

establishes decidedly subjective criteria that will unquestionably prove unenforceable. We disagree with this comment, because the State regulations at CSR 46–1 clearly identify the specific numerical water quality standards that apply to West Virginia's streams and stream segments.

The commenter also stated that none of the terms used in the definition of "material damage" (such as "long term," "permanent," and "capability") is an objective criterion. Even if WVDEP had defined these terms, the commenter stated, the WVDEP's definitions of the terms would not have necessarily precluded the West Virginia Surface Mine Board or the West Virginia courts from settling on different definitions. The vague nature of the terms in the proposed "material damage" definition requires OSM to conclude that approval of the proposed program amendments would render the West Virginia program less effective than its Federal counterpart. First, there is no Federal counterpart to the proposed definition, nor is there a Federal requirement that the State establish objective criteria, or submit them to OSM for approval. We agree with the comment that some of the words in the definition of "material damage to the hydrologic balance outside the permit areas" may appear to be vague and subject to interpretation. However, the numerical water quality standards presented in the regulations at CSR 46–1, which take into consideration stream uses, are clear. Therefore, despite the vagueness of some words in the definition, the State has clear numeric and use based standards that the WVDEP has stated it will consider when performing a CHIA determination.

In referring to the statements in the WVDEP's July 1, 2003, letter, the commenter stated that nothing in the rulemaking record supports the WVDEP's suggestion that the existing "cumulative impact" definition leaves "the threshold(s) to be assigned to the unguided discretion of an individual reviewer." In actual practice, when WVDEP reviewers have assigned "threshold limits or ranges" under the existing regulation, they have drawn them from the established numeric West Virginia water quality standards in Appendix E to CSR 46–1. WVDEP cites not even one instance, the commenter stated, in which an "individual reviewer" has assigned any "threshold" that does not appear in Appendix E. Even if there have been such instances, the rational remedy would be to confine the assignable threshold limits or ranges to those set forth in Appendix E, rather than doing away with limits or ranges

altogether. An unrealized potential for abuse does not constitute a rational justification for repealing West Virginia's "cumulative impact" definition, particularly in view of the State's ability to prevent abuse without doing away with "threshold limits or ranges" entirely, the commenter stated. The commenter is seeking OSM intervention into the innerworkings of the State's CHIA process that Federal regulations have left to the discretion of the States. In response, this comment acknowledges WVDEP's current reliance on the water quality standards in Appendix E of CSR 46–1. We believe that this is what the WVDEP stated that it will do as part of its CHIA process in its July 1, 2003, letter. That is, it stated that "[t]he 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." Requiring all CHIA reviewers to use the specific standards at CSR 46–1 should also eliminate WVDEP's concern that such standards would be developed individually by the unguided discretion of individual reviewers.

The commenter stated that WVDEP's claim that the proposed program amendments will prevent development or utilization of thresholds or parameters for effluent discharges other than those established by the CWA program is a complete non sequitur. The threshold limits or ranges required by the current definition of "cumulative impact" concern determinations of "material damage to the hydrologic balance." When predetermined, such threshold limits or ranges apply to the water quality of water bodies that receive effluent discharges from surface coal mining and reclamation operations, not to effluent discharges themselves. Thus, it is irrational to suggest that abandonment of the requirement to predetermine threshold limits and ranges preclude development or utilization of thresholds or parameters for effluent discharges that might prove inconsistent with the CWA. Moreover, the commenter stated, even if predetermination of "threshold limits or ranges" might conceivably dictate effluent limitations that conflict with West Virginia's program under the CWA, the only rational solution to that problem would be to confine the selection of limits or ranges to those that are consistent with proper implementation of the CWA, not to abandon threshold limits or ranges altogether. In response, we believe that by considering the numerical water quality standards in CSR 46–1, as the

WVDEP so indicated in its July 1, 2003, letter, the WVDEP is in effect confining its consideration to those water quality standards that are consistent with proper implementation of the CWA. Furthermore, the State's water quality standards protect both aquatic life and human health by designating uses and establishing specific parameters and limits or ranges to protect such uses during mining.

The commenter stated that, absent a showing that the State's enforcement of SMCRA's hydrologic protection requirements has suffered from the absence of a "use"-based material damage definition (rather than non-enforcement of the existing "cumulative impact" definition), the WVDEP's desire to shift to the sort of definition it previously rejected (and which OSM has found inappropriate for inclusion in its national regulations, the commenter stated) is arbitrary and capricious, the commenter stated. We disagree with this comment. As we stated above in Finding 2, OSM concluded that, because the gauges for measuring material damage may vary from area to area, and from operation to operation, the criteria for determining material damage should be left to the States (48 FR 43956, 43972–43973; September 26, 1983). It is not inappropriate for the State to amend its procedures or criteria for performing CHIAs and to amend those procedures as it deems necessary. Seeking Federal approval of CHIA criteria is discretionary.

5. A commenter stated that WVDEP's perceived need to establish a definition of "material damage" that is consistent with the administration and implementation of West Virginia's counterpart to the Clean Water Act, while rational in and of itself, does not provide a rational justification for repealing the definition of "cumulative impact" or shifting to an exclusively "use"-based definition of material damage. The commenter stated that West Virginia has adopted numeric water quality standards that function hand-in-glove with the State's narrative, "use"-based water quality criteria. The only rational method of ensuring that the CHIA process and enforcement of SMCRA's hydrologic protection requirements are consistent with the administration and implementation of West Virginia's counterpart to the Clean Water Act, the commenter stated, would be to confine the "threshold limits or ranges" that WVDEP may predetermine under the "cumulative impact" definition to (1) The numeric water quality standards applicable to each affected water body and (2) such additional limits or ranges as WVDEP