

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 of the West Virginia program in the January 21, 1981, **Federal Register** (46 FR 5915). You can also find later actions concerning West Virginia’s program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Description of the Proposed Amendment

By letter dated May 2, 2001, the West Virginia Department of Environmental Protection (WVDEP) sent us a proposed amendment to its program (Administrative Record Number WV–1209) under SMCRA (30 U.S.C. 1201 *et seq.*). The program amendment consisted of changes to the West Virginia Surface Mining Reclamation Regulations at 38 Code of State Regulations (CSR) Series 2 as amended by House Bill 2663. The proposed amendment responded, in part, to the required program amendments codified in the Federal regulations at 30 CFR 948.16(xx), (qqq), (zzz), (ffff), (gggg), (hhhh), (jjjj), (nnnn), and (pppp). In order to expedite our review of the State’s responses to the required amendments, we separated those amendments from the current amendment and we published our approval of those amendments in the **Federal Register** on May 1, 2002 (67 FR 21904).

On February 26, 2003, we sent the State a list of questions to help us better understand the remaining proposed amendments (Administrative Record Number WV–1365). The State responded by letter dated July 1, 2003 (Administrative Record Number WV–1365). The State’s response is quoted below.

The following is additional clarification to Office of Surface Mining in answer to questions posed by OSM concerning the deletion of the definition for “cumulative impact,” the addition of a definition of “material damage to the hydrologic balance outside the permit area,” and the addition of a provision qualifying certain coal removal during

reclamation as government financed construction exempt from a permit. These rules were passed in the 2001 Legislative session and were submitted to OSM as program amendments in May 2001. The rationale for these changes are to provide a narrative standard for reviewers to utilize when making findings relative to the hydrologic balance in and around the area of the proposed mining operation and to make the State delegated program language more similar to the Federal regulations. [Material Damage and Cumulative Impact at CSR 38–2–3.22.e and CSR 38–2–2.39, respectively.]

The changes in the West Virginia Surface Mining Reclamation Rules relative to the added phrase defining “material damage to the hydrologic balance outside the permit area” and deleting the defined term “cumulative impact” are addressed together. These changes were made to set forth some objective criteria to use in making the determination required by SMCRA that a proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The added definition in the West Virginia rules provides a narrative standard, based upon use, for the reviewer to apply to make the required findings rather than leaving the threshold(s) to be assigned to the unguided discretion of an individual reviewer.

The Federal regulations at 30 CFR 773.15(e) requires [a determination that the proposed operation has been designed to prevent] material damage to the offsite hydrologic balance. The Federal program does not currently contain a standard, narrative or otherwise, to ascertain when such material damage would occur. Rather, the Federal program appears to leave this call to the discretion of the States. However, the Federal program does contain material damage criteria for the effects of mining associated with subsidence and alluvial valley floors based upon functionality and use (See 30 CFR 701.5). The definition submitted as a program amendment establishes a narrative threshold for material damage to the hydrologic balance, which is patterned after related definitions in the federal program, and is based upon the use of State waters. Additionally, the proposed definition is consistent with the administration and implementation of the State counterpart to the Clean Water Act in that the use of State waters established under the water program is recognized when the State SMCRA authority makes the assessment of cumulative hydrologic impacts.

Including the narrative threshold for material damage to the hydrologic balance obviates the need for the definition for “cumulative impact.” Even though the definition of “cumulative impact” is deleted, the defined term “cumulative impact area” remains. In addition, other sections of the WV rules require the applicant to show no material damage outside of the permit area and to assess the cumulative impacts within the cumulative impact area.

The reviewer of a proposal to conduct mining operations must delineate the area to be considered in assessing hydrologic consequences in accordance with the statute, rules and 1999 CHIA Writing Guidelines utilizing the actual or designated use and parameters designed to protect the same, as established by the WVDEP Division of Water Resources. The uses are outlined in the West Virginia Legislative rules 46CSR1 and include the propagation and maintenance of fish and other aquatic life. Water quality standards were designed to protect established uses. A review process wherein the SMCRA authority would develop or utilize thresholds/parameters for effluent discharges other than those established by the Clean Water Act program would likely result in interfering with the administration of the CWA. The 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, thus precluding such interference.

[Exemption for Government-Financed Construction at CSR 38–2–3.31.c.]

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 state rule contains the same language as the federal regulations, except the State refers to the WV code and the federal counterpart refers to Title IV. The WV Code 22–3–28(e) is a subsection of 22–3–28. It is the only subsection that mentions government-financed reclamation. Therefore, it is obvious that subsection (e) is the only applicable subsection to which 38CSR2–3.31(c) could apply.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment, as further clarified in the State’s clarification letter dated July 1, 2003, satisfies the applicable program