

may determine necessary to enforce applicable narrative water quality criteria. Here again, the commenter stated, the perceived need to ensure compatibility with the Clean Water Act simply does not justify doing away with "threshold limits or ranges" that are an integral part of the State's program under the Clean Water Act. In response, as we stated above in Finding 2, the WVDEP's July 1, 2003, letter acknowledges that the State intends to use a narrative-based use standard in making its CHIA. 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 CHIA required by the mining program.

6. A commenter stated that Congress imposed the CHIA requirement to ensure that regulatory authorities do not approve permit applications for mines that would make worse pollution overloads that already exist. Congress certainly intended, the commenter stated, that SMCRA regulatory authorities would perform CHIA and make material damage findings that are consistent with the letter and underlying purpose of section 303(d) of the Clean Water Act, 33 U.S.C. 1313(d), which requires the imposition of sharply reduced effluent limits or the denial of National Pollutant Discharge Elimination System (NPDES) permits in order to restore the quality of streams overloaded with pollutants. The commenter referred to 30 U.S.C. 1292(a)(3) (requiring construction of SMCRA to avoid superseding, amending, modifying, or repealing the Clean Water Act).

In response, the WVDEP's July 1, 2003, letter did not address the specific points made here by the commenter. However, CSR 46-1 clearly sets forth the numerical water quality standards for streams and stream segments in West Virginia. Additionally, CSR 46-1 does not provide for or allow the discharge of pollutants that would make worse pollution overloads that already exist. Furthermore, CSR 38-2-14.15.b, like 30 CFR 816/817.42, clearly provides that discharges from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards. Therefore, we cannot agree that it is the WVDEP's intention to allow discharges from mines that would not comply with effluent limitations or make worse pollution overloads that already exist.

7. A commenter stated that approval of the amendments at CSR 38-2-2.39 and CSR 38-2-3.22.e. would impair or preclude effective citizen participation

in and OSM oversight of the administration and enforcement of the West Virginia program. The commenter asserts that the amendments at CSR 38-2-2.39 and CSR 38-2-3.22.e. replace predetermined, quantitative material damage criteria with a vague, subjective definition that would surely confound any citizen's effort to independently detect or prove a violation of the standard. The cost and restricted availability of experts whom a citizen would necessarily have to retain in any attempt to prove a violation of such an amorphous standard will almost certainly chill public participation in its enforcement well below the freezing level.

We disagree with this comment. None of the amendments that the State is proposing affect in any way the public participation provisions of the approved West Virginia program. In addition, as it stated in its July 1, 2003, letter, the WVDEP will consider the existing and designated uses and numerical water quality standards for West Virginia streams and stream segments at CSR 46-1 when making CHIA. These numerical water quality standards are the predetermined, quantitative standards with specific parameters and limits or ranges that WVDEP's CHIA reviewers will consider in making CHIA determinations, and that the public can use to monitor compliance.

8. One commenter addressed the amendments to CSR 38-2-5.2 concerning intermittent or perennial streams. The commenter stated that, "the changes delete three explicit requirements, and substitute in their place the requirement that the activities will not adversely affect 'the water quantity and quality or other environmental resources of the stream'." The commenter stated that the amended rule is sufficiently vague that the practice of burying intermittent or perennial streams may arguably be approvable by the WVDEP, because burying streams would not directly contradict the letter of the rule. The commenter stated that, "this clear attempt to weaken the existing rule should be disapproved."

As we discussed above in Finding 5, we have determined that as amended, the revisions to section CSR 38-2-5.2.a. concerning intermittent or perennial streams render that provision substantively identical to the counterpart Federal regulations at 30 CFR 816.57(a)(1) and (b). Therefore, we found that the amendments can be approved. We also noted in Finding 5, that the State counterpart to the Federal regulations at 30 CFR 816.57(a)(2) concerning stream channel diversions

was previously approved and is located at CSR 38-2-5.3.

Federal Agency Comments

Under 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on the amendments from various Federal agencies with an actual or potential interest in the West Virginia program by letters dated May 30, 2001 and July 25, 2003 (Administrative Record Numbers WV-1215 and WV-1367, respectively).

By letter dated June 25, 2001 (Administrative Record Number WV-1224), the U.S. Fish and Wildlife Service (USFWS) provided the following comments.

1. CSR 38-2-2.39 Definition of Cumulative Impact

The USFWS stated that the deletion of the definition of "cumulative impact" as meaning the hydrologic impact that results from the cumulation of flows from all coal mining sites to common channels or aquifers is a serious concern to the USFWS. The USFWS also stated that it is also concerned with the deletion of the language of that definition that states cumulative impact should be minimized.

The USFWS stated that cumulative impact assessments are required by the National Environmental Policy Act (NEPA) and by the Council on Environmental Quality's (CEQ) regulations requiring agencies to address cumulative effects. As stated in the CEQ regulations for implementing NEPA, the USFWS stated, cumulative effects are defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. "We have ongoing concern," USFWS stated, "for the cumulative impacts occurring from individual mountaintop mining operations on the ecological functioning of entire watersheds and believe that the law should address this very important issue more thoroughly rather than with less scrutiny." The USFWS recommended that these changes not be approved.

In response, the deletion of the definition of "cumulative impact" does not mean that the WVDEP will not be conducting cumulative hydrologic impact assessments. CSR 38-2-3.22.e continues to require the WVDEP to conduct a CHIA that is sufficient to determine whether the proposed mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area. In