



DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[SATS No. PA-173-FOR; Docket ID: OSM-2021-0005; S1D1S SS08011000

SX064A000 234S180110; S2D2S SS08011000 SX064A000 23XS501520]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are announcing receipt of a proposed amendment to the Pennsylvania regulatory program (hereinafter, the Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Through this submission, Pennsylvania addresses regulations regarding water replacement provisions that were disapproved by us in 2005. This document gives the times and locations that the Pennsylvania program and this proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., Eastern Daylight Time (EDT), [INSERT DATE 30 DAYS AFTER DATE OF

PUBLICATION IN THE FEDERAL REGISTER]. If requested, we may hold a public hearing or meeting on the amendment on [INSERT DATE 25 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. We will accept requests to speak at a hearing until 4 p.m., EDT on [INSERT DATE 15 DAYS AFTER DATE OF

PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by SATS No. PA-173-FOR, by any of the following methods:

- *Mail/Hand Delivery:* Ben Owens, Acting Field Office Director, Pittsburgh Field Office, 3 Parkway Center South, 2nd Floor, Pittsburgh, PA, 15220
- *Fax:* (412) 937-2827
- *Email:* bowens@osmre.gov
- *Federal eRulemaking Portal:* The amendment is assigned the Docket ID: OSM-2021-0005, If you would like to submit comments go to <https://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comment Procedures” heading of the

SUPPLEMENTARY INFORMATION section of this document.

Docket: For access to the docket to review copies of the Pennsylvania program, this amendment, a listing of any scheduled public hearings or meetings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSMRE’s Pittsburgh Field Office or the full text of the program amendment is available for you to read at

<https://www.regulations.gov>.

Ben Owens, Acting Field Office Director

Pittsburgh Field Office

Office of Surface Mining Reclamation and Enforcement

3 Parkway Center Drive South, 2nd Floor, Pittsburgh, PA 15220

Telephone: (412) 937-2827

E-mail: bowens@osmre.gov

In addition, you may review a copy of the amendment during regular business hours at the following location:

Nathan A. Houtz, P.G., Director

Bureau of Mining Programs

Pennsylvania Department of Environmental Protection

Rachel Carson State Office Building

P.O. Box 8461

Harrisburg, PA 17101-8461

FOR FURTHER INFORMATION CONTACT: Ben Owens, Acting Field Office

Director, Pittsburgh Field Office, Office of Surface Mining Reclamation and

Enforcement, 3 Parkway Center Drive South, 2nd Floor, Pittsburgh, PA 15220

Telephone: (412) 937-2827. E-mail: bowens@osmre.gov.

SUPPLEMENTARY INFORMATION:

- I. Background on the Pennsylvania Program
- II. Description of the Proposed Amendment
- III. Public Comment Procedures
- IV. Statutory Orders and Executive Reviews

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 approved State program includes, among other things, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. See 30 U.S.C. 1253(a)(1) and (7). Based on 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 of the Pennsylvania program in the July 30, 1982 **Federal Register** (47 FR 33050). You can also find later actions concerning the Pennsylvania program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15, and 938.16.

II. Description of the Proposed Amendment

By letter dated August 5, 2021, (Administrative Record No. PA 907.00), Pennsylvania sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). This submission addresses several previously not approved items relating to inconsistencies between Pennsylvania's Surface Coal Mining Program (Program) and Federal regulatory requirements relating to water supply replacement as specified at 30 CFR 938.12(c). On May 13, 2005, we published a final rule notice that disapproved five provisions submitted by Pennsylvania pertaining to their water replacement provisions (70 FR 25472). This submission proposes to address those disapprovals. Pennsylvania has submitted several proposed revisions to their water replacement provisions intended to ensure that their water replacement requirements are consistent with SMCRA.

Pennsylvania determined that 25 Pa. Code sections 87.119 and 88.107 require extensive reorganization for clarity. Therefore, for ease of reference, Pennsylvania has reserved these section numbers in their entirety and adopted sections 87.119a and 88.107a respectively. Several minor editorial changes were made throughout. Substantive changes are summarized as follows:

1. Section 4.2(f)(4) of PA SMCRA was not approved because it allowed for final bond release when there is an outstanding Pennsylvania Department of Environmental Protection (Department) water supply replacement order. *See* 30 CFR 938.12(c)(1). Sections 87.119(i) and 88.107(i) (relating to hydrologic balance: water

rights and replacement) were not approved for the same reason of allowing for final bond release when there is an outstanding Department order. *See* 30 CFR 938.12(c)(7). The program amendment proposes to eliminate the ability to release bond when a Department order issued under the water supply replacement section is under appeal.

2. *25 Pa. Code Sections 87.1 and 88.1* (Relating to definitions) and *25 Pa. Code Sections 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 also not approved in 2005. This is because it established a less stringent standard than is required by the Federal regulations. 30 CFR 938.12(c)(4) and (5) require that no additional costs be passed along to the water supply owner. This amendment proposes to delete the term “de minimis cost increase” and references thereto making it just as effective as the regulations. *See* 30 CFR 938.12(c)(4) and (5).

3. *25 Pa. Code Sections 87.119(a) and 88.107(a)* were not approved in 2005 because they did not include a requirement to provide temporary replacement water supply. Furthermore, they allowed for the replacement supply to be of a lesser quantity and quality than the pre-mining water supply. *See* 30 CFR 938.12(c)(5). The proposed revisions amend the Pennsylvania Surface Mining Regulations to render them consistent, where possible, with existing Underground Coal Mining Regulations, specifically 25 Pa. Code Chapter 89.145, which sets forth program provisions that define circumstances where a temporary replacement water supply is required and direct that the supplied temporary or permanent replacement water supply is not of a lower quantity or quality.

4. *25 Pa. Code Section 87.119(a)(3) and 88.107(a)(3)* were not approved because they allowed persons with an ownership interest in the water supply to waive the requirements to restore or replace the water supply. The program amendment proposes that the Department may waive the restoration or replacement water supply requirement, if it is determined by the Department that the affected water supply is to be abandoned. All

persons who possess an ownership interest in the water supply would be required to submit a notarized written statement of knowingly and willingly agreeing to said abandonment.

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 water supply. OSMRE did not approve these regulations because section 4.2(f)(5) of PASMCRRA which provided statutory authority for the regulations was repealed in 2000. As a result, there was no statutory authority for these regulations. The program amendment proposes to allow an operator or mine owner to pursue recovery costs if they prevail in an appeal of a Department order to replace a water supply in accordance with 27 Pa.C.S. section 7708.

A. *Proposed Revisions in Response to Disapprovals at 938.12(c)*

In its August 5, 2021 submission (Administrative Record No. PA 907.00), the Department explained that the changes it was proposing to 87.119 and 88.107 required extensive reorganization, and that, to facilitate this, the sections were replaced by the new sections 87.119a and 88.107a. Additional detail on these and other changes proposed in the Department's amendment are discussed below.

a. *Definitions:*

- i. *"De minimis cost increase"* is proposed to be deleted as required by OSMRE.
- ii. *"Alternative water supply information"* proposes revision to sections 87.47 and 88.27 to specify that any affected "water supply" be identified and include water supplies replacement cost calculations be included in the permit application. Additionally, the Department will provide notice to water supply owners for said supplies.
- iii. *"Operation and maintenance costs"* is proposed to be included to ensure

consistency with State law.

- iv. “*Water supply*” is proposed revised to specify that natural soil moisture is not a water supply.
 - v. “*Water supply owner*” is proposed to be included and that the term be used throughout each provision to avoid repetition of using both “landowner” and “water supply company” terms.
 - vi. “*Water supply surveys*” is proposed relocated from definitions to the specific section in each chapter.
- b. *Sections 87.119a and 88.107a* propose language setting out requirements for the operator or mine owner, who affects a water supply to any demonstrable extent by contamination, pollution, diminution or interruption, to promptly provide temporary replacement water supplies as defined at 30 CFR 701.5.
- c. *Sections 87.119a(a) and 88.107a(a)* (Water supply surveys), proposes language expanding the detailed requirements for a water supply survey.
- d. *Sections 87.119a(a)(1) and 88.107a(a)(1)* propose expanding existing requirements for the water supply survey, drawing provisions from 25 Pa. Code 89.145a, which govern water supply surveys for underground coal mining. The resulting proposed regulation would address the following requirements:
- i. location and type of the water supply;
 - ii. uses of the water supply, both existing and reasonably foreseeable future uses;
 - iii. the chemical and physical characteristics of the water;
 - iv. historic and recent quantity measurements and other hydrologic data;
 - v. physical description of the water supply;
 - vi. sufficient sampling and other measurements to document the

seasonal variation in hydrologic conditions of the water supply.

- e. *Sections 87.119a(a)(2) and 88.107a(a)(2)* propose the requirements for operators or mine owners to submit the water supply survey to the Department, to the water supply owner, and the water supply user, prior to permit issuance.
- f. *Sections 87.119a(a)(3) and 88.107a(a)(3)* propose the requirements for operators or mine owners to 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.
- g. *Sections 87.119a(a)(4) and 88.107a(a)(4)* regarding rejection of pre-mining or post-mining surveys by the water supply owner, reorganize the requirements with regard to “defenses to presumption of liability” and “notification to the Department.”
- h. *Sections 87.119a(b) and 88.107a(b)* (Water supply replacement obligation), propose language amending, through enhanced specificity, the existing requirement that an operator or mine owner to restore or replace an affected water supply, no matter how minimal, with a permanent alternative source to meet reasonably foreseeable uses of the existing water supply and that for any water supply that will, with a reasonable degree of certainty establish 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. In addition, it proposes to require that the operator or mine owner provide to the Department, in writing, a description of the locations of a restored or replaced water supply.
- i. *Sections 87.119a(c) and 88.107a(c)* (Temporary water supplies) propose requirements that, if the Department has determined in a preliminary review that the water loss is related to mining activity, a temporary water supply, adequate

to meet pre-mining needs, must be provided within 24 hours if no alternate source of water is readily available to the water supply owner or user.

- j. *Sections 87.119a(d) and 88.107a(d)* (Immediate replacement of water supply by the Department) propose language addressing the immediate replacement of a water supply and the Department's authority to recover costs from the responsible operator or mine owner, as relocated verbatim from sections 87.119(e) and 88.107(f).
- k. *Sections 87.119a(e) and 88.107a(e)* (Reimbursement), propose new requirements addressing reimbursement of a water supply owner or user based on a negotiation in circumstances where a water supply owner or user has replaced a water supply that an operator or mine owner is responsible for replacing. This requirement includes a process should disputes arise and the determination by the Department of the fair cost reimbursement. This requirement also imposes a 5-year reimbursement claim period until final bond release.
- l. *Sections 87.119a(f) and 88.107a(f)* (Adequacy of permanently restored or replaced water supply) propose language expanding the concepts of "adequate quality" and "adequate quantity" in permanently restored or replaced water supplies and eliminates references to the concept of *de minimis* costs of operation and maintenance.
- m. *Sections 87.119a(g) and 88.107a(g)* (Increased operation and maintenance costs) propose language describing the procedure for determining annual operation and maintenance 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.
- n. *Sections 87.119a(h) and 88.107a(h)* (Special provisions for operation and

maintenance costs) propose language clarifying two provisions for operation and maintenance costs: when the ownership of the supply changes; and when there are multiple supplies that have been replaced with associated increases in costs.

- o. *Sections 87.119a(i) and 88.107a(i)* (Waivers) propose to address compensation as an alternative to replacement and would provide that only a water supply owner may waive the operator's or mine owner's responsibility to replace a water supply, which may occur only when replacement is not necessary to achieve the approved post-mining land use.
- p. *Sections 87.119a(j) and 88.107a(j)* (Presumption of liability) propose to restate provisions in PASMCRRA that provide that the operator or mine owner is presumed liable for water supply pollution and diminution within 1,000 feet of areas affected by mining and restate the five defenses to the presumption of liability that exist in PASMCRRA. This revision does not propose to make any changes to the statutory defenses but clarifies the criteria for the operator or mine owner to be excluded from the presumption of responsibility.
- q. *Sections 87.119a(k) and 88.107a(k)* (Operator cost recovery) propose replacement of language disapproved in 2005 due to the repeal of section 4.2(f)(5) of PASMCRRA. They address an operator's or mine owner's ability to recover costs by referencing the current statute related to cost for mining proceedings at 27 Pa.C.S. section 7708.
- r. *Sections 87.119a(l) and 88.107a(l)* (Other remedies) propose language clarifying that nothing in the regulations would prevent a water supply owner or user from pursuing any other remedy provided in law or equity when claiming pollution or diminution of a water supply. The language also clarifies that nothing in the regulations prevents an operator or mine owner from pursuing

other legal remedies should they incur costs in restoring or replacing a supply that experienced pollution or diminution caused by third parties.

- s. *Sections 87.119a(m) and 88.107a(m)* (Issuance of new permits) propose the removal of language from previous sections that indicated that a Department order to restore or replace a water supply would not affect final bond release.

B. Revisions to other sections are solely for the purpose of establishing consistency or to adjust the references affected by renumbering.

The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES** or at <https://www.regulations.gov>.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Electronic or Written Comments

If you submit written or electronic comments on the proposed rule during the 30-day comment period, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

We cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m., EDT on **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public

and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Statutory Orders and Executive Reviews

Executive Order 12866 - Regulatory Planning and Review and Executive Order 13563— Improving Regulation and Regulatory Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of State program amendments is exempted from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSMRE for review, our regulations at 30 CFR 732.17(h) require us to publish a notice in the **Federal Register** indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. We conclude our review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, we will also make the determinations and certifications required by the various laws and Executive orders governing the rulemaking process and include them in the final rule.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Thomas D. Shope,

Regional Director,

North Atlantic - Appalachian Region.

