

in part 522 (21 CFR part 522) by adding § 522.1367 to reflect the approval. The basis of approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(ii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(ii)), this approval qualifies for 3 years of marketing exclusivity beginning November 12, 2003.

The agency has determined under 21 CFR 25.33(d)(1) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

#### List of Subjects in 21 CFR Part 522

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 522 is amended as follows:

#### PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 522 continues to read as follows:

**Authority:** 21 U.S.C. 360b.

■ 2. Section 522.1367 is added to read as follows:

#### § 522.1367 Meloxicam.

(a) *Specifications.* Each milliliter of solution contains 5.0 milligrams (mg) meloxicam.

(b) *Sponsor.* See No. 000010 in § 510.600(c) of this chapter.

(c) *Conditions of use in dogs—(1) Amount.* Administer 0.2 mg/kilogram (kg) body weight by intravenous or subcutaneous injection on the first day of treatment. For treatment after day 1, administer meloxicam suspension orally

at 0.1 mg/kg body weight once daily as in § 520.1350(c) of this chapter.

(2) *Indications for use.* For the control of pain and inflammation associated with osteoarthritis.

(3) *Limitations.* Federal law restricts this drug to use by or on the order of a licensed veterinarian.

Dated: November 21, 2003.

**Stephen F. Sundlof,**

*Director, Center for Veterinary Medicine.*

[FR Doc. 03-30643 Filed 12-9-03; 8:45 am]

**BILLING CODE 4160-01-S**

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 948

[WV-095-FOR]

#### West Virginia Regulatory Program

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

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

**SUMMARY:** We are approving, with one exception, amendments to the West Virginia surface coal mining regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The amendments we are approving concern blasting, and amend the Code of State Regulations (CSR) by adding the Surface Mining Blasting Rule, and amend the Code of West Virginia (W. Va. Code) blasting provisions as contained in Enrolled Senate Bill 689. The amendments are intended to improve the operational efficiency of the West Virginia program, and to render the West Virginia program consistent with SMCRA and the Federal regulations.

**EFFECTIVE DATE:** December 10, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. Roger W. Calhoun, Director, Charleston Field Office, 1027 Virginia Street East, Charleston, West Virginia 25301. Telephone: (304) 347-7158, Internet address: [chfo@osmre.gov](mailto:chfo@osmre.gov).

#### SUPPLEMENTARY INFORMATION:

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

## I. Background on the West Virginia Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "\* \* \* a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

## II. Submission of the Amendment

By letter dated October 30, 2000, West Virginia sent us an amendment to its program (Administrative Record Number WV-1187) under SMCRA (30 U.S.C. 1201 *et seq.*). The amendment added to the West Virginia regulations new Title 199, Series 1, entitled Surface Mining Blasting Rule. These regulations consist of some new blasting provisions and many blasting provisions that were relocated or derived from previously-approved West Virginia blasting provisions. The amendment is intended to revise the State's blasting rules to implement statutory revisions concerning blasting that we approved, with certain exceptions, on November 12, 1999 (64 FR 61507) (Administrative Record Number WV-1143).

We announced receipt of the proposed amendment in the December 5, 2000, **Federal Register** (65 FR 75889) (Administrative Record Number WV-1190). In the same document, we opened the public comment and provided an opportunity for a public hearing or meeting on the amendment's adequacy. We did not hold a hearing or a meeting because no one requested one. The public comment period ended on January 4, 2001. We received comments from one Federal agency and one professional organization.

By letter dated November 28, 2001 (Administrative Record Number WV-

1258), West Virginia sent us another proposed amendment to its blasting provisions. The proposed amendment consists of several changes to blasting provisions in the W. Va. Code as contained in Enrolled Senate Bill 689, and changes to the Surface Mining Blasting Rule at CSR 199-1. Senate Bill 689 amends preblast survey requirements, site-specific blasting design requirements, and provisions concerning liability and civil penalties in the event of property damage. We note that the State submitted two versions of CSR 199-1. One version contained underlines of most of the proposed additions and strikethroughs of most of the language proposed for deletion. The second version of CSR 199-1 submitted by the State was a "clean" version with no underlines or strikethroughs of the proposed changes. It was this "clean" version, with sixteen additional revisions, that was adopted by the State Legislature. We announced receipt of the proposed amendment that the State sent us on November 28, 2001, including both versions of CSR 199-1, in the January 31, 2002, **Federal Register** (67 FR 4689) (Administrative Record Number WV-1267). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the proposed amendment. The public comment period ended on March 4, 2002. We did not hold a hearing or meeting because no one requested one. We received comments from four Federal agencies.

The statutory revisions in Senate Bill 689 were also intended to address the required program amendments codified at 30 CFR 948.16(kkkk) and (llll) concerning preblast survey requirements, and (mmmm) concerning blasting requirements. To expedite our review of the State's responses to those required amendments, we separated those proposed changes from the submittal and published our approval of those provisions (W.Va. Code sections 22-3-13a(g) and 13a(j)(2), and 22-3-30a(a)) in the May 1, 2002, **Federal Register** (67 FR 21904, 21920) (Administrative Record Number WV-1300).

### III. OSM's Findings

Following are findings we made concerning the amendments under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendments with one exception noted below. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes, or recodification

changes resulting from these amendments and are approved here without discussion.

*A. Revisions to the West Virginia Program That Are Substantively Identical to the Corresponding Provisions of SMCRA and the Federal Regulations, or That Were Previously Approved by OSM and Merely Copied to CSR 199-1, and Do Not Require Specific Findings*

Code of West Virginia (W. Va. Code)

22-3-13a(a)(3) Preblast survey requirements (30 CFR 817.62(a))

Code of State Regulations (CSR)

199-1-1 General (30 CFR 816/817.61(a) and 850.1)

199-1-2.9 Definition of "blaster," in conjunction with CSR 38-2-3.1 (30 CFR 850.5)

199-1-2.25 Definition of "explosives," previously approved (30 CFR 816/817.61)

199-1-3.1 Blasting; General requirements (30 CFR 816/817.61(a) and (c)(1))

199-1-3.5 Blast record; previously approved (30 CFR 816/817.68)

199-1-3.6.a Blasting procedures (30 CFR 816/817.64(a),(2),(3); 816/817.67(a))

199-1-3.6.b Safety precautions (30 CFR 816/817.66(b),(c); 816/817.61(c)(3))

199-1-3.6.c Airblast limits (30 CFR 816/817.67(b))

199-1-3.6.d Flyrock (30 CFR 816/817.67(c))

199-1-3.6.e Access to blast area (30 CFR 816/817.66(c))

199-1-3.6.f Blast design (30 CFR 816/817.61(d))

199-1-3.6.g Underground mine (30 CFR 780.13(c))

199-1-3.6.h Scaled distance formulas (30 CFR 816/817.67(d)(2)(i), (d)(3))

199-1-3.6.j Seismograph recording; previously approved (30 CFR 816/817.67(d)(6))

199-1-3.6.k Maximum allowable ground vibration; previously approved (30 CFR 816/817.67(d)(5))

199-1-3.6.l Maximum airblast and ground vibration standards; previously approved (30 CFR 816/817.67(e))

199-1-3.7.b Blasting control for other structures; previously approved (30 CFR 816/817.67(d)(1))

199-1-4.11 Blasting crew; previously approved (30 CFR 850.13(a)(2))

Because these State provisions have been approved previously or contain language that is substantively identical to the corresponding Federal requirements, we find that they are no

less effective than those corresponding Federal requirements and can be approved without further discussion.

*B. Revisions to West Virginia's Code and Regulations That Require Specific Findings*

Code of West Virginia (W. Va. Code)

1. 22-3-13a(g) Preblast survey requirements. This provision provides that pre-blast surveys shall be submitted to the Office of Explosives and Blasting (Office) at least 15 days prior to the start of any "production blasting." The provision is amended by adding the following sentence: "Provided, That once all required surveys have been reviewed and accepted by the Office of Explosives and Blasting, blasting may commence sooner than fifteen days after submittal." We find that the amendment does not render the provision less effective than the Federal regulations at 30 CFR 816/817.62(d), which require that such surveys be promptly submitted to the regulatory authority, and can be approved.

We note that in our November 12, 1999, approval of this provision (64 FR 61507, 61510-61511) we approved W. Va. Code 22-3-13a(g) with the understanding that, as explained by the West Virginia Department of Environmental Protection (WVDEP) at that time, 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." The State's submittal of the Surface Mining Blasting Rule at CSR 199-1-3.8.a, concerning pre-blast survey, provides that surveys, waivers or affidavits for each dwelling or structure within the pre-blast survey area shall be completed and submitted to the Office of Explosives and Blasting at least 15 days before any blasting may occur. The Federal regulations at 30 CFR 816/817.62(e) provide that surveys requested more than 10 days before the planned initiation of blasting shall be completed by the operator before the initiation of blasting. In Finding B.10 below, on CSR 199-1-3.8, we conclude that the State's 15-day requirement does not render the State provision less effective than 30 CFR 816/817.62(e). Likewise, W.Va. Code 22-3-13a(g) does not conflict with the requirement that surveys requested more than 10 days before the planned initiation of blasting be completed by the operator before the initiation of blasting. Therefore, we find that the provisions are not inconsistent with the Federal preblast survey requirements, and we are approving the amendments to W. Va. Code 22-3-13a(g).

2. 22-3-22a(e) Blasting restrictions. This provision concerns blasting within 1,000 feet of a protected structure. This subsection was amended by adding the words "identified," and "notification area," which are intended to clarify the intent of the last sentence of this provision. These changes were made in response to our recommendations when we initially approved these blasting provisions on November 12, 1999 (64 FR 61507, 61511). As amended, the sentence provides that in the development of a site-specific blasting plan, consideration shall be given, but not limited to "\* \* \* the concerns of the owner or occupant living in the protected structures identified in the blasting schedule notification area." We find that the amendment does not render the provision inconsistent with SMCRA section 515(b)(15)(C), which concerns the prevention of injury to persons and damage to property, and can be approved. We note, however, that in our November 12, 1999, approval of this provision (64 FR at 61511) we approved W. Va. Code 22-3-22a(e) only to the extent that all blast designs, site specific and generic, as explained by WVDEP at that time, comply with the blast design requirements at CSR 38-2-6.5.g.3. These provisions are now located at CSR 199-1-3.6.f.3. Therefore, W. Va. Code 22-3-22a(e) remains approved with the understanding that all blast designs, site specific and generic, comply with the blast design requirements at CSR 199-1-3.6.f.3.

3. 22-3-22a(f) Waiver of the blasting prohibitions. This subsection was amended by deleting the words "or the site specific restriction within one thousand feet in writing" in two locations. The effect of this deletion means that a waiver of the site-specific blast design cannot be obtained within "one thousand feet" of a protected structure. Subsection 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. Deletion of the words "or the site specific restriction within one thousand feet in writing" from the waiver provisions of subsection 22-3-22a(f) means that although an owner or occupant may waive the blasting prohibition within 300 feet of a protected structure, the permittee must still provide a site-specific blast design to the Office for all blasting within 1,000 feet of a protected structure. We find that the amendments to this provision do not render the West Virginia program less effective than the Federal

regulations at 30 CFR 816/817.61(d) and can be approved.

4. 22-3-30a(b) Blasting requirements. This subsection requires penalties to be imposed for each permit area or contiguous permit areas where blasting was not in compliance with the regulations governing blasting parameters and resulted in property damage to a protected structure. The subsection was amended by adding language to the first sentence that establishes the limits to which the penalties at subsection 22-3-30a(b) will apply. The words "at a surface coal mine operation as defined by the provisions of subdivision (2), subsection (a), section thirteen-a of this article" were added following the word "blast" and before the word "was." In effect, the penalties identified at subsection 22-3-30a(b) apply to surface coal mining operations, except those that are 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. This revision is intended to ensure that coal operators with relatively small mining operations will not be subject to the penalties authorized by subsection 22-3-30a(b) (see Administrative Record Number WV-1376).

By its terms, 22-3-30a(b) pertains only to blasting violations that result in property damage to protected structures. These punitive penalties are in addition to the civil penalties that will be assessed for blasting violations resulting in property damage under CSR 199-1-8.6, 8.7, and 8.8 (Administrative Record Number WV-1376). These penalties will not apply to blasting violations caused by small surface mining operations as described in W. Va. Code 22-3-13a(1) or to coal extraction by underground coal mining methods. Thus, the supplemental penalties imposed by the State for these blasting violations are not inconsistent with the Federal penalty requirements at section 518 of SMCRA. Furthermore, all blasting violations, regardless of whether they cause damage to protected structures, including damage to water wells, will be subject to the civil penalty assessment requirements set forth in W. Va. Code 22-3-17 and CSR 199-1-8.6, 8.7, and 8.8 (see 64 FR at 61513-61514; November 12, 1999). Therefore, we find that the new language does not render the West Virginia program inconsistent with SMCRA at section 518, or the Federal regulations at 30 CFR part 845, and can be approved.

5. 22-3-30a(c) Prohibition against imposing penalties for violations that are merely administrative in nature. This provision was amended by adding

language to clarify what penalties may not be imposed on an operator for any violation identified in 22-3-30a(b) that is merely administrative in nature. As amended, this provision provides as follows:

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, the division [Department] of environmental protection may not impose penalties, as provided for in subsection (b) of this section, on an operator for the violation of any rule identified in subsection (b) of this section that is merely administrative in nature.

We note that W. Va. Code 22-3-30a concerns liability and requires the imposition of punitive penalties in the event of property damage. As discussed above, all blasting related violations will be assessed civil penalties in accordance with W. Va. Code 22-3-17 and CSR 199-1-8.6, 8.7, and 8.8. This would also include blasting violations resulting in property damage that are administrative in nature. Therefore, we find that this provision is not inconsistent with SMCRA section 518(a) concerning penalties, and can be approved.

6. 22-3-30a(e) Blasting within 300 feet of a protected structure. This provision has been amended by adding language concerning site-specific blast designs. As amended, this subsection provides that where an inspection establishes that production blasting is done within 300 feet of a protected structure, without an approved site-specific blast design or not in accordance with an approved site-specific blast design for production blasting within 1,000 feet of a protected structure or within 100 feet of a cemetery, the monetary penalties and revocation, as set out in W. Va. Code 22-3-30a(b), apply. This means that production blasting that is done within 300 feet of a protected structure, even if it was done in accordance with a waiver or a site-specific blast design, and causes property damage will be assessed a supplemental penalty in accordance with W. Va. Code 22-3-30a(b). In addition, all blasting related violations that cause or do not cause property damage to protected structures will be subject to the civil penalty requirements of W. Va. Code 22-3-17 and CSR 199-1-8.6, 8.7, and 8.8. Therefore, we find that subsection 22-3-30a(e), as amended, is no less stringent than SMCRA section 518 and not inconsistent with 30 CFR part 845, and can be approved.

7. 22-3-30a(f) Penalties assessed and collected. This provision is amended by adding a citation to clarify that the penalties and liabilities that must be assessed are those authorized by subsection 22-3-30a(b). As

amended, subsection 22-3-30a(f) provides that all penalties and liabilities as set forth in subsection 22-3-30a(b) shall be assessed by the Secretary of the WVDEP and deposited with the treasurer of the State of West Virginia in the "general school fund." In our previous finding concerning this provision (November 12, 1999; 64 FR at 61514), we did not approve subsection 22-3-30a(f) because of the requirement that the fees collected would be deposited in the "general school fund," rather than the "special reclamation fund."

The approved State program at W. Va. Code 22-3-17(d)(2) currently requires that civil penalties be deposited into the State's alternative bonding system, known as the "special reclamation fund." Under 22-3-30a(f), penalties collected from blasting violations that resulted in property damage to protected structures will be deposited into the general school fund. We note that W. Va. Code 22-3-30a(f) only concerns punitive penalty assessments relating to property damage violations due to blasting that supplement the State's existing civil penalty assessments at CSR 38-2-20. All blasting related violations will still be assessed under CSR 199-1-8.6, 8.7, and 8.8 and the monies collected will be deposited in the Special Reclamation Fund. Therefore, the Special Reclamation Fund will continue to receive funds from civil penalty assessments under CSR 199-1-8.6, 8.7, and 8.8, while the general school fund will receive funds from the supplemental penalties assessed under 22-3-30a(b) and (f). Given that existing funds will not be diverted from the Special Reclamation Fund, we find that this provision does not render the West Virginia program inconsistent with SMCRA section 518 concerning penalties and section 509(c) concerning alternative bonding systems, and can be approved.

8. 22-3-30a(h) *Applicability.* This provision is amended to clarify that the provisions of section 22-3-30a do not apply to the extraction of minerals by underground mining methods, provided that nothing contained in section 22-3-30a may be construed to exempt any coal mining operation from the general performance standards as contained in W. Va. Code 22-3-13 and any rules promulgated pursuant thereto. Blasting associated with surface impacts and surface operations incidental to underground coal mining would be subject to the State's blasting requirements, including the supplemental and civil penalty assessment provisions at 22-3-30a(b),

subject to the acreage limitations of that same subsection, and CSR 199-1-8.6, 8.7, and 8.8. We find that as amended, this provision is consistent with SMCRA section 518 and 30 CFR part 845, pertaining to penalty assessments, and can be approved.

#### Code of State Regulations (CSR)

9. CSR 199-1-2 *Definitions.* CSR 199-1-2 contains definitions, which are discussed next. Except for the definitions at CSR 199-1-2.15, 2.26, 2.30, 2.32, 2.36, and 2.38, the terms that are defined herein have no specific Federal counterparts.

199-1-2.1 *Definition of "active blasting experience."* Active blasting experience means experience gained by a person who has worked on a blasting crew, or supervised a blasting crew. Two hundred forty (240) working days constitutes one year of experience. Experience may only be gained by "first hand" participation in activities associated with the storing, handling, transportation and use of explosives or the immediate supervision of those activities within surface coal mined, and the surface areas of underground coal mines. Experience should be related to surface mine blasting; Provided, that other related blasting experience (quarrying operations, *etc.*) may be accepted by the Secretary on a case-by-case basis as qualifying experience. We find that this definition is not inconsistent with SMCRA section 515(b)(15)(D) or the Federal regulations at 30 CFR part 850 and can be approved.

199-1-2.2 defines "air blast" to mean an airborne shock wave resulting from the detonation of explosives. We find that this definition is not inconsistent with SMCRA section 515(b)(15) or the Federal regulations at 30 CFR 816/817.67(b) and can be approved.

199-1-2.3 defines "adjuster" to mean an outside party that is assigned to investigate, document, evaluate and make recommendations on a reported loss. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.4 defines "arbitrator" as an impartial individual appointed by the Office of Explosives and Blasting with the authority to settle the disputes between property owners and mine operators as they relate to allegations of blasting damage. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.5 defines "arbitration" as the referral of a dispute to a neutral or impartial person for total or partial determination. It is intended to be inexpensive, prompt and fair to the

parties. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.6 *Definition of "blast."* This provision was previously approved and was amended by adding the words "planned or unplanned." As amended, "blast" is defined to mean any planned or unplanned detonation(s) of an explosive(s) being initiated simultaneously by a single source. We find that the definition is not inconsistent with the Federal regulations at 30 CFR 816/817.61 concerning the use of explosives and can be approved.

199-1-2.7 defines "blast area" to mean the area surrounding a blast site where flyrock could occur and which should be guarded against entry during the shot. We find that this definition is not inconsistent with SMCRA section 515(b)(15) or the Federal regulations at 30 CFR 816/817.66 and can be approved.

199-1-2.8 defines "blast site" to mean the area where explosive material is handled during loading including the perimeter formed by the loaded blast holes, and 50 feet in all directions from the collar of the outermost borehole or protected by a physical barrier to prevent access to the loaded blast holes. We find that this definition is not inconsistent with SMCRA section 515(b)(15) or the Federal regulations at 30 CFR 816/817.61 and can be approved.

199-1-2.10 defines "blasting complaint" to mean a communication to the Office from a member of the general public expressing concern, aggravation, fear or indications of blasting damage. A blasting complaint may or may not initially indicate damage. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.11 defines "blasting claim" to mean an allegation by the property owner of blasting related damage to property. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.12 defines "blasting log" as a written record containing all pertinent information about a specific blast as may be required by law or rule. We find that this definition is not inconsistent with SMCRA section 515(b)(15) or the Federal regulations at 30 CFR 816/817.68 and can be approved.

199-1-2.13 defines "blasting vibration" to mean the temporary ground movement produced by a blast that can vary in both intensity and duration. We find that this definition is

not inconsistent with SMCRA section 515(b)(15) or the Federal regulations at 30 CFR 816/817.67 and can be approved.

199-1-2.14 defines "caused by blasting" to mean that there is direct, consistent and conclusive evidence or information that the alleged damage was definitely caused by blasting from the mine site in question. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.15 defines "certified blaster" to mean a person who has taken and passed the examination described in CSR 199-1, and has been issued a certification card by the Office. We find that this definition is not inconsistent with SMCRA section 515(b)(15) or the Federal regulations at 30 CFR 816/817.61(c) and 850.5 and can be approved.

199-1-2.16 defines "certified examiner/inspector" to mean a person employed by the Office of Explosives and Blasting who administers training or examinations to applicants for certification as certified blasters, or who inspects surface mining operations and who has taken and passed the examination described in CSR 199-1. We find that this definition is not inconsistent with SMCRA section 515(b)(15) or the Federal regulations and can be approved.

199-1-2.17 defines "chief" to mean the Chief of the Office of Explosives and Blasting. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.18 defines "claimant" to mean the property owner who makes a blasting damage claim. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.19 defines "claims administrator" to mean the individual, firm or organization that manages the blasting damage claims program for the Office of Explosives and Blasting. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.20 defines "construction blasting" to mean blasting to develop haulroads, mine access roads, coal preparation plants, drainage structures, or underground coal mine sites and shall not include production blasting. We find that this definition is not inconsistent with SMCRA section 515(b)(15) or the Federal regulations at 30 CFR 816/817.61 and can be approved.

199-1-2.21 defines "contiguous or nearly contiguous" to mean surface

mining operations that share a permit boundary or are within 100 feet of each other at the nearest point. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.22 defines "detonation" to mean a chemical reaction resulting in a rapid release of energy. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.23 defines "Secretary" to mean the Secretary of the Department of Environmental Protection or the Secretary's authorized agent. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.24 defines "Department" to mean the Department of Environmental Protection. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.26 defines "fly rock" to mean rock and/or earth propelled from the blast site through the air or along the ground by the force of the detonated explosives. We find that this definition is consistent with the Federal regulations at 30 CFR 816/817.67(c) regarding flyrock and can be approved.

199-1-2.27 defines "loss value" to mean the amount of money indicated in a given loss to include costs of repairs or replacement costs. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.28 defines "not caused by blasting" to mean that there is direct, consistent, and conclusive evidence or information that blasting from the mine site in question was definitely not at fault for the alleged property damage. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.29 defines "office" to mean the Office of Explosives and Blasting. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.30 Definition of "operator." Operator means any person who is granted or who should obtain a permit to engage in any activity covered by W. Va. Code 22. Under W. Va. Code 22-3-3(o), "operator" is defined as follows:

(o) "Operator" means any person who is granted or who should obtain a permit to engage in any activity covered by this article and any rule promulgated under this article and includes any person who engages in surface-mining or surface-mining and reclamation operations, or both. The term shall also be construed in a manner consistent with the federal program pursuant to the federal Surface-Mining Control and Reclamation Act of 1977, as amended.

The Federal definition at 30 CFR 701.5 defines "operator" as any person engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location. In accordance with the State's statutory definition of "operator," the State's regulatory definition of "operator" must be construed in a manner consistent with the Federal definition of "operator." We find, therefore, that the definition of "operator" at CSR 199-1-2.30, like W. Va. Code 22-3-3(o), is consistent with the Federal definition of "operator" at 30 CFR 701.5 and can be approved.

199-1-2.31 defines "possible caused by blasting" to mean the physical damage in question is not entirely consistent with blasting induced property damage, but that blasting cannot be ruled out as a causal factor. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.32 defines "pre-blast survey" to mean the written documentation of the existing condition of a given structure near an area where blasting is to be conducted. The purpose of the survey is to note the pre-blasting condition of the structure and note any observable defects or damage. While the proposed definition does not define near, we note that under W. Va. Code 22-3-13a(a), pre-blast surveys will be conducted for man-made dwellings or structures within 1/2 mile of the permitted area or under specified circumstances 7/10 mile of the proposed blasting site. We find that this definition, when read together with the statute, is consistent with the Federal regulations at 30 CFR 816/817.62 and can be approved.

199-1-2.33 defines "probably caused by blasting" to mean that there is physical damage present at the site in question that is entirely consistent with blasting induced property damage, and said damage can be attributed to a specific mine site and/or blast event(s). We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.34 defines "probably not caused by blasting" to mean that there is substantial, but not conclusive information that the alleged damage was caused by something other than blasting. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.35 defines "production blasting" to mean blasting that removes the overburden to expose underlying

coal seams and shall not include construction blasting. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.36 defines "protected structure" to mean any of the following structures that are situated outside the permit area: An occupied dwelling, a temporarily unoccupied dwelling which has been occupied within the past 90 days, a public building, a habitable building for commercial purposes, a school, a church, a community or institutional building, a public park or a water supply. This definition is used in the provisions at CSR 199-1-3.6 to provide protection from blasting damage for such protected structures. CSR 199-1-3.7 provides for the protection of structures in the vicinity of the blasting area which are not defined as protected structures. We find that this definition is not inconsistent with SMCRA or the Federal blasting regulations at 30 CFR 816/817.67 and can be approved.

199-1-2.37 defines "supervised a blasting crew" to mean that a person assumed responsibility for the conduct of a blasting crew(s) and that the crew(s) reported directly to that person. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

199-1-2.38 defines "surface mine and surface area of underground mines" to mean:

all areas except underground workings surface mined or being surfaced mined, including adjacent areas ancillary to the operations, *i.e.*, preparation and processing plants, storage areas, shops, haulageways, roads, and trails, which are covered by the provisions of W. Va. Code 22-3-1 *et seq.*, and rules promulgated under that article.

Although it lacks commas setting apart the phrase, it is our understanding that this definition intends to exclude "underground workings" from the definition of "surface mine and surface area of underground mines." Our finding that this definition is not inconsistent with SMCRA or the Federal definition of "surface coal mining operations" at 30 CFR 700.5 and can be approved is based upon that understanding of its intended meaning.

199-1-2.39 defines "worked on a blasting crew" to mean a person has first-hand experience in storing, handling, transporting, and using explosives, and has participated in the loading, connecting, and preparation of blast holes and has participated in detonating blasts. We find that this definition is not inconsistent with SMCRA or the Federal regulations and can be approved.

10. CSR 199-1-3 Blasting.

199-1-3.2.a Blasting plans. This subdivision is nearly identical to CSR 38-2-6.2 with the following changes. The first sentence was deleted, which required that each application for a permit, where blasting is anticipated, shall include a blasting plan. The deleted sentence was replaced by the following sentence: "As required by statute, all surface mining operations that propose blasting shall include a blasting plan." The W. Va. Code 22-3-9(e) provides that each applicant for a surface-mining permit shall submit to the director as part of the permit application a blasting plan where explosives are to be used, which shall outline the procedures and standards by which the operator will meet the provisions of the blasting performance standards. We find that this new sentence is substantively identical to the Federal requirement at 30 CFR 780.13(a) concerning blasting plan, and that it can be approved.

Proposed 199-1-3.2.a was amended by deleting the phrase "and the terms and conditions of the permit." We find that the deletion of this phrase does not render the provision less effective than the counterpart Federal provision at 30 CFR 780.13(a) and can be approved.

Proposed 199-1-3.2.a was amended to provide that the blasting plan would include methods to be applied in preventing, rather than controlling, the adverse effects of blasting. It was also amended by adding language that requires that blasting plans shall delineate the type of explosives and detonation equipment, the size, the timing and frequency of blasts, and the effect of geologic and topographic conditions on specific blasts. The new language also provides that blasting plans shall be designed to prevent injury to persons, prevent damage to public and private property outside the permit area, prevent adverse impacts on any underground mine, prevent change in the course, channel or availability of ground or surface water outside the permit area, and reduce dust outside the permit area. We find that this new language, which provides for the prevention of the adverse effects of blasting, is substantively identical to the requirements in SMCRA at section 515(b)(15)(C) with one exception. There is no Federal counterpart to the new provision at 199-1-3.2.a.5, which requires that blasting shall be designed to reduce dust outside the permit area. We find, however, that the provision is not inconsistent with the Federal requirements. Therefore, we find that the amendments to CSR 199-1-3.2.a can be approved.

199-1-3.2.b Review of blasting plans. This provision requires the Office of Explosives and Blasting to review blasting plans for administrative and technical completeness. There is no direct Federal counterpart to this provision. However, we find that the provision is not inconsistent with SMCRA section 515(b)(15) and the Federal regulations at 30 CFR 777.15 and 780.13(a) concerning completeness of a permit application and the blasting plan and can be approved.

199-1-3.2.c Inspection and monitoring procedure. This provision provides that each blasting plan shall contain an inspection and monitoring procedure to insure that blasting operations are conducted to eliminate, to the maximum extent technically feasible, adverse impacts to the surrounding environment and surrounding occupied dwellings. In addition, this subdivision provides that for all surface coal extraction operations that will include production blasting, the monitoring procedure shall include provisions for monitoring ground vibrations and air blast. This mandatory monitoring of production blasting is no less effective than the Federal requirements at 30 CFR 780.13(b), which requires each permit application to include a description of any system to be used to monitor compliance with blasting standards. We find that subdivision 3.2.c is consistent with the Federal requirements at 30 CFR 780.13(b) and can be approved.

199-1-3.2.d Review of blasting plans where a blasting related notice of violation (NOV) or cessation order (CO) have been issued. This provision requires that where a blasting related NOV or CO has been issued, the Office shall review the blasting plan within thirty (30) days of final disposition of the NOV or CO. This review will focus on the specific circumstances that led to the enforcement action. If necessary, the blasting plan will be modified to insure all precautions are being taken to safely conduct blasting operations. There is no direct Federal counterpart to this provision. However, we find that subdivision 3.2.d. is consistent with the Federal regulations at 30 CFR 816/817.61(d)(5), which states that the regulatory authority may require changes to the blast design, and can be approved.

199-1-3.3(a) Public notice of blasting operations. This provision is copied from CSR 38-2-6.3 and amended by adding a requirement that copies of the blasting schedule must also be distributed by Certified Mail to residents within seven tenths of a mile of the blasting sites for all surface coal

extraction permits larger than those defined in accordance with W. Va. Code 22-3-13a(a)(1). The State also revised an existing sentence providing that, unless blasting operations will occur on drainage structures and roads, [such] structures are exempt from measuring the notification area. In addition, the State added a requirement that a list of residents, utilities, and owners of man-made structures within the notification area shall be made part of the blasting plan, and shall be updated on an annual basis. Finally, the provision now requires publication and redistribution of the blasting schedule in a newspaper of general circulation in all the counties of the proposed [permit] area, rather than just in the county of the proposed permit area. We find that as amended, CSR 199-1-3.3(a) is consistent with and no less effective than the Federal regulations at 30 CFR 816.64(b) and can be approved.

199-1-3.4 Public notice of surface blasting incident to underground coal mining. This provision, which is nearly identical to the provision at CSR 38-2-6.3.b, is amended by adding the words "and workplaces" immediately following the word "residents" and before the words "or owners." The effect of this amendment is to require that "workplaces" also receive the written notification of the proposed times and locations of the surface blasting operations incidental to underground coal mining operations. We find that the addition of the words "and workplaces" does not render the provision less effective than the Federal regulations at 30 CFR 817.64(a) and 816.79 and can be approved.

199-1-3.6.i Ground vibration. This provision was copied from CSR 38-2-6.5.j and amended by adding language to provide that seismographs used to demonstrate compliance with this subdivision must be shake-table calibrated annually. Also, the annual calibration certificate shall be kept filed with the blasting logs and seismograph records and made available for review as required by subdivision CSR 199-1-3.5.a. While there is no Federal counterpart to the new language, we find that it is not inconsistent with the Federal regulations concerning ground vibration at 30 CFR 816/817.67(d) and that CSR 199-1-3.6.i can be approved.

199-1-3.7.a Blasting control for other structures. This provision was copied from CSR 38-2-6.6.a, and amended by adding language to provide that if alternative maximum allowable limits on vibration are not included in the approved blast plan, the operator shall comply with the limits specified in paragraph 3.6.c.1, and subdivisions

3.6.h and 3.6.i. While there is no direct Federal counterpart to this provision, we find that it is consistent with the intent of 30 CFR 816/817.67(b) and (d) and can be approved.

199-1-3.8 Pre-blast survey. This provision is copied from CSR 38-2-6.8.a.2, and amended by adding the following language at the end of the provision:

The pre-blast survey shall include a description of the water source and water delivery system. When the water supply is a well, the pre-blast survey shall include written documentation about the type of well, and where available, the well log and information about the depth, age, depth and type of casing, the static water level, flow and recharge data, the pump capacity, the name of the drilling contractor, and the source or sources of the information.

While the proposed language has no direct Federal counterpart, we find that it is consistent with and no less effective than the Federal regulations at 30 CFR 816/817.62(c) and can be approved.

We must note that the State has not included specific procedures in its rules requiring operators, at least 30 days prior to the beginning of blasting operations, to notify residents or owners of structures in writing on how to request a preblast survey. However, this specific requirement is contained in W.Va. Code 22-3-13a(a), and it is our understanding that W.Va. Code 22-3-13a(a) continues to apply.

In addition, subsection 3.8 does not specifically require that copies of the preblast survey be promptly provided the person requesting the survey and the Secretary, and that the report be signed by the person conducting the preblast survey. However, W. Va. Code 22-3-13a(f)(18) specifically requires that the preblast survey include the signature of the person performing the survey. In addition, W. Va. Code 22-3-13a(g) provides that pre-blast surveys must be submitted to the Office of Explosives and Blasting, and that the Office shall provide a copy of the survey to the owner or occupant. It is our understanding that both W. Va. Code 22-3-13a(f)(18) and 22-3-13a(g) continue to apply. Our approval of subsection 3.8 is based upon those understandings.

199-1-3.8.a Pre-blast survey. This provision provides that surveys, waivers or affidavits for each dwelling or structure within the pre-blast survey area shall be completed and submitted to the Office of Explosives and Blasting at least 15 days before any blasting may occur, provided, that once all pre-blast surveys have been accepted by the Office, blasting may commence sooner than 15 days from submittal. There is no

direct Federal counterpart to this provision. However, the Federal regulations at 30 CFR 816/817.62(e) provide that surveys requested more than 10 days before the planned initiation of blasting shall be completed by the operator before the initiation of blasting. While subdivision 199-1-3.8.a does not contain a specific counterpart to this language at 30 CFR 816/817.62(e), we find that CSR 199-1-3.8.a does not conflict with the Federal requirement. That is, the State provision in no way prohibits surveys being requested more than 10 days before the planned initiation of blasting. Furthermore, the State's existing regulations at CSR 38-2-6.8.a.4 provide that pre-blast surveys requested more than 10 days before the planned initiation of blasting must be completed before blasting begins. This ensures that any preblast survey that may be requested after the 15-day submission period will be completed before blasting commences. Therefore, we are approving this provision because, when read in conjunction with CSR 38-2-6.8.a.4, it is not inconsistent with 30 CFR 816/817.62(e).

199-1-3.8.a.1 Disagreement with pre-blast survey results. This provision provides that any person who disagrees with the results of the survey may submit a detailed description of the specific areas of disagreement, to the Office of Explosives and Blasting. The description of the areas of disagreement will be made a part of the pre-blast survey on file at the Office. We find that this new provision is no less effective than the Federal regulations at 30 CFR 816/817.62(d) and can be approved.

199-1-3.8.a.2 Structures/renovations after an initial pre-blast survey. This provision provides that if a structure is added to or renovated subsequent to a survey, a survey of such additions and/or renovations shall be performed upon request of the resident or owner. If a pre-blast survey was waived by the owner and was within the requisite area and the property was sold, the new owner may request a pre-blast survey from the operator. An owner within the requisite area may request, from the operator, a pre-blast survey on structures constructed after the original pre-blast survey. We find that this new provision is no less effective than the Federal regulations at 30 CFR 816/817.62(b) and can be approved.

199-1-3.9 Pre-blast surveyors. These new provisions set forth the qualifications for individuals and firms performing pre-blast surveys. There are no Federal counterparts to these provisions. We find, however, that these

provisions are not inconsistent with SMCRA section 515(b)(15) concerning the use of explosives, and the Federal regulations at 30 CFR 816/817.62 concerning pre-blasting surveys and can be approved.

199-1-3.10 Pre-blast survey review. This provision sets forth the requirements for submittal of pre-blast surveys to the Office of Explosives and Blasting and review of such surveys by the Office. The Federal regulations at 30 CFR 816/817.62, concerning pre-blasting survey, provide for pre-blast surveys, but the Federal regulations do not contain submittal and review procedures for pre-blast surveys. SMCRA at section 505(b) provides that any State statutory or regulatory provision which is in effect or may become effective after the enactment of SMCRA and that provides for control and regulation of surface mining and reclamation operations for which no provision is contained in SMCRA shall not be construed to be inconsistent with SMCRA. We find that this provision is not inconsistent with the Federal regulations at 30 CFR 816/817.62 concerning pre-blasting surveys and can be approved, to the extent described as follows:

Subdivision 3.10.b provides that the operator or his designee shall correct deficiencies within 30 days from receipt of notice of deficiencies. The Federal regulations at 30 CFR 816/817.62(e) provide that any surveys requested more than 10 days before the planned initiation of blasting shall be completed by the operator before the initiation of blasting. The approved West Virginia program at CSR 38-2-6.8.a.4, concerning pre-blast survey, contains a counterpart to the Federal 10-day requirement at 30 CFR 816/817.62(e). Therefore, we are approving the provision at subdivision 3.10.b, because when read in conjunction with CSR 38-2-6.8.a.4, it is not inconsistent with 30 CFR 816/817.62(e).

Subdivision 3.10.d provides that all pre-blast surveys shall be confidential and only used for evaluating damage claims. This subdivision also provides that the Office of Explosives and Blasting shall develop a procedure for assuring surveys shall remain confidential. The Federal regulations, at 30 CFR 816/817.62, neither require nor preclude pre-blast surveys being confidential, nor do they limit their use to the evaluation of blasting damage claims or expressly specify a broader use of such surveys. While requiring such surveys to be kept confidential appears to pose no consistency problems with respect to Federal regulations, limiting the use of the

surveys to damage claims warrants further discussion. The State's amendments at CSR 38-2-2.11 define blasting claim to mean an allegation by the property owner of blasting related damage to property. To the extent issuance of an enforcement action is necessary in resolving a blasting claim because of an operator's failure to repair, we do not find that these regulations preclude the use of a preblast survey to support actions such as the issuance of an NOV. Therefore, we are approving this provision with the understanding that the phrase "only used for evaluating damage claims" does not preclude the use of preblast surveys to support the issuance of NOV's, CO's, civil penalties or other forms of alternative enforcement actions under the West Virginia Surface Coal Mining and Reclamation Act and its implementing regulations to achieve the repair of blasting damage and thus resolve a damage claim.

199-1-3.11 Additional protections. This new subsection provides that the Secretary of the WVDEP may prohibit blasting or may prescribe alternative distance, vibration and airblast limits on specific areas, on a case-by-case basis, where research establishes it is necessary, for the protection of public or private property, or the general welfare and safety of the public. While this provision has no direct Federal counterpart, we find that it is consistent with the Federal blasting provisions at 30 CFR 816/817.67(a), (b)(1)(ii), and (d)(5) and can be approved.

#### 11. CSR 199-1-4 Certification of Blasters.

199-1-4.1.a Requirements for certification of blasters. This provision provides that in every surface mine and surface area of an underground mine when blasting operations are being conducted, a certified blaster shall be responsible for the storage, handling, transportation, and use of explosives for each and every blast, and for conducting the blasting operations in accordance with the blasting plans approved in a permit issued pursuant to W. Va. Code 22-3-1 *et seq.*, and the rules promulgated under that article. This provision also provides that each person responsible for blasting operations shall be certified. Each certified blaster shall have proof of certification either on his/her person or on file at the permit area during blasting operations. Certified blasters shall be familiar with the blasting plan and blasting related performance standards for the operation at which they are working. Where more than one certified blaster is working on a blast, the blaster who designed the blast shall supervise the loading

operations and sign the blasting log. Furthermore, it provides that nothing in this rule modifies the statutory regulatory authority of the State Fire Marshal and the State Commission to regulate blasting and explosives. Similar provisions regarding certified blasters were previously approved at former W. Va. Code 22-4-3.01(A). We find that the revised provision is consistent with SMCRA sections 515(b)(15)(D) and 719 concerning blasters, and no less effective than the Federal regulations at 30 CFR 816/817.61(c)(1), (2) and (4)(i) and can be approved.

199-1-4.1.b Qualifications for certification. This provision provides that each applicant for certification shall have had at least one (1) year active blasting experience within the past three (3) years, and have demonstrated a working knowledge of and skills of the storage, handling, transportation, and use of explosives, and a knowledge of all State and Federal laws pertaining thereto, by successfully taking and passing the examination for certification required by CSR 199-1-4.3.b. Similar provisions regarding qualifications for certification were previously approved at W. Va. Administrative Regulations, Department of Mines, Chapter 22-4-3.01(A). Although it has no direct Federal counterpart, we find that the revised provision is consistent with the Federal regulations at 30 CFR 850.14(a)(2) and can be approved.

199-1-4.1.c Application for certification. This provision requires that prior to taking the examination for certification, a person must submit an application along with a fifty dollar (\$50.00) application fee to the Office to take the examination on forms prescribed by the Secretary of the WVDEP. Upon receipt of an application for examination, the Secretary of the WVDEP shall, after determining that the applicant meets the experience requirements of subsection 199-1-4.1.b, notify the applicant of the date, time, and location of the scheduled examination. Similar provisions regarding application for certification were previously approved at former Chapter 22-4-6.02, except for the \$50.00 fee. Although the revised provision has no direct Federal counterpart, we find that it is consistent with the Federal regulations at 30 CFR 850.12(b) and can be approved.

199-1-4.2 Training. This provision provides that the Office of Explosives and Blasting will administer a training program to assist applicants for blaster certification or re-certification in acquiring the knowledge and skills required for certification. The training requirements shall include, at a



minimum, those subject areas set forth in subdivisions 199–1–4.3.b.1.A through 4.3.b.1.K. The Secretary of the WVDEP may establish a fee for training to cover costs to the Office. In lieu of completing the training program, the applicant for certification or re-certification who meets the experience requirements specified in subdivision 199–1–4.1.b, may complete a self-study course using the study guide and other materials available from the Office. Prior to certification, all applicants who choose to self-study will also be required to attend an Office two-hour training session addressing certified blasters' responsibilities and the disciplinary procedures contained in subsections 199–1–4.9 and 4.10. This training will be made available immediately prior to scheduled examinations when necessary. Similar training provisions were previously approved at former Chapter 22–4–3.01(B). In addition, the requirement to allow for completion of a self-study course in lieu of completing the training program was previously approved at CSR 38–2C–4 (61 FR 6511, 6528; February 21, 1996). While the revised provision has no direct Federal counterpart, we find that it is consistent with the requirements of SMCRA at section 515(b)(15)(D) and the Federal regulations at 30 CFR 850.13 and can be approved.

199–1–4.3.a Examinations for Certified Blaster Examiners/Inspectors. This provision provides that all persons employed by the Office, whose duties include training, examining, and certification of blasters and/or inspecting blasting operations shall be a certified examiner/inspector. Certification as an examiner/inspector does not constitute a surface mine blaster certification; however, a surface mine blaster certification is sufficient for certification as an examiner/inspector. The examination for certified examiner/inspector shall at a minimum test the applicant's knowledge as required by CSR 199–1–4.3.b. Similar provisions requiring certification of blaster examiners were previously approved at former Chapter 22–4–4. There is no direct Federal counterpart to this provision. However, we find that the requirements of this provision do not render the West Virginia program less effective than the Federal regulations concerning blasting at 30 CFR part 850 concerning training, examination, and certification of blasters and can be approved.

199–1–4.3.b and 4.3.b.1 Examination for certified blaster. These provisions identify the topics that must be covered in the *Study Guide for West Virginia Surface Mine Blasters* and by

the examination for certified blasters. Similar provisions were previously approved at former Chapter 22–4–5.03(A)(1). The requirement providing that the examination will also test on information contained in the self-study course was previously approved for both blaster examiners/inspectors and certified blasters at CSR 38–2C–5.1 and 5.2 (61 FR at 6528; February 21, 1996). At CSR 199–1–4.3.b, the words “three (3) parts” were deleted. This is a nonsubstantive change, relating to parts of the examination that are no longer applicable, that does not affect the approved provision. We find that the revised blaster examination provisions at subdivisions 4.3.b and 4.3.b.1 are consistent with the Federal requirements at 30 CFR 850.13(b) and 850.14(b) and can be approved.

199–1–4.3.b.2 This provision provides that the examination for certified blaster shall also include a simulation examination whereby the applicant must correctly and properly complete a blasting log. A similar provision was previously approved at former Chapter 22–4–5.03(A)(2). While the revised provision has no direct Federal counterpart, we find that it is consistent with the Federal requirement concerning blaster training at 30 CFR 850.13(b)(8) and 850.14(b) and can be approved.

199–1–4.3.b.3 This provision provides that the examination for certified blaster shall also include other portions or parts developed to demonstrate an applicant's ability to use explosives products and equipment properly, as deemed appropriate by the Secretary of the WVDEP. Provisions requiring hands-on simulation, including wiring, checking and shooting a blast were previously approved at former Chapter 22–4–5.03(A)(3). While the revised provision has no direct Federal counterpart, we find that it is consistent with the Federal requirements concerning blaster training at 30 CFR 850.13(b) and 850.14 and can be approved.

199–1–4.3.c Standards for Blaster Exam. This provision provides that a score of 80 percent for the multiple choice examination, and satisfactory completion of the blasting log portion, and any other portions that may be included in the examination, which are graded on a pass/fail basis, are required for successful passage of the examination for certified blaster. Similar provisions were previously approved at former Chapter 22–4–5.03(B), except, as proposed, hands-on simulation may not necessarily be required to pass the examination. We find that the revised provision is not inconsistent with the

Federal requirements for blaster examination at 30 CFR 850.14 and can be approved.

199–1–4.3.d Notification of scores. This provision provides that the Office must notify all persons of their scores within 30 days of completing the examination. A person who fails to achieve a passing score of any of the parts of the examination, may apply, after receipt of his or her examination results, to retake the entire examination or any portions that the individual failed to pass. Any person who fails to pass the exam on the second attempt must certify that he/she has taken or retaken the training course described at CSR 199–1–4.2 prior to applying for another examination. Similar provisions regarding notification of scores were previously approved at former Chapter 22–4–5.03(C), except the person was required to retake the entire examination. There is no direct Federal counterpart to this provision. We find, however, that it is consistent with the Federal requirements for blaster examination at 30 CFR 850.14 and can be approved.

199–1–4.4 Approval of certification. This provision provides that upon determination that an applicant for certification has satisfactorily passed the examination, the Secretary of the WVDEP shall, within 30 days of the examination date, issue a certification card to the applicant. Similar provisions regarding approval of certification were previously approved at former Chapter 22–4–6.03. While the revised provision has no direct Federal counterpart, we find that it is consistent with the Federal requirements for blaster examination at 30 CFR 850.15(a) concerning issuance of certification and can be approved.

199–1–4.5 Conditions or practices prohibiting certification. This provision provides that the Secretary of the WVDEP shall not issue a blaster certification or re-certification to persons who: are currently addicted to alcohol, narcotics or other dangerous drugs; have exhibited a pattern of conduct inconsistent with the acceptance of responsibility for blasting operations; or are convicted felons. Similar requirements prohibiting blaster certification were previously approved at former Chapter 22–4–6.01, except for the new provision relating to convicted felons, which has no direct Federal counterpart. Nevertheless, we find that the entire provision is consistent with the Federal provisions concerning issuance of certification at 30 CFR 850.14(a) and 850.15(a) and (b) and can be approved.

199-1-4.6.a Refresher training. This provision provides that all certified blasters must complete a minimum of 12 hours of refresher training during the three-year period that each blaster's certification is in effect. This refresher training requirement may be satisfied by attendance at various professional and technical seminars and meetings approved by the Office, or by attendance at a refresher training session conducted by the Office. The Secretary of the WVDEP may establish a fee for refresher training to cover costs to the Office. Similar provisions requiring annual refresher training were previously approved at former Chapter 22-4-3.01(B). While the revised provision has no direct Federal counterpart, we find that it is consistent with the Federal provision concerning recertification at 30 CFR 850.15(c) and can be approved.

199-1-4.6.b Re-certification of blasters. This provision provides that a certified blaster must be re-certified every three (3) years. Each applicant for re-certification must be currently certified and must document that he or she satisfactorily meets the experience requirements of CSR 199-1-4.1.b and has satisfied the refresher training requirement at CSR 199-1-4.6.a. The application for re-certification must be submitted on forms prescribed by the Secretary with a thirty dollar (\$30.00) reapplication fee. Similar provisions regarding re-certification were previously approved at former Chapter 22-4-7.01, except for the re-application fee. While the revised provision has no direct Federal counterpart, we find that it is consistent with the Federal requirement for recertification at 30 CFR 850.15(c) and can be approved.

199-1-4.6.c Re-training. This provision provides that an applicant for re-certification, who does not meet the experience requirements of CSR 199-1-4.1.b, must take the training course, and must take and pass the examination required in CSR 199-1-4.3.b. Similar provisions were previously approved at former 22-4-7.01(B) and CSR 38-2C-8.2, except for the modified provision at subsection 8.2 allowing for the completion of the self-study course as an option to completing the refresher training course, which is to be deleted. While the revised provision has no direct Federal counterpart, we find that it is consistent with the Federal provision regarding training for certified blasters at 30 CFR 850.13(a), as well as the provision for recertification of blasters at 30 CFR 850.15(c), and can be approved.

199-1-4.6.d Re-examination. This provision provides that each certified blaster shall be required to successfully

complete the examination for certified surface coal mine blasters at least once every sixth year, as required by CSR 199-1-4.3.b. Similar provisions regarding re-examination were previously approved at former Chapter 22-4-7.02. While the revised provision has no direct Federal counterpart, we find that it is consistent with the Federal requirement for recertification of blasters at 30 CFR 850.15(c) and can be approved.

199-1-4.7 Presentation of certificate; Transfer; and Delegation of authority. This provision provides that: Upon request by the Secretary of the WVDEP, a certified blaster shall exhibit his/her blaster certification card; The certified blaster shall take all reasonable care to protect his/her certification card from loss or unauthorized duplication, and shall immediately report any such loss or duplication to the Office; Blaster's certifications may not be transferred or assigned; and certified blasters shall not delegate their authority or responsibility to any individual who is not a certified blaster. A certified blaster shall not take any instruction or direction on blast design, explosives loading, handling, transportation and detonation from a person not holding a blaster's certificate, if such instruction or direction may result in an unlawful act, or an improper or unlawful action that may result in unlawful effects of a blast. A person not holding a blaster's certification who requires a certified blaster to take such action may be prosecuted under W. Va. Code 22-3-17(c) or (i). Similar provisions regarding presentation, transfer and delegation of blaster certification were previously approved at former Chapter 22-4-8. We find that the revised provision is no less effective than the Federal requirements for recertification of blasters at 30 CFR 850.15(d) and (e) and can be approved.

199-1-4.8 Violations by a certified blaster. This provision provides that the Secretary of the WVDEP may issue a temporary suspension order against a certified blaster who is, based on clear and convincing evidence, in violation of any of the items listed at CSR 199-1-4.8.a through 4.8.e. The proposed language was copied and amended from approved language at CSR 38-2C-10.1 concerning violations, and 38-2-11.1 concerning suspension. Language authorizing the Secretary to issue a cessation order and/or take other action was removed from former CSR 38-2C-10.1, but the Secretary retained authority to issue a notice of violation for violations by a certified blaster as approved on February 21, 1996 (61 FR 6528-6529). The revised provision is

similar to CSR 38-2C-10.1 with the following changes. At subsection CSR 199-1-4.8, the words "notice of violation" were deleted and replaced with the words "temporary suspension order." With these changes, the Secretary of WVDEP may issue a temporary suspension order against a certified blaster who is, based on clear and convincing evidence, in violation of any of the provisions listed at CSR 199-1-4.8.a through 4.8.e. We find that the proposed State language as revised is consistent with the Federal regulations at 30 CFR 850.15(b), concerning suspension and revocation of blaster certification, and can be approved, except as follows.

199-1-4.8.c Violations by a certified blaster. The words "substantial or significant" were added prior to the word "violations;" the words "or state" were added after the word "federal"; and the words "or the approved blast plan for the permit where the blaster is working" were added after the word "explosives." With these changes, violations of Federal or State laws or regulations related to explosives or the approved blasting plan must be "substantial or significant" violations before a temporary suspension order can be issued. We find that the proposed State language is not consistent with the Federal regulations at 30 CFR 850.15(b)(1)(iii) which authorizes suspension or revocation for violation of any provision of the State or Federal explosives laws or regulations. The proposed language is narrower than its Federal counterpart, since it allows for suspension or revocation of blaster certification based only on "substantial or significant" violations. In contrast, the Federal regulations at 30 CFR 850.15(b) authorize suspension or revocation of the blaster certification for any type of violation of State or Federal explosives laws or regulations. Therefore, we are not approving the phrase "substantial or significant" at CSR 199-1-4.8.c. We are approving the reference to State laws and regulations, because it is no less effective than the Federal regulation at 30 CFR 850.15(b)(1)(iii) and can be approved. We also find that the addition of the words "or the approved blast plan for the permit where the blaster is working" do not render the provision less effective than 30 CFR 850.15(b)(1)(iii) and can be approved.

199-1-4.8.d Violations by a certified blaster. This provision identifies "false swearing in order to obtain a blaster's certification card" as a violation that the Secretary may issue a temporary suspension order against a certified blaster. The counterpart Federal

regulations at 30 CFR 850.15(b)(1)(iv) provide that the regulatory authority may suspend or revoke a blaster's certification for, among other reasons, providing false information or a misrepresentation to obtain certification. The Federal provision encompasses more than swearing under oath. It is our understanding that the State provision encompasses swearing under oath, as well as providing false information or a misrepresentation to obtain blaster certification. Our finding that this provision is no less effective than the Federal regulations at 30 CFR 850.15(b)(1)(iv) is based on this understanding. Therefore, subdivision 4.8.d can be approved.

199-1-4.8.e Illegal or improper actions by a blaster. At subdivision 4.8.e., the words "in the use, handling, transportation, or storage of explosives or in designing and executing a blast," were added after the words "certified blaster." In addition, the words "a blast site" are deleted and replaced with the words "or near a mine site." As amended, the Secretary of WVDEP may issue a temporary suspension order against a certified blaster for any illegal or improper action taken by a certified blaster in the use, handling, transportation, or storage of explosives or in designing and executing a blast, which may or has led to injury or death at or near a mine site. While there is no direct Federal counterpart to this new language, we find that it is not inconsistent with the Federal regulations at 30 CFR 850.15(b)(1) and can be approved.

199-1-4.9.a Suspension. This provision provides that upon service of a temporary suspension order, the certified blaster shall be granted a hearing before the Secretary of the WVDEP to show cause why his or her certification should not be suspended or revoked. Similar language was previously approved at CSR 38-2C-11.1, except the former provision provided that issuance of the suspension order was based upon the service of a notice of violation. Prior to the issuance of such an order, the certified blaster would be granted a hearing regarding the proposed suspension. We find that the revised provision is no less effective than the Federal regulations concerning suspension or revocation of the certification of a blaster at 30 CFR 850.15(b)(1) and can be approved. CSR 199-1-4.9.a also provides that the period of suspension will be conditioned on the severity of the violation committed by the certified blaster, and, if the violation can be abated, the time period in which the

violation is abated. The Secretary of the WVDEP may require remedial actions and measures and retraining and reexamination as a condition for reinstatement of certification. While there is no direct Federal counterpart to this provision, we find that the State provision is not inconsistent with the Federal regulations at 30 CFR 850.15(b) and can be approved.

199-1-4.9.b Revocation of blaster certification. This provision provides that if the remedial action required to abate a suspension order issued by the Secretary of the WVDEP to a certified blaster, or any other action required at a hearing on the suspension of a blaster's certification, is not taken within the specified time period for abatement, the Secretary of the WVDEP may revoke the blaster's certification and require the blaster to relinquish his or her certification card. Revocation will occur if the certified blaster fails to retrain or fails to take and pass reexamination as a requirement for remedial action as described in subsection 12.1 of this rule. We note that the reference to subsection 12.1 is a typographical error, and the correct citation is subdivision 4.9.a. We approved the deletion of the phrase "or a cessation order" from this subsection on February 21, 1996 (61 FR 6529). The State further proposes to amend this subsection by deleting the words "notice of violation" and adding in their place the words "suspension order." In addition, the phrase "or any other action required at a hearing on the suspension of a blaster's certification" was added to the first sentence, after the words "certified blaster." We find that these changes are not inconsistent with the Federal regulations and can be approved.

While we are approving, with the exception noted above, the State's proposed rules addressing suspension and revocation, we note that there is one Federal requirement not covered by these rules. The State lacks a counterpart to the Federal provision at 30 CFR 850.15(b)(1) that provides that the regulatory authority must suspend or revoke a blaster's certification upon a finding of willful conduct that was previously addressed at West Virginia Administrative Regulations 22-4-6.01.C. Therefore, the State must further amend CSR 199-1-4.9.a and 4.9.b, or otherwise amend the West Virginia program, to provide that upon a finding of willful conduct, the Secretary "shall" revoke or suspend a blaster's certification.

199-1-4.9.c Reinstatement. This provision provides that subject to the discretion of the Secretary of the

WVDEP, and based on a petition for reinstatement, any person whose blaster certification has been revoked, may, if the Secretary of the WVDEP is satisfied that the petitioner will comply with all blasting laws and rules, apply to re-take the blasters certification examination, provided the person meets all of the requirements for blasters certification specified by this subsection, and has completed all requirements of the suspension and revocation orders, including the time period of the suspension. While there is no direct Federal counterpart to this provision, we find that the provision is not inconsistent with the Federal regulations concerning suspension and revocation of blasters certifications at 30 CFR 850.15(b) and can be approved.

199-1-4.9.d Civil and criminal penalties. This provision provides that any certified blaster is subject to the individual civil and criminal penalties provided for in W. Va. Code 22-3-17. While there is no direct Federal counterpart to this provision, we find that it is not inconsistent with either SMCRA at section 518 concerning penalties, nor 30 CFR part 846 concerning individual civil penalties and can be approved.

199-1-4.10 Hearings and appeals. This provision provides that any certified blaster who is served a suspension order, revocation order, or civil and criminal sanctions is entitled to the rights of hearings and appeals as provided for in W. Va. Code 22-3-16 and 17. We find that this provision is not inconsistent with the Federal regulations concerning suspensions and revocations of blasters certifications at 30 CFR 850.15(b) and can be approved.

199-1-4.12 Reciprocity with other states. This provision provides that the Secretary of the WVDEP may enter into a reciprocal agreement with other states wherein persons holding a valid certification in that state may apply for certification in West Virginia, and upon approval by the Secretary of the WVDEP, be certified without undergoing the training or examination requirements set forth in this rule. There is no direct Federal counterpart to this State provision. However, because all state coal mining regulatory programs are subject to the same minimum Federal standards under SMCRA at section 719 and the Federal regulations at 30 CFR part 850, we find that this provision does not render the West Virginia program less effective than those Federal requirements concerning the training, examination, and certification of blasters and can be approved.

## 12. CSR 199-1-5 Blasting Damage Claim.

199-1-5 Blasting damage claim. This section is new, and identifies the characteristics of the types of blasting damage, and provides requirements concerning filing a claim, responsibilities of claims administrators, and the responsibilities of claims adjusters. There is no direct Federal counterpart to the provisions concerning claims for blasting damage at CSR 199-1-5. We find that these provisions are not inconsistent with SMCRA section 515(b)(15) concerning blasting, nor with the Federal blasting regulations at 30 CFR 816/817.61 through 68 and can be approved. However, one specific provision within section 5 requires further explanation, which follows.

199-1-5.2.a.4 Filing a claim. This provision states that if the property owner declines to submit a claim to the Office of Explosives and Blasting under part 5.2.a.3.C.4, then the Office's involvement will be concluded. We understand this to mean that CSR 199-1-5.2.a.4 authorizes the Office to conclude its involvement with the claims process as identified at CSR 199-1-5, but it does not mean that the Office or the WVDEP will be precluded from issuing a blasting-related NOV, CO, or taking other enforcement actions where blasting-related violations that cause property damage have occurred. Therefore, based upon that understanding, we find that CSR 199-1-5.2.a.4 is not inconsistent with SMCRA and the Federal regulations at 30 CFR 816/817.61-68 and can be approved. If, in future reviews, we should determine that West Virginia is implementing this provision inconsistent with this finding, a further amendment may be required.

## 13. CSR 199-1-6 Arbitration.

199-1-6 Arbitration for blasting damage claims. This section provides for the listing and selection of arbitrators, preliminary information to the arbitrator, demand for arbitration and timeframes for arbitration, place of arbitration, confidentiality of the arbitration process, presentations to the arbitrator, arbitration award, fees, costs and expenses, binding nature of the award, and payment of the award. There are no Federal counterparts to these provisions concerning arbitration for blasting damage claims. We find, however, that these provisions are not inconsistent with SMCRA section 515(b)(15) concerning blasting, nor with the Federal blasting regulations at 30 CFR 816/817.61 through 816/817.68 and can be approved. However, further explanation of one provision is needed, as follows.

199-1-6.8 Arbitration award, fees, costs, and expenses. This subsection limits a claimant's recovery of costs and attorney fees to \$1,000.00 when an operator requests arbitration and the initial claim determination in favor of the claimant is upheld in whole or in part. Otherwise, the parties are equally responsible for the cost of the proceeding and are responsible for their own fees and costs. This provision can not supersede existing attorney fees provisions pertaining to citizens who prevail in enforcement actions or appeals involving blasting violations. Therefore, and with the understanding that this provision does not affect any claimant's involvement in proceedings where fees can be claimed under CSR 199-1-8.13 or CSR 38-2-20.12 regardless of whether or not they enter the arbitration claims process, we find that CSR 199-1-6.8 is not inconsistent with the Federal regulations at 43 CFR 4.1290-96 and can be approved.

## 14. CSR 199-1-7 Explosive Material Fee.

199-1-7 Explosive Material Fee. These provisions provide for the assessment fee on blasting material, requirements for remittance of the fee, availability of material delivery records and inventories, dedication of the fee, expenditures, sufficiency of fees, authorization of WVDEP to invest accrued earnings, and consequences of noncompliance. There are no direct Federal counterparts to these provisions concerning the explosive material fee. We find, however, that these provisions are not inconsistent with SMCRA section 515(b)(15) concerning blasting, nor with the Federal blasting regulations at 30 CFR 816/817.61 through 68. In addition, we find that CSR 199-1-7.2, regarding the submittal and availability of records concerning the delivery, inventory, and use of explosives is not inconsistent with 30 CFR 840.12(b) concerning inspection of documents. Therefore, we find that CSR 199-1-7 can be approved.

## 15. CSR 199-1-8 Inspections.

199-1-8 Inspections. These provisions provide for inspections of blasting operations, compliance conferences, notice of violations, cessation orders, show cause orders, civil penalty determinations, procedure for assessing civil penalties, assessment rates, when an individual civil penalty may be assessed, amount of individual civil penalty, procedure for assessment for individual civil penalty, payment of penalty, and fees and costs of administrative proceedings. These provisions at CSR 199-1-8 can be approved because they are identical to approved provisions in the West

Virginia program at CSR 38-2-20.1.e. through 20.12 concerning inspection and enforcement, with the following exceptions.

199-1-8.1 Inspections. This subsection states that "[i]nspections shall be made on any prospecting, active surface mining operation, or inactive surface mining operation as necessary to assure compliance with the WV Code 22-3 and 3A, this rule, and the terms and conditions of the blasting plan." We understand that this provision only governs blasting-specific inspections which supplement and do not supersede the inspection frequency requirements for surface coal mining and reclamation operations and prospecting operations contained in CSR 38-2-20.1.a. through 20.1.d. Therefore, and based on our understanding described above, we find subsection 8.1 to be consistent with the Federal regulations at 30 CFR 840.11, and it can be approved.

CSR 199-1-8.3 Notice of Violations. The regulations at subsection 8.3, which govern imminent harm cessation orders, lack a counterpart to CSR 38-2-20.3.a.4, which states that mining without a valid permit or prospecting approval constitutes imminent harm. However, the approved provisions at CSR 38-2-20.3.a.4 require the issuance of a cessation order to an operator conducting mining-related blasting without a valid permit or prospecting approval. Therefore, we find the proposed requirements at CSR 199-1-8.3 to be no less effective than the Federal requirements at 30 CFR 840.13 and 843.11 and can be approved.

CSR 199-1-8.6 Civil Penalty Determinations. The sentence at CSR 199-1-8.6 concerning civil penalty assessments is new, and provides as follows:

8.6. Civil Penalty Determinations. Except as specified in WV Code section 22-3-30a(b), civil penalties for any notice of violation issued by the Office of Explosives and Blasting shall be determined by the following procedure.

We approved W. Va. Code 22-3-30a(b) on November 12, 1999 (64 FR 61507, 61517). In approving that provision, we stated that our approval of W. Va. Code 22-3-30a(b) was only upon the condition that any implementing regulations later promulgated by the State contain the four criteria for assessing civil penalties found at section 518(a) of SMCRA. The criteria are history of violations, seriousness of the violation, negligence, and demonstrated good faith of the permittee. As discussed above at Finding B.4., the penalties set forth in W. Va. Code 22-

3–30a(b) are punitive penalties for blasting violations that result in property damage. Because they are punitive in nature, these penalties are in addition to the civil penalties that are assessed under CSR 199–1–8.6, 8.7 and 8.8. The proposed language at CSR 199–1–8.6 reaffirms this finding by providing that the violations cited under W. Va. Code 22–3–30a(b) are exempt from the civil penalty assessment procedures. The determination of the supplemental penalty amounts for blasting violations that result in property damage are limited to the factors set forth in W. Va. Code 22–3–30a(b). Furthermore, notices of violation, including those that are issued by the Office of Explosives and Blasting that relate to property damage, are subject to the civil penalty assessment procedures set forth in CSR 199–1–8.6, 8.7 and 8.8. Given this interpretation, we no longer find our original conditional approval of W. Va. Code 22–3–30a(b) to be applicable. In addition, we find that the new language at CSR 199–1–8.6, 8.7 and 8.8 is not inconsistent with section 518 of SMCRA and the Federal regulations at 30 CFR part 845 and can be approved.

There appear to be errors in the civil penalty assessment rates set forth in subdivisions 8.8.b and 8.8.d concerning seriousness of the violation and the operator's good faith. In the table regarding seriousness of the violation under rating 6, the dollar amount should be \$1400, not \$1200, and in the good faith table, the percentage under rating 3 should be 15%, not 20% as shown. These typographical errors are also in the civil penalty assessment rate tables at CSR 38–2–20.7.b and 20.7.d. While these errors do not render the tables inconsistent with the Federal requirements, it is recommended that they be revised.

#### 16. Surface Mine Board.

CSR 199–1–9 Surface Mine Board. This provision provides for open meetings, appeals to the surface mine board, and prohibits *ex parte* communication. CSR 199–1–9 concerning Surface Mine Board is identical to the approved West Virginia program at CSR 38–2–21 concerning the Surface Mine Board. Therefore, we find that the addition of CSR 199–1–9 does not render the West Virginia program inconsistent with SMCRA nor less effective than the Federal regulations and can be approved.

### IV. Summary and Disposition of Comments

#### Public Comments

In response to our request for comments from the public on the

proposed amendments (see Section II of this preamble), we received the following comments from the American Arbitration Association (AAA). By letter dated January 3, 2001 (Administrative Record Number WV–1193), the AAA commented on Section CSR 199–1–17, Arbitration for Blasting Damage Claims. (This section was subsequently recodified at CSR 199–1–6.) Specifically, the AAA commented on subsection CSR 199–1–6.1 that states, "It is anticipated that the office will recommend the roster be maintained by the American Arbitration Association from which the parties will choose the arbitrator."

The AAA acknowledged that it has had discussions with the West Virginia Office of Explosives and Blasting concerning AAA involvement in arbitrating blasting-related disputes. However, the AAA stated that the proposed blasting rule deviates from the AAA's established rules and procedures, and does not conform to its discussions with officials of the West Virginia Office of Explosives and Blasting. The AAA further stated that, although programs such as this do not need to exactly match the AAA's existing rules, the AAA will not be bound through regulation to administer an unfair program.

The AAA stated that it will continue to work with the West Virginia Office of Explosives and Blasting to develop a fair and expeditious program to administer and resolve disputes. However, the AAA stated, the AAA reserves the right to refuse administration of the disputes if the program, at any time, deviates from the established AAA standards.

By letter dated April 20, 2001 (Administrative Record Number WV–1208), WVDEP, Office of Explosives and Blasting sent us a letter with its comments on the AAA's letter. The Office of Explosives and Blasting stated that it is working with the AAA to compile a list of arbitrators according to CSR 199–1–6. The Office stated that since it has no experience with the arbitration process, it fully intends to let the AAA proceed in its normal operating capacity, as long as the Office still meets the requirements of the rule. The Office also stated that in a recent conversation with AAA, the AAA informed the Office that the AAA's comment concerning CSR 199–1–6 is a general statement, sent as documentation of AAA established administrative rules. The Office further stated that it is working with AAA to implement the process.

In response, we acknowledge the AAA's concern and we recognize that its participation with West Virginia in

the arbitration of blasting-related disputes is voluntary. We encourage the AAA to continue working with the State Office of Explosives and Blasting to resolve its concerns. We note that any changes the State makes to its blasting rules at CSR 199–1 as a result of its discussions with the AAA will need to be submitted to OSM as a program amendment for approval. In addition, we note that the sentence quoted above that was the subject of the AAA's comment was deleted from the regulations when they were recodified at CSR 199–1–6.

#### Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, on December 1, 2000, and February 1, 2002, we requested comments on these amendments from various Federal agencies with an actual or potential interest in the West Virginia program (Administrative Record Numbers WV–1188 and WV–1268, respectively). We received comments from three Federal agencies. The U.S. Department of Labor, Mine Safety and Health Administration (MSHA) responded by letter dated March 1, 2002, and stated that the employee and adjacent landowner safety provisions are consistent with MSHA blasting standards (Administrative Record Number WV–1281). MSHA also stated that it found no issues or impact upon coal miner's health and safety.

The U.S. National Park Service responded by letter dated February 5, 2002, and stated that it had no specific comments (Administrative Record Number WV–1270).

The Department of the Army, U.S. Army Corps of Engineers responded on February 26, 2002, and stated that its review found the proposed amendment to be generally satisfactory to the agency (Administrative Record Number WV–1279). In addition, the Corps of Engineers stated that it has a concern with the relationship between the blasting plans discussed in CSR 199–1–3.2 and the agency's responsibilities in administering section 404 of the Clean Water Act. To avoid any confusion that the proposed amendment supersedes the requirements of section 404 of the Clean Water Act, the agency suggested including a statement in the amendment indicating that a separate authorization is required from the U.S. Army Corps of Engineers for all work involving any discharge of dredged or fill material into the waters of the United States. In response, there is nothing in the proposed amendments that supersedes any of the requirements of Section 404 of the Clean Water Act. Therefore, the

addition of such a statement in the amendment is not necessary.

*Environmental Protection Agency (EPA) Comments*

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued 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.*). None of these West Virginia amendments pertains to air or water quality standards. Therefore, we did not ask EPA for its concurrence on any of the proposed amendments.

By letters dated December 1, 2000, and February 1, 2002, we requested comments from EPA on these amendments (Administrative Record Numbers WV-1188 and WV-1268, respectively).

The EPA responded by letters dated January 17, 2001, April 13, 2001, and February 28, 2002 (Administrative Record Numbers WV-1196, WV-1207, and WV-1282, respectively). EPA stated that it appears that the amendment is in compliance with the Clean Water Act and other statutes and regulations under the jurisdiction of the EPA.

**V. OSM's Decision**

Based on the above findings, and except as noted below, we are approving the amendments submitted to us on October 30, 2000 and November 28, 2001.

At CSR 199-1-3.10.d., the phrase "and only used for evaluating damage claims" is approved with the understanding that it does not preclude the use of pre-blast surveys to support the issuance of NOVs, COs, civil penalties or other forms of alternative enforcement actions under the West Virginia Surface Coal Mining and Reclamation Act and its implementing regulations to achieve the repair of blasting damage and thus resolve a damage claim. At CSR 199-1-4.8.c., we are not approving the phrase "substantial or significant." In addition, we are requiring the State to amend CSR 199-1-4.9.a and 4.9.b, or otherwise amend the West Virginia program, to provide that upon finding of willful conduct, the Secretary shall revoke or suspend a blaster's certification.

To implement this decision, we are amending the Federal regulations at 30 CFR part 948, which codify decisions concerning the West Virginia program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that the State's

program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

**VI. Procedural Determinations**

*Executive Order 12630—Takings*

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

*Executive Order 12866—Regulatory Planning and Review*

This rule is exempt from review by the Office of Management and Budget under Executive Order 12866.

*Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that 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 because each 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 the Federal regulations at 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.

*Executive Order 13132—Federalism*

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

*Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The basis for this determination is our decision on a State regulatory program and does not involve Federal regulations involving Indian lands.

*Executive Order 13211—Regulations That Significantly Affect The Supply, Distribution, or Use of Energy*

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

*National Environmental Policy Act*

This rule does not require an environmental impact statement because 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 certifies 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 counterpart 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. 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 counterpart Federal regulations.

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the analysis performed under various laws

and executive orders for the counterpart Federal regulations.

*Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the analysis performed under various laws and executive orders for the counterpart Federal regulations.

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 17, 2003.

**Brent Wahlquist,**

*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 948.12 is amended by adding new paragraph (d) to read as follows:

**§ 948.12 State statutory, regulatory, and proposed program amendment provisions not approved.**

\* \* \* \* \*

(d) We are not approving the following provision of the proposed blasting-related program amendment that West Virginia submitted on October 30, 2000, and November 28, 2001: At CSR 199–1–4.8.c, the phrase “substantial or significant” is not approved.

\* \* \* \* \*

■ 3. Section 948.15 is amended in the table by adding a new entry in chronological order by “Date of publication of final rule” to read as follows:

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

\* \* \* \* \*

Original amendment submission date	Date of publication of final rule	Citation/description of approved provisions
October 30, 2000, November 28, 2001	December 10, 2003	W.Va. Code 22–3–13a(a)(3), (b), (c), (f)(14), (g); 22a(a), (b), (e), (f), (g); 30a(b), (b)(3), (b)(3)(C), (b)(5), (c), (d), (e), (f), (h). Code of State Regulations CSR 199–1, except as identified at 30 CFR 948.12(d), and subdivision 3.10.d is a qualified approval.

■ 4. Section 948.16 is amended by adding paragraph (a) to read as follows:

**§ 948.16 Required regulatory program amendments.**

\* \* \* \* \*

(a) By February 9, 2004, West Virginia must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption to amend CSR 199–1–4.9.a and 4.9.b, or otherwise amend the West Virginia program, to provide that upon finding of willful conduct, the Secretary shall revoke or suspend a blaster’s certification.

\* \* \* \* \*

[FR Doc. 03–30550 Filed 12–9–03; 8:45 am]

BILLING CODE 4310–05–P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 42**

[NV108–SW1a; FRL–7595–5]

**Approval and Promulgation of State Air Quality Plans for Designated Facilities and Pollutants; Control of Emissions From Existing Commercial/Industrial Solid Waste Incinerator Units; Nevada**

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking direct final action to approve a negative declaration submitted by the Nevada Division of Environmental Protection. The negative declaration certifies that commercial/industrial solid waste incinerator units, subject to the requirements of sections 111(d) and 129 of the Clean Air Act, do not exist within the agency’s air pollution control jurisdiction.

**DATES:** This rule is effective on February 9, 2004 without further notice, unless

EPA receives adverse comments by January 9, 2004. If we receive such comment, we will publish a timely withdrawal in the **Federal Register** to notify the public that this rule will not take effect.

**ADDRESSES:** Send comments to Andrew Steckel, Rulemaking Office Chief (AIR–4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901, or e-mail to [steckel.andrew@epa.gov](mailto:steckel.andrew@epa.gov), or submit comments at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mae Wang, EPA Region IX, (415) 947–4124, [wang.mae@epa.gov](mailto:wang.mae@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Sections 111(d) and 129 of the Clean Air Act (CAA or the Act) require States to submit plans to control certain pollutants (designated pollutants) at existing solid waste combustor facilities (designated facilities) whenever standards of performance have been established under section 111(b) for new