

amounts. Slip op. at 15 through 20. Consequently, we are amending our approval of CSR 38-2-12.4.e. to show that the phrase "other responsible party" is not approved. In addition, we are requiring that CSR 38-2-12.4.e. be amended to delete the phrase "other responsible party."

The Federal regulations at 30 CFR 948.15 codifying decisions concerning the West Virginia program are being amended to implement this revised decision. After the October 4, 1995, publication of the final rule notice containing our approval of CSR 38-2-12.4.e., the format of the codification section at 30 CFR 948.15 was changed from individual paragraphs to a summary table. Therefore, the correction will have the following effect in the summary table at 30 CFR 948.15. In the table at 30 CFR 948.15, for the "Original amendment submission date" of June 28, 1993, and "date of final publication" of October 4, 1995 and February 21, 1996, the "Citation/

description" section of the approved provisions will be revised to exclude from the approval of CSR 38-2-12.4.e. the phrase "other responsible party."

**Administrative Procedure Act**

The Administrative Procedure Act provides exceptions to its notice and public comment procedures when an agency finds that there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that, under 5 U.S.C. 553(b)(B), good cause exists for dispensing with the notice and public comment procedures in this case. Good cause exists because this rule merely removes regulations already declared void by the Court. Therefore, opportunity for prior comment is unnecessary and we are issuing this regulation as a final rule.

In addition, under 5 U.S.C. 553(d)(3), we find good cause for dispensing with the 30-day delay in the effective date of

this final rule because we are merely removing a provision already declared void by the court.

Dated: October 22, 1999.

**Allen D. Klein,**

*Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, 30 CFR Part 948 is amended as set forth below:

**PART 948—WEST VIRGINIA**

1. The authority citation for Part 948 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

2. Section 948.15 is amended in the table by revising the entry with the "Date of Final Publication" of October 4, 1995, February 21, 1996, to read as follows:

**§ 948.15 Approval of West Virginia regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
* * * * *	* * * * *	* * * * *
June 28, 1993 .....	October 4, 1995, February 21, 1996.	WV Code 22-1-4 through -8; 22-2; 22-3-3, -5, -7, -8, -9, a, -11(a), (g), -12, -13, -15, -17, -18, -19, -22, -26, -28, -40; 22B-1-4 through -12; 22B-3-4; 22B-4; CSR 38-2-1.2, -2, -3.1(o), .4, .6, .7, .8, .12, .14, .15, .16, .25, .26, .27(a), .28, .29, .30, .31(a), .32, .33, .34, -4, .1(a), .2 through .12, -5.2, .4, .5, -6, .3(b), .6, .8, -8.1, -9, -11.1 through .7, -12.2, .3, .4(a), (2)(B), (c) through (e) except the words "other responsible party" at (e) are not approved, .5, -13, -14.5, .8, .11, .12, .14, .15, .17, .18, .19, -15.2, -16.2, -17, -18.3, -20.1, .2, .4 through .7, -22; 38-2C-4, -5, -8.2, -10.1, -11.1; 38-2D-4.4(b), -6.3(a), -8.7(a).
* * * * *	* * * * *	* * * * *

3. Section 948.16 is amended by adding new paragraph (jjj), to read as follows:

**§ 948.16 Required regulatory program amendments.**

\* \* \* \* \*

(jjj) By January 11, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to remove the words "other responsible party" at CSR 38-2-12.4.e.

[FR Doc. 99-29581 Filed 11-10-99; 8:45 am]  
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**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 948**

[WV-081-FOR]

**West Virginia Regulatory Program**

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

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** OSM is announcing its approval, with certain exceptions, of an amendment to the West Virginia permanent regulatory 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.

**EFFECTIVE DATE:** November 12, 1999.

**FOR FURTHER INFORMATION CONTACT:** Mr. Roger W. Calhoun, Director, Charleston Field Office, 1027 Virginia Street East, Charleston, West Virginia 25301. Telephone: (304) 347-7158.

**SUPPLEMENTARY INFORMATION**

- I. Background on the West Virginia Program
- II. Submission of the Amendment
- III. Director's Findings
- IV. Summary and Disposition of Comments
- V. Director's Decision
- VI. Procedural Determinations

**I. Background on the West Virginia Program**

On January 21, 1981, the Secretary of the Interior conditionally approved the West Virginia program. You can find

background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and the conditions of the approval in the January 21, 1981, Federal Register (46 FR 5915-5956). You can find later actions concerning the West Virginia program and previous amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

## II. Submission of the 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 also 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. We reviewed the amendment, and provided the WVDEP with our comments at a meeting on July 19, 1999 (Administrative Record Number WV-1136). The WVDEP responded to our comments in a letter dated August 10, 1999 (Administrative Record Number WV-1137).

We announced receipt of the proposed amendment in the April 20, 1999, **Federal Register** (64 FR 19327), invited public comment, and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on May 20, 1999. No one requested an opportunity to speak at a public hearing, so none was held. We reopened the public comment period on October 8, 1999 (64 FR 54845), to provide an opportunity for the public to review and comment on the information provided to us by the WVDEP at the July 19, 1999, meeting. The comment period closed on October 25, 1999.

## III. Director's Findings

Following, according to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are our findings concerning the proposed amendment. Any revisions that we do not specifically discuss below concern nonsubstantive wording changes or revised paragraph notations to reflect organizational changes that result from this amendment.

### 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.

There is no direct counterpart to this provision in SMCRA or the Federal regulations. Nevertheless, we find that the provision does not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations.

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

(A) W.Va. Code 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.” We find that this amendment is substantively identical to SMCRA at section 515(a). Further, this amendment clarifies the manner in which the director of the WVDEP must promulgate requirements under this provision.

(B) W.Va. Code 22-3-13(b)(3), concerning approximate original contour, is amended by changing the words “The director shall promulgate rules governing variances \* \* \*” to read, “The director shall propose rules for legislative approval in accordance with article three, chapter twenty-nine-a of this code, governing variances. \* \* \*” We find that this amendment clarifies the manner in which the director of the WVDEP must promulgate regulations under this provision, and is not inconsistent with SMCRA at section 515.

(C) W.Va. Code 22-3-13(b)(15)(A): Paragraph (A), which concerns the general performance standard for providing advance written notice to local governments and residents of the planned blasting schedule, has been deleted. However, the State has added a new article 3A, which concerns the new Office of Explosives and Blasting. New section 22-3A-4(a)(8) provides that the office of explosives and blasting shall propose rules that shall include provisions for requiring mining operators to provide adequate advance written notice of the proposed blasting schedule. Such notice shall be made to local governments, owners and occupants living within the distances prescribed in section 22-3-13a(a). New

section 22-3A-4(a)(5) provides that the office of explosives and blasting shall propose rules that shall provide a procedure to warn of impending blasting to the owners or occupants adjoining the blasting area. In addition, the currently approved West Virginia regulations at Code of State Regulations (CSR) 38-2-6.3.a. provide for public notice of blasting operations. These blasting schedule notice requirements are applicable to both surface and underground mining operations. CSR 38-2-6.3.a. requires the operator to publish a blasting schedule in a newspaper of general circulation in the county of the proposed permit area and copies of the schedule must be distributed by certified mail to local governments, public utilities and each resident within ½ mile of the blasting site. Finally, the State regulations at CSR 38-2-6.5.b. concerning safety precautions provide that a warning signal audible to a range of ½ mile from the blast site shall be given before each blast. Consequently, we find that the audible warning signal requirements at CSR 38-2-6.5.b. satisfy the daily notice requirement under section 515(b)(15)(A) of SMCRA. Therefore, we find that the deletion of § 22-3-13(b)(15)(A) does not render the West Virginia program less stringent than SMCRA at section 515(b)(15)(A), and can be approved.

(D) W.Va. Code 22-3-13(b)(15)(C): Paragraph (C), which concerns the general performance standard for limiting the size, type, and frequency of blasting to prevent injury to persons and damage to property and the environment has been deleted. Concurrently, the State has added a new article 3A, which creates the Office of Explosives and Blasting. New section 22-3A-4(a)(6) provides that the office of explosives and blasting shall propose rules that shall include a procedure to limit the type of explosives and detonating equipment, as well as size, type, and frequency of blasts based upon the physical conditions of the site to prevent injury to persons and damage to property and the environment. When promulgated, the new regulations required by 22-3A-4(a)(6) should provide a replacement for the deleted requirement at section 22-3-13(b)(15)(C). However, during our review of this amendment, we were concerned that in the meantime, the deletion of the performance standard at section 22-3-13(b)(15)(C) may leave a gap in the West Virginia program and render it less stringent than SMCRA at section 515(b)(15)(C). In response to our concern, the WVDEP stated in a letter dated August 10, 1999 (Administrative

Record Number WV-1137) that the deletion does not leave a gap in the West Virginia program. Specifically, the WVDEP stated that the blasting provisions at CSR 38-2-6.5.a. continue to apply and provide that blasting shall be conducted in such a way so as to prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course channel, or availability of surface or groundwater outside the permit area. The WVDEP also added that there are specific limitations on blast design contained in CSR 38-2-6.4 and 6.5 which in effect limit the explosives and type of blast. These regulations remain in effect under the authority of W.Va. Code sections 22-3-2(b)(1) and (2), and 22-3-2(c)(1), (3), and (5). Finally, the WVDEP acknowledged that re-inserting the deleted language at section 22-3-13(b)(15)(C) would remove any uncertainty relative to the authority of WVDEP to protect the public from the effects of blasting.

Therefore, we are approving the deletion of section 22-3-13(b)(15)(C) with the understanding that, as explained by the WVDEP, the West Virginia program regulations at CSR 38-2-6.5.a. and CSR 38-2-6.4 and 6.5 continue in effect and provide the protection afforded by the deleted provision. In addition, we encourage West Virginia to re-insert the deleted section 22-3-13(b)(15)(C) in the W.Va. Code.

(E) W.Va. Code 22-3-13(b)(15)(D) concerning blaster certification, now re-lettered as paragraph (B), is amended by deleting the word "director" and adding in its place the words "office of explosives and blasting." We find that this amendment does not render the West Virginia program less stringent than SMCRA section 515(b)(15)(D) and can be approved.

(F) W.Va. Code 22-3-13(b)(15)(E), concerning the right to request a pre-blast survey, has been deleted. However, the State has added a new article 3A, which concerns the new Office of Explosives and Blasting. New section 22-3A-4(a)(2) provides that the office of explosives and blasting shall propose rules that shall provide specific minimum requirements for pre-blast surveys, as set forth in new section 22-3-13a concerning pre-blast survey requirements. This new section contains many of the requirements contained in section 22-3-13(b)(15)(E). Please note in Finding 3, however, that we are not approving new section 22-3-13a in its entirety. Nevertheless, the approved West Virginia program currently contains counterparts to the deleted

requirements at CSR 38-2-6.8.a.1. and 38-2-6.8.a.3. Therefore, we find the deletion of section 22-3-13(b)(15)(E) does not render the West Virginia program less stringent than section 515(b)(15)(E) of SMCRA.

(G) W.Va. Code 22-3-13(b)(21) is amended by providing that the spoil may be placed outside the permit area if the director finds the placing of spoil material outside the permit area will result in environmental benefits. The change proposed by the State is a non-substantive change and, therefore, our approval is not needed. We note that the approved State regulations at CSR 38-2-14.14.c. currently limit the placement of excess spoil to another permitted area or to an approved project conducted under the Abandoned Mine Land Program. Therefore, section 22-3-13(b)(21) remains no less stringent than sections 515(b)(21) and 515(b)(22)(B) of SMCRA.

(H) W.Va. Code 22-3-13(e), concerning variances from approximate original contour, is amended by changing the words, "The director may promulgate rules \* \* \*" 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 from approximate original contour \* \* \*." We find that this amendment clarifies the manner in which the director of the WVDEP must promulgate regulations under this provision, and is not inconsistent with SMCRA at section 515(e)(5). Furthermore, to implement these requirements, the State has promulgated existing rules at CSR 38-2-14.12 to govern the approval of steep slope mining variances from approximate original contour.

(I) W.Va. Code 22-3-13(f) concerning coal mine waste piles is amended to provide that the director shall propose rules for legislative approval, rather than promulgate rules. We find that this amendment clarifies the manner in which the director of the WVDEP must promulgate regulations under this provision, and is not inconsistent with SMCRA at section 515(f).

### 3. § 22-3-13a Pre-blast Survey Requirements

(A) 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 surface mining 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. For operations described at section 22-3-13a(a)(1), the requirements of subsection 22-3-13a(a) are substantively identical to and therefore no less stringent than SMCRA at section 515(b)(15)(E) concerning pre-blast surveys. For operations described at section 22-3-13a(a)(2), the requirements of subsection 22-3-13(a) provide for more stringent blasting controls of surface coal mining operations than do the provisions of SMCRA section 515(b)(15)(E), and are, therefore, not inconsistent with section 515(b)(15)(E).

(B) Section 22-3-13a(b) adds a requirement that operators who have already made pre-blast surveys prior to the effective date of section 13a, and who otherwise would have been subject to the requirements of section 22-3-13a(a)(2) shall notify owners and occupants within seven tenths of a mile of the blasting site of the right to request a pre-blast survey, unless a written waiver is executed in accordance with section 22-3-13(c). Any such additional surveys must be performed within ninety days of the effective date of this section. We find that section 22-3-13a(b) provides for more stringent blasting controls of surface coal mining operations than do the provisions of SMCRA section 515(b)(15)(E), and it is, therefore, not inconsistent with section 515(b)(15)(E).

(C) Section 22-3-13a(c) provides for the written waiver of the right to a pre-blast survey. This section 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.

Neither SMCRA nor the Federal regulations contains counterparts to the

proposed provisions for waivers of pre-blasting surveys, or the provisions concerning the impossibility or impracticality of access to conduct a survey. We find, however, that since a pre-blasting survey must be requested by an owner or occupant, that the waiving of such a survey in writing by an owner or occupant is not inconsistent with the pre-blast survey requirements of SMCRA at section 515(b)(15)(E). In addition, we find the proposed provisions concerning the impossibility or impracticality of access to be reasonable, and not inconsistent with the pre-blasting survey requirements of SMCRA at section 515(b)(15)(E), and no less effective than the Federal regulations at 30 CFR 816/817.62(b) and (c).

(D) 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. While this subsection has no precise Federal counterpart, we find it to be consistent with the pre-blast survey requirements of SMCRA at section 515(b)(15)(E).

(E) Section 22-3-13a(e) provides that an owner may request from the operator a pre-blast survey on structures constructed after the original pre-blast survey. While this subsection has no direct Federal counterpart, we find it to be consistent with the pre-blast survey requirements of SMCRA at section 515(b)(15)(E).

(F) Section 22-3-13a(f) provides for the information that a pre-blast survey must contain. Such information must include: The names, addresses or description of the location of the structure and the names, addresses and telephone numbers of the owner and residents of the structure, as well as the structure number from the permit blasting map; the current home insurer of the owner and residents of the structure; the names, addresses and telephone numbers of the surface mining operator, as well as the permit number; the current general liability insurer of the surface mining operator; the name, address and telephone number of the person or firm conducting the survey, as well as the name of the current general liability insurer of that person or firm; the date of the pre-blast survey and the date the survey was mailed or delivered to the office of explosives and blasting; a general description of the structure and its appurtenances; a general description of 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 type of water supply; a description of any portion of the structure and appurtenances not documented or photographed and the reasons; the signature of the person performing the survey; and any other information required by rule. While this subsection has no precise Federal counterpart, we find it to be consistent with the pre-blast survey requirements of SMCRA at section 515(b)(15)(E) and the Federal regulations at 30 CFR 816/817.62.

(G) 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 any "production blasting." The office shall review each survey for form and 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.

Our first interpretation of this provision was that pre-blast surveys would only be provided for "production blasting." This would render the West Virginia program less effective than the Federal regulations at 30 CFR 816.61(a) and 817.61(a) and (b) which provide that the Federal blasting provisions at 30 CFR 816/817.61 through 816/817.68 apply to all surface blasting activities, including surface blasting incident to underground coal mining. In response to our concern, the WVDEP clarified that the intent of this provision is to single out "production blasting" and to require that such blasting requires the submittal of the pre-blast survey to the office of explosives and blasting at least 15 days prior to the commencement of "production blasting." Other blasting (construction blasting) operations, the WVDEP explained, must still comply with the pre-blast survey requirements at CSR 38-2-6.8.a.4. which provide that surveys requested more than 10 days before the planned initiation of blasting shall be completed before blasting operations begin. In effect, the pre-blast survey requirement for "production blasting" is a higher standard than that which is applied to other blasting operations.

The proposed provision also requires that the office of explosives and blasting shall provide a copy of the pre-blast survey to the owner and/or occupant upon request. However, the Federal regulations at 30 CFR 816/817.62(d) provide that a copy of the pre-blast survey report be provided to the owner or occupant, even if the owner or occupant does not specifically request a

copy. Therefore, the words "upon request" render the West Virginia program less effective than the Federal regulations at 30 CFR 816/817.62(d) and cannot be approved.

We are approving this provision with the understanding that, as explained by the WVDEP, the time limits for submittal of pre-blast surveys at CSR 38-2-6.8.a.4. continue to apply to all blasting other than "production blasting." However, the words "upon request" are not approved. In addition, we are requiring that the State amend its program to remove the words "upon request" from subsection (g), or otherwise amend its program to require that a copy of the pre-blast survey be provided to the owner and/or occupant even if the owner or occupant does not specifically request a copy. In addition, we are only approving this provision to the extent that the State continues to implement CSR 38-2-6.8.a.5. to allow any person who disagrees with the survey to file a detailed description of the areas of disagreement.

(H) 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 to notify the public that the pre-blast survey has been conducted or waived. The office of explosives and blasting shall prescribe the form to be used. While this subsection has no precise Federal counterparts, we find that it is not inconsistent with SMCRA section 515(b)(15)(E) concerning pre-blast surveys and can, therefore, be approved.

(I) 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. We find this provision to be consistent with SMCRA section 515(b)(15)(E) concerning pre-blast surveys and that it can be approved.

(J) 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. Except as discussed below, we find that this provision is consistent with SMCRA section 515(b)(15)(E) and the Federal regulations at 30 CFR 816/817.62 which provide for pre-blast surveys only for surface mining operations and for surface blasting activities incident to

underground coal mining. At subsection 22-3-13a(j)(2) the phrase "or the surface impacts of the underground mining methods" renders the West Virginia program less effective than the Federal regulations at 30 CFR 817.61(a). 30 CFR 817.61(a) provides that the Federal blasting provisions at 30 CFR 817.61 through 817.68 apply to surface blasting activities incident to underground coal mining, including, but not limited to, initial rounds of slopes and shafts. Consequently, the proposed exclusion of the surface impacts of the underground mining methods from the requirements of section 22-3-13a renders the West Virginia program less effective than the Federal regulations. Therefore, we are approving this provision, except for the phrase "or the surface impacts of the underground mining methods" at section 22-3-13a(j)(2), which is not approved. In addition, we are requiring the State to amend its program to remove this phrase or otherwise amend its program to clarify that the surface blasting impacts of underground mining operations are subject to the requirements of 22-3-13a.

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

(A) 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. There is no counterpart to this definition in SMCRA or the Federal regulations. We find, however, that the definition is not inconsistent with the blasting requirements in SMCRA at section 515(b)(15) nor the Federal regulations concerning blasting at 30 CFR 816/817.61-816/817.68 and can be approved.

(B) 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. There is no counterpart to this definition in SMCRA or the Federal regulations. We find, however, that the definition is not inconsistent with the blasting requirements in SMCRA at section 515(b)(15) nor the Federal regulations concerning blasting at 30 CFR 816/817.61-816/817.68 and can be approved.

(C) 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. There is no counterpart to this definition in SMCRA or the Federal regulations. We find, however, that the definition is not inconsistent with the blasting requirements in SMCRA at section 515(b)(15) nor the Federal regulations concerning blasting at 30 CFR 816/817.61-816/817.68 and can be approved.

(D) 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. This provision has no precise Federal counterpart. However, section 522(e)(5) of SMCRA prohibits surface coal mining operations, except those with valid existing rights (VER), from being conducted within 300 feet of any occupied dwelling, unless waived by the owner, or within 300 feet of any public building, school, church, community or institutional building, or public park, or within 100 feet of a cemetery. The West Virginia counterpart to section 522(e)(5) is at W.Va. Code section 22-3-22(d)(4). Upon initial review of this provision, we were concerned that because the new prohibitions were limited to production blasting, they implicitly negated the mining prohibitions contained in W.Va. Code section 22-3-22(d)(4), with respect to construction blasting. In response to our concern, the WVDEP explained that section 22-3-22(d)(4) of the W.Va. Code remains in effect for all blasting operations. New section 22-3-22a(d) is intended to prohibit "production blasting," despite a showing of VER, within 300 feet of a protected structure or 100 feet of a cemetery. In other words, operators possessing VER are exempt from the prohibitions of section 22-3-22(d)(4), but they are not exempt from the production blasting prohibitions of section 22-3-22a(d). Therefore, we are approving this provision with the understanding that, as explained by the WVDEP, the prohibitions contained in W.Va. Code 22-3-22(d)(4) continue to apply to all blasting operations.

(E) Section 22-3-22a(e) provides that blasting within 1,000 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 living in the protected structure. In its letter of August 10, 1999, the WVDEP clarified that section 22-3-22a(e) requires a site-specific blast design and not the generic blast design in the Federal rules. If the site-specific design is waived, then a blast design plan in accordance with CSR 38-2-6.5.g. must be submitted. However, the requirements of CSR 38-2-6.5.g.3 must be met with respect to all blast designs, whether they be site specific or generic. These requirements are also contained in the Federal regulations at 30 CFR 816/817.61(d)(3), and require that the blast design contain sketches of the drill patterns, delay patterns and decking, indicate the type and amount of explosives to be used, and contain a discussion of the design factors to be used to protect the public and meet applicable blasting regulatory limitations. Since the requirements of section 6.5.g.3. are not specifically included in W.Va. Code section 22-3-22a(e), we are approving it only to the extent that all blast designs, site specific and generic, comply with section 6.5.g.3. Otherwise, we find this provision to be not inconsistent with SMCRA section 515(b)(15)(C) which concerns the prevention of injury to persons and damage to property, and no less effective than the requirements of 30 CFR 816/817.67(a) and the 1,000-foot blast design standard at 30 CFR 816/817.61(d). We also recommend that the State remove the phrase "in the blasting schedule" at the end of the sentence or include the word "identified" before the phrase to clarify the intent of this provision.

(F) 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. There is no direct counterpart to this provision in SMCRA or the Federal regulations. However, SMCRA

section 522(e)(5) prohibits surface coal mining operations, except those with VER, from being conducted within 300 feet of any occupied dwelling, unless waived by the owner, or within 300 feet of any public building, school, church, community or institutional building, or public park, or within 100 feet of a cemetery.

In response to our concern, the WVDEP explained that this provision, as well as the production blasting prohibition contained in section 22-3-22a(d), are in addition to the mining prohibitions contained in SMCRA section 522(e)(5) and its West Virginia program counterpart at section 22-3-22(d)(4) of the W.Va. Code. In other words, operators who propose to conduct production blasting within 300 feet of a protected structure or within 100 feet of a cemetery must not only possess VER, or, with respect to occupied dwellings, obtain a waiver from the owner in accordance with W.Va. Code section 22-3-22(d)(4), but must also obtain a specific waiver of the new production blasting prohibitions contained in W.Va. Code section 22-3-22a(d). Waivers granted by owners of occupied dwellings to the general prohibition on mining at W.Va. Code section 22-3-22(d)(4) are not enforceable against subsequent owners, unless the subsequent owners have actual or constructive knowledge of the waivers, in accordance with 30 CFR 761.11(e). However, waivers granted under 22-3-22a(f) are enforceable against all subsequent owners and occupants, including those without actual or constructive knowledge of the existence of the waivers.

As stated above, the prohibition on production blasting contained in section 22-3-22a(d) is in addition to and does not supersede the mining prohibitions contained in W.Va. Code 22-3-22(d)(4). As such, it is a more stringent land use or environmental control or regulation than is contained in SMCRA, and is therefore not inconsistent with SMCRA. See SMCRA section 505(b), 30 U.S.C. 1255(b). West Virginia is free to allow waivers of more stringent requirements as it sees fit. Therefore, the waiver at Section 22-3-22a(f) of the blasting prohibition at Section 22-3-22a(d) is approved.

As discussed above in Finding 4(E), if a waiver of the site specific restriction within 1000 feet of a protected structure is obtained, then a blast design plan in accordance with CSR 38-2-6.5.g. must be submitted. However, both site specific and generic blast designs must comply with CSR 38-2-6.5.g.3. With this condition, therefore, the allowance of the waiver at Section 22-3-22a(f) of

the site specific blast design requirement at Section 22-3-22a(e) does not render the West Virginia program less effective than the Federal regulations at 30 CFR 816/817.61(d) and can be approved.

(G) Section 22-3-22a(g) provides that section 22-3-22a does not apply to: (1) underground coal mining operations; (2) the surface operations and surface impacts incident to an underground coal mine; and (3) the extraction of minerals by underground mining methods or the surface impacts of the underground mining methods. Section 22-3-22a(g) further provides that nothing in section 22-3-22a shall exempt any coal mining operation from the general performance standards contained in Section 22-3-13 and any implementing rules. Since the requirements of section 22-3-22a are in addition to those contained in the approved program, and do not supersede any of those requirements, we find that the exemptions contained in section 22-3-22a(g) do not render the State's program inconsistent with SMCRA section 515(b)(15), or the Federal regulations at 30 CFR 817.61(a).

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

Subsection 22-3-23(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 22-3-23(c), 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 three, chapter 29a of the W.Va. Code, to govern a bond release pursuant to the terms of this paragraph.

The new language added to this subdivision appears to allow the total release of the performance bond despite the bond release scheduling provisions of section 22-3-23(c)(1), (2), and (3). Such release could only take place if both backfilling and reclamation have

been achieved in accordance with an approved post-mining land use plan. Further, the post-mining land use plan must have been approved by the WVDEP and accepted by a local or regional economic development or planning agency for the county or region in which the operation is located. In addition, provisions for sound future maintenance must be assured by the local or regional economic development or planning agency, and the quality of any untreated postmining water discharge must comply with applicable water quality criteria for bond release.

SMCRA at section 509(a) provides that before a permit is issued, the applicant must file a bond for performance, that is conditional upon the faithful performance of all the requirements of SMCRA and the permit. SMCRA at section 509(b) provides that liability under the bond shall be for the duration of the surface coal mining and reclamation operation and for a period coincident with the operator's responsibility for revegetation requirements in section 515 of SMCRA. SMCRA at section 515(b)(20) provides that the operation shall assume the responsibility for successful revegetation for a period of five years after the last year of augmented seeding, fertilizing, irrigation, or other work in order to assure compliance with section 515(b)(19) concerning the establishment of a diverse, effective and permanent vegetative cover. Despite these revegetation requirements and the bond release provisions of section 519(c) of SMCRA and the Federal regulations at 30 CFR 800.40(c), the proposed provision appears to authorize the release of a performance bond prior to the end of the revegetation responsibility period. Since neither SMCRA nor the Federal regulations provide for exemptions to the bond release provisions, the proposed amendment, to the extent that it conflicts with the existing bond release requirements at Section 22-3-23 and CSR 38-2-12.2 would render the West Virginia program less stringent than SMCRA at section 519(c). In response to our concerns with this provision, the WVDEP requested that our decision on this provision be deferred, because the WVDEP is currently developing implementing regulations that it believes will address our concerns. Therefore, we are deferring our decision on Section 22-3-23(c). We will reconsider this proposed provision when the WVDEP submits the implementing regulations for our review and approval. In the meantime, the State

is prohibited from implementing these proposed bond release provisions.

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

(A) 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.

There is no direct counterpart to this provision in SMCRA or the Federal regulations. However, we find that this provision is not inconsistent with the water rights and replacement provisions at sections 717(b) and 720(a)(2) of SMCRA and to an extent constitutes a more stringent standard for water replacement than is provided for in SMCRA or the Federal regulations, in accordance with section 505(b). Therefore, the provision is approved.

(B) 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 section 22-3A-5 concerning claims processing. There is no direct counterpart to this provision in SMCRA or the Federal regulations. However, we find that this provision is not inconsistent with the requirements of section 717(b) of SMCRA and can, therefore, be approved.

(C) New subsection 22-3-24(e) provides that the director shall propose rules for legislative approval to implement the requirements of this section. We find that this provision is not inconsistent with the water replacement provisions in SMCRA at section 717(b) and can, therefore, be approved.

(D) New subsection 22-3-24(f) provides that the rebuttable

presumption provisions of subsection 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. Since neither SMCRA nor the Federal regulations provide for rebuttable presumptions of water supply loss or damage due to surface or underground coal mining operations, we find that the provision is consistent with sections 717(b) and 720(a)(2) of SMCRA and can, therefore, be approved. However, it should be noted that the water replacement requirements of subsection 720(a)(2) of SMCRA are applicable to underground mining operations. The proposed State provision does not negate the State's water replacement requirements at subsection 22-3-24(b), and it would not relieve an operator of replacing a water supply which is adversely affected by an underground mining operation.

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

(A) 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. By doing so, the State is limiting all of its blasting requirements only to "production blasting." We find this provision would render the West Virginia program less stringent than SMCRA section 515(b)(15) and less effective than the Federal regulations at 30 CFR 816/817.61(a). Specifically, the proposed provision only applies to the blasting of overburden and coal, whereas the Federal blasting provisions apply to all blasting at surface coal mining and reclamation operations and surface blasting activities incident to underground coal mining, including, but not limited to, initial rounds of slopes and shafts. Therefore, we are approving this provision, except for the phrase "of overburden and coal" which is not approved. Also, we are requiring the State to amend its program to remove the phrase "of overburden and coal," or to otherwise clarify that its general surface coal mining blasting laws and regulations apply to all blasting at surface coal mining and reclamation operations and surface blasting activities incident to underground coal mining, including, but not limited to, initial rounds of slopes and shafts.

(B) 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, other than wells, as defined in section 22-3-22a. The first offense carries a penalty of not less than \$1,000.00 and not more than \$5,000.00. The second offense and each subsequent offense within one year of the first offense carries a penalty of not less than \$5,000.00 and not more than \$10,000.00. The third offense, any subsequent offense within one year of the first offense, and any failure to pay any assessment within a reasonable time will subject the permit to a cessation order, which shall be released only when the permittee files a plan with the director assuring that additional violations will not occur, compensates for any property damages that have occurred due to the offense, and provides monetary or other assurances to compensate for future property damages. Second and subsequent offenses on any one permit area entitle the owner of a protected structure to a rebuttable presumption that the property damage was caused by the blasting offense, if a pre-blast survey was performed and the blasting is within seven tenths of a mile of the protected structure. No more than one offense shall arise out of a single "shot," which means a single blasting event composed of one or multiple detonations, or the assembly of explosive materials for this purpose. One "shot" may be composed of numerous explosive charges detonated at intervals measured in milliseconds.

There is no direct counterpart to this provision in SMCRA or the Federal regulations. However, during our review of this provision, it appeared that the phrase "other than wells" which excludes wells from penalties to be imposed where blasting was out of compliance and resulted in property damage would render the West Virginia program less stringent than SMCRA at sections 515(b)(15)(C) and section 518(a). SMCRA at section 515(b)(15)(C) provides that blasting shall be limited so as to prevent injury to persons and damage to public and private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel or availability of ground or surface water outside the permit area. Wells are not excluded from the requirements of section 515(b)(15)(C). SMCRA at section 518(a) also provides for civil penalty assessment for violations of any provision of SMCRA. SMCRA does not exclude wells from this requirement.

In response to our concern with the phrase "other than wells," the WVDEP

explained that new section 22-3-30a pertains only to production blasting violations that result in property damage. All other blasting related violations, including those cited for damage to wells, will utilize the penalty system described in CSR 38-2-20.

We note that the clear language of subsection 22-3-30a(b) indicates that it applies to all blasting that results in property damage to protected structures, rather than just to production blasting that results in damage to protected structures. Therefore, we cannot concur with the WVDEP's construction of subsection (b) in this regard. However, we agree with the WVDEP that the West Virginia program may reasonably be interpreted such that all other blasting related violations, including those cited for damage to water wells, will continue to be subject to the civil penalty provisions at CSR 38-2-20. Therefore, the exclusion of water wells from the coverage of the new requirements in section 22-3-30a(b) does not render the West Virginia program less stringent than section 518 of SMCRA or inconsistent with the Federal regulations at 30 CFR part 845.

We note that the proposed provision is silent on how the specific amount of a penalty would be determined. SMCRA at section 518(a) provides four criteria that should be considered that in determining the amount of a penalty: (1) the permittee's history of previous violations at the particular surface coal mining operation; (2) the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; (3) whether the permittee was negligent; and (4) the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

Therefore, we are approving section 22-3-30a(b) because blasting related enforcement actions taken for damage to wells, and all enforcement actions taken for blasting that does not cause damage to protected structures, will continue to be subject to the civil penalty requirements of CSR 38-2-20, rather than to the new requirements of this subsection, except as provided for in section 22-3-30a(e). Also, as noted below in Finding 7.H, violations for surface blasting activities incident to underground coal mining will continue to be subject to the requirements of CSR 38-2-20. We are also approving section 22-3-30a(b) upon the condition that the new rules to be developed by the State to implement this provision shall contain the four criteria listed above in determining the amount of a penalty for any type of blasting violation. In

addition, the State may only implement this provision now, prior to promulgation of implementing regulations, to the extent that it applies the four criteria listed above and found in the State's program at W.Va. Code 22-3-17(c), to civil penalties assessed pursuant to this section.

(C) 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(a) that is merely administrative in nature. The meaning of this prohibition is unclear, and may allow the WVDEP to waive the assessment of a civil penalty on a cessation order issued for failure to abate a blasting related violation which is administrative in nature. If so, this new subsection is less stringent than section 518(a) of SMCRA which mandates the issuance of a civil penalty for any violation that leads to a cessation order. Therefore, this provision cannot be approved. The State may wish to clarify the meaning of the term "administrative in nature" in any regulation it may develop to implement this section, and if appropriate, we will reconsider this provision when the new regulations are submitted to OSM.

(D) 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. While this provision has no Federal counterpart, we find that it is not inconsistent with SMCRA or the Federal regulations and it can, therefore, be approved.

(E) 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 300 feet of a protected structure, within 100 feet of a cemetery, or within 1000 feet of a protected structure without an approved site specific blast design. Production blasting conducted within these distance limitations need not cause property damage to protected structures to be subject to the provisions of 22-3-30a(b). As noted above in Finding 7.B, all other blasting violations that do not cause property damage to protected structures will continue to be subject to the civil penalty requirements of CSR 38-2-20. We find that subsection 22-3-30a(e) is no less stringent than SMCRA section 518 and not inconsistent with 30 CFR Part 845.

(F) Subsection 22-3-30a(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." The approved program, at W.Va. Code § 22-3-17(d)(2), currently requires that civil penalty moneys be deposited into the State's alternative bonding fund, known as the "special reclamation fund." If this provision is approved, however, penalties collected from blasting violations that resulted in property damage to protected structures would no longer be placed in the special reclamation fund, but instead would be deposited into the newly created general school fund. Prior to our approval of subsection 22-3-30a(f), the State must demonstrate that the special reclamation fund will not become unacceptably compromised without the proceeds from these blasting related civil penalties. The State has not yet satisfied the required program amendment codified at 30 CFR 948.16(III) concerning elimination of the deficit in the State's alternative bonding system and requiring that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites. Therefore, we are not approving subsection 22-3-30a(f) until the State demonstrates that the special reclamation fund does not have a deficit and that it will not become unacceptably compromised without the proceeds from blasting related civil penalties.

(G) Subsection 22-3-30a(g) provides that the director shall propose rules for the implementation of this section. We find this provision is not inconsistent with the blasting provisions in SMCRA at section 515(b)(15) and the Federal regulations at 30 CFR 816/817.61-816/817.68 and can be approved.

(H) Subsection 22-3-30a(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. As noted above in Finding 7.B., surface blasting activities incident to underground coal mining will continue to be regulated under CSR 38-2-6, and 20. Therefore, we are approving this provision.

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

(A) 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 (office) is in the public interest, and that this office will be vested with authority to enforce all rules and laws established to regulate blasting. There is no Federal counterpart to this provision. We find, however, that the provision is not inconsistent with SMCRA at section 515(b)(15) and the Federal regulations at 30 CFR 816/817.61-816/817.68 and can be approved.

(B) 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. There is no Federal counterpart to this provision. We find, however, that the provision is not inconsistent with SMCRA at section 515(b)(15) and the Federal regulations at 30 CFR 816/817.61-816/817.68 and can be approved.

(C) Section 22-3A-3 establishes the powers and duties of the office of explosives and blasting. These include, but are not limited to: regulating blasting on all surface mining operations; implementing and overseeing the pre-blast survey process; maintaining and operating a system to receive and address questions, concerns and complaints; setting the qualifications for individuals and firms performing pre-blast surveys; education, training, examination and certification of blasters; and proposing rules for legislative approval. There is no Federal counterpart to this provision. We find, however, that the provision is not inconsistent with SMCRA at section 515(b)(15) and the Federal regulations at 30 CFR 816/817.61-816/817.68 and can be approved.

(D) Section 22-3A-4 provides that the office shall propose rules for the purpose of implementing article 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 and review procedures 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. We

find that the provision is not inconsistent with the Federal blasting provisions in SMCRA at section 515(b)(15) and the Federal regulations at 30 CFR 816/817.61-816/817.68 and Part 850, and can be approved.

(E) 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 for the claimant, 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 to operators who fail to pay claims within thirty days of a final determination of liability. 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. This section has no Federal counterparts. However, we find that the section provides for more stringent environmental controls of surface coal mining and reclamation operations than those contained in SMCRA or the Federal regulations. Therefore, in accordance with section 505(b) of SMCRA, this section is not inconsistent with SMCRA and can be approved.

(F) Section 22-3A-6 provides that rules, orders, licenses, certificates 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 affected by this enactment. We find that the provision is not inconsistent with the Federal blasting provisions in SMCRA at section 515(b)(15) and the Federal regulations at 30 CFR 816/817.61-816/817.68, and can be approved.

(G) 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 office of explosives and blasting and the office of coal field community development in conducting their duties. The legislature shall appropriate the funds for expenditure. This section has no Federal counterparts. However, because this section provides for the creation of a

new funding source for these newly created offices and it will not affect the current funding of the State's approved program, we find this provision is not inconsistent with section 503(a)(3) of SMCRA and can be approved.

(H) Section 22-3A-8 concerns the transfer of personnel and assets currently used to perform the duties of article 3A to the office. We find that the provision is necessary to effectuate the transfer of authority for the regulation and enforcement of blasting activities to the office, that it is not inconsistent with the Federal blasting provisions in SMCRA at section 515(b)(15) and the Federal regulations at 30 CFR 816/817.61-816/817.68, and can be approved to the extent that the levels of funding, staffing, and equipment continue as before, with the addition of the funding provided for in section seven of this article.

(I) Section 22-3A-9 sets forth the limitations of article 3A. Except for sections five and seven of this article, pertaining to the claims process and funding, respectively, all provisions of this article are also applicable to surface blasting activities related to underground mining operations. As noted above, article 3A generally provides for blasting controls of surface coal mining and reclamation operations that are in addition to and to some extent more stringent than those contained in SMCRA or the Federal regulations. Sections five and seven are two examples of these additional controls. Therefore, the exemption of surface blasting activities related to underground mining operations from the requirements of section 5 and 7 of article 3A does not render this section inconsistent with SMCRA, and it can be approved.

(J) Section 22-3A-10 provides that the office 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 West Virginia Legislature's joint committee on government and finance on or before January 1, 2001, and annually thereafter or as otherwise requested. We find that the provision is not inconsistent with the Federal blasting provisions in SMCRA at section 515(b)(15) and the Federal regulations at 30 CFR 816/817.61-816/817.68, and can be approved.

(K) Section 22-3A-11 provides that the office of explosives and blasting is continued until July 1, 2002. We find that the provision is not inconsistent with the Federal blasting provisions in SMCRA at section 515(b)(15) and the

Federal regulations at 30 CFR 816/817.61–816/817.68, and can be approved.

#### IV. Summary and Disposition of Comments

##### *Federal Agency Comments*

According to 30 CFR 732.17(h)(11)(i), we solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the West Virginia program. The U.S. Department of Labor, Mine Safety and Health Administration (MSHA) responded and stated that the changes do not appear to affect MSHA. The U.S. Army Corps of Engineers responded and recommended that the proposed amendments specify measures in the International System of Units (SI), in lieu of the inch-pound (IP) system. While we concur with this recommendation, the lack of the use of SI units does not render the amendment less stringent than SMCRA nor less effective than the Federal regulations.

##### *Public Comments*

We solicited public comments on the amendment. The Surety Association of America (SAA) commented on the amended bond release provision at section 22–3–23(c)(3). The SAA stated that the amendment creates another bond release provision. Specifically, the SAA stated, the director of the WVDEP may release the entire amount of bond after satisfaction of the three specified criteria (backfilling and reclamation, sound future maintenance, and the quality of untreated discharges). Under this provision, the SAA stated, the director of the WVDEP will have the discretion to retain 100 percent of the bond throughout the entire reclamation process, as opposed to releasing the bond according to the normal three-phase bond release process. The SAA further stated that it is its understanding that the original intent of the bond release amendment was to permit an accelerated final bond release during Phase Three of reclamation. That is, the passing of five growing seasons alluded to in Subsection 22–3–23(c)(3) could be disregarded. However, as written the SAA asserts, the amendment actually prolongs the period during which the full bond liability is outstanding.

The SAA expressed its concern regarding the legislation (and any implementing rules) that permit the retention of the full bond amount during the entire reclamation process and which abandon the practice of a phased bond release. The current West Virginia Code mitigated the long-term underwriting hazard of the bond by

allowing a phased release of the liability. The proposed amendment, the SAA stated, prevents any bond release until the entire process is completed.

The SAA provided the following recommendations. The SAA recommends that the phrase “notwithstanding the bond release provisions of subdivision (1), (2), and (3)” should be revised to state “notwithstanding the bond release scheduling provision of subdivision (3).” Further, the SAA suggested that the phrase “backfilling and reclamation” be revised to read “backfilling and revegetation.” With these changes, the SAA stated, “the amendment is clear that the provisions regarding bond release in Phase One and Phase Two of reclamation are unchanged.” With this change, the amendment would only affect Phase Three (monitoring). The SAA also requested that any rules concerning bond release should retain the phased bond release element.

In response, and as noted above in Finding 5, we have deferred our decision on this provision. The WVDEP requested that we defer our decision because the WVDEP is in the process of developing rules that, the WVDEP stated, will address our concerns with this provision. When those are submitted for our review, we will reopen the public comment period so that this statute and its implementing rules can be reviewed together. At that time, we will consider the SAA comments. Of course, the SAA may submit additional comments when the comment period is reopened on this provision.

##### *Environmental Protection Agency (EPA)*

Under 30 CFR 732.17(h)(11)(ii), the Director is required to obtain the written concurrence of the Administrator of the EPA with respect to any provisions of a State program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). The EPA responded by letter dated June 3, 1999 (Administrative Record Number WV–1134), and concurred with the amendment. The EPA stated that the amendment does not violate the Clean Water Act or the Clean Air Act.

Pursuant to 732.17(h)(11)(i), we also solicited comments on the proposed amendment from EPA. The EPA provided the following two comments. First, the EPA commented on section 22–3–13(a)(21) [the correct cite is 22–3–13(b)(21)], which provides an exemption for placing spoil material

within the permit area. The EPA stated that although the change to this provision is a change in wording rather than in substance, the EPA endorses the State’s concept of authorizing the placement of spoil material outside the permit area if it is determined that environmental benefits will result. The EPA stated that in some situations, it can be seen that placement of spoil on adjacent reclaimed permit areas, rather than in valley fills, can help minimize stream impacts. We concur with the EPA’s comment concerning this provision, subject to the restrictions contained in the State’s regulations at CSR 38–2–14.14.c.

Second, the EPA stated that changes to section 22–3–24 are disturbing because they place more burden of proof on a well owner if an underground mine is the suspected cause of damage to an underground water supply than if a surface mine is the suspected cause. Specifically, new subsection 22–3–24(c) provides a rebuttable presumption that a mining operation caused damages to an underground water supply if an inspector determines that contamination, diminution, or damage to the well exists, and that a pre-blast survey indicated that these problems did not exist beforehand. However, the EPA stated, new subsection 22–3–24(f) provides an exemption to subsection 22–3–24(c) if the suspected cause is either an underground mine, the surface operations incident to an underground mine, or surface impacts caused by an underground mine. In these situations, the EPA stated, the well owner would have to prove on his or her own that the underground mine is the cause of the damage to the underground water supply. This proposed exemption, the EPA stated, basically shifts the burden from the underground mining company, to the well owner. Since most well damage problems are linked to underground mines rather than surface mines, the proposed exemption in subsection 22–3–24(f) would seem to place an undue burden on the well owner to substantiate damage. The EPA recommended that this exemption be eliminated.

We agree with the EPA that proposed section 22–3–24(f) exempts underground mines from the rebuttable presumption at section 22–3–24(c) that a mining operation caused damage to an owner’s underground water supply. However, as noted above in Finding 6, we find that the exception provided at section 22–3–24(f) is not inconsistent with sections 717(b) and 720(a)(2) of SMCRA concerning water rights and replacement, since the Federal provisions do not provide for a

rebuttable presumption of water supply loss or damage due to either an underground or surface coal mining operation. Nothing in the revised section would relieve an operator of replacing a water supply which is determined to be adversely affected by an underground mining operation.

#### V. Director's Decision

Based on the findings above, we are approving the proposed amendment, except as noted below.

The deletion of section 22-3-13(b)(15)(C) is approved with the understanding that the West Virginia rules at CSR 38-2-6.5.a. and CSR 38-2-6.4 and 6.5 continue in effect and provide the protection afforded by the deleted provision.

Section 22-3-13a(g) is approved with the understanding that the time limits for submittal of pre-blast surveys at CSR 38-2-6.8.a. continue to apply to all blasting other than "production blasting." However, the words "upon request" are not approved. The State is being required to amend its program to remove the words "upon request" from subsection (g), or otherwise amend its program to require that a copy of the pre-blast survey be provided to the owner and/or occupant even if the owner or occupant does not specifically request a copy. In addition, the remainder of section 22-3-13a(g) is approved only to the extent that the State continues to implement CSR 38-2-6.8(a)(5) to allow any person who disagrees with the survey to file a detailed description of the areas of disagreement.

At section 22-3-13a(j)(2), the phrase "or the surface impacts of the underground mining methods" is not approved, and the State is being required to amend its program to remove this phrase or otherwise amend its program to clarify that the surface blasting impacts of underground mining operations are subject to the requirements of 22-3-13a.

Section 22-3-22a(d) is approved with the understanding that the VER requirements at W.Va. Code 22-3-22(d)(4) continue to apply to all blasting operations.

Section 22-3-22a(e) is approved only to the extent that all blast designs, site specific and generic, comply with section 38-2-6.5.g.3.

Section 22-3-22a(f) is approved with the understanding that all blast designs, site specific and generic, comply with section 38-2-6.5.g.3.

Our decision on section 22-3-23(c)(3) is deferred.

Section 22-3-30a(a) is approved, except the phrase "of overburden and coal" which is not approved.

Section 22-3-30a(b) is approved because blasting-related violations cited for damage to wells, and all violations cited for blasting that does not cause damage to protected structures, will continue to be subject to the civil penalty requirements of CSR 38-2-20, rather than to the new requirements of this subsection, except as provided for in section 22-3-30a(e). Violations for surface blasting activities incident to underground coal mining will also continue to be subject to the requirements of CSR 38-2-20. Also, section 22-3-30a(b) is approved upon the condition that the new rules to be developed by the State to implement this provision shall consider the four criteria listed at section 518(a) of SMCRA in determining the amount of a penalty for any type of blasting violation. In addition, the State may only implement this provision now, prior to promulgation of implementing regulations, to the extent that it applies the four criteria at section 518(a) of SMCRA and found in the State's program at W.Va. Code 22-3-17(c), to civil penalties assessed pursuant to this Section.

Section 22-3-30a(c) is not approved.

Section 22-3-30a(f) is not approved.

Section 22-3-30a(h) is approved because surface blasting activities incident to underground coal mining will continue to be regulated under CSR 38-2-6, and 20.

Section 22-3A-8 is approved to the extent that the levels of funding, staffing, and equipment continue as before, with the addition of the funding provided for in section 22-3A-7.

The Federal regulations at 30 CFR 948 codifying decisions concerning the West Virginia program are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

#### VI. 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: October 29, 1999.

**Michael K. Robinson,**

*Regional Director, Appalachian Regional Coordinating Center.*

For the reasons set out in the preamble, Title 30, Chapter VII,

Subchapter T of the Code of Federal Regulations is amended as set forth below:

**PART 948—WEST VIRGINIA**

1. The authority citation for Part 948 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

2. Section 948.15 is amended in the table by adding a new entry in

chronological order by "Date of Final Publication" to read as follows:

**§ 948.15 Approval of West Virginia regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
* * * * *	* * * * *	* * * * *
March 25, 1999 .....	November 12, 1999 .....	W.Va. Code 22-1-7(a)(7); 22-3-13(a), (b)(3) and (15), (e), and (f); 22-3-13a, in 13a(g) the words "upon request" are not approved, in 13a(j)(2) the phrase "or the surface impacts of the underground mining methods" is not approved; 22-3-22a; 22-3-23(c)(3) decision is deferred; 22-3-24(c), (d), (e), and (f); 22-3-30a, in 30a(a) the phrase "of overburden and coal" is not approved, 30a(c) and (f) are not approved; and 22-3A.

3. Section 948.16 is amended by adding new paragraphs (kkkk), (llll) and (mmmm) to read as follows:

**§ 948.16 Required regulatory program amendments.**

\* \* \* \* \*

(kkkk) By January 11, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to remove the words "upon request" at W. VA. Code 22-3-13a(g), or otherwise amend its program to require that a copy of the pre-blast survey be provided to the owner and/or occupant even if the owner or occupant does not specifically request a copy.

(llll) By January 11, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to remove the phrase "or the surface impacts of the underground mining methods" from 22-3-13a(j)(2), or otherwise amend its program to clarify that the surface blasting impacts of underground mining operations are subject to the requirements of 22-3-13a.

(mmmm) By January 11, 2000, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to remove the phrase "of overburden and coal" from W.Va. Code 22-3-30a(a), or to otherwise clarify that its general surface coal mining blasting laws and regulations apply to all blasting at

surface coal mining and reclamation operations and surface blasting activities incident to underground coal mining, including, but not limited to, initial rounds of slopes and shafts.

[FR Doc. 99-29580 Filed 11-10-99; 8:45 am]

BILLING CODE 4310-05-P

**DEPARTMENT OF TRANSPORTATION**

**Coast Guard**

**33 CFR Part 117**

[CGD01-99-087]

RIN 2115-AE47

**Drawbridge Operation Regulations: Niantic River, CT**

**AGENCY:** Coast Guard, DOT.

**ACTION:** Final Rule.

**SUMMARY:** The Coast Guard is changing the drawbridge operation regulations governing the S156 Bridge, mile 0.1, across the Niantic River, at Niantic, Connecticut. The bridge owner asked the Coast Guard to change the regulations to require a six-hour advance notice for openings at night during the winter months because there have been no requests to open the bridge during that time period. This final rule is expected to relieve the bridge owner of the burden of crewing the bridge at all times and still meet the needs of navigation.

**DATES:** This final rule is effective December 13, 1999.

**ADDRESSES:** Documents as indicated in this preamble are available for inspection or copying at the First Coast Guard District Office, 408 Atlantic Avenue, Boston, Massachusetts, 02110, 7 a.m. to 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (617) 223-8364.

**FOR FURTHER INFORMATION CONTACT:** John W. McDonald, Project Officer, First Coast Guard District, (617) 223-8364.

**SUPPLEMENTARY INFORMATION:**

**Regulatory History**

On August 13, 1999, the Coast Guard published a notice of proposed rulemaking entitled Drawbridge Operation Regulations; Niantic River, Connecticut, in the **Federal Register** (64 FR 44149). The Coast Guard received no comments in response to the notice of proposed rulemaking. No public hearing was requested and none was held.

**Background**

The S156 Bridge, mile 0.1, across the Niantic River, at Niantic, Connecticut, has a vertical clearance of 9 feet at mean high water and 12 feet at mean low water.

The existing operating regulations listed at 33 CFR 117.215(b) require the bridge to open on signal; except that, from 7 a.m. to 8 a.m., and 4 p.m. to 5 p.m., Monday through Friday, except holidays, the draw shall open only for the passage of commercial vessels.

The owner of the bridge, the Connecticut Department of Transportation (CONNDOT) has asked the Coast Guard to change the