

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