



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 256S180110; S2D2S SS08011000 SX064A000 25XS501520]

Pennsylvania Regulatory Program

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

ACTION: Final rule; partial approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE), are approving in part an amendment to the Pennsylvania regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The amendment addresses regulations regarding water replacement provisions that were disapproved by us in 2005.

DATES: The effective date is [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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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). 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 of the Pennsylvania program in the *Federal Register* on July 30, 1982 (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. Submission of the 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.*). The proposed amendment addresses several items, previously not approved, relating to inconsistencies between Pennsylvania's Surface Coal Mining Program and Federal regulatory requirements relating to water supply replacement as specified at 30 CFR 938.12(c). This submission also proposes to address, among other issues, five provisions previously submitted by Pennsylvania pertaining to water replacement which were not approved by final rule on May 13, 2005 (70 FR 25472). In its August 5, 2021 amendment submission letter, Pennsylvania states that 25 Pa. Code Sections 87.119 and 88.107 required extensive reorganization for clarity. Pennsylvania has reserved these sections and adopted new sections at 25 Pa. Code 87.119a and 25 Pa. Code 88.107a.

With this submission, Pennsylvania intends to create water replacement requirements that are consistent with SMCRA and the Federal regulations.

We announced receipt of the proposed amendment in the *Federal Register* on May 23, 2023 (88 FR 33021). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. No hearing or meeting was requested and, therefore, neither was held. The public comment period ended June 22, 2023. We received no comments.

III. OSMRE's Findings

The following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. Any revisions that we do not specifically discuss below concern non-substantive wording or editorial changes. We are approving the amendment, in part, and not approving it in part, as described below.

As an initial matter, in its August 5, 2021, submission (Administrative Record No. PA 907.00), Pennsylvania explained that its proposed changes to 25 Pa. Code sections 87.119 and 88.107 required extensive reorganization, and these sections were replaced by the new Sections 87.119a and 88.107a. The text of 25 Pa. Code 87.119a is structurally and substantively identical to that of 25 Pa. Code 88.107a. Accordingly, our findings regarding any specific subsection or provision of 25 Pa. Code 87.119a also apply to its twin at 25 Pa. Code 88.107a.

1. 25 Pa. Code Sections 87.1 and 88.1 - Definitions.

Pennsylvania has proposed to amend 25 Pa. Code Sections 87.1 and 88.1 to provide definitions for “operation and maintenance costs” and “water supply owner,” as well as to amend the term “water supply” as follows. The term “operation and maintenance costs” is defined as “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.” The definition provided for “water supply owner” is a “landowner or water supply company.” The proposed amendment to the definition for “water supply” is, “for the purpose of Sections 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.” The changes to this definition are the addition of the last sentence regarding soil moisture, the revision of the reference to section 87.119 to reflect its replacement at 87.119a, and the addition of a parenthetical description of the contents of section 87.119a.

25 Pa. Code Sections 87.1, 88.1, and 89.5 previously defined the term “de minimis cost increase” as a cost increase either less than 15% of the annual operating and maintenance costs of the previous water supply that is restored or replaced, or a cost that is less than \$60 per year. We previously did not approve of this term or its use in conjunction with replacement water supplies to the extent it could allow any additional cost above the premining cost to be passed to the water supply user or owner. *See* 70 FR 25472, 25482-83 (May 13, 2005); 66 FR 67010, 67029 (December 27, 2001). The definition for “de minimis cost increase” has since been deleted from 25 Pa. Code Sections 87.1, 88.1, and 89.5.

OSMRE Finding: The definitions of “operation and maintenance costs,” “water supply,” and “water supply owner” are not defined terms in SMCRA or the Federal regulations at 30 CFR part 700. We find these proposed definitions are not inconsistent with the use of those terms used with section 4.2(f) of PASMCRRA (52 P.S. 1396.4b(f)).

When we previously considered the water supply replacement requirements for 25 Pa. Code Chapter 89 relating to water supplies affected by underground mining activities, we determined that the definition of “de minimis cost increase” was not as effective as that which appears in the Federal regulation at 30 CFR 701.5 (definition of the term, “replacement of water supply”). 70 FR 25472, 25482-83 (May 13, 2005); 66 FR 67010, 67029 (December 27, 2001). We found the intent of the Federal regulation was to ensure that the owner or user of the water supply was made whole and that no additional costs were passed on to the water supply owner or user. Accordingly, we previously did not approve the definition of “de minimis cost increase” as it appeared at 25 Pa. Code 87.1 and 88.1. 70 FR 25472, 25482 (May 13, 2005); 30 CFR 938.12(c)(4). Pennsylvania has now proposed to delete the “de minimis cost increase” provisions from 25 Pa. Code 87.1 and 88.1, and to not insert any such term as part of the criteria at 25 Pa. Code 87.119a(f) and 88.107a(f) (which were included with their predecessor sections at 25 Pa. Code 87.119(a)(1)(v) and 88.107(a)(1)(v)). These deletions resolve our prior disapproval and cause the Pennsylvania program to comply with SMCRA and the Federal regulations at 30 CFR 701.5.

The definitions and deletions proposed above are consistent with SMCRA and no less stringent than the Federal regulations, and we approve these changes. Because the deletion of the term “de minimis cost increase” at 25 Pa. Code 87.1 and 88.1 resolves our prior non-approval codified at 30 CFR 938.12(c)(4), that provision can be removed and reserved.

2. 25 Pa. Code Sections 87.47 and 88.27 – Alternative water supply information.

Pennsylvania has proposed revisions to 25 Pa. Code sections 87.47 and 88.27. These sections state that a permit application “shall identify the extent to which the proposed... mining activities may result in contamination, diminution or interruption of an underground or surface source of water within the proposed permit or adjacent area for

domestic, agricultural, industrial or other legitimate use.” Pennsylvania has proposed to replace the phrase “an underground or surface source of water” with simply “any water supply,” and to strike the phrase “for domestic, agricultural, industrial or other legitimate use.” In both sections, Pennsylvania has proposed to add that the description shall include cost calculations for restoration or replacement of the affected water supply, and that PADEP will notify the owner of any potentially affected supply. At 25 Pa. Code 87.47, Pennsylvania has also proposed to change the reference to 25 Pa. Code 87.119 to its renumbered location at section 87.119a.

OSMRE Finding: We find that the foregoing changes require the permit applicant to provide a more detailed description of alternative water supply information than required by the Federal regulations at 30 CFR 780.21(e). We find that the definition for “water supply” at 25 Pa. Code Sections 87.1 and 88.1, which includes “an existing, designated, or currently planned source of water” is broader than the sources that must be described at 30 CFR 780.21(e). Furthermore, the proposed changes require the applicant to provide cost calculations for restoration or replacement of the affected water supply, which is also more than is required at 30 CFR 780.21(e). Accordingly, we find that requirements detailed in 25 Pa. Code sections 87.47 and 88.27 are consistent with SMCRA Section 507 (30 U.S.C. 1257) and no less stringent than the alternative water source information required by the Federal regulations at 30 CFR 780.21(e). Therefore, we approve the changes.

3. *25 Pa. Code Sections 87.119a(f) and 88.107a(f) - Adequacy of permanently restored or replaced water supply.*

Pennsylvania has proposed regulations at 25 Pa. Code Sections 87.119a(f) and 88.107a(f) to provide the criteria used by PADEP to deem a permanently restored or replaced water supply as “adequate.” This list of adequacy criteria is an expanded version of the criteria for water supply adequacy that formerly appeared at 25 Pa. Code Sections 87.119(a)(1) and 88.107(a)(1). 25 Pa. Code Sections 87.119a(f) and 88.107a(f) provide

that a permanently restored or replaced water supply shall include any well, spring, municipal water supply system or other supply approved by PADEP which meets certain criteria. The proposed regulations provide four numbered subsections containing the criteria for adequacy: “reliability, maintenance, and control,” “quality,” “quantity,” and “water source serviceability.”

The prior version of these “adequacy” criteria at 25 Pa. Code Sections 87.119(a)(1) and 88.107(a)(1) provided that a replacement water supply could not result in more than a “de minimis” cost increase to the owner or user to operate and maintain. As noted in Finding 1 above, the proposed regulations at 25 Pa. Code Sections 87.119a(f) and 88.107a(f) have deleted any such requirement.

The proposed regulations at subsection (f)(1), relating to reliability, maintenance and control, provide: “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; and, (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).

Subsection (f)(2) provides the criteria for a replacement water supply to be deemed “adequate” in quality by PADEP. Subsection (f)(2)(i) provides that water quality is adequate for a domestic supply if the restored or replaced water supply meets the PSDWA standards, or a quality comparable to the premining water supply if that water supply did not meet these standards. This subsection further provides that PADEP 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. Subsection (f)(2)(ii) provides that water quality is adequate for non-domestic supplies if it meets 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.”

Subsection (f)(3) states that for purposes of this paragraph, the term “reasonably foreseeable uses” includes the reasonable expansion of use where the premining quantity of the water supply was adequate to supply the foreseeable uses. Subsection (f)(3) then provides that either the following subsections (f)(3)(i) or (f)(3)(ii) must be satisfied for a water supply’s quantity to be deemed “adequate.” Subsection (f)(3)(i) would deem a water supply adequate in quantity if 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. This subsection also provides that PADEP 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. Subsection (f)(3)(ii) would deem a water supply adequate in quantity if 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.

The provisions at subsections (f)(4), relating to water source serviceability, require that 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.

OSMRE Finding: The previous iterations of these water supply criteria were located at 25 Pa. Code Sections 87.119(a) and 88.107(a), which we did not approve

because they were less stringent than the Federal regulations for the following reasons: at subsection (a), to the extent it allowed the replaced water supply to be of a lesser quantity and quality than the premining water supply; at subsection (a), to the extent it did not provide for temporary replacement of water supplies; at subsection (a)(1)(v), to the extent it would pass on “de minimis” operating and maintenance costs of a replacement water supply in excess of the operating and maintenance costs of the premining water supply to the landowner or water supply user; at subsection (a)(2), to the extent it did not require an operator to provide for all increased operating and maintenance costs of a restored or replaced water supply; and, at subsection (a)(3), to the extent it would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term “replacement of water supply.” 30 CFR 938.12(c)(5); 70 FR 25472, 25483 (May 13, 2005).

Pennsylvania’s proposed regulations address two of the reasons we did not approve 87.119(a) and 88.107(a). The predecessor of the “adequacy” criteria, now located at subsection (f)(1), provided that a replacement water supply could not result in more than a de minimis cost increase to the owner or user to operate and maintain. For the reasons described at Finding 1 above, we did not approve of the use of “de minimis cost increase” as it appeared at 25 Pa. Code 87.119(a)(1)(v) and 88.107(a)(1)(v). The deletion of the “de minimis cost increase” provisions from 25 Pa. Code 87.119a(f) and 88.107a(f) resolves one of the five reasons we did not approve 25 Pa. Code 87.119 and 88.107, as codified at 30 CFR 938.12(c)(5). Another reason we did not approve of these sections was that they did not require the provision of a temporary water supply, which has also been remedied as described at Finding 6 below.

We also did not approve 25 Pa. Code 87.119(a) and 88.107(a) to the extent that each would allow the replaced water supply to be of lesser quantity and quality than the premining water supply. The Federal definition of the term “replacement of water

supply” at 30 CFR 701.5 states: “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 equivalent to premining quantity and quality.” Because the prior regulations at subsection (a) allowed replacement of a water supply that was “adequate” in water quantity and quality rather than “equivalent” to the premining quantity and quality, we found them less stringent than the Federal regulations and did not approve them. 30 CFR 938.12(c)(5); 70 FR 25472, 25483 (May 13, 2005).

The proposed regulations in subsection (f)(1) provides acceptable qualitative criteria for a water supply that is based on that of the premining water supply, and the restored or replaced water supply is disallowed from requiring the water supply owner or user to pay increased cost or operation and maintenance. Subsection (f)(4) also requires that 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. We find that subsections (f)(1) and (f)(4) comply with 30 CFR 701.5, since they provide for an equivalent water delivery system that does not result in increased operating or maintenance costs to the water supply user or owner.

As described above, the Federal regulations require that a replacement water supply must provide an equivalent quantity and quality of water to that of the premining supply. While Pennsylvania’s proposed regulations at 25 Pa. Code Sections 87.119a(f) and 88.107a(f) provide more detailed qualitative criteria for a replacement water supply than the former criteria at 25 Pa. Code 87.119(a) and 88.107(a), the proposed regulations nonetheless continue to allow the replacement water supply to be of “adequate” quantity and quality. Pennsylvania’s proposed regulations at subsection (f)(2) would set the floor for water quality at the level required by the Pennsylvania Safe Drinking Water Act (PSDWA) (35 P.S. 721.1—721.17). In a situation where the premining quality of the

water supply was higher than required by PSDWA, subsection (f)(2) could nonetheless authorize the provision of a water supply of lower quality than the premining water supply. Proposed subsection (f)(2)(i) makes this clear by adding in its final sentence that PADEP “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.” Similarly, if the water supply owner or user’s premining water supply provided a greater quantity of water than necessary for their needs, the Federal standard would require that same abundance to be restored while Pennsylvania’s proposed regulations at (f)(3) would not.

Accordingly, we do not approve the proposed regulations at 25 Pa. Code Sections 87.119a(f) and 88.107a(f) to the extent they could permit a replaced water supply to provide lesser quantity and quality of water than “equivalent” to that of the premining water supply as required by the Federal regulations. Otherwise, we approve the proposed regulations.

4. 25 Pa. Code Sections 87.119a(a) and 88.107a(a) – Water supply surveys.
Pennsylvania has proposed revisions to 25 Pa. Code sections 87.119a(a) and 88.107a(a) which provide similar criteria to the definition of “water supply survey” that previously appeared at 25 Pa. Code sections 87.1 and 88.1.

The proposed sections at 25 Pa. Code 87.119a(a) and 88.107a(a) require an operator or mine owner who, because of mining activities, may affect a water supply to any demonstrable extent by contamination, pollution, diminution, or interruption, must conduct a survey of all water supplies within the permit area and adjacent areas that may be affected, except when the water supply owner denies the operator or mine owner access for the survey. To the extent that it can be collected without excessive inconvenience to the water supply owner or water supply user, the information gathered must include: the location and type of water supply; its existing and reasonably

foreseeable uses; historic and recent quantity measurements and other hydrogeologic data such as the static water level and yield determination; 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; sufficient sampling and other measurements to document the seasonal variation in hydrologic conditions of the water supply; and, a broad list of chemical and physical water characteristics specified in the proposed regulation.

The operator or mine owner conducting the survey must use a certified laboratory to analyze the samples. In addition, a copy of the results must be provided to PADEP, the water supply owner, and the water supply user. A water supply survey must be conducted prior to the time a water supply is susceptible to mining-related effects, and the proposed regulations would require that a copy of the survey is part of the permit application submitted to PADEP. If a mine owner or operator was denied the access to the site by the water supply owner for the purpose of conducting the survey, the operator must provide evidence to PADEP proving that the water supply owner was notified by certified mail or personal service, that the operator attempted to conduct a survey, and that the water supply owner failed to authorize access prior to the commencement of mining activity.

OSMRE Finding: We previously approved of the prior definition “water supply survey” as it appeared at 25 Pa. Code sections 87.1 and 88.1 because the term is undefined in SMCRA and the Federal regulations, the term is only used in conjunction with an operator’s ability to rebut the presumption of liability of pollution, and the term’s use does not relieve operators of liability for replacement or restoration of water supplies that were impacted by their mining operations. *See* 70 FR 25472, 25482 (May 13, 2005). For the same reasons, we find that the addition of the water supply survey provisions detailed in 25 Pa. Code Sections 87.119a(a) and 88.107a(a) are consistent with SMCRA and no less stringent than the Federal regulations. Therefore, we approve the changes.

5. *25 Pa. Code Sections 87.119a(b) and 88.107a(b) - Water supply replacement obligations.*

Pennsylvania has proposed regulations at 25 Pa. Code 87.119a(b) and 88.107a(b), relating to water supply replacement obligations. The proposed regulations at 25 Pa. Code 87.119a(b)(1) and 87.107a(b)(1) provide that “the operator of any mine or a person engaged in government-financed reclamation who affects a water supply by contamination, pollution, diminution or interruption shall restore or replace the affected water supply with an alternate source, adequate in water quantity and water quality, for the purpose served by the water supply.” The proposed regulations at 25 Pa. Code 87.119a(b)(2) and 88.107a(b)(2) provide that “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.”

OSMRE Finding: As discussed at Finding 3 above, the proposed regulations at subsection (b) only require that a water supply replacement be “adequate” considering its purpose, which we found less stringent than the Federal regulations as discussed at Finding 3 above. Accordingly, the proposed regulations at 25 Pa. Code Sections 87.119a(b) and 88.107a(b) remain less stringent than required by the Federal regulations because they do not require the replacement water supply to be of “equivalent to premining” quantity and quality. 30 CFR 938.12(c)(5); 70 FR 25472, 25483 (May 13, 2005). Accordingly, we are not approving the proposed regulations at 25 Pa. Code 87.119a(b) and 88.107a(b) to the extent they would allow the replaced water supply to be of a lesser quantity and quality than the premining water supply. Otherwise, they are approved.

6. *25 Pa. Code Sections 87.119a(c) and 88.107a(c)- Temporary water supplies.*

Pennsylvania has proposed regulations at 25 Pa. Code 87.119a(c) and 87.107a(c), requiring that, 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 PADEP, whichever occurs first. The proposed regulation provides that the temporary water supply 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, and that the requirement for a temporary water supply may be subject to a preliminary determination by PADEP.

OSMRE Finding: The Federal definition of the term "replacement of water supply" requires that an operator must restore or replace an affected water supply, on both a temporary and permanent basis, with one that is equivalent to premining quantity and quality. 30 CFR 701.5. We did not approve the prior versions of Pennsylvania's water supply replacement obligations provisions to the extent that they did not require an operator to provide a temporary water supply in addition to a permanent water supply as required by the Federal regulations at 30 CFR 701.5. 70 FR 25472, 25483 (May 13, 2005). Pennsylvania's proposal to add a regulation requiring the provision of a temporary water supply resolves this issue, which addresses one of the reasons we did not approve 25 Pa. Code 87.119 and 88.107, as codified at 30 CFR 938.12(c)(5).

However, Pennsylvania's proposed regulations only require that the temporary water supply 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. As discussed at Finding 3 above, the criteria at proposed subsection (f), fall below the Federal requirement that the replacement water supply be equivalent in quantity and quality to the premining supply. We similarly find that a "sufficient" quantity of water is less stringent than the Federal requirement for an "equivalent" quantity of water.

Because 25 Pa. Code 87.119a(c) and 88.107a(c) are less stringent than the Federal

regulations at 30 CFR 701.5, we are not approving them to the extent they would allow the temporary water supply to be of a lesser quantity and quality than the premining water supply. Otherwise, they are approved.

7. 25 Pa. Code Sections 87.119a(d) and 88.107a(d) - Immediate replacement of water supply by the Department.

Pennsylvania's proposed regulations at 25 Pa. Code Sections 87.119a(d)(1) and 88.107a(d)(1) provide that, if PADEP 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 PASMCR (52 P.S. 1396.4b(f)) (relating to the mine owner liability to restore or replace an affected water supply), PADEP may use moneys from the Surface Mining Conservation and Reclamation Fund to restore or replace the affected water supply. Subsections (d)(2) and (d)(2) would provide that PADEP will recover the costs of such 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. Such costs recovered will be deposited in the Surface Mining Conservation and Reclamation Fund.

OSMRE Finding: The foregoing proposed provisions at subsections 87.119a(d)(1) and 88.107a(d)(1) substantively match those that previously appeared at 25 Pa. Code Sections 87.119(e) and 88.107(e), while proposed sections 87.119a(d)(2) and 88.107a(d)(2) substantively match those that previously appeared at 87.119(f) and 88.107(f). We approved of former sections 87.119(e) and 88.107(e) for the same reason that we approved Section 4.2(f)(3) of PASMCR, finding that while there is no provision in the Federal program expressly allowing an agency to fund the restoration/replacement of temporary water supplies, it is not inconsistent with SMCRA and the Federal regulations because it holds the operator responsible for replacing water supplies affected by coal mining operations through a cost recovery action. *See* 70 FR 25472, 25475-84

(May 13, 2005). We approved of former sections 87.119(f) and 88.107(f) because, under SMCRA, an operator remains responsible for replacing a water supply that was affected by the mining operations, and former subsection (f) provided another means to achieve that purpose. *See* 70 FR 25472, 25484 (May 13, 2005). We also found that there was no similar provision in the Federal regulations, and that these were not inconsistent with the requirements of SMCRA or the Federal regulations. Because the proposed regulations at 25 Pa. Code Sections 87.119a(d) and 88.107a(d) substantively match those we previously approved, the same analyses apply. Accordingly, we approve the provisions proposed at 25 Pa. Code Sections 87.119a(d) and 88.107a(d).

8. 25 Pa. Code Sections 87.119a(e) and 88.107a(e) – Reimbursement.

Pennsylvania has proposed provisions at 25 Pa. Code Sections 87.119a(e) and 88.107a(e) which would require that if a water supply is restored or replaced by the water supply owner or user prior to establishing that mining activity is responsible for the pollution or diminution, a responsible operator or mine owner must reimburse the water supply owner or user for the cost of replacing or restoring a water supply, including payment of increased operation and maintenance costs. This subsection further provides that if the operator or mine owner disputes the cost as presented by the water supply owner or user, the operator or mine owner may present to PADEP comparable estimates meeting the requirements of subsection (b)(1) from three water supply installers in the area. PADEP will determine the fair cost of reimbursement based upon these estimates and any other applicable information. Without affecting a water supply owner's or user's other rights consistent with subsection (1), an affected water supply owner or user may make a reimbursement claim to PADEP against an operator or mine owner only until final release of the reclamation bond for the site.

OSMRE Finding: The first sentence of the proposed provision would allow the owner or user of a water supply negatively affected by mining to be made completely

whole for the cost incurred if they choose to replace the water supply before proving such to PADEP. This portion of subsection (e) also does not relieve the mine owner or operator from their responsibility to provide the water supply replacement and pay all operating and maintenance costs of such. However, the following two sentences of the proposed regulation provide that an operator that disputes the cost presented by the water supply owner or user may present to PADEP comparable estimates for three water supply installers in the area that meet the requirements of subsection (b)(1), and that PADEP will determine the fair cost of reimbursement based on such estimates. The requirements of subsection (b)(1) incorporate the “adequate in water quantity and quality” standard we did not approve as described in Findings 3 and 5 above. Pennsylvania’s proposed requirements use the standard of an “adequate” or “sufficient” supply, which falls below the Federal requirement that the replacement water supply be equivalent in quantity and quality to the premining supply. The final sentence, of subsection (e), only allowing the affected water supply user to seek reimbursement from the mine company or operator until final bond release, has no Federal equivalent but is not inconsistent with SMCRA or the Federal regulations.

Accordingly, we do not approve of the proposed regulations at 25 Pa. Code Sections 87.119a(e) and 88.107a(e) to the extent that they would set the amount of reimbursement based on estimates of an “adequate” water supply rather than one of equivalent quantity and quality to the premining supply as required by the Federal regulations. Otherwise, it is approved.

9. 25 Pa. Code Sections 87.119a(g) and 88.107a(g) - Increased operation and maintenance costs.

Pennsylvania has proposed revisions to 25 Pa. Code Sections 87.119a(g) and 88.107a(g) relating to procedures that an operator or mine owner must follow if the operation and maintenance costs of the restored or replaced water supply are more than those of the previous supply. These subsections require that 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 a procedure described in four subsequent subsections, each with their own criteria.

Subsection (g)(1) requires PADEP to determine the amount of the annual increase in operation and maintenance costs of the restored or replaced water supply based on the current actual uses of the water supply, based on information about those costs submitted by the mine owner or operator, in consultation with the water supply owner or user.

Within 30 days after the end of the data collection period, the operator or mine owner must submit to PADEP, 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, as well as 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. PADEP is required to review the operator's or mine owner's information, the water supply owner's information, and any other information PADEP deems relevant, then determine the amount of annual increase in operation and maintenance costs.

Subsection (g)(2) requires that within 60 days of PADEP's determination of the annual increased cost, the operator shall post a surety or collateral bond separate from the designated reclamation bond, on a form prepared by PADEP, in an amount calculated in accordance with a formula provided at subsection (g)(3). Pursuant to subsection (g)(2)(ii), this bond amount will be reviewed and adjusted as necessary and in accordance with 25 Pa. Code 86.152 (relating to bond adjustments) at an interval no less than every five years in conjunction with the permit renewal. Pursuant to subsection (g)(2)(iii), a replacement bond must be posted by any successor operator of the associated permit. Subsection (g)(2)(iv) provides that 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 PADEP forfeited the bond unless this supply has since been

abandoned. The money will be paid by PADEP 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.

Subsection (g)(3) provides a formula to calculate the amount of the bond, which includes variables to account for annual increased operation and maintenance costs as well as inflation.

Subsection (g)(4), relating to release of the obligation, provides that 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. Upon receipt of the fully executed and recorded release, PADEP 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.

OSMRE Finding: The Federal regulations at 30 CFR 701.5 state that replacement of a water supply includes provision of an equivalent water delivery system and payment of operation and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies. However, 30 CFR 701.5 continues that, upon agreement by the permittee and the water supply owner, the obligation to pay such operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance costs for a period agreed to by the permittee and the water supply owner.

The proposed Subsections 87.119a(g) and 88.107a(g) satisfy the requirements at the Federal regulations that waiver of the water supply replacement obligation as to the

portion of increased operation and maintenance costs. As with the Federal regulation, a written waiver is required, and the requirement of a one-time payment will be satisfied, at the very least, in the form of the bond forfeiture and settlement remitted to the water supply owner or user pursuant to subsection (g)(2)(iv). Because the proposed Subsections 87.119a(g) and 88.107a(g) comply with the provisions relating to voluntary waiver of the obligation to provide increased operation and maintenance costs at 30 CFR 701.5, we are approving them.

10. 25 Pa. Code Sections 87.119a(h) and 88.107a(h) - Special provisions for operation and maintenance costs.

Proposed subsections 87.119a(h)(1) and 88.107a(h)(1) would provide that if ownership of the affected water supply changes, 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. Subsections 87.119a(h)(2) and 88.107a(h)(2) provide that 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.

OSMRE Finding: We have determined that there is no direct Federal counterpart to 25 Pa. Code sections 87.119a(h) and 88.107a(h). Subsections 87.119a(h)(1) and 88.107a(h)(1) continue to require an operator to pay increased operation and maintenance costs until release, per subsection (g) which we approved above. Nothing at subsection (h)(2) substantively changes the requirement that the operator or mine owner must pay for the increased operation and maintenance costs until release, as required by 30 CFR 701.5. We find that proposed regulations at subsection (h)

are consistent with SMCRA and no less stringent than the Federal regulations. Therefore, we are approving them.

11. *25 Pa. Code Sections 87.119a(i) and 88.107a(i) – Waivers..*

Pennsylvania has proposed regulations at 25 Pa. Code 87.119a(i) (formerly 25 Pa. Code 87.119(a)(3)) and 25 Pa. Code 88.107a(i) (formerly 25 Pa. Code 88.107(a)(3)) related to procedures for waiving the obligation to provide water supply replacement. Pennsylvania's proposed regulations at subsection (i) would allow waiver of the requirement to restore or replace an affected water supply if: PADEP 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; and, a notarized written statement signed by all persons who possess an ownership interest in the water supply is submitted to PADEP establishing that the individuals knowingly and willingly agree to abandon the water supply.

OSMRE Finding: We previously did not approve the waiver provisions at 25 Pa. Code 87.119(a)(3) and 88.107(a)(3) to the extent they would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, "replacement of water supply." 70 FR 25472, 25483 (May 13, 2005). The Federal definition for "replacement of water supply" states that "if the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water supply owner." 30 CFR 701.5. We disapproved of Pennsylvania's prior regulations for falling below the Federal requirement, since it allowed a waiver from the restoration or replacement obligations without requiring a demonstration that a suitable alternative

water source is available and could feasibly be developed, and the water supply is not needed for the land use in existence at the time it was affected by surface mining and the supply is not needed to achieve the postmining land use. 70 FR 25472, 25483 (May 13, 2005).

Pennsylvania's proposed regulations at subsection (i) would require that before the obligation to restore or replace an affected water supply can be waived, PADEP must determine the affected water supply "is to be abandoned whereby a replacement is no longer needed based on the approved post-mining land use." While Pennsylvania's new proposed regulations address the Federal requirement for a demonstration that the water supply is not needed to achieve the postmining land use, there is no explicit requirement that PADEP make any findings related to the supply's necessity for the land use in existence at the time it was affected by surface mining, nor that a suitable alternative water source is available and could feasibly be developed.

Accordingly, we do not approve the proposed regulations at 25 Pa. Code 87.119a(i) and 88.107a(i) to the extent they would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, "replacement of water supply."

12. 25 Pa. Code Sections 87.119a(j) and 88.107a(j) - Presumption of liability.

Pennsylvania has submitted 25 Pa. Code Sections 87.119a(j) and 88.107a(j) for approval, relating to the presumption of liability for pollution and its defenses. This section combines and makes minor changes to provisions previously located at 25 Pa. Code Sections 87.119(b)-(d) and 88.107(b)-(d).

Proposed subsection (j)(1) provides that it shall be presumed, as a matter of law, that a 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 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 are not included in the presumption area. This language substantively matches that which previously appeared at 87.119(b)(1) and 88.107(b)(1).

Proposed subsection (j)(2), and the following subsection at (j)(2)(i) through (iv), provide largely similar defenses to the presumption of liability to those that previously appeared at Sections 87.119(c)(1)-(5) and 88.107(c)(1)-(5). These defenses include: the operator, mine owner, or PADEP determines that the water supply is not within the 1,000-foot area; 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; 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; 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; and, the pollution or diminution is not a result of the surface mining activities.

Proposed subsection (j)(3) matches provisions previously located at sections 87.119(d) and 88.107(d), stating that if the operator or mine owner intends to demonstrate the presumption of liability is not applicable, they shall notify PADEP and provide supporting evidence. Subsection (j)(3) adds the requirement that PADEP consider the submitted proof and make a liability determination within 90 days of the operator's or mine owner's submissions.

OSMRE Finding: The foregoing subsections substantively match those we previously approved at 25 Pa. Code Sections 87.119(b)-(d) and 88.107(b)-(d). 70 FR 25472, 25483-84 (May 13, 2005). We found that the Federal regulations do not provide

for a similar rebuttable presumption for such liability, but that this does not prohibit Pennsylvania from enacting such a presumption. We found those subsections are not inconsistent with the requirements of SMCRA and the Federal regulations because they do not eliminate an operator's responsibility under Section 717(b) of SMCRA. The presumptions and their enumerated defenses do not relieve the regulatory authority of its initial burden. If the evidence demonstrates that a water supply is affected within the presumption area, then the operator has the burden to rebut the presumption with one of the defenses, and the ultimate burden remains with the regulatory authority. Nothing in the changes proposed in subsection (j) changes our prior analysis. We find these provisions have no direct Federal counterpart, but that they are consistent with SMCRA and are no less stringent than the Federal regulations. Therefore, we approve them.

13. 25 Pa. Code Sections 87.119a(k) and 88.107a(k) - Operator cost recovery.

Pennsylvania has proposed revisions to its regulations at 87.119a(k) and 88.107a(k) (formerly located at 25 Pa. Code sections 87.119(g) and 88.107(g)), which were previously not approved because they allowed for operators to recover costs if an operator successfully appeals a PADEP order to restore or replace water supply. We did not approve these regulations because they were the implementing regulations for Section 4.2(f)(5) of PASMCR (52 P.S. 1396.4b(f)(5)), which allowed a surface operator or owner to recover sustained costs from PADEP if an effective defense to presumption was provided. Since Section 4.2(f)(5) was repealed, we found that there was no statutory authority for the regulations at 25 Pa. Code Sections 87.119(g) and 88.107(g). 70 FR 25472, 25484 (May 13, 2005).

OSMRE Finding: Pennsylvania's proposed regulations at 25 Pa. Code 87.119a(k) and 88.107a(k) identify statutory authority for their cost recovery provisions at 27 Pennsylvania Consolidated Statutes (Pa. C.S.) Section 7708 (Costs for Mining Proceedings). 27 Pa.C.S. Section 7708(a) states that the purpose of this statute is to

provide costs and fees available in proceedings involving coal mining activities to the same extent of section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1275(e)) and the regulations promulgated pursuant thereto. We previously approved 27 Pa.C.S. Section 7708, finding that it was consistent with SMCRA and no less stringent than the Federal regulations. 66 FR 57662, 57664 (November 16, 2001). Because the proposed regulations at 25 Pa. Code 87.119a(k) and 88.107a(k) are authorized by 27 Pa.C.S. Section 7708 (Costs for Mining Proceedings) which we have previously found to be consistent with SMCRA and the Federal regulations, we approve these provisions.

14. *25 Pa. Code Sections 87.119a(l) and 88.107a(l) - Other remedies.*

Pennsylvania has proposed regulations at 25 Pa. Code Sections 87.119a(l) and 88.107a(l), which both provide “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 portion subsection (l) matches provisions we previously approved at 25 Pa. Code Sections 87.119(h) and 88.107(h). *See* 70 FR 25472, 25484 (May 13, 2005). Pennsylvania’s proposal has added a sentence at the end, stating “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.”

OSMRE Finding: The first sentence of the proposed subsection (l) matches provisions we previously approved at 25 Pa. Code Sections 87.119(h) and 88.107(h). *See* 70 FR 25472, 25484 (May 13, 2005). We found that nothing in those sections prevent anyone who claims water pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or equity. We also found that there is no Federal counterpart to these provisions, and that landowners or water supply users have

the full protection of Chapters 87 and 88 even while pursuing other avenues of redress.

That same analysis applies here.

Regarding the additional sentence, the provision that an operator or mine owner may pursue costs for restoring or replacing a water supply because of damage caused by third parties, also has no Federal counterpart. However, its addition does not render the Pennsylvania program inconsistent with SMCRA or less stringent than the Federal regulations. Since all the protections of Chapter 87 and 88 remain available, we have determined that the proposed regulations at subsection (l) are not inconsistent with the requirements of SMCRA or the Federal regulations. Accordingly, we approve them.

15. 25 Pa. Code sections 87.119a(m) and 88.107a(m) – Issuance of new permits.

Certain provisions of section 4.2(f)(4) (52 P.S. 1396.4b(f)(4)) of the Pennsylvania Surface Mining Conservation and Reclamation Act (PASMCR) (52 P.S. 1396.1 *et seq.*) and 25 Pa. Code sections 87.119(i) and 88.107(i) were not previously approved in our decision of May 13, 2005, because they allowed for final bond release when there is an outstanding Pennsylvania Department of Environmental Protection (PADEP) water replacement order. 30 CFR 938.12(c)(1), (c)(7); 70 FR 25472, 25475 (May 13, 2005). 25 Pa. Code 87.119(i) and 88.107(i) provided that a PADEP water replacement order could not be used to block issuance of new permits “or the release of bonds when a stage of reclamation work is completed.”

While the disapproved language at section 4.2(f)(4) of PASMCR (52 P.S. 1396.4b(f)(4)) has not had the offending bond release language removed, Pennsylvania has proposed regulations largely matching the prior, non-approved subsection (i) at 25 Pa. Code 87.119a(m) and 88.107a(m). Proposed subsection (m) still provides that a PADEP water replacement order which is appealed will not be used to block issuance of new permits. However, the former provision related to bond release has been deleted.

OSMRE Finding: By striking the bond release provision from this regulation,

Pennsylvania's proposed subsection (m) is now consistent with Section 519(c)(3) of SMCRA (30 U.S.C. 1269) and 30 CFR 800.40(c)(3) by preventing final bond release when a PADEP water supply replacement order is under appeal. Phase 3 bond release cannot be granted until all reclamation requirements of SMCRA and the permit are fully met. Because the proposed regulations at subsection (m) comply with SMCRA and are no less stringent than the Federal regulations, we approve of these changes. This approval resolves our prior non-approval codified at 30 CFR 938.12(c)(7).

16. 25 Pa. Code sections 87.119a(n) and 88.107a(n) – Department authority.

Pennsylvania has submitted 25 Pa. Code Sections 87.119a(n) and 88.107a(n) for approval, which both read “nothing in this section limits the Department's authority under section 4.2(f)(1) of [PASMCRRA].”

OSMRE Finding: The foregoing proposed provisions at 25 Pa. Code match provisions we previously approved at 25 Pa. Code Sections 87.119(j) and 88.107(j). *See* 70 FR 25472, 25484 (May 13, 2005). We found that this subsection was not inconsistent with SMCRA or the Federal regulations, and the same analysis applies here.

Accordingly, we are approving these provisions.

17. 25 Pa. Code Sections 87.119a(o) and 88.107a(o) – Exception.

Pennsylvania has proposed regulations at 25 Pa. Code Sections 87.119a(o) and 88.107a(o), which provide “a surface mining operation conducted under a surface mining permit issued by the Department before February 16, 1993, is not subject to subsections (b) -- (i) but is subject to subsections (a) and (j).”

OSMRE Finding: Aside from the renumbering of internal cross-references, the foregoing proposed provisions at 25 Pa. Code match provisions we previously reviewed at 25 Pa. Code Sections 87.119(k) and 88.107(k). *See* 70 FR 25472, 25484 (May 13, 2005). We found that these provisions were not inconsistent with SMCRA or the Federal regulations, and that same analysis applies here. Accordingly, we approve these

subsections to the extent that they require compliance with the provisions of 25 Pa. Code Sections 87.119a and 88.107a which we have approved above.

IV. Summary and Disposition of Comments

Public Comments

We asked for public comments on the amendment but received none.

Federal Agency Comments

On August 5, 2021, 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. 907.01). We did not receive any comments.

V. OSMRE's Decision

Based on the above findings we approve, with certain exceptions, Pennsylvania's program amendment sent to us on August 5, 2021 (Administrative Record No. PA 907.00). We are not approving the following provisions to the extent noted:

25 Pa. Code 87.119a and 88.107a. We are not approving subsections (b), (c), and (f) to the extent that they would allow the replaced water supply to be of a lesser quantity and quality than the premining water supply.

25 Pa. Code 87.119a(e) and 88.107a(e). We are not approving these subsections to the extent that they would set the amount of reimbursement based on estimates of an "adequate" water supply rather than one of equivalent quantity and quality to the premining supply.

25 Pa. Code 87.119a(i) and 88.107a(i). We are not approving these subsections to the extent that they would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, "replacement of water supply."

To implement this decision, we are amending the Federal regulations at 30 CFR

part 938, that codify decisions concerning the Pennsylvania program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after the date of publication. Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. SMCRA requires consistency of State and Federal standards.

VI. Statutory and Executive Order Reviews

Executive Order 12630—Governmental Actions and Interference with Constitutionally Protected Property Rights

This rule would not effect a taking of private property or otherwise have taking implications that would result in public property being taken for government use without just compensation under the law. Therefore, a takings implication assessment is not required. This determination is based on an analysis of the corresponding Federal regulations.

Executive Orders 12866—Regulatory Planning and Review and 13563 – Improving Regulation and Regulatory Review

Executive Order 12866, as amended by Executive Order 14094, 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 (OMB Memo M-94-3), the approval of State program amendments is exempted from OMB review under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has reviewed this rule as required by section 3 of Executive Order 12988. The Department has determined that this *Federal Register* notice meets the criteria of section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and proposed regulations to eliminate drafting errors and ambiguity; that the agency write its legislation and regulations to minimize litigation; and that the agency's legislation and regulations provide a clear legal

standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Because section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive Order to the quality of this *Federal Register* notice and to changes to the Federal regulations. The review under this Executive Order did not extend to the language of the State regulatory program or to the program amendment that the Commonwealth of Pennsylvania drafted.

Executive Orders 13132—Federalism

This rule has potential Federalism implications as defined under section 1(a) of Executive Order 13132. Executive Order 13132 directs agencies to “grant the States the maximum administrative discretion possible” with respect to Federal statutes and regulations administered by the States. Pennsylvania, through its approved regulatory program, implements and administers SMCRA and its implementing regulations at the state level. This rule approves an amendment to the Pennsylvania program submitted and drafted by the State, and thus is consistent with the direction to provide maximum administrative discretion to States.

Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department’s consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on the distribution of power and responsibilities between the Federal Government and Tribes. The basis for this determination is that our decision on the Pennsylvania program does not include Indian lands as defined by SMCRA or other Tribal lands and it does not affect the regulation of activities on Indian lands or other Tribal lands. Indian lands under SMCRA are regulated independently under the applicable, Federal Indian program. The

Department's consultation policy also acknowledges that our rules may have Tribal implications where the State proposing the amendment encompasses ancestral lands in areas with mineable coal. We are currently working to identify and engage appropriate Tribal stakeholders to devise a constructive approach for consulting on these amendments.

Executive Order 13211—Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rulemaking 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 significant energy action under the definition in Executive Order 13211, a statement of energy effects is not required.

National Environmental Policy Act

Consistent with sections 501(a) and 702(d) of SMCRA (30 U.S.C. 1251(a) and 1292(d), respectively) and the U.S. Department of the Interior Departmental Manual, part 516, section 13.5(A), State program amendments are not 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 include requests and requirements of an individual, partnership, or corporation to obtain information and report it to a Federal agency. As this rule does not contain information collection requirements, a submission to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

Regulatory Flexibility Act

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 corresponding 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 the data and assumptions for the corresponding 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 on an analysis of the corresponding Federal regulations, which were determined not to constitute a major rule.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to impose an unfunded mandate. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Ben Owens,
Acting Regional Director,
Interior Regions 1 & 2.

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.*

2. Section 938.12 is amended by:

a. Removing and reserving paragraphs (c)(4) and (7).

b. Adding paragraph (f).

The addition reads as follows:

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

* * * * *

(f) We are not approving the following portions of provisions of the proposed program amendment that Pennsylvania submitted on August 5, 2021:

(1) 25 Pa. Code 87.119a and 88.107a. We are not approving subsections (b), (c), and (f) to the extent that they would allow the replaced water supply to be of a lesser quantity and quality than the premining water supply.

(2) 25 Pa. Code 87.119a(e) and 88.107a(e). We are not approving these subsections to the extent that they would set the amount of reimbursement based on estimates of an “adequate” water supply rather than one of equivalent quantity and quality to the

premining supply.

(3) 25 Pa. Code 87.119a(i) and 88.107a(i). We are not approving these subsections to the extent that they would allow a waiver from the requirements for replacing a water supply outside the requirements of 30 CFR 701.5 regarding the definition of the term, “replacement of water supply.”

3. Section 938.15 is amended in the table by adding an entry for “August 5, 2021” 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 5, 2021	* * <u>[Insert date of publication in the Federal Register]</u>	25 Pa. Code 87.1 (addition of definitions for “operation and maintenance costs” and “water supply owner,” revision of the definition for “water supply”); 25 Pa. Code 88.1 (addition of definitions for “operation and maintenance costs” and “water supply owner,” revision of the definition for “water supply”); 25 Pa. Code 87.47 (revision of text to permit application requirements, including renumbering of an internal reference, rewording text to indicate “any water supply,” removal of requirement that water supply is “for domestic, agricultural, industrial or other legitimate use,” addition of a requirement to provide cost calculations to restore or replace water supplies, and addition of requirement that PADEP notify the water supply owner of any potentially affected water supply); 25 Pa. Code 88.27 (revision of text to permit application requirements, including rewording text to indicate “any water supply,” removal of requirement that water supply is “for domestic, agricultural,

		industrial or other legitimate use,” addition of a requirement to provide cost calculations to restore or replace water supplies, and addition of requirement that PADEP notify the water supply owner of any potentially affected water supply); 25 Pa. Code 87.119a(a), (d), (g), (h), (j), (k), (l), (m), (n), and (o); and 25 Pa. Code 88.107a(a), (d), (g), (h), (j), (k), (l), (m), (n), and (o).
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[FR Doc. 2025-14245 Filed: 7/25/2025 8:45 am; Publication Date: 7/28/2025]