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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 948

[WV-091-FOR]

#### West Virginia Regulatory Program

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

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

**SUMMARY:** We are announcing our approval of an amendment to the West Virginia surface coal mining regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The amendment we are approving consists of changes to the West Virginia Surface Mining Reclamation Rules as contained in House Bill 2663. The amendment is intended to improve the operational efficiency of the West Virginia program.

**EFFECTIVE DATE:** December 1, 2003.

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

#### SUPPLEMENTARY INFORMATION:

- I. Background on the West Virginia Program
- II. Submission of the Amendment
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#### I. Background on the West Virginia Program

Section 503(a) of SMCRA permits a State to assume primacy for the regulation of surface mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \* ; and

rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the West Virginia program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

#### II. Submission of the Amendment

By letter dated May 2, 2001 (Administrative Record Number WV-1209), the West Virginia Department of Environmental Protection (WVDEP) submitted a proposed amendment to the West Virginia program. The program amendment consists of changes to the West Virginia Surface Mining Reclamation Rules at Code of State Regulations (CSR) 38-2, as amended by House Bill 2663.

We announced receipt of the proposed amendment in the May 24, 2001, **Federal Register** (66 FR 28682). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the proposed amendment (Administrative Record Number WV-1213). The public comment period closed on June 25, 2001. At the request of two commenters, we extended the comment period through July 13, 2003 (Administrative Record Numbers WV-1222 and WV-1223). We received comments from four environmental organizations and two Federal agencies.

We did not request comments on the proposed changes to CSR 38-2-3.14.b.12, concerning the partial removal of coal processing refuse piles, because that activity pertains to the removal of coal refuse that does not meet the definition of coal. In 1990, we stated that "the removal, transport and use (without onsite reprocessing) of coal mine refuse which does not meet the definition of "coal" set forth in 30 CFR 700.5; *i.e.*, ASTM Standard D 388-77, is not subject to regulation [under SMCRA]." 55 FR 21314; May 23, 1990. Therefore, it is not subject to regulation under SMCRA, and will not be considered here. We note that the removal of abandoned coal refuse piles was the subject of a later amendment that was addressed in a final rule notice published in the May 1, 2002, **Federal**

**Register** (67 FR 21920) (Administrative Record Number WV-1300).

In the proposed rule notice published on May 24, 2001, we incorrectly stated that the definition of "cumulative impact area" at CSR 38-2-2.39 is new and subject to public comment. The definition of "cumulative impact area" is not new, and is already part of the approved West Virginia program.

On July 1, 2003, WVDEP sent us a letter containing clarification concerning the proposed deletion of the definition of "cumulative impact," the addition of a definition of "material damage to the hydrologic balance outside the permit areas," and the addition of a provision qualifying certain coal removal during reclamation as government-financed construction that is exempt from a permit (Administrative Record Number WV-1365). The State's July 1, 2003, letter was in response to questions that we posed in a list dated February 26, 2003 (Administrative Record Number WV-1365). We announced receipt of the State's clarification letter in the **Federal Register** on July 31, 2003 (68 FR 44910). In the same document, we reopened the comment period to provide the public an opportunity to review and comment on the State's letter and whether the amendment, as further clarified in the State's letter dated July 1, 2003, satisfies the applicable program approval criteria of 30 CFR 732.15 (Administrative Record Number WV-1369). The public comment period closed on August 15, 2003. At the request of a Federal agency, we extended the public comment period through August 29, 2003 (Administrative Record Number WV-1371). We received comments from three environmental organizations and two Federal agencies.

Several of the proposed changes to the West Virginia regulations that were submitted as part of this amendment were intended to address required program amendments codified in the Federal regulations at 30 CFR 948.16(xx), (qqq), (zzz), (ffff), (gggg), (hhhh), (jjjj), (nnnn) and (pppp). We expedited our review of the specific amendments relating to those required amendments and published our decisions on them in the **Federal Register** on May 1, 2002 (67 FR 21904). Specifically, our findings on the following provisions that were submitted with this amendment and were addressed in our May 1, 2002, decision include: CSR 38-2-14.8.a.6 (948.16(xx)); CSR 38-2-12.2.e (948.16(qqq)); CSR 38-2-3.12.a.1 (948.16(zzz)); CSR 38-2-16.2.c.4 (948.16(ffff)); CSR 38-2-16.2.c.4 (948.16(gggg)); CSR 38-2-16.2.c.4

(948.16(hhhh)); CSR 38–2–12.4.e (948.16(jjjj)); CSR 38–2–3.14.a (948.16(nnnn)); and CSR 38–2–24.4 (948.16(pppp)). Our findings on the remaining amendments submitted to us on May 2, 2001, are presented below.

### III. OSM's Findings

Following are the findings we made pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17 concerning the proposed amendments to the West Virginia program. Any revisions that we do not specifically discuss below concern nonsubstantive wording or editorial changes and are approved here without discussion.

#### 1. CSR 38–2–2.39 Definition of "Cumulative Impact"

The definition of "cumulative impact" at CSR 38–2–2.39 is being deleted. The deleted definition provided as follows:

2.39. Cumulative Impact means the hydrologic impact that results from the cumulation of flows from all coal mining sites to common channels or aquifers in a cumulative impact area. Individual mines within a given cumulative impact area may be in full compliance with effluent standards and all other regulatory requirements, but as a result of the co-mingling of their off-site flows, there is a cumulative impact. The Act does not prohibit cumulative impacts but does emphasize that they be minimized. When the magnitude of cumulative impact exceeds threshold limits or ranges as predetermined by the Division, they constitute material damage.

There is no Federal counterpart to the definition of "cumulative impact" at CSR 38–2–2.39 that the State proposes to delete. Under SMCRA at section 505, the States have the discretion to add laws or regulations to their programs as long as those laws or regulations are not inconsistent with SMCRA. Conversely, the States also have the discretion to remove laws or regulations from their approved programs so long as the removal does not render the program inconsistent with SMCRA. Therefore, the criterion we must apply in deciding whether to approve the proposed deletion is whether or not the deletion would render the West Virginia program less stringent than SMCRA or less effective than the Federal regulations. That criterion is different than the question of whether the deletion of the definition of "cumulative impact" may alter the existing CHIA process in West Virginia in a way that is adverse to some commenters' interests as they have asserted (see Section IV, Summary and Disposition of Comments). Rather, we are rendering a decision only on the question of whether the deletion of the definition of "cumulative impact"

renders the West Virginia program less stringent than SMCRA or less effective than the Federal regulations.

As the WVDEP noted in its July 1, 2003, letter to OSM, the West Virginia program contains a counterpart to the Federal definition of "cumulative impact area." That definition was determined earlier to be consistent with the counterpart Federal definition of the term "cumulative impact area" at 30 CFR 701.5. The West Virginia program also has approved counterparts to all of the Federal CHIA-related requirements, and those provisions are not at issue here. However, there is no Federal requirement that State programs contain a definition of "cumulative impact." For these reasons, we find that the deletion of the definition of "cumulative impact" does not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations and can be approved. We express no further opinion on whether or how the deletion of this definition may alter the current CHIA process in West Virginia, because such procedural changes are within the State's discretion under the existing Federal regulations.

#### 2. CSR 38–2–3.22.e Cumulative Hydrologic Impact Assessment (CHIA)

The CHIA provision at CSR 38–2–3.22.e is being amended by adding the following definition of material damage:

3.22.e. \* \* \* Material damage to the hydrologic balance outside the permit areas means any long term or permanent change in the hydrologic balance caused by surface mining operation(s) which has a significant adverse impact on the capability of the affected water resource(s) to support existing conditions and uses.

There is no Federal counterpart to the proposed State definition of "material damage to the hydrologic balance outside the permit areas." Nor is there a Federal requirement that States develop a definition of material damage. In addition, SMCRA at section 505(b) provides that any State statutory or regulatory provision which is in effect or may become effective after the enactment of SMCRA and that provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in SMCRA shall not be construed to be inconsistent with SMCRA. In a **Federal Register** notice dated September 26, 1983, OSM addressed comments on the Federal CHIA regulations at 30 CFR 780.21(g) and 784.14(f) (48 FR 43956). OSM concluded that, because the gauges for measuring material damage may vary from area to area, and even from operation to operation, the criteria for determining material damage should

be left to the States (48 FR 43956, 43972–43973).

It is expected that State and Federal regulatory authorities will develop criteria to measure material damage for the purposes of the CHIAs. Currently, all 24 State coal regulatory programs and the Federal regulatory programs in Tennessee, Washington, and the Federal Indian lands program have implemented a CHIA process. All of these programs include making decisions on whether or not material damage outside the permit area would occur. As such, each has established some basis or criteria for making those decisions. Seeking Federal approval of such criteria is discretionary, and many States have developed and applied such criteria without OSM approval. Only one State (Wyoming), has previously codified a definition of material damage and has had that definition approved by OSM. We approved Wyoming's definition of material damage in the original program approval on November 26, 1980, as follows: "material damage to the hydrologic balance is a significant long-term or permanent adverse change to the hydrologic regime." We note that Wyoming's approved definition includes a long-term aspect as does the proposed West Virginia definition of material damage to the hydrologic balance outside the permit areas.

While West Virginia has submitted its definition of material damage for approval, that action does not alter the fact that it, like any other State, has the discretion to develop and implement material damage criteria without seeking or awaiting OSM approval of that criteria. The WVDEP's July 1, 2003, letter acknowledges that the State intends to use a narrative-based use standard in making its CHIAs and is asking for OSM to formally sanction that narrative-based standard. Furthermore, the WVDEP also stated in its July 1, 2003, letter, that the State approach will consider both water quality numerical limits and water resources uses designated by the water quality programs in making the CHIAs required by the mining program. In essence, the State proposes to adopt both a use-based narrative standard and a numeric standard for evaluating material damage to the hydrologic balance under its CHIA process.

As mentioned above in Finding 1, the West Virginia program has approved counterparts to all the Federal CHIA-related requirements. However, there is no Federal requirement that States must develop a specific definition of material damage. The proposed definition does not on its face negate, supersede, alter, or conflict with any of the approved

State rules related to the CHIA process or their Federal counterparts. For these reasons, we find that the proposed State definition of material damage does not render the West Virginia program less stringent than SMCRA nor less effective than the Federal regulations and can be approved.

*3. CSR 38-2-3.31 Federal, State, County, Municipal, or Other Local Government-Financed Highway or Other Construction Exemption*

By submitting the following changes on May 1, 2002, and March 18, 2003, the State proposes to amend CSR 38-2-3.31 (Administrative Record Numbers WV-1209 and WV-1352).

In its March 18, 2003, amendment submittal, subsection 3.31.a is amended to provide that, "Funding at less than fifty percent (50%) may qualify if the construction is undertaken as an approved government reclamation contract." We announced receipt of the proposed amendment to subsection 3.31.a in a proposed rule that was published in the **Federal Register** on April 14, 2003, (68 FR 17898). Although the rest of the submittal has been acted upon, we have not rendered a decision on the proposed amendment to subsection 3.31.a.

Subsection 3.31.c is new, and provides the following: "Funding less than fifty percent (50%) may qualify if the construction is undertaken as part of an approved reclamation project in accordance with WV Code § 22-3-28." This amendment was submitted on May 1, 2002, and is intended to revise the West Virginia program to add the additional flexibility afforded by the revised Federal definition of the term "government-financed construction" at 30 CFR 707.5. For more information concerning the revised Federal definition and the Federal Abandoned Mine Land (AML) Enhancement Rule, see the February 12, 1999, **Federal Register** (64 FR 7469).

In its July 1, 2003, clarification letter to OSM, WVDEP stated that the "change to allow coal removal in conjunction with a reclamation project is designed to encourage/result in low cost or no-cost reclamation as provided for in the Federal program (see 30 CFR 707.5)." The WVDEP asserted that the State rule contains the same language as the Federal regulations, except that the State refers to the W. Va. Code and the Federal counterpart refers to title IV. Indeed, the Federal definition of "Government-financed construction" at 30 CFR 707.5 provides, in part, that funding at less than 50 percent may qualify if the construction is undertaken as an approved reclamation project

under title IV of the Act. That is, the Federal definition of "government-financed construction" limits government funding at less than 50 percent to only those construction projects that are undertaken as approved abandoned mine land reclamation projects under title IV of SMCRA.

The WVDEP also stated that the W. Va. Code 22-3-28(e) is a subsection of W. Va. Code 22-3-28. Subsection (e), the WVDEP stated, is the only subsection of W. Va. Code 22-3-28 that mentions government-financed reclamation. Therefore, the WVDEP asserts, it is obvious that subsection (e) is the only applicable subsection to which the proposed CSR 38-2-3.31(c) could apply.

The WVDEP is currently in the process of revising the State AML Reclamation Plan to add counterparts to the Federal requirements at 30 CFR 874.17 which require specific consultations and concurrences with the Title V regulatory authority for AML construction projects receiving less than 50 percent government financing. In addition, the WVDEP intends to submit a revision to the State's AML rules during the 2004 regular legislative session that will add a counterpart to the Federal definition of "government-financed construction" at 30 CFR 707.5.

As discussed in the February 9, 1999, May 5, 2000, and May 1, 2002, **Federal Register** notices, we deferred taking similar action on proposed revisions to the State's statutory and regulatory provisions regarding government-financed construction (64 FR 6201, 64 FR 6204, 65 FR 26130 and 67 FR 21920). We took this action because the Federal AML Enhancement Rule had not been finalized and the State had not amended its rules. Even with the proposed changes mentioned above, the State has not completely revised its rules to include all of the AML Enhancement requirements at 30 CFR 707.5 and 874.17. In addition, in a recent ruling, the U.S. Court of Appeals concluded that the Federal AML Enhancement Rule is a reasonable interpretation of SMCRA. However, the Court found that, in promulgating the rule, OSM issued an interpretation that does not appear reasonable and remanded the case for further explanation. See *Kentucky Resources Council, Inc. v. Gale A. Norton, Secretary of the Interior, U.S. District Court of Appeals for the District of Columbia Circuit, Civil Action No. 01-5263, June 12, 2003*. Therefore, we are deferring our decision on the amendments at CSR 38-2-3.31.a and c until the State adds counterparts to the Federal regulations at 30 CFR 707.5 and 874.17 as discussed above.

*4. CSR 38-2-3.32.g. Permit Issuance—Unanticipated Event or Condition*

This provision is amended by adding new language at the end of the existing one-sentence paragraph, and by adding three new subdivisions. As amended, the provision is as follows:

3.32.g. The prohibition of subdivision 3.32.c shall not apply to a permit application due to any violation resulting from an unanticipated event or condition at a surface mine eligible for remining under permit held by the applicant that meets the requirements of 30 CFR 773.15(4)(i). An event will be presumed to be unanticipated for purposes of this paragraph if it:

3.32.g.1. Arose after remining permit was issued.

3.32.g.2. Was related to prior mining; and

3.32.g.3. Was not identified in the remining permit.

We find that as amended, CSR 38-2-3.32.g is substantively identical to and no less effective than the Federal requirements at 30 CFR 773.13 and can be approved. We note that the proposed language contains a citation error, in that "30 CFR 773.15(4)(i)" should be "30 CFR 785.25." It is our understanding that the citation error will be corrected at a future date. Our finding that this provision is no less effective than the Federal regulations is based upon that understanding.

*5. CSR 38-2-5.2.a. Intermittent or Perennial Stream Buffer Zone*

This provision is amended by deleting the words, "normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the." In addition the words "and" and "or other environmental resources" are added. As amended, the provision is as follows:

5.2.a. Intermittent or Perennial Stream. No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will not adversely affect the water quantity and quality or other environmental resources of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards. The area not to be disturbed shall be designated a buffer zone and marked accordingly.

We find that as amended, section CSR 38-2-5.2.a. is substantively identical to and no less effective than the counterpart Federal regulations at 30 CFR 816.57(a)(1) and (b) and can be approved. We note that the State counterpart to the Federal regulations at 30 CFR 816.57(a)(2) concerning stream channel diversions was previously

approved and is located at CSR 38–2–5.3.

#### 6. CSR 38–2–11.3.a.3. Surety Bonds

This provision is new, and provides as follows:

11.3.a.3. Surety received after July 1, 2001, must be recognized by the treasurer of state as holding a current certificate of authority from the United States Department of the Treasury as an acceptable surety on federal bonds.

There is no counterpart to this new State provision in the Federal surface mining regulations. However, before a surety company can issue a bond for a Federal project, it must be certified by the U.S. Department of the Treasury. For further information, see Department of the Treasury's Listing of Approved Sureties, Department Circular 570. Therefore, we find that the new provision does not render the West Virginia program inconsistent with the Federal bonding and insurance regulations at 30 CFR part 800 and can be approved.

### IV. Summary and Disposition of Comments

#### Public Comments

We asked for public comments on the State's amendment in the **Federal Register** on May 24, 2001 (66 FR 28682) (Administrative Record Number WV–1213). We received comments from the West Virginia Rivers Coalition (Administrative Record Number WV–1228), and combined comments from Hominy Creek Preservation Association, Inc., Ohio River Valley Environmental Coalition, Inc., and Citizen Coal Council (Administrative Record Number WV–1227). We also asked for comments on the State's clarification letter in the **Federal Register** on July 31, 2003 (Administrative Record Number WV–1368). By letter dated August 15, 2003, the Hominy Creek Preservation Association, Inc., Ohio River Valley Environmental Coalition, Inc., and Citizen Coal Council submitted combined comments in response to the WVDEP's July 1, 2003, letter of explanation concerning the CHIA amendments (Administrative Record Number WV–1370).

1. A commenter stated that, despite the State's assertion that the amendments become effective on August 1, 2001, the Federal regulations provide that no amendments may take effect until OSM approves the change as a program amendment. We concur with this comment. According to the Federal regulations at 30 CFR 732.17(g) concerning State program amendments, no changes to laws or regulations that

make up the approved State program shall take effect for purposes of a State program until approved as an amendment. However, as noted above in Finding 2, because the Federal rules do not define material damage, a State has discretion to develop and implement material damage criteria without seeking or awaiting OSM approval of that criteria.

2. A commenter asserted that the State did not include a "reasoned analysis" as to why it was making the changes to delete the definition of "cumulative impact" at CSR 38–2–2.39 and to add the definition of "material damage to the hydrologic balance outside the permit area" at CSR 38–2–3.22.e. Despite its July 1, 2003, clarification letter, the commenter asserted, the State has still not offered a rational explanation for the proposed amendment. This comment is beyond the scope of our criteria in approving proposed State program amendments. Whether or not the State has provided a "reasoned analysis" of proposed changes is an issue for the State rulemaking process. Our criterion is only to the issue of whether or not the proposed changes are consistent with the Federal requirements.

3. A commenter stated that the definition of "cumulative impact" at CSR 38–2–2.39 is needed because the term "cumulative impact" is used at CSR 38–2–3.32.d.5. Subsection 3.32.d.5 provides that no permit application or significant revision may be approved until, among other things, the WVDEP has made an assessment of the probable "cumulative impacts" of all anticipated coal mining on the hydrologic balance in the cumulative impact area, and has determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The commenter stated that for CSR 38–2–3.32.d.5 to retain meaning, the term "cumulative impact" must continue to be defined. We disagree with this comment, because the State retains the definition of "cumulative impact area" at CSR 38–2–2.39, which explains the concept of cumulative impact to mean the area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface and groundwater systems. As addressed in a prior approval, the State's definition of cumulative impact area is substantively identical to the Federal definition of cumulative impact area at 30 CFR 701.5.

The commenter stated that the definition of "cumulative impact" is also important because it clarifies that "individual mines within a given

cumulative impact area may be in full compliance with effluent standards and all other regulatory requirements, but as a result of the co-mingling of their off-site flows, there is cumulative impact." By deleting the definition, the commenter asserted, this clarification is omitted from the rules, making it more difficult in the future to hold individual mines accountable if they impact nearby water resources. In response, despite the deletion of the definition of "cumulative impact," the WVDEP continues to require, at CSR 38–2–14.5, that all surface mining and reclamation activities shall be conducted to prevent material damage to the hydrologic balance outside the permit area. In its July 1, 2003, letter, the WVDEP stated that it will consider the numerical limits and water resource use designated by the water quality programs to make its CHIAs. As discussed above in Finding 1, the deletion of the definition of "cumulative impact" does not render the West Virginia program less effective than the Federal regulations which do not contain a definition of "cumulative impact."

In addition, the commenter stated, the original definition of "cumulative impact" requires that cumulative impacts be minimized. The proposed deletion, the commenter stated, does away with this goal, further weakening the proposed new regulations. We disagree. The State performance standards at CSR 38–2–14.5 concerning hydrologic balance provide that all surface mining and reclamation activities shall be conducted to minimize the disturbance of the hydrologic balance within the permit and adjacent area, and to prevent material damage to the hydrologic balance outside the permit area.

The commenter also stated that the deletion of the definition of "cumulative impact" at CSR 38–2–2.39 and the addition of the definition of "material damage to the hydrologic balance" at CSR 38–2–3.22.e. combine to redefine "material damage." The commenter stated that the proposed definition of "material damage to the hydrologic balance" refers to "existing conditions and uses" without stating whether this phrase refers to "existing uses" as defined in the Clean Water Act (CWA) or a plain English definition such as "those conditions currently found." If a new definition of "material damage" is to be adopted, it should be clearly tied to "existing uses" and "designated uses" as defined in the CWA, the commenter stated. In response, the State's July 1, 2003, letter clearly links "existing uses" to the State's legislative rule at CSR 46–1 concerning

requirements governing stream uses and numerical water quality standards that apply to those streams. While the proposed definition of material damage only mentions existing uses, the State's water quality standards at CSR 46-1 take into consideration both existing and designated uses of streams.

Therefore, as required by CSR 46-1, both existing and designated uses will be considered when determining what constitutes material damage to the hydrologic balance. In any case, such changes are within the discretion of the State under the Federal regulations.

The commenter stated that if OSM approves a new definition of "material damage," it should be modified as follows: "Material damage to the hydrologic balance outside the permit areas means any long term or permanent change in the hydrologic balance caused by surface mining operation(s) which has a significant adverse impact on the capability of the affected water resource(s) to support existing uses and designated uses as defined by the Clean Water Act and as implemented by the state's water quality standards." Otherwise, the commenter stated, the definition as currently written would have as a goal the maintenance of existing conditions—even if impacted water bodies are already impaired—rather than the goal of protecting existing and designated uses as required by the Clean Water Act. The proposed changes would facilitate the further degradation of polluted streams, the commenter asserted. In response, we believe that the State has, as explained in its July 1, 2003, letter, linked its CHIA requirements to the States identified uses of West Virginia streams and the numerical water quality standards that apply to those streams. Therefore, the State will consider both existing and designated uses when making its determination of material damage.

4. A commenter stated that the deletion of the definition of "cumulative impact" would authorize WVDEP to perform CHIAs that do not predetermine threshold limits or ranges in defining material damage and that do not include each applicable numeric water quality standard and effluent limitation among those limits and ranges. These amendments, the commenter stated, are not in accordance with the provisions of SMCRA, nor are they consistent with the Federal regulations governing hydrologic protection. The changes thus fail to meet the criteria for approval set forth at 30 CFR 732.15(a) and 732.17(h)(10), the commenter stated. The commenter also stated, in response to the WVDEP's July 1, 2003, letter, that

it is essential that WVDEP set forth some objective criteria to use in performing CHIA's. Unless WVDEP sets specific limits or ranges of cumulative impact (whether based on biological, chemical, or other parameters), there can be no "objective criteria" to determine whether a surface coal mining operation has or has not materially damaged the "use" of a water body. Indeed, the commenter stated, to implement effectively the "use"-based material damage standard that WVDEP proposes, the agency will necessarily have to establish threshold limits or ranges of parameters that measure actual stream "use" in order to determine objectively whether the hydrologic effect of a particular operation meets or violates any narrative "use" standard in 46 CSR 1. At a minimum, the commenter stated, monitoring plans for permits approved on the basis of a biologically-based "use" standard would necessarily have to establish specific thresholds and ranges of biological activity in making such determinations. Thus, repeal of the current requirement to predetermine "threshold limits or ranges" of cumulative impact that constitute material damage to the hydrologic balance cannot be justified by either the goal of establishing "objective criteria" or the goal of shifting to use-based standard for material damage.

We disagree with the assertion that the proposed changes are not consistent with SMCRA or the Federal regulations. It is our understanding that under the proposed amendments, the WVDEP will conduct CHIAs by considering the West Virginia legislative rules at CSR 46-1 to identify both the existing and designated uses and the established numerical water quality standards for the streams and stream segments in the cumulative impact area. The numerical water quality standards identified in CSR 46-1 are, as WVDEP stated in its July 1, 2003, letter, intended to protect the respective stream uses that are identified in CSR 46-1. Therefore, it is the numerical water quality standards that are the objective criteria that the WVDEP will use in its assessment of whether the proposed mining operation is designed to prevent material damage outside the permit area in accordance with CSR 38-2-3.22.e. As noted in its July 1, 2003, letter, the State also plans to adopt a use-based narrative standard to assess material damage to the hydrologic balance. The WVDEP stated that this approach considers the numerical limits and water resource use designated by the water programs when making CHIAs. In any case, West

Virginia has the discretion under the Federal regulations to establish or modify its CHIA process, without seeking OSM's approval, so long as it remains consistent with Federal regulations. Therefore, to the extent that these changes may broaden the State's discretion in its CHIA process, it is still consistent with Federal regulations.

The commenter also stated that, at a minimum, OSM must require WVDEP to explain how the WVDEP will require permittees to monitor affected water bodies in a manner that produces data that can be "used to determine the impact of the operation on the hydrologic balance" as CSR 38-2-3.22.g and 38-2-3.22.h require. The proposed shift to a "use"-based definition of material damage appears to make irrelevant any measurement of the chemical or physical parameters mentioned in the hydrologic monitoring provisions of the approved program, because those parameters do not (at least directly) measure changes in the capability of a water body to support a specific "use." Since WVDEP does not propose a change in the specifically required monitoring parameters, the commenter stated, how will the WVDEP ensure that permittees develop meaningful data for determining whether material damage has occurred? In response, the State's shift to a "use"-based definition of material damage does not mean that the State has abandoned the use of numerical water quality standards. Rather, the WVDEP has indicated that the State is using the "use" designations of West Virginia streams as identified in CSR 46-1 to identify the designated use of a stream or stream segment, and to determine the numerical water quality standards for those streams and stream segments. The use of CSR 46-1 allows the WVDEP CHIA reviewers to clearly identify the numerical water quality standards for West Virginia streams. The WVDEP stated in its July 1, 2003, letter that the State rules provide a narrative standard, based upon use, for the reviewers to apply when making CHIA findings.

The commenter stated that, as noted in detail in their initial comments on the proposed amendments (see Administrative Record Number WV-1227), the proposed deletion of the "cumulative impact" definition appears aimed at eliminating rather than establishing "objective criteria" for determining whether a mining operation causes material damage to the hydrologic balance. The commenter also stated that without the existing requirement to predetermine threshold limits or ranges, WVDEP's proposed definition of "material damage"

establishes decidedly subjective criteria that will unquestionably prove unenforceable. We disagree with this comment, because the State regulations at CSR 46-1 clearly identify the specific numerical water quality standards that apply to West Virginia's streams and stream segments.

The commenter also stated that none of the terms used in the definition of "material damage" (such as "long term," "permanent," and "capability") is an objective criterion. Even if WVDEP had defined these terms, the commenter stated, the WVDEP's definitions of the terms would not have necessarily precluded the West Virginia Surface Mine Board or the West Virginia courts from settling on different definitions. The vague nature of the terms in the proposed "material damage" definition requires OSM to conclude that approval of the proposed program amendments would render the West Virginia program less effective than its Federal counterpart. First, there is no Federal counterpart to the proposed definition, nor is there a Federal requirement that the State establish objective criteria, or submit them to OSM for approval. We agree with the comment that some of the words in the definition of "material damage to the hydrologic balance outside the permit areas" may appear to be vague and subject to interpretation. However, the numerical water quality standards presented in the regulations at CSR 46-1, which take into consideration stream uses, are clear. Therefore, despite the vagueness of some words in the definition, the State has clear numeric and use based standards that the WVDEP has stated it will consider when performing a CHIA determination.

In referring to the statements in the WVDEP's July 1, 2003, letter, the commenter stated that nothing in the rulemaking record supports the WVDEP's suggestion that the existing "cumulative impact" definition leaves "the threshold(s) to be assigned to the unguided discretion of an individual reviewer." In actual practice, when WVDEP reviewers have assigned "threshold limits or ranges" under the existing regulation, they have drawn them from the established numeric West Virginia water quality standards in Appendix E to CSR 46-1. WVDEP cites not even one instance, the commenter stated, in which an "individual reviewer" has assigned any "threshold" that does not appear in Appendix E. Even if there have been such instances, the rational remedy would be to confine the assignable threshold limits or ranges to those set forth in Appendix E, rather than doing away with limits or ranges

altogether. An unrealized potential for abuse does not constitute a rational justification for repealing West Virginia's "cumulative impact" definition, particularly in view of the State's ability to prevent abuse without doing away with "threshold limits or ranges" entirely, the commenter stated. The commenter is seeking OSM intervention into the innerworkings of the State's CHIA process that Federal regulations have left to the discretion of the States. In response, this comment acknowledges WVDEP's current reliance on the water quality standards in Appendix E of CSR 46-1. We believe that this is what the WVDEP stated that it will do as part of its CHIA process in its July 1, 2003, letter. That is, it stated that "[t]he WVDEP approach considers the numerical limits and water resource use designated by the water quality programs to make the assessment required by the mining program." Requiring all CHIA reviewers to use the specific standards at CSR 46-1 should also eliminate WVDEP's concern that such standards would be developed individually by the unguided discretion of individual reviewers.

The commenter stated that WVDEP's claim that the proposed program amendments will prevent development or utilization of thresholds or parameters for effluent discharges other than those established by the CWA program is a complete non sequitur. The threshold limits or ranges required by the current definition of "cumulative impact" concern determinations of "material damage to the hydrologic balance." When predetermined, such threshold limits or ranges apply to the water quality of water bodies that receive effluent discharges from surface coal mining and reclamation operations, not to effluent discharges themselves. Thus, it is irrational to suggest that abandonment of the requirement to predetermine threshold limits and ranges preclude development or utilization of thresholds or parameters for effluent discharges that might prove inconsistent with the CWA. Moreover, the commenter stated, even if predetermination of "threshold limits or ranges" might conceivably dictate effluent limitations that conflict with West Virginia's program under the CWA, the only rational solution to that problem would be to confine the selection of limits or ranges to those that are consistent with proper implementation of the CWA, not to abandon threshold limits or ranges altogether. In response, we believe that by considering the numerical water quality standards in CSR 46-1, as the

WVDEP so indicated in its July 1, 2003, letter, the WVDEP is in effect confining its consideration to those water quality standards that are consistent with proper implementation of the CWA. Furthermore, the State's water quality standards protect both aquatic life and human health by designating uses and establishing specific parameters and limits or ranges to protect such uses during mining.

The commenter stated that, absent a showing that the State's enforcement of SMCRA's hydrologic protection requirements has suffered from the absence of a "use"-based material damage definition (rather than non-enforcement of the existing "cumulative impact" definition), the WVDEP's desire to shift to the sort of definition it previously rejected (and which OSM has found inappropriate for inclusion in its national regulations, the commenter stated) is arbitrary and capricious, the commenter stated. We disagree with this comment. As we stated above in Finding 2, OSM concluded that, because the gauges for measuring material damage may vary from area to area, and from operation to operation, the criteria for determining material damage should be left to the States (48 FR 43956, 43972-43973; September 26, 1983). It is not inappropriate for the State to amend its procedures or criteria for performing CHIAs and to amend those procedures as it deems necessary. Seeking Federal approval of CHIA criteria is discretionary.

5. A commenter stated that WVDEP's perceived need to establish a definition of "material damage" that is consistent with the administration and implementation of West Virginia's counterpart to the Clean Water Act, while rational in and of itself, does not provide a rational justification for repealing the definition of "cumulative impact" or shifting to an exclusively "use"-based definition of material damage. The commenter stated that West Virginia has adopted numeric water quality standards that function hand-in-glove with the State's narrative, "use"-based water quality criteria. The only rational method of ensuring that the CHIA process and enforcement of SMCRA's hydrologic protection requirements are consistent with the administration and implementation of West Virginia's counterpart to the Clean Water Act, the commenter stated, would be to confine the "threshold limits or ranges" that WVDEP may predetermine under the "cumulative impact" definition to (1) The numeric water quality standards applicable to each affected water body and (2) such additional limits or ranges as WVDEP

may determine necessary to enforce applicable narrative water quality criteria. Here again, the commenter stated, the perceived need to ensure compatibility with the Clean Water Act simply does not justify doing away with "threshold limits or ranges" that are an integral part of the State's program under the Clean Water Act. In response, as we stated above in Finding 2, the WVDEP's July 1, 2003, letter acknowledges that the State intends to use a narrative-based use standard in making its CHIA's. The WVDEP also stated in its July 1, 2003, letter, that the State approach will consider both water quality numerical limits and water resources uses designated by the water quality programs in making the CHIA required by the mining program.

6. A commenter stated that Congress imposed the CHIA requirement to ensure that regulatory authorities do not approve permit applications for mines that would make worse pollution overloads that already exist. Congress certainly intended, the commenter stated, that SMCRA regulatory authorities would perform CHIA's and make material damage findings that are consistent with the letter and underlying purpose of section 303(d) of the Clean Water Act, 33 U.S.C. 1313(d), which requires the imposition of sharply reduced effluent limits or the denial of National Pollutant Discharge Elimination System (NPDES) permits in order to restore the quality of streams overloaded with pollutants. The commenter referred to 30 U.S.C. 1292(a)(3) (requiring construction of SMCRA to avoid superseding, amending, modifying, or repealing the Clean Water Act).

In response, the WVDEP's July 1, 2003, letter did not address the specific points made here by the commenter. However, CSR 46-1 clearly sets forth the numerical water quality standards for streams and stream segments in West Virginia. Additionally, CSR 46-1 does not provide for or allow the discharge of pollutants that would make worse pollution overloads that already exist. Furthermore, CSR 38-2-14.15.b, like 30 CFR 816/817.42, clearly provides that discharges from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards. Therefore, we cannot agree that it is the WVDEP's intention to allow discharges from mines that would not comply with effluent limitations or make worse pollution overloads that already exist.

7. A commenter stated that approval of the amendments at CSR 38-2-2.39 and CSR 38-2-3.22.e. would impair or preclude effective citizen participation

in and OSM oversight of the administration and enforcement of the West Virginia program. The commenter asserts that the amendments at CSR 38-2-2.39 and CSR 38-2-3.22.e. replace predetermined, quantitative material damage criteria with a vague, subjective definition that would surely confound any citizen's effort to independently detect or prove a violation of the standard. The cost and restricted availability of experts whom a citizen would necessarily have to retain in any attempt to prove a violation of such an amorphous standard will almost certainly chill public participation in its enforcement well below the freezing level.

We disagree with this comment. None of the amendments that the State is proposing affect in any way the public participation provisions of the approved West Virginia program. In addition, as it stated in its July 1, 2003, letter, the WVDEP will consider the existing and designated uses and numerical water quality standards for West Virginia streams and stream segments at CSR 46-1 when making CHIA's. These numerical water quality standards are the predetermined, quantitative standards with specific parameters and limits or ranges that WVDEP's CHIA reviewers will consider in making CHIA determinations, and that the public can use to monitor compliance.

8. One commenter addressed the amendments to CSR 38-2-5.2 concerning intermittent or perennial streams. The commenter stated that, "the changes delete three explicit requirements, and substitute in their place the requirement that the activities will not adversely affect 'the water quantity and quality or other environmental resources of the stream'." The commenter stated that the amended rule is sufficiently vague that the practice of burying intermittent or perennial streams may arguably be approvable by the WVDEP, because burying streams would not directly contradict the letter of the rule. The commenter stated that, "this clear attempt to weaken the existing rule should be disapproved."

As we discussed above in Finding 5, we have determined that as amended, the revisions to section CSR 38-2-5.2.a. concerning intermittent or perennial streams render that provision substantively identical to the counterpart Federal regulations at 30 CFR 816.57(a)(1) and (b). Therefore, we found that the amendments can be approved. We also noted in Finding 5, that the State counterpart to the Federal regulations at 30 CFR 816.57(a)(2) concerning stream channel diversions

was previously approved and is located at CSR 38-2-5.3.

#### *Federal Agency Comments*

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the West Virginia program by letters dated May 30, 2001 and July 25, 2003 (Administrative Record Numbers WV-1215 and WV-1367, respectively).

By letter dated June 25, 2001 (Administrative Record Number WV-1224), the U.S. Fish and Wildlife Service (USFWS) provided the following comments.

#### 1. CSR 38-2-2.39 Definition of Cumulative Impact

The USFWS stated that the deletion of the definition of "cumulative impact" as meaning the hydrologic impact that results from the cumulation of flows from all coal mining sites to common channels or aquifers is a serious concern to the USFWS. The USFWS also stated that it is also concerned with the deletion of the language of that definition that states cumulative impact should be minimized.

The USFWS stated that cumulative impact assessments are required by the National Environmental Policy Act (NEPA) and by the Council on Environmental Quality's (CEQ) regulations requiring agencies to address cumulative effects. As stated in the CEQ regulations for implementing NEPA, the USFWS stated, cumulative effects are defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. "We have ongoing concern," USFWS stated, "for the cumulative impacts occurring from individual mountaintop mining operations on the ecological functioning of entire watersheds and believe that the law should address this very important issue more thoroughly rather than with less scrutiny." The USFWS recommended that these changes not be approved.

In response, the deletion of the definition of "cumulative impact" does not mean that the WVDEP will not be conducting cumulative hydrologic impact assessments. CSR 38-2-3.22.e continues to require the WVDEP to conduct a CHIA that is sufficient to determine whether the proposed mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area. In

addition, the State regulations continue to require the permit applicant to provide probable hydrologic consequences (PHC) information (at 38–2–3.22.a) and to provide surface and groundwater monitoring plans (CSR 38–2–3.22.g and 3.22.h, respectively). The State's regulations continue to contain, at CSR 38–2–2.39, the definition of cumulative impact area. In addition, the State explained in its July 1, 2003, letter, that the WVDEP's CHIA process considers the numerical limits and water resource uses designated at CSR 46–1 to make the required CHIA. Therefore, under the approved State program, the State will continue to evaluate cumulative hydrologic impacts. Furthermore, actions of State regulatory authorities under their approved State coal regulatory programs are not subject to NEPA review.

## 2. CSR 38–2–3.22.e Definition of Material Damage to the Hydrologic Balance

The USFWS stated that in the new language added to CSR 38–2–3.22.e., the terms "long term" and "significant adverse impact" are not defined and therefore are open to individual interpretation. The USFWS recommended that this subsection contain a definition of these terms. Also, the USFWS stated, this definition effectively eliminates any consideration of short-term impacts to the hydrologic balance with no regard to the degree of those impacts. The USFWS further stated that it considers the elimination of any consideration of short-term impacts to be "a serious shortcoming in protection of fish and wildlife resources." The USFWS recommended that these changes not be approved.

In response, there are, indeed, undefined words in the definition of "material damage to the hydrologic balance outside the permit areas." However, the State's use of such words as "long term" and "significant adverse impact" in defining material damage does not render the State's definition less effective than SMCRA or the Federal regulations, because there is no Federal counterpart to this term. In accordance with SMCRA and the Federal regulations, the State provision requires a CHIA to determine whether the proposed operation has been designed to prevent material damage outside the permit area. Finally, the State's proposed definition does not supersede or prohibit compliance with any State or Federal water quality standards. Furthermore, short-term impacts will be considered. The NPDES effluent limitations established for a proposed permit will apply, as will all

applicable State and Federal water quality standards. As we noted above in Finding 2, we determined that the definition of "material damage to the hydrologic balance outside the permit areas" does not render the West Virginia program less effective than the Federal CHIA regulations and can be approved.

## 3. CSR 38–2–5.2.a Intermittent or Perennial Stream

The USFWS stated that it opposes the changes to this provision. The USFWS specifically objected to the deletion of the language that required that mining activity within one hundred feet of an intermittent or perennial stream not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values or materially damage water quantity or quality. The USFWS stated that given that hundreds of miles of West Virginia's headwater streams have been permanently filled as a result of surface coal mining, it believes that protection of aquatic resources should be strengthened in the West Virginia program. The USFWS recommended that these changes not be approved. In response, and as we stated above in Finding 5, as amended, section CSR 38–2–5.2.a is substantively identical to the counterpart Federal regulations at 30 CFR 816.57(a)(1) and (b) and can be approved. We also noted that the State counterpart to the Federal regulations at 30 CFR 816.57(a)(2) concerning stream diversions was previously approved and is located at CSR 38–2–5.3.

By letter dated August 27, 2003, and an e-mail message dated August 19, 2003 (Administrative Record Numbers WV–1375 and WV–1374, respectively), the U.S. Department of Labor, Mine Safety and Health Administration (MSHA) responded and stated that it has reviewed the additions and changes, and has determined that there is no inconsistency with MSHA's regulations. Most of the changes pertain to hydrologic impacts of mining and do not affect MSHA programs.

## *Environmental Protection Agency (EPA) Comments/Concurrence*

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

On May 29, 2003, we asked for concurrence on the amendments from EPA (Administrative Record Number WV–1214). On November 23, 2001

(Administrative Record Number WV–1252) EPA sent us its written concurrence with comments. EPA stated that there are no apparent inconsistencies with the CWA, NPDES regulations, or other statutes and regulations under the authority of EPA. EPA said that it is providing its concurrence with the understanding that implementation of the amendments must comply with the CWA, NPDES regulations, and other statutes and regulations under its authority. On July 25, 2003, we asked the EPA for its concurrence on the July 1, 2003, letter from the WVDEP that provided further clarification concerning proposed amendments regarding cumulative impact, material damage, and government-financed construction at CSR 38–2–2.39, 3.22.e, and 3.31.c, respectively (Administrative Record Number WV–1368). On August 19, 2003, EPA sent us its written concurrence with comments (Administrative Record Number WV–1372).

In its August 19, 2003, letter, EPA stated that WVDEP's clarification letter addresses "cumulative impact" and "material damage," two of the issues that the EPA had concerns and recommendations. EPA stated that it feels that its recommendations on these issues as well as others addressed in its November 23, 2001, letter still have merit and should be considered for inclusion. Nevertheless, EPA stated, WVDEP's July 1, 2003, clarification letter stresses its commitment to require compliance with water quality standards, EPA's main concern.

EPA provided the following comments on the proposed amendments in its November 23, 2001, letter.

## 1. CSR 38–2–2.39 Definition of Cumulative Impact

EPA recommended that the definition of cumulative impact not be deleted, and that wording be added to the definition to clarify that it includes impacts from past, present, and reasonably foreseeable future activities. EPA stated that it is concerned that the deletion of the definition would leave that term cumulative impact vague and would subject it to individual interpretation. EPA stated that this could result in less environmental focus during preparation of a CHIA which is required for new mining operations. EPA stated that where cumulative impacts are large enough to cause non-compliance with water quality standards, including the anti-degradation policy, they constitute a violation of the CWA, even if the NPDES permits require compliance with

applicable technology-based effluent guideline limits.

As we noted above in Finding 1, the deletion of the definition of "cumulative impact" does not render the West Virginia program less effective because there is no Federal definition of cumulative impact as the term relates to CHIA. We also noted that the State's existing definition of "cumulative impact area" at CSR 38-2-2.39 clearly states that cumulative impact area means the area, including the permit area, within which impacts resulting from the proposed mining operation may interact with the impacts of all anticipated mining on surface and groundwater systems. The State's definition of "cumulative impact area" was determined earlier to be substantively identical to the counterpart Federal definition of "cumulative impact area" at 30 CFR 701.5. We believe that the impacts due to past mining are captured via the surface and ground water baseline data required by CSR 38-2-3.22. Therefore, in its CHIA assessment, the State will be considering the impacts from past, present, and anticipated future mining operations in the cumulative impact area. The WVDEP's July 1, 2003, letter further clarified that other sections of the State rules require the applicant to show no material outside the permit area and to assess cumulative impacts within the cumulative impact area. We concur with EPA's comment that where cumulative impacts are large enough to cause non-compliance with water quality standards, including the anti-degradation policy, they could constitute a violation of the CWA, even if the NPDES permits require compliance with applicable technology-based effluent guideline limits.

#### 2. CSR 38-2-3.22.e Definition of "Material Damage" Added to This Provision

EPA recommended that the definition of material damage be expanded to include "violation of water quality standards." EPA stated that water quality standards require protection of designated uses as well as existing uses, compliance with anti-degradation policy, and do not exempt short term adverse impacts. We agree that water quality standards require protection of designated uses as well as existing uses, compliance with anti-degradation policy, and do not exempt short term adverse impacts. In its July 1, 2003, letter, the WVDEP stated that the WVDEP approach considers the numerical water quality limits and the water resource use designated by the water quality programs. The WVDEP

further stated that the uses are outlined in the State's rules at CSR 46-1. Under SMCRA and the Federal regulations, the purpose of the CHIA is to determine, for permit approval purposes, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. We believe, as discussed above in Finding 2, that the State's program amendment does not render the West Virginia program less effective than the Federal CHIA provisions and can be approved.

#### 3. CSR 38-2-3.32.g Unanticipated Event or Condition

EPA stated that, although unanticipated remining discharges may not be a cause for blocking future SMCRA permits, it wants to make sure that it is understood that remining companies are not exempt from NPDES permit violations which may arise from unanticipated discharges. EPA stated that where there may be a question about a potential unanticipated discharge during remining, such as release of water caused by breaking into an adjacent abandoned mine pool, EPA recommended that pre-remining exploration, boreholing, and reviewing of old mine maps be conducted to minimize this possibility. We concur that remining operations are not exempt from NPDES permit violations that arise from unanticipated discharges, and that appropriate pre-mining exploration should be conducted to minimize the possibility of breaking into adjacent abandoned mine pools. The State's approved program would allow such exploration if it is deemed necessary during remining operations.

#### 4. CSR 38-2-5.2.a Intermittent or Perennial Stream Buffer Zones

EPA recommended that the entire current definition be retained, since it is more comprehensive about measures for environmental protection. EPA also stated that the most important part of the definition has been kept—the requirement for compliance with water quality standards. EPA stated that the proposed wording which prohibits adverse effects on water quantity and quality and other environmental resources should provide an added measure of environmental protection, with one exception—the proposed change from "or" to "and" in reference to "water quantity or quality." EPA stated that the proposed word "and" implies that there must be adverse effects to both water quantity and quality before the activities are prohibited. EPA recommended keeping the word "or" which clarifies that

adverse effects to either water quantity or quality are prohibited. EPA also stated that the proposed deletion of adverse effects on stream gradient and fish migration, as a reason for prohibiting surface mining activities, appears to be designed to accommodate construction of valley fills. EPA stated that filling of the waters of the U.S. requires authorization under Section 404 of the CWA. As we stated above in Finding 5, the State's proposed stream buffer zone requirements at CSR 38-2-5.2.a (along with CSR 38-2-5.3) are substantively identical to the counterpart Federal regulations at 30 CFR 816/817.57(a) and, therefore, can be approved. In addition, there is nothing in the proposed amendment that prevents or prohibits compliance with section 404 of the Clean Water Act.

#### V. OSM's Decision

Based on the findings above, we are approving the amendments to the West Virginia program sent to us on May 2, 2001, and clarified by letter dated July 1, 2003. However, we are deferring our decision on the amendments at CSR 38-2-3.31.a and c regarding funding for government-financed construction until the State adds counterparts to the Federal regulations at 30 CFR 707.5 and 874.17.

To implement this decision, we are amending the Federal regulations at 30 CFR part 948, which codify decisions concerning the West Virginia program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that a State program demonstrate that such State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

#### VI. Procedural Determinations

##### *Executive Order 12630—Takings*

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

##### *Executive Order 12866—Regulatory Planning and Review*

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

##### *Executive Order 12988—Civil Justice Reform*

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the

applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

*Executive Order 13132—Federalism*

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

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

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

program and does not involve Federal regulations involving Indian lands.

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

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

*National Environmental Policy Act*

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

*Paperwork Reduction Act*

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

*Regulatory Flexibility Act*

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

*Small Business Regulatory Enforcement Fairness Act*

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

*Unfunded Mandates*

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

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

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 17, 2003.

**Brent Wahlquist,**

*Regional Director, Appalachian Regional Coordinating Center.*

■ For the reasons set out in the preamble, title 30, chapter VII, subchapter T of the Code of Federal Regulations is amended as set forth below:

**PART 948—WEST VIRGINIA**

■ 1. The authority citation for part 948 continues to read as follows:

**Authority:** 30 U.S.C. 1201 *et seq.*

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

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

\* \* \* \* \*

Original amendment submission date	Date of publication of final rule	Citation/description of approved provisions
* * * * *	* * * * *	* * * * *
May 2, 2001, July 1, 2003 .....	December 1, 2003 .....	CSR 38–2–2.39 (a deletion), 3.22.e, 3.31.a (deferral), 3.32.g, 5.2.a, and 11.3.a.3.

[FR Doc. 03-29757 Filed 11-28-03; 8:45 am]

BILLING CODE 4310-05-P

**LIBRARY OF CONGRESS****Copyright Office****37 CFR Part 253****[Docket No. 2003-3 CARP NCBRA]****Cost of Living Adjustment for Performance of Musical Compositions by Colleges and Universities****AGENCY:** Copyright Office, Library of Congress.**ACTION:** Final rule.

**SUMMARY:** The Copyright Office of the Library of Congress announces a cost of living adjustment of 2% in the royalty rates paid by colleges, universities, or other nonprofit educational institutions that are not affiliated with National Public Radio for the use of copyrighted published nondramatic musical compositions in the BMI, ASCAP and SESAC repertoires. The cost of living adjustment is based on the change in the Consumer Price Index from October, 2002 to October, 2003.

**EFFECTIVE DATE:** January 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Tanya M. Sandros, Senior Attorney, Copyright Arbitration Royalty Panel, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

**SUPPLEMENTARY INFORMATION:** Section 118 of the Copyright Act, 17 U.S.C., creates a compulsory license for the use of published nondramatic musical works and published pictorial, graphic, and sculptural works in connection with noncommercial broadcasting. Terms and rates for this compulsory license, applicable to parties who are not subject to privately negotiated licenses, are published in 37 CFR part 253 and are subject to adjustment at five-year intervals. 17 U.S.C. 118(c).

The most recent proceeding to consider the terms and rates for the section 118 license occurred in 2002. 67 FR 15414 (April 1, 2002). Final regulations governing the terms and rates of copyright royalty payments with respect to certain uses by public broadcasting entities of published nondramatic musical works, and published pictorial, graphic, and sculptural works for the license period beginning January 1, 2003, and ending December 31, 2007, were published in the **Federal Register** on December 17, 2002. 67 FR 77170 (December 17, 2002).

Pursuant to these regulations, on December 1 of each year the Librarian shall publish a notice of the change in the cost of living as determined by the Consumer Price Index (all consumers, all items) during the period from the most recent Index published prior to the previous notice, to the most recent Index published prior to December 1, of that year. 37 CFR 253.10(a). The regulations also require that the Librarian publish a revised schedule of rates for the public performance of musical compositions in the ASCAP, BMI, and SESAC repertoires by public broadcasting entities licensed to colleges and universities, reflecting the change in the Consumer Price Index. 37 CFR 253.10(b). Accordingly, the Copyright Office of the Library of Congress is hereby announcing the change in the Consumer Price Index and performing the annual cost of living adjustment to the rates set out in § 253.5(c).

The change in the cost of living as determined by the Consumer Price Index (all consumers, all items) during the period from the most recent Index published before December 1, 2002, to the most recent Index published before December 1, 2003, is 2% (2002's figure was 181.3; the figure for 2003 is 185.0, based on 1982-1984=100 as a reference base). Rounding off to the nearest dollar, the royalty rates for the use of musical compositions in the repertoires of ASCAP, BMI, and SESAC are \$254, \$254, and \$82, respectively.

**List of Subjects in 37 CFR Part 253**

Copyright, Radio, Television.

**Final Regulation**

■ For the reasons set forth in the preamble, part 253 of title 37 of the Code of Federal Regulations is amended as follows:

**PART 253—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING**

■ 1. The authority citation for part 253 continues to read as follows:

**Authority:** 17 U.S.C. 118, 801(b)(1) and 803.

■ 2. Section 253.5 is amended by revising paragraphs (c)(1) through (c)(3) as follows:

**§ 253.5 Performance of musical compositions by public broadcasting entities licensed to colleges and universities.**

\* \* \* \* \*  
(c) \* \* \*

(1) For all such compositions in the repertory of ASCAP, \$254 annually.

(2) For all such compositions in the repertory of BMI, \$254 annually.

(3) For all such compositions in the repertory of SESAC, \$82 annually.

\* \* \* \* \*

Dated: November 21, 2003.

**Marybeth Peters,***Register of Copyrights.*

[FR Doc. 03-29824 Filed 11-28-03; 8:45 am]

BILLING CODE 1410-33-P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52****[NE-193-1193; FRL-7592-1]****Approval and Promulgation of Air Quality Implementation Plans; Nebraska Update to Materials Incorporated by Reference****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule; notice of administrative change.

**SUMMARY:** EPA is updating the materials submitted by Nebraska that are incorporated by reference (IBR) into the state implementation plan (SIP). The regulations affected by this update have been previously submitted by the state agency and approved by EPA. This update affects the SIP materials that are available for public inspection at the Office of the Federal Register (OFR), Office of Air and Radiation Docket and Information Center, and the Regional Office.

**EFFECTIVE DATE:** This action is effective December 1, 2003.

**ADDRESSES:** SIP materials which are incorporated by reference into 40 CFR part 52 are available for inspection at the following locations: Environmental Protection Agency, Region VII, 901 North 5th Street, Kansas City, Kansas 66101; Office of Air and Radiation Docket and Information Center, Room B-108, 1301 Constitution Avenue, NW (Mail Code 6102T), Washington, DC 20460, and Office of the Federal Register, 800 North Capitol Street NW., Suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Evelyn VanGoethem at (913) 551-7659, or by e-mail at [vangoethem.evelyn@epa.gov](mailto:vangoethem.evelyn@epa.gov).

**SUPPLEMENTARY INFORMATION:** The SIP is a living document which the state can revise as necessary to address the unique air pollution problems in the state. Therefore, EPA from time to time