

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 948**

[WV-081-FOR]

**West Virginia Permanent Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Proposed rule.

**SUMMARY:** OSM is announcing receipt of a proposed amendment to the West Virginia permanent regulatory program (hereinafter referred to as the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment revises the West Virginia Code to create the Office of Explosives and Blasting, and adds and amends sections of the West Virginia Code concerning blasting. The amendment is intended to improve the operational efficiency of the State program.

**DATES:** Written comments must be received on or before 4:00 p.m. on May 20, 1999. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. on May 17, 1999. Requests to present oral testimony at the hearing must be received on or before 4:00 p.m. on May 5, 1999.

**ADDRESSES:** Your written comments and requests to speak at the hearing should be mailed or hand delivered to Mr. Roger W. Calhoun, Director, Charleston Field Office at the address listed below.

Copies of the proposed amendment, the West Virginia program, and the administrative record on the West Virginia program are available for public review and copying at the addresses below, during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the proposed amendment by contacting the OSM Charleston Field Office.

Mr. Roger W. Calhoun, Director,  
Charleston Field Office, Office of  
Surface Mining Reclamation and  
Enforcement, 1027 Virginia Street,  
East, Charleston, West Virginia 25301  
Telephone: (304) 347-7158

West Virginia Division of  
Environmental Protection, 10  
McJunkin Road, Nitro, West Virginia  
25143, Telephone: (304) 759-0515

In addition, copies of the proposed amendment are available for inspection during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, 75 High Street, Room 229, P.O. Box 886, Morgantown, West Virginia 26507, Telephone: (304) 291-4004  
Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 323 Harper Park Drive, Suite 3, Beckley, West Virginia 25801, Telephone: (304) 255-5265

**FOR FURTHER INFORMATION CONTACT:** Mr. Roger W. Calhoun, Director, Charleston Field Office; Telephone: (304) 347-7158.

**SUPPLEMENTARY INFORMATION:****I. Background on the West Virginia Program**

On January 21, 1981, the Secretary of the Interior conditionally approved the West Virginia program. Background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and the conditions of the approval can be found in the January 21, 1981, **Federal Register** (46 FR 5915-5956). Subsequent actions concerning the West Virginia program and previous amendments are codified at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

**II. Discussion of the Proposed Amendment**

By letter dated March 25, 1999 (Administrative Record Number WV-1119), the West Virginia Division of Environmental Protection (WVDEP) submitted an amendment to the West Virginia program pursuant to 30 CFR 732.17. The amendment concerns changes to Chapter 22 Article 3 (§ 22-3) and § 22-1 of the West Virginia Code as contained in West Virginia Senate Bill (SB) 681. The amendment creates the Office of Explosives and Blasting within the WVDEP, and adds and amends sections of the West Virginia Code concerning blasting. By letter dated April 1, 1999 (Administrative Record Number WV-1121), the WVDEP notified us that the West Virginia Governor signed SB-681, and provided a copy of the signed bill.

The amendments submitted by the WVDEP are identified below. Minor wording changes and other non-substantive changes are not identified.

**1. 22-1-7 Offices Within the Division; Continuation of the Office of Water Resources**

New section 22-1-7(a)(7) is added to provide that the director shall maintain the office of explosives and blasting, which is charged, at a minimum, with administering and enforcing, under the supervision of the director, the

provisions of 22-3A, concerning the office of explosives and blasting.

**2. 22-3-13 General Environmental Protection Performance Standards for Surface Mining; Variances**

Section 22-3-13(a) is amended to change the phrase “\* \* \* and other requirements as the director promulgates” to read “\* \* \* and other requirements set forth in legislative rules proposed by the director.”

Section 22-3-13(b)(3) is amended to change a proviso statement concerning backfilling and grading requirements from, “Provided further, That the director shall promulgate rules governing variances \* \* \*” to read, “Provided further, That the director shall propose rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code. \* \* \*”

Section 22-3-13(b)(15) concerning explosives is amended by deleting paragraphs (A), (C), and (E), and relettering the remaining paragraphs. Paragraph (D) concerning blaster certification, now relettered as paragraph (B), is amended by deleting the word “director” and adding in its place the words “office of explosives and blasting.”

Section 22-3-13(e) concerning variances from approximate original contour is amended from the words, “The director may promulgate rules that permit variances \* \* \*” to read “The director may propose rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code, that permit variances. \* \* \*”

Section 22-3-13(f) concerning coal mine waste piles is also amended to provide that the director may propose rules for legislative approval, rather than promulgate rules.

**3. 22-3-13a Pre-Blast Survey Requirements**

This section is all new. Section 22-3-13a(a) provides that at least 30 days before blasting, the following notifications shall be made in writing to all owners and occupants of man-made dwellings or structures that the operator or designee will perform pre-blast surveys: (1) For operations less than 200 acres in a single permitted area or less than 300 acres of contiguous or nearly contiguous area of two or more permitted areas, the notifications shall be to all owners and occupants within five tenths of a mile of the permitted area or areas; (2) for all other surface mining operations, the required notifications shall be to all owners or occupants within five tenths of a mile of the permitted area or areas, or seven

tenths of a mile of the proposed blasting site, whichever is greater.

Section 22-3-13a(b) adds a requirement that operators who have already made pre-blast surveys, and if Section 22-3-13a(a)(2) applies, shall notify owners and occupants within seven tenths of a mile of the blasting site, unless a written waiver is executed in accordance with Section 22-3-13(c).

Section 22-3-13a(c) provides for the waiver of the right to a pre-blast survey. This provision also provides that if access to conduct a pre-blast survey is denied and a waiver is not provided, or to the extent that access to any portion of the structure, underground water supply or well is impossible or impractical under the circumstances, the pre-blast survey shall indicate that access was refused, impossible or impractical. The operator or designee shall execute a sworn affidavit explaining the reasons and circumstances surrounding the refusals. The office of explosives and blasting shall not determine the pre-blast survey to be incomplete because it indicates that access was refused, impossible, or impractical. The operator shall send copies of all written waivers and affidavits to the office of explosives and blasting.

Section 22-3-13a(d) provides that if a pre-blast survey was waived by the owner and the property sold, the new owner may request a pre-blast survey from the operator.

Section 22-3-13a(e) provides that an owner may request from the operator a pre-blast survey on structures conducted after the original pre-blast survey.

Section 22-3-13a(f) provides for the information that a pre-blast survey must contain. Such information includes a general description of the structure and the survey methods; written documentation and drawings, videos or photos of the pre-blast defects, other physical conditions, and unusual or substandard construction of all structures, appurtenances and water sources which could be affected by blasting; written documentation of the water supply; a description of any portion of the structure and appurtenances not documented or photographed and the reasons; signature of the person performing the survey; and any other information required by rule.

Section 22-3-13a(g) provides that pre-blast surveys shall be submitted to the office of explosives and blasting at least 15 days prior to the start of blasting. The office shall review each survey for completeness only, and notify the operator of any deficiencies.

The office shall notify the owner and occupant of the location and availability of the pre-blast survey, and provide a copy upon request.

Section 22-3-13a(h) provides that the operator shall file notice of the pre-blast survey or waiver in the office of the county clerk of the county commission of the county where the man-made dwelling or structure is located. The office of explosives and blasting shall prescribe the form to be used.

Section 22-3-13a(i) provides that the chief of the office of explosives and blasting shall propose rules for legislative approval in accordance with Article 29A-3 of the State Code, dealing with pre-blast survey requirements and setting the qualifications for individuals and firms performing pre-blast surveys.

Section 22-3-13a(j) provides that the provisions of Section 22-3-13a shall not apply to underground coal mining operations, and the extraction of minerals by underground mining methods or the surface impacts of the underground mining methods.

#### *4. 22-3-22a Blasting Restrictions; Site Specific Blasting Design Requirement*

This is a new section. Section 22-3-22a(a) provides that for this section, the term "production blasting" means blasting that removes the overburden to expose underlying coal seams and shall not include construction blasting.

Section 22-3-22a(b) provides that for this section, the term "construction blasting" means blasting to develop haul roads, mine access roads, coal preparation plants, drainage structures, or underground coal mine sites and shall not include production blasting.

Section 22-3-22a(c) provides that for this section, the term "protected structure" means any of the following that are outside the permit area: an occupied dwelling, a temporarily unoccupied dwelling which has been occupied within the past ninety days, a public building, a structure for commercial purposes, a school, a church, a community or institutional building, a public park or a water well.

Section 22-3-22a(d) provides that production blasting is prohibited within 300 feet of a protected structure or within 100 feet of a cemetery.

Section 22-3-22a(e) provides that blasting within 1000 feet of a protected structure shall have a site specific blast design approved by the office of explosives and blasting. The design shall limit the type of explosives and detonating equipment, the size, the timing and frequency of blasts to do the following: (1) Prevent injury to persons; (2) prevent damage to property outside the permit area; (3) prevent adverse

impacts on any underground mine; (4) prevent change in the course, channel or availability of ground or surface water outside the permit area; and (5) reduce dust outside the permit area. This provision also provides that in developing the blasting plan, consideration be given to such items as the physical condition, type and quality of construction of the protected structure, current use of the protected structure, and the concerns of the owner or occupant.

Section 22-3-22a(f) provides for the waiver in writing of the blasting prohibition within 300 feet, or the site specific restriction within 1000 feet. The operator shall send copies of all waivers to the office of explosives and blasting. Waivers shall be valid during the life of the permit and renewals, and shall be enforceable against any subsequent owners or occupants of the protected structure.

Section 22-3-22a(g) provides that this section does not apply to underground coal mining operations and the surface operations and impacts incident to underground coal operations, or to the extraction of minerals by underground mining methods or the surface impacts of the underground mining methods. Nothing in this section shall exempt any coal mining operation from the general performance standards contained in Section 22-3-13 and any implementing rules.

#### *5. 22-3-23(c) Release of Bond or Deposits*

Subsection 22-3-22(c)(3) concerning final bond release is amended to add a paragraph which provides that notwithstanding the bond release scheduling provisions of subdivisions (1), (2) and (3) of this subsection, if the operator completes the backfilling and reclamation in accordance with an approved post-mining land use plan that has been approved by the division of environmental protection and accepted by a local or regional economic development or planning agency for the county or region in which the operation is located, provisions for sound future maintenance are assured by the local or regional economic development or planning agency, and the quality of any untreated postmining water discharge complies with applicable water quality criteria for bond release, the director may release the entire amount of said bond or deposit. The director shall propose rules for legislative approval in accordance with the provisions of article 29a-3 of this code, to govern a bond release pursuant to the terms of this paragraph.

### 6. 22-3-24 Water Rights and Replacement; Waiver of Replacement

This Section is being amended to add new subsections (c), (d), (e), and (f). New subsection (c) provides that there is a rebuttable presumption that a mining operation caused damage to an owner's underground water supply if the inspector determines the following: (1) Contamination, diminution or damage to an owner's underground water supply exists; and (2) a pre-blast survey was performed, consistent with the provisions of section 22-3-13a, on the owner's property including the underground water supply that indicated that contamination, diminution or damage to the underground water supply did not exist prior to the mining conducted at the mining operation. The operator conducting the mining operation shall: (1) Provide an emergency drinking water supply within 24-hours; (2) provide a temporary water supply within 72-hours; (3) provide a permanent water supply within 30 days; and (4) pay all reasonable costs incurred by the owner in securing a water supply.

New subsection 22-3-24(d) provides that an owner aggrieved under the provisions of subsections (b) or (c) of this section, may seek relief in court or pursuant to the provisions of 22-3b-6.

New subsection 22-3-24(e) provides that the director shall propose rules for legislative approval to implement the requirements of this section.

New subsection 22-3-24(f) provides that the provisions of 22-3-24(c) shall not apply to underground coal mining operations, the surface operations and impacts incident to an underground coal mine, and the extraction of minerals by underground mining methods or the surface impacts of the underground mining methods.

### 7. 22-3-30a Blasting Requirements; Liability and Civil Penalties in the Event of Property Damage

This section is new. Subsection 22-3-30a(a) provides that blasting of overburden and coal shall be conducted in accordance with the rules and laws established to regulate blasting.

Subsection 22-3-30a(b) provides the penalties to be imposed for each permit area or contiguous permit areas where blasting was out of compliance and resulted in property damage to a protected structure as defined in 22-3-22a.

Subsection 22-3-30a(c) provides that the division of environmental protection may not impose penalties on an operator for the violation of any rule

identified in 22-3-30a that is merely administrative in nature.

Subsection 22-3-30a(d) provides that the remedies provided in this section are not exclusive and shall not bar an owner or occupant from any other remedy accorded by law.

Subsection 22-3-30a(e) provides that the monetary penalties and revocation set out at 22-3-30(b) apply if the division of environmental protection establishes that production blasting was conducted within the 300 feet, or the 1000 feet standards set out at 22-3-22a, or was within 100 feet of a cemetery.

Subsection 22-3-30(f) provides that all penalties and liabilities set forth in this section shall be assessed and collected by the director, and deposited with the treasurer of the State of West Virginia in the "general school fund."

Subsection 22-3-30(g) provides that the director shall propose rules for the implementation of this section.

Subsection 22-3-30(h) provides that the provisions of this section shall not apply to underground coal mining operations and the surface operations and impacts incident to underground coal operations, or to the extraction of minerals by underground mining methods or the surface impacts of the underground mining methods. Nothing in this section shall exempt any coal mining operation from the general performance standards contained in Section 22-3-13 and any implementing rules.

### 8. 22-3A Office of Explosives and Blasting

Article 3A is new. Section 22-3A-1 provides for legislative findings, and policies and purposes. Section 22-3A-1 declares that establishment of the office of explosives and blasting is in the public interest, and that this office will be vested with authority to enforce the rules and laws established to regulate blasting.

Section 22-3A-2 creates the office of explosives and blasting, provides that the director shall appoint a chief to administer the office, and provides that the office shall assume responsibility for the enforcement of all the rules and laws established to regulate blasting.

Section 22-3A-3 establishes the powers and duties of the office of explosives and blasting.

Section 22-3A-4 provides that the office shall propose rules for the purpose of implementing Article 22-3A. The rules shall include, but not be limited to: procedures for the review, modification and approval of blasting plans, inspection and monitoring of blasting; minimum requirements for pre-blast surveys; procedures for the use

of seismographs; a procedure to warn of impending blasting; a procedure to limit the type of explosives and detonating equipment, the size, timing, and frequency of blasts based on the physical conditions at the site to prevent injury, damage, and adverse impacts; publication of blasting schedules; and written notice of blasting schedules. The office shall also propose rules for blaster certification, and for disciplinary procedures for blasters.

Section 22-3A-5 provides that the office shall establish and manage a claims process related to blasting, and shall propose rules concerning blasting claims and arbitration. The section also provides that participation in the claims process is voluntary, but that claim determinations are intended to be final, if not taken to arbitration. The section provides for written notice, the payment of claims for which an operator is adjudged liable, and for the issuance of cessation orders. The section also provides that no permit shall be granted unless the applicant agrees to be subject to the terms of this section. The section also authorizes the office to retain the services of inspectors, experts and other persons or firms as necessary to fulfill its responsibilities under this section.

Section 22-3A-6 provides that rules, orders and permits already issued will remain in effect until modified, terminated, superseded, set aside or revoked by a court, and that proceedings pending before the division are not effected by this enactment.

Section 22-3A-7 concerns funding. It provides that the office shall assess each operator a fee on each quantity of explosive material used on the surface mining operations. The office shall propose rules establishing the fees, and the office shall deposit all monies received into a special fund called the "mountaintop removal fund" to be spent by the offices in conducting their duties. The legislature shall appropriate the funds for expenditure.

Section 22-3A-8 concerns the transfer of personnel and assets currently used to perform the duties of Article 22-3A to the office of explosives and blasting.

Section 22-3A-9 sets forth the limitations of Article 22-3A. Except for sections five and seven of this article, all provisions of this article are also applicable to surface blasting activities related to underground mining operations.

Section 22-3A-10 provides that the office of explosives and blasting shall conduct or participate in studies or research to develop scientifically based data and recommendations related to various aspects of blasting. The office

shall report the data and recommendations to the joint committee on government and finance on or before January 1, 2001, and annually thereafter or as otherwise requested.

Section 22-3A-11 provides that the office of explosives and blasting is continued until July 1, 2002.

### III. Public Comment Procedures

We are seeking comments, in accordance with the provisions of 30 CFR 732.17(h), on the proposed amendment submitted by the State of West Virginia by letter dated March 25, 1999. Your comments should address whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the West Virginia program.

#### Written Comments

Your written comments should be specific, pertain only to the issues proposed in this notice and include explanations in support of your recommendations. Comments received after the time indicated under **DATES** or at locations other than the OSM Charleston Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

#### Public Hearing

If you wish to comment at the public hearing, you should contact the person listed above at **FOR FURTHER INFORMATION CONTACT** by close of business on May 5, 1999. If no one requests an opportunity to comment at a public hearing, the hearing will not be held.

If you file a written statement at the same time that you request a hearing, the statement will greatly assist the person who will make a transcript of the hearing.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment, and who wish to do so, will be heard following those scheduled. The hearing will end after all persons scheduled to comment and persons present in the audience who wish to comment have been heard.

#### Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with us to discuss the proposed amendments, may request a meeting at the Charleston Field Office by contacting the person listed above at

**FOR FURTHER INFORMATION CONTACT.** All such meetings will be open to the public and, if possible, notices of meetings will be posted in advance at the locations listed above at **ADDRESSES**. A written summary of each public meeting will be made part of the Administrative Record.

If you are disabled and have need for a special accommodation to attend a public hearing, please contact the person listed above at **FOR FURTHER INFORMATION CONTACT**.

### IV. Procedural Determinations

#### Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

#### Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

#### National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

#### Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

#### Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have

a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

#### Unfunded Mandates

This rule will not impose a cost of \$100 million or more in any given year on any governmental entity or the private sector.

#### List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 13, 1999.

#### H. Vann Weaver,

Acting Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 99-9887 Filed 4-19-99; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[CA 164-0112b; FRL-6324-9]

#### Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision; Sacramento Metropolitan Air Quality Management District (SMAQMD), Mojave Desert Air Quality Management District (MDAQMD), and the Ventura County Air Pollution Control District (VCAPCD) as Revisions to the California State Implementation Plan (SIP)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve revisions to the California State Implementation Plan (SIP) which concern the control of oxides of nitrogen (NO<sub>x</sub>) emissions from rules from Sacramento Metropolitan Air Quality Management District (SMAQMD), Mojave Desert Air Quality Management