply prior to commencing mining. If a water supply has been affected to any demonstrable extent by mining, the operator or mine owner is responsible for restoring or replacing the supply with a permanent alternative source adequate for the purposes served. The purposes served include any reasonably foreseeable uses of the water supply.

Temporary water supplies

Sections 87.119a(c) and 88.107a(c) include requirements for a temporary water supply that must be provided within 24 hours if the water supply owner or water supply user is without a readily available alternate source of water. The supply must be adequate to meet the premining needs. The Department may determine in a preliminary review that the water supply loss is not related to the mining activity, in which case the operator or mine owner will not be required to install a temporary supply.

Immediate replacement of water supply by the Department

Sections 87.119a(d) and 88.107a(d) address the situation where the Department provides an immediate replacement of a water supply and explains the Depart-

ment's authority to recover costs from the responsible operator or mine owner. These sections are relocated verbatim from existing provisions in §§ 87.119(e) and 88.107(f), which restate section 4.2(f)(3) of the PA SMCRA.

Reimbursement

Sections 87.119a(e) and 88.107a(e) are new requirements that address reimbursement for a water supply owner or water supply user. Reimbursement is negotiated when the water supply owner or water supply user has replaced the supply themselves, and it is later determined that the operator or mine owner is responsible for the water supply problem. The Department has included a process for the operator or mine owner to dispute the cost of a replacement supply if the new supply appears to be in excess of the premining characteristics of the supply, the purposes served by the supply, and reasonably foreseeable uses, that is, in excess of what the operator or mine owner would be required to replace. The Department would then determine the fair cost of the reimbursement based on the evidence supplied by the operator or mine owner to that effect. The reimbursement claim window is the 5-year period until final bond release.

Adequacy of permanently restored or replaced water supply

The language regarding adequacy of the replacement supply is relocated to §§ 87.119a(f) and 88.107a(f). Subsection (f)(1) explains that a restored or replaced water supply must be as reliable and permanent as the previous supply; not require excessive maintenance or result in increased cost to the owner or user without compensation; and provide the water supply owner and water supply user with as much control and accessibility as the previous water supply.

The criteria for whether a restored or replaced supply is adequate in quality and quantity are located under their own subsections (f)(2) and (3), respectively. The concept of "adequate quality" is expanded and explains that the replacement supply must be comparable to the premining supply as documented in the water supply survey or meet the standards of the Pennsylvania Safe Drinking Water Act unless there is a rare instance where the water supply owner or water supply user can demonstrate that water quality beyond Pennsylvania Safe Drinking Water Act standards is necessary to meet the use served by the original supply. For a nondomestic supply, the quality must also be adequate for the reasonably foreseeable uses. "Adequate quantity" is expanded to clarify that a restored or replaced supply must deliver the amount of water necessary to satisfy the purposes served by the supply as documented in the water supply survey including the demands of any reasonably foreseeable uses and provides a definition for the concept of "reasonably foreseeable uses."

Subsection (f)(4) explains that a water supply replacement shall also include the installation of all piping, pumping equipment and treatment equipment necessary to have the replaced water source in service. The concept of *de minimis* no longer applies to operation and maintenance costs as required by OSM.

Increased operation and maintenance costs

Sections 87.119a(g) and 88.107a(g) describe the procedure for determining O&M costs and providing for these costs so that the restored or replaced water supply is no more costly to operate and maintain than the original water supply. The *de minimis* option has been deleted as required by OSM. The options for payment include a

one-time payment agreed to by the water supply owner or a bond posted by the operator to ensure the water supply owner receives payment. Subsection (g)(3) provides the bond calculation process if that payment option is used by an operator.

Special provisions for operation and maintenance costs

Sections 87.119a(h) and 88.107a(h) clarify two provisions for O&M costs: when the ownership of the supply changes, and if there are multiple supplies that have been replaced with associated increase in costs. If ownership changes, the operator or mine owner must continue to pay the O&M costs unless a release as described in § 87.119a(g)(4) has been executed. For multiple water supplies, an operator may post one bond that covers the O&M costs for multiple water supplies.

Waivers

Sections 87.119a(i) and 88.107a(i) address compensation as an alternative to replacement. A water supply owner may knowingly and willingly waive the operator's or mine owner's responsibility to replace a water supply only in the situation where the supply is not necessary to achieve the approved post-mining land use.

Presumption of liability

Sections 87.119a(j) and 88.107a(j) recite provisions from the PA SMCRA that provide that the operator or mine owner is presumed to be liable for water supply pollution and diminution within 1,000 feet of areas affected by mining (see 52 P.S. § 1396.4b(f)(2)). The subsections restate five defenses to the presumption that exist in the PA SMCRA, including one defense that the operation is located outside the 1,000-foot area. This revision makes no changes to the statutory defenses but clarifies the criteria for the operator or mine owner to be excluded from the presumption of responsibility.

Operator cost recovery

Sections 87.119a(k) and 88.107a(k) replace previous provisions that were disapproved by OSM in 2005 due to the repeal of the underlying provision that was section 4.2(f)(5) of the PA SMCRA. See 27 Pa.C.S. § 7708 (relating to costs for mining proceedings). These subsections address an operator's or mine owner's ability to recover costs by referencing 27 Pa.C.S. § 7708, the current statute related to costs for mining proceedings.

Other remedies

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

Issuance of new permits

Sections 87.119a(m) and 88.107a(m) deleted language from previous sections that indicated that a Department order to restore or replace a water supply would not affect final bond release. OSM did not approve this section as previously written, because it could be construed as allowing final bond release while a water supply replacement order was in effect.

Several other sections were amended in the proposed rulemaking solely to correct the references due to renumbering.

F. Summary of Comments and Responses on the Proposed Rulemaking

The proposed rulemaking was adopted by the Board at its meeting on June 18, 2019, and published in the *Pennsylvania Bulletin* at 49 Pa.B. 6524 (November 2, 2019), with a 30-day public comment period. No public hearings were held. The public comment period closed on December 2, 2019.

The Board received several comments from one public commenter, Mountain Watershed Association (MWA), and the Independent Regulatory Review Commission (IRRC) on the proposed rulemaking. A summary of the major comments received by the Board is included in this section. A full Comment and Response document is published separately upon final publication of this rulemaking on the Department's web site.

Sections 87.47 and 88.27 (and all subsections)

Comment: IRRC notes that under these sections, the Department is required to "notify the owner of any potentially affected supply." (Emphasis added.) In the preamble, the Board states that "the Department will give advance notice to water supply owners and water supply users." (Emphasis added.) A public commentator states that limiting "notice to owners. . . would severely undercut the stated goal of this amendment" and that advance notice "will help enable residents to know their rights and protect their water." Why is a time frame not specified in the regulation for notice, and why are water supply users omitted? IRRC asks the Board to amend the notification requirements to clarify implementation procedures and to ensure protection of the public health, safety and welfare. IRRC also asks the Board to explain in the preamble to the final-form regulation the implementation procedures for notification and how the procedures adequately protect the public health, safety and welfare. Finally, the Department should review the entire final regulation to ensure that water supply users are included in all relevant provisions.

MWA comments that §§ 87.47 and 88.27 must be amended to require notification to both the owner and user of any potentially affected water supply. There are myriad ways in which notice may be delayed from reaching a water supply owner. To limit such notice to owners and not users would severely undercut the stated goal of this amendment. Not only must the language be amended to provide notice to water supply users as well as owners, but it should also be expanded to ensure that such notice is issued before the permit is issued. Much in the same way that sharing results of water surveys with users before permit issuance will help enable residents to know their rights and protect their water, as will alerting potentially affected users before issuance. If water supply users and owners are not notified of potential impacts until after permit issuance, it is much less likely they will utilize their right to water replacement supplies. Residents may even be entitled to water replacement supplies prior to when construction begins under § 87.119a (Water Supply Replacement Obligations). Yet, if they did not receive notice until after the permit is issued, it may be too late for them to understand such a threat and employ their right to the available protections.

Response: Regarding the time frame for providing notice, the District Mining Office (DMO) will provide written notice (certified mail) to the owners of these water supplies when a mining permit application or the DMO identifies proposed activities that may result in the loss, diminution or interruption of a water supply in the

permit area or adjacent area. The letter from the DMO must address how the owner's water supply would be replaced if affected by the mining operation. The DMO will send the notice as soon as the operator is able to identify and propose an adequate replacement supply. The preamble has been updated to clarify that resolution of the permit applicant's water supply survey obligations, including contact with the water supply owner, must occur prior to permit issuance. Additionally, the preamble explains that the process and associated timeline for this is currently outlined in the existing technical guidance document, Water Supply Replacement and Permitting (DEP ID # 563-2112-605).

Related to the feedback concerning "water supply owners" and "water supply users," the final-form rulemaking distinguishes between water supply owners and water supply users based on the relative rights of each party consistent with the Federal Surface Mining Control and Reclamation Act of 1977 (Federal SMCRA) and the Pennsylvania Surface Mining Conservation and Reclamation Act (PA SMCRA). Water supply owners require notification that the water supplies may potentially be affected, because the water supply owner is the party who has the right to consent to a permit applicant's request to enter the property to perform the water supply survey, as well as the right to consent to the proposed replacement supply and associated long-term operation and maintenance costs.

By contrast, water supply users, to the extent that those parties are different than the water supply owner, are considered when determining the uses of the supply, and therefore to determining whether the proposed replacement is adequate in quantity and quality to serve the purposes of the existing supply (that is, the water supply user's needs). This final-form rulemaking also includes consideration of water supply users with regard to the following: (i) the water supply survey cannot pose an excessive inconvenience to the water supply user; (ii) the water supply user shall receive a copy of the results of all qualitative analyses and quantity measurements gathered as part of a water supply survey; (iii) a water supply user who is in the statutory zone of presumption will receive a temporary replacement supply within 24 hours of notifying the Department that their supply has been affected; (iv) a water supply user who incurs costs restoring or replacing their supply prior to a determination that mining was the cause will be reimbursed by the operator; (v) a water supply user's refusal to allow an operator on site to determine the cause of an affected supply may be used by the operator to rebut the statutory presumption of liability; and (vi) water supply users are referenced as a party who, through these regulations, are not prevented from pursuing other remedies available under law.

In several circumstances, the water supply user may be unknown or unknowable (such as the case with short-term rentals), which would complicate the Department's ability to comply with a regulation requiring notice to water supply users in the manner the commenters are suggesting. In all circumstances, the water supply owner will be in the best position to notify water supply users. The preamble has been revised to remove "water supply user" in the context referenced in the comments to be consistent with Annex A for the reasons provided previously.

Sections 87.119(a) and 88.107(a)

Comment: IRRC comments that under subsection (a) (relating to water supply surveys), paragraph (1) states

that the survey must include certain information to the extent that it can be collected without “excessive inconvenience to the water supply owner or water supply user.” In the preamble, the Board explains that “[t]hese exceptions address situations such as when an operator or mine owner would have to excavate or remove a structure to gain access to a well or spring, or, for supplies with existing treatment, when there is no reasonable option to collect untreated water without risking contamination of the supply (that is, no port in the piping to obtain the water).” Further, the Board states that the Department will make its determination that a scenario constitutes an excessive inconvenience or that collection is infeasible on a case-by-case basis. Since the term “excessive inconvenience” is not regulatory language and does not set a binding norm that could be predicted by the regulated community, IRRC asks the Board to clarify this term in the final-form regulation.

Response: “Excessive inconvenience” is included to maintain consistency with an analogous provision in Chapter 89 (§ 89.145a(a)(1) (relating to water supply replacement: performance standards) references “excessive inconvenience” without elaboration). This term is described in the preamble using examples, because it is difficult to define precisely and is rather a determination to be made on a site-specific basis. The Mining and Reclamation Advisory Board (MRAB) also engaged in discussion regarding this term and were satisfied with the use of examples to provide additional clarification for this term. The MRAB agreed that there is a judgment that must be made by the Department at the time as to whether the sampling would be too inconvenient to complete. This is a rare occurrence; therefore, it is not suitable for inclusion in the regulations but should be resolved through professional judgment and discussion with the water supply owner on a case-by-case basis.

Comment: MWA strongly encourages the addition of subsection (a)(2), which says that prior to issuance of a permit mine owners/operators must submit the results of water supply surveys to: the Department, the water supply owner, and water supply user. This will be an incredibly valuable tool in protecting the rights of coal-field communities. For the many reasons set forth as follows, it is often the case that water supply users are never notified of potential threats, despite the fact that they are often the best situated to respond to such impacts. Providing them with information about their water supply is the best way to help ensure the protection of their rights.

Subsection (a)(4)(iii) potentially undercuts much of the utility of this rule and, in fact, much of the requirement to conduct water surveys, generally. This section seems to say that water supply owners (not users) will receive a notice of intent to survey and, if they do not authorize the survey within 10 days, the operator is no longer obligated. The newly proposed language in §§ 87.119a(a)(4) and 88.107a(a)(4) [...] implies that if a water supply owner fails to, not only respond, but authorize access within 10 days of receiving notice, then the mine owner/operator is no longer required to conduct a water supply survey. If this is the case, such a severe time restraint could functionally render the requirement of a water supply survey almost entirely moot. Experience shows us that very often, water supply inventories are rife with outdated and inaccurate information about the water supply owners. Many times, notification never even comes to the hands of the correct water supply owner. In these cases, such a severe time constraint would have the unjust effect of essentially releasing the mine operator/

owner from the duty to conduct water surveys for anyone whose information is incorrectly listed.

Particularly in the tourist-heavy area of the Laurel Highlands, which covers many coal-producing counties in Pennsylvania, “water supply owner” is often synonymous with “vacation home owner.” These seasonal residents may not be in the area, or even the country, for more than a few months a year. Hence, a large percentage of our region’s water supply owners would be functionally excluded from their right to a water supply survey. Furthermore, in many instances water supply owners rent their property to others who occupy it a majority of the time. Individual owners—if they do ultimately receive the notice—need to coordinate with their lessees and tenants before they may authorize such access, a process which could take several months. In fact, sometimes property owners are prohibited, by lease terms or landlord-tenant laws, from entering a leased property without a minimum of 30 days advance notice. Hence, it would be functionally impossible for water supply owners to authorize access within the 10 days stated in the rule. If it is not the case that the Board intends to create such a stringent requirement, then the language should be revised and clarified so that no such potential loophole exists.

Response: Related to the time period for which the water supply owner must respond to the mining applicant’s request for a survey, this provision was originally included in the proposed rulemaking to maintain consistency with its analogous provision under Chapter 89. This provision, that provides that a mine operator may rebut the presumption of liability if the surface owner does not authorize access within 10 days of receipt of notice, is unique to section 5.2(c) of the Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.5b(c)), regulating underground coal mining. The related provision in the PA SMCRA does not include a time within which a landowner must respond. Therefore, as the commenter has suggested, the Board has removed “within 10 days of receipt” from the final-form regulations under Chapters 87 and 88 and replaced it with “prior to commencing mining activity.” This provides potentially several months for the owner and mine operator to communicate regarding the survey.

Comment: IRRC finds that paragraph (l)(vi) requires the survey to include “[s]ufficient sampling and other measurements to document the seasonal variation in hydrologic conditions of the water supply.” Is an operator or mine owner required to survey water during all four seasons before an application can be submitted? We ask the Board to explain in the preamble to the final-form regulation the timetable for compliance with this requirement.

Response: As part of the overall hydrologic assessment (§§ 87.69 and 88.49) that requires the operator to determine probable hydrologic consequences within the proposed permit and adjacent areas, the operator considers seasonal variations that correspond to times of high or low water tables (early spring vs. late summer, respectively). During the application process, the permit reviewer assesses differences in types of water supplies and seasonal variations for the background samples. For a monitoring point, 6 months of samples are required with at least one sample during a low-flow period of August, September or October. For points not included in the monitoring plan, that is, water supplies that are not anticipated to be affected, the survey would include information on its seasonal variability.

Comment: IRRC says that regarding subsection (b) (relating to water supply replacement obligations), the preamble explains that §§ 87.119a and 88.107a replace §§ 87.119 and 88.107, respectively, which apply to mine operators and persons engaged in government-financed reclamation (GFR). However, GFR is not addressed in subsection (b) and the Board does not explain in the preamble why these persons are no longer obligated to meet the water supply replacement requirements. IRRC asks the Board to amend the final-form regulation or to explain in the preamble why it is reasonable for a person engaged in GFR not to be required to meet the obligations in this subsection.

MWA comments that §§ 88.107 and 87.119 must not remove obligation for operators/owners to replace water supplies caused by government-financed construction contracts (GFCC). In regard to water replacement, the draft language unacceptably removes the obligation for persons engaged in GFCCs to replace damaged water supplies. This is deeply problematic because GFCCs often utilize the exact same processes and procedures as surface mining.

Response: This final-form rulemaking does not remove the obligation for persons engaged in GFR or GFCCs to restore or replace a water supply affected by those activities. The provisions in Chapters 87 and 88 pertain to activities that require a surface mining permit. GFCCs and GFR projects are not permits but reclamation contracts authorized under the PA SMCRA. See 52 P.S. § 1396.4h (regarding government-financed reclamation projects authorizing incidental and necessary extraction of coal or authorizing removal of coal refuse). As such, they are not directly subject to regulation under Chapters 87 and 88.

GFCCs and GFR projects are regulated primarily under section 4.8 of the PA SMCRA (52 P.S. § 1396.4h) and the Commonwealth's regulations in 25 Pa. Code § 86.6 (relating to extraction of coal incidental to government-financed construction or government-financed reclamation projects), which do not require permits for coal extraction related to GFCCs or GFR projects. Specifically, GFR projects and GFCCs are exempt from the surface mining permit requirements of Chapter 87 and 88 if they meet the criteria listed in 25 Pa. Code § 86.6(a).

However, in addition to being subject to provisions of the PA SMCRA and other environmental laws, section 4.8(c)(4)(i) of the PA SMCRA directs that GFCCs adhere to "the applicable environmental protection performance standards promulgated in the rules and regulations relating to surface coal mining listed in the [GFCC]." See 52 P.S. § 1396.4h(c)(4)(i); see also 25 Pa. Code § 86.6(a)(6) and (d). Operations performing work pursuant to GFCCs and GFR projects must still restore or replace water supplies affected by those operations under section 4.2(f)(1) and 4.8(g) of the PA SMCRA (52 P.S. §§ 1396.4b(f)(1) and 1396.4h(g)).

Persons engaged in GFR projects or GFCCs that do not meet the exemption criteria in § 86.6(a) would require a surface mining permit for their activities. Under those circumstances, GFR and GFCC projects would be obligated to meet the water supply replacement requirements in §§ 87.119a and 88.107a.

To avoid unnecessary repetition in the regulatory text and confusion resulting from an inconsistent reference to GFCCs in other provisions that still otherwise apply to these activities, "a person engaged in government-financed reclamation" was omitted from the regulatory

text in §§ 87.119(a) and 88.107(a) even though the obligation for operations performing work under GFCCs to restore or replace affected water supplies still exists.

Comment: IRRC comments that under subsection (b), paragraph (1) states that the operator or mine owner "who affects a water supply to any demonstrable extent. . . shall promptly restore or replace the affected water supply with a permanent alternate supply. . . ." (Emphasis added.) The term "promptly" is not regulatory language and does not set a binding norm that could be predicted by the regulated community. IRRC asks the Board to clarify this implementation time frame in the final-form regulation.

Response: The phrase "promptly replace" is included to maintain consistency with an analogous provision under Chapter 89 (§ 89.145a(b)) and has been effectively understood and implemented in the regulation of underground mining to mean without undue or unjustified delay. The word "promptly" is used frequently in the Federal SMCRA. "Promptly" provides some flexibility by allowing the supply to be replaced as soon as practical considering site-specific conditions." See 35 Pa.B. 5775 (October 22, 2005); 25 Pa. Code § 89.145a(b); see also section 720(a)(2) of Federal SMCRA (30 U.S.C.A. § 1309a(a)(2)) ("Promptly replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations.").

Comment: IRRC notes that under subsection (b), paragraph (2) states that "for any water supply that will. . . be affected by. . . the proposed mining, the operator or mine owner shall provide a replacement supply prior to commencing the activity." (Emphasis added.) How does this provision work with subsection (c) (relating to temporary water supplies) that requires the operator or mine owner to provide a temporary water supply within 24 hours if the affected water supply owner or user is without a readily available alternate source of water? IRRC asks the Board to explain in the preamble to the final-form regulation how an owner or mine operator will be required to implement these regulations.

Response: These provisions operate together across the timeline of mining activity, where subsection (b) relates to permanent replacement supplies while subsection (c) relates to the temporary supply provided until a permanent supply can be established. In order of events, the regulations apply as follows:

1. If the operator or the Department anticipates that a mining activity will impact a water supply, the operator must provide a replacement supply prior to commencing its activities. (subsection (b)(2)). This is determined during permit review.

2. If no impact is anticipated but a water supply within the area of presumption is affected after commencement of the mining activity, the operator shall provide a temporary water supply within 24 hours of being contacted (subsection (c)).

3. Then, if the water supply is within the area of presumption and no defense is available or if causation can otherwise be established, the operator must "promptly" provide a permanent replacement (subsection (b)(1)).

The Department has successfully been implementing the 24-hour time frame for providing temporary water supplies for supplies impacted by underground mines (see

25 Pa. Code § 89.145a(e)(1)) and intends to continue this implementation for surface mining impacted supplies.

Comment: IRRC notes that subsection (c) relates to temporary water supplies. The term “temporary” is not regulatory language and does not set a binding norm that could be predicted by the regulated community. IRRC asks the Board to clarify this time frame in the final-form regulation.

Response: “Temporary” is used in the Federal regulations in relation to the requirement for a temporary supply that is equivalent to premining quality and quantity under the Federal regulations (30 CFR 701.5) (“Replacement of water supply means, with respect to protected water supplies contaminated, diminished, or interrupted by coal mining operations, provision of water supply on both a temporary and permanent basis. . .”). A temporary supply is warranted if the persons served by the supply will be without water for more than 24 hours. Therefore, a temporary supply is needed when the prompt resolution of a problem or installation of a new permanent supply will take more than a day. The duration of the temporary supply will depend on the successful installation and implementation of a new supply that meets the quality and quantity requirements, which will vary depending on the type of permanent replacement supply or whether the affected supply can otherwise be restored.

Comment: IRRC notes that, in subsection (c), the requirement for a temporary water supply may be subject to a preliminary determination by the Department. The Board states in the preamble that “the Department may determine in a preliminary review that the water supply loss is not related to the mining activity in which case the operator or mine owner will not be required to install a temporary supply. This determination may not be possible, however, within a 24-hour [time frame], but the District Mining Office personnel who investigate water loss claims stated that they can regularly make this preliminary determination within 48 hours of notification of an impacted supply.” Why is the time frame for implementation in subsection (c) 24 hours if the Department needs 48 hours to make a determination? If the provision remains unchanged at final, what is the recourse for an operator or mine owner who has complied by providing a temporary water supply within 24 hours if the Department then determines that the water supply loss is not related to mining activity? Who will reimburse the operator or mine owner? IRRC asks the Board to explain the reasonableness and fiscal impacts of these implementation time frames in the final-form regulation.

Response: To clarify, water supply issues are typically addressed within the 24-hour time frame. The language in the preamble of the proposed rulemaking attempted to address the rare instances that the Department may be unable to respond to a water loss call within 24 hours due to holidays or other conditions. This language has since been removed to avoid further confusion. While the Department is unable to ensure that it can make a determination as to the cause of the impact of the supply within any particular time frame, the final-form rule-making has been written to accommodate the scenario where the Department is able to quickly determine that the cause was not related to mining. For example, the mine operator or Department staff may suspect the cause of the affected supply is instead a mechanical or plumbing issue unrelated to mining. In that instance, a plumber or well driller may be required to check the distribution system.

If the Department later determines mining did not impact the water supply yet an operator had to provide a temporary water supply, the operator or mine owner will not be reimbursed. This was the cost of operating near water supplies determined by the General Assembly when it created the statutory presumption. The PA SMCRA initially included a provision for operators to seek reimbursement for these costs, but this provision was later repealed in 2000. The statutory presumption makes the reasonableness and fiscal impact difficult to discern, as the scenarios described by IRRC take place after an impact but before the cause of the impact is known. Any fiscal impact to a mine operator or mine owner directly corresponds to a fiscal impact to the water supply owner or water supply user within the zone of presumption, which the General Assembly already weighed in creating the presumption.

Comment: IRRC notes that subsection (j) regarding presumption of liability is described in the preamble as “specify[ing] that the presumptive area includes support areas. . .” However, this subsection does not explicitly include “support areas.” IRRC asks the Board to add “support areas” or explain in the preamble to the final-form regulation how support areas are addressed in this subsection.

Response: Sections 87.119a(j) and 88.107a(j) regarding presumption of liability state that the area subject to the presumption extends 1,000 feet from “areas affected” by the mining activities. “Affected area,” which is a broadly defined term in §§ 87.1 and 88.1, is comprised of a mining area, where the coal is mined, and “support areas,” which the Department and the regulated community understand as describing areas needed to facilitate, but otherwise incidental to, the extraction of coal.

Comment: IRRC comments that both RAF Question # 9 and the preamble state: “Section 4.2 (f)(4) of PA SMCRA [the Pennsylvania Surface Mining Conservation and Reclamation Act], 52 P.S. § 1396.4b, was not approved [by the United States Department of the Interior’s Office of Surface Mining Reclamation and Enforcement (OSM)] because it allowed for final bond release when there is an outstanding water supply replacement order. See 30 CFR 938.12(c)(1). Sections 87.119(i) and 88.107(i) were not approved for the same reason. See 30 CFR 938.12(c)(7).” The preamble also states that “[s]tate laws must be consistent with the provisions of Federal SMCRA, see 30 U.S.C.A. § 1255(a). . .” Has section 4.2(f)(4) of the PA SMCRA been amended to conform to Federal law? If not, how is the Department addressing OSM’s disapproval of this statutory provision?

Response: Section 87.119(i) was replaced by § 87.119a(m), which removed the language objected to by OSM.

Section 4.2(f)(4) of the PA SMCRA has not been amended to conform to Federal law, but this should have no effect on OSM’s approval of the PA coal mining regulatory program. Section 4.2(f)(4) and the corresponding regulations in §§ 87.119(i) and 88.107(i) were a limitation on an otherwise valid Department enforcement mechanism (withholding final bond release), codified under section 4(g) of the PA SMCRA (52 P.S. § 1396.4(g)) and in the regulations in §§ 86.172 and 86.174 (relating to criteria for release of bond; and standards for release of bonds).

Federal regulations require that “[s]tates with an approved State program shall implement, administer, enforce and maintain it in accordance with the [Surface Mining Control and Reclamation Act of 1977], this chapter and the provisions of the approved State program.”

30 CFR 733.11 (relating to general requirements for maintaining State programs). Moreover, section 18.10 of the PA SMCRA directs that “it shall be the intent of the General Assembly, and this act shall not be construed to violate any of the requirements of . . . the Surface Mining Control and Reclamation Act of 1977. . .” (52 P.S. § 1396.18j).

Therefore, OSM’s disapproval of the limitation set forth in section 4.2(f)(4) of the PA SMCRA rendered the Department unable to implement it. This effectively lifts the restriction on the Department’s authority under section 4(g) to enforce compliance with the standards set forth in the PA SMCRA and other relevant laws (which includes compliance with a water supply replacement order) by withholding final bond release. See 52 P.S. § 1396.4(g) and 25 Pa. Code §§ 86.172 and 86.174.

Comment: IRRC asks that if the Department is required to submit this proposed regulation to OSM for its review and approval, to provide this information in the preamble to the final-form regulation.

Response: The proposed rulemaking has been informally provided to OSM for their review. OSM has provided some preliminary feedback, which was positive and did not identify any issues. Once approved, the final-form rulemaking will be submitted as a program amendment to OSM.

G. *Benefits, Costs and Compliance*

Benefits

Because the amendments incorporated in this final-form rulemaking will resolve inconsistencies between existing Department regulations and Federal requirements, they will allow the Commonwealth to maintain primary regulatory authority over coal mining activities. This final-form rulemaking codifies mine operator responsibilities that exist under State law and as articulated in Department policy documents, which will provide clarity to mine operators regarding compliance standards for water supply replacement and protect the rights of water supply owners and users.

The consolidation of requirements into the surface mining chapters of the regulations promotes public understanding of these rights and responsibilities. Both water supply owners and surface coal mine operators benefit by having these requirements in the mining regulations published in the *Pennsylvania Code* instead of in Department policy documents. In particular, this final-form rulemaking now clarifies that if a water supply is presumed to be affected by mining, the owner of that supply is entitled to a temporary water supply, saving them the difficulty of finding a supplier and a potential cost of around \$1,000 to \$2,000 to secure a temporary water supply themselves.

This final-form rulemaking outlines a process to ensure that water losses are anticipated in advance to the reasonable extent possible so that the water supply user is spared excessive inconvenience and interruption to the supply and that operation and maintenance cost agreements can be determined fairly and concluded expeditiously.

Compliance costs

This final-form rulemaking is likely to have no impact on existing costs for compliance. The requirements included in this final-form rulemaking are largely based on Federal requirements or developments in State law that are currently implemented through Department policy. Therefore, it is not anticipated that this final-form rulemaking will increase or decrease costs to the operator or mine owner.

Compliance assistance plan

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

The Department will update Program guidance and provide information on the Department’s web site to further assist mine operators with compliance.

Paperwork requirements

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

H. *Pollution Prevention*

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This final-form rulemaking has minimal impact on pollution prevention since it is predominantly focused on updating regulations to reflect current Federal requirements, amendments to state statutes and references to citations.

I. *Sunset Review*

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

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on October 15, 2019, the Department submitted a copy of this proposed rulemaking, published at 49 Pa.B. 6524, to IRRC and to 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, the Department is required to submit to IRRC and the House and Senate Committees copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees, and the public.

Under section 5.1a(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on April 14, 2021, the final-form

rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on April 15, 2021, and approved the final-form rulemaking.

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), known as the Commonwealth Documents Law, and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(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 49 Pa.B. 6524.

(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:

(1) The regulations of the Department, 25 Pa. Code Chapters 87—90, are amended by amending §§ 87.1, 87.47, 88.1, 88.27, 88.381, 89.173 and 90.116a, adding 87.119a, 88.107a, and deleting 87.119 and 88.107 to read as set forth in Annex A.

(2) The Chairperson of the Board shall submit this final-form regulation 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.

(3) The Chairperson of the Board shall submit this final-form regulation to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(4) The Chairperson of the Board shall certify this final-form regulation and deposit them with the Legislative Reference Bureau, as required by law.

(5) This final-form regulation shall take effect immediately upon publication in the Pennsylvania Bulletin.

PATRICK McDONNELL,
Chairperson

Fiscal Note: Fiscal Note 7-545 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 87. SURFACE MINING OF COAL

Subchapter A. GENERAL PROVISIONS

§ 87.1. Definitions.

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

* * * * *

Degree—The inclination from the horizontal.

Disturbed area—An area where vegetation, topsoil or overburden is removed or upon which topsoil, spoil, coal processing waste or noncoal waste is placed by surface coal mining activities. Those areas are classified as disturbed until reclamation is complete, and the performance bond or other assurance of performance required by Chapter 86 Subchapter F (relating to bonding and insurance requirements) is released.

* * * * *

Noxious plants—Species that have been included on official State lists of noxious plants.

Operation and maintenance costs—All costs incurred by the water supply owner or water supply user associated with utilizing that supply for the purposes served. Examples of these costs include electricity, chemicals, treatment system maintenance, public water fees and equipment replacement costs.

Outslope—The face of the soil or embankment sloping downward from the highest elevation to the toe.

* * * * *

Water supply—For the purpose of §§ 87.47 and 87.119a (relating to alternative water supply information; and hydrologic balance: water rights and replacement), an existing, designated, or currently planned source of water, facility, or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses. Natural soil moisture utilized by vegetation or crops is not a water supply.

Water supply owner—Landowner or water supply company.

Water table—The upper surface of a zone of saturation, where the body of groundwater is not confined by an overlying impermeable zone.

Subchapter C. SURFACE COAL MINES: MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES

§ 87.47. Alternative water supply information.

The application shall identify the extent to which the proposed surface mining activities may result in contamination, diminution or interruption of any water supply within the proposed permit or adjacent area. If contamination, pollution, diminution or interruption may result, then the description shall identify the means to restore or replace the affected water supply in accordance with § 87.119a (relating to hydrologic balance: water rights and replacement), including cost calculations. The Department will notify the owner of any potentially affected supply.

Subchapter E. SURFACE COAL MINES: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 87.119. (Reserved).

§ 87.119a. Hydrologic balance: water rights and replacement.

(a) Water supply surveys. The operator or mine owner shall conduct a survey of the quantity and quality of all water supplies within the permit area and those in adjacent areas that may be affected by mining activities, except when the water supply owner denies the operator or mine owner access for the survey.

(1) The survey must include the following information to the extent that it can be collected without excessive inconvenience to the water supply owner or water supply user:

- (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, acidity, alkalinity and sulfates. Additional parameters, including hardness and total coliform, may be required by the Department based on the local aquifer conditions and the characteristics of the water supply and uses. An operator or mine owner who obtains water samples in a premining or postmining survey shall utilize a certified laboratory to analyze the samples. For water supplies with existing treatment, the treatment system must be documented, and a chemical analysis of the untreated water shall be obtained if a sample that bypasses the treatment can feasibly be collected.
- (iv) Historic and recent quantity measurements and other hydrogeologic data such as the static water level and yield determination.
- (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) Sufficient sampling and other measurements to document the seasonal variation in hydrologic conditions of the water supply.

(2) The operator or mine owner shall submit the results of all qualitative analyses and quantity measurements gathered as part of a water supply survey to the Department and supply a copy to the water supply owner and water supply user prior to the issuance of a mining permit.

(3) A water supply survey shall be conducted prior to the time a water supply is susceptible to mining-related effects and shall be made part of the application for surface mining permit submitted to the Department. An update to the original survey may be required after permit issuance under the requirements of § 86.53 (relating to reporting of new information).

(4) If the operator or mine owner is prohibited from making a premining or postmining survey because the water supply owner will not allow access to the site, the operator or mine owner shall submit evidence to the Department of the following:

(i) The operator or mine owner notified the water supply owner by certified mail or personal service of the water supply owner's rights and the effect on the water supply owner of the water supply owner's denial to the operator or mine owner of access to the site under section 4.2 of SMCRA (52 P.S. § 1396.4b).

(ii) The operator or mine owner attempted to conduct a survey.

(iii) The water supply owner failed to authorize access to the operator or mine owner to conduct a survey prior to commencing mining activity.

(b) *Water supply replacement obligations.*

(1) The operator or mine owner of any mine who affects a water supply to any demonstrable extent by contamination, pollution, diminution or interruption shall promptly restore or replace the affected water supply with a permanent alternate supply adequate in water quantity and water quality for the purposes served by, and the reasonably foreseeable uses of, the water supply. The operator or mine owner shall provide to the Department,

in writing, the description of the location of a restored or replaced water supply and the name and address of the water supply owner under the requirements of § 86.53.

(2) For any water supply that will, with a reasonable degree of certainty established by supporting evidence, be affected by contamination, pollution, diminution or interruption by the proposed mining, the operator or mine owner shall provide a replacement supply prior to commencing the activity.

(c) *Temporary water supplies.* If the affected water supply owner or water supply user whose supply is in the area of presumption as defined in subsection (j)(1) is without a readily available alternate source of water, the operator or mine owner shall provide a temporary water supply within 24 hours of being contacted by the water supply owner, water supply user or the Department, whichever occurs first. The temporary water supply provided under this subsection shall meet the quality requirements of subsection (f)(2) and provide sufficient quantity to meet the water supply owner or water supply user's premining needs. The requirement for a temporary water supply may be subject to a preliminary determination by the Department.

(d) *Immediate replacement of water supply by the Department.*

(1) If the Department finds that immediate replacement of an affected water supply used for potable or domestic purposes is required to protect public health or safety and the operator or mine owner has failed to comply with an order issued under section 4.2(f) of SMCRA, the Department may use moneys from the Surface Mining Conservation and Reclamation Fund to restore or replace the affected water supply.

(2) The Department will recover the costs of restoration or replacement, the costs of temporary water supply and costs incurred for design and construction of facilities from the responsible operator or mine owner. Costs recovered will be deposited in the Surface Mining Conservation and Reclamation Fund.

(e) *Reimbursement.* If a water supply is restored or replaced by the water supply owner or water supply user prior to establishing that mining activity is responsible for the pollution or diminution, the responsible operator or mine owner shall reimburse the water supply owner or water supply user the cost of replacing or restoring the supply including payment of operation and maintenance costs as described in subsection (g). If the operator or mine owner disputes the cost as presented by the water supply owner or water supply user, the operator or mine owner may present to the Department comparable estimates meeting the requirements of subsection (b)(1) from three water supply installers in the area. The Department will determine fair cost of reimbursement based upon these estimates and any other applicable information. Without affecting a water supply owner's or water supply user's other rights consistent with subsection (1), an affected water supply owner or water supply user may make a reimbursement claim to the Department against an operator or mine owner only until final release of the reclamation bond for the site.

(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 following criteria for adequacy:

(1) *Reliability, maintenance and control.* As documented in the premining water supply survey, a restored or replaced water supply, at a minimum, shall:

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

(v) Not result in increased cost of operation and maintenance for the water supply owner or water supply user, unless the operator or mine owner has provided for payment of the increased cost as described under subsection (g).

(2) *Quality.* A restored or replaced water supply will be deemed adequate in quality if it meets the following:

(i) For a domestic supply, the Pennsylvania Safe Drinking Water Act (35 P.S. §§ 721.1—721.17) standards, or a quality comparable to the premining water supply if that water supply did not meet these standards. The Department may require that the quality of the restored or replaced water supply be equivalent to the premining supply in particular circumstances where the water supply owner or water supply user has demonstrated that this standard is necessary for the purposes served by the current supply.

(ii) For other than a domestic supply, the premining quality established by the water supply survey data or an adequate quality of water needed for the purposes served by and the reasonably foreseeable uses of the supply.

(3) *Quantity.* For purposes of this paragraph the term “reasonably foreseeable uses” includes the reasonable expansion of use where the quantity of the water supply available prior to mining was adequate to supply the foreseeable uses. 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 purposes served by the supply as documented in the water supply survey, including the demands of any reasonably foreseeable uses. The Department will not accept the use of water storage systems in conjunction with the replaced or restored supply to meet quantity requirements, unless the operator or mine owner can demonstrate the existence of no reasonable alternative.

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

(4) *Water source serviceability.* Replacement of a water supply shall include the installation of all piping, pumping equipment and treatment equipment necessary to put the replaced water source into service.

(g) *Increased operation and maintenance costs.* If the operation and maintenance costs of the restored or replaced water supply are more than those of the previous supply, the operator or mine owner shall provide for the permanent payment of the increased operation and maintenance costs of the restored or replaced water supply in accordance with the following procedure:

(1) *Determining costs.* The Department will determine the amount of the annual increase in operation and

maintenance costs of the restored or replaced water supply based on current actual uses of the water supply.

(i) In consultation with the water supply owner or water supply user, the operator or mine owner shall use a minimum of 6 months of data, including high and low use periods, to ascertain the cost of operating and maintaining the replacement water supply. The data collection period should not exceed 1 year from the date the replacement water supply is functional unless the Department determines a reason to extend the period. During this collection period, the operator or mine owner pays the operation and maintenance costs.

(ii) Within 30 days after the end of the data collection period, the operator or mine owner shall submit to the Department, and to the water supply owner by certified mail, the operator’s or mine owner’s calculation of the annual increased operation and maintenance costs and a plan for payment of these costs. The water supply owner may respond to the proposed calculation of costs within 30 days from receipt of the certified mail.

(iii) The Department will review the operator’s or mine owner’s information, the water supply owner’s information and any other information the Department deems relevant and will determine the amount of annual increase in operation and maintenance costs.

(iv) In determining the amount of annual increase in operation and maintenance costs, the Department will take into account contingencies and the precision of the cost estimates.

(2) *Provisions for payment.* Within 60 days of the Department’s determination of the annual increased cost, the operator shall post a surety or collateral bond in an amount calculated in accordance with paragraph (3). This bond is subject to the following provisions:

(i) The bond shall be submitted on a form prepared by the Department, separate from the designated reclamation bond.

(ii) The bond amount will be reviewed and adjusted as necessary and in accordance with § 86.152 (relating to bond adjustments) at an interval no less than every 5 years in conjunction with the permit renewal.

(iii) A replacement bond must be posted by any successor operator of the associated permit.

(iv) If a water supply operation and maintenance costs bond is forfeited, money received from the forfeiture of the bond can be used only for the water supply for which the Department forfeited the bond unless this supply has since been abandoned. The money will be paid by the Department to the current water supply owner as a settlement of the water supply owner’s claim for increased operation and maintenance costs for the water supply for which the bond was forfeited. If a permittee has posted a bond for multiple water supplies, the moneys will be paid to the water supply owners on a prorated basis, based on the respective operation and maintenance costs.

(3) *Bond calculation.* Calculation of the amount of bond necessary to assure payment of operation and maintenance costs will be accomplished through the following procedure:

(i) The annual increased operation and maintenance costs are determined as in paragraph (1).

(ii) This cost is then projected through 1 year beyond the term of the associated permit accounting for inflation through this time period. The following formula is used to calculate the projected costs.

$$OM_x = OM * (1 + E)^x$$

Where:

OM_x is the projected cost for operation and maintenance,

OM is the annual increased operation and maintenance costs,

E is inflation rate based on the average Consumer Price Index as a decimal,

x is years to renewal plus one.

(iii) The projected cost is then used to calculate bond value that is necessary to assure payment of operation and maintenance costs. This bond value can be established by using the projected cost determined in subparagraph (ii) in the following formula:

$$Bond = OM_x / \left(\frac{i - E}{1 + E} \right)$$

Where:

$Bond$ is the present value of the funds needed to cover increased operation and maintenance costs in perpetuity,

i is the historic, long-term rate of return on investments based on Treasury Bills as a decimal,

OM_x and E are defined as in subparagraph (ii).

(iv) The Department will annually recalculate values for the variables i and E used in the previous formulas and publish these values in the *Pennsylvania Bulletin*.

(4) *Release of obligation.* A voluntary agreement between the water supply owner and the operator or mine owner may be executed at any time. This agreement shall include a notarized statement signed by the water supply owner that documents the settlement of increased operation and maintenance costs to the satisfaction of all parties. This agreement shall be on forms provided by the Department and recorded with the deed to the property, with an original signed, recorded document submitted to the Department upon completion. Upon receipt of the fully executed and recorded release, the Department will consider the operator's or mine owner's obligation to pay increased operation and maintenance costs for the water supply to be satisfied and any bonds posted for this supply can be released.

(h) *Special Provisions for operation and maintenance costs.*

(1) Should ownership of the affected water supply change, the operator or mine owner must continue to pay the increased operation and maintenance costs unless a release outlined in subsection (g)(4) is executed.

(2) An operator who incurs the obligation to pay for increased operation and maintenance costs for multiple water supplies may post one bond that covers the increased operation and maintenance costs for multiple water supplies. The procedures for calculating this bond amount shall be consistent with a single supply bond value as described in subsection (g)(3) but the bond amount must be sufficient to provide for the payment for each water supply in the event that the operator defaults on the legal obligation of permanent payment.

(i) *Waivers.*

(1) The requirement to restore or replace an affected water supply may be waived by the Department if the Department determines that the affected water supply is to be abandoned whereby a replacement is no longer needed based on the approved post-mining land use.

(2) If a water supply is to be abandoned as in subsection (i)(1), a notarized written statement signed by all persons who possess an ownership interest in the water supply shall be submitted to the Department establishing that the individuals knowingly and willingly agree to abandon the water supply. This document shall be recorded with the deed to the property at the office of the recorder of deeds.

(j) *Presumption of liability.*

(1) It shall be presumed, as a matter of law, that a surface mine operator or owner is responsible without proof of fault, negligence or causation for all pollution and diminution, except for bacteriological contamination, of public or private water supplies within 1,000 linear feet (304.80 meters) of the boundaries of any areas affected by surface mining activities whether or not permitted, including all reclaimed areas that underwent these activities. Areas utilized solely for haul and access roads shall not be included in the presumption area.

(2) Other than if the operator, mine owner or the Department determines that the water supply is not within the 1,000-foot area as described in paragraph (1), the presumption is voided if the operator or mine owner can affirmatively prove by a preponderance of the evidence one or more of the following:

(i) The water supply owner refused to allow the operator or mine owner access to conduct a water supply survey prior to commencing surface mining activities.

(ii) The water supply owner or water supply user refused to allow the operator or mine owner access to determine the cause of pollution or diminution or to replace or restore the water supply.

(iii) The pollution or diminution existed prior to the surface mining activities as evidenced by a water supply survey conducted prior to commencing surface mining activities and as documented in the approved surface mine permit application submitted to the Department prior to permit issuance.

(iv) The pollution or diminution is not a result of the surface mining activities.

(3) If the operator or mine owner intends to demonstrate the presumption of liability is not applicable, they shall notify the Department and provide information in support of the demonstration. If asserting that access was denied, evidence must be provided showing that the water supply owner was notified by certified mail or personal service that the refusal of access to conduct a water supply survey or assessment may be used to rebut the presumption of liability. The Department will consider information provided under this paragraph in determining if mining activity caused the pollution or diminution and make a determination within 90 days of the operator's or mine owner's submissions.

(k) *Operator cost recovery.* An operator or mine owner who prevails in an appeal of a Department order to replace a water supply may pursue recovery of costs in accordance with 27 Pa.C.S. § 7708 (relating to costs for mining proceedings).

(l) *Other remedies.* Nothing in this section prevents a water supply owner or water supply user who claims pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or in equity. This section also does not prevent an operator or mine owner from pursuing any remedy in law or in equity should the operator incur costs for restoring or replacing a water supply that experienced pollution or diminution caused by third parties.

(m) *Issuance of new permits.* A Department order issued under this section which is appealed will not be used to block issuance of new permits.

(n) *Department authority.* Nothing in this section limits the Department's authority under section 4.2(f)(1) of SMCRA.

(o) *Exception.* A surface mining operation conducted under a surface mining permit issued by the Department before February 16, 1993, is not subject to subsections (a) and (c)—(m) but is subject to subsections (b) and (n).

CHAPTER 88. ANTHRACITE COAL

Subchapter A. GENERAL PROVISIONS

PRELIMINARY PROVISIONS

§ 88.1. Definitions.

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

* * * * *

Degree—The inclination from the horizontal.

Disturbed area—An area where vegetation, soil or overburden is removed or upon which soil, spoil, coal processing waste or noncoal waste is placed by surface coal mining activities. Those areas are classified as disturbed until reclamation is complete, and the performance bond or other assurance of performance required by Chapter 86 Subchapter F (relating to bonding and insurance requirements) is released.

* * * * *

Open pit mining—The type of surface mining operation involving one or more of the following:

- (i) Basin removal operations where the open pit encompasses the entire cross section of a synclinal basin or a significant portion thereof unless the cross section of the synclinal basin is relatively narrow, less than 1,500 feet in width, in which case the operation will be classified as modified block-cut mining upon a demonstration by the operator that the requirements of § 88.115(c)(1) are met.
- (ii) Area mining operations.
- (iii) Overburden haul back operations.
- (iv) Mining operations where multiple seams are being mined concurrently within a single mining phase or multiple mining phases, if the sequence of mining and reclamation operations are controlled by this phase mining plan developed by the coal operator and the timing of backfilling and grading operations is controlled by the backfilling schedule approved by the Department.

Operation and maintenance costs—All costs incurred by the water supply owner or water supply user associated with utilizing that supply for the purposes served. Examples of these costs include electricity, chemicals, treatment system maintenance, public water fees and equipment replacement costs.

Outslope—The face of the spoil or embankment sloping downward from the highest elevation to the toe.

* * * * *

Water supply—For the purpose of §§ 88.27 and 88.107a (relating to alternative water supply information; and hydrologic balance: water rights and replacement), an existing, designated, or currently planned source of water, facility, or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses. Natural soil moisture utilized by vegetation or crops is not a water supply.

Water supply owner—Landowner or water supply company.

Water table—The upper surface of a zone of saturation where the body or groundwater is not confined by an overlying impermeable zone.

ANTHRACITE COAL MINING ACTIVITIES: APPLICATION REQUIREMENTS AND PREMINING RESOURCES

§ 88.27. Alternative water supply information.

The application shall identify the extent to which the proposed anthracite coal surface mining activities may result in contamination, diminution or interruption of any water supply within the proposed permit or adjacent area. If contamination, pollution, diminution or interruption may result, then the description shall identify the means to restore or replace the affected water supply in accordance with Subchapters B, C or D (relating to surface anthracite coal mines: minimum environmental protection performance standards; anthracite bank removal and reclamation: minimum environmental protection performance standards; and anthracite refuse disposal: minimum environmental protection performance standards), including cost calculations. The Department will notify the owner of any potentially affected supply.

Subchapter B. SURFACE ANTHRACITE COAL MINES: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 88.107. (Reserved).

§ 88.107a. Hydrologic balance: water rights and replacement.

(a) *Water supply surveys.* The operator or mine owner shall conduct a survey of the quantity and quality of all water supplies within the permit area and those in adjacent areas that may be affected by mining activities, except when the water supply owner denies the operator or mine owner access for the survey.

(1) The survey must include the following information to the extent that it can be collected without excessive inconvenience to the water supply owner or water supply user:

- (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, acidity, alkalinity and sulfates. Additional parameters, including hardness and total coliform, may be required by the Department based on the local aquifer conditions and the characteristics of the water supply and uses. An operator or mine owner who obtains water samples in a premining or postmining survey shall utilize a certified laboratory to analyze the samples. For

water supplies with existing treatment, the treatment system must be documented, and a chemical analysis of the untreated water shall be obtained if a sample that bypasses the treatment can feasibly be collected.

(iv) Historic and recent quantity measurements and other hydrogeologic data such as the static water level and yield determination.

(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) Sufficient sampling and other measurements to document the seasonal variation in hydrologic conditions of the water supply.

(2) The operator or mine owner shall submit the results of all qualitative analyses and quantity measurements gathered as part of a water supply survey to the Department and supply a copy to the water supply owner and water supply user prior to the issuance of a mining permit.

(3) A water supply survey shall be conducted prior to the time a water supply is susceptible to mining-related effects and shall be made part of the application for surface mining permit submitted to the Department. An update to the original survey may be required after permit issuance under the requirements of § 86.53 (relating to reporting of new information).

(4) If the operator or mine owner is prohibited from making a premining or postmining survey because the water supply owner will not allow access to the site, the operator or mine owner shall submit evidence to the Department of the following:

(i) The operator or mine owner notified the water supply owner by certified mail or personal service of the water supply owner's rights and the effect on the water supply owner of the water supply owner's denial to the operator or mine owner of access to the site under section 4.2 of SMCRA (52 P.S. § 1396.4b).

(ii) The operator or mine owner attempted to conduct a survey.

(iii) The water supply owner failed to authorize access to the operator or mine owner to conduct a survey prior to commencing mining activity.

(b) *Water supply replacement obligations.*

(1) The operator or mine owner of any mine who affects a water supply to any demonstrable extent by contamination, pollution, diminution or interruption shall promptly restore or replace the affected water supply with a permanent alternate supply adequate in water quantity and water quality for the purposes served by, and the reasonably foreseeable uses of, the water supply. The operator or mine owner shall provide to the Department, in writing, the description of the location of a restored or replaced water supply and the name and address of the water supply owner under the requirements of § 86.53.

(2) For any water supply that will, with a reasonable degree of certainty established by supporting evidence, be affected by contamination, pollution, diminution or interruption by the proposed mining, the operator or mine owner shall provide a replacement supply prior to commencing the activity.

(c) *Temporary water supplies.* If the affected water supply owner or water supply user whose supply is in the area of presumption as defined in subsection (j)(1) is without a readily available alternate source of water, the

operator or mine owner shall provide a temporary water supply within 24 hours of being contacted by the water supply owner, water supply user or the Department, whichever occurs first. The temporary water supply provided under this subsection shall meet the quality requirements of subsection (f)(2) and provide sufficient quantity to meet the water supply owner or water supply user's premining needs. The requirement for a temporary water supply may be subject to a preliminary determination by the Department.

(d) *Immediate replacement of water supply by the Department.*

(1) If the Department finds that immediate replacement of an affected water supply used for potable or domestic purposes is required to protect public health or safety and the operator or mine owner has failed to comply with an order issued under section 4.2(f) of SMCRA, the Department may use moneys from the Surface Mining Conservation and Reclamation Fund to restore or replace the affected water supply.

(2) The Department will recover the costs of restoration or replacement, the costs of temporary water supply and costs incurred for design and construction of facilities from the responsible operator or mine owner. Costs recovered will be deposited in the Surface Mining Conservation and Reclamation Fund.

(e) *Reimbursement.* If a water supply is restored or replaced by the water supply owner or water supply user prior to establishing that mining activity is responsible for the pollution or diminution, the responsible operator or mine owner shall reimburse the water supply owner or water supply user the cost of replacing or restoring the supply including payment of operation and maintenance costs as described in subsection (g). If the operator or mine owner disputes the cost as presented by the water supply owner or water supply user, the operator or mine owner may present to the Department comparable estimates meeting the requirements of subsection (b)(1) from three water supply installers in the area. The Department will determine fair cost of reimbursement based upon these estimates and any other applicable information. Without affecting a water supply owner's or water supply user's other rights consistent with subsection (l), an affected water supply owner or water supply user may make a reimbursement claim to the Department against an operator or mine owner only until final release of the reclamation bond for the site.

(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 following criteria for adequacy:

(1) *Reliability, maintenance and control.* As documented in the premining water supply survey, a restored or replaced water supply, at a minimum, shall:

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

(v) Not result in increased cost of operation and maintenance for the water supply owner or water supply user, unless the operator or mine owner has provided for payment of the increased cost as described under subsection (g).

(2) *Quality.* A restored or replaced water supply will be deemed adequate in quality if it meets the following:

(i) For a domestic supply, the Pennsylvania Safe Drinking Water Act (35 P.S. §§ 721.1—721.17) standards, or a quality comparable to the premining water supply if that water supply did not meet these standards. The Department may require that the quality of the restored or replaced water supply be equivalent to the premining supply in particular circumstances where the water supply owner or water supply user has demonstrated that this standard is necessary for the purposes served by the current supply.

(ii) For other than a domestic supply, the premining quality established by the water supply survey data or an adequate quality of water needed for the purposes served by and the reasonably foreseeable uses of the supply.

(3) *Quantity.* For purposes of this paragraph the term “reasonably foreseeable uses” includes the reasonable expansion of use where the quantity of the water supply available prior to mining was adequate to supply the foreseeable uses. 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 purposes served by the supply as documented in the water supply survey including the demands of any reasonably foreseeable uses. The Department will not accept the use of water storage systems in conjunction with the replaced or restored supply to meet quantity requirements, unless the operator or mine owner can demonstrate the existence of no reasonable alternative.

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

(4) *Water source serviceability.* Replacement of a water supply shall include the installation of all piping, pumping equipment and treatment equipment necessary to put the replaced water source into service.

(g) *Increased operation and maintenance costs.* If the operation and maintenance costs of the restored or replaced water supply are more than those of the previous supply, the operator or mine owner shall provide for the permanent payment of the increased operation and maintenance costs of the restored or replaced water supply in accordance with the following procedure:

(1) *Determining costs.* The Department will determine the amount of the annual increase in operation and maintenance costs of the restored or replaced water supply based on current actual uses of the water supply.

(i) In consultation with the water supply owner or water supply user, the operator shall use a minimum of 6 months of data, including high and low use periods, to ascertain the cost of operating and maintaining the replacement water supply. The data collection period should not exceed 1 year from the date the replacement water supply is functional unless the Department determines a reason to extend the period. During this collection period, the operator or mine owner pays the operation and maintenance costs.

(ii) Within 30 days after the end of the data collection period, the operator or mine owner shall submit to the Department, and to the water supply owner by certified mail, the operator’s or mine owner’s calculation of the annual increased operation and maintenance costs and a

plan for payment of these costs. The water supply owner may respond to the proposed calculation of costs within 30 days from receipt of the certified mail.

(iii) The Department will review the operator’s or mine owner’s information, the water supply owner’s information and any other information the Department deems relevant and will determine the amount of annual increase in operation and maintenance costs.

(iv) In determining the amount of annual increase in operation and maintenance costs, the Department will take into account contingencies and the precision of the cost estimates.

(2) *Provisions for payment.* Within 60 days of the Department’s determination of the annual increased cost, the operator shall post a surety or collateral bond in an amount calculated in accordance with paragraph (3). This bond is subject to the following provisions:

(i) The bond shall be submitted on a form prepared by the Department, separate from the designated reclamation bond.

(ii) The bond amount will be reviewed and adjusted as necessary and in accordance with § 86.152 (relating to bond adjustments) at an interval no less than every 5 years in conjunction with the permit renewal.

(iii) A replacement bond must be posted by any successor operator of the associated permit.

(iv) If a water supply operation and maintenance costs bond is forfeited, money received from the forfeiture of the bond can be used only for the water supply for which the Department forfeited the bond unless this supply has since been abandoned. The money will be paid by the Department to the current water supply owner as a settlement of the water supply owner’s claim for increased operation and maintenance costs for the water supply for which the bond was forfeited. If a permittee has posted a bond for multiple water supplies, the moneys will be paid to the water supply owners on a prorated basis, based on the respective operation and maintenance costs.

(3) *Bond calculation.* Calculation of the amount of bond necessary to assure payment of operation and maintenance costs will be accomplished through the following procedure:

(i) The annual increased operation and maintenance costs are determined as in paragraph (1).

(ii) This cost is then projected through 1 year beyond the term of the associated permit accounting for inflation through this time period. The following formula is used to calculate the projected costs.

$$OM_x = OM * (1 + E)^x$$

Where:

OM_x is the projected cost for operation and maintenance,

OM is the annual increased operation and maintenance costs,

E is inflation rate based on the average Consumer Price Index as a decimal,

x is years to renewal plus one.

(iii) The projected cost is then used to calculate bond value that is necessary to assure payment of operation

and maintenance costs. This bond value can be established by using the projected cost determined in subparagraph (ii) in the following formula:

$$\text{Bond} = OM_x / \left(\frac{i - E}{1 + E} \right)$$

Where:

Bond is the present value of the funds needed to cover increased operation and maintenance costs in perpetuity,

i is the historic, long-term rate of return on investments based on Treasury Bills as a decimal,

OM_x and *E* are defined as in subparagraph (ii).

(iv) The Department will annually recalculate values for the variables *i* and *E* used in the previous formulas and publish these values in the *Pennsylvania Bulletin*.

(4) *Release of obligation.* A voluntary agreement between the water supply owner and the operator or mine owner may be executed at any time. This agreement shall include a notarized statement signed by the water supply owner that documents the settlement of increased operation and maintenance costs to the satisfaction of all parties. This agreement shall be on forms provided by the Department and recorded with the deed to the property, with an original signed, recorded document submitted to the Department upon completion. Upon receipt of the fully executed and recorded release, the Department will consider the operator's or mine owner's obligation to pay increased operation and maintenance costs for the water supply to be satisfied and any bonds posted for this supply can be released.

(h) *Special provisions for operation and maintenance costs.*

(1) Should ownership of the affected water supply change, the operator or mine owner must continue to pay the increased operation and maintenance costs unless a release outlined in subsection (g)(4) is executed.

(2) An operator who incurs the obligation to pay for increased operation and maintenance costs for multiple water supplies may post one bond that covers the increased operation and maintenance costs for multiple water supplies. The procedures for calculating this bond amount shall be consistent with a single supply bond value as described in subsection (g)(3) but the bond amount must be sufficient to provide for the payment for each water supply in the event that the operator defaults on the legal obligation of permanent payment.

(i) *Waivers.*

(1) The requirement to restore or replace an affected water supply may be waived by the Department if the Department determines that the affected water supply is to be abandoned whereby a replacement is no longer needed based on the approved post-mining land use.

(2) If a water supply is to be abandoned as in paragraph (1), a notarized written statement signed by all persons who possess an ownership interest in the water supply shall be submitted to the Department establishing that the individuals knowingly and willingly agree to abandon the water supply. This document shall be recorded with the deed to the property at the office of the recorder of deeds.

(j) *Presumption of liability.*

(1) It shall be presumed, as a matter of law, that a surface mine operator or owner is responsible without proof of fault, negligence or causation for all pollution and

diminution, except for bacteriological contamination, of public or private water supplies within 1,000 linear feet (304.80 meters) of the boundaries of any areas affected by surface mining activities whether or not permitted, including all reclaimed areas that underwent these activities. Areas utilized solely for haul and access roads shall not be included in the presumption area.

(2) Other than if the operator, mine owner or the Department determines that the water supply is not within the 1,000-foot area as described in paragraph (1), the presumption is voided if the operator or mine owner can affirmatively prove by a preponderance of the evidence one or more of the following:

(i) The water supply owner refused to allow the operator or mine owner access to conduct a water supply survey prior to commencing surface mining activities.

(ii) The water supply owner or water supply user refused to allow the operator or mine owner access to determine the cause of pollution or diminution or to replace or restore the water supply.

(iii) The pollution or diminution existed prior to the surface mining activities as evidenced by a water supply survey conducted prior to commencing surface mining activities and as documented in the approved surface mine permit application submitted to the Department prior to permit issuance.

(iv) The pollution or diminution is not the result of the surface mining activities.

(3) If the operator or mine owner intends to demonstrate the presumption of liability is not applicable, they shall notify the Department and provide information in support of the demonstration. If asserting that access was denied, evidence must be provided showing that the water supply owner was notified by certified mail or personal service that the refusal of access to conduct a water supply survey or assessment may be used to rebut the presumption of liability. The Department will consider information provided under this paragraph in determining if mining activity caused the pollution or diminution and make a determination within 90 days of the operator's or mine owner's submissions.

(k) *Operator cost recovery.* An operator or mine owner who prevails in an appeal of a Department order to replace a water supply may pursue recovery of costs in accordance with 27 Pa.C.S. § 7708 (relating to costs for mining proceedings).

(l) *Other remedies.* Nothing in this section prevents a water supply owner or water supply user who claims pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or in equity. This section does not prevent an operator or mine owner from pursuing any remedy in law or in equity should the operator incur costs for restoring or replacing a water supply that experienced pollution or diminution caused by third parties.

(m) *Issuance of new permits.* A Department order issued under this section which is appealed will not be used to block issuance of new permits.

(n) *Department authority.* Nothing in this section limits the Department's authority under section 4.2(f)(1) of SMCRA.

(o) *Exception.* A surface mining operation conducted under a surface mining permit issued by the Department before February 16, 1993, is not subject to subsections (a) and (c)—(m) but is subject to subsections (b) and (n).

Subchapter E. COAL PREPARATION ACTIVITIES
§ 88.381. General requirements.

(a) A person who conducts or intends to conduct coal preparation activities, not within the permit area of a specific mine, shall obtain a permit from the Department under §§ 86.11—86.18 (relating to general requirements for permits and permit applications). The person shall meet certain performance standards and application requirements as specified in this subchapter.

(b) The following performance standards shall be met:

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(13) Water rights shall be protected in accordance with § 88.107a (relating to hydrologic balance: water rights and replacement).

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CHAPTER 89. UNDERGROUND MINING OF COAL AND COAL PREPARATION FACILITIES

Subchapter H. COAL PREPARATION ACTIVITIES
§ 89.173. Performance standards.

Construction, operation, maintenance, modification, removal and reclamation of coal preparation activities shall comply with the following:

(1) Signs and markers shall comply with § 89.51 (relating to signs and markers).

(2) Erosion and sedimentation shall be controlled under §§ 89.21—89.26 (relating to performance standards).

(3) The hydrologic balance shall be protected under §§ 87.102(b), 87.106, 87.107, 87.119a, 89.52, 89.53, 89.55 and 89.57—89.60.

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CHAPTER 90. COAL REFUSE DISPOSAL

Subchapter D. PERFORMANCE STANDARD FOR COAL REFUSE DISPOSAL

§ 90.116a. Hydrologic balance: water rights and replacement.

An operator who conducts coal refuse disposal and adversely affects a water supply by contamination, pollution, diminution or interruption shall comply with § 87.119a (relating to hydrologic balance: water rights and replacement).

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