

**TITLE 199  
LEGISLATIVE RULE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OFFICE OF EXPLOSIVES AND BLASTING**

**SERIES 1  
SURFACE MINING BLASTING RULE**

**§199-1-1. General.**

1.1. Scope. -- This rule establishes general and specific rules for overseeing and regulating blasting on \_all surface mining operations; implementing and overseeing the pre-blast survey process; inspection and monitoring of blasting operations; seismograph use; warning methods; site specific limitations for type, size, timing and frequency of blasts; public notice requirements; maintaining and operating a system to receive and address questions, concerns and complaints relating to mining operations; setting the qualifications for individuals and firms performing pre-blast surveys; establishing the education, training, examination and certification of blasters; disciplinary procedures for blasters; and administering a claims process, including arbitration, for property damage caused by blasting.

1.2. Applicability. -- This rule applies to all surface mining operations and surface disturbances associated with underground mining operations in the State of West Virginia.

1.3. Authority. -- W. Va. Code §§22-1-3, 22-3A-4, 22-1-5.

1.4. Filing Date. -- 04/10/08

1.5. Effective Date. -- 07/01/08

**§199-1-2. Definitions.**

As used in this rule unless used in a context that clearly requires a different meaning the term:

2.1. "Active Blasting Experience" means experience gained by a person who has worked on a blasting crew, or supervised a blasting crew. Two hundred forty working days constitutes one year of experience. Experience may only be gained by "first-hand" participation in activities associated with the storing, handling, transportation and use of explosives or the immediate supervision of those activities within surface coal mines, and the surface areas of underground coal mines. Experience should be related to surface mine blasting; Provided, that other related blasting experience (quarrying operations, etc.) may be accepted by the secretary or on a case-by-case basis as qualifying experience.

2.2. "Air Blast" means an airborne shock wave resulting from the detonation of explosives.

2.3. "Adjuster" means an outside party that is assigned to investigate, document, evaluate and make recommendations on a reported loss.

2.4. "Arbitrator" means an impartial individual appointed by the Secretary with the authority to settle the disputes between property owners and mine operators as they relate to allegations of blasting damage.

2.5. "Arbitration" means the referral of a dispute to a neutral or impartial person for total or partial determination. It is intended to be inexpensive, prompt and fair to the parties.

2.6. "Blast" means any planned or unplanned detonation(s) of an explosive(s) being initiated simultaneously by a single energy source.

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2.7. “Blast Area” means the area surrounding a blast site where flyrock could occur and which should be guarded against entry during the shot.

2.8. “Blast Site” 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, and 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 ~~access~~ to the loaded blast holes.

2.9. “Blaster” means a qualified person in charge of and responsible for the design, loading and firing of a blast. This must be an individual who is certified by the Office of Explosives and Blasting.

2.10. “Blasting Complaint” means a communication to the Office of Explosives and Blasting from a member of the general public expressing concern, aggravation, fear or indications of blasting damage. A blasting complaint may or may not initially indicate damage.

2.11. “Blasting Claim” means an allegation by the property owner of blasting related damage to property.

2.12. “Blasting Log” means a written record containing all pertinent information about a specific blast as may be required by law or rule.

2.13. “Blasting Vibration” means the temporary ground movement produced by a blast that can vary in both intensity and duration.

2.14. “Caused By Blasting” means that there is direct, consistent and conclusive evidence or information that the alleged damage was definitely caused by blasting from the mine site in question.

2.15. “Certified Blaster” means a person who has taken and passed the examination described in this rule, and has been issued a certification card by the Secretary.

2.16. “Certified Examiner/Inspector” means a person employed by the Secretary who administers training or examinations to applicants for certification as certified blasters, or who inspects surface mining operations and who has taken and passed the examination described in this rule.

2.17. “Claimant” means the property owner who makes a blasting damage claim.

2.18. “Claims Administrator” means the individual, firm or organization that manages the blasting damage claims program for the Secretary.

2.19. “Construction Blasting” means blasting to develop haulroads, mine access roads, coal preparation plants, drainage structures, or underground coal mine sites and shall not include production blasting.

2.20. “Contiguous or Nearly Contiguous” means surface mining operations that share a permit boundary or are within 100 feet of each other at the nearest point.

2.21. “Detonation” means a chemical reaction resulting in a rapid release of energy.

2.22. “Department” means the Department of Environmental Protection.

2.23. “Explosives” means any chemical compound, mixture or device, the primary or common purpose of which is to function by explosion; including, but not limited to, water gel, slurries, emulsion, dynamites, permissibles, pellet powder, blasting caps, cast primers and boosters, detonating cord, detonating cord delay connectors, and blasting agents.

2.24. “Fly Rock” means rock and/or earth propelled from the blast site through the air or along the ground by the force of the detonated explosives.

2.25. “Loss Value” means the amount of money indicated in a given loss to include costs of repairs or replacement costs.

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2.26. “Not Caused By Blasting” means that there is direct, consistent, and conclusive evidence or information that blasting from the mine site in question was definitely not at fault for the alleged property damage.

2.27. “Other Structure” 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.

2.28. “Operator” means any person who is granted or who should obtain a permit to engage in any activity covered by W. Va. Code §22.

2.29. “Possibly Caused By Blasting” means the physical damage in question is not entirely consistent with blasting induced property damage, but that blasting cannot be ruled out as a causal factor.

2.30. “Pre-Blast Survey” means the written documentation of the existing condition of a given structure near an area where blasting is to be conducted. The purpose of the survey is to note the pre-blasting condition of the structure and note any observable defects or damage.

2.31. “Probably Caused By Blasting” means that there is physical damage present at the site in question that is entirely consistent with blasting induced property damage, and said damage can be attributed to a specific mine site and/or blast event(s).

2.32. “Probably Not Caused By Blasting” means that there is substantial, but not conclusive information that the alleged damage was caused by something other than blasting.

2.33. “Production Blasting” means blasting that removes the overburden to expose underlying coal seams and shall not include construction blasting.

2.34. “Protected Structure” means any of the following structures that are situated outside the permit area: an occupied dwelling, a temporarily unoccupied dwelling which has been occupied within the past ninety (90) days, a public building, a habitable building for commercial purposes, a school, a church, a community or institutional building, a public park or a water well.

2.34.a. “Community or Institutional Building” means any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

2.34.b. “Public Building” means any structure that is owned or leased by a public agency or used primarily for public business or meetings.

2.35. “Secretary” means the Secretary of the Department of Environmental Protection or the Secretary's authorized agent.

2.36. “Structure” means “a protected structure” or “other structure” which is any man-made structures within or outside the permit areas which include, 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. The term does not include structures built and/or utilized for the purpose of carrying out the surface mining operation.

2.37. “Supervised a Blasting Crew” means ~~that a person that is assumed~~ responsibility for the conduct of a blasting crew(s) and/or that the crew(s) ~~reported directly to~~ is directed by that person.

2.38. “Surface Mine Operations” means all

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

2.39. “Worked on a Blasting Crew” means that a person has first-hand experience in storing, handling, transporting, and using explosives, and has participated in the loading, connecting, and initiation processespreparation of blasting holes and has participated, and has experience in blasting proceduresdetonating blasts, and preparation of blast holes.

**§199-1-3. Blasting.**

3.1. General Requirements. Each operator shall comply with all applicable state and federal laws in the use of explosives. A blaster certified by the ~~Office~~Secretary shall be responsible for all blasting operations including the transportation, storage and use of explosives within the permit area in accordance with the blasting plan.

3.2. Blasting Plans.

3.2.a. As required by statute, all surface mining operations that propose blasting shall include a blasting plan. The blasting plan shall explain how the applicant will comply with the blasting requirements of W. Va. Code §22-3-1 et seq., and this rule. This plan shall include, at a minimum, information setting forth the limitations the operator will meet with regard to ground vibration and airblast, the basis for those limitations, and the methods to be applied in preventing the adverse effects of blasting operations. The blasting plan shall delineate the type of explosives and detonation equipment, the size, the timing and frequency of blasts, and the effect of geologic and topographic conditions on specific blasts. Blasting plans shall be designed to

do the following:

3.2.a.1. Prevent injury to persons;

3.2.a.2. Prevent damage to public and private property outside the permit area;

3.2.a.3. Prevent adverse impacts on any underground mine;

3.2.a.4. Prevent change in the course, channel or availability of ground or surface water outside the permit area; and

3.2.a.5. Minimize~~Reduce~~ dust outside the permit area.

3.2.b. The blasting plans referred to in subdivision 3.2.a. of this rule will be reviewed for administrative and technical completeness by the Secretary. The person conducting the review shall be experienced in common blasting practices utilized on surface mining operations and shall be a certified inspector. The reviewer will take into consideration past operational history of the applicant, the geological formation the blasting operations will take place in, and the proximity of individual dwellings, structures, or communities to the blasting operations.

3.2.c. The blasting plan shall also contain an inspection and monitoring procedure to insure that all blasting operations are conducted to minimize eliminate, (to the maximum extent technically feasible), adverse impacts to the surrounding environment and surrounding occupied dwellings. For all surface coal extraction operations that will include production blasting, the monitoring procedure shall include provisions for monitoring ground vibrations and air blast.— All seismographs used to monitor airblast or ground vibrations or both shall comply with the ISEE Performance Specifications for Blasting Seismographs.

3.2.d. For operations where a blasting related notice of violation (NOV) or cessation order (CO) has been issued; the Secretary shall review the blasting plan as soon as possible, but within thirty (30) days of final disposition of the

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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.

~~3.2.e. Where a notice of violation (NOV) or cessation order (CO) has been issued, the Office shall review the blasting plan within thirty (30) days of final disposition of the NOV or CO. This review will focus on the specific circumstances that led to the enforcement action. If necessary, the Secretary may require that the blasting plan be modified to insure all precautions are being taken to safely conduct blasting operations.~~

### 3.3. Public Notice of Blasting Operations.

3.3.a. At least ten (10) days but not more than thirty (30) days prior to commencing any blasting operations which detonate five (5) pounds or more of explosives at any given time, the operator shall publish a blasting schedule in a newspaper of general circulation in all the counties of the proposed permit area. Copies of the schedule described in subdivision 3.6.a. of this rule shall be distributed by Certified Mail to local governments, public utilities, and each resident, within one half mile of the blasting sites, and seven tenths (0.7) of a mile of the blasting sites for all surface coal extraction permits larger than those defined in accordance with W. Va. Code §22-3-13a(a)(1). Unless blasting will occur on drainage structures and roads, these structures will be exempt for the purpose of measuring the notification area. A list of residents, utilities and owners of man-made structures within the notification area shall be made a part of the blasting plan, and shall be updated on an annual basis. The operator shall republish and redistribute the schedule at least every twelve (12) months in the same manner above. ~~and~~ The operator shall revise, republish and redistribute the schedule at least ten (10) days, but not more than thirty (30) days prior to blasting whenever the area covered by the schedule changes or actual time periods for blasting significantly differ from that set forth in

the prior schedule. Proof of notification must be retained by the permittee. The blasting schedule described in subdivision 3.6.a. of this rule shall contain at a minimum the following:

3.3.a.1. Name, address and phone number of the operator;

3.3.a.2. Identification of the specific areas in which blasting will take place;

3.3.a.3. Dates and times when explosives will be detonated;

3.3.a.4. Methods to be used to control access to the blasting area; and

3.3.a.5. Types and patterns of audible warning and all clear signals to be used before and after blasting.

3.3.b. Blasting Signs. The following signs and markers shall be erected and maintained while blasting is being conducted:

3.3.b.1 Conspicuously place signs reading "Blasting Area" along the edge of any blasting area that comes within 100 feet of any public road right-of-way, and at the point where any other road provides access to the blasting area; and ~~Warning signs shall be conspicuously displayed at all approaches to the blasting site, along haulageways and access roads to the mining operation and at all entrances to the permit area. The sign shall at a minimum be two feet by three feet (2' x 3') reading "WARNING! Explosives in Use" and explaining the blasting warning and the all clear signals~~

3.3.b.2 At all entrances to the permit area from public roads or highways, place conspicuous signs which state "Warning! Explosives in Use," which clearly list and describe the meaning of the audible blast warning and all-clear signals that are in use, and which explain the marking of blasting areas and charged holes awaiting firing within the permit area.. The signs shall at a minimum be two feet by three feet (2' x 3') ~~Where blasting operations will be conducted~~

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~~within one hundred (100) feet of the outside right-of-way of a public road, signs reading "Blasting Area", shall be conspicuously placed along the perimeter of the blasting area~~

**3.4. Surface Blasting on Underground Mines**

3.4.a. Surface blasting activities incident to underground coal mining are not subject to the requirements of subdivision 3.3.a. of this rule so long as all local governments and residents and workplaces or owners of dwellings or structures located within one-half (1/2) mile of the blast site are notified in writing by the operator of proposed times and locations of the blasting operation. Such notice of times that blasting is to be conducted may be announced weekly, but in no case less than twenty-four (24) hours before the blasting will occur.

3.4.b. Blasting activities for the development of slopes and shafts will be subject to this rule and regulated as surface blasting. The operator will submit a blast plan for the initial developmental blast of shafts and slopes, which will consider all aspects of surface coal mine blasting contained in 199CSR1. The Secretary will then only regulate and monitor for surface effects from ground vibration and airblast for the remainder of the shaft or slope until it intersects the coal seam to be mined.

**3.5. Blast Record.**

3.5.a. A blasting log book on forms formatted in a manner prescribed by the Secretary shall be kept current daily and made available for inspection at the site by the Secretary and upon written request by the public.

3.5.b. The blasting log shall be retained by the operator for three (3) years.

3.5.c. The blasting log shall contain, at a minimum, but not limited to, ~~contain~~ the following information:

3.5.c.1. Name of permittee, operator, company conducting blasting, and

other person conducting the blast;  
3.5.c.2. Article 3 permit number, location, shot number, date and time of blast;

3.5.c.3. Name, signature and certification number of blaster-in-charge;

3.5.c.4. Identification of nearest protected structure and nearest other structure not owned or leased by the operator, indicate the and direction and distance, in feet, to both such structures;

3.5.c.5. Weather conditions, including estimated wind direction and speed;

3.5.c.6. Type of material blasted, including rock type and description of conditions;

3.5.c.7. Number of holes, burden, and spacing;

3.5.c.8. Diameter and depth of holes;

3.5.c.9. Describe different types and quantities of explosives used;

3.5.c.10. Weight of explosives used per hole;

3.5.c.11. Total weight of explosives used;

3.5.c.12. Maximum weight of explosives detonated within any eight (8) millisecond period;

3.5.c.13. Method of firing and type of circuit;

3.5.c.14. Type and length of stemming and decking;

3.5.c.15. Describe use of blasting mats or other protective ~~ons~~ measures were used;

3.5.c.16. Type of delay detonator used, and delay periods used, and quantities;

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3.5.c.17. Seismograph records and air blast records, when required, shall include but not be limited to:

3.5.c.17.A. Seismograph and air blast reading, including exact location, trigger levels, date, ~~and~~ time of reading, frequency in Hz, and its distance from the blast, full waveform readings shall be attached to the blast log;

3.5.c.17.B. Name of person who installed the seismograph, also name of person and firm taking the readings;

3.5.c.17.C. Name of person and firm analyzing the record, where analysis is necessary; and

3.5.c.17.D. Type of instrument, sensitivity, ~~and~~ calibration signal, ~~and~~ ~~or~~ certification of annual calibration-

3.5.c.18. Shot location shall be identified with use of blasting grids as found on the blast map, GPS, or other methods as defined by the approved blast plan;

3.5.c.19. Detailed sketch of delay pattern to include detonation timing for each hole or deck in the entire blast pattern and all decks, borehole loading configuration, north arrow, distance and directions to structures; and

3.5.c.20. Reasons and conditions for unscheduled blasts, misfires, any unusual event, or violation of the blast plan shall be noted.

**3.6. Blasting Procedures.**

3.6.a. All blasting shall be conducted during daytime hours, between sunrise and sunset; provided, that the Secretary may specify more restrictive time periods based on public requests or other consideration, including the proximity to residential areas. No blasting shall be conducted on Sunday. Provided, however, the Secretary may grant approval of a request for Sunday blasting if the operator demonstrates to the satisfaction of the Secretary that the blasting is necessary and there

has been an opportunity for a public hearing. Blasting shall not be conducted at times different from those announced in the blasting schedule except in emergency situations where rain, lightning, or other atmospheric conditions, or operator or public safety requires unscheduled detonations. Blasting shall be conducted in such a way so as to prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel, or availability of surface or groundwater outside the permit area.

**3.6.b. Safety Precautions:**

3.6.b.1. Three (3) minutes prior to blasting, a warning signal audible to a range of one-half (1/2) mile from the blast site will be given. This pre-blast warning shall consist of three (3) short warning signals of five (5) seconds duration with five (5) seconds between each signal. One (1) long warning signal of twenty (20) seconds duration shall be the "all clear" signal. Each person in the permit area, and each person who resides or regularly works within one-half (1/2) mile of the permit area shall be notified of the meaning of these signals;

3.6.b.2. All approaches to the blast area shall be guarded against unauthorized entry prior to and immediately after blasting; and shall remain guarded until the blaster signals the "all clear".

3.6.b.3. All charged holes shall be guarded and posted against unauthorized entry; and

3.6.b.4. The certified blaster shall be accompanied by at least one other person at the time of firing of the blast.

**3.6.c. Airblast Limits.**

3.6.c.1. Airblast shall not exceed the maximum limits listed below at the location of any dwelling, public buildings, school, church, or community or institutional building outside the permit area.

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Lower frequency limit of measuring system maximum level, in Hz (no more than -3dB) Maximum Level in dB

- 0.1 Hz or lower --flat response 134 peak.
2 Hz or lower -- flat response 133 peak.
6 Hz or lower -- flat response 129 peak.
C-weighted--slow response 105 peak dBC.

3.6.c.2. If necessary to prevent damage, the Secretary may specify lower maximum allowable airblast levels for use in the vicinity of a specific blasting operation.

3.6.c.3. Monitoring. The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The Secretary may require airblast measurement of any or all blasts and may specify the locations at which such measurements are taken. The air blast measuring systems used shall have an upper-end flat-frequency response of at least 200 Hz. All seismic monitoring shall follow the ISEE Field Practice Guidelines for Blasting Seismographs, unless otherwise approved in the blasting plan.

3.6.d. Flyrock, including blasted material, shall not be cast from the blasting site more than half way to the nearest dwelling or other occupied structure, beyond the area of control specified in subdivision 3.6.e. of this rule, or in no case beyond the bounds of the permit area.

3.6.e. Access to the blast area shall be controlled against the entrance of livestock or unauthorized personnel during blasting and for a period thereafter until an authorized person has

1 Airblast is a flat response from 4 to 125 Hz range, at 2hz airblast the microphone can have an error of no more than -3dB.

2 Only when approved by the Secretary

reasonably determined:

3.6.e.1. That no unusual circumstances exist such as imminent slides or undetonated charges, etc.; and

3.6.e.2. That access to and travel in or through the area can be safely resumed.

3.6.f. Blast Design.

3.6.f.1. An anticipated blast design shall be submitted if blasting operations will be conducted within:

3.6.f.1.A. 1,000 feet of any building used as a dwelling, public building, school, church, or community or institutional building outside the permit area; or

3.6.f.1.B. 500 feet of an active or abandoned underground mine.

3.6.f.2. The blast design may be presented as part of a permit application or at a time, before the blast as approved by the Secretary.

3.6.f.3. The blast design shall contain sketches of the drill patterns, delay periods, and decking and shall indicate the type and amount of explosives to be used, critical dimensions, and the location and general description of structures, including protected structures, to be protected, as well as a discussion of design factors to be used, which protect the public and meet the applicable airblast, flyrock, and ground-vibration standards.

3.6.f.4. The blast design shall be prepared and signed by a certified blaster.

3.6.f.5. The Secretary may require changes to the design submitted.

3.6.g. No blasting within five hundred (500) feet of an underground mine not totally abandoned shall be permitted except with the concurrence of the Secretary, the operator of the underground mine, West Virginia Office of



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Miners Health Safety and Training, and the Mine Safety and Health Administration.

3.6.h. The operator shall not exceed the allowable maximum weight of explosives (lbs.) to be detonated in any eight millisecond period calculated using the following scaled distance formulas, without seismic monitoring:

Formula	Distance in Feet from the Blasting Site to the Nearest Protected Structure
$W = (D/50)^2$	0 - 300 feet
$W = (D/55)^2$	301 - 5,000 feet
$W = (D/65)^2$	5,001 feet or greater

W = Weight of explosives in pounds  
D = Distance to the nearest structure

3.6.i. The scaled distance formulas need not be used for any particular blast if a seismograph measurement at the nearest protected structure is recorded and maintained for the blast. The peak particle velocity in inches per second in any one of the three mutually perpendicular directions shall not exceed the following values at any protected structure:

Seismograph Measurement (peak particle velocity)	Distance to the Nearest Protected Structure
1.25 ips	___ 0 - 300 feet
1.00 ips	___ 301 - 5,000 feet
0.75 ips	___ 5,001 feet or greater

Seismographs used to demonstrate compliance with this subsection must be shake-table calibrated annually. A copy of the annual calibration certificate shall be kept filed with the blasting logs and seismograph records and made available for review as required by subdivision 3.5.a of this rule. All seismic monitoring shall follow the ISEE Field Practice Guidelines for Blasting Seismographs, unless otherwise approved in the blasting plan.

3.6.j. The Secretary may require a seismograph recording of any or all blasts based on the physical conditions of the site in order to prevent injury to persons or damage to property.

3.6.k. The maximum allowable ground vibration as provided in subdivisions 3.6.h. and 3.6.i. of this subsection shall be reduced by the Secretary, if determined necessary to provide damage protection.

3.6.l. The maximum airblast and ground-vibration standards of subdivisions 3.6.c. ~~and~~, 3.6.h., ~~and~~ 3.6.i. of this subsection shall not apply at the following locations:

3.6.l.1. Structures owned by the permittee and not leased to another person; and

3.6.l.2. Structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the Secretary before blasting.

3.7. Blasting Control for “Other Structures”.

3.7.a. All “other structures” in the vicinity of the blasting area which are not defined as protected structures shall 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. The waiver of the protective 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, specified by the operator 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 designed on that waiver and approved by the Secretary. If alternative maximum allowable limits on vibration are not included in the approved blast plan, the operator shall comply with the limits specified in paragraph 3.6.c.1., and subdivisions 3.6.h. and 3.6.i. of this rule.

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3.7.b. The plan submitted under this subsection shall not reduce the level of protection for other structures otherwise provided for in this rule.

### 3.8. Pre-blast Surveys. –

3.8.a. At least thirty days prior to commencing blasting, an operator's designee shall notify in writing all owners and occupants of man-made dwellings or structures that the operator or operator's designee will perform preblast surveys. The operator shall conduct the pre-blast survey in a manner which will determine the condition of the dwelling or structure, to document any pre-blasting damage and to document other physical factors that could reasonably be affected by the blasting. Assessments of the pre-blasting condition of structures such as pipes, cables, transmission lines, wells and water systems shall be based on the exterior or ground surface conditions and other available data. ~~Special~~ Attention shall be given to documenting and establishing the pre-blasting condition of wells and other water systems. The pre-blast survey shall include a description of the water source and water delivery system. When the water supply is a well, the pre-blast survey shall include written documentation about the type of well, and where available, the well log and information about the depth, age, depth and type of casing, the static water level, flow and recharge data, the pump capacity, the name of the drilling contractor, and the source or sources of the information.

3.8.b. Surveys, waivers or affidavits for each dwelling or structure within the pre-blast survey area shall be completed and submitted to the Secretary at least fifteen (15) days before any blasting may occur: provided, that once all pre-blast surveys have been accepted by the Secretary, blasting may commence sooner than 15 days from submittal. Surveys requested more than ten (10) days before the planned initiation of the blasting shall be completed and submitted to the Secretary by the operator before the initiation of blasting.

3.8.b.1. Any person who receives a survey who disagrees with the results of the survey may submit a detailed description of the

specific areas of disagreement, to the Secretary. The description of the areas of disagreement will be made a part of the pre-blast survey on file with the Secretary.

3.8.b.2. If a structure is added to or renovated subsequent to a pre-blast survey, a survey of such additions and/or renovation shall be performed upon request of the resident or owner. If a pre-blast survey was waived by the owner and was within the requisite area and the property was sold, the new owner may request a pre-blast survey from the operator. An owner within the requisite area may request, from the operator, a pre-blast survey on structures constructed after the original pre-blast survey.

3.9. Pre-blast Surveyors -- Qualifications for Individuals and Firms Performing Pre-blast Surveys. -- Individuals must comply with the following:

3.9.a. At a minimum Individuals applying as a preblast 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.

~~equivalent, provided that experience working as a pre-blast surveyor may be acceptable in lieu of the educational requirement, and All applicants must complete the pre-blast surveyor training provided by the Secretary prior to approval to conduct pre-blast surveys.~~ provided that individuals meeting these criterion shall be approved. The Secretary shall not grant approval or re-approval to any person who is a convicted felon. The Secretary may establish a fee for approval and for pre-blast surveyor training to cover costs of the training of pre-blast surveyors.

3.9.b. The Secretary shall develop and maintain a list of individuals who are approved

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pre-blast surveyors. The Secretary shall provide written documentation of the approval to conduct pre-blast surveys, which shall expire in three (3) years, to each person who has been approved by the Secretary.

3.9.c. Every three (3) years after meeting initial qualifications for performing pre-blast surveys, those individuals that have ~~must~~ meet the requirements of subparagraph 3.9.a. of this rule ~~must~~ or submit, ~~in person,~~ a written demonstration of qualifications ~~of~~ ~~and~~ ongoing experience performing pre-blast surveys. Those individuals who have no ongoing experience must attend the training required in 3.9.a. The Secretary shall also require that all applicants for re-approval attend a minimum of 4 hours continuing education training in a subject area relative to knowledge required for conducting preblast surveys. Training programs must be approved by the Secretary.

The Secretary shall issue written documentation of the re-approval to conduct pre-blast surveys to each person who has been re-approved by the Secretary

3.9.d. Individuals who assist in the collection of information for pre-blast surveys must have completed, 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, and only under the direct supervision of an approved Pre-blast Surveyor. The Secretary shall maintain a list of all those individuals who have completed the pre-blast survey requirement training. An individual who is not an approved pre-blast surveyor may conducting pre-blast surveys working as a pre-blast surveyor in training, only if he or she have 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 are 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~~

3.9.e. The Secretary may disqualify an approved pre-blast surveyor and remove the person from the list of approved pre-blast surveyors, if the person repeatedly conducts, ~~and~~ submits, or allow surveys to be submitted that do not meet the requirements of W. Va. Code §22-3-13a and subsection 3.8 of this rule, provided that the Secretary shall notify the approved pre-blast surveyor of his pending disqualification, and provide an opportunity for the person to show cause why he/she should not be disqualified. Any person who is disqualified may appeal to the Secretary, and if not resolved to the Surface Mine Board.

### 3.10. Pre-blast Survey Review.

3.10.a. Pre-blast surveys shall be submitted to the Secretary on forms prescribed by the Secretary in accordance with W. Va. Code §22-3-13a.

3.10.b. The Secretary shall review each pre-blast survey as to form and completeness only, and notify the operator of any deficiencies. The operator or his designee shall correct deficiencies within 30 days from receipt of notice of deficiencies.

3.10.c. At the time the pre-blast survey is accepted by the Secretary, the Secretary shall forward a copy to the homeowner or resident.

3.10.d. All pre-blast surveys shall be confidential and only used for evaluating damage claims. The Secretary shall develop a procedure for assuring surveys shall remain confidential.

3.10.e. The Secretary shall make available informational materials educating citizens about pre-blast surveys and blasting.

3.10.f. All persons employed by the Secretary, whose duties include review of pre-blast surveys and training of pre-blast surveyors,

shall meet the requirements for pre-blast surveyors as set forth in section 3.9.

3.11. The Secretary may prohibit blasting or may prescribe alternative distance, vibration and airblast limits on specific areas, on a case by case basis, where research establishes it is necessary, for the protection of public or private property, or the general welfare and safety of the public.

#### **§199-1-4. Certification of Blasters.**

4.1.a. Requirements for Certification. -- In every surface mine and surface area of an underground mine when blasting operations are being conducted, a certified blaster shall be responsible for the storage, handling, transportation, and use of explosives for each and every blast, and for conducting the blasting operations in accordance with the blasting plans approved in a permit issued pursuant to W. Va. Code §22-3-1 et seq., and the rules promulgated under that article. Each person acting in the capacity of a blaster and responsible for the blasting operations shall be certified by the Secretary. Each certified blaster shall have proof of certification either on his or her person or on file at the permit area during blasting operations. Certified blasters shall be familiar with the blasting plan and blasting related performance standards for the operation at which they are working. Where more than one certified blaster is working on a blast, the blaster who designed the blast shall supervise the loading operations and sign the blasting log. Nothing in this rule modifies statutory regulatory authority of the state fire marshal and the state fire commission to regulate blasting and explosives.

#### 4.1.b. Qualifications for Certification.

- Each applicant for certification shall be a minimum of twenty-one (21) years old, have had at least one (1) year active blasting experience within the past three (3) years, and have demonstrated a working knowledge of and skills in the storage, handling, transportation, and use of explosives, and a knowledge of all state and federal laws pertaining thereto, by successfully

taking and passing the examination for certification required by subdivision 4.3.b. of this rule. Applicants 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 requirements of 4.6.c. will apply.

4.1.c. Application for Certification. -- Prior to taking the examination for certification, a person must submit an application on forms prescribed by the Secretary, along with a fifty dollar (\$50.00) application fee, to the Secretary to take the examination.. Upon receipt of an application for examination, the Secretary shall, after determining that the applicant meets the experience requirements of subdivision 4.1.b. of this rule, notify the applicant of the date, time, and location of the scheduled examination.

4.2. Training. -- The Secretary will administer a training program to assist applicants for blaster certification or re-certification in acquiring the knowledge and skills required for certification. The training requirements shall include, at a minimum, those subject areas set forth in subparagraphs 4.3.b.1.A through 4.3.b.1.K. of this rule. 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. The Secretary may establish a fee for training to cover costs to the Secretary.

~~In lieu of completing the training program, the applicants~~ Applicants for certification, or applicants for re-certification who can not meet document the experience requirements specified in subdivision 4.1.b. of this rule, may must complete the aWest Virginia Surface Mine Blasters Self-Study Guideself-study course, using the study guide and other materials available from the Office.

4.2 a. Blasters Responsibilities - Prior to certification, all applicants ~~who choose to self-~~

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~~study will also be required to attend an Office of Explosives and Blasting~~ 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. This training will be made available immediately prior to scheduled examinations, ~~when necessary.~~

4.3. Examination for Certification of Examiner/Inspector and Certified Blaster.

4.3.a. Examinations for Certified Blaster Examiners/Inspectors. All persons employed by the Secretary, whose duties include training, examining, and certification of blasters and/or inspecting blasting operations shall be a certified examiner/inspector. Certification as an examiner/inspector does not constitute surface mine blaster certification; however, a surface mine blaster certification is sufficient for certification as an examiner/inspector. The examination for certified examiner/inspector shall at a minimum, test the applicant's knowledge as required by subdivision 4.3.b. of this rule.

4.3.b. Examination for Certified Blaster.

- The examination for certified blaster shall include information presented in the Study Guide for West Virginia Surface Mine Blasters, and shall consist of three parts:

4.3.b.1. A written multiple choice examination covering:

4.3.b.1.A. Types of explosives and their properties, to include selection of appropriate explosive(s);

4.3.b.1.B. Blasting equipment and accessories, to include blasting machines;

4.3.b.1.C. Blast dimensions and calculations, to include geologic and topographic considerations, blast hole design, flyrock control, secondary blasting, and blast plans;

4.3.b.1.D. Delay systems, to include pattern design, field layout, and initiation systems;

4.3.b.1.E. Timing;

4.3.b.1.F. Blast vibration and vibration control, to include airblast, monitoring techniques, and use of preblast surveys;

4.3.b.1.G. Loading and detonating, to include priming, scheduling, site control, warning signals, and unpredictable hazards;

4.3.b.1.H. Storage and transportation of explosives;

4.3.b.1.I. Record keeping and reporting;

4.3.b.1.J. Current state and federal laws, rules and regulations relating to the handling, storage, transportation, and use of explosives; the training and certification of blasting personnel, and blasting signs; and

4.3.b.1.K. Responsibilities of a certified blaster.

4.3.b.2. A simulation examination whereby the applicant must correctly and properly complete a blasting log.

4.3.b.3. Other portions or parts developed to demonstrate an applicants ability to use explosives products and equipment properly, as deemed appropriate by the Secretary.

4.3.c. A score of 80 percent (80%) for the multiple choice examination, and satisfactory completion of the blasting log portion, and any other portions that may be included in the examination, which are graded on a pass/fail basis, are required for successful passage of the examination.

4.3.d. Notification of Scores. -- The Secretary will notify all persons of their scores within thirty (30) days of completing the

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examination. A person who fails to achieve a passing score of any of the parts of the examination may apply, after receipt of his or her examination results, to retake the entire examination or any portions that the individual failed to pass.

Any person who fails to pass 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 ~~course~~ described in subsection 4.2. of this rule prior to applying for another examination.

4.4. Approval of Certification. -- Upon determination that an applicant for certification has satisfactorily passed the examination, the Secretary shall, within thirty (30) days of the examination date, issue a certification card to the applicant.

4.5. Conditions or Practices Prohibiting Certification. -- The Secretary shall not issue a blaster certification or re-certification to persons who:

4.5.a. Are currently addicted to alcohol, narcotics or other dangerous drugs;

4.5.b. Have exhibited a pattern of conduct inconsistent with the acceptance of responsibility for blasting operations; or

4.5.c. Are convicted felons.

4.5.d. 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.

4.6. Re-certification Requirements for Certified Blaster.

4.6.a. Refresher Training -- All certified blasters must complete a minimum of twelve (12) hours of refresher training during the three (3) year period that each blasters' certification is in effect. This refresher training requirement may be satisfied by attendance at various professional and technical seminars and meetings approved by the

Secretary, or by attendance at a refresher training session conducted by the Secretary. The Secretary may establish a fee for refresher training to cover costs.

4.6.b. Re-certification of Blasters. A certified blaster must be re-certified every three (3) years. Each applicant for re-certification must be currently certified and must document that he or she satisfactorily meets the experience requirements of subdivision 4.1.b. of this rule, and has satisfied the refresher training requirement in subdivision 4.6.a. of this rule. The application for re-certification must be submitted on forms prescribed by the Secretary with a thirty dollar (\$30.00) re-application fee.

4.6.c. Re-training. -- An applicant for re-certification 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, and pass the examination required in subdivision 4.3.b. of this rule.

4.6.d. Re-examination - - Each certified blaster shall be required to successfully complete the examination for certified surface coal mine blasters at least once every sixth year, as required by subdivision 4.3.b of this rule.

4.7. Presentation of Certificate; Transfer; and Delegation of Authority.

4.7.a. Upon request by the Secretary, a certified blaster shall exhibit his or her blaster certification card.

4.7.b. The certified blaster shall take all reasonable care to protect his or her certification card from loss or unauthorized duplication, and shall immediately report any such loss or duplication to the Secretary.

4.7.c. Blaster's certifications may not be transferred or assigned.

4.7.d. Certified blasters shall not delegate their authority or responsibility to any individual who is not a certified blaster. A certified blaster

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shall not take any instruction or direction on blast design, explosives loading, handling, transportation and detonation from a person not holding a West Virginia blasters certificate, if such instruction or direction may result in an unlawful act, or an improper or unlawful action that may result in unlawful effects of a blast. A person not holding a West Virginia blasters certification who requires a certified blaster to take such action may be prosecuted under W. Va. Code §22-3-17(c) or (i).

4.8. Violations by a Certified Blaster. --The Secretary may issue written notification, a temporary suspension order, or revoke the certification of a certified blaster who is, based on clear and convincing evidence, in violation of any of the following:

4.8.a. Failure to comply with any order issued by the Secretary;

4.8.b. Illegal use of drugs or narcotics, or any use of alcohol in the work place;

4.8.c. Violations of Federal or state laws, or regulations governing, the purchase, use, handling, transportation, storage, or detonation of explosives, or the approved blast plan for the permit where the blaster is working;

4.8.d. False swearing in order to obtain a blaster's certification card;

4.8.e. Any illegal or improper action taken by a certified blaster in the use, handling, transportation, or storage of explosives or in designing and executing a blast, which may or has led to injury or death at or near a mine site.

4.8.f. A pattern of conduct which is not consistent with acceptance of responsibility for blasting operations, i.e., repeated violations of state or Federal laws pertaining to explosives; or

4.8.g. Willful Conduct -The Secretary shall suspend or revoke the certification of a blaster for willful violations of state or Federal laws pertaining to explosive.

## 4.9. Penalties.

### 4.9.a Suspension and Revocation.

4.9.a.1. Suspension. -- Upon service of a temporary suspension order, the certified blaster shall be granted a hearing before the Secretary to show cause why his or her certification should not be suspended or revoked.

4.9.a.1.A. 4.9.a.2. The period of suspension will be conditioned on the severity of the violation committed by the certified blaster and, if the violation can be abated, the time period in which the violation is abated. The Secretary may require remedial actions and measures and re-training and re-examination as a condition for reinstatement of certification.

### 4.9.a.2. Imminent Harm Suspension.

- A certified inspector has the authority to issue a temporary suspension order to a certified blaster when an imminent danger to the health or safety of the public exists, or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resource by any condition, practice, or violation of this rule or any permit condition. The temporary suspension order shall take effect immediately.

4.9.a.2.A. The Secretary shall formally investigate the incident(s) and provide written findings to the blaster within fifteen days following the effective date of the temporary suspension.

4.9.a.2.B . Informal Conference - Unless waived in writing by the certified blaster, an informal conference shall be held at or near the site relevant to the violation. This informal conference shall be held within twenty-four hours after the temporary suspension order becomes effective. The conference shall be held before the Secretary, who shall evaluate the blasters' performance and upon conclusion of the hearing shall; determine if the temporary suspension of the blaster shall remain in force, withdraw the

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suspension, or uphold in part.

4.9.a.2.C. Appeal to the Secretary  
– If a blaster chooses to appeal the results of the informal conference or the written findings of the initial investigation; they may appeal the results within in five days to the Secretary. The appeal shall include written reasons for the appeal. A hearing shall be conducted by the Secretary within ten days of receipt of the appeal.

4.9.a.2.D. Any blaster receiving a temporary suspension may appeal the decision of the Secretary to the Surface Mine Board.

4.9.a.3. Revocation. -- If the remedial action required to abate a suspension order, issued by the Secretary to a certified blaster, or any other action required at a hearing on the suspension of a blaster's certification, is not taken within the specified time period for abatement, the Secretary may revoke the blaster's certification and require the blaster to relinquish his or her certification card. Revocation will occur if the certified blaster fails to re-train or fails to take and pass reexamination as a requirement for remedial action.

4.9.a.4 In addition to suspending or revoking the certification of a blaster, failure to comply with the requirements of this subsection may also result in further suspension or revocation of a blasters certification.

4.9.a.5 Any blaster receiving a suspension or revocation may appeal the decision to the Secretary and to the Surface Mine Board.

4.10. Reinstatement - Subject to the discretion of the Secretary, and based on a petition for reinstatement, any person whose blaster certification has been revoked, may, if the Secretary is satisfied that the petitioner will comply with all blasting law and rules, apply to re-take the blasters certification examination, provided the person meets all of the requirements for blasters certification specified by this subsection, and has completed all requirements of the suspension and revocation orders, including

the time period of the suspension.

4.11. Civil and Criminal Penalties. -- Every certified blaster is subject to the individual civil and criminal penalties provided for in W. Va. Code §22-3-17.

4.12. Hearings and Appeals. -- Any certified blaster who is served a suspension order, revocation order, or civil and criminal sanctions is entitled to the rights of hearings and appeals as provided for in W. Va. Code §§22-3-16 and 17.

4.13. Blasting Crew. —Persons who are not certified and who are assigned to a blasting crew, or assist in the use of explosives, shall receive directions and on-the-job training from ~~a—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.

4.14 Reciprocity With Other States. -- The Secretary may enter into a reciprocal agreement with other states wherein persons holding a valid certification in that state may apply for certification in West Virginia, and upon approval by the Secretary, be certified without undergoing the training or examination requirements set forth in this rule. Reciprocity is a one time only process. Any blaster who has been issued a certification through reciprocity and fails to meet the re-certification requirements will be required to re-examine and may be required to provide refresher training documentation, as per section 4.6.a of this rule.

### **§199-1-5. Blasting Damage Claim.**

5.1. Damage to Surface Structures. -- A claim of damage to surface structures from blasting will be the result of one or more of the following:

5.1.a. Fly Rock. -- Fly rock damage is based on the presence of debris from the blast site and the presence of impact damage;

5.1.b. Air Blast. -- Air blast damage is characterized by broken or cracked window glass;



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and

5.1.c. Blasting Vibration Damage. -- Blasting vibration damage is investigated by experienced and specially trained personnel to accurately determine the presence of such damage. Examples are explained in, but not limited to, the American Insurance Association publication, Blasting Damage, A Guide for Adjusters and Engineers.

5.2. Filing a Claim.

5.2.a. It is the responsibility of the property owner to notify the Secretary of the alleged blasting damage. ~~An~~ A certified inspector will be assigned to conduct a field investigation to determine the initial merit of the damage claim. An investigation by a certified inspector will include the following:

5.2.a.1. The inspector will contact property owner within one (1) business day of receiving the complaint to schedule a visit to the property where the alleged blasting damage occurred and interview the property owner;

5.2.a.2. The inspector will visit the blasting site to determine if the operator and blaster are in compliance with state blasting requirements; and

5.2.a.3. The inspector will make a written a 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, damage 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. 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. If a definite determination that the~~ There is merit of that blasting caused the alleged blasting damage; or can be made, ~~the inspector will 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.B. There is no merit that blasting caused the alleged damage.

~~5.2.a.3.C. If a definite determination that t~~ The determination of merit as to whether blasting caused or did not cause the alleged blasting damage cannot be made, ~~The inspector will notify the claims administrator and supply such information that the claims administrator needs to sufficiently document and administer the claim;~~

5.2.a.4. The inspector will inform the property owner of the following four resolution options available for the alleged blasting damage:

5.2.a.4.A. Withdraw the claim, with no further action required by the Secretary;

5.2.a.4.B. File a claim with the operator or the operator's general liability insurance carrier;

5.2.a.4.C. File a claim with the homeowner's insurance carrier; or

5.2.a.4.D. Submit to the Secretary's claims process.

5.2.a.5. If the property owner declines part 5.2.a.4.D of this rule, the Secretary's involvement will be concluded.

~~5.2.a.3.C. The inspector will inform the property owner of the following four resolution options available for the alleged blasting damage:~~

~~5.2.a.3.C.1. Withdraw the claim, with no further action required by the~~

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Office;

~~5.2.a.3.C.2. File a claim with the operator or the operator's general liability insurance carrier;~~

~~5.2.a.3.C.3. File a claim with the homeowner's insurance carrier; or~~

~~5.2.a.3.C.4. Submit to the Office's claims process.~~

~~5.2.a.4. If the property owner declines part 5.2.a.3.C.4 of this rule, the Office's involvement will be concluded.~~

5.2.a.6. Once a determination is made as to the merit of a claim by the inspector, the Secretary shall offer the claimant and the permittee the opportunity to meet to attempt to resolve the issue.

5.3. The claims administrator will be responsible for the following:

5.3.a. Sending notice to the respective operator of the damage claim;

5.3.b. Making an initial assignment of the damage claim to a qualified claims adjuster within one (1) business day;

5.3.c. Providing the relevant claims information to the arbitrator assigned to that claim;

5.3.d. Making a final determination on the merit and loss value of the claim; and

5.3.e. Providing a complete report of the adjusters and the administrators findings to the Secretary Office, the claimant and the respective operator.

5.4. The adjuster will be responsible for the following:

5.4.a. Contacting the property owner and physically visiting the site of the alleged blasting damage within three (3) business days of the initial assignment;

5.4.b. Documenting the alleged blasting damage through accepted methods such as photographs, video tapes, written descriptions, and diagrams;

5.4.c. Reviewing all available supporting information such as blasting logs, seismograph records and pre-blasting surveys;

5.4.d. Making a determination of the need for additional assistance from structural engineers, building contractors and blasting consultants. The claims administrator will be the approving authority for the assignment of such specialists;

5.4.e. Making a preliminary determination as to the merit of the blasting damage claim; and

5.4.f. Making an initial monetary determination of the loss value of the respective claim.

5.4.f.1. The adjuster will use the following ratings in the determination of the merit of the alleged blasting damage claim:

5.4.f.1.A. Caused by blasting;

5.4.f.1.B. Probably caused by blasting;

5.4.f.1.C. Possibly caused by blasting;

5.4.f.1.D. Probably not caused by blasting; or

5.4.f.1.E. Not caused by blasting.

5.4.f.2. The merit-rating factors include, but are not limited to the following:

5.4.f.2.A. The claimant is the property owner;

5.4.f.2.B. Correlation of alleged damage event to a specific blast and mine;

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5.4.f.2.C. Correlation of alleged damage event to a large, unusual or problem shot;

5.4.f.2.D. Proximity to the blast site;

5.4.f.2.E. Timeliness of first notice of loss;

5.4.f.2.F. Damage that is not indicated on the pre-blast survey;

5.4.f.2.G. Lack of any other issues or grievances besides blasting;

5.4.f.2.H. Age and physical condition of the structure in question;

5.4.f.2.I. Presence of seismographic records close to the structure in question;

5.4.f.2.J. History of previous blasting in the immediate area;

5.4.f.2.K. Property that has been undermined; and

5.4.f.2.L. An area with a history of geological abnormalities.

5.4.g. Recommendations as to the equitable resolution of the claim; and

5.4.h. Completing report and sending to the claims administrator.

### §199-1-6. Arbitration for Blasting Damage Claims.

6.1 Listing of Arbitrators. -- The ~~Secretary Office~~ shall maintain and make available to the claimant and the operator a listing of persons willing and qualified to serve as arbitrators. The ~~Secretary Office~~ will recommend a listing from the roster maintained by the American Arbitration Association from which the parties will choose the arbitrator. The listing shall

identify those persons who are qualified and willing to serve, including but not limited to, those willing to serve on a volunteer (i.e., without compensation) basis. The ~~Secretary Office~~ shall establish a pool of arbitrators sufficient to handle the claims process. 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. The Environmental Advocate is required to seek citizen input.

6.2. Selection of Arbitrator. -- The parties may chose their own arbitrator by agreement, who need not be on the listing of arbitrators as defined by subsection 6.1 of this rule. In the absence of such agreement, the Secretary will provide the parties with a listing of arbitrators and permit each of the parties to eliminate, in rotation, names from the list until one name remains. That person shall serve as arbitrator.

6.3. Provision for Preliminary Information to the Arbitrator. -- The arbitrator may require the parties to provide pertinent information to the arbitrator and to the other parties prior to the arbitration session. Such information may include, but is not limited to:

6.3.a. The pre-blast survey, shot logs, and other documents deemed necessary by the arbitrator to determine the merits and value, if any, of the blasting damage claim; and

6.3.b. A confidential statement summarizing a party's position on the issues and what relief, if any, should be awarded.

6.4. Demand for Arbitration and Timeframes for Arbitration. -- When notifying the parties of the claim determination, the Secretary shall also notify the parties of the right to demand arbitration. If a party wants to arbitrate the claim determination, the party seeking arbitration shall serve the other party by certified mail, a written demand for arbitration on forms provided by the Secretary within fifteen (15) days of receipt of the initial claim determination. An arbitrator shall be

chosen within fifteen (15) days of receipt of the notice by the parties for arbitration. Unless otherwise agreed by the parties and the arbitrator, the arbitration shall be conducted within thirty (30) days after the appointment of the arbitrator. Arbitration shall be completed within thirty (30) days after the first arbitration session, unless changed by agreement of the parties and the arbitrator. The arbitrator is empowered to set the date and time of all arbitration sessions.

6.5. Place of Arbitration. -- The parties may by agreement select the place of arbitration and arrange for paying any associated costs. If the place of arbitration is determined by agreement, the place must be identified to the arbitrator upon the arbitrator's appointment. The Secretary shall, upon reasonable request by the parties, make available its state-Office for the arbitration. In the event the parties cannot agree on the place of arbitration, the arbitrator is empowered to select a place.

6.6. Confidentiality of the Arbitration Process. -- Arbitration shall be regarded as confidential. The arbitrator shall maintain and preserve the confidentiality of all arbitration proceedings and records. An arbitrator may not be subpoenaed or called to testify, or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute arbitrated.

6.7. Presentations to the Arbitrator. -- Unless otherwise directed by the Arbitrator, witnesses for the claimant will be the claimant, any one other person designated by the claimant, and the; ~~and~~ witnesses for the operator will be a company Officer, its engineer or blaster. If the claimant does not have a representative and requests representation, the Secretary, through the Office of the Environmental Advocate, shall provide a representative, willing to work at a low-cost or no-cost, throughout the arbitration process, the representative is not required to be an attorney-at-law.

6.8. Arbitration Award, Fees, Costs and Expenses. -- If parties agree on settlement after

entering into arbitration, parties may request their settlement be declared the official award by the arbitrator. Within thirty (30) days after the arbitration process is closed or terminated, the arbitrator shall issue a decision upholding, upholding in part, or overruling the initial claim determination made by the claims administrator. If the initial claim determination was in favor of the claimant, the operator requests arbitration and the claim determination is upheld or upheld in part, the operator shall pay the costs of the proceeding, as well as reasonable representation fees and costs of the claimant not to exceed one thousand dollars (\$1,000.00). Otherwise, the parties are equally responsible for the cost of the proceeding and are responsible for their own fees and costs.

6.9. Binding Nature of the Award. -- By requesting arbitration, the results of the arbitration are intended to be final and binding. As such they are not appealable to the West Virginia Supreme Court of Appeals, the circuit courts, or any other tribunal. The Secretary shall provide written notice to the claimant of the binding nature of the arbitration award and shall secure from the claimant a written acknowledgement that the claimant understands the final nature of the award and agrees to be bound by it.

6.10. Payment of the Award. -- Should an award be made against the operator on an arbitrated claim, the operator shall pay the full amount of the award within thirty (30) days of the final determination and award. If the operator fails to pay the award within thirty (30) days, the Secretary may issue a cessation order pursuant to W. Va. Code §22-3-16 for all sites operated by the operator.

**§199-1-7. Explosive Material Fee.**

7.1. Assessment Fee on Blasting Material. -- Pursuant to W. Va. Code §§22-3A-7 and ~~22-5B-2a-2~~, there is hereby assessed a fee of one-quarter cent (\$.0025) per pound on explosive material used for any purpose on surface mining operations. Provided, that the operators exempted from the application of W. Va. Code §5BB1-2A et

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seq. shall pay one-eighth (\$.00125) cent per pound on explosive material.

7.2. Remittance of Fee. -- Within thirty (30) days of the end of each previous quarter after the effective date of this rule, the operator shall remit to the Secretary the amount of the fee calculated by multiplying one-quarter cent (\$.0025) or one-eighth cent (\$.00125) for operators exempt from the application of W. Va. Code §5B-2A-1 et seq, times the number of pounds of explosive material used during the preceding quarter for any purpose on the surface mining operations: Provided, That, the materials are measured by the pound. A report of the amount of explosives used per calendar quarter shall be submitted on forms prescribed by the Secretary with the fee. To verify the accuracy of the report and fee calculation, the Secretary may require copies of delivery records, blast logs, and inventories be submitted, as necessary. Upon request, operators shall make explosives delivery and inventory records available at the site, for inspection by the Secretary

7.3. Dedication of the Fee. -- The Secretary shall deposit all moneys received from the explosive material fees into a special revenue fund to be known as the "mountaintop removal fund" within the state treasury. These moneys shall be expended by the Explosives and Blasting Program~~Office of Explosives and Blasting~~ and the Office of Coalfield Community Development, created by W. Va. Code §5B-2A-1 et seq, in the performance of their respective duties; Provided, However, that no explosive material fees collected from underground or surface mining operations specifically exempted from application of W. Va. Code §5B-2A-2(b) may be expended to fund the Office of Coalfield Community Development. All such fees shall be reserved and expended exclusively to fund the Explosives and Blasting Program. For the purpose of this section; detonators, caps, detonating cords, and initiation systems shall be exempt from the calculation for explosive material fees. However, the Secretary may require reporting on the use of these products.

7.4. Expenditures. -- Direct expenditures from the fees collected are not authorized, but shall be

appropriated by the Legislature.

7.5. Sufficiency of Fees. -- After one year of collection of the explosive material fees and expenditure of the appropriations there from, the Secretary shall report to the Legislature whether the fees have provided sufficient revenue to fund the operation of both the Explosives and Blasting Program ~~Office of Explosives and Blasting~~ and the Office of Coalfield Community Development.

7.6. The Secretary is authorized, through the Treasurer's Office to invest the mountaintop removal fund with all interest earnings accrued to be returned to and be made part of the fund.

7.7. Noncompliance. -- Failure to comply in a timely manner with the fee requirements of W. Va. Code §22-3A-1 et seq. and this rule may result in permit suspension or revocation in accordance with W. Va. Code §22-3-17.

### §199-1-8. Inspections.

8.1. Inspections shall be made on any prospecting, active surface mining operation, or inactive surface mining operation as necessary to assure compliance with the W. Va. Code §§22-3-1 et seq. and 22-3A-1 et seq., this rule, and the terms and conditions of the blasting plan.

8.2. A permittee may request an on-site compliance conference to review the status of any condition or practice at any surface coal mining and reclamation operation. A compliance conference does not constitute an inspection within the meaning of W. Va. Code §22-3-15 and this section. The Secretary may accept or refuse any request to conduct a compliance conference. If accepted, authorized representative of the Secretary shall conduct the compliance conference and shall review conditions and/or practices at the operation in order to advise whether any conditions and/or practices has the potential to become a violation of the law or any applicable permit condition. Neither the holding of a compliance conference or any opinion given by the authorized representative of the Secretary at a conference shall affect:

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8.2.a. Any rights or obligations of the Secretary or by the permittee with respect to any inspection, notice of violation, or cessation order, whether prior or subsequent to the compliance conference; or

8.2.b. The validity of any notice of violation or cessation order issued with any condition or practice reviewed at the compliance conference.

### 8.3. Notice of Violations.

8.3.a. When, on the basis of an inspection carried out pursuant to subsection 8.1. of this rule, the Secretary determines that the surface mining and reclamation operation or prospecting operation is in violation of any of the requirements of the law, this rule, or the terms and conditions of the permit or prospecting approval, a notice of violation shall be issued. The notice of violation shall comply with all requirements and provisions of this subsection.

8.3.b. Notice Procedures. A notice of violation shall be in writing signed by the Secretary and shall set forth with reasonable specificity:

8.3.b.1. The nature of the violation;

8.3.b.2. The remedial action required, which may include interim steps;

8.3.b.3. A reasonable time for abatement, which may include time for accomplishment of interim steps, but in no case shall the initial abatement period be in excess of thirty (30) days; and

8.3.b.4. A reasonable description of the portion of the prospecting or surface coal mining and reclamation operation to which it applies.

8.3.c. Abatement. The Secretary may extend the time set for abatement or for accomplishment of an interim step if the failure to

meet the time previously set was not caused by lack of diligence on the part of the operator. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance except upon a showing by the operator that it is not feasible to abate the violation within 90 calendar days due to one or more of the circumstances in subdivision 8.3.e of this subsection. An extended abatement date pursuant to this subsection shall not be granted when the operator's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the operator in completing the required remedial action.

8.3.d. Termination. The Secretary shall terminate a notice of violation by written notice to the permittee when he determines that all violations listed in the notice of violation have been abated. Notices of violations shall not be terminated or vacated because of the operator's inability to comply with the terms of abatement.

8.3.e. Criteria for Extensions of Abatement Period. Circumstances which may qualify an operator for an abatement period of more than 90 days are:

8.3.e.1. Where the operator of a permitted operation has made timely application for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit renewal or other approval has not been or will not be issued within 90 days after the time required for reasons not within the control of the operator;

8.3.e.2. Where there is a valid judicial order precluding abatement within 90 days as to which the operator has diligently pursued all rights of appeal and as to which there is no other effective legal remedy;

8.3.e.3. Where the operator cannot abate within 90 days due to a labor strike;

8.3.e.4. Where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days

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clearly would cause more environmental harm than it would prevent; or

8.3.e.5. Where abatement within 90 days requires action that would violate safety standards established by statute or regulation under the Mine Health and Safety Act of 1977.

8.3.f. Interim Procedures. Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or the environment.

8.3.g. Grant of Extension. If any of the conditions in subdivision 8.3.e. of this subsection exist, the operator may request that the Secretary grant an abatement period exceeding 90 days. An authorized representative of the Secretary shall grant the extension only with the concurrence of his immediate supervisor. The abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The operator shall have the burden of establishing by clear and convincing proof that he or she is entitled to an extension. The authorized representative of the Secretary who grants or denies the extension shall promptly and fully document in the file the reasons for granting or denying the request. The immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for concurrence or disapproval in the file.

8.3.h. Appeals. Any determination made under subdivision 8.3.g. of this subsection shall carry with it a right of appeal.

8.3.i. Extension Period. No extension granted under subdivision 8.3.g. of this subsection may exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration date of any such extension, the operator may request and the Secretary may grant a further extension pursuant to the procedures of subdivision 8.3.g. of this subsection.

### 8.4. Cessation Orders.

#### 8.4.a. Imminent Harm.

8.4.a.1. When the Secretary finds that a prospecting or surface mine operation creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, a cessation order shall be issued forthwith.

8.4.a.2. Any cessation order issued under the provisions of W. Va. Code §22-3-16(a), shall remain in effect until the violation has been abated or until modified, vacated, or terminated by the Secretary or the Surface Mine Board or by a court.

8.4.a.3. In any cessation order, the Secretary shall determine the appropriate remedial measures to be taken to abate the violation in the most expeditious manner possible and shall set forth these measures and the time by which abatement shall be accomplished in the order.

#### 8.4.b. Failure to Abate.

8.4.b.1. If the operator fails to meet the time set for abatement of a notice of violation issued pursuant to subsection 8.3. of this rule, the Secretary shall issue a cessation order; or

8.4.b.2. If the operator fails to meet the time set for accomplishment of any interim step of a notice of violation issued pursuant to subsection 8.3. of this rule, the Secretary may issue a cessation order.

8.4.c. All cessation orders shall be issued as follows:

8.4.c.1. A cessation order shall set forth in writing with reasonable specificity:

8.4.c.1.A. The nature of the condition, practice or violation for which the order was issued;

8.4.c.1.B. The remedial action or

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affirmative obligation required by the operator, if any, including any interim steps;

8.4.c.1.C. The time established for abatement, if appropriate; and

8.4.c.1.D. A reasonable description of the portion of the prospecting or surface mining and reclamation operation to which it applies.

8.4.c.2. Reclamation operations and other activities intended to protect public health and safety and the environment shall continue during the period of any cessation order unless otherwise provided in the order.

8.4.c.3. The Secretary may modify, terminate or vacate a cessation order for good cause, and may extend the time for abatement if the failure to abate within the time previously set was not caused by lack of diligence on the part of the operator. A cessation order shall not be terminated or vacated because of the operator's inability to comply with the terms of abatement.

8.4.c.4. The Secretary shall terminate a cessation order by written notice when it is determined that all conditions, practices, or violations listed in the order have been abated. The termination notice must be in writing and shall not affect the right of the Secretary to assess civil penalties for the violation.

8.4.d. Notice of Informal Conference. Notices of informal conferences held as a result of a cessation order issued pursuant to the provisions of W. Va. Code §22-3-16(a) shall be posted at the nearest regional ~~Office~~ office and sent by mail or communicated verbally, whichever is more practicable, to any person who filed a report which led to a cessation order for which the informal conference is to be held. The results of the informal conference shall be provided to any person who filed a report which led to the order within five (5) days after the close of the informal conference.

8.4.e. Within sixty (60) days after issuing

a cessation order, the Secretary shall notify in writing any person identified as owning or controlling the permittee, that the cessation order was issued and that the person has been identified as an owner or controller.

### 8.5. Show Cause Orders.

8.5.a. General. Where the Secretary determines that a pattern of violations of the law is rule or the terms and conditions of a permit exists or has existed, and that the violations were caused willfully or through an unwarranted failure to comply, the Secretary shall issue an order requiring the permittee to show cause why the permit and the permittee's right to mine under the law should not be suspended or revoked. For purposes of this subsection a willfully caused violation is a violation resulting from an intentional act or omission, and an unwarranted failure to comply means the failure of the permittee to prevent the occurrence of any violation or the failure to abate any violation of the law, this rule, or the terms and conditions of the permit due to indifference, lack of diligence or lack of reasonable care.

8.5.b. Criteria for Establishing a Pattern of Violations. The Secretary may determine that a pattern of violations exists or has existed, where violations were cited on two or more inspections of the permit area within any twelve (12) month period. In making such a determination, the Secretary shall take into consideration the following circumstances:

8.5.b.1. The number of previous violations cited on more than one occasion for the same or related requirements of the law, this rule, or the terms and conditions of the permit;

8.5.b.2. The number of previous violations, cited on more than one occasion, of different requirements of the law, this rule, or the terms and conditions of the permit; and

8.5.b.3. The extent to which the violations were isolated departures from lawful conduct.



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8.5.c. Duplicate or Similar Violations. The Secretary shall promptly review the history of violations of any permittee who has been cited for violations of the same or related requirements of the law, this rule, or the terms and conditions of the permit during three (3) or more inspections of the permit area within any twelve (12) month period. After such review, the Secretary shall determine whether or not a pattern of violations exists.

8.5.d. Permittee Responsibility. Violations by any person conducting surface coal mining operations on behalf of the permittee shall be attributed to the permittee, unless the permittee establishes that they were acts of deliberate sabotage.

8.5.e. Hearings and Appeals. If the permittee files an answer to the show cause order and requests a hearing, a public hearing shall be held. The Secretary shall give thirty (30) days advance written notice to the permittee and any interested party who requests intervenor status of the date, time, and place of the hearing. The Secretary shall publish the notice if practicable, in a newspaper of general circulation in the area of the operations, and shall also post the notice in the regional ~~Office~~ office of the Department of Environmental Protection nearest the operation.

8.5.f. Consent Agreement. When the permittee demonstrates that sufficient resources are available to him to abate the violation(s), the Secretary may enter into a consent agreement.

8.5.g. Hearing Record and Decisions. Within sixty (60) days following the hearing, the Secretary shall issue a written determination as to whether a pattern of violations exists, and furnish to the operator and all other parties to the hearing a written decision or consent order and the reason therefore, concerning suspension or revocation of the permit.

8.5.h. Revocation and Suspension. If the Secretary revokes or suspends the permit and the permittees right to mine under W. Va. Code §22-

3-1 et seq., the permittee shall immediately cease surface coal mining operations in the subject permit area, and initiate the appropriate remedial action as follows:

8.5.h.1. If the permit and the right to mine are revoked, the operator shall complete reclamation within the time specified in the revocation order; or

8.5.h.2. If the permit and right to mine are suspended, the operator shall complete all affirmative obligations to abate all conditions, practices, or violations, as specified in the suspension order.

8.5.i. Failure to Abate. Whenever a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as subsequently extended, the Secretary shall review the permittee's history of violations to determine whether a pattern of violations exists and shall issue an order to show cause where appropriate.

8.5.j. Consent Agreement. If, at any point in the enforcement process following the issuance of a notice of violation, a cessation order or a show cause order, a consent agreement is reached between the Secretary and a permittee and/or operator, the following standards shall apply to that consent order:

8.5.j.1. The Secretary will require all abatement work mandated in the consent agreement to be performed in the most expeditious manner physically possible. In no event shall the time period in which remedial action must be completed exceed one (1) year, nor can extensions to abatement times in consent orders total more than one year; provided however, that for sites permitted before September 5, 1989, the Secretary may grant a future extension if he finds in writing that exceptional circumstances exist which preclude abatement in the twelve-month period.

8.5.j.2. Violation of any term in a consent agreement shall result in immediate forfeiture of the bond for the site, unless the

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Secretary finds in writing that:

8.5.j.2.A. The operator and/or permittee have shown good faith in taking remedial actions required by the consent agreement; and

8.5.j.2.B. No environmental harm has resulted, or will result, from the subject violation.

8.5.j.3. No consent agreement shall be agreed to if the permittee, and/or operator or any entity owned or controlled by the permittee and/or the operator, has violated or is in violation of a previous consent agreement; provided however, that the Secretary is required to make only best efforts to determine if said violation or ownership and control ties exist.

8.5.j.4. No consent agreement can be reached on a site if the permittee and/or operator have previously entered into two consent orders on the same site.

The standards set forth in paragraphs 8.5.j.1 through 8.5.j.4 of this rule shall apply to any extension, modification, or other change in any existing consent agreement.

8.6. Civil Penalty Determinations. Except as specified in W. Va. Code §22-3-30a(b), civil penalties for any notice of violation issued by the Secretary shall be determined by the following procedure.

8.6.a. Notice of Violation Assessments. The Secretary shall review each notice of violation and determine whether or not a civil penalty will be assessed and the amount of the penalty. The Secretary for each notice of violation, may assess a separate civil penalty for each day of the violation, beginning with the date of issuance of a notice of violation to the date of abatement of the violation. In determining whether or not to assess a separate daily civil penalty and determine the amount of the civil penalty, the Secretary shall consider those factors specified in W. Va. Code §22-3-17, and subsection 8.7 of this rule and may consider the extent to which the operator may

have gained any economic benefit as a result of a failure to comply. Any notice of violation which continued unabated for two or more days after the initial abatement period, and received a civil penalty assessment of \$3,500 or more, shall be assessed the penalty amount for a minimum of two separate days. The determination as to whether or not to assess a civil penalty if the amount is less than one thousand dollars (\$1,000) will be at the discretion of the Secretary. Notices of violations with a seriousness rating of 4 or greater shall be assessed regardless of the amount. Termination of a notice of violation shall not affect the right of the Secretary to assess a civil penalty for those violations.

8.6.b. Cessation Order Assessments. The Secretary shall, for any cessation order, assess a civil penalty in accordance with W. Va. Code §22-3-17(a) for each day of continuing violation, except that such penalty shall not be assessed for more than thirty (30) days. If the cessation order has not been abated within the thirty (30) day period, the Secretary shall initiate action pursuant to W. Va. Code §§22-3-17(b), (g), (h) and (j), as appropriate. If the order is suspended in a temporary relief proceeding, the period specified for the abatement shall not end until the date on which the Secretary issues a final order with respect to the violation in question. If judicial review proceedings are initiated in which the order is suspended by court, the daily assessment of the civil penalty shall not be made for any period before entry of a final order by the court.

8.7. Procedure for Assessing Civil Penalties.

8.7.a. Assessment Officer - Duties. For the purposes of this section, the assessment officer shall not determine the proposed penalty assessment until such time as the Secretary has caused an inspection of the violation to be conducted and the findings of that inspection are submitted to the assessment officer in writing. The Secretary must conduct the inspection of the violation within the first fifteen (15) days after the notice or order was served. The assessment officer may continue conferences, conduct investigations, and interview witnesses as

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necessary.

8.7.b. Determination of Civil Penalty Amounts. Civil penalty amounts for notices of violation shall be determined in accordance with the factors specified in W. Va. Code §22-3-17(c), and the numerical point system in subsection 8.8 of this section. Within fifteen (15) days of service of a notice of violation or cessation order, the person to whom it was issued may submit written information about the violation to the Secretary and to the inspector who issued the notice of violation or cessation order.

8.7.c. Notice of Assessment. The Secretary shall provide a copy of the proposed assessment and the accompanying worksheet to the operator by certified mail, within thirty (30) days of the date of the issuance of a notice or order. If the mail is tendered at the address of the person set forth in the sign required under 38CSR2, subdivision 14.1a, or at any address at which that person is in fact located, and he or she refuses to accept delivery of or to collect such mail, the requirements of this paragraph shall be deemed to have been complied with upon such tender. Failure by the Secretary to serve any proposed assessment within thirty (30) days shall not be grounds for dismissal of all or part of such assessment unless the person against whom the proposed penalty has been assessed:

8.7.c.1. Proves actual prejudice as a result of the delay; and

8.7.c.2. Makes a timely objection to the delay. An objection shall be timely only if made in the normal course of administrative review. The Secretary shall also give notice including any worksheet, in person or by certified mail, to the operator of any penalty adjustment as a result of an informal conference within thirty (30) days following the date of the conference. The reasons for reassessment shall be documented in the file by the assessment officer. The Secretary shall consider any information submitted pursuant to subdivision 8.7.b of this rule in determining the facts surrounding the violation and the amount of the penalty. Unless a

conference has been requested, the Secretary shall review and if necessary reassess any penalty considering facts which were not reasonably available on the date of issuance of the proposed assessment because of the length of the abatement period. The Secretary shall serve a copy of any such reassessment and of the worksheet showing the computation of the reassessment within thirty (30) days after the date the violation is abated.

8.7.d. Notice of Informal Assessment Conference. The time and place of an informal assessment conference shall be posted at the nearest Department of Environmental Protection regional office to the operation, at least five days prior to the conference date. Any person shall have the right to attend and participate in the conference. Any person, other than the operator and Department of Environmental Protection representatives, may submit in writing at the time of the conference a request to present evidence concerning the violation(s) being conferenced. Such request shall be granted by the assessment officer. Should problems arise due to scheduling, the assessment officer may continue the conference to a later time and/or date as the assessment officer deems necessary to honor other scheduled conferences.

8.7.e. Informal Conference. An informal conference on the assessment or reassessment must be scheduled within 60 days of the receipt of a request, pursuant to W. Va. Code §22-3-17(d)(1). Failure to hold an informal conference in the time limits specified in this subsection will not be considered as grounds for dismissal of the assessment, unless the operator proves actual prejudice and makes timely objection to the delay. The assessment officer shall consider all relevant information on the violation including information which may be provided pursuant to subdivisions 8.7.b. and 8.7.d. of this subsection. Within thirty (30) days after the conference is held the assessment officer shall either:

8.7.e.1. Settle the issue, in which case a settlement agreement shall be prepared and signed by the assessment officer on behalf of the Secretary and by the person assessed;

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8.7.e.2. Affirm, raise, lower, or vacate the penalty; or

8.7.e.3. Terminate the conference when it is determined that the issues cannot be resolved or that the person assessed is not diligently working toward resolution of the issues.

8.7.f. Settlement Agreement. If a settlement agreement is entered into, the person assessed will be deemed to have waived all rights to further review of the violation or penalty in question, except as otherwise expressly provided for in the settlement agreement. The settlement agreement shall contain a clause to this effect. If full payment of the amount specified in the settlement agreement is not received by the Secretary within thirty (30) days after the date of signing, the Secretary may enforce the agreement or rescind it and affirm, raise, lower or vacate the penalty within thirty (30) days from the date of the rescission.

8.7.g. Rules of Evidence. At formal review proceedings pursuant to W. Va. Code §22-3-17, no evidence as to any statement made or evidence produced by one party at a conference shall be introduced as evidence by another party, or may be used to impeach a witness.

8.7.h. Fact of Violation. The fact of violation may not be contested in a civil penalty review proceeding, if it has already been decided in a formal review proceeding under W. Va. Code §22-3-17(d)(1).

8.7.i. Escrow. If a person requests judicial review of a proposed assessment, the proposed penalty assessment shall continue to be held in escrow until completion of the judicial review.

8.7.j. Penalty Adjustment. When an administrative or judicial review of a civil penalty order results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the amount of the increase within fifteen (15) days after the order is mailed to each person.

8.7.k. Mitigation. Unless caused by lack of diligence, inability to comply may be considered in mitigation of the amount of civil penalty.

8.8. Assessment Rates.

8.8.a. History of Violations. History of previous violations is an accounting of all Notices of Violation and Cessation Orders that were written on the subject operation in the previous twelve (12) months. Notices of Violation and Cessation Orders which were withdrawn or vacated shall not be included in the accounting. The dollar amount to be assessed shall be determined by multiplying the number of violations by a factor of one hundred (100).

8.8.b. Seriousness of the Violation.

1-2 Violation is of an administrative nature resulting in no harm or danger to the environment or public: or the standard is violated to such a minor degree that environmental harm or public danger will not result.

3-4 Violation results in potential or actual harm or danger remaining ~~the~~ the permit area; or in the case where the impact extends beyond the permit area; can be demonstrated that potential danger or harm or will not result.

5-6 Violation extends beyond the permit area and results in a minor degree of potential or actual harm or impact on the public.

7-8 Violation can reasonably be expected to result in significant imminent environmental harm or create an imminent danger to the health and safety of the public. A violation which initially has a seriousness rating of 7 or higher is one which must be an imminent harm cessation order, as set forth in subdivision 8.4.a of this rule.

9-10 Violation extends beyond the permit area and results in a significant degree of environmental harm or danger to the public.

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Rating	0	1	2	3	4	5
Dollar Amount	-	100	200	400	600	900

Rating	6	7	8	9	10
Dollar Amount	1200	1600	2100	2700	3500

8.8.c. Operator Negligence.

0 This violation is considered beyond the control of the operator or his employees and no negligence can be attributed to this violation.

1-2 This violation was a result of an oversight on the part of the operator and may have been avoided if more conscientious effort and/or reasonable care were given.

3-4 This violation was obvious and/or no action was taken by the operator to prevent the problem.

5-6 The operator failed to adequately respond to previous written instructions of the inspector to prevent this event.

7-8 The operator had been officially notified, in writing, of this problem and did not make any effort at correcting the problem.

Rating	0	1	2	3	4	5
Dollar Amount	-	100	225	350	475	600

Rating	6	7	8			
Dollar Amount	725	875	875			

8.8.d. Operator's Good Faith

Good faith percentage shall not include a history of violations in the amount. Good faith

percentage shall be rounded to the nearest dollar amount.

0 Operator failed to take appropriate remedial action. Violation has been modified to a cessation order.

1-2 Operator took prompt, but insufficient remedial action to fully abate the violation within the required abatement period. Abatement period was extended for just cause. Remedial action was completed prior to the end of the extended abatement period.

3-4 Operator took prompt remedial action and worked diligently to abate the violation. Conditions beyond the operator's control prevented full abatement and required that the abatement period be extended for just cause. Abatement of the violation was accomplished before the end of the extended abatement period.

5-6 Operator initiated remedial action immediately and expended all reasonable efforts to abate the violation. Violation was abated before the end of the original abatement period.

7-8 Operator was already taking remedial action at the time the violation was noted, and expended exemplary effort in abating the violation before the end of the original abatement period.

Rating	0	1	2	3	4	5
%	0%	5%	10%	20%	20%	25%

Rating	6	7	8		
%	30%	35%	40%		

(e) Determination of Penalty Amount

Seriousness of Violations	\$ _____
Operator Negligence	+ \$ _____
Subtotal	\$ _____

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Less Good Faith %	-	
\$_____		
Sub Total		\$_____
History of Violations	+	\$_____
Total		\$_____

8.9. When an Individual Civil Penalty May be Assessed:

8.9.a. Except as provided in subdivision 20.8.b. of this subsection, the Secretary may assess an individual civil penalty against any corporate Secretary, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered, or carried out a violation, failure or refusal.

8.9.b. The Secretary shall not assess an individual civil penalty in situations resulting from a permit violation by a corporate permittee until a cessation order has been issued by the Secretary to the corporate permittee for the violation and the cessation order has remained unabated for thirty (30) days.

8.10. Amount of Individual Civil Penalty.

8.10.a. In determining the amount of an individual civil penalty assessed under subsection 8.9 of this rule, the Secretary shall consider the criteria specified in W. Va. Code §22-3-17(c).

8.10.b. The penalty shall not exceed \$5,000 for each violation. Each day of a continuing violation may be deemed a separate violation and the Secretary may assess a separate individual civil penalty for each day the violation, failure or refusal continues, from the date of service of the underlying notice of violation, cessation order or other order incorporated in a final decision issued by the Secretary until abatement or compliance is achieved.

8.11. Procedure for Assessment for Individual Civil Penalty.

8.11.a. The Secretary shall serve on each

individual to be assessed an individual civil penalty a notice of proposed individual civil penalty assessment, including a narrative explanation of the reasons for the penalty, the amount to be assessed, and a copy of an underlying notice of violation and cessation order.

8.11.b. The notice of proposed individual civil penalty assessment shall become a final order of the Secretary thirty (30) days after service upon the individual unless:

8.11.b.1. The individual files within thirty (30) days of service of the notice of proposed individual civil penalty assessment a petition for review with the Surface Mine Board; or

8.11.b.2. The Secretary and the individual or responsible corporate permittee agree within thirty (30) days of service of the notice of proposed individual civil penalty assessment to a schedule or plan for the abatement or correction of

8.11.c. For purposes of this subsection, service is sufficient if it would satisfy state requirements for service of a summons and complaint.

8.12. Payment of Penalty.

8.12.a. If a notice of proposed individual civil penalty assessment becomes a final order in the absence of a petition for review or abatement agreement, the penalty shall be due upon issuance of the final order.

8.12.b. If an individual named in a notice of proposed individual civil penalty assessment files a petition for review in accordance with paragraph 8.11.b.1. of this section, the penalty shall be due upon issuance of a final administrative order affirming, increasing, or decreasing the proposed penalty.

8.12.c. Where the Secretary and the corporate permittee or individual have agreed in writing on a plan for the abatement of or compliance with the unabated order, an individual

named in a notice of proposed individual civil penalty assessment may postpone payment until receiving either a final order from the Secretary stating that the penalty is due on the date of such final order, or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.

8.13. Fees and Costs of Administrative Proceedings.

8.13.a. Request for Fees. Any person may on request be awarded by the appropriate board or court a sum equal to costs and expenses including attorneys' fees and expert witness fees as determined to have been reasonably incurred. Such request must be filed within forty-five (45) days of date of entry of judgment.

The request shall include an affidavit setting forth costs and expenses and an itemized statement of attorneys' fees. The request shall be served upon all parties who shall have thirty (30) days to answer the request. Cost and expenses including attorneys' fees may be awarded to:

8.13.a.1. Any participating party against the violator upon a finding that there is a violation of law, rules or the permit has occurred, and there is a determination that the party made a significant contribution to the full and fair determination of the issues;

8.13.a.2. To any participating party other than the violator or his representative from the Department of Environmental Protection upon a determination that the party made a significant contribution to a full and fair determination of the issues;

8.13.a.3. To a violator from the Department of Environmental Protection when the violator demonstrates that the Department of Environmental Protection issues cessation order, a show cause order or notice of violation in bad faith and for the purpose of harassing or embarrassing the violator, provided that no award shall be made under this subsection if the Department of Environmental Protection prevails

upon the issue of a violation;

8.13.a.4. To a violator from any participating party other than the Department of Environmental Protection where such participating parties initiated or participated in the magistrate proceeding in bad faith and for the purpose of harassing or embarrassing the violator; and

8.13.a.5. To the Department of Environmental Protection from any participating party where the Department of Environmental Protection demonstrates that any such party participating in such proceeding in bad faith and for the purpose of harassing or embarrassing the Department of Environmental Protection. An award may also include attorneys' fees and expert witness fees expended in obtaining an award of costs, expenses and attorneys' fees. Decisions on such awards may be appealed as other cases.

**§199-1-9. Surface Mine Board.**

Open Meetings.

9 1.a. General. All meetings of the Surface Mine Board shall be open to the public.

9.1.b. Public Notice. The time, and place of all regularly scheduled meetings and the time, place and purpose of all special meetings shall be made available to the public and the news media by publishing a notice containing at least the above information in a newspaper of general circulation in the county where the site or environmental concern exists, or if the matter under consideration is of general interest to the people of the State in a newspaper of general circulation in the State.

9.1.c. Emergency Meetings. In the event of any emergency requiring immediate official action such efforts to notify the public shall be taken as circumstances allow.

9.2 Appeals to the Surface Mine Board.

9.2.a. Site Visits. The board may visit the site of the activity or proposed activity which is the subject of the hearing and take such additional evidence as it deems necessary provided that all

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All changes except as noted were enacted 2008 Legislative session and are pending OSM decision.

parties and interveners be given notice of the visit and are given an opportunity to accompany the Board.

9.2.b. Finals Orders. On all appeals to the Board, the Board shall issue a final decision thirty (30) days after the hearing or within thirty (30) days after the testimony presented at the hearing has been transcribed and checked for accuracy.

9.2.c. Burden of Proof. The burden of proof shall be on the party seeking to reverse the decision of the Secretary.

### 9.3 Ex parte Communication.

9.3.a. Prohibition. Ex parte contacts between representatives of the parties appearing before the Board and members or representatives of the Board shall be prohibited.