

III. Legislative and Regulatory History

Legislative History of BMSLCA

In 1966 at a Special Session, the General Assembly enacted the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA). BMSLCA established various requirements for bituminous underground mines such as permitting, mapping, protection of certain structures from subsidence damage, repair of subsidence damage to certain structures, and the right for surface owners to purchase support for their structures.

The legislative findings associated with BMSLCA explain that it was enacted because the General Assembly had determined that mine subsidence and coal mining laws had failed to protect the public interest in Pennsylvania in preserving the land. Damage from uncontrolled mine subsidence was seriously impeding land development, was eroding the tax base and had caused a clear and present danger to health, safety and welfare of the people. BMSLCA was enacted to protect the public health, safety and general welfare while allowing the continued growth and development of the bituminous coal industry.

Section 4 of BMSLCA prohibited bituminous coal from being mined in a manner that would cause subsidence damage to certain structures. Homes, public buildings, noncommercial structures customarily used by the public (such as churches and schools) and cemeteries were protected if they were in place on April 27, 1966.

If the Department-approved measures taken by a mine operator to protect a structure were unsuccessful and a protected structure was damaged by subsidence, then the permittee of the mine was required to repair the damages. Section 6 of BMSLCA required the permittee to repair the damage within six months and satisfy all claims arising from the subsidence damage or to deposit with the Department, as security for the claim, a sum of money equal to the amount of damage. The law also authorized the Department to require mine operators to post a surety bond to cover possible future property damage.

Section 15 of BMSLCA provided certain owners the right to purchase the coal located beneath their property that was necessary to provide surface support to protect the structures from subsidence damage. The structures in this group included those erected before April 27, 1966 that were not otherwise protected, such as agricultural and commercial structures, and all structures erected after April 27, 1966.

Finally, as enacted in 1966, BMSLCA did not contain any provisions addressing water supplies affected by underground mining.

In 1980, BMSLCA, along with the other coal mining statutes, was amended. It was amended to include various provisions to meet the minimum requirements of the federal Surface Mining Control and Reclamation Act so that Pennsylvania could maintain primary responsibility for regulating coal mining within the Commonwealth. Among other things, there were changes to the provisions governing subsidence damage.

Section 4, which provided protection to certain structures, was amended to allow the current owner of the structure to consent to subsidence damage, but the damage had to be repaired or the owner compensated. Section 5 was amended to require an operator of an underground mine to adopt measures to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability and to maintain the value and reasonably foreseeable use of the surface. These measures were to be described in the permit application. The new language also specifically provided that the new subsection was not to be construed to prohibit planned subsidence or standard room-and-pillar mining.

In 1986, in response to dissatisfaction with the existing law, the Deep Mine Mediation Project (Project) was convened by Arthur A. Davis, then Goddard Professor of Forestry and Environmental Resources at the Pennsylvania State University. The Project brought together deep mine industry, agricultural, and public interest organizations to discuss and attempt to reach consensus on ways to change BMSLCA. Organizations that accepted the invitation and participated in the Project included Beth Energy Mines, Inc., Consolidation Coal Company, League of Women Voters of Pennsylvania, Pennsylvania Coal Association, Pennsylvania Environmental Council, Inc., Pennsylvania Farmers Association, Rochester and Pittsburgh Coal Company, USX Corporation and the Western Pennsylvania Conservancy. In addition, Citizens Against Water Loss Due to Mining initially participated and then withdrew from the Project, while the Pennsylvania Federation of Sportsmen's Clubs withdrew after the final proposal was developed.

After three years of work, the participants reached a consensus on a set of recommendations and specific statutory language to address water supply replacement, enhance remedies for structural damage and statutory changes to eliminate impediments to mining. The General Assembly approved the statutory amendments in 1992. However, because of a procedural problem, the bill was not presented to the governor for signature. Subsequently, the amendments, commonly referred to as Act 54, were reintroduced and passed with unanimous votes in both the House and Senate in mid-June, 1994. The bill was approved by Governor Casey on June 22, 1994 and became effective 60 days thereafter, on August 21, 1994. The law was self-implementing, since its detailed guidelines on the process for applying its major provisions precluded the need to promulgate regulations. A copy of the statute is included in Appendix A.

The 1994 amendments provide for water supply replacement and limit the number of structures protected from subsidence while expanding the class of structures damaged by subsidence which must be repaired by the mine operator.

The 1994 water supply replacement provisions generally provide:

1. Mine operators must restore or replace public or private water supplies for homeowners and farmers where the underground mining activity caused contamination, diminution or interruption.

2. There is a rebuttable presumption that the underground mining activity caused the contamination, diminution or interruption of affected water supplies that are located above an underground mine.
3. Where the presumption applies, landowners are entitled to a temporary water supply within 24 hours pending the completion of investigations and the restoration or replacement of a permanent supply by the mine operator.
4. For the rebuttable presumption to apply, landowners must allow surveys to be conducted to determine the premining quality and quantity of their water supply.
5. Where the rebuttable presumption does not apply and the water supply has been affected, the mine operator is responsible to restore or replace the supply. However, if the operator contests liability, the burden of proving causation falls on the landowner or Department.
6. Landowners and mine operators can execute voluntary agreements, under certain conditions, and of limited duration, which provide for alternate restoration, replacement or compensation mechanisms when a water supply is affected. Notice of any such agreements must be given to subsequent purchasers of the property by reference of such agreement in the deed of conveyance.
7. If an operator does not provide for permanent restoration or replacement within three years, and the operator and landowner cannot agree on terms for compensation, the landowner has two options. The landowner may opt to have the operator purchase the property at its fair market value prior to the time the supply was affected. Alternatively, the landowner may have the operator 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.

The 1994 revised structural damage repair provisions are summarized as follows:

1. Mine operators are required to repair or compensate for subsidence damage to any building which is accessible to the public (including industrial and recreational buildings), noncommercial buildings customarily used by the public (such as schools and churches), dwellings used for human habitation and permanently affixed pertinent structures and improvements, and certain agricultural structures.
2. The structure owner or occupant is also entitled to payments for temporary relocation and other incidental expenses.
3. In order for the structure owner to have the repairs made or to be compensated for the damages, he must allow the mine operator to conduct a premining survey of the structure prior to beginning of mining.

4. Structure owners and mine operators are authorized to enter into voluntary agreements specifying the terms and conditions for restoration of or compensation for subsidence damage. Notice of such agreements must be given to subsequent purchasers of the property by reference to the agreement in the deed of conveyance.

The 1994 statutory changes to eliminate impediments to mining permitted mining under pre-1966 structures. As a consequence, underground mining can now occur beneath and damage any structure, except a certain limited class of structures and features, as long as the damages are not irreparable and are repaired. Irreparable damage can only occur with the consent of the owner.

Regulatory History and Development

Act 54 was passed in June 1994 and became effective on August 21, 1994. The final steps in the implementation of the Act 54 amendments to BMSLCA were two rulemakings. Although the provisions authorized by the statute were self-implementing, the first rulemaking was necessary to eliminate inconsistencies between the existing regulations and the law. The second rulemaking was undertaken to resolve certain ambiguities within the law and to bring Pennsylvania's regulations into conformance with their federal counterparts. Both rulemakings amended the Department's regulations in 25 Pa Code Chapter 89. The amendments, sometimes referred to as the Act 54 regulations, were formally titled "Mine Subsidence Control, Subsidence Damage Repair and Water Supply Replacement."

Initially, the Department developed a policy to smooth the transition into the amendments' new provisions and requirements. Subsequently, in March 1997, the Department submitted an "expedited rulemaking" to remove those parts of Chapter 89 that were statutorily repealed by the amendments. The rulemaking completed the phase-in process by adding to Chapter 89 new provisions and requirements arising from the amendments to BMSLCA.

Development of the final regulations was accomplished with extensive public participation. In March 1996, the Department convened a meeting of interested parties to discuss the matters to be addressed in the rulemaking. Draft regulations were then prepared and made available for public review and comment through an Advanced Notice of Proposed Rulemaking (ANPR). The notice of availability for the ANPR regulations appeared in the *PA Bulletin* on September 28, 1996. The notice initially provided for a 30-day comment period. This period was subsequently extended to six weeks at the request of commentators. Following the ANPR, proposed regulations were prepared and submitted to the Environmental Quality Board (EQB) in March 1997. The proposed regulations were published in the *Pa. Bulletin* on May 10, 1997, this time with a 60-day period for public review and comment. The EQB also held a public hearing on June 18, 1997 to receive comments on the proposed rulemaking. In addition to these outreach efforts, the Department met with representatives of the Citizens Advisory Council and the Public Utility Commission to discuss remaining issues as the regulations entered the final phase of rulemaking.

Additions to the regulations included new subsidence damage repair and compensation requirements; new water supply replacement requirements; new requirements relating to the control of irreparable damage; and additional requirements relating to the prevention of imminent hazards to human safety. The regulations also reflected the amended statutory provisions concerning the prevention of material damage and reduction in the reasonably foreseeable uses of certain structures and features listed in Section 9.1 of the amendments to BMSLCA. These damage prevention standards were for the most part carried over from the previous regulations; although “public facilities” were added and “coal refuse disposal areas” were deleted in keeping with the specific language of the statute.

The regulations also contained provisions that were necessary to clarify requirements and improve the Department’s ability to enforce the provisions of BMSLCA. Definitions were provided for key terms such as “irreparable damage,” “permanently affixed appurtenant structures” and “public buildings and facilities.” The terms “underground mining” and “underground mining operations” were defined and used so as to correlate specific activities with requirements and liabilities. The regulations included mandatory survey requirements for all water supplies and structures to ensure that baseline information would be available for evaluating reported impacts. The regulations also included standards for the reliability, cost, maintenance and control of replacement water supplies. These standards were based on case law in the Department’s surface mining program where water supply replacement requirements have been in place for many years.

The amendments included changes to better clarify some of the requirements of Chapter 89. Information requirements were revised to correlate more directly with performance standards. Requirements for mining beneath protected structures such as public buildings were revised to clarify the options an operator may pursue in preventing material damage. Language was revised to clarify the conditions that must be met in order to mine beneath a structure where the cover is less than 100 feet (30.48 meters).

The regulations were published in the *Pennsylvania Bulletin* and became effective on June 13, 1998. A copy of the regulations is included in Appendix B.

The final objective of the rulemaking was to make Pennsylvania’s program as effective as its federal counterpart. As a general observation, Pennsylvania’s statute requires mine operators to address impacts to more types of structures and more types of water supplies than the federal program. Although BMSLCA does not allow an exact match with every aspect of the federal regulations, in the Department’s view the regulations provide protections that are as effective as those required by the federal program. On July 29, 1998, the revised regulations were submitted to the federal Office of Surface Mining (OSM)¹ for incorporation into Pennsylvania’s approved program.

¹ OSM is the office within the federal Department of the Interior responsible for carrying out the requirements of the Surface Mining Control and Reclamation Act.