

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