

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

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

16. Surface Mine Board.

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

IV. Summary and Disposition of Comments

Public Comments

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

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

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

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

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

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

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

Federal Agency Comments

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

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

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