

**Notice of Final Rulemaking**  
**Department of Environmental Protection**  
**Environmental Quality Board**  
**(25 Pa. Code Chapters 87, 88, 89 and 90)**  
**Water Supply Replacement for Coal Surface Mining**

The Environmental Quality Board (Board) amends 25 Pa. Code Chapters 87—90, to read as set forth in Annex A. This final rulemaking has the following purposes: to ensure compliance with Federal requirements and developments in State law; provide consistency, where possible, with water supply replacement regulations relevant to underground mining; and codify existing practices developed by the Department of Environmental Protection (Department).

This order was adopted by the Board at its meeting of [REDACTED].

*A. Effective Date*

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

*B. Contact Persons*

For further information, contact Sharon Hill, Environmental Group Manager, Bureau of Mining Programs, Rachel Carson State Office Building, P.O. Box 8461, Harrisburg, PA 17105-8461, (717) 787-5015; or Robert A. Reiley, Acting Director, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. This final-form rulemaking is available on the Department's web site at [www.dep.pa.gov](http://www.dep.pa.gov) (select "Public Participation," then "Environmental Quality Board").

*C. Statutory Authority*

The final-form rulemaking is authorized under the authority of section 5 of The Clean Streams Law (35 P.S. § 691.5); sections 4(a) and 4.2 of the Surface Mining Conservation and Reclamation Act (PA SMCRA) (52 P.S. §§ 1396.4(a) and 1396.4b); section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); section 7(b) of the Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.7(b)); and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20).

*D. Background and Purpose*

This final-form rulemaking addresses inconsistencies between the Commonwealth's Surface Coal Mining Program and Federal requirements relating to water supply replacement so that the Commonwealth may maintain primary regulatory authority over coal mining activities in this Commonwealth. This final-form rulemaking also aligns the language regarding water supply replacement for anthracite and bituminous surface mining with underground coal mining to the extent allowed by statute and ensures that the regulations are otherwise consistent with State law and Department practice. These measures will provide clarity to mine owners and operators

regarding compliance standards for water supply replacement and protect the rights of water supply owners and users.

### *Required Consistency of the Commonwealth's Mining Program with Federal Law*

The Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. §§ 1201—1328) (Federal SMCRA) "establish[ed] a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." See 30 U.S.C.A. § 1202(a). Federal SMCRA authorizes the Secretary of the Interior, through the Office of Surface Mining Reclamation and Enforcement (OSM), to administer the programs for controlling surface coal mining operations, and to review and approve or disapprove state programs for controlling the same. See 30 U.S.C.A. § 1211(c)(1).

Federal SMCRA allows a state to assume jurisdiction over the regulation of surface coal mining and reclamation operations if the state can administer that program according to Federal standards. See 30 U.S.C.A. § 1253. When a state program is approved by OSM, the state achieves "primacy" over the regulation of its surface coal mining program. The Commonwealth achieved primacy in 1982. See 47 FR 33050, 33076 (July 30, 1982). To maintain its jurisdiction over regulation of coal surface mining activities, the Commonwealth must maintain a state program in accordance with the requirements of Federal SMCRA, and with "rules and regulations consistent with regulations issued by the Secretary." See 30 U.S.C.A. § 1253(a)(1) and (7).

State laws must be consistent with the provisions of Federal SMCRA, see 30 U.S.C.A. § 1255(a), and any provision of state law that provides for more stringent land use and environmental controls and regulations shall not be construed to be inconsistent with Federal SMCRA. See 30 U.S.C.A. § 1255(b). In other words, a state program must be at least as effective as the requirements in Federal SMCRA but may be more stringent.

### *Coal Mining Regulatory Program Amendments Required by OSM*

By letter dated December 18, 1998, the Department submitted a proposed amendment of the Commonwealth's approved Coal Mining Regulatory Program (Program) to OSM for review and approval. The proposed amendment covered various aspects of the Program and consisted of both statutory changes to PA SMCRA as well as regulations under 25 Pa. Code Chapters 86—90. In May 2005, OSM approved this Program amendment with certain exceptions (2005 OSM conditional approval). OSM approved most of the amendment specific to the replacement of water supplies affected by mining activities but did not approve certain provisions. The disapproved portions of the Program amendment related to water supply replacement include both statutory and regulatory sections as follows:

Section 4.2(f)(4) of PA SMCRA was not approved, because it allowed for final bond release when there is an outstanding water supply replacement order. See 30 CFR 938.12(c)(1) (relating to state statutory, regulatory, and proposed program amendment provisions not approved). Sections 87.119(i) and 88.107(i) (relating to hydrologic balance: water rights and replacement) were not approved for the same reason. See 30 CFR 938.12(c)(7).

Sections 87.1 and 88.1 (relating to definitions) defining "de minimis cost increase" and §§ 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 not approved, because the Federal regulations require that no additional costs be passed along to the water supply owner. See 30 CFR 938.12(c)(4) and (5).

Sections 87.119(a) and 88.107(a) were not approved to the extent that they did not include a requirement to provide a temporary replacement water supply. See 30 CFR 938.12(c)(5). Furthermore, they allowed for the replacement supply to be of a lesser quantity and quality than the premining water supply. See 30 CFR 938.12(c)(5). The Federal definition of "replacement water supply" at 30 CFR 701.5 (relating to definitions) includes a reference to temporary replacement water supplies.

Sections 87.119(a)(3) and 88.107(a)(3) were not approved, because they allowed for persons with an ownership interest in the water supply to waive the requirements to restore or replace the water supply. The basis for the disapproval was 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).

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 a water supply. OSM did not approve these regulations, because section 4.2(f)(5) of PA SMCRA, which provided the statutory authority for these regulations, was repealed in 2000 and replaced with 27 Pa.C.S. § 7708 (relating to costs for mining proceedings). Therefore, no remaining statutory authority existed to support the regulations. See 30 CFR 938.12(c)(6) and 70 FR 25472, 25484.

In response to OSM's disapproval of these regulations and to implement the approved Program amendments, the Department developed the following technical guidance documents to address water supply replacement operation and maintenance costs: *Increased Operation and Maintenance Costs of Replacement Water Supplies on All Coal and Surface Noncoal Sites* (DEP ID #562-4000-102), issued on December 2, 2006; *Water Supply Replacement and Permitting* (DEP ID #563-2112-605), issued in 1998 and updated in 2007; and *Water Supply Replacement and Compliance* (DEP ID #562-4000-101), issued in 1999 and updated in October 2007.

This final-form rulemaking codifies the procedures outlined in these technical guidance documents, reconciles the outstanding unapproved portions of the Program amendment listed previously, and ensures water supply replacement obligations are consistent with Federal law.

#### *Required Consistency of the Commonwealth's Mining Program with State Law*

This final-form rulemaking also ensures consistency with State law. The following provisions address regulatory gaps or lack of clarity issues under PA SMCRA:

Amendments to §§ 87.1 and 88.1 revise the definition of "water supply" to explain that soil moisture is not a water supply. The term "water supply" connotes a specific water resource (for example, a well or spring). Soil moisture, on the other hand, is more appropriately regulated under separate Department provisions requiring that mining activities are conducted to minimize disturbance to the prevailing hydrologic balance. See 25 Pa. Code §§ 87.101(a) and 88.291(a) (relating to hydrologic balance: general requirements). These provisions also add a definition of "water supply owner" that includes landowners and water supply companies to reflect terminology used in section 4.2(f) of PA SMCRA. See 52 P.S. § 1396.4b(f).

Amendments to §§ 87.47 and 88.27 (relating to alternative water supply information) clarify the regulations by using the defined term "water supply"; requiring that the permit application must include calculations regarding the cost of potential replacement; and stating that the Department will give advance notice to water supply owners whose water supplies are identified as potentially affected.

Sections 87.119a(a) and 88.107a(a) clarify the requirements related to sampling, laboratory analysis and notice to water supply owners and water supply users.

Sections 87.119a(b) and 88.107a(b) clarify that obligations to restore or replace an affected supply are applicable for any effect to a water supply, even if the effect is minimal, and that operators or mine owners must restore water supplies to meet reasonably foreseeable uses of the existing supply, not only existing uses of the supply.

Sections 87.119a(f) and 88.107a(f) clarify the concepts of "adequate quality" and "adequate quantity" of the replacement supply to more closely mirror the statutory language under section 4.2(f)(1) of PA SMCRA. This includes clarifying that an operator must, under certain circumstances, replace an affected supply with a supply that is of better quality than the Pennsylvania Safe Drinking Water Act standards (35 P.S. §§ 721.1—721.17).

Sections 87.119a(g) and 88.107a(g) clarify the procedure for determining operation and maintenance (O&M) costs of a replacement supply, and that operators or mine owners must cover O&M costs in perpetuity because the obligation attaches to the land, not to the current water supply owner. See, for example, *Carlson Mining v. DER*, 1992 EHB 1401, 1412–16 (Oct. 29, 1992).

Sections 87.119a(h) and 88.107a(h) clarify O&M requirements in situations when the current water supply owner or water supply user, or both, releases the obligation under a settlement agreement with the operator or mine owner that complies with the regulations and clarifies that an operator may cover O&M responsibilities for multiple water supplies under one bond.

Sections 87.119a(j) and 88.107a(j) clarify the statutory presumption of liability in PA SMCRA and the available defenses to the presumption. This presumption does not exist in Federal law.

Sections 87.119a(l) and 88.107a(l) add an additional provision that nothing in these regulations would prevent a mine owner or operator from pursuing other legal remedies should

they incur costs in restoring or replacing a supply and later determine that some other party was responsible for the pollution or diminution of the water supply.

#### *Amendments Made in Response to Public Outreach*

Prior to the 2005 OSM conditional approval, the Department held six open-house public meetings in May and June of 2004 to gather comments and suggestions regarding existing regulations and policies governing the replacement of private water supplies lost, diminished or degraded by mining activities. These meetings were held at Department facilities across the State after invitation letters were sent to interested parties, including individual property owners who were known to have experienced past water supply problems. Also, news media alerts were issued to promote these meetings. The issues raised at these meetings included items regarding responsibility for water supply impacts, reimbursement for replaced supplies, the rights of water supply owners to information supplied by the mining operators, correct characterization of the existing supply and reasonably foreseeable uses of the supply, and various other suggestions for improving the Program to benefit those who have lost their water supply as a result of mining activities.

The Department evaluated the comments received from the public meetings in conjunction with the 2005 OSM conditional approval and ultimately included several concepts resulting from these meetings in this final-form rulemaking. For example, §§ 87.47 and 88.27 will now require permit applications to include replacement cost calculations, and the Department will notify the water supply owner/users that their supply may be affected. Early identification and characterization of potentially affected water supplies provides the water supply owner/user with adequate notice that the supply may be interrupted, and it informs them of their rights under the regulations for replacement of the supply. Early identification also promotes an easier path to agreement on replacement options, which is disruptive and often a point of contention between the operator and water supply owner that delays resolution of the claim.

#### *Mining and Reclamation Advisory Board Coordination*

The Department collaborated with the Mining and Reclamation Advisory Board (MRAB), which is composed of representation from anthracite surface mine operators, the Pennsylvania Coal Alliance, the Pennsylvania Anthracite Council, the County Conservation Districts, the Citizens Advisory Council, the Pennsylvania House of Representatives, and the Pennsylvania Senate to develop the final-form rulemaking.

Because the provisions concerning water supply replacement are similar across the various coal regulatory chapters, the Department and the MRAB spent considerable time clarifying language that may differ between surface mining and the approved underground coal mining regulations in Chapter 89 (relating to underground mining of coal and coal preparation facilities) due to variations between the Commonwealth's surface mining and bituminous underground mining statutes. Policy changes to the Surface Mining Program regarding water supply replacement were discussed at the MRAB Regulation, Legislation and Technical (RLT) committee meeting of January 2005 in response to concerns from the Pennsylvania Coal Association. The RLT committee made various recommendations regarding O&M costs

calculations and payments, and replacement of a water supply to a quality and quantity necessary for current and reasonably foreseeable uses.

Concepts for this rulemaking were discussed with the MRAB beginning on October 19, 2017, during a meeting of the full board. On January 11, 2018, an outline of the proposed changes was presented in a meeting of the RLT committee. Comments were provided by the committee. On April 19, 2018, draft language and responses to previous comments were presented to the committee. The RLT committee supplied verbal and written comments on this draft, some of which were incorporated into the final-form rulemaking. The summary of the primary issues raised by the MRAB is as follows.

The MRAB questioned the repeated use of the term "reasonably foreseeable uses" throughout the final-form rulemaking. This phrase originated in section 5(e) of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.5(e)) and has been incorporated into the Federally-approved Surface Mining Program through the requirement that the water supply must be equivalent to the previous supply in quality and quantity. To replace the supply with a source that did not match the ability of the previous supply to support plausible future uses, based on existing and proposed land use, would be a failure to meet the standards of replacement. OSM has stated their acceptance of the "reasonably foreseeable uses" concept in this context.

The MRAB also expressed concern for the operator's responsibility to replace a supply if the water supply owner refused access to the supply for the premining survey. The MRAB stated that if the operator is denied the information from the premining survey, the operator (and the Department) had no basis for judging the condition of the supply. That is, there would be no baseline from which to assess claims of degradation or diminution during mining activities. While it is disadvantageous to all parties for a water supply owner to refuse the information-gathering process, this does not exempt the operator from responsibility for replacing a supply if evidence can be procured that the supply has been affected by the mining activities. It does, however, provide a rebuttal for the mining operator within the presumption zone. If the operator raises this defense to the presumption, the burden shifts to the water supply owner to present evidence that the supply has been affected by mining, and to the Department to gather additional evidence to determine if mining was the cause. If there is no baseline survey information and a Department inquiry finds that mining activity is responsible for the disruption to the supply, the Department and water supply owner must establish what the adequate quantity and quality of the replacement supply should be based on data from similar supplies in the area and from aquifer characteristics, as well as the existing and reasonably foreseeable uses.

The MRAB was also concerned that water supply owners who replace their supply on their own and then seek reimbursement from the operator could install a supply that is higher performing than the previous supply, which could exceed the cost of replacement with an equivalent supply. This final-form rulemaking makes clear that the operator is not required to replace the affected supply with a system that exceeds regulatory requirements and that the operator can dispute reimbursement costs by obtaining comparable estimates. In this scenario, the Department determines the cost of reimbursement. The water supply owner may install any

system they choose, but any additional cost beyond the specifications of the previous supply will not be borne by the mining operator.

The MRAB inquired when the quality of a replacement supply would need to meet standards beyond baseline or the Commonwealth's drinking water standards. While the Department concedes this would be a rare occurrence, it is justified in some cases. The Department provides an explanation for this exception, which the Department anticipates will be rare, in the summary that follows in Section E of the Preamble for §§ 87.119a(f) and 88.107a(f).

The MRAB also questioned the basis for the calculations of O&M costs. The Department contends that these calculations, also used for underground and noncoal O&M calculations, are a fair means to determine accurate costs. Variables within the calculations that are tied to economic factors and affect current costs are subject to recalculation annually. The Department considered proposed alternative means during the comment period for this proposed rulemaking. However, having been applied for over 12 years, the existing calculations have proved to be suitable, and an alternative calculation that meets the necessary criteria ultimately was not proposed.

The RLT committee recommended proceeding with the proposed rulemaking at the April 19, 2018, meeting and advised the MRAB of their recommendation also on this date. The MRAB was presented with the draft language on July 19, 2018, and requested a revised draft reflecting minor changes to the proposed language for clarity. In further consultation with the RLT committee on October 11, 2018, additional revisions were incorporated. The MRAB voted to concur with the Department's recommendation that the proposed rulemaking move forward in the regulatory process on October 25, 2018. Subsequently, additional clarifications and modifications were made to further conform certain provisions to State and Federal law.

The RLT committee reviewed the proposed minor changes from the proposed to the final-form rulemaking and, on March 16, 2020, recommended the MRAB adopt the changes and proceed with the final-form rulemaking. At its April 2, 2020, meeting, the MRAB voted to concur with the Department's recommendation that the final-form rulemaking move forward in the regulatory process.

#### *E. Summary of Final-Form Rulemaking and Changes from Proposed to Final-Form Rulemaking*

Sections 87.119 and 88.107 required extensive reorganization for clarity. For ease of reference, these sections have been reserved, and the new §§ 87.119a and 88.107a, respectively, will be adopted. Several minor editorial changes were also made throughout. Substantive changes are summarized as follows.

##### *Definitions*

"De minimis cost increase" is removed as required by OSM. "Operation and maintenance costs" is added to ensure consistency with State law. "Water supply" is revised to specify that natural soil moisture is not a water supply. A definition for "water supply owner" is added, and the term is now used repeatedly throughout the final-form rulemaking to avoid repetition of

using both "landowner" and "water supply company" in each provision. The definition of "water supply survey" is relocated from the "Definitions" section to its own specific section in each chapter.

#### *Alternative water supply information*

Sections 87.47 and 88.27 are revised to specify that any "water supply" that may be affected must be identified as part of a permit application, and that the permit application shall also include replacement cost calculations for these water supplies. There is also additional clarification that the Department will supply notice to water supply owners for those supplies that may be potentially affected prior to permit issuance, codifying the notification process as currently outlined in the Department's technical guidance document, *Water Supply Replacement and Permitting* (DEP ID #563-2112-605). This notification will be via certified mail and will address how the supply will be replaced if affected by the mining operation.

#### *Water supply surveys*

Subsections 87.119a(a) and 88.107a(a) detail the requirements for the water supply survey. Subsection (a)(1) was expanded to explain what information is required as part of the survey. This includes the location and type of water supply; the existing and reasonably foreseeable uses of the supply; the chemical and physical characteristics of the water; historic and recent quantity measurements; and sufficient sampling to document seasonal variation in hydrologic conditions of the water supply. Under subsection (a)(1), an operator or mine owner is excused from collecting survey information if the required collection measures pose an excessive inconvenience to the water supply owner or water supply user, or in the case of supplies that have existing treatment, if collecting a sample of untreated water is infeasible. These exceptions address situations such as when an operator or mine owner would have to excavate or remove a structure to gain access to a well or spring, or for supplies with existing treatment when there is no reasonable option to collect untreated water without risking contamination of the supply (that is, no port in the piping to obtain the water). The Department will make its determination that a scenario constitutes an excessive inconvenience or that collection is infeasible on a case-by-case basis.

Subsection (a)(2) requires the operators or mine owners to submit the results of the water supply survey to the Department, the water supply owner, and water supply user prior to the issuance of a mining permit.

Subsection (a)(3) clarifies that an operator or mine owner must 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 submitted to the Department.

Subsection (a)(4) explains what evidence an operator or mine owner must supply to the Department if a water supply owner has rejected a premining or postmining survey, and reorganizes requirements under previous subsections (c) and (d) of §§ 87.119 and 88.107 regarding "defenses to presumption of liability" and "notification to the Department."



Two changes, both under 87.119a(a) and 88.107a(a), were made from proposed to final. First, a grammatical change was made to change “analyses” to “analysis”. Second, under subsection (a)(4), in response to a public comment, the window for an operator to claim a non-response to the operator’s water supply survey request from a water supply owner was extended from 10 days from the owner’s receipt of the survey request to any time “prior to commencing mining activity.”

#### *Water supply replacement obligations*

Sections 87.119a(b) and 88.107a(b) are amended to include additional clarifications concerning an operators or mine owners’ obligations to replace an affected water supply. If any effect on the supply is presumed to occur from proposed mining, the operator or mine owner is responsible for providing a replacement supply prior to commencing mining. If a water supply has been affected to any demonstrable extent by mining, the operator or mine owner is responsible for restoring or replacing the supply with a permanent alternative source adequate for the purposes served. The purposes served include any reasonably foreseeable uses of the water supply.

#### *Temporary water supplies*

Sections 87.119a(c) and 88.107a(c) include requirements for a temporary water supply that must be provided within 24 hours if the water supply owner or water supply user is without a readily available alternate source of water. The supply must be adequate to meet the premining needs. The Department may determine in a preliminary review that the water supply loss is not related to the mining activity in which case the operator or mine owner will not be required to install a temporary supply.

#### *Immediate replacement of water supply by the Department*

Sections 87.119a(d) and 88.107a(d) address the situation where the Department provides an immediate replacement of a water supply and explains the Department's authority to recover costs from the responsible operator or mine owner. These sections are relocated verbatim from existing provisions in §§ 87.119(e) and 88.107(f), which restate section 4.2(f)(3) of PA SMCRA.

#### *Reimbursement*

Sections 87.119a(e) and 88.107a(e) are new requirements that address reimbursement for a water supply owner or water supply user. Reimbursement is negotiated when the water supply owner or water supply user has replaced the supply themselves, and it is later determined that the operator or mine owner is responsible for the water supply problem. The Department has included a process for the operator or mine owner to dispute the cost of a replacement supply if the new supply appears to be in excess of the premining characteristics of the supply, the purposes served by the supply, and reasonably foreseeable uses, that is, in excess of what the operator or mine owner would be required to replace. The Department would then determine the

fair cost of the reimbursement based on the evidence supplied by the operator or mine owner to that effect. The reimbursement claim window is the 5-year period until final bond release.

#### *Adequacy of permanently restored or replaced water supply*

The language regarding adequacy of the replacement supply was relocated to sections 87.119a(f) and 88.107a(f). Subsection (f)(1) explains that a restored or replaced water supply must be as reliable and permanent as the previous supply; not require excessive maintenance or result in increased cost to the owner or user without compensation; and provide the water supply owner and water supply user with as much control and accessibility as the previous water supply.

The criteria for whether a restored or replaced supply is adequate in quality and quantity are located under their own subsections (f)(2) and (f)(3), respectively. The concept of "adequate quality" has been expanded and explains that the replacement supply must be comparable to the premining supply as documented in the water supply survey or meet the standards of the Pennsylvania Safe Drinking Water Act unless there is a rare instance where the water supply owner or water supply user can demonstrate that water quality beyond Pennsylvania Safe Drinking Water Act standards is necessary to meet the use served by the original supply. For a nondomestic supply, the quality must also be adequate for the reasonably foreseeable uses. "Adequate quantity" has been expanded to clarify that a restored or replaced supply must deliver 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 and provides a definition for the concept of "reasonably foreseeable uses."

Subsection (f)(4) explains that a water supply replacement shall also include the installation of all piping, pumping equipment and treatment equipment necessary to have the replaced water source in service. The concept of *de minimis* no longer applies to operation and maintenance costs as required by OSM.

#### *Increased operation and maintenance costs*

Sections 87.119a(g) and 88.107a(g) describe the procedure for determining O&M 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. The *de minimis* option has been removed as required by OSM. The options for payment include a one-time payment agreed to by the water supply owner or a bond posted by the operator to ensure the water supply owner receives payment. Subsection (g)(3) provides the bond calculation process if that payment option is used by an operator.

#### *Special provisions for operation and maintenance costs*

Sections 87.119a(h) and 88.107a(h) clarify two provisions for O&M costs: when the ownership of the supply changes, and if there are multiple supplies that have been replaced with associated increase in costs. If ownership changes, the operator or mine owner must continue to pay the O&M costs unless a release as described in § 87.119a(g)(4) has been executed. For multiple

water supplies, an operator may post one bond that covers the O&M costs for multiple water supplies.

### *Waivers*

Sections 87.119a(i) and 88.107a(i) address compensation as an alternative to replacement. Only a water supply owner may knowingly and willingly waive the operator's or mine owner's responsibility to replace a water supply only in the situation where the supply is not necessary to achieve the approved post-mining land use.

### *Presumption of liability*

Sections 87.119a(j) and 88.107a(j) recite provisions from PA SMCRA that provide that the operator or mine owner is presumed to be liable for water supply pollution and diminution within 1,000 feet of areas affected by mining (see 52 P.S. § 1396.4b(f)(2)). The subsections also restate five defenses to the presumption that exist in PA SMCRA, including one defense that the operation is located outside the 1,000-foot area. This revision makes no changes to the statutory defenses but clarifies the criteria for the operator or mine owner to be excluded from the presumption of responsibility.

### *Operator cost recovery*

Sections 87.119a(k) and 88.107a(k) replace previous provisions that were disapproved by OSM in 2005 due to the repeal of the underlying provision that was section 4.2(f)(5) of PA SMCRA. See the act of December 20, 2000 (P.L. 980, No. 138), 27 Pa.C.S. § 7708 (relating to costs for mining proceedings). These subsections address an operator's or mine owner's ability to recover costs by referencing 27 Pa.C.S. § 7708, the current statute related to costs for mining proceedings.

### *Other remedies*

Sections 87.119a(l) and 88.107a(l) clarify that nothing in these regulations would prevent a water supply owner or water supply user from pursuing any other remedy provided in law or equity when claiming pollution or diminution of a water supply. These subsections also provide that an operator or mine owner is not prevented from pursuing other legal remedies should they incur costs in restoring or replacing a supply that experienced pollution or diminution caused by third parties.

### *Issuance of new permits*

Sections 87.119a(m) and 88.107a(m) removed language from previous sections that indicated that a Department order to restore or replace a water supply would not affect final bond release. OSM did not approve this section as previously written, because it could be construed as allowing final bond release while a water supply replacement order was in effect.

Several other sections were revised in the proposed rulemaking solely to correct the references due to renumbering.

#### *F. Summary of Comments and Responses on the Proposed Rulemaking*

The proposed rulemaking was adopted by the Board at its meeting on June 18, 2019, and published in the *Pennsylvania Bulletin* on November 2, 2019, with a 30-day public comment period (49 Pa.B. 6524). No public hearings were held. The public comment period closed on December 2, 2019.

The Board received several comments from one public commenter, Mountain Watershed Association (MWA), and the Independent Regulatory Review Commission (IRRC) on the rulemaking. A summary of the major comments received by the Board is included in this section. A full Comment and Response document is published separately upon final publication of this rulemaking on the DEP website.

#### **Sections 87.47 & 88.27 (and all sections)**

**Comment:** IRRC notes that under these sections, the Department is required to “notify the **owner** of any potentially affected supply.” [Emphasis added.] In the Preamble, the Board states that “the Department will give **advance notice** to water supply owners and **water supply users.**” [Emphasis added.] A public commentator states that limiting “notice to owners... would severely undercut the stated goal of this amendment” and that advance notice “will help enable residents to know their rights and protect their water.” Why is a timeframe not specified in the regulation for notice, and why are water supply users omitted? IRRC asks the Board to amend the notification requirements to clarify implementation procedures and to ensure protection of the public health, safety and welfare. IRRC also asks the Board to explain in the Preamble to the final-form regulation the implementation procedures for notification and how the procedures adequately protect the public health, safety and welfare. Finally, the Department should review the entire final regulation ensure that water supply users are included in all relevant provisions.

MWA comments that §§ 87.47 and 88.27 must be amended to require notification to both the owner *and user* of any potentially affected water supply. There are myriad ways in which notice may be delayed from reaching a water supply owner. To limit such notice to owners and not users would severely undercut the stated goal of this amendment. Not only must the language be amended to provide notice to water supply users as well as owners, but it should also be expanded to ensure that such notice is issued before the permit is issued. Much in the same way that sharing results of water surveys with users before permit issuance will help enable residents to know their rights and protect their water, as will alerting potentially affected users before issuance. If water supply users and owners are not notified of potential impacts until after permit issuance, it is much less likely they will utilize their right to water replacement supplies. Resident may even be entitled to water replacement supplies prior to when construction begins under section § 87.119a (Water Supply Replacement Obligations). Yet, if they did not receive notice until after the permit is issued, it may be too late for them to understand such a threat and employ their right to the available protections.

**Response:** Regarding the timeframe for providing notice, the District Mining Office (DMO) will provide written notice (certified mail) to the owners of these water supplies when a mining permit application or the DMO identifies proposed activities that may result in the loss, diminution or interruption of a water supply in the permit area or adjacent area. The letter from the DMO must address how the owner's water supply would be replaced if affected by the mining operation. The DMO will send the notice as soon as the operator is able to identify and propose an adequate replacement supply. The Preamble has been updated to clarify that resolution of the permit applicant's water supply survey obligations, including contact with the water supply owner, must occur prior to permit issuance. Additionally, the Preamble explains that the process and associated timeline for this is currently outlined in the existing technical guidance document, *Water Supply Replacement and Permitting* (DEP ID #563-2112-605).

Related to the feedback concerning "water supply owners" and "water supply users", the final-form rulemaking distinguishes between water supply owners and water supply users based on the relative rights of each party consistent with the Federal Surface Mining Control and Reclamation Act of 1977 (Federal SMCRA) and the Pennsylvania Surface Mining Conservation and Reclamation Act (PA SMCRA). Water supply owners require notification that the water supplies may potentially be affected, because the water supply owner is the party who has the right to consent to a permit applicant's request to enter the property to perform the water supply survey, as well as the right to consent to the proposed replacement supply and associated long-term operation and maintenance costs.

By contrast, water supply users, to the extent that party is different than the water supply owner, are considered when determining the uses of the supply, and therefore to determining whether the proposed replacement is adequate in quantity and quality to serve the purposes of the existing supply (i.e., the water supply user's needs). This final-form rulemaking also includes consideration of water supply users with regard to the following: (i) the water supply survey cannot pose an excessive inconvenience to the water supply user; (ii) the water supply user shall receive a copy of the results of all qualitative analyses and quantity measurements gathered as part of a water supply survey; (iii) a water supply user who is in the statutory zone of presumption will receive a temporary replacement supply within 24 hours of notifying the Department that their supply has been affected; (iv) a water supply user who incurs costs restoring or replacing their supply prior to a determination that mining was the cause will be reimbursed by the operator; (v) a water supply user's refusal to allow an operator on site to determine the cause of an affected supply may be used by the operator to rebut the statutory presumption of liability; and (vi) water supply users are referenced as a party who, through these regulations, are not prevented from pursuing other remedies available under law.

In several circumstances, the water supply user may be unknown or unknowable (such as the case with short-term rentals), which would complicate the Department's ability to comply with a regulation requiring notice to water supply users in the manner the commenters are suggesting. In all circumstances, the water supply owner will be in the best position to notify water supply users. The Preamble has been revised to remove "water supply user" in the context referenced in the comments to be consistent with the Annex A for the reasons provided above.

## **Sections 87.119(a) and 88.107(a)**

**Comment:** IRRC comments that under Subsection (a) (relating to water supply surveys), Paragraph (1) states that the survey must include certain information to the extent that it can be collected without “excessive inconvenience to the water supply owner or water supply user.” In the Preamble, the Board explains that “[t]hese exceptions address situations such as when an operator or mine owner would have to excavate or remove a structure to gain access to a well or spring, or, for supplies with existing treatment, when there is no reasonable option to collect untreated water without risking contamination of the supply (that is, no port in the piping to obtain the water).” Further, the Board states that the Department will make its determination that a scenario constitutes an excessive inconvenience or that collection is infeasible on a case-by-case basis. Since the term “excessive inconvenience” is not regulatory language and does not set a binding norm that could be predicted by the regulated community, IRRC asks the Board to clarify this term in the final-form regulation.

**Response:** “Excessive inconvenience” is included to maintain consistency with an analogous provision in Chapter 89 (§ 89.145a(a)(1) references “excessive inconvenience” without elaboration). This term is described in the Preamble using examples, because it is difficult to define precisely and is rather a determination to be made on a site-specific basis. The Mining and Reclamation Advisory Board (MRAB) also engaged in discussion regarding this term and were satisfied with the use of examples to provide additional clarification for this term. The MRAB agreed that there is a judgment that must be made by the Department at the time as to whether the sampling would be too inconvenient to complete. This is a rare occurrence; therefore, it is not suitable for inclusion in the regulations but should be resolved through professional judgment and discussion with the water supply owner on a case-by-case basis.

**Comment:** MWA strongly encourages the addition of subsection (a)(2), which says that prior to issuance of a permit mine owners/operators must submit the results of water supply surveys to: the Department, the water supply owner, and water supply user. This will be an incredibly valuable tool in protecting the rights of coalfield communities. For the many reasons set forth below, it is often the case that water supply users are never notified of potential threats, despite the fact that they are often the best situated to respond to such impacts. Providing them with information about their water supply is the best way to help ensure the protection of their rights.

Subsection (a)(4)(iii) potentially undercuts much of the utility of this rule and, in fact, much of the requirement to conduct water surveys, generally. This section seems to say that water supply owners (not users) will receive a notice of intent to survey and if they do not authorize the survey within 10 days, the operator is no longer obligated. The newly proposed language §§ 87.119a (a)(4) and § 88.107a (a)(4) [...] implies that if a water supply owner fails to, not only respond, but authorize access within 10 days of receiving notice, then the mine owner/operator is no longer required to conduct a water supply survey. If this is the case, such a severe time restraint could functionally render the requirement of a water supply survey almost entirely moot. Experience shows us that very often, water supply inventories are rife with outdated and inaccurate information about the water supply owners. Many times, notification never even comes to the hands of the correct water supply owner. In these cases, such a severe time

constraint would have the unjust effect of essentially releasing the mine operator/owner from the duty to conduct water surveys for anyone whose information is incorrectly listed.

Particularly in the tourist-heavy area of the Laurel Highlands, which covers many coal producing counties in Pennsylvania, “water supply owner” is often synonymous with “vacation home owner.” Such seasonal residents may not be in the area, or even the country, for more than a few months a year. Hence, a large percentage of our region’s water supply owners would be functionally excluded from their right to a water supply survey. Furthermore, in many instances water supply owners rent their property to others who occupy it a majority of the time. Individual owners – if they do ultimately receive the notice - need to coordinate with their lessees and tenants before they may authorize such access, a process which could take several months. In fact, sometimes property owners are prohibited, by lease terms or landlord-tenant laws, from entering a leased property without a minimum of 30 days advance notice. Hence, it would be functionally impossible for water supply owners to authorize access within the 10 days stated in the rule. If it is not the case that the Board intends to create such a stringent requirement, then the language should be revised and clarified so that no such potential loophole exists.

**Response:** Related to the time period for which the water supply owner must respond to the mining applicant’s request for a survey, this provision was originally included in the proposed rulemaking to maintain consistency with its analogous provision under Chapter 89. This provision – that provides that a mine operator may rebut the presumption of liability if the surface owner does not authorize access within ten days of receipt of notice – is unique to Section 5.2(c) of the Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.5b(c)), regulating underground coal mining. The related provision in PA SMCRA does not include a time within which a landowner must respond. Therefore, as the commenter has suggested, the Board has removed “within 10 days of receipt” from the final-form regulations under Chapters 87 and 88 and replaced it with “prior to commencing mining activity.” This provides potentially several months for the owner and mine operator to communicate regarding the survey.

**Comment:** IRRC finds that paragraph (l)(vi) requires the survey to include “[s]ufficient sampling and other measurements to document the seasonal variation in hydrologic conditions of the water supply.” Is an operator or mine owner required to survey water during all four seasons before an application can be submitted? We ask the Board to explain in the Preamble to the final-form regulation the timetable for compliance with this requirement.

**Response:** As part of the overall hydrologic assessment (§§ 87.69 and 88.49) that requires the operator to determine probable hydrologic consequences within the proposed permit and adjacent areas, the operator considers seasonal variations that correspond to times of high or low water tables (early spring vs. late summer, respectively). During the application process, the permit reviewer assesses differences in types of water supplies and seasonal variations for the background samples. For a monitoring point, six months of samples are required with at least one sample during a low-flow period of August, September, or October. For points not included in the monitoring plan – that is, water supplies that are not anticipated to be affected – the survey would include information on its seasonal variability.

**Comment:** IRRC says that regarding Subsection (b) (relating to water supply replacement obligations), the Preamble explains that Sections 87.119a and 88.107a replace Sections 87.119 and 88.107, respectively, which apply to mine operators and persons engaged in government-financed reclamation. However, government-financed reclamation is not addressed in Subsection (b) and the Board does not explain in the Preamble why these persons are no longer obligated to meet the water supply replacement requirements. IRRC asks the Board to amend the final-form regulation or to explain in the Preamble why it is reasonable for a person engaged in government-financed reclamation not to be required to meet the obligations in this subsection.

MWA comments that §§ 88.107 and 87.119 must not remove obligation for operators/owners to replace water supplies caused by government-financed construction contracts. In regard to water replacement, the draft language unacceptably removes the obligation for persons engaged in government-financed construction contracts (GFCC's) to replace damaged water supplies. This is deeply problematic because GFCC's often utilize the exact same processes and procedures as surface mining.

**Response:** This final-form rulemaking does not remove the obligation for persons engaged in government-financed reclamation (GFR) or government-financed construction contracts (GFCCs) to restore or replace a water supply affected by those activities. The provisions in Chapters 87 and 88 pertain to activities that require a surface mining permit. GFCCs and GFR projects are not permits but reclamation contracts authorized under PA SMCRA. See 52 P.S. § 1396.4h (regarding government-financed reclamation projects authorizing incidental and necessary extraction of coal or authorizing removal of coal refuse). As such, they are not directly subject to regulation under Chapters 87 and 88.

GFCCs and GFR projects are regulated primarily under 52 P.S. § 1396.4h and Pennsylvania's regulations in 25 Pa. Code § 86.6 (relating to extraction of coal incidental to government-financed construction or government-financed reclamation projects), which do not require permits for coal extraction related to GFCCs or GFR projects. Specifically, GFR projects and GFCCs are exempt from the surface mining permit requirements of Chapter 87 and 88 if they meet the criteria listed in 25 Pa. Code § 86.6(a).

However, in addition to being subject to provisions of PA SMCRA and other environmental laws, Section 4.8(c)(4)(i) of PA SMCRA directs that GFCCs adhere to "the applicable environmental protection performance standards promulgated in the rules and regulations relating to surface coal mining listed in the [GFCC]." See 52 P.S. § 1396.4h(c)(4)(i); see also 25 Pa. Code § 86.6(a)(6) and (d). Operations performing work pursuant to GFCCs and GFR projects must still restore or replace water supplies affected by those operations under Section 4.2(f)(1) and 4.8(g) of PA SMCRA (52 P.S. §§ 1396.4b(f)(1) and 1396.4h(g)).

Persons engaged in GFR projects or GFCCs that do not meet the exemption criteria in § 86.6(a) would require a surface mining permit for their activities. Under those circumstances, GFR and GFCC projects would be obligated to meet the water supply replacement requirements in §§ 87.119a and 88.107a.



To avoid unnecessary repetition in the regulatory text and confusion resulting from an inconsistent reference to GFCCs in other provisions that still otherwise apply to these activities, "a person engaged in government-financed reclamation" was omitted from the regulatory text in §§ 87.119(a) and 88.107(a) even though the obligation for operations performing work pursuant to GFCCs to restore or replace affected water supplies still exists.

**Comment:** IRRC comments that under Subsection (b), Paragraph (1) states that the operator or mine owner “who affects a water supply to any demonstrable extent . . . shall **promptly** restore or replace the affected water supply with a permanent alternate supply . . . .” [Emphasis added.] The term “promptly” is not regulatory language and does not set a binding norm that could be predicted by the regulated community. IRRC asks the Board to clarify this implementation timeframe in the final-form regulation.

**Response:** The phrase “promptly replace” is included to maintain consistency with an analogous provision under Chapter 89 (§ 89.145a(b)) and has been effectively understood and implemented in the regulation of underground mining to mean without undue or unjustified delay. The word “promptly” is used frequently in the Federal SMCRA. “Promptly” provides some flexibility by allowing the supply to be replaced as soon as practical considering site-specific conditions.” See 35 Pa.B. 5775; 25 Pa. Code § 89.145a(b); see also Section 720(a)(2) of Federal SMCRA (30 U.S.C.A. § 1309a(a)(2)) (“*Promptly* replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations.”).

**Comment:** IRRC notes that under Subsection (b), Paragraph (2) states that “for any water supply that will ... be affected by . . . the proposed mining, the operator or mine owner shall provide a replacement supply **prior to commencing the activity.**” [Emphasis added.] How does this provision work with Subsection (c) (relating to temporary water supplies) that requires the operator or mine owner to provide a temporary water supply within 24 hours if the affected water supply owner or user is without a readily available alternate source of water? IRRC asks the Board to explain in the Preamble to the final-form regulation how an owner or mine operator will be required to implement these regulations.

**Response:** These provisions operate together across the timeline of mining activity, where subsection (b) relates to permanent replacement supplies while subsection (c) relates to the temporary supply provided until a permanent supply can be established. In order of events, the regulations apply as follows:

1. If the operator or the Department anticipate that a mining activity will impact a water supply, the operator must provide a replacement supply prior to commencing its activities. (subsection (b)(2)). This is determined during permit review.
2. If no impact is anticipated but a water supply within the area of presumption is affected after commencement of the mining activity, the operator shall provide a temporary water supply within 24 hours of being contacted (subsection (c)).

3. Then, if the water supply is within the area of presumption and no defense is available or if causation can otherwise be established, the operator must “promptly” provide a permanent replacement (subsection (b)(1)).

The Department has successfully been implementing the 24-hour time frame for providing temporary water supplies for supplies impacted by underground mines (see 25 Pa. Code § 89.145a(e)(1)) and intends to continue this implementation for surface mining impacted supplies.

**Comment:** IRRC notes that subsection (c) relates to **temporary** water supplies. The term “temporary” is not regulatory language and does not set a binding norm that could be predicted by the regulated community. IRRC asks the Board to clarify this timeframe in the final-form regulation.

**Response:** “Temporary” is used in the federal regulations in relation to the requirement for a temporary supply that is equivalent to premining quality and quantity under the federal regulations (30 CFR 701.5) (“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 . . .”). A temporary supply is warranted if the persons served by the supply will be without water for more than 24 hours. Therefore, a temporary supply is needed when the prompt resolution of a problem or installation of a new permanent supply will take more than a day. The duration of the temporary supply will depend on the successful installation and implementation of a new supply that meets the quality and quantity requirements, which will vary depending on the type of permanent replacement supply or whether the affected supply can otherwise be restored.

**Comment:** IRRC notes that in Subsection (c), the requirement for a temporary water supply may be subject to a preliminary determination by the Department. The Board states in the Preamble that “the Department may determine in a preliminary review that the water supply loss is not related to the mining activity in which case the operator or mine owner will not be required to install a temporary supply. This determination may not be possible, however, within a 24-hour [timeframe], but the District Mining Office personnel who investigate water loss claims stated that they can regularly make this preliminary determination within 48 hours of notification of an impacted supply.” Why is the timeframe for implementation in Subsection (c) 24 hours if the Department needs 48 hours to make a determination? If the provision remains unchanged at final, what is the recourse for an operator or mine owner who has complied by providing a temporary water supply within 24 hours if the Department then determines that the water supply loss is not related to mining activity? Who will reimburse the operator or mine owner? IRRC asks the Board to explain the reasonableness and fiscal impacts of these implementation timeframes in the final-form regulation.

**Response:** To clarify, water supply issues are typically addressed within the 24-hour time frame. The language in the Preamble of the proposed rulemaking attempted to address the rare instances that the Department may be unable to respond to a water loss call within 24 hours due to holidays or other conditions. This language has since been removed to avoid further confusion. While the Department is unable to ensure that it can make a determination as to the cause of the impact of the supply within any particular timeframe, the final-form rulemaking has been written

to accommodate the scenario where the Department is able to quickly determine that the cause was not related to mining. For example, the mine operator or Department staff may suspect the cause of the affected supply is instead a mechanical or plumbing issue unrelated to mining. In that instance, a plumber or well driller may be required to check the distribution system.

If the Department later determines mining did not impact the water supply yet an operator had to provide a temporary water supply, the operator or mine owner will not be reimbursed. This was the cost of operating near water supplies determined by the General Assembly when it created the statutory presumption. PA SMCRA initially included a provision for operators to seek reimbursement for these costs, but this provision was later repealed in 2000. The statutory presumption makes the reasonableness and fiscal impact difficult to discern, as the scenarios described by IRRC take place after an impact but before the cause of the impact is known. Any fiscal impact to a mine operator or mine owner directly corresponds to a fiscal impact to the water supply owner or water supply user within the zone of presumption, which the General Assembly already weighed in creating the presumption.

**Comment:** IRRC notes that subsection (j) (relating to presumption of liability) is described in the Preamble as “specify[ing] that the presumptive area includes support areas...” However, this subsection does not explicitly include “support areas.” IRRC asks the Board to add “support areas” or explain in the Preamble to the final-form regulation how support areas are addressed in this subsection.

**Response:** Sections 87.119a(j) and 88.107a(j) (relating to presumption of liability) state that the area subject to the presumption extends 1,000 feet from “areas affected” by the mining activities. “Affected area,” which is a broadly defined term in §§ 87.1 and 88.1, is comprised of a mining area, where the coal is mined, and “support areas,” which the Department and the regulated community understand as describing areas needed to facilitate, but otherwise incidental to, the extraction of coal.

**Comment:** IRRC comments that both RAF Question #9 and the Preamble state: “Section 4.2(f)(4) of PA SMCRA [the Pennsylvania Surface Mining Conservation and Reclamation Act], 52 P.S. § 1396.4b, was not approved [by the United States Department of the Interior’s Office of Surface Mining Reclamation and Enforcement (OSM)] because it allowed for final bond release when there is an outstanding water supply replacement order. See 30 CFR 938.12(c)(1). Sections 87.119(i) and 88.107(i) were not approved for the same reason. See 30 CFR 938.12(c)(7).” The Preamble also states that “[s]tate laws must be consistent with the provisions of Federal SMCRA, see 30 U.S.C.A. § 1255(a)...” Has Section 4.2(f)(4) of the Pennsylvania SMCRA been amended to conform to Federal law? If not, how is the Department addressing OSM’s disapproval of this statutory provision?

**Response:** Section 87.119(i) was replaced by § 87.119a(m), which removed the language objected to by OSM.

Section 4.2(f)(4) of PA SMCRA has not been amended to conform to Federal law, but this should have no effect on OSM’s approval of the PA coal mining regulatory program. Section 4.2(f)(4) and the corresponding regulations at sections 87.119(i) and 88.107(i) were a limitation

on an otherwise valid Department enforcement mechanism (withholding final bond release), codified under section 4(g) of PA SMCRA, 52 P.S. § 1396.4(g), and in the regulations at sections 86.172 and 86.174.

Federal regulations require that “[s]tates with an approved State program shall implement, administer, enforce and maintain it in accordance with the [Surface Mining Control and Reclamation Act of 1977], this chapter and the provisions of the approved State program.” 30 CFR 733.11. Moreover, Section 18.10 of PA SMCRA directs that “it shall be the intent of the General Assembly, and this act shall not be construed to violate any of the requirements of ... the Surface Mining Control and Reclamation Act of 1977... “ 52 P.S. § 1396.18j.

Therefore, OSM’s disapproval of the limitation set forth in section 4.2(f)(4) of PA SMCRA rendered the Department unable to implement it. This effectively lifts the restriction on the Department’s authority under Section 4(g) to enforce compliance with the standards set forth in PA SMCRA and other relevant laws (which includes compliance with a water supply replacement order) by withholding final bond release. See 52 P.S. § 1396.4(g) and 25 Pa. Code §§ 86.172 and 86.174.

**Comment:** IRRC asks that if the Department is required to submit this proposed regulation to OSM for its review and approval, to provide this information in the Preamble to the final-form regulation.

**Response:** The proposed rulemaking has been informally provided to OSM for their review. OSM has provided some preliminary feedback, which was positive and did not identify any issues. Once approved, the final-form rulemaking will be submitted as a program amendment to OSM.

## *G. Benefits, Costs and Compliance*

### *Benefits*

Because the revisions incorporated in this final-form rulemaking will resolve inconsistencies between existing Department regulations and Federal requirements, they will allow the Commonwealth to maintain primary regulatory authority over coal mining activities. This final-form rulemaking codifies mine operator responsibilities that exist under State law and as articulated in Department policy documents, which will provide clarity to mine operators regarding compliance standards for water supply replacement and protect the rights of water supply owners and users.

The consolidation of requirements into the surface mining chapters of the regulations promotes public understanding of these rights and responsibilities. Both water supply owners and surface coal mine operators benefit by having these requirements in the mining regulations published in the *Pennsylvania Code* instead of in Department policy documents. In particular, this final-form rulemaking now clarifies that if a water supply is presumed to be affected by mining, the owner of that supply is entitled to a temporary water supply, saving them the

difficulty of finding a supplier and a potential cost of around \$1,000 to \$2,000 to secure a temporary water supply themselves.

This final-form rulemaking outlines a process to ensure that water losses are anticipated in advance to the reasonable extent possible so that the water supply user is spared excessive inconvenience and interruption to the supply and that operation and maintenance cost agreements can be determined fairly and concluded expediently.

#### *Compliance costs*

This final-form rulemaking is likely to have no impact on existing costs for compliance. The requirements included in this final-form rulemaking are largely based on Federal requirements or developments in State law that are currently implemented through Department policy. Therefore, it is not anticipated that this final-form rulemaking will increase or decrease costs to the operator or mine owner.

#### *Compliance assistance plan*

Compliance assistance for this final-form rulemaking will be provided through the Department's routine interaction with trade groups and individual applicants. There are about 400 licensed surface coal mining operators in this Commonwealth that will be subject to this final-form rulemaking.

The Department will update Program guidance and provide information on the Department's web site to further assist mine operators with compliance.

#### *Paperwork requirements*

This final-form rulemaking does not require additional paperwork. Forms already exist to collect the information requirements to be supplied by the mine operator with regards to this final-form rulemaking. The surface coal mining application sections applicable to water supplies will require minor revisions to reflect the regulatory changes. This will be done in conjunction with the MRAB at a later date. The form regarding the Abandonment of Water Supply Agreement will be revised to remove the "de minimis" language. A new form, Model Water Supply Settlement Agreement and Release, can be used when the mine owner or operator enters into an agreement with the water supply owner to provide a replacement supply and all the requirements entailed.

#### *H. Pollution Prevention*

The Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with

greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This final-form rulemaking has minimal impact on pollution prevention since it is predominantly focused on updating regulations to reflect current Federal requirements, amendments to state statutes and references to citations.

#### *I. Sunset Review*

The Board is not proposing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

#### *J. Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on October 15, 2019, the Department submitted a copy of this proposed rulemaking, published at 48 Pa.B. 6844 (October 27, 2018), to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees, for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final rulemaking, the Department has considered all comments from IRRC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on [REDACTED], the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on [REDACTED], and approved the final-form rulemaking.

#### *K. Findings of the Board*

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 48 Pa.B. 6844 (October 27, 2018).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

*L. Order of the Board*

The Board, acting under the authorizing statutes, orders that:

- (1) The regulations of the Department, 25 Pa. Code Chapters 87-90, are amended as set forth in Annex A.
- (2) The Chairperson of the Board shall submit this final-form regulation to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (3) The Chairperson of the Board shall submit this final-form regulation to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (4) The Chairperson of the Board shall certify this final-form regulation and deposit them with the Legislative Reference Bureau, as required by law.
- (5) This final-form regulation shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

PATRICK McDONNELL,  
Chairperson  
Environmental Quality Board