

regulation was not considered a major rule.

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfounded mandate.

**List of Subjects in 30 CFR Part 938**

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 26, 2004.

**Brent Wahlquist,**

*Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, 30 CFR part 938 is amended as set forth below:

**PART 938—PENNSYLVANIA**

■ 1. The authority citation for part 938 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

**§§ 938.12, 938.15, 938.16 [Amended]**

■ 2. Section 938.12 is amended as follows: Paragraphs (a)(2), (a)(3), (a)(4), (a)(7), (a)(8), (a)(9) and (a)(10) are removed and reserved. Paragraphs (a)(14) through and including (a)(30) are removed.

■ 3. Section 938.15 is amended in the table by adding a new entry in chronological order by “*Date of final publication*” to read as follows:

**§ 938.15 Approval of Pennsylvania regulatory program amendments.**

\* \* \* \* \*

| Original amendment submission date | Date of final publication | Citation/description  |
|------------------------------------|---------------------------|---|
| August 27, 2003                    | December 9, 2004          | 25 Pa. Code 86.1 modification of definition of underground mining activities, 86.151(b)(2), 86.152(a), 89.5, Addition of definitions of EPAct structures and EPAct water supplies; removal of definition of permanently affixed appurtenant structures; modification of definitions of underground mining activities and underground mining operations, 89.141(d), 89.142a(a), (c) through (i), 89.143a(a), (c) and (d), 89.144a(a) and (b), 89.145a(a), (b), (e) and (f), 89.146a(c)(2), and 89.152(a) and (b).<br>In BMSLCA, Sections 5.2(b)(2), 5.2(d), 5.2(e)(2), 5.2(i), 5.3(a), 5.3(b), 5.3(c), 5.5(c), 5.5(f), 5.6(c), and 5.6(d). |

**§ 938.16 [Amended]**

■ 4. Section 938.16 is amended by removing paragraphs (hhhh) through and including (bbbbbb).

[FR Doc. 04–26928 Filed 12–8–04; 8:45 am]

**BILLING CODE 4310–05–P**

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 938**

[PA–141–FOR]

**Pennsylvania Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Final rule.

**SUMMARY:** We are superseding portions of Pennsylvania’s Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) to the extent that they are inconsistent with the requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act).

**EFFECTIVE DATE:** December 9, 2004.

**FOR FURTHER INFORMATION CONTACT:** George Rieger, Director, Pittsburgh Field Division, Telephone: (717) 782–4036, e-mail: [grieger@osmre.gov](mailto:grieger@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Pennsylvania Program
- II. Background on the Action
- III. OSM’s Findings
- IV. Summary and Disposition of Comments
- V. OSM’s Decision
- VI. Procedural Determinations

**I. Background on the Pennsylvania Program**

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act.” See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information on the Pennsylvania program, including the Secretary’s findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania’s program and program

amendments at 30 CFR 938.11, 938.12, 938.15 and 938.16.

**II. Background on the Action**

Pursuant to Section 505(b) of SMCRA and 30 CFR 730.11(a), we are superseding portions of the following sections of BMSLCA: 5.1(b) (52 P.S. 1406.5a(b)), 5.2(g) (52 P.S. 1406.5b(g)), 5.2(h) (52 P.S. 1406.5b(h)), 5.4(a)(3) (52 P.S. 1406.5d(a)(3)), 5.4(c) (52 P.S. 1406.5d(c)), 5.5(b) (52 P.S. 1406.5e(b)) to the extent identified for each section as noted below in “Section III. OSM’s Findings.” We are also revising our disapprovals published in the **Federal Register** on December 27, 2001 (66 FR 67010), to be consistent with this action regarding these sections of BMSLCA. We are taking these actions because we have determined that there are aspects of these sections that are inconsistent with SMCRA and the Federal regulations.

When we disapproved these sections in the final rulemaking published in the **Federal Register** on December 27, 2001 (66 FR 67010), we also imposed requirements, codified at 30 CFR 938.16, to amend BMSLCA related to these sections. Pennsylvania challenged these disapprovals and required amendments, along with others contained in that same December 27, 2001, **Federal Register** notice, by filing a lawsuit against OSM in U.S. District Court for the Middle District of

Pennsylvania. During settlement discussions Pennsylvania agreed to implement regulatory changes to address the issues raised in these particular disapprovals, as well as others. We are now superseding these sections of the statute to the extent noted in this notice so that there will be no confusion regarding the status of those portions of BMSLCA listed above that conflict with the revised regulations we are simultaneously approving in a separate notice. In that separate notice, we are also removing the requirements to amend these sections of BMSLCA.

These sections are being superseded for essentially the same reasons cited under "Director's Findings" in a notice of final rulemaking published in the **Federal Register** on December 27, 2001 (66 FR 67010). Accordingly, that notice is a part of the record for this action as well.

On September 22, 2003, we published a notice of proposed rulemaking in the **Federal Register** concerning the proposed action to supersede the above sections of BMSLCA (68 FR 55134). In the same document, we opened the public comment period and scheduled public hearings on the proposed action to supersede sections of BMSLCA. We held the public hearings in Indiana, Pennsylvania, on October 15, 2003, at 3 p.m. and at 7 p.m. and in Washington, Pennsylvania, on October 16, 2003, at 3 p.m. and at 7 p.m. We entered a transcript of the public hearings into the administrative record (the Indiana hearings under Administrative Record Nos. PA 841.91 and PA 841.92 and the Washington hearings under Administrative Record Nos. PA 841.88 and PA 841.89). The public comment period ended on October 22, 2003.

In a separate proposed rulemaking published in the **Federal Register** on September 22, 2003 (68 FR 55106), we asked for comments on regulatory changes and clarifications that Pennsylvania submitted to OSM to satisfy the required amendments published in the **Federal Register** on December 27, 2001 (68 FR 55106). In the September 22, 2003, proposed rule, we also announced that we would take testimony and comments for these changes and clarifications during the same public hearings scheduled for the proposed action to supersede sections of BMSLCA. During the hearings for both rulemakings, we received 18 distinct sets of comments through written and oral testimony. Comments were received from the following:

*Industry:* Pennsylvania Coal Association (PCA).

*Private Citizens:* Eight homeowners.

*Businesses:* The Hothouse Flora Company.

*Citizen/Environmental Groups:* Citizens for Pennsylvania's Future a/k/a PennFuture; Concern About Water Loss due to Mining (CAWLM); Sierra Club/Tri-States Citizen Network; Mountain Watershed Association; Ten Mile Protection Network; Wheeling Creek Watershed Conservancy; and Citizen's Coal Council. Testimony by legal counsel for State Representative William DeWeese.

We received written comments from the PCA, the National Mining Association (NMA), the U.S. Environmental Protection Agency, Department of Labor, Mine Safety and Health Administration, several private citizens, and from two environmental groups (CAWLM & Tri-States Citizen Network). In this final rule, we will only reply to those comments pertaining to the superseding of portions of BMSLCA. In a separate final rule published this date, we will reply to comments regarding Pennsylvania's submission of regulatory changes and clarifications (see PA-143-FOR).

### III. OSM's Findings

Pursuant to Section 505(b) of SMCRA and 30 CFR 730.11(a), the Secretary is superseding the following provisions of BMSLCA to the extent that they are inconsistent with, or preclude implementation of, SMCRA. In a separate final rule published in today's **Federal Register**, we are approving proposed changes to Pennsylvania's regulatory program and removing the required amendments at 30 CFR 938.16(hhhh) through (bbbbbb) (see the final rule on PA-143-FOR).

We are superseding the following sections of BMSLCA to the extent noted:

Section 5.1(b). We are superseding Section 5.1(b) to the extent that it would limit an operator's liability to restore or replace a water supply covered under Section 720 of SMCRA. Section 5.1(b) provides that:

(b) A mine operator shall not be liable to restore or replace a water supply under the provisions of this section if a claim of contamination, diminution or interruption is made more than two years after the supply has been adversely affected.

After consideration of all comments received in response to our proposed rulemaking of September 22, 2003 (68 FR 55134), we are making a final determination to supersede Section 5.1(b) to the extent noted above. We are making this determination because we have found Section 5.1(b) to be inconsistent with the requirements of SMCRA and the Federal regulations to

the extent that it limits an operator's liability for replacement of water supplies protected under Section 720 of SMCRA. In this superseding notice, we are making it clear that Section 5.1(b) is superseded only to the extent noted above. Our reasons for superseding Section 5.1(b) are essentially the same as we expressed in our December 27, 2001, final rule. Please see our December 27, 2001, **Federal Register** (66 FR at 67014-67015) for a complete discussion of this section.

Section 5.2(g). We are superseding Section 5.2(g) of BMSLCA to the extent that it would limit an operator's liability to restore or replace a water supply covered under Section 720 of SMCRA. Section 5.2(g) provides that:

(g) If an affected water supply is not restored or reestablished or a permanent alternate source is not provided within three years, the mine operator may be relieved of further responsibility by entering into a written agreement providing compensation acceptable to the landowner. If no agreement is reached, the mine operator, at the option of the landowner, shall:

(1) Purchase the property for a sum equal to its fair market value immediately prior to the time the water supply was affected; or

(2) Make a one-time payment equal to the difference between the property's fair market value immediately prior to the time the water supply was affected and at the time payment is made; whereupon the mine operator shall be relieved of further obligation regarding contamination, diminution or interruption of an affected water supply under this act. Any measures taken under Sections 5.1 and 5.3 and this section to relieve a mine operator of further obligation regarding contamination, diminution or interruption of an affected water supply shall not be deemed to bar a subsequent purchaser of the land on which the affected water supply was located or any water user on such land from invoking rights under this section for contamination, diminution or interruption of a water supply resulting from subsequent mining activity other than that contemplated by the mine plan in effect at the time the original supply was affected.

After consideration of all comments received in response to our proposed rulemaking of September 22, 2003 (68 FR 55134), we are making a final determination to supersede Section 5.2(g) to the extent noted above. We are making this determination because we have found that the limitation on an operator's liability for water supply replacement in Section 5.2(g) to be less

stringent than Section 720 of SMCRA and less effective than 30 CFR 817.41(j) which require restoration or replacement of protected water supplies without exception. In this superseding notice, we are making it clear that Section 5.2(g) is superseded only to the extent noted above.

Our reasons for superseding Section 5.2(g) are essentially the same as we expressed in our December 27, 2001, final rule. Please see our December 27, 2001, **Federal Register** (66 FR 67018) for a complete discussion of this section.

Section 5.2(h). We are superseding Section 5.2(h) of BMSLCA to the extent that it would preclude Pennsylvania from requiring the restoration or replacement of a water supply covered under Section 720 of SMCRA. Section 5.2(h) provides that:

(h) Prior to entering into an agreement with the mine operator pursuant to subsection (g), the landowner may submit a written request to the department [Department of Environmental Resources] asking that the department review the operator's finding that an affected water supply cannot reasonably be restored or that a permanent alternate source, as described in subsection (i), cannot reasonably be provided. The department shall provide its opinion to the landowner within sixty days of receiving the landowner's request. The department's opinion shall be advisory only, including for purposes of assisting the landowner in selecting the optional compensation authorized under subsection (g). The department's opinion shall not prevent the landowner from entering into an agreement with the mine operator pursuant to subsection (g), and such opinion shall not serve as the basis for any action by the department against the mine operator or create any cause of action in a third party, provided the operator otherwise complies with subsection (g).

After consideration of all comments received in response to our proposed rulemaking of September 22, 2003 (68 FR 55134), we are making a final determination to supersede Section 5.2(h) to the extent noted above. We are making this determination because we have found Section 5.2(h) to be less stringent than Section 720 of SMCRA and less effective than 30 CFR 817.41(j) which require restoration or replacement of protected water supplies without exception. In this superseding notice, we are making it clear that Section 5.2(h) is superseded only to the extent noted above. Our reasons for superseding Section 5.2(h) are essentially the same as we expressed in our December 27, 2001, final rule.

Please see our December 27, 2001, **Federal Register** (66 FR 67018–67019) for a complete discussion of this section.

Section 5.4(a)(3). We are superseding the portion of Section 5.4(a)(3) of BMSLCA that states, "in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application," to the extent it would limit an operator's liability for restoration of, or compensation for, subsidence damages to structures protected under Section 720 of SMCRA that were in existence at the time of mining. This provision is being superseded to the extent that it may exclude certain structures from the repair and compensation provisions of SMCRA.

Section 5.4(a)(3) provides that:  
5.4. Restoration or compensation for structures damaged by underground mining.

(a) Whenever underground mining operations conducted under this act cause damage to any of the following surface buildings overlying or in the proximity of the mine:

\* \* \* \* \*  
(3) Dwellings used for human habitation and permanently affixed appurtenant structures or improvements in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application; or  
\* \* \* \* \*

After consideration of all comments received in response to our proposed rulemaking of September 22, 2003 (68 FR 55134), we are making a final determination to supersede Section 5.4(a)(3) to the extent noted above. We are making this determination because we have found that the limitation on an operator's liability for repair or compensation for subsidence damage to structures protected under Section 720 of SMCRA in Section 5.4(a)(3) to be less effective than the Federal regulations at 30 CFR 701.5 and 817.121(c)(2). These Federal regulations require repairs or compensation for damage to occupied dwellings and structures related thereto existing at the time of mining, regardless of whether they are permanently affixed or whether they are in place on the effective date of the application for a mine permit or a renewal of that permit. In this superseding notice, we are

making it clear that Section 5.4(a)(3) is superseded only to the extent noted above. Our reasons for superseding Section 5.4(a)(3) are essentially the same as we expressed in our December 27, 2001, final rule. Please see our December 27, 2001, **Federal Register** (66 FR 67021) for a complete discussion on this section.

Section 5.4(c). We are superseding Section 5.4(c) of BMSLCA to the extent it limits an operator's liability for repair of, or compensation for, subsidence damage to a structure covered under Section 720 of SMCRA. Section 5.4(c) provides that:

(c) A mine operator shall not be liable to repair or compensate for subsidence damage if the mine operator, upon request, is denied access to the property upon which the building is located to conduct premining and postmining surveys of the building and surrounding property and thereafter serves notice upon the landowner by certified mail or personal service, which notice identifies the rights established by Sections 5.5 and 5.6 and this section, the mine operator was denied access and the landowner failed to provide or authorize access within ten days after receipt thereof.

After consideration of all comments received in response to our proposed rulemaking of September 22, 2003 (68 FR 55134), we are making a final determination to supersede Section 5.4(c) to the extent noted above. We are making this determination because we have found that the limitation on an operator's liability for repair or compensation for subsidence damage to structures covered under Section 720 of SMCRA in Section 5.4(c) to be less effective than the Federal regulations at 30 CFR 817.121(c)(2). The Federal regulations do not provide for relief of an operator's liability for repair or compensation for subsidence damage to protected structures due to underground coal mining operations when a landowner does not allow access to the property for a premining survey. In this superseding notice, we are making it clear that Section 5.4(c) is superseded only to the extent noted above. Our reasons for superseding Section 5.4(c) are essentially the same as we expressed in our December 27, 2001, final rule. Please see our December 27, 2001, **Federal Register** (66 FR 67022) for a complete discussion on this section.

Section 5.5(b). We are superseding the portion of Section 5.5(b) of BMSLCA that reads, "All claims under this subsection shall be filed within two years of the date damage to the building occurred" to the extent that it would limit an operator's liability for

restoration of, or compensation for, subsidence damages to a structure covered under Section 720 of SMCRA. Section 5.5(b) provides that:

(b) If the parties are unable to agree within six months of the date of notice as to the cause of the damage or the reasonable cost of repair or compensation, the owner of the building may file a claim in writing with the Department of Environmental Resources, a copy of which shall be sent to the operator. All claims under this subsection shall be filed within two years of the date damage to the building occurred.

After consideration of all comments received in response to our proposed rulemaking of September 22, 2003 (68 FR 55134), we are making a final determination to supersede Section 5.5(b) to the extent noted above. We are making this determination because we have found that the limitation on an operator's liability for repair or compensation for subsidence damage in Section 5.5(b) to be inconsistent with the requirements of SMCRA and the Federal regulations. Neither SMCRA nor the Federal regulations provide for a time limitation to file subsidence damage claims. In this superseding notice, we are making it clear that Section 5.5(b) is superseded only to the extent noted above. Our reasons for superseding Section 5.5(b) are essentially the same as we expressed in our December 27, 2001, final rule. Please see our December 27, 2001, **Federal Register** (66 FR 67023–24) for a complete discussion on this section.

Please note that we are superseding only the provisions of BMSLCA to the extent noted above in this notice. These provisions, as noted above, cannot be implemented or enforced by any party in a manner inconsistent with this superseding as they would apply to a water supply or structure covered by Section 720 of SMCRA.

#### IV. Summary and Disposition of Comments

##### *Public Comments*

We received comments from the Pennsylvania Coal Association (PCA) and the National Mining Association (NMA) of a general nature on our proposed rule to supersede the above noted sections of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) that were not directed specifically to those sections of BMSLCA. We will respond first to these comments and then respond to the specific comments according to the section of BMSLCA they pertain to.

##### *General Comments*

PCA provided written and oral comments at the public hearings (Administrative Record Nos. PA 841.71 and PA 841.88) and by letters dated October 15, 2003 (Administrative Record No. PA 841.85), October 22, 2003 (Administrative Record No. PA 841.84), and November 12, 2003 (Administrative Record No. PA 841.96). PCA indicated that there exists no factual basis for OSM to conclude that any provision of Act 54 should be "superseded," and PCA requests that OSM respond to these comments by citing specific factual instances where the implementation of the sections of BMSLCA proposed to be superseded, as applied, have resulted in actual inconsistencies with SMCRA or OSM's regulations.

We disagree with PCA's premise that there exists no factual basis for this action. Pennsylvania Department of Environmental Protection (PADEP) stated in its August 27, 2003, proposal that twenty-two of the required amendments from the December 27, 2001, final rule involved changes to BMSLCA. It asserts that the General Assembly is the only State entity with the authority to make the statutory changes required by the December rule and that our superseding of portions of BMSLCA will enable Pennsylvania to promulgate regulations to respond to some of the requirements of our December 27, 2001, final rule. PADEP contends that without this action, some of the regulations PADEP is proposing would have conflicted with BMSLCA. Therefore, to alleviate Pennsylvania's concerns and to remove any ambiguity regarding the status of those portions of BMSLCA described above, we are superseding them.

PCA further commented that Pennsylvania has, for over nine years, been regulating the subsidence impacts of bituminous underground mining in accordance with the very provisions of Act 54 which OSM now proposes to "supersede." Throughout this nine year period, OSM has been fully willing to "share" enforcement authority with PADEP, reserving the right to "directly enforce" its interpretation of Federal law in circumstances where it found that citizens of Pennsylvania were being denied their "rights" under SMCRA or OSM's regulations. PCA noted that, despite nine years of "dual enforcement," there have been only a few instances when OSM saw any need to "directly enforce" some aspect of its subsidence control program. PCA requested that OSM respond to PCA's comment that OSM has had no cause,

for over nine years, to conclude that the Pennsylvania subsidence control program has deprived anyone of their "rights" under Federal law.

As provided for under a July 28, 1995, **Federal Register** notice (60 FR 38685–38689), OSM and Pennsylvania have had an enforcement agreement to provide for the implementation of the EPAct water supply replacement and structure requirements of Section 720 of SMCRA. Since 1995, we have had to utilize our enforcement authority in two instances where the Pennsylvania program was unable to require the necessary corrective action. In those cases, landowners' rights under SMCRA were protected. While previous enforcement actions can provide information on the adequacy of State program requirements, our standard of review of State program amendments requires a determination that the State regulations are no less effective than the Federal regulations. In this case, this determination is being made without regard to a State's past enforcement of its program because the regulations being reviewed here are necessary to insure future compliance.

PCA provided further comments noting that SMCRA does not impose the standard of review applied by OSM in this case and does not require that a State program "mirror" that of OSM's. Instead, SMCRA specifically recognizes that each State should be free to develop its own program of laws and regulations governing subsidence control which is tailored to its specific needs and interests. PCA cited a court case from the United States Court of Appeals for the Third Circuit in support of this argument.

OSM's standard for review for superseding part of a State law or regulation is whether the State's law or regulation is inconsistent with, or precludes implementation of, provisions of the Act or its implementing regulations. The very limited actions taken in this notice are fully in accord with that standard, as explained in each action.

PCA also asserts that OSM only had four concerns with BMSLCA in 1995 and no other concerns were expressed by OSM until the December 27, 2001, final rule. We disagree with this characterization because in the July 28, 1995, **Federal Register** notice, PADEP disclosed twelve significant situations where BMSLCA did not provide water replacement or repair to structures, as required by EPAct. Additionally, once we received the formal amendment in 1998, we sent lengthy letters to PADEP expressing our concerns; please see the December 27, 2001, rule for details.

NMA provided general comments via e-mail dated October 22, 2003 (Administrative Record No. PA 841.83). NMA stated that there is no basis for OSM to supersede the above noted provisions of Pennsylvania's BMSLCA because OSM has not identified any evidence that the Pennsylvania program is inconsistent with SMCRA or is resulting in a deprivation of Federal rights under the Energy Policy Act Amendments of 1992.

We do not agree with this comment. As explained above for each action, the provisions being superseded either limit an operator's liability or preclude corrective action by Pennsylvania in ways inconsistent with Federal law. Pennsylvania agrees that these actions are necessary because of its concern that revisions to make its regulations consistent with Federal law would make the regulations inconsistent with BMSLCA. Therefore, OSM is superseding specific language in six sections of BMSLCA to the extent that the provisions are inconsistent with, or preclude implementation of, SMCRA.

NMA further stated that Pennsylvania's statutory provisions must be evaluated in a holistic, not a piecemeal, fashion. NMA stated that OSM is applying the incorrect standard to determine whether or not the State law should be superseded. OSM should not compare the State and Federal rules line by line and disapprove the State law if there is any difference between them. Instead, OSM must evaluate whether the State law is more or equally protective as a whole, not piece by piece. NMA noted that Pennsylvania provided superior rights to property owners when compared to the Federal rules in many respects. Therefore, OSM must take the whole package into account before deciding whether a State's statute and program is equal to or better than what SMCRA provides. In addition, the failure to use a holistic approach will improperly require every State program to be a mirror of the Federal rules. Such a result may be easier for OSM, but it would also be contrary to SMCRA and judicial precedent, and it would be bad public policy. NMA concluded their comment by stating that a piecemeal approach will discourage States from experimenting or creating innovative solutions to solve problems.

We agree that a State's statutory provisions need not match Federal provisions line for line. However, in this case, Federal law expressly imposed obligations on operators which State law expressly limited in a manner inconsistent with Federal law. This

inconsistency limited the rights of other parties provided for by Federal law.

NMA stated that the Federal Government, and this Administration in particular, espouses principles of States Rights, comity, and Federalism, however, none of these principles are respected by OSM's action in this rule. NMA further stated that Pennsylvania is among the most experienced regulators of mining activity in the United States and that to suggest, without evidence to support it, that the Pennsylvania legislature is not adequately protecting the rights of its citizens is inappropriate. NMA also stated that, contrary to OSM's statement at 68 FR 55137, this rule does have Federalism implications because the State provisions do not conflict with any of SMCRA's provisions and that OSM has provided no evidence of problems "on the ground" with these provisions in almost a decade. NMA concludes that OSM has no basis to supersede these duly enacted provisions of State law.

NMA has misstated the proposed rule's implications with regard to the principles of State's Rights and Federalism. While we acknowledge Pennsylvania's experience in mine regulation, our review is restricted to a determination of whether the provisions are consistent with SMCRA and the regulations. Consistent with State's Rights and Federalism concepts, Pennsylvania provisions that provide for more stringent land use and environmental controls than SMCRA or its implementing regulations cannot be, and are not, construed as inconsistent with SMCRA. State provisions that provide less stringent controls are inconsistent with SMCRA. This review and approval process is specifically required under SMCRA and has no implications with regard to the principles of States Rights or Federalism.

NMA further questioned how enforcement would occur under the set-aside proposals. NMA thought that it is unclear how provisions are to be enforced if the Pennsylvania statute is superseded.

We have superseded the above portions of BMSLCA only to the extent that they limited protections or responsibilities mandated by SMCRA and the Federal regulations. These sections of BMSLCA remain in the regulatory program for Pennsylvania and we have limited their application only to the extent stated in this notice. By superseding these provisions to the extent noted above we are only ensuring that they are not applied in a manner inconsistent with SMCRA or the Federal regulations.

Statute specific comments:

#### Sections 5.2(g) and (h)

PCA provided comments regarding our proposed superseding of Sections 5.2(g) and 5.2(h) of BMSLCA in its October 15, 2003, letter. PCA believes that these sections are not inconsistent with SMCRA or OSM's own interpretation of its regulations relating to the replacement and restoration of domestic water supplies. PCA noted our statements from the proposed rule that rare cases may exist where the operator cannot develop an adequate replacement water supply. OSM's view that such instances will be "rare," may well be the case in other States but in Pennsylvania replacement or restored supplies often must meet "drinking water" criteria, a far more stringent requirement than imposed by Federal law. Consequently, it is more likely, in Pennsylvania, that it will prove impossible to provide an "adequate" replacement supply than would be the case in other States. This is a change in position from PCA's previous statement that "[t]hese cases are indeed rare in Pennsylvania [and] [t]hat to the best of PCA's knowledge, Sections 5.2(g) and (h) have never been exercised since enactment of Act 54." (Administrative Record No. PA 841.71). PCA believes that superseding these sections which allow compensation in lieu of replacement will put Pennsylvania's operators at a disadvantage.

PCA further states that OSM's "interpretation" of these two sections of BMSLCA is flawed, in part, because PADEP itself appears to have improperly interpreted the language of these sections. Section 5.2(g) does not have to be read to mean that if three years pass and a property owner has not had its domestic water supply restored or replaced that the operator is relieved of its obligation to try and provide such a supply and the only remedy available to the property owner is "fair compensation." Instead, because BMSLCA is generally to be construed in a manner which would enable Pennsylvania to retain primary jurisdiction over the regulation of underground coal mining, an alternative and supportable interpretation of Section 5.2(g) is that, with respect to water supplies protected by Federal law, operators are required to promptly and diligently attempt to restore the affected domestic water supply or to replace it with an adequate alternative supply for at least 3 years, unless it can be sooner shown that it will be impossible to do so.

PCA also requests that we should wait and see if there is a problem with these

sections of BMSLCA, and if there is, then supersede the statute. Finally, PCA requests that we get an opinion from an appropriate State official as to whether BMSLCA can be interpreted in a manner that avoids a conflict with SMCRA.

We disagree with PCA's comment. Generally, courts grant deference to an agency's interpretation of a statute that the agency implements. PADEP's interpretation that Sections 5.2(g) and (h) are inconsistent with the regulations it has submitted to us is reasonable. PADEP's proposed regulations eliminate a provision allowing an operator to escape liability for replacement or restoration of an EPAct protected water supply by executing a purchase agreement with a landowner. These changes, at 25 Pa. Code 89.152, have been approved in a separate rulemaking published in today's **Federal Register**. These changes make Sections 5.2(g) and (h) inconsistent with the regulatory provisions.

PCA's suggested alternate reading of Section 5.2(g) of BMSLCA is not Pennsylvania's interpretation of that section of the statute. As Pennsylvania noted in its submission to us, "The existing provisions of Sections 5.2(g) and (h) limit PADEP's authority to require a replacement water supply when an operator decides to pursue a settlement involving compensation. If PADEP is to have authority to require replacement water supplies in situations where it determines that a replacement water supply meeting the standards in § 89.145a(f) can be developed, OSM must supersede these provisions to the extent they would interfere with PADEP actions requiring replacement of EPACT water supplies." Pennsylvania's interpretation is more in line with the language of BMSLCA. Additionally, PCA's alternate interpretation does not provide for prompt replacement of water supplies because it allows an operator three years across the board to attempt replacement.

As stated before, our standard of review is not a "wait and see" approach, but whether the State's laws and regulations are no less stringent than SMCRA and no less effective than the Federal regulations. Lastly, we did get opinions from State officials who concluded that certain sections of BMSLCA conflicted with SMCRA and Pennsylvania's proposed regulations. These opinions are in the form of the August 27, 2003, State program submission.

We received comments from Tri-State in a letter dated November 4, 2003 (Administrative Record No. PA 841.94). Tri-State believes our superseding of portions of Sections 5.2(g) and 5.2(h) of

BMSLCA alone are inadequate because Section 5.3 was not superseded. Tri-State believes that Section 5.3 must also be superseded to avoid a conflict between BMSLCA and the regulations Pennsylvania is proposing to enact to satisfy the requirements of 30 CFR 938.16.

Tri-State further indicates that it does not approve of the different protections accorded to EPAct water supplies vs. non-EPAct water supplies.

Finally, Tri-State believes that the three year statute of limitations should be deleted because in older mines and even modern room and pillar mines, water loss can occur from pillar failure long after mining ceases.

We disagree with Tri-State's characterization of Section 5.3. In our review of BMSLCA, we found that Section 5.3 is needed because it provides the ability for landowners and operators to determine the manner and means to restore or replace an affected water supply. Also, it provides for situations when an operator will not be required to restore or replace a water supply outside the protections of Section 720 of SMCRA.

We understand Tri-State's concerns regarding differing standards between Federally and State protected water supplies and structures, but there is nothing in the Federal regulations that prohibits a State from implementing different sets of rules for Federally protected structures and water supplies than for those structures and supplies protected only by the State. As long as Pennsylvania's regulations applying to structures and water supplies protected under Section 720 of SMCRA are no less effective than the Federal regulations, we will approve them.

With regard to Tri-State's concern about the three year statute of limitation, we believe that the steps taken by Pennsylvania including: (1) Amending its definition of "underground mining activities" to include mine pool stabilization; (2) demonstrating that it has the authority to require an operator to replace a water supply if an operator uses erroneous or fraudulent information; and, (3) its interpretation that Section 13 of BMSLCA will not be affected, demonstrates that there is recourse for the landowner and there is a way to require the replacement of water supply after the three years. These steps make the operator liable for water supply replacement and are no less effective than the Federal regulations.

#### **Section 5.4(a)(3)**

PCA provided a comment on this section in its October 15, 2003, letter.

PCA noted that Pennsylvania law provides protection to all dwellings in place when its laws have changed to impose greater obligations on mine operators and, since 1994, has provided protection for structures built after 1994, if they are in place at a time when the operator is (or should be aware) that the structure exists. However, the Pennsylvania General Assembly decided not to provide such protection to the persons who, with knowledge that mining will occur beneath their property within the next five years, voluntarily assume the risk of future subsidence damage by building a new structure, the location and value of which could seriously impede the operators ability to implement its already developed and approved mining plan. PCA notes that even though underground mining in Pennsylvania, unlike underground mining in other States, is a regular occurrence in areas where new structures are being built, and Pennsylvania affords protection to far more structures than Federal law does, OSM has concluded that Pennsylvania's program is not "consistent" with SMRCA and OSM's regulations. PCA believes that OSM has apparently done so because Pennsylvania law provides that persons who "elect" to build a new dwelling with knowledge that it might be damaged should be not be permitted to profit from their folly and should, like all other property owners, have an obligation to take reasonable steps to mitigate their own potential for damage.

Finally, PCA asserts that this section does not deny property owners a right to file a subsidence claim if they did not know their dwelling would be undermined. The purpose of BMSLCA is to discourage property owners who knew mining was imminent and would impose a moratorium of no more than 5 years on construction. PCA claims that there are several unique factors that contributed to the development of Section 5.4(a)(3): underground mining occurs more frequently under residential area than in other States, prevents bad land use planning, and requires a homeowner to mitigate their damages.

We disagree with PCA's characterization that BMSLCA is no less effective than the Federal regulations regarding operators' obligations to repair or compensate. While it may be prudent to preclude or limit the construction of residences on areas about to be subsided, Federal regulation provides for repair or compensation for all residences in existence at the time of mining.

**Sections 5.4(c)**

PCA submitted comments regarding Section 5.4(c) of BMSLCA in its October 15, 2003, letter. PCA indicated it is aware of no instances where the provisions of Act 54 relating to premining inspections imposed by Section 5.4(c) of BMSLCA, or the two year statute of limitations imposed by Section 5.5(b) of BMSLCA, or the provisions of Section 5.4(a)(3) of BMSLCA, relating to the time when a structure must have been built in order to be "protected," or any of the other provisions of BMSLCA which OSM proposes to supersede, were found by OSM to have created any need for "Federal enforcement." PCA indicated that it is aware of instances where OSM knew that property owners were reluctant to allow mine operators premining access to their property to take premining mitigation measures, yet did nothing to "enforce" their alleged Federal "right" to deny such access.

PCA's characterization of the Federal program is incorrect. A premining survey is a homeowner's right; it is not an obligation placed on the homeowner. As such, it would be inconsistent for homeowners to lose the protections afforded under EPAAct because they declined to exercise their rights. The Federal regulations provide no penalty for homeowners electing to not allow an operator to perform a premining inspection.

PCA further commented on Section 5.4(c) that it does not deny any owner of a dwelling the right to file a subsidence damage claim. Instead, this section of BMSLCA merely conditions this right by providing that in return for being given a right to file a statutory subsidence damage claim the structure owner must grant the mine operator an opportunity to conduct a premining and a postmining inspection. PCA further indicated that to assure that operators are not required to pay compensation equal to the cost of repair (the Pennsylvania compensation standard which is different from, and more stringent than, OSM's) for "damages" they did not cause, the Pennsylvania General Assembly concluded homeowners should not be allowed to file subsidence damage claims unless they allow the mine operator access to their dwelling to establish a premining baseline of its condition.

We understand PCA's concerns with premining surveys. We, along with PADEP, actively encourage landowners to secure premining surveys to prove, to all concerned parties, the precise damage caused by subsidence. However, there is nothing in SMCRA, the Federal

regulations, or the approved Pennsylvania program that would prohibit underground mining because a pre-subsidence survey by the operator has not been completed. As we noted earlier, a landowner who refuses to allow an operator access to conduct a premining survey will have to provide proof that underground mining operations have caused damage to his property. While both Pennsylvania and OSM encourage landowners to allow premining surveys, their failure to do so will not stop underground mining, but only make it more difficult to prove the extent of damages from mining.

NMA provided comments regarding this section in its e-mail of October 22, 2003. NMA disagreed with our proposed superseding of Pennsylvania provisions that relieved the operator of the responsibility to repair or compensate for structure damage if the property owner denied access for premining or postmining surveys. NMA stated that premining surveys are another example of State statutory provisions that are consistent with SMCRA and therefore should be approved by OSM. A requirement to conduct a premining survey protects everyone: operators and landowners, in the event that there is a claim for damage from subsidence in the future. This is a perfectly rational and common sense approach to ensure that legitimate claims for subsidence damage are promptly compensated, and at the same time protects operators from claims for damage for which they are not legally responsible. Coupled with reasonable notice provisions to ensure protection of property owners and their rights, these provisions are not only consistent with the letter and spirit of Section 720, but should be added to the Federal regulations. NMA stated that OSM has offered no rational basis to second-guess the determination by Pennsylvania that these provisions will enhance the process and provide fair protection for all parties for subsidence claims. The agency has not even recognized the benefits of pre-subsidence surveys to property owners, in that it will facilitate legitimate claims for subsidence damage.

We agree that premining and postmining surveys are important tools in the process of ensuring appropriate structure repair/compensation by mine operators. However, even though surveys are an important tool in reclamation process, the Federal rules requiring repair or compensation for damage to non-commercial buildings and dwellings and related structures (30 CFR 812.121(c)(2)) do not provide or allow an exception to the obligation to

repair or compensate when an operator's underground mining operation has caused subsidence damage.

**Section 5.1(b) and 5.5(b)**

PCA and NMA provided similar comments (PCA in its letter of October 15, 2003, and NMA in its e-mail of October 22, 2003) on these sections. PCA indicated that SMCRA is silent on the issue of whether claims for subsidence damage to dwellings and claims for the replacement of domestic water supplies must be filed within any defined time frame. PCA believes that by superseding Sections 5.5(b) and 5.1(b) of BMSLCA, OSM is necessarily interpreting SMCRA as precluding any time limitation on the filing of subsidence damage claims. This interpretation effectively establishes a new regulatory requirement that all states must accept for processing any claim for subsidence damage to dwellings and any claim for the replacement or restoration of domestic water supplies no matter how long the property owner waits to file such a claim. PCA submits that OSM is required to engage in formal rulemaking before promulgating a new standard of general applicability. It is not free to issue "regulations" with a national scope in the context of ruling on a State program.

PCA also indicated that, in the absence of any express prohibition in SMCRA on placing time limits on the time within which subsidence damage claims must be filed, there is no basis for OSM to conclude that Pennsylvania's decision to do so is not authorized by 30 U.S.C. 1201(f).

PCA and NMA believe that there are reasons why statutes of limitation are imposed on "damage" claims in every jurisdiction in the United States, and they relate to a legitimate interest of the State in barring claims that are premised on stale evidence and which are not pursued until memories have faded and evidence is lost or destroyed. The provisions of both State law and Federal law, which grant the owners of dwellings and the users of domestic water supplies a statutory right to pursue a claim for damages or water supply replacement/restoration are, quite simply, statutory tort remedies.

PCA and NMA further note that in the absence of any express prohibition in SMCRA on placing limits on the time within which subsidence damage claims must be filed, there is no basis for OSM to conclude that Pennsylvania's decision to do so is not authorized by 30 U.S.C. Section 1201(f). Indeed, in the absence of any express limitation action

period on a Federal statutory claim, the Courts will traditionally provide for one. When a statute creating a right of action does not specify a limitations of action period, it is not assumed that Congress intended that there be no time limit at all on the action.

PCA and NMA believe that OSM's proposed decision with respect to Sections 5.5(b) and 5.1(b) of BMSLCA should not be finalized and these sections should be found to be fully consistent with SMCRA and OSM's own regulations.

Federal law does not have time limitations on citizens' rights to seek compensation, repair or replacement. We certainly agree that it is prudent to file claims soon after damage occurs and expect that, in most cases, that will occur. To delay means not only living with the damage, but possibly weakening a claim of cause and effect related to subsidence that occurred long before. However, that does not alter the fact that imposing a time limit on an owner's right to compensation, repair or replacement is inconsistent with Federal law. Therefore, we have superseded that aspect of BMSLCA to the extent that it limits an operator's liability.

PCA also refers to 30 U.S.C. 1201(f). That section of SMCRA accounts for each State's diversity and provides that because of that diversity, the States should regulate surface mining and reclamation operators. We agree that the States should be the primary enforcer of surface coal mining operations. However at Section 503(a) of SMCRA, a State may assume primacy over its regulatory program if its laws are in accordance with SMCRA and its regulations are consistent with the Federal regulations.

Section 101(g) of SMCRA requires this national consistency to "insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders." 30 U.S.C. 1201(g).

PCA again states that this is an action in tort. We disagree and have previously addressed this issue in our December 27, 2001, rule at 66 FR 67058, which is part of the record of this rulemaking. We also contend that the rationale in the Carlson Mining decision, which was discussed in the December 27, 2001, final rule would also apply to structure damage.

With regard to the rest of PCA's arguments, we disagree with PCA's characterization of the SMCRA and the

Federal regulations. Pennsylvania and PCA advanced the same or very similar arguments that we addressed in the December 27, 2001, final rule (66 FR at 67014–67015, 67023–67024 and 67058). PCA has not provided any compelling reason for us to reassess the position stated in that final rule.

#### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and Section 503(b) of SMCRA, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the Pennsylvania program (Administrative Record No. PA 841.66). We received no comments directed specifically to the superseding of these sections.

#### *Environmental Protection Agency (EPA) Comments*

Under 30 CFR 732.17(h)(11)(i) we requested comments on the amendment from EPA (Administrative Record No. PA 841.66). EPA's response did not specifically address the superseding of the sections of BMSLCA noted above. More information concerning EPA's response can be found in the final rule published elsewhere in this **Federal Register** where we approved an amendment to the Pennsylvania program (PA–143–FOR).

#### **V. OSM's Decision**

It is generally not necessary to use Section 505 of SMCRA or 30 CFR 730.11(a) with regard to proposed amendments to approved State regulatory programs because 30 CFR 732.17(g) provides that "No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment." In this instance, however, Pennsylvania has actually implemented unapproved statutory and regulatory changes and has raised Section 505 in court pleadings. Pennsylvania contends that its changes have become effective and that Section 505 is applicable. The provisions disapproved in the December 27, 2001, final rule are ineffective as a matter of Federal law (*see* Section 505 of SMCRA) and, according to Pennsylvania, effective as a matter of State law. This situation is unusual in that certain provisions of BMSLCA conflict with SMCRA as well as provisions which go beyond and do not conflict with SMCRA.

Therefore, to avoid any doubt whatsoever concerning the Secretary's intentions in this unusual and significant matter, and because the Secretary has determined that the following State laws are inconsistent with SMCRA and its implementing

regulations, the Secretary, pursuant to Section 505 of SMCRA and 30 CFR 730.11(a), supersedes 5.1(b) (52 P.S. 1406.5a(b)), 5.2(g) (52 P.S. 1406.5b(g)), 5.2(h) (52 P.S. 1406.5b(h)), 5.4(a)(3) (52 P.S. 1406.5d(a)(3)), 5.4(c) (52 P.S. 1406.5d(c)), 5.5(b) (52 P.S. 1406.5e(b)) to the extent noted above. In this final rule, we are modifying the language of our previous disapproval of the noted sections of BMSLCA to make it clear that our superseding of the above noted sections applies only to structures and water supplies protected under Section 720 of SMCRA. The modified language will be codified at 30 CFR 938.13.

We note that this action also resolves the need for the required actions related to these sections. They are being removed under a separate notice also published in today's **Federal Register** (*see* PA–143–FOR).

#### **VI. Procedural Determinations**

##### *Executive Order 12630—Takings*

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

##### *Executive Order 12866—Regulatory Planning and Review*

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

##### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

##### *Executive Order 13132—Federalism*

This rule does not have federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and



reclamation operations. One of the purposes of SMCRA is to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be “in accordance with” the requirements of SMCRA, and Section 503(a)(7) requires that State programs contain rules and regulations “consistent with” regulations issued by the Secretary pursuant to SMCRA.

*Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Pennsylvania does not regulate any Native Tribal lands.

*Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

*National Environmental Policy Act*

This rule does not require an environmental impact statement because Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

*Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

*Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon data and assumptions for the counterpart Federal regulations.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

**List of Subjects in 30 CFR Part 938**

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 29, 2004.

**Rebecca W. Watson,**

*Assistant Secretary, Land and Minerals Management.*

■ For the reasons set out in the preamble, 30 CFR part 938 is amended as set forth below:

**PART 938—PENNSYLVANIA**

■ The authority citation for part 938 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

■ 1. Amend section 938.12 to revise paragraphs (a)(1), (a)(5), (a)(6), (a)(11), (a)(12) and (a)(13) to read as follows:

**§ 938.12 State statutory, regulatory, and proposed program amendment provisions not approved.**

(a) \* \* \*

(1) Section 5.1(b) (52 P.S. 1406.5a(b)) of BMSLCA is not approved to the extent noted in 30 CFR 938.13(a)(1).

\* \* \* \* \*

(5) Section 5.2(g) (52 P.S. 1406.5b(g)) of BMSLCA is not approved to the extent noted in 30 CFR 938.13(a)(2).

(6) Section 5.2(h) (52 P.S. 1406.5b(h)) of BMSLCA is not approved to the extent noted in 30 CFR 938.13(a)(3).

\* \* \* \* \*

(11) Section 5.4(a)(3) (52 P.S. 1406.5d(a)(3)) of BMSLCA is not approved to the extent noted in 30 CFR 938.13(a)(4).

(12) Section 5.4(c) (52 P.S. 1406.5d(c)) of BMSLCA is not approved to the extent noted in 30 CFR 938.13(a)(5).

(13) Section 5.5(b) (52 P.S. 1406.5e(b)) of BMSLCA is not approved to the extent noted in 30 CFR 938.13(a)(6).

\* \* \* \* \*

■ 2. Add § 938.13 to read as follows:

**§ 938.13 State statutory and regulatory provisions set aside.**

(a) The following provisions of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) are inconsistent with the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and are superseded to the extent noted effective December 9, 2004.

(1) Section 5.1(b) (52 P.S. 1406.5a(b)) of BMSLCA is superseded to the extent that it would limit an operator's liability to restore or replace a water supply covered under section 720 of SMCRA.

(2) Section 5.2(g) (52 P.S. 1406.5b(g)) of BMSLCA is superseded to the extent that it would limit an operator's liability to restore or replace a water supply covered under section 720 of SMCRA.

(3) Section 5.2(h) (52 P.S. 1406.5b(h)) of BMSLCA is superseded to the extent it would preclude Pennsylvania from

requiring the restoration or replacement of a water supply covered under section 720 of SMCRA.

(4) The portion of section 5.4(a)(3) (52 P.S. 1406.5d(a)(3)) of BMSLCA that states, "in place on the effective date of this section or on the date of first publication of the application for a Mine Activity Permit or a five-year renewal thereof for the operations in question and within the boundary of the entire mine as depicted in said application," is superseded to the extent it would limit

an operator's liability for restoration of, or compensation for, subsidence damages to structures protected under section 720 of SMCRA that were in existence at the time of mining.

(5) Section 5.4(c) (52 P.S. 1406.5d(c)) of BMSLCA is superseded to the extent it limits an operator's liability for repair of, or compensation for, subsidence damage to a structure covered under section 720 of SMCRA.

(6) The portion of Section 5.5(b) (52 P.S. 1406.5e(b)) of BMSLCA that states,

"All claims under this subsection shall be filed within two years of the date damage to the building occurred" is superseded to the extent that it would limit an operator's liability for restoration of, or compensation for, subsidence damages to a structure covered under section 720 of SMCRA.

(b) [Reserved]

[FR Doc. 04-26927 Filed 12-8-04; 8:45 am]

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