

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"