

WATER SUPPLY REPLACEMENT REGULATIONS: CHAPTER 87 & 88 OUTLINE OF PROPOSED CHANGES

In May 2005, OSM approved some amendments to the water supply regulations and did not approve others. The disapproved portions of the program amendment include both statutory and regulatory sections.

OSM decisions are noted in appropriate sections below. One section was not changed: Operator cost recovery, Sections 87.119(g) and 88.107(g), were not approved because of the repeal of section 4.2(f)(5) of PA SMCRA. (30 CFR 938.12(c)(6))

1. De minimus 87.1 and 88.1

“de minimus cost increase” – remove from 87.1 and 88.1 to address the requirement at 30 CFR 938.16(c)(4).

OSM: Sections 87.1, 88.1, where “de minimis cost increase” is defined and sections 87.119(a)(1)(v) 88.107(a)(1)(v) were not approved because the federal regulations require that no additional costs be passed along to the water supply owner. (30 CFR 938.12(c)(5))

2. O&M definition 87.1 and 88.1

“operation and maintenance costs” are addressed in TGD 562-4000-102

All costs incurred by the water supply owner/user associated with using the water supply for the purposes served. Examples include electricity, chemicals and treatment requirements, maintenance of a treatment system, and public water fees.

3. Water supply survey section 87.1 and 88.1

“water supply survey” definition to be relocated to own section (87.119 and 88.107) and expanded.

Include a section that describes a situation where the operator is prohibited from gathering information about a water supply by the owner – See comparable in 89.145a (3)

4. “Water supply” definition

Revise to exclude soil moisture taken up by vegetation as a water supply. This is necessary to address an EHB case (*Schneiderwind, 2003*) where soil moisture was argued to be a water supply.

5. Alternative water supply information

a. **87.47** and **88.27** Application shall... include replacement cost calculations.

b. Add (b) to say the applicant will supply notice to water supply owner/user to those supplies that may be affected, including replacement or restoration details. P. 2 of TGD 563-2112-605.

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WATER SUPPLY REPLACEMENT OBLIGATIONS **87.119** and **88.107** (to be revised and expanded with several new sections)

6. “to any extent”

Add to clarify that there is no percentage of “affecting” that exempts the operator.

7. “promptly”

Add as a modifier to “restore” (as provided in 89.145)

8. Notice of a replaced supply

Requirement for operator to supply DEP with this notice. The operator already supplies notice of claim and investigation results, important to document supply was replaced. (Under *Reporting of new information* 86.53) Also see P. 2 “Notice to the Water Supply Owners” in TGD-563-2112-605.

9. Adequacy of restored or replaced supply

Replace existing language with explanations for “reliability,” “quality,” “quantity” as provided in 89.145a (f)(1). Also see Pp. 2-3, 5-6 of TGD-563-2112-605.

OSM: Sections 87.119(a) and 88.107(a) were not approved to the extent that they allow for replacement water supply of lesser quality or quantity. (30 CFR 938.12(c)(5)) The federal requirement is that the replacement supply be “equivalent to premining quality and quantity,” while the state regulations require the replacement be adequate for the purpose served by the supply.

10. Increased operation and maintenance (O&M) costs (new section)

Prompted by EHB cases (*Carlson Mining, 1994; Buffy & Landis, 1990; Lang, et al. 2004; and Gioia Coal Company, 1986*)

- a. How to determine these costs (P. 3 of TGD 562-4000-102)
- b. Provisions for payment – surety or collateral bond to be checked every 5 years with renewal. A replacement bond must be posted by a successor operator of the permit. If the bond is forfeited, it can only be used for those water supplies in a settlement between the Department and owners. (P. 10 of TGD)
- c. How to calculate O&M bond. Calculation process as described on P. 6-7 of TGD.

d. Release of obligation provision that allows for a voluntary agreement to be made between operator and owner. See P. 4 of TGD.

11. Special provisions (new section)

- a. Waiver for abandoned supplies P. 6 of TGD 563-2112-605
- b. Transferrable O&M costs to new owner

OSM: Sections 87.119(a)(3) and 88.107(a)(3) were not approved because they allow for the waiver of the replacement of a water supply. The basis for the disapproval is the definition of “replacement water supply” at 30 CFR 701.5, which provides for a waiver only in the limited circumstance where the water supply is not needed for the land use as it exists at the time of the loss and that there is a demonstration that a “suitable alternative water source is available and could be feasibly developed.” (30 CFR 938.12(c)(5))

12. Presumption of liability for pollution

- a. Need to add “diminution” in title of section
- b. Clarify language that exclude haul and access roads but include mining areas affected off permit. Subsections can be combined into one.

13. Defenses to presumption of liability

Minor clarification of language to exclude haul and access roads but include mining areas affected off permit. In (3) fix typo “diminutation”.

14. Temporary Water Supplies (new section):

Requirement to supply temporary supply (within RP area and within 24 hours) sufficient to meet user’s needs. See 89.145a (e)

OSM: Sections 87.119(a) and 88.107(a) were not approved to the extent that they do not include a requirement to provide a temporary replacement water supply. (30 CFR 938.12(c)(5)) The federal definition of “replacement water supply” at 30 CFR 701.5 includes a reference to temporary replacement water supplies.

15. Reimbursement (new section):

Requirement for the operator to reimburse a supply owner who has incurred costs due to mining activity. Provided the operator is found to be responsible, this inclusion was approved by OSM.

The operator can dispute the cost if three comparable estimates are provided. Claims for reimbursement cannot occur after final release of reclamation bonds.

OSM: Section 4.2(f)(4) of PA SMCRA was not approved because it allows for final bond release when there is an outstanding water supply replacement order. (30 CFR 939.12(c)(1))

and

Sections 87.119(i) and 88.107(i) were not approved because they allow for final bond release when there is an outstanding water supply replacement order. (30 CFR 938.12(c)(7))

16. Issuance of New Permits (Revised)

“release of bonds” wording to be eliminated. Bond release will not be held up if reclamation is completed.