



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV-113-FOR; OSM-2008-0009; S1D1S SS08011000 SX064A000 201S180110 S2D2S SS08011000 SX064A000 20XS501520]

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment with exceptions.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSMRE) are issuing a final rule to the West Virginia regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Our decision approves, with certain exceptions and understandings, an amendment to the West Virginia regulatory program. West Virginia revised its Code of State Regulations (CSR) and the West Virginia Code, as contained in Committee Substitutes for Senate Bills 373 and 751. Additionally, on June 16, 2008, OSMRE also announced in a separate **Federal Register** document, its interim approval of the State's alternative bonding provisions of the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) that specifically relate to the special reclamation tax and the creation of the Special Reclamation Water Trust Fund.

DATES: The effective date is [Insert date 30 days after date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION;

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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, State laws and regulations that govern surface coal mining and reclamation operations in accordance with the Act and consistent with the Federal regulations. 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 April 8, 2008, and received electronically on April 17, 2008 (Administrative Record Number WV-1503), the West Virginia Department of Environmental Protection (WVDEP) submitted an amendment to its permanent regulatory program under SMCRA (30 U.S.C. 1201 *et seq.*). The amendment included changes to the West Virginia Code of State Regulations (CSR) and the West Virginia Code, as contained in Committee Substitutes for Senate Bills 373 and 751.

Committee Substitute for Senate Bill 373 authorized revisions to the State's Surface Mining Reclamation Regulations at 38 CSR 2 and its Surface Mining Blasting Regulations at 199 CSR 1. Committee Substitute for Senate Bill 373 was adopted by the Legislature on March 6, 2008, and signed into law by the Governor on March 28, 2008. West Virginia Code at paragraphs 64-3-1 (o) and (p) authorized WVDEP to promulgate the revisions to its rules as legislative rules. This amendment included a variety of topics, including new language for technical completeness, sediment control, storm water runoff, blasting, excess spoil fills, bonding programs, water quality, seismograph records, and definitions.

In addition, the amendment included Committee Substitute for Senate Bill 751, which was adopted by the Legislature on March 8, 2008, and approved by the Governor on March 27, 2008. Committee Substitute for Senate Bill 751 amended and reenacted Section 22-3-11 of the WVSCMRA. As mentioned above, OSMRE approved, on an interim basis, under a separate **Federal Register** document a portion of the bill relating to the special reclamation tax and the Special Reclamation Water Trust Fund (73 FR 33884-33888). The interim rule with request for comments was published in the **Federal**

Register on June 16, 2008 (Administrative Record Number WV-1507). The public comment period closed on July 16, 2008.

We announced receipt of the remaining portions of the proposed amendment in the July 8, 2008, **Federal Register** (73 FR 38941-38951). 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 (Administrative Record Number WV-1508). We did not hold a hearing or a meeting because no one requested one. The public comment period closed on August 7, 2008. We received comments from three Federal agencies and one industry group regarding the various provisions announced in the interim and proposed rules.

III. OSMRE's Findings

The following are the findings that we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. As discussed below, we are approving the proposed State amendment. Any revisions that we do not specifically discuss below, such as changes from “Office” to “Secretary,” “Office” to “office,” or “Office of Explosives and Blasting” to “Secretary” concern non-substantive wording or editorial changes and are approved here without further discussion. The full text of the program amendment is available online at www.regulations.gov or through OSMRE’s West Virginia administrative record, upon request.

Pursuant to Committee Substitute for Senate Bill 373, West Virginia proposes the following revisions to its Surface Mining Reclamation Regulations at Title 38 CSR 2.

1. CSR 38-2-3.1.c and 3.1.d Applicant Information

West Virginia proposes to change the references in Subdivisions 3.1.c and 3.1.d from subsection 2.87 to subsection 2.85. These changes are necessary to reference the correct subsection, which defines ownership and control.

We find that the proposed State revisions to Subdivisions 3.1.c and 3.1.d are not inconsistent with the Federal ownership and control requirements at 30 CFR 778.11, and the revisions are approved.

2. CSR 38-2-3.2.g Notice of Technical Completeness

Notice of technical completeness is new language that is to be added to the State's regulations. It is to provide the public an opportunity to review and comment on a permit application once technical review is completed by the State and the application has been supplemented by the applicant after the close of the public comment period.

Under the State's current regulations, after a permit application has been determined to be administratively complete and the initial public notice and review process has been initiated and in some cases completed, clarification information or additional material is sometimes submitted by the applicant to supplement that permit application in response to the State's technical review or public comments. While the State may require a re-advertisement with a 10-day comment period under the current provisions of Subdivision 3.2.e., these provisions do not provide the State sufficient authority to require that such applications be re-advertised once they are determined to be technically complete. While the term "technically complete" as used in the proposed rule is not defined, WVDEP provided further clarification regarding its use of the term in a conversation with the Charleston Field Office (Administrative Record WV-1515). The

State would require readvertisement under this new provision if its technical review results in an applicant making revisions to the probable hydrologic consequences determination, storm water runoff analysis (SWROA), maps, designs or some other technical aspect of the permit application. In addition, if an application is determined to be technically complete and the applicant has failed to readvertise it for several months, the Secretary may require it to be readvertised in accordance with Subdivision 3.2.g.

Because this new proposed Subdivision 3.2.g creates opportunities for public review of permit applications that are in addition to those opportunities available under SMCRA or the Federal regulations, we find that it is not inconsistent with the Federal public notice provisions at section 513 of SMCRA and the Federal public participation requirements at 30 CFR 773.6, and it is approved.

3. CSR 38-2-3.29.a Incidental Boundary Revisions (IBRs)

This amendment proposes to delete language regarding incidental boundary revisions that provides “or where it has been demonstrated to the satisfaction of the Secretary that limited coal removal on areas immediately adjacent to the existing permit.” This proposal is in response to earlier OSMRE concerns raised in the March 2, 2006, **Federal Register** (71 FR 10768) about the State’s incidental boundary revision requirements. In that notice, OSMRE indicated that the wording of the rule resulted in an incomplete sentence, which should be revised as the State has proposed in this amendment.

As mentioned, the proposed State revisions are in response to an earlier decision by OSMRE regarding the State’s incidental boundary requirements. We find that the

proposed revisions to Subdivision 3.29.a are no less effective than the Federal permit revision requirements at 30 CFR 774.13(d), and the revisions are approved.

4. CSR 38-2-3.32.b Findings – Permit Issuance.

This amendment proposes to delete language at Subdivision 3.32.b relating to required written findings for permit issuance.

The State is proposing to delete data collection requirements, which it has determined are no longer necessary for the administration of its approved permanent regulatory program. The requirements proposed for deletion have no counterparts in SMCRA or in its implementing Federal regulations. Moreover, the remaining State requirements still require the use of the Federal Applicant Violator System and other State databases to determine permit eligibility. Therefore, we find that the proposed revisions at Subdivision 3.32.b are no less stringent than the Federal permitting requirements at section 510 of SMCRA, no less effective than the corresponding Federal regulatory requirements at 30 CFR 773.8, 773.11, and 773.12, and the revisions are approved.

5. CSR 38-2-5.4.e.1 Sediment Control: Inspections

This amendment proposes to remove the words “Impoundments meeting” after “30 CFR 77.216(a).” This revision is to delete language that OSMRE previously disapproved relating to impoundments. See the March 2, 2006, **Federal Register** for further explanation (71 FR 10764).

As discussed in the March 2, 2006, **Federal Register**, OSMRE determined that the words “Impoundments meeting” confuses the intended meaning of the provision that identifies the impoundments that a licensed land surveyor may not inspect. Therefore, the words “Impoundments meeting” in Subparagraph 5.4.e.1 were not approved by OSMRE (71 FR at 10771). We find that the State’s proposed revision to delete the words “Impoundment meeting” at Subparagraph 5.4.e.1 is no less effective than the Federal inspection requirements for impoundments at 30 CFR 816.49(a)(11)(iv) and 817.49(a)(11)(iv), and it is approved.

Furthermore, we are amending and reserving 30 CFR 948.12(i)(1) to implement this decision.

6. CSR 38-2-5.4.h.2 Abandonment Procedures

This amendment proposes to delete language and add new language regarding the construction of natural drain ways subsequent to sediment pond removal.

The State proposes to amend Subparagraph 5.4.h.2 by deleting the requirement that the channel sides and bottom of a natural drain way be rock riprapped, and by deleting the waiver of this requirement. The added provisions require that natural drain ways be returned as near as practicable to their premining condition with additional consideration given to channel and bank stability and habitat enhancement. We find that the revised State requirements at Subparagraph 5.4.h.2 regarding the abandonment of sediment control structures are no less effective than the Federal abandonment requirements at 30 CFR 816.46(b), 816.49(c), 816.56, 817.46(b), 817.49(c), and 817.56, and the revisions are approved.

7. *CSR 38-2-5.6.a Storm Water Runoff*

This amendment proposes to clarify what operations may be exempt from conducting a “Storm Water Runoff Analysis” by adding new language.

Each permit application must include a storm water runoff analysis. However, like former Subparagraph 5.6.d.1.e, under proposed Subdivision 5.6.a, the State intends to exempt operators with mining operations of less than 50 acres from having to submit storm water runoff analyses. Furthermore, haulroads, loadouts and ventilation facilities, regardless of acreage, will be excluded from this requirement. The State will only grant exemptions for mining operations of less than 50 acres on a case-by-case basis. It is our understanding, based on conversations with the State, that this exemption will only apply to a mining operation with “total” permitted acreage of less than 50 acres. This is to prevent a mining operation with more than 50 permitted acres from getting an exemption from the State on a piecemeal basis during the life of its operation. The Federal regulations do not specifically provide for a storm water runoff analysis, and the State has discretion on how to evaluate storm impacts through its cumulative hydrologic impact analysis (CHIA). For this reason, we find that the reduced information for operations of 50 acres or less that would be submitted to the State, as described in revised Subdivision 5.6.a, is not inconsistent with the Federal hydrologic requirements at 30 CFR 780.21 and 784.14, and it is approved.

We must note that the proposed revisions to Subdivision 5.6.a do not exempt surface mining activities from any applicable regulations under the Clean Water Act, including the storm water regulations. Like 30 CFR 816.42 and 817.42, Subdivision 14.5.b provides that all discharges from areas disturbed by surface mining cannot violate

effluent limitations or cause violation of applicable State or Federal water quality standards. In addition, monitoring frequency and effluent limitations are governed by standards set forth in the National Pollutant Discharge Elimination System (NPDES) Permit issued pursuant to the West Virginia Water Pollution Control Act, the Clean Water Act, and the regulations promulgated thereunder.

8. *CSR 38-2-5.6.b Storm Water Runoff Plan*

This amendment proposes to change the time period from twenty four (24) to forty eight (48) hours in which the monitoring results of a 1-year, 24-hour storm event or greater must be reported to the Secretary by the permittee.

As proposed, operators will be required to report to the State any 1-year, 24-hour storm event or greater within 48 hours and include the results of a permit wide drainage system inspection. The additional 24 hours is necessary to provide the operator sufficient time to collect and report the data to the State. The Federal rules lack the specificity of the State rules regarding information considered in storm water runoff analyses, therefore, we find that the proposed revision to Subdivision 5.6.b, as described above, is no less effective than the Federal hydrologic requirements at 30 CFR 780.21 and 784.14, and it is approved.

9. *CSR 38-2-5.6.d Phase-in Compliance Schedule*

This amendment proposes to delete language regarding the phase-in compliance schedule for the submission of the storm water runoff analysis that expired in June 2006.

Because the deadline for the submission of storm water runoff analysis has expired, the State is proposing to delete Subparagraphs 5.6.d, d.1, d.1.a, d.1.b, d.1.c, d.1.d, and d.1.e.

There is no direct Federal counterpart to this requirement, and we find that the proposed deletion of the State's compliance scheduling requirements at Subdivision 5.6.d does not render the remaining storm water runoff requirements at Subsection 5.6 less effective than the Federal hydrologic requirements at 30 CFR 780.21 and 784.14, and it is approved.

10. CSR 38-2-6 Blasting

This amendment proposes to remove duplication of rules for blasting at Section 6. At Subsections 6.1 and 6.2, this amendment proposes to add at the end of the subsections, "and be in accordance with the requirements with Surface Mining Blasting Rule, Title 199 Series 1."

The State is making changes to Subsection 6.1 to ensure that operators comply with all State and Federal blasting requirements, including the Surface Mining Blasting Rule at Title 199, Series 1. We find that the proposed State revision at Subsection 6.1 is no less effective than the Federal blasting requirements at 30 CFR 816.61 and 817.61 and is approved.

The State is making this revision to Subsection 6.2 to ensure that all blasting plans that are submitted with permit applications are in accordance with the State's Surface Mining Blasting Rule, Title 199, Series 1. The State's blasting rules at Title 199, Series 1 are counterparts to the Federal blasting regulations at 30 CFR 816.61 through 816.68 and 817.61 through 817.68. We find that the proposed revision to Subsection 6.2 is no less

effective than the Federal blasting plan requirements at 30 CFR 780.13(a), and it is approved.

Subsections 6.3, 6.4, 6.5, 6.6, 6.7, and 6.8 are proposed to be deleted entirely. These provisions pertain to public notice of blasting operations, blast record, blasting procedures, blasting control for other structure, certified blasting personnel, and pre-blast survey, respectively.

The State is proposing to delete these blasting requirements because similar requirements are set forth in its Surface Mining Blasting Rule at Title 199, and the State does not want to have redundant blasting requirements in its Surface Mining Reclamation Rules. The deleted requirements are set forth in the State's Surface Mining Blasting Rule at Subsections 3.3, 3.5, 3.6, 3.7, 3.8 and 4. Because these blasting requirements are set forth in the State's Surface Mining Blasting Rule, we find that the deletion of these blasting requirements does not render the State's Surface Mining Reclamation Rules less effective than the Federal blasting requirements, and the deletion of these subsections is approved.

Proposed Subparagraph 3.6.c.1 differs slightly from deleted Subparagraph 6.5.c.1 in that the heading has been modified to read "Lower frequency limit of measuring system maximum level, in Hz (no more than - 3 dB)." As discussed below in Finding 23, this revision is no less effective than the Federal airblast limits at 30 CFR 816/817.67(b), and the deletion of Subparagraph 6.5.c.1 is approved.

Proposed Subdivision 3.6.g does not include the provision in existing Subdivision 6.5.h that is to be deleted and which provides that, "The Secretary may prohibit blasting on specific areas where it is deemed necessary for the protection of public or private

property or the general welfare and safety of the public.” A similar existing, unmodified requirement at Subsection 3.11 provides that the Secretary may prohibit blasting or may prescribe distance, vibration and airblast limits on specific areas, or on a case by case basis, where research establishes it is necessary, for the protection of the public or private property, or the general welfare and safety of the public. Although similar, this provision is less effective than the Federal requirements in that the Secretary’s action is limited to where research establishes that a prohibition is necessary to protect the public, private property or general welfare and safety of the public. Unlike the existing State provision at Subsection 3.11, the Federal requirements at 30 CFR 816.64(a) provide in part that the regulatory authority may limit the area covered, timing, and sequence of blasting if such limitations are necessary and reasonable in order to protect the public health and safety or welfare. Therefore, we are not approving the State’s proposed deletion of Subdivision 6.5.h, which provides that the Secretary may prohibit blasting on specific areas where it is deemed necessary for the protection of public or private property or the general welfare and safety of the public.

Proposed Subdivision 3.8.a, unlike existing Subdivision 6.8.a, neither requires the operator inform all residents or owners of manmade dwellings or structures located within one half (1/2) mile of the permit area on how to request a pre-blast survey nor requires the resident or owner of the structure to submit a written request to the Secretary for the operator to conduct such survey. The State’s distance requirements regarding pre-blast surveys are set forth in State law at WVSCMRA 22-3-13a and are not repeated in the rules to avoid redundancy. As discussed in the November 12, 1999, **Federal Register**, OSMRE determined that the State’s pre-blast survey requirements at

WVSCMRA 22-3-13a(a) and (b) provide for no less effective blasting controls of surface coal mining operations than do the provisions of SMCRA section 515(b)(15)(E), and are, therefore, not inconsistent with section 515(b)(15)(E) (64 FR 61509). Based on this prior determination, the deletion of Subdivision 6.8.a is approved.

Unlike existing Subparagraph 6.8.a.1, proposed Subdivision 3.8.a does not require residents or owners of dwellings or structures to submit a written request to the Secretary for a pre-blast survey. Proposed Subdivision 3.8.a implies that either the operator or the operator's designee will perform the pre-blast survey without the written request of the occupant or owner of the dwelling or structure, unless said occupant or owner has waived the right to a pre-blast survey. In practice, we know that the operator submits a notice to the occupant or owner of the dwelling or structure, and the owner or occupant completes a pre-blast survey request (Form EB-39A) if they want a pre-blast survey or a waiver (Form EB-39B) if they do not want one. If a pre-blast survey is not conducted, the operator completes a pre-blast survey affidavit (Form EB-39C) explaining why it was not conducted. As discussed, the State's aforementioned forms provide that a pre-blast survey will be conducted by the operator or the operator's designee upon written request of the owner or occupant.

In addition, the State's statutory provisions at WV Code 22-3-13a provide that an operator or his designee must make, in writing, a notice to all owners and occupants of man-made dwellings or structures that the operator or his designee will perform the pre-blast surveys. Although the State's written notice requirements are somewhat different, we find that together the State's pre-blast survey forms, written notification requirements at proposed Subdivision 3.8.a, and its pre-blast survey requirements at WV Code 22-3-

13a are no less stringent than and no less effective than the Federal pre-blast survey requirements at SMCRA section 515(b)(15)(E) and 30 CFR 816.62 and 817.62, and the deletion of existing Subparagraph 6.8.a.1 is approved. Any future change in the aforementioned forms by the State cannot be done without OSMRE's prior approval. Otherwise, the State will be expected to modify its pre-blast survey requirements at Subdivision 3.8.a to specifically provide that a resident or owner of a dwelling or structure within 1/2 mile of any part of the permit area may request a pre-blast survey. Therefore, we are approving proposed Subdivision 3.8.a and the deletion of Subparagraph 6.8.a.1 with these understandings.

Finally, proposed Subdivision 3.8.b, unlike existing Subparagraph 6.8.a.3, does not require that a written report of the pre-blast survey be prepared and signed by the person or persons approved by the Secretary who conducted the survey. However, the State statute at WVSCMRA 22-3-13a(f)(5) requires the pre-blast survey to include the name, address, and telephone number of the person or firm performing the pre-blast survey, and the statute at WVSCMRA 22-3-13a(f)(18) requires the signature of the person conducting the pre-blast survey. In addition, Subdivision 3.10.a requires that pre-blast surveys be submitted on forms prescribed by the Secretary. The State's pre-blast survey form (EB-40) requires the surveyor in training, if applicable, and the approved surveyor to sign and date the form. Therefore, we find that Subdivision 3.8.b, when read in combination with WVSCMRA 22-3-13a(f)(5) & (18) and Subdivision 3.10.a, is no less effective than the Federal pre-blast survey requirements at 30 CFR 816.62(b) and 817.62(b), and the deletion of Subparagraph 6.8.a.3 is approved.

11. CSR 38-2-7.4.b.1.J.1.(c) Front Faces of Valley Fills

This amendment proposes to add language that was previously removed and not approved by OSMRE in the March 2, 2006, **Federal Register** (71 FR 10776).

West Virginia is proposing to amend Subparagraph 7.4.b.1.J.1.(c) by reinstating the following language:

7.4.b.1.J.1.(c) Surface material shall be composed of soil and the materials described in Subparagraph 7.4.b.1.D.

As discussed in the March 2, 2006, **Federal Register** notice, the State revised Subparagraph 7.4.b.1.J by deleting the requirement that the surface material be composed of soil and the materials described in Subparagraph 7.4.b.1.D. The intent of the change was to ensure that fill faces do not have to be covered with four feet of surface material. However, the effect of the deletion of subparagraph (c) was that the front faces of fills were exempt from all of the requirements of this rule, except for those set forth in Subparagraph 7.4.b.1.J. The revised State rule would not require topsoil or topsoil substitutes to be redistributed on fill faces. Because OSMRE did not approve the deletion of Subparagraph 7.4.b.1.J.1.(c), the provision, in essence, remained in the West Virginia approved program.

WVDEP proposes to resolve this issue by reinserting Subparagraph 7.4.b.1.J.1.(c) into its commercial forestry and forestry rules. We find that the proposed State revision at Subparagraph 7.4.b.1.J.1.(c) is no less effective than the Federal topsoil redistribution requirements at 30 CFR 816.22(d)(1) and 816.71(e)(2), and it is approved. Furthermore, we are amending and reserving 30 CFR 948.12(i)(2) to implement this decision.

12. CSR 38-2-14.15.c.2 Reclaimed Areas: Calculation of Disturbed Areas

This amendment proposes to clarify contemporaneous reclamation rules and bonding of excess spoil disposal fills by deleting “area is available to do so;” and adding “first two lifts are in and are seeded” at the end of the subparagraph.

The provisions at Subparagraphs 14.15.c.1 through 14.15.c.4 set forth the criteria for that area which is not to be included in the calculation of disturbed area.

Subparagraph 14.15.c.2 is being amended to provide that an area would not be considered to be disturbed if it is within the confines of the excess spoil fill, which is being constructed from the toe up and the first two lifts have been installed and seeded. As such, these areas would appear to be exempt from the contemporaneous reclamation requirements. However, as noted below, the approved program, even after approval of the proposed change to 14.15.c.2, preserves the contemporaneous reclamation requirement for excess spoil fills.

The Federal contemporaneous reclamation requirements at 30 CFR 816.100 and 817.100 provide in part that reclamation efforts, including but not limited to backfilling, grading, topsoil replacement and revegetation, on all land that is disturbed by surface mining activities must occur as contemporaneously as practicable. Given this limited requirement and the fact that all excess spoil fills must be constructed contemporaneously as provided by Subdivision 14.15.d, we find that the proposed revision to the State’s contemporaneous reclamation provisions at Subparagraph 14.15.c.2, which define the areas that are not included within the calculation of disturbed area, does not render the West Virginia rule less effective than the Federal contemporaneous reclamation requirements at 30 CFR 816.100 and 817.100, and it is approved.

13. CSR 38-2-14.15.d.3 Excess Spoil Disposal Fills: Bonding Proposed Fill Areas

This amendment proposes to clarify the contemporaneous reclamation and bonding requirements of certain excess spoil disposal fills by deleting the phrase “to use single lift top down construction” and adding “with erosion protection zones” after the word “designed.”

Top down fills are often referred to as end dump fills. The State requirements at Subdivision 14.14.g provide that durable rock fills may only be approved if they are constructed from the toe upward or in a single lift with an erosion protection zone. As proposed, all single lift fills must now be constructed with erosion protection zones. In addition, any operation that proposes a durable rock fill that is designed with an erosion protection zone must bond the fill area with the required maximum bond of \$5,000 per acre.

By continuing to require bonding at the maximum, site-specific, per-acre amount for these durable rock fills, the proposed requirement will continue to ensure the protection of the State’s alternative bonding system, Special Reclamation Fund, should an operator forfeit the bond and fail to complete the reclamation of a single lift, durable rock fill with an erosion protection zone. Although there is no direct Federal counterpart to this provision, we find that the proposed addition of the reference to erosion protection zones at Subparagraph 14.15.d.3 is consistent with the Federal requirements at 30 CFR 800.14, 816.71, and 816.100, and it is approved.

14. CSR 38-2-14.15.e Applicability

This amendment proposes to remove the applicability schedule that expired in 2004. The applicability schedule regarding the implementation of contemporaneous reclamation plans at Subparagraphs 14.15.e, 14.15.e.1 and 14.15.e.2 are removed completely and 14.15.e.3 is renumbered as 14.15.e.

These requirements set forth the dates by which active and inactive operations had to modify their mining and reclamation plans to comply with the revised excess spoil requirements at Subdivision 14.15.d. The State is proposing to delete these requirements, because all existing permit applications have been modified to comply with Subdivision 14.15.d.

Although there are no direct Federal counterparts to the subparagraphs that the State proposes to delete, we find that the proposed deletion of the applicability requirements at Subparagraphs 14.15.e, 14.15.e.1 and 14.15.e.2 and the renumbering of Subdivision 14.15.e is not inconsistent with the Federal excess spoil permitting requirements at 30 CFR 780.35, and the proposed deletion of these subparagraphs is approved.

15. CSR 38-2-19.9 Land Exempt From Designation as Unsuitable for Surface Coal Mining Operations.

The State proposes to amend its requirements at Subsection 19.9 regarding land exempt from designation as unsuitable for surface coal mining operations. Specifically, WVDEP proposes to amend Subparagraph 19.9.a.2 by changing the word “and” to “or.”

As amended, Subdivision 19.9.a will provide that the requirements of this section do not apply to:

- 19.9.a.1. Lands on which surface coal mining operations were being conducted prior to August 3, 1977;
- 19.9.a.2. Lands covered by a permit issued after August 3, 1977; or
- 19.9.a.3. Lands where substantial legal and financial commitments in surface coal mining operations were in existence prior to January 4, 1977.

The proposed change at Subparagraph 19.9.a.2 is to correct an apparent error that has existed in the State’s Surface Mining Reclamation Regulations. As proposed, any of the three situations mentioned above would be exempt from the State’s lands unsuitable requirements at Subsection 19.7. We find that the proposed revision to Subparagraph 19.9.a.2 is no less effective than the Federal lands unsuitable requirements at 30 CFR 762.13, and it is approved.

16. CSR 38-2-23.3 Water Quality – Coal Remining Operations

This amendment proposes to make the State’s remining rule consistent with the proposed changes in the State’s National Pollutant Discharge Elimination System (NPDES) rules by deleting the phrase “which began after February 4, 1987, and on a site which was mined prior to August 3, 1977,” after “operation:”

- deleting “water quality exemptions” and adding “effluent limitations” after “the;”
- adding “Title 47 Series 30 subdivision” and deleting “Subsection” and adding “6.2.d.” after “in;” and
- deleting “subsection (p), section 301 of the Federal Clean Water Act, as amended or a coal remining operation as defined in 40 CFR Part 434 as amended may qualify for the water quality exemptions set forth in 40 CFR Part 434 as amended.”

The State is revising its remining requirements to comply with the coal remining provisions adopted by the U.S. Environmental Protection Agency (EPA) on January 23, 2002 (67 FR 3370-3410). Coal remining operation, as defined by 40 CFR 434.70(a), means a coal mining operation at a site on which coal mining was previously conducted and where the site has been abandoned or the performance bond has been forfeited. The EPA established a Coal Remining Subcategory at Subpart G, 40 CFR 434.70 through 434.75, to address pre-existing discharges. The references to February 4, 1987, and subsection (p), section 301 of the Clean Water Act (CWA) are deleted because the EPA based its coal remining rules on section 304(b) of the CWA, rather than section 301(p), known as the Rahall Amendment. In response to a comment, the EPA noted that the authority for its coal remining rule is section 304(b) of the CWA, which requires the EPA to adopt and revise regulations providing guidelines for effluent limitations as appropriate. The Rahall Amendment, section 301(p) of the CWA, provided specific authority for modified, less stringent effluent limitations for specified coal remining operations. Because the effluent limitations guidelines for the Coal Mining Point Source Category did not provide any different requirements for coal remining operations, the Rahall Amendment provided the only basis for issuing permits containing modified requirements to remining operations. In promulgating regulations adopting effluent limitation guidelines for the coal remining subcategory, the EPA noted that its new remining requirements are consistent with, but not necessarily identical to, the provisions of the Rahall Amendment. According to the EPA, the applicability of these effluent limitation guidelines to remining operations on abandoned mine lands abandoned after the enactment of SMCRA is within its discretion under section 304(b) of the CWA.

The State's effluent limitation requirements are set forth at CSR 47-30-6.2. In response to the Federal NPDES remining rule changes, Subsection 6.2.d was amended to include effluent limitation provisions for coal remining operations.

It should be noted that WVDEP has incorrectly referenced the wrong Title in its CSR. WVDEP understands that the remining variance should be issued in accordance with the procedural rules at 46CSR6, not 47CSR6. There are no procedural rules at 47CSR6. However, there are procedural rules governing site-specific revisions to water quality standards at 46CSR6. Therefore, we recommend that the State correct the cross reference in its coal remining rules or modify its procedural rules and include them in Title 47. Nevertheless, given the EPA's changes to its remining rules at 40 CFR Part 434, Subpart G, and the subsequent changes made by the State to its coal remining rules at CSR 47-30-6.2.d, we find that the State's proposed revisions to Subsection 23.3 regarding effluent limitations for coal remining operations are no less effective than the Federal hydrologic balance requirements at 30 CFR 816.42 and 817.42, and they are approved. We must caution, however, that these remining requirements do not relieve the State regulatory authority of its duty to use bond forfeiture proceeds to remedy problematic polluttional discharges at bond forfeiture sites.

17. CSR 38-2-23.4 Requirements to Release Bonds

This amendment, which relates to bond release for coal remining operations, proposes to delete the following language: "and the terms and conditions set forth in the NPDES Permit in accordance with subsection (p), section 301 of the Federal Clean Water Act, as amended or 40 CFR Part 434 as amended."

The State is revising its bond release requirements for coal remining operations. As proposed, coal remining operations will have to comply with the same bond release standards as regular coal mining operations, which include compliance with all the terms and conditions of the NPDES permit prior to bond release. The references to subsection 301(p) of the CWA and to 40 CFR part 434 are being deleted because, as explained above in Finding 16, new coal remining permits may, in some instances, qualify for NPDES effluent limitations pursuant to subsection 304(b) of the CWA and under Title 47 Series 30 Subdivision 6.2.d of the West Virginia NPDES Rules for Coal Mining Facilities. The general provision remaining in Subsection 23.4 requires compliance with the NPDES permit, issued under any of the above-referenced authorities, as a prerequisite to final bond release.

As amended, the revised State bond release requirements at Subsection 23.4 for coal remining operations are no less effective than the Federal requirements at 30 CFR 800.40, 816.42, 816.106, 817.42, and 817.106, and the revisions are approved.

Pursuant to Committee Substitute for Senate Bill 373, West Virginia proposes the following amendments to its Surface Mining Blasting Rule at Title 199 CSR 1:

18. Title 199 – Surface Mining Blasting Rule CSR 199-1-2 Definitions

Various definitions relating to blasting at CSR 199-1-2 are amended by non-substantive grammatical changes, such as putting all definition terms in quotation marks; changing the term “Office of Explosives and Blasting” to “Secretary;” deleting the definitions of “Office” and “Chief” because those terms are no longer used in this rule; and renumbering of definitions due to additions and/or deletions of terms. In addition,

there are similar changes in other sections throughout this rule. The proposed revisions are consistent with statutory changes at West Virginia Code 22-1-2 and 22-1-7 relating to the organization of offices within the WVDEP and no less effective than the Federal requirements regarding the state regulatory authority at 30 CFR 700.5. Given the non-substantive nature of these proposed changes, no further determinations will be made with respect to such revisions in subsequent sections described herein.

The following substantive revisions at CSR 199-1-2 are as follows:

At Subsection 2.8, “Blast Site” is amended and means the area where explosive material is handled during loading into boreholes. This includes the perimeter area formed by the loaded blast holes as measured, 50 feet in all directions from the collar of the outermost loaded borehole; or that area protected from access by a physical barrier to prevent entry to the loaded blast holes. The term “blast site” is not defined in either SMCRA or its implementing regulations. However, we find the proposed revision to the State’s definition of blast site at Subsection 2.8 to be no less effective than the Federal regulations at 30 CFR 816.61, 816.64, 817.61, and 817.64, all of which refer to a “blasting site,” and the revision is approved.

At Subsection 2.27, “Other Structure” is new and means any man made structure excluding “protected structures” within or outside the permit areas which includes but is not limited to, gas wells, gas lines, water lines, towers, airports, underground mines, tunnels, bridges, and dams. The term does not include structures owned, operated, or built by the permittee for the purpose of carrying out surface mining operations.

The Federal regulations at 30 CFR 816.67(b)(1)(i) and (d)(2)(i) and 817.67(b)(1)(i) and (d)(2)(i) define protected structures to include any dwelling, public building, school, church, or community or institutional building outside the permit area. The Federal regulations at 30 CFR 816.67(d)(1) and 817.67(d)(1) also provide that all structures, except protected structures, in the vicinity of the blasting area such as water towers, pipelines and other utilities, tunnels, dams, impoundments, and underground mines must be protected from damage by establishment of a maximum allowable limit on the ground vibration submitted by the operator in the blasting plan and approved by the regulatory authority. The preamble to the Federal regulations clarifies that 30 CFR 816.67(d)(1) and 817.67(d)(1) set levels for structures other than buildings (48 FR 9788, 9800, March 8, 1983). The burden for setting limits for these other structures is on the operator and regulatory authority. In addition, such limits would be for all structures in the vicinity of the blasting area. While not specifically defined in the regulation or its accompanying preamble, the phrase “in the vicinity of the blasting area” is broad enough to include structures within and outside of the permit area. We construe the phrase to include structures within and outside of the permit area, in order to ensure that the regulatory authority has ample authority to protect those structures within the vicinity of the blasting because damage to such structures, including those within the permit area, could lead to damage to public and private property outside the permit area, or adverse impacts to underground mines in contravention of section 515(b)(15)(C) of SMCRA, 30 U.S. C. 1265(b)(15)(C). As discussed in the November 12, 1999, **Federal Register**, WVDEP inadvertently deleted language at West Virginia Code section 22-3-13(b)(15)(C), which was the State’s statutory counterpart to SMCRA section

515(b)(15)(C); it acknowledged that reinserting the deleted language would remove any uncertainty relative to the authority of WVDEP to protect the public from the effects of blasting (64 FR 61507, 61509, November 12, 1999). Fortunately, the approved West Virginia program still contains a regulatory counterpart to section 515(b)(15)(C), at CSR 199-1-3.6.a. However, we recommend that West Virginia reinsert the deleted statutory language at West Virginia Code section 22-3-13(b)(15)(C) to ensure the protection of the public from the effects of blasting.

The Federal regulations at 30 CFR 816.67(e) and 817.67(e) exclude from airblast and ground vibration limits structures owned by the permittee and those owned by the permittee and leased to another person, if a written waiver is obtained from the lessee. The 1979 predecessor to these exemption provisions, at former 30 CFR 816.65(e)(1) and 817.65(e)(1), clearly stated that the exemption from the numerical airblast limits was applicable only to the buildings designated as protected structures, i.e., dwellings, public buildings, schools, churches, commercial, or institutional structures. (“If a *building* owned by the person conducting surface mining activities is leased to another person, the lessee may sign a waiver relieving the operator from meeting the airblast limitations of this paragraph.” 30 CFR 816.65(e)(1) (March 13, 1979, repealed March 8, 1983) (emphasis added). While the exemption from numerical ground vibration limits did not explicitly apply exclusively to these aforementioned buildings, it is logical to interpret the exemption in this fashion, because these buildings were, and remain currently, the only structures otherwise subject to the numerical ground vibration limits set forth in the Federal regulations. 30 CFR 816.65(j) and 817.65(j) (March 13, 1979, repealed March 8, 1983). These provisions were reworded and moved to 30 CFR 816.67(e) and 817.67(e)

in 1983; however, there was no discussion of any change in meaning to the exemptions from the manner in which they were created in 1979. 48 FR at 9802-3 (March 8, 1983). Therefore, we believe the “permittee-owned” exemption applies only to dwellings, public buildings, schools, churches, commercial or institutional structures, and not to other structures, such as water towers, pipelines, other utilities, tunnels, dams, impoundments, and underground mines, for which there must be site-specific numerical ground vibration limitations that are proposed by the operator in the blasting plan and approved by the regulatory authority. 30 CFR 816.67(d)(1).

However, the State’s proposed definition of “other structure” does not include structures owned, operated, or built by the permittee for the purpose of carrying out surface mining operations. Therefore, structures such as pipelines, dams, impoundments, or underground mines that are owned, operated, or built by the permittee, whether within or outside the permit area, would be exempted from the ground vibration limits that apply, under CSR 199-1-3.7a., to “other structures.” As such, the definition would render the State’s program less effective than the Federal regulations at 30 CFR 816.67(d)(1) and 817.67(d)(1), which contains no exemption from ground vibration limits for structures owned, operated, or built by the permittee. For this reason, we are not approving the last sentence of the definition of other structure at CSR 199-1-2.27, which states that “[t]he term does not include structures owned, operated, or built by the permittee for the purpose of carrying out surface mining operations.”

At Subsection 2.35, the definition of “Secretary” is substantively identical to former Subsection 2.23 and means the Secretary of the Department of Environmental Protection or the Secretary’s authorized agent. We find that the proposed change at

Subsection 2.35 is no less effective than the Federal requirements with respect to the State regulatory authority as set forth at 30 CFR 700.5, and it can be approved.

At Subsection 2.36, “Structure” is amended and means “a protected structure” or “other structure,” which is any manmade structure within or outside the permit areas and which includes, but is not limited to, dwellings, outbuildings, commercial buildings, public buildings, community buildings, institutional buildings, gas lines, water lines, towers, airports, underground mines, tunnels, and dams. In addition, the term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation. We find the revision to the definition of structure at Subsection 2.36 to be consistent with the Federal requirements pertaining to structures at 30 CFR 816.67(d) and 817.67(d), and the revision is approved.

However, we are taking this opportunity to re-examine the exemption for structures built and/or utilized for the purpose of carrying out the surface mining operation at CSR 38-2-2.119 and 199-1-2.36. While this exemption was approved on January 21, 1981, as part of the original program approval (46 FR 5915), we now believe it must be disapproved, for the same reasons that we are disapproving a similar exemption to the definition of “other structure,” as discussed above in this finding. The reason for our change in position is that we did not believe, until West Virginia submitted the definition of “other structures” in this amendment, that the State intended to exempt non-building type structures, such as gas lines, water lines, towers, airports, underground mines, tunnels, or dams from ground vibration limits. We now have reason to believe, however, that the exemptions in the definitions of “structure” and “other structure” will apply to these structures. Therefore, we are revoking our prior approvals and are not

approving the following sentences in the State's definitions of "structure" at CSR 38-2-2.119 and 199-1-2.36: "The term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation."

At Subsection 2.37, "Supervised a Blasting Crew" is amended and means a person that is responsible for the conduct of a blasting crew(s) and/or that the crew(s) is directed by that person. Though it has no Federal counterpart, the revised definition of supervised a blasting crew at Subsection 2.37 is no less effective than the Federal requirements relating to blasters at 30 CFR 816.61 and 817.61, and it is approved.

At Subsection 2.38, "Surface Mine Operations" is amended and means all areas of surface mines, and surface area of underground mines (including shafts and slopes), areas ancillary to these operations, and the reclamation of these areas, 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. As discussed in the December 10, 2003, **Federal Register** notice, OSMRE approved the State's previous definition with the understanding that it only intends to exclude "underground workings" from the definition of surface mine and surface area of underground mines (68 FR 68724, 68729). The revised definition of "surface mine operations" at proposed Subsection 2.38 resolves our earlier concern. We find Subsection 2.38 to be no less effective than the Federal definition of surface coal mining operations at 30 CFR 700.5, and the revision is approved.

At Subsection 2.39, "Worked on a Blasting Crew" is amended and means that a person has first-hand experience in storing, handling, transporting, and using explosives,

and has participated in the loading, connecting, and initiation processes of blasting, and has experience in blasting procedures, and preparation of blast holes. While it has no direct Federal counterpart, the revised State definition of “worked on a blasting crew” at Subsection 2.39 is no less effective than the Federal blasting requirements at 30 CFR 816.61 and 817.61 and is approved.

19. CSR 199-1-3.2 Blasting Plans

Subparagraph 3.2.a.5, regarding blasting plans, is amended by adding language to minimize, not reduce, dust outside the permit area. Though it has no direct Federal counterpart, the proposed State revision at Subparagraph 3.2.a.5 is consistent with the Federal blasting plan requirements at 30 CFR 780.13, and it is approved.

Subdivision 3.2.b, regarding blasting plans, is amended by requiring that the person conducting the review must be experienced in common blasting practices used on surface mining operations and must be a certified inspector. In addition, the reviewer will take into consideration the proximity of individual dwellings, structures, or communities to the blasting operations. These two new requirements have no direct Federal counterparts; however, we find that the proposed State revisions at Subdivision 3.2.b are consistent with the Federal blasting plan requirements at 30 CFR 780.13, and the revisions are approved.

Subdivision 3.2.c is amended to provide that the blasting plan must also contain an inspection and monitoring procedure to ensure that all blasting operations are conducted to minimize, not eliminate, to the maximum extent technically feasible, adverse impacts to the surrounding environment and surrounding occupied dwellings. In

addition, this subdivision is amended to provide that all seismographs used to monitor airblast or ground vibrations or both must comply with the International Society of Explosives Engineers (ISEE) Performance Specifications for Blasting Seismographs. The ISEE standards referenced in the revised State rule include the ISEE Performance Specification for Blasting Seismographs copyright 2000 and the ISEE Field Practices Guidelines for Blasting Seismographs copyright 1999, which is referenced therein. Copies of the ISEE Performance Specifications and the Field Practice Guidelines have been included in the administrative record and are available for public review (Administrative Record Number WV-1503A). We find that the proposed revisions at Subdivision 3.2.c are consistent with the Federal blasting plan requirements at 30 CFR 780.13(a) and (b), and the revisions are approved.

Subdivision 3.2.d is amended to provide that for operations where a blasting related notice of violation (NOV) or cessation order (CO) has been issued, the Secretary must review the blasting plan as soon as possible and no later than thirty (30) days of final disposition of the NOV or CO. As currently written, the subdivision requires only that the plan be reviewed within 30 days of final disposition of the NOV or CO, without the additional requirement that the plan be reviewed “as soon as possible.” While there is no specific Federal counterpart to this revision, we find that the proposed State revision at Subdivision 3.2.d is no less effective than the Federal requirements at 30 CFR 816.61(d)(5) and 817.61(d)(5), and it is approved.

Subdivision 3.2.e relating to the review of a blasting plan where an enforcement action has been taken by the State is deleted in its entirety. The provisions to be deleted provide: “Where a notice of violation (NOV) or cessation order (CO) has been issued;

the Office must 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 Secretary may require that the blasting plan be modified to insure all precautions are being taken to safely conduct blasting operations.” The requirements at Subdivision 3.2.e are redundant with those at Subdivision 3.2.d. Therefore, we approve of the deletion of these requirements.

20. CSR 199-1-3.3 Public Notice of Blasting Operations

Subparagraph 3.3.a, relating to public notice of blasting operations, is amended by requiring that at least ten (10) days, but not more than thirty (30) days, prior to commencing any blasting operations that detonate five (5) pounds or more of explosives at any given time, the operator must publish a blasting schedule in a newspaper of general circulation in all the counties of the proposed permit area. The operator must republish and redistribute the schedule at least every twelve months in the same manner above. In addition, new language provides that the permittee must retain proof of publication.

We find the revisions to the State’s blasting schedule requirements at Subdivision 3.3.a to be no less effective than the Federal blasting schedule requirements at 30 CFR 816.64(b), and the revisions are approved.

At Subparagraph 3.3.b.1, existing language is deleted, and new language is added related to the placement of signs for “Blasting Areas” at the edge of any site that is within 100 feet of any public road and where any road provides access to the blasting area.

We find the revised State provision regarding blasting signs at Subparagraph 3.3.b.1 to be substantively identical to, and, therefore, no less effective than the Federal blasting requirements at 30 CFR 816.66(a)(1) and 817.66(a)(1), and it is approved.

At Subparagraph 3.3.b.2, existing language is deleted, and new language is added for the placement of signs at all entrances to the permit area from public roads for warnings of explosives in use. The sign must also contain a list of the meanings for signals used to give the all-clear and blast warnings and also explain blasting areas and charged holes.

We find the revised State provision regarding blasting signs at Subparagraph 3.3.b.2 to be substantively identical to, and, therefore, no less effective than the Federal blasting requirements at 30 CFR 816.66(a)(2) and 817.66(a)(2), and it is approved.

21. CSR 199-1-3.4 Surface Blasting at Underground Mines

This amendment proposes to add a new Subdivision, 3.4.b, regarding the regulation of surface blasting at underground mines.

This provision is intended to clarify the applicability of State's blasting requirements in the development of shafts and slopes associated with underground mining activities. The proposed requirement is intended to resolve past confusion regarding the State's responsibility in regulating underground blasting activities relating to the development of shafts and slopes and to clearly provide how the State's Surface Mining Blasting Rule applies with regard to such development.

We find that the new State provision at Subdivision 3.4.b is no less effective than the Federal requirements regulating surface blasting activities incident to underground

coal mining activities at 30 CFR 817.61, and it is approved. To ensure compliance with the monitoring obligations under Subdivision 3.4.b, we recommend that the State require the blaster to maintain a blasting log on a daily basis and conduct regular monitoring of ground vibration and airblast limits through the use of a seismograph, etc. during the development of the shaft or slope until it intersects the coal seam to be mined.

22. CSR 199-1-3.5 Blast Record

Subdivision 3.5.a is amended to require that the blasting log book be on forms formatted in a manner prescribed by the Secretary. We find the proposed amendment at Subdivision 3.5.a to be no less effective than the Federal blasting requirements at 30 CFR 816.68 and 817.68, and it is approved.

Subdivision 3.5.c is amended to provide that the blasting log must contain, at a minimum, but not limited to, the following information:

- Subparagraph 3.5.c.1 is amended to require the name of the company conducting blasting;
- Subparagraph 3.5.c.2 is amended to require the Article 3 permit number and shot number;
- Subparagraph 3.5.c.4 is amended to require the identification of nearest protected structure and nearest other structure not owned or leased by the operator, and indicate the direction and distance, in feet, to both such structures;
- Subparagraph 3.5.c.5 is amended to require estimated wind direction and speed;
- Subparagraph 3.5.c.6 is amended by adding a proviso to identify material blasted, including rock type and description of conditions;

- Subparagraph 3.5.c.9 is amended to require a description of different quantities of explosives used;
- Subparagraph 3.5.c.14 is amended to require type and length of decking;
- Subparagraph 3.5.c.15 is amended to require a description of use of blasting mats or other protective measures used;
- Subparagraph 3.5.c.16 is amended to require the quantities of delay detonators used;
- Subparagraph 3.5.c.17 is amended by adding the words “when required” in relation to seismograph records and air blast records;
- Subparagraph 3.5.c.17.A is amended to require that seismograph and air blast readings include trigger levels, frequency in Hz, and full waveform readings, all of which must be attached to the blast log;
- Subparagraph 3.5.c.17.B is amended to require the name of person who installed the seismograph, as well as the name of person taking the readings;
- Subparagraph 3.5.c.17.D is amended to require certification of annual calibration in addition to, rather than in lieu of, submitting the type of instrument, its sensitivity and calibration signal;
- Subparagraph 3.5.c.18 is amended to require that the shot location be identified with use of blasting grids as found on the blast map, GPS, or other methods as defined by the approved blast plan;
- Subparagraph 3.5.c.19 is amended by deleting the requirement for a sketch of the delay pattern for all decks and to require a detailed sketch of delay pattern, including the detonation timing for each hole or deck in the entire blast pattern,

borehole loading configuration, north arrow, distance and directions to structures;
and

- Subparagraph 3.5.c.20 is amended to require the reasons and conditions to be noted in the blasting log for misfires, any unusual event, or violation of the blast plan.

We find that all of the proposed State revisions at Subdivision 3.5.c regarding information to be contained in a blasting log, are no less effective than the Federal blast record requirements at 30 CFR 816.68 and 817.68, and the revisions are approved.

23. CSR 199-1-3.6 Blasting Procedures

Subparagraph 3.6.b.2 is amended to require that all approaches to the blast area remain guarded until the blaster signals the “all clear.” We find that the proposed revision to the State’s safety precaution requirements at Subparagraph 3.6.b.2 is no less effective than the Federal requirements at 30 CFR 816.66 and 817.66, and it is approved.

Subparagraph 3.6.c.1 regarding airblast limits is amended to provide that the maximum level in Hz be no more than -3dB. In addition, Footnote 1 was added to clarify that airblast is a flat response from 4 to 125 Hz range; and at 2 Hz airblast, the microphone can have an error of no more than -3dB. Footnote 2 was added to clarify that the use of the frequency limits of 0.1 Hz or lower -- flat response or C-weighted -- slow response requires the Secretary’s approval.

The +/- 3 dB requirement in the Federal rules at 30 CFR 816.67(b)(1)(i) and 817.67(b)(1)(i) defines the frequency response limit of the measuring instruments and not the accuracy of the measuring system. It is not a tolerance allowed to the operator in

meeting the standard, but rather an instrument manufacturing standard. For example, an instrument with a 2 Hz lower frequency range would be allowed to have no more or less than a 3 dB variance from the actual sound level present at 2 Hz to define the lower range of the system. In other words, if the microphone input sound was 133 dB at 2 Hz, the reported value could be between 130 and 136 dB and the instrument could be specified to have a lower frequency response of 2 Hz. This value, either high or low, is then digitally adjusted to the actual sound level present (133 dB). Furthermore, all microphones that are part of blasting seismographs manufactured today are in compliance with the ISEE Performance Specifications for Blasting Seismographs. This standard defines the lower response frequency of the system as being 3 dB down (-3 dB) at 2 Hz. No blasting seismographs currently manufactured define the lower frequency response with the +3 dB criteria. The State specifies that the lower frequency response be down 3 dB (-3dB) only. By specifying the low end value only, the State rule is no less effective than the Federal rule because the specification for defining the lower response range is within the range specified by OSMRE, and it is within the current industry standard. Therefore, we find that the proposed revisions, including Footnotes 1 and 2, at Subparagraph 3.6.c.1 are not inconsistent with the Federal airblast requirements at 30 CFR 816.67(b)(1)(i) and 817.67(b)(1)(i), and the revisions are approved.

Subparagraph 3.6.c.3 is amended to require that all seismic monitoring follow the ISEE Field Practice Guidelines for Blasting Seismographs, unless otherwise approved in the blasting plan. We find that the proposed State revision regarding seismic/airblast monitoring is no less effective than the Federal blasting requirements at 30 CFR 816.67(b)(2) and 817.67(b)(2), and it is approved.

Subdivision 3.6.g is amended to provide that blasting within five hundred (500) feet of an underground mine not totally abandoned requires the concurrence of the Secretary and the West Virginia Office of Miners Health Safety and Training, in addition to the operator of the underground mine and the Mine Safety and Health Administration. We find the proposed State revision at Subdivision 3.6.g renders that provision substantively identical to, and, therefore, no less effective than, the Federal requirements at 30 CFR 780.13(c) regarding blasting near underground mines. Thus, it is approved.

However, WVDEP is proposing to delete existing provisions in its Surface Mining Reclamation Regulations at CSR 38-2-6.5.h that mirror those in CSR 199-1-3.6.g, but which, in addition, also provide: “The Secretary may prohibit blasting on specific areas where it is deemed necessary for the protection of public or private property or the general welfare and safety of the public.” The Federal requirement at 30 CFR 816.64(a) provides that the regulatory authority may limit the area covered, timing, and sequence of blasting if the regulatory authority determines that such limitations are necessary and reasonable in order to protect the public health and safety or welfare. Because of the Secretary’s inability to limit blasting under its proposed Surface Mining Blasting Rule, we find the proposed deletion of CSR 38-2-6.5.h would render the State program less effective than the Federal blasting requirements at 30 CFR 816.61 through 816.68 and 817.61 through 817.68, and, in particular, 30 CFR 816.64(a). Therefore, as stated above in Finding No. 10, we are not approving the State’s proposed deletion of existing Subdivision 6.5.h in its Surface Mining Reclamation Rules.

Subdivision 3.6.i is amended to require that all seismic monitoring follow the ISEE Field Practice Guidelines for Blasting Seismographs, unless otherwise approved in

the blasting plan. We find that the proposed State revision regarding seismic monitoring is no less effective than the Federal blasting requirements at 30 CFR 816.67(d)(2) and 817.67(d)(2), and it is approved.

Subdivision 3.6.l is amended by adding a reference to 3.6.i in relation to the maximum airblast and ground vibration standards that do not apply to structures owned by the permittee and leased or not leased to another person. We find that the proposed State revision regarding airblast and ground vibration standards at Subdivision 3.6.l is not inconsistent with the Federal blasting requirements at 30 CFR 816.67(e) and 817.67(e), and it is approved.

24. CSR 199-1-3.7 Blasting Control for "Other Structures"

Subdivision 3.7.a is amended by adding language to require that all "other structures" in the vicinity of the blasting area be protected from damage by the limits specified in paragraph 3.6.c.1 subdivisions 3.6.h. and 3.6.i. of this rule, unless waived in total or in part by the owner of the structure. In addition, the waiver of the protective [limits] sic may be accomplished by the establishment of a maximum allowable limit on ground vibration or air blast limits or both for the structure in the written waiver agreement between the operator and the structure owner. The waiver may be presented at the time of application in the blasting plan or provided at a later date and made available for review and approval by the Secretary. All waivers must be acquired before any blasts may be conducted [as] sic designed on that waiver. Language requiring that the operator specify the waiver in the blasting plan and that the Secretary approve the waiver is being deleted. In addition, language providing for alternative maximum allowable limits is

being deleted. Given the proposed revisions, the existing language is redundant and appears unnecessary, so it is being deleted by the State.

The Federal regulations specifically set airblast limits for protected structures outside the permit area but not for “other structures.” In addition, they require, at 30 CFR 816.67(a) and 817.67(a), that blasting be conducted so as to prevent damage to public or private property outside the permit area. However, the Federal regulations at 30 CFR 816.67(d) and 817.67(d) require that maximum ground vibration limits be established for both protected and “other structures.” Because the proposed State revision requires, with respect to “other structures,” compliance with the airblast and ground vibration limits for protected structures, the establishment of alternative maximum allowable ground vibration or airblast limits, or both where the owner waives those limits, we find the revisions to Subdivision 3.7.a. to be no less effective than the Federal blasting requirements at 30 CFR 816.67(d) and 817.67(d), and the revisions are approved. However, to minimize confusion, we recommend that the State correct the two apparent typographical errors identified above in brackets.

25. CSR 199-1-3.8 Pre-blast Surveys

The State’s statutory provisions at W. Va. Code 22-3-13a currently requires that an operator or his designee must make, in writing, notifications to all owners and occupants of man-made dwellings or structures that the operator or his designee will perform pre-blast surveys. To ensure consistency with the statutory requirement, WVDEP is proposing to amend Subdivision 3.8. by adding language to provide that at least thirty days prior to commencing blasting, an operator or his designee must notify in

writing, all owners and occupants of manmade dwellings or structures that the operator or the operator's designee will perform pre-blast surveys. In addition, language is added to require that attention be given to documenting and establishing the pre-blasting condition of wells and other water systems, and deleting the word "special" from the requirement that "special" attention be given to the pre-blasting condition of wells and other water systems. We find that the State's proposed pre-blast survey requirements at Subdivision 3.8.a are no less stringent than and no less effective than the Federal pre-blast survey requirements at SMCRA section 515(b)(15)(E) and 30 CFR 816.62(a) and 817.62(a), respectively, and the proposed revisions are approved.

Subdivision 3.8.b is amended by adding language to require: "Surveys requested more than ten (10) days before the planned initiation of the blasting must be completed and submitted to the Secretary by the operator before the initiation of blasting." We find that the proposed pre-blast survey requirement at Subdivision 3.8.b is substantively identical to, and therefore, no less effective than, the Federal pre-blasting survey requirements at 30 CFR 816.62(e) and 817.62(e), and it is approved.

26. CSR 199-1-3.9 Pre-blast Surveyors

Subdivision 3.9.a is amended to require that, at a minimum, individuals applying as a pre-blast surveyor must possess a high school diploma and have a combination of at least two (2) of the following:

- 3.9.a.1 experience in conducting pre-blast surveys, or
- 3.9.a.2 technical training in a construction or engineering related field,
- or
- 3.9.a.3 other related training deemed equivalent by the Secretary.

In addition, language was added to clarify that all applicants must complete the pre-blast surveyor training provided by the Secretary prior to approval to conduct pre-blast surveys. The Secretary may establish a fee for approval and training of pre-blast surveyors. Language is being deleted that provides that experience working as a pre-blast surveyor may be acceptable in lieu of the education requirement.

Subdivision 3.9.c is amended to clarify that every three (3) years after meeting initial qualifications for performing pre-blast surveys, those individuals that have met the requirements of Subdivision 3.9.a. of this rule must submit a written demonstration of qualifications of ongoing experience performing pre-blast surveys. In addition, language was added to provide that those individuals who have no ongoing experience must attend the training required in 3.9.a., and all applicants for re-approval must attend a minimum of four (4) hours continuing education training in a subject area relative to knowledge required for conducting pre-blast surveys. Furthermore, the Secretary must approve the training programs.

Subdivision 3.9.d is amended by adding language to require that individuals who assist in the collection of information for pre-blast surveys must complete, or be registered for, the pre-blast surveyor training provided by the Secretary in 3.9.a. Those registered to attend the next available training on the pre-blast survey requirements may assist in the collection of information for a period of no more than three (3) months if under the direct supervision of an approved pre-blast surveyor. The Secretary must maintain a list of all those individuals who have completed the pre-blast survey requirement training. Subdivision 3.9.d is also amended by deleting language that provides that an individual, who is not an approved pre-blast surveyor, may conduct pre-

blast surveys-working as a pre-blast surveyor-in-training, only if he or she has registered to attend pre-blast surveyor training at the next available opportunity. Pre-blast surveyors-in-training may conduct pre-blast surveys only if he or she is conducting the survey under the direct supervision of an approved pre-blast surveyor. The approved pre-blast surveyor must co-sign any survey conducted by a pre-blast surveyor-in-training. Individuals may work as pre-blast surveyors-in-training for a period of no more than three months, prior to becoming approved pre-blast surveyors.

Subdivision 3.9.e is amended to provide that the Secretary may disqualify an approved pre-blast surveyor and remove the person from the list of approved pre-blast surveyors, if the person allows surveys to be submitted that do not meet the requirements of W. Va. Code 22-3-13a and subsection 3.8 of this rule. In addition, language was added to provide that any person who is disqualified may appeal to the Secretary, and if not resolved, to the Surface Mine Board.

There are no direct Federal counterparts to these requirements. However, we find that the proposed revisions to the State's pre-blast surveyor requirements at Subdivisions 3.9.a, 3.9.c, 3.9.d, and 3.9.e are not inconsistent with SMCRA section 515(b)(15) concerning the use of explosives, the Federal regulations at 30 CFR 816.61, 816.62, 817.61, and 817.62 concerning use of explosives and pre-blasting surveys, and 30 CFR 850.13, 850.14, and 850.15 concerning training, examination, and certification of blasters. Therefore, they are approved.

27. CSR 199-1-3.10 Pre-blast Survey Review

Subdivision 3.10.f is amended by adding language to provide that all persons employed by the Secretary, whose duties include review of pre-blast surveys and training of pre-blast surveyors, must meet the requirements for pre-blast surveyors as set forth in section 3.9. This provision is to ensure that State employees or contractors who review pre-blast surveys or train pre-blast surveyors have the same training, qualifications, and experience as individuals who actually perform pre-blast surveys within the State.

The Federal rules lack specific provisions concerning individuals who review pre-blast surveys or train pre-blast surveyors. However, we find that the proposed addition of Subdivision 3.10.f. is not inconsistent with SMCRA section 515(b)(15) concerning the use of explosives, the Federal regulations at 30 CFR 816.61, 816.62, 817.61, and 817.62 concerning use of explosives and pre-blasting surveys, and 30 CFR 850.13, 850.14, and 850.15 concerning training, examination, and certification of blasters. Therefore, it is approved.

We must also note that our previous concern regarding the confidentiality provision at Subdivision 3.10.d which limits the use of pre-blast surveys for only evaluating blasting claims is still valid, and the approval of that requirement is still limited to the extent described in our December 10, 2003, **Federal Register** notice (68 FR 68731). We approved this provision with the understanding that the phrase, “only used for evaluating damage claims” does not preclude the use of pre-blast surveys to support the issuance of notices of violations, cessation orders, civil penalties or other forms of alternative enforcement action under WVSCMRA and its implementing regulations to achieve the repair of blasting damage and thus resolve a damage claim.

28. *CSR 199-1-4.1 Blaster Certification Requirements*

Subdivision 4.1.a is amended to require that each person acting in the capacity of a blaster and responsible for the blasting operation be certified by the Secretary.

Subdivision 4.1.b is amended to require that each applicant for certification be a minimum of twenty-one (21) years old. In addition, new language was added to provide that “[a]pplicants who have blasting experience prior to the last three years, with documentation, may be considered by the Secretary on a case-by-case basis as qualifying experience for initial certification and re-certification; provided the [retraining] requirements of 4.6.c. apply.”

Subdivision 4.1.c is amended to state that the application for certification be on forms prescribed by the Secretary.

There are no direct Federal counterparts to these requirements. However, we find that the proposed revisions to the State’s blaster certification requirements at Subdivisions 4.1.a, 4.1.b, and 4.1.c are not inconsistent with the Federal blaster certification requirements at 30 CFR 816.61(c), 817.61(c), 850.12(b), and 850.14(a)(2), and the revisions are approved.

29. CSR 199-1-4.2 Training

Subsection 4.2 is amended by adding language to provide that the training program will consist of the West Virginia Surface Mine Blasters Self-Study Guide Course and a classroom review of the self-study guide course. Completion of the classroom review part of the training program may not be required for first time applicants. Furthermore, applicants for certification or applicants for re-certification, who cannot document the experience requirements specified in Subdivision 4.1.b. of this rule, must complete the West Virginia Surface Mine Blasters Self-Study Guide.

Subdivision 4.2.a is amended to provide that, prior to certification, all applicants, not just those who choose self-study, attend a two (2) hour Blaster's Responsibilities training session addressing certified blasters' responsibilities and the disciplinary procedures contained in subsections 4.9 and 4.10 of this rule.

We find that the proposed State revisions to Subsection 4.2 and Subdivision 4.2.a are no less effective than the Federal blaster certification requirements at 30 CFR 850.12(b) and 850.13(a), and the revisions are approved.

30. CSR 199-1-4.3 Examination

Subdivision 4.3.b is amended to clarify that the examination for certified blaster consists of three parts.

Subdivision 4.3.d is amended to state that any person who fails to pass any part of the exam on the second attempt or every other subsequent attempt must certify that he/she has taken or retaken the classroom review training program described in subsection 4.2 of this rule prior to applying for another examination.

There are no direct Federal counterparts to these requirements. However, we find that proposed State revisions to Subdivisions 4.3.b and 4.3.d are not inconsistent with the Federal certified blaster examination requirements at 30 CFR 850.14, and the revisions are approved.

31. CSR 199-1-4.5 Conditions or Practices Prohibiting Certification

Subdivision 4.5.d is amended by adding language to provide that persons who have had their blasters certification suspended or revoked in any other state may be required to show cause as to why they should be considered for certification. As specifically written, the language does not comport directly with our interpretation of the State's intent when combined with the opening sentence of Subsection 4.5. However, in an email conversation with the WVDEP (Administrative Record Number WV-1514), the State indicated the language should read: "Has had their blaster's certification suspended or revoked in any other state. The blasters may be required to show cause as to why they should be considered for certification." Basically, West Virginia will not certify or re-certify anyone who has had their certification in another state suspended or revoked without them showing cause why West Virginia should certify them.

Therefore, while there is no specific Federal counterpart to this State requirement and with this understanding in mind, we find that the proposed revision to Subdivision 4.5.d is not inconsistent with the Federal requirements concerning blaster certification at 30 CFR 850.15(b), and it is approved. However, we recommend that the WVDEP revise the language in Subdivision 4.5.d to match our understanding as provided in the conversation record mentioned above.

32. *CSR 199-1-4.6 Retraining*

Subdivision 4.6.c is amended to clarify that an applicant for recertification who does not meet the experience requirements of Subdivision 4.1.b of this rule must take the training course defined in section 4.2.

While there is no direct Federal counterpart to this requirement, we find that the proposed revision to Subdivision 4.6.c is not inconsistent with the Federal blaster training requirements at 30 CFR 850.13(a) and the Federal blaster recertification requirements at 30 CFR 850.15(c), and it is approved.

33. *CSR 199-1-4.7 Blaster's Certificate*

Subdivision 4.7.d is amended by adding language to clarify that a certified blaster must not take any instruction or direction on blast design, explosives loading, handling, transportation and detonation from a person not holding a West Virginia 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. In addition, a person not holding a West Virginia 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). While these revisions have no direct Federal counterparts, we find that they are not inconsistent with Federal requirements concerning blaster certification at 30 CFR 850.15, and the revisions are approved.

34. *CSR 199-1-4.9.a Suspension and Revocation*

Subparagraph 4.9.a.2 is amended by adding language relating to Imminent Harm Suspension.

Subparagraph 4.9.a.5 is amended by adding language to provide that any blaster receiving a suspension or revocation may appeal the decision to the Secretary and to the Surface Mine Board.

While these revisions have no direct Federal counterparts, we find that they are not inconsistent with the Federal requirements concerning the suspension and revocation of a blaster's certification at 30 CFR 850.15(b), and the revisions are approved.

35. CSR 199-1-4.13 Blasting Crew

Subsection 4.13 is amended to provide that persons who are not certified and who are assigned to a blasting crew, or assist in the use of explosives, must receive directions and on-the-job training from the certified blaster in the technical aspects of blasting operations, including applicable state and Federal laws governing the storage, transportation, and proper use of explosives. We find that the proposed State revision at Subsection 4.13 is no less effective than the Federal blaster training requirements at 30 CFR 850.13(a), and it is approved.

36. CSR 199-1-4.14 Reciprocity with Other States

Subsection 4.14 is amended by adding language to clarify that reciprocity is a one-time only process. New language is also added to clarify: "Any blaster who has been issued a certification through reciprocity and fails to meet the recertification requirements will be required to reexamine and may be required to provide refresher training documentation, as per Subdivision [section] 4.6.a of this rule."

There is no Federal counterpart to the proposed State revision. However, all State coal mining regulatory programs are subject to the same minimum Federal blasting standards. Therefore, we find that the proposed State revision at Subsection 4.14 regarding reciprocity with other States is not inconsistent with the Federal requirements at section 719 of SMCRA and 30 CFR part 850 regarding the training, examination, and certification of blasters, and it is approved.

37. CSR 199-1-5.2 Filing a Blasting Damage Claim

Subdivision 5.2.a is amended to clarify that only a certified inspector will be assigned to conduct a field investigation to determine the initial merit of the damage claim and what such an investigation by a certified inspector is to include.

There is no Federal counterpart to the proposed State revision. However, we find that the revised requirement at Subdivision 5.2.a is not inconsistent with the Federal blasting requirements at 30 CFR 816.61 through 816.68 and 817.61 through 817.68, and it is approved.

Subparagraph 5.2.a.3 is amended to require that the inspector will make a written report on the investigation that describes the nature and extent of the alleged damage, taking into consideration the condition of the structure, observed defects, or pre-existing damage that is accurately indicated on a pre-blast survey, conditions of the structure that existed where there has been no blasting conducted by the operator, or other reliable indicators that the alleged damage actually pre-dated the blasting by the operator.

In addition, language was deleted and added to clarify that the inspector will make one of the following initial determinations and notify the claims administrator, make a

recommendation on the merit of the claim, and supply such information that the claims administrator needs to sufficiently document the claim:

- 5.2.a.3.A. There is merit that blasting caused the alleged damage; or
- 5.2.a.3.B. There is no merit that blasting caused the alleged damage.
- 5.2.a.3.C. The determination of merit as to whether blasting caused or did not cause the alleged damage cannot be made.

The former Subparagraph 5.2.a.5 has been moved to Subparagraph 5.2.a.6 and is also amended to clarify that the determination as to the merit of a claim is to be made by the inspector.

Under the revised procedures, a certified inspector will investigate any claim alleging blasting damage; make an initial determination and notify the claims administrator; make a recommendation on the merit of the claim; and provide the claims administrator information to sufficiently document the claim. As revised, the inspector will initially determine whether or not there is merit that blasting caused the alleged damage. In addition, Subparagraph 5.2.a.3.C allows for the possibility that the determination of merit as to whether blasting caused or did not cause the alleged damage cannot be made. As proposed, a certified inspector will have three options to choose from with respect to the merit of a claim.

We are approving these provisions with the understanding that only the certified inspector will make the determination regarding the fact of violation and the claims administrator/adjuster is primarily responsible for determining the award amount due to the blasting damage. In situations where the determination of merit cannot be made, it is the adjuster's responsibility under Subparagraph 5.4.e to make a preliminary determination of merit and the claims administrator's responsibility under Subparagraph 5.3.d to make a final determination on the merit and loss value of the claim. Regardless,

in all instances, it is the certified inspector's responsibility to make the determination regarding the fact of violation and to take appropriate enforcement action when necessary. In an email communication with OSMRE (Administrative Record Number WV-1514), the State confirmed that: "In cases where damage is found to exist, it is the inspector's duty to write the violation. The Secretary will still be the one who ultimately decides if damage occurs based on the information provided when the claims administrator or the adjuster is involved."

Based upon this understanding, we find that the State's revised blasting damage claims procedures at Subparagraphs 5.2.a.3 and 5.2.a.6. are consistent with the Federal inspection requirements at SMCRA section 517 and 30 CFR part 842 and are the same as or similar to the Federal enforcement and penalties procedures at SMCRA sections 518 and 521 and 30 CFR parts 840, 845, 846, and 847. Therefore, these revisions are approved.

The provisions formerly contained at Subparagraphs 5.2.a.3.C and 5.2.a.4. have been moved to Subparagraphs 5.2.a.4 and 5.2.a.5, respectively. In these revised provisions, the word "Office" has been changed to "Secretary," and cross-references to other provisions have been amended appropriately.

We initially approved these provisions on December 10, 2003, with the understanding that, if the property owner declines to participate in the claims process, the State could conclude its involvement in that process, but the WVDEP would not be precluded from issuing a blasting-related notice of violation, cessation order, or taking other enforcement actions where blasting-related violations that cause property damage have occurred (68 FR 68735). We continue to maintain that the conclusion of the State's

involvement, as provided by revised Subparagraphs 5.2.a.4.A and 5.2.a.5, is limited to the blasting claims process and not the State's enforcement process. Therefore, it is with this understanding that we are able to find that the revised State provisions at Subparagraphs 5.2.a.4.A and 5.2.a.5 regarding the blasting damage claims process are not inconsistent with SMCRA and the Federal regulations, and the revisions are approved.

38. CSR 199-1-6 Arbitration for Blasting Damage Claims

Subsection 6.1, relating to the listing of arbitrators, is amended by adding language to provide that once a year the Environmental Advocate, and industry representatives (selected by the West Virginia Coal Association, Inc.) may move to strike up to twenty-five percent (25%) of the list, with cause.

In addition, Subsection 6.4 is amended by adding language to require the parties to arbitration to choose an arbitrator within fifteen (15) days of receipt of the notice by the parties.

There are no Federal counterparts to the proposed State revisions. However, we find that the proposed revisions at Subsections 6.1 and 6.4 regarding the State's arbitration process are not inconsistent with the Federal blasting requirements at section 515(b)(15) of SMCRA and 30 CFR 816.61 through 816.68 and 817.61 through 817.68, and the revisions are approved.

39. CSR 199-1-7 Explosive Material Fees

Subsection 7.2 is amended by adding language to require copies of blast logs be submitted as necessary to verify the accuracy of the report and explosive material fee calculation made by operators.

Subsection 7.3 is also amended by adding language to provide that, for the purpose of this section, detonators, caps, detonating cords, and initiation systems are exempt from the calculation for explosive material fees. However, the Secretary may require reporting on the use of these products.

There are no Federal counterparts to the proposed State revisions regarding the explosive material fee. However, we find that the revised provisions at Subsections 7.2 and 7.3 are not inconsistent with the Federal blasting requirements at sections 515(b)(15) and 719 of SMCRA, 30 CFR 840.12(b) and 30 CFR 816.61 through 816.68 and 817.61 through 817.68, and the revisions are approved.

Pursuant to Committee Substitute for Senate Bill 751, West Virginia proposes the following amendments to Section 22-3-11 of the WVSCMRA:

40. WVSCMRA 22-3-11 Bonds; amount and method of bonding; bonding requirements; special reclamation tax and funds; prohibited acts; period of bond liability.

This amendment revises Section 22-3-11 of the WVSCMRA relating to the State's alternative bonding system. As stated in the WVDEP's April 8, 2008, letter transmitting the program amendment, the revisions included in Committee Substitute for Senate Bill 751 related "generally to the special reclamation tax by establishing the Special Reclamation Water Trust Fund; continuing and reimposing a tax on clean coal mined for deposit into both funds; requiring the secretary to look at alternative programs; and authorizing Secretary to promulgate legislative rules implementing the alternative programs."

The provisions relating to the creation of the Special Reclamation Water Trust Fund and the reinstatement and increase in the special reclamation tax to 7.4 cents per ton as contained in subsections 22-3-11(g) and (h)(1), respectively, were approved by OSMRE on an interim basis in a separate **Federal Register** notice dated June 16, 2008 (73 FR 33884-33888), and public comments were later solicited on those provisions. Pursuant to the Administrative Procedure Act at 5 U.S.C. 553(b)(3)(B), we found that good cause existed to approve the revisions to subsections 22-3-11(g) and (h)(1) of the WVSCMRA on an interim basis because requiring notice and the opportunity for comment then would have delayed the start of the collection of the increased special reclamation tax. Enrolled Committee Substitute for Senate Bill 751 became effective on July 1, 2008, and the public interest in the accomplishment of prompt and thorough reclamation of bond forfeiture sites, including water treatment of discharges there from, would have been adversely affected if the 7.4 cents per ton special reclamation tax had not been collected on and after that effective date. In any event, the public still had an opportunity to comment on the reinstatement and increase in the special reclamation tax and on the creation of the Special Reclamation Water Trust Fund prior to this decision.

Subsection 22-3-11(a) of the WVSCMRA is amended by adding language to provide that the penal amount of the bond will be for each acre or fraction of an acre. Formerly, the provision stated: “[T]he penal amount of the bond must be for each acre or fraction ‘thereof.’” The deletion of the word “thereof” and the addition of the words “of an acre” do not change the meaning of the provision, so our approval of the change is not necessary.

Subsection 22-3-11(g) of the WVSCMRA is amended by adding language to provide that the Special Reclamation Fund previously created is continued. In addition, the Special Reclamation Water Trust Fund is created within the State Treasury into and from which moneys will be paid for the purpose of assuring a reliable source of capital to reclaim and restore water treatment systems on forfeited sites. The moneys accrued in both funds, any interest earned thereon and yield from investments by the State Treasurer or West Virginia Investment Management Board are reserved solely and exclusively for the purposes set forth in WVSCMRA 22-3-11 and 17. The funds will be administered by the Secretary who is authorized to expend the moneys in both funds for the reclamation and rehabilitation of lands which were subjected to permitted surface mining operations and abandoned after August 3, 1977, where the amount of the bond posted and forfeited on the land is less than the actual cost of reclamation, and where the land is not eligible for abandoned mine land reclamation funds under W.Va. Code 22-2. The Secretary will develop a long-range planning process for selection and prioritization of sites to be reclaimed so as to avoid inordinate short-term obligations of the assets in both funds of such magnitude that the solvency of either is jeopardized. The Secretary may use both funds for the purpose of designing, constructing, and maintaining water treatment systems when they are required for a complete reclamation of the affected lands described in Subsection 11(g). The Secretary may also expend an amount not to exceed ten percent of the total annual assets in both funds to implement and administer the provisions of this article and, as they apply to the Surface Mine Board, W.Va.Code 22B-1 and 4..

Previously, the expenditure for water treatment systems was limited to fees collected under the Special Reclamation Fund. Under the proposed revisions, funds from both the Special Reclamation Fund and the Special Reclamation Water Trust Fund can be used to design, construct, and maintain water treatment systems on bond forfeiture sites. We find that the creation of the Special Reclamation Water Trust Fund into which moneys will be deposited for the purpose of designing, constructing, and maintaining water treatment systems on bond forfeiture sites when necessary, and for the purpose of completing other reclamation of bond forfeiture sites within the State affected by mining is no less stringent than the Federal alternative bonding requirement at section 509(c) of SMCRA and no less effective than the Federal alternative bonding requirements at 30 CFR 800.11(e), and the revisions are approved on a permanent basis.

Subsection 22-3-11(h)(1) of the WVSCMRA is amended by adding language to provide that, “For tax periods commencing on and after July 1, 2008, every person conducting coal surface mining must remit a special reclamation tax as follows: (A) For the initial period of twelve months, ending June 30, 2009, 7.4 cents per ton of clean coal mined, the proceeds of which will be allocated by the Secretary for deposit in the Special Reclamation Fund and the Special Reclamation Water Trust Fund; (B) an additional 7 cents per ton of clean coal mined, the proceeds of which will be deposited in the Special Reclamation Fund. The tax will be levied upon each ton of clean coal severed or clean coal obtained from a refuse pile and slurry pond recovery or clean coal from other mining methods extracting a combination of coal and waste material as part of a fuel supply.” While Senate Bill 751 stated that the Council was to review and make recommendations on needed adjustments to the Legislature, it also contained a proviso that the tax could

“not be reduced until the Special Reclamation Fund and Special Reclamation Water Trust Fund have sufficient moneys to meet the reclamation responsibilities of the State established in this section.” *See* WVSCMRA Subsection (h)(1)(B).

Under the proposed changes, the State reinstated and increased the initial tax from 7 cents to 7.4 cents per ton of clean coal mined. The tax was extended by the Legislature and approved by the Governor. The proceeds from this tax are deposited in both the Special Reclamation Fund and the Special Reclamation Water Trust Fund. Given that OSMRE approved these proposed provisions on an interim bases on June 16, 2009, both the Special Reclamation Fund and the Special Reclamation Trust Fund are still in effect. *See* 73 FR 33884. The WVSCMRA also provides for an additional seven cents per ton of clean coal mined to be deposited into the Special Reclamation fund, which was also to be reviewed and, if necessary, adjusted annually by the Legislature upon the recommendation of the Special Reclamation Fund Advisory Council.

Because we find the proposed State revisions at subsection 22-3-11(h)(1) to be no less stringent than the Federal alternative bonding requirements at section 509(c) of SMCRA and no less effective than the Federal alternative bonding requirements at 30 CFR 800.11(e), they are approved on a permanent basis.

Subsection 22-3-11(h)(2) of the WVSCMRA is amended to clarify that in managing the Special Reclamation Program, the Secretary will: (A) pursue cost-effective alternative water treatment strategies; and (B) conduct formal actuarial studies every two years and conduct informal reviews annually on both the Special Reclamation Fund and Special Reclamation Water Trust Fund.

Under the proposed changes, both the Special Reclamation Fund and the Special Reclamation Water Trust Fund will be reviewed informally on an annual basis and actuarial studies will be done every two years. The proposed revisions are in keeping with the sound management of an alternative bonding system. In addition, we find that the proposed revisions at subsection 22-3-11(h)(2) are no less stringent than the Federal alternative bonding requirements at section 509(c) of SMCRA and no less effective than the Federal alternative bonding requirements at 30 CFR 800.11(e), and the revisions are approved on a permanent basis.

Subsection 22-3-11(h)(3) of the WVSCMRA is amended to delete obsolete language relating to tasks that were to be completed by the Secretary by December 31, 2005, and adding additional language.

The proposed tasks outlined in this section are typical of the kinds of tasks that are undertaken under an alternative bonding system. Completion of these tasks should enable the State to make adjustments in its alternative bonding system that will ensure its long-term financial solvency. We find the proposed revisions at subsection 22-3-11(h)(3) to be no less stringent than the Federal alternative bonding requirements at section 509(c) of SMCRA and no less effective than the Federal alternative bonding requirements at 30 CFR 800.11(e), and the revisions are approved on a permanent basis.

As discussed below, Subsection 22-3-11(h)(4) of the WVSCMRA is amended.

Once the tasks mentioned under subsection 22-3-11(h)(3) are completed, the Secretary is authorized under subsection 22-3-11(h)(4) to promulgate legislative rules to implement these alternative bonding mechanisms. It is important to note that, pursuant to

30 CFR 732.17(h), any rules pertaining to the State's alternative bonding system will have to be submitted to OSMRE for approval prior to implementation. As provided by 30 CFR 732.17(g), whenever changes to laws or regulations that make up an approved State program are proposed by a State, the State must immediately submit the changes to OSMRE as an amendment. No such change to laws or regulations can take effect for the purposes of a State program until approved as an amendment. Because we find the proposed revisions at subsection 22-3-11(h)(4) to be no less stringent than the Federal alternative bonding requirements at section 509(c) of SMCRA and no less effective than the Federal alternative bonding requirements at 30 CFR 800.11(e), the revisions are approved on a permanent basis.

Subsection 22-3-11(l) of the WVSCMRA is amended by adding language to clarify that the Tax Commissioner will deposit the moneys collected with the Treasurer of the State of West Virginia to the credit of the Special Reclamation Fund and Special Reclamation Water Trust Fund. Existing language providing that the moneys in the fund are to be placed by the Treasurer in an interest-bearing account with the interest being returned to the fund on an annual basis is being deleted.

As proposed, the State Tax Commissioner is required to deposit moneys collected with the State Treasurer to the credit of both the Special Reclamation Fund and Special Reclamation Water Trust Fund. In addition, language providing for interest being returned to the fund is being deleted. In keeping with the other requirements, it is necessary to allow moneys collected by the Tax Commissioner to be deposited with the Treasurer to the credit of the Special Reclamation Water Trust Fund. Because subsection 22-3-11(g) allows interest to be earned and credited to both the Special Reclamation

Fund and Special Reclamation Water Trust Fund, the provision that is being deleted at subsection 22-3-11(l) is redundant and no longer necessary. Therefore, we find the proposed revisions at subsection 22-3-11(l) to be no less stringent than the Federal alternative bonding requirements at section 509(c) of SMCRA and no less effective than the Federal alternative bonding requirements at 30 CFR 800.11(e), and the revisions are approved on a permanent basis.

Subsection 22-3-11(m) of the WVSCMRA is amended by adding the words “in both funds” at the end of the sentence. The provision now reads: “At the beginning of each quarter, the secretary must advise the State Tax Commissioner and the Governor of the assets, excluding payments, expenditures and liabilities, in both funds.”

As proposed, the Secretary is required to notify the Tax Commissioner and the Governor of the assets and liabilities in both the Special Reclamation Fund and the Special Reclamation Water Trust Fund on a quarterly basis. Given the creation of the Special Reclamation Water Trust Fund, it was necessary to amend the State’s financial reporting requirements. We find that the proposed State revisions at subsection 22-3-11(m) are no less stringent than the Federal alternative bonding requirements at section 509(c) of SMCRA and no less effective than the Federal alternative bonding requirements at 30 CFR 800.11(e), and the revisions are approved on a permanent basis.

IV. Summary and Disposition of Comments

Public Comments

On June 16, 2008, we published a **Federal Register** notice announcing our approval of the reinstatement and increase in the State’s special reclamation tax and the

creation of the Special Reclamation Water Trust Fund on an interim basis. We also asked for public comments on the proposed changes (Administrative Record Number WV-1507). On July 8, 2008, we announced receipt and requested comments on the remaining portions of the proposed State amendment (Administrative Record Number WV-1508). One organization, the West Virginia Coal Association (WVCA), responded on August 7, 2008 (Administrative Record Number WV-1512).

The WVCA stated that OSMRE's review of Senate Bill 751 (West Virginia's approved alternative bonding system (ABS), known as the Special Reclamation Fund (SRF)) should be confined to assuring that the provisions of the legislation will not conflict with other provisions of Federal mining statutes and regulations. The WVCA said that any review beyond that, such as determination as to the adequacy of funding of the alternative bonding system (ABS), is improper as provisions of West Virginia's Special Reclamation Fund related to water treatment at bond forfeiture sites exceed the requirement of Federal mining statutes and regulations. The WVCA went on to say that any action on behalf of WVDEP regarding water treatment and the approved State ABS exceeds the requirements of SMCRA. These comments are available in their entirety at www.regulations.gov.

For this specific amendment, we neither reviewed the financial adequacy of the State's ABS nor are we evaluating the solvency of the ABS with regard to 30 CFR 800.11(e). Our review, at this time, is limited to the reinstatement of the 7 cents per ton special reclamation tax, its increase to 7.4 cents per ton, and the creation of the Special Reclamation Water Trust Fund. Further information regarding our approval of this component of the amendment is included in Finding 40. Given the limited scope of our

review, this comment is beyond the scope of this decision. However, we want to note that issues related to use of the ABS to treat mine drainage discharges from bond forfeiture sites, as well as the State's overall approach to funding its ABS, were addressed in OSMRE's initial approval of the State's ABS, as published in the **Federal Register** on December 28, 2001 (66 FR 67446-67451) and May 29, 2002 (67 FR 37610-37626).

Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, on April 28, 2008, we requested comments on the amendment from various Federal agencies with an actual or potential interest in the West Virginia program (Administrative Record Number WV-1505A). Given the publication of our interim rule in the **Federal Register** on June 16, 2008, regarding the State's reinstatement of its special reclamation tax and the creation of the Special Reclamation Water Trust Fund, we clarified in a letter dated May 14, 2008, that OSMRE would be interested in receiving comments on the proposed change to the State's special reclamation tax and any other revisions to the State's alternative bonding system as set forth in West Virginia Code 22-3-11(h)(1) (Administrative Record Number WV-1509).

We received comments from the U.S. Department of Energy (DOE) on June 5, 2008 (Administrative Record Number WV-1506). The DOE acknowledged receipt of both letters and stated that it did not have the expertise to analyze the issues underlying the State's ABS or to comment on the other proposed revisions. Although they offered no substantive comments, we appreciate the time and effort that DOE took to respond to our request.

The Natural Resources Conservation Service (NRCS), U.S. Department of Agriculture submitted its response on June 5, 2008 (Administrative Record Number WV-1510). The NRCS did not have any comments on the proposed changes to the special reclamation tax and any other proposed changes to the State's ABS. Although NRCS also offered no substantive comments, we appreciate the time and effort that they took to respond to our request.

The Mine Safety and Health Administration (MSHA), U.S. Department of the Interior, submitted its comments on June 12, 2008 (Administrative Record Number WV-1511). MSHA acknowledged that some of the changes to the State's blasting and reclamation requirements are more restrictive than current MSHA standards, and the proposed revisions to the State's requirements for sediment control and water retention structures are newer and, in some instances, more stringent than MSHA standards. According to MSHA, because mine operators must comply with the more stringent standard, they had no concerns regarding the proposed amendments.

We concur with MSHA's comments. In those instances where a State provision may be more stringent than the Federal requirement, section 505(b) of SMCRA provides that the State requirement will not be construed to be inconsistent with the Act.

Environmental Protection Agency (EPA) Concurrence and Comments

Under 30 CFR 732.17(h)(11)(i) and (ii), we are required to request comments and 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.*). On April 29,

2008, we solicited comments and the written concurrence of EPA on the proposed State revisions (Administrative Record Number 1505B). As mentioned above, we also notified EPA on May 14, 2008, that we would be interested in receiving comments on the proposed change to the State's special reclamation tax and any other revisions to the State's alternative bonding system as set forth in West Virginia Code 22-3-11(h)(1) (Administrative Record Number WV-1509).

EPA responded by letter dated September 25, 2008 (Administrative Record Number WV-1513). EPA stated that, based on 30 U.S.C. 1292, the proposed State amendments must be construed and implemented consistent with the Clean Water Act (CWA), National Pollutant Discharge Elimination System (NPDES) regulations, and other relevant environmental statutes. Accordingly, EPA provided its concurrence on the proposed State program amendments. EPA went on to provide the following comments on the proposed revisions to the State's Surface Mining Reclamation Regulations and the proposed statutory revisions to the State's alternative bonding system.

EPA commented on the proposed revisions to CSR 38-2-5.4.h.2 regarding sediment control. EPA acknowledged that it strongly supports efforts to ensure that natural drain ways are returned to natural conditions once drainage control structures are removed. EPA encouraged the use of natural erosion control techniques, such as vegetation, in lieu of rock-lined channels to the maximum extent practicable. Accordingly, EPA viewed the proposed amendment as a step in that direction.

We concur with EPA's comment. As discussed above in Finding 6, we found that the proposed changes to the State's abandonment procedures for sediment control

structures at Subparagraph 5.4.h.2 were no less effective than the Federal abandonment requirements at 30 CFR 816.46(b), 816.49(c), 816.56, 817.46(b), 817.49(c), and 817.56.

EPA commented on the State's proposed revisions to its storm water runoff requirements at CSR 38-2-5.6.a. EPA noted that the amendment exempts mining operations with permitted acreage of less than 50 acres from preparing a storm water runoff analysis and further excludes from the requirement haulroads, loadouts and ventilation facilities. EPA went on to warn that the NPDES permitting requirements do not include an exemption or limitation based on minimum permitted acreage, and these amendments cannot exempt coal mining facilities from any applicable regulations under the CWA, including the storm water regulations.

We must note that the State's storm water runoff analysis required under Subdivision 5.6.a does not relate to storm water requirements under the CWA. As provided by CSR 38-2-5.4.b.2, all sediment control or other water retention structures used in association with mining must comply with applicable State and Federal water quality standards and meet effluent limitations as specified in an NPDES permit for all discharges. In addition, CSR 38-2-14.5.b provides that discharges from areas disturbed by surface mining cannot violate effluent limitations or cause a violation of applicable water quality standards. The monitoring frequency and effluent limitations are governed by the standards set forth in an NPDES permit issued pursuant to W. Va. Code Section 22-11 *et seq.*, the Federal Water Pollution Control Act as amended, 33 U.S.C. 1251 *et seq.* and the rules and regulations promulgated thereunder. As discussed above in Finding 7, we found that Subdivision 5.6.a contains more specific information regarding storm impacts than the Federal rules, but the proposed revisions thereto were not

inconsistent with the Federal hydrologic requirements at 30 CFR 780.21 and 784.14. Furthermore, water discharges from areas disturbed by surface mining activities must comply with NPDES effluent limitations and all applicable State and Federal water quality laws and regulations, as provided by Subdivision 14.5.b and 30 CFR 816.42 and 817.42. However, we must also note that the State has adopted a NPDES storm water policy that allows storm water discharges to be regulated in accordance with an Article 3 (SMCRA) permit revision, including incidental boundary revisions, and with the best management practices and performance standards contained in the State's surface mining law and regulations. Such storm water discharges cannot involve any coal removal, pumping of storm water, or storm water runoff commingled with mine drainage, refuse drainage, coal stockpile areas, preparation plant areas, loading areas, or unloading areas. Under the policy, the State can require any permittee to submit a NPDES modification when it is determined that such receiving stream will be better protected by an individual NPDES permit. Given that under this policy some discharges of water from areas disturbed by surface mining activities, especially underground mines, may not be subject to an individual NPDES permit as required by Subdivision 14.5.b and 30 CFR 816.42 and 817.42, further consultation and coordination with EPA is envisioned to ensure that the State's policy is consistent with SMCRA, the CWA, and their implementing regulations. The aforementioned State policy would not be part of the approved State regulatory program, because the authority for this policy resides under the CWA, not SMCRA. OSMRE is, however, interested in the mechanics of the policy and how it is to be implemented and enforced under SMCRA.

EPA supports the proposed change to the State's alternative bonding system because it addresses long term pollutional drainage.

V. OSMRE's Decision

Based on the above findings, we are approving, with certain exceptions and understandings, the West Virginia program amendment dated April 8, 2008, as received electronically on April 17, 2008.

To implement this decision, we are amending the Federal regulations at 30 CFR Part 948, which codify decisions concerning the West Virginia program. In accordance with the Administrative Procedure Act, this rule will take effect 30 days after publication in the **Federal Register**. 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. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630 – Governmental Actions and Interference with Constitutionally Protected Property Rights

This rule would not effect a taking of private property or otherwise have taking implications that would result in public property being taken for government use without just compensation under the law. Therefore, a takings implication assessment is not required. This determination is based on an analysis of the corresponding Federal regulations.

Executive Order 12866 - Regulatory Planning and Review and 13563 – Improving Regulation and Regulatory Review

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) will review all significant rules. Pursuant to OMB guidance, dated October 12, 1993, the approval of state program amendments is exempt from OMB review under Executive Order 12866. Executive Order 13563, which reaffirms and supplements Executive Order 12866, retains this exemption.

Executive Order 12988 - Civil Justice Reform

The Department of the Interior has reviewed this rule as required by Section 3 of Executive Order 12988. The Department has determined that this **Federal Register** notice meets the criteria of Section 3 of Executive Order 12988, which is intended to ensure that the agency review its legislation and proposed regulations to eliminate drafting errors and ambiguity; that the agency write its legislation and regulations to minimize litigation; and that the agency's legislation and regulations provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Because Section 3 focuses on the quality of Federal legislation and regulations, the Department limited its review under this Executive Order to the quality of this **Federal Register** notice and to changes to the Federal regulations. The review under this Executive Order did not extend to the language of the state regulatory program or to the program amendment that the State of West Virginia drafted.

Executive Order 13132 - Federalism

This rule is not a “[p]olicy that [has] Federalism implications” as defined by Section 1(a) of Executive Order 13132 because it does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Instead, this rule approves an amendment to the West Virginia program submitted and drafted by that State. OSMRE reviewed the submission with fundamental federalism principles in mind as set forth in Sections 2 and 3 of the Executive Order and with the principles of cooperative federalism set forth in SMCRA. *See e.g.* 30 U.S.C. 1201(f). As such, pursuant to Section 503(a)(1) and (7)(30 U.S.C. 1253(a)(1) and (7)), OSMRE reviewed the program amendment to ensure that it is “in accordance with” the requirements of SMCRA and “consistent with” the regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments

The Department of the Interior strives to strengthen its government-to-government relationship with Tribes through a commitment to consultation with Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department’s consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Tribes or on the distribution of power and responsibilities between the Federal government and Tribes. Therefore, consultation under the Department’s tribal consultation policy is not required. The basis for this determination is that our decision is on the West Virginia program that does not include Tribal lands or regulation

of activities on Tribal lands. Tribal lands are regulated independently under the applicable, approved Federal program.

Executive Order 13211 – Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rulemaking 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 significant energy action under the definition in Executive Order 13211, a Statement of Energy Effects is not required.

National Environmental Policy Act

Consistent with sections 501(a) and 702(d) of SMCRA (30 U.S.C. 1251(a) and 1292(d), respectively) and the U.S. Department of the Interior Departmental Manual, part 516, section 13.5(A), State program amendments are not major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 3701 *et seq.*) directs OSMRE to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. (OMB Circular A-119 at p. 14). This action is not subject to the

requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with SMCRA.

Paperwork Reduction Act

This rule does not include requests and requirements of an individual, partnership, or corporation to obtain information and report it to a Federal agency. As this rule does not contain information collection requirements, a submission to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

Regulatory Flexibility Act

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

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 on an analysis of the corresponding Federal regulations, which were determined not to constitute a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. This determination is based on an analysis of the corresponding Federal regulations, which were determined not to impose an unfunded mandate. Therefore, a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Thomas D. Shope, Regional Director
North Atlantic - Appalachian Region

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 revising paragraph (i) and adding paragraph (j) to read as follows:

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

* * * * *

- (i) We are removing and reserving paragraph (i) for the following reasons:

- (1) We are removing and reserving subparagraph (1) of paragraph (i) since the words “Impoundments meeting” have been removed from CSR 38-2-5.4.e.1.

- (2) We are removing and reserving subparagraph (2) of paragraph (i) since CSR 38-2-7.4.b.1.J.1(C) has been reinserted in the State regulations.

- (j) We are not approving the following provisions of the proposed West Virginia program amendment dated April 8, 2008, and received electronically on April 17, 2008:

- (1) At CSR 199-1-2.27 regarding other structure, the last sentence which provides that, “The term does not include structures owned, operated, or built by the permittee for the purpose of carrying out surface mining operations.”

- (2) At CSR 199-1-2.36 regarding structure, the last sentence which provides that, “The term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation.”

(3) At CSR 38-2-2.119 regarding structure, the last sentence which provides that, “The term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation.”

(4) At CSR 38-2-6.5.h, we are not approving its deletion because the deletion of CSR 38-2-6.5.h would make CSR 199-1-3.6.g and 3.11 less effective than the Federal blasting requirements.

3. Section 948.15 is amended by adding an entry to the table 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
<p>*****</p> <p>April 8, 2008</p>	<p>**</p> <p><u>[Insert date of publication in the Federal Register]</u></p>	<p>**</p> <p>CSR 38-2-2.119 (partial approval); 38-2-3.1.c; 3.1.d; 3.2.g (qualified approval); 3.29.a (deletion); 3.32.b (deletion); 5.4.e.1 (deletion); 5.4.h.2; 5.6.a (qualified approval); 5.6.b; 5.6.d (deletion); 6.1; 6.2; 6.3 – 6.8 (deletions), with exception 6.5.h (deletion not approved) and 6.8.a.1 (qualified approval); 7.4.b.1.J.1(c); 14.15.c.2; 14.15.d.3; 14.15.e (deletions); 19.9; 23.3 (qualified approval); and 23.4.</p> <p>CSR 199-1-2; 2.27 (partial approval) 2.36 (partial</p>

		<p>approval); 3.2.a; 3.2.b; 3.2.c; 3.2.d; 3.2.e (deletion); 3.3; 3.4 (qualified approval); 3.5; 3.6 (qualified approval); 3.7; 3.8 (qualified approvals/forms); 3.9; 3.10 (qualified approval); 4.1; 4.2; 4.3; 4.5 (qualified approval); 4.6; 4.7; 4.9.a; 4.13; 4.14; 5.2 (qualified approval); 6; and 7.</p> <p>W. Va. Code 22-3-11(a); 11(g); 11(h)(1); 11(h)(2); 11(h)(3); 11(h)(4); 11(l) (deletion); and 11(m).</p>
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