

(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