

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

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

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

13. CSR 199-1-6 Arbitration.

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

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

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

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

15. CSR 199-1-8 Inspections.

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

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

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

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

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

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

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