

addition, the State regulations continue to require the permit applicant to provide probable hydrologic consequences (PHC) information (at 38–2–3.22.a) and to provide surface and groundwater monitoring plans (CSR 38–2–3.22.g and 3.22.h, respectively). The State's regulations continue to contain, at CSR 38–2–2.39, the definition of cumulative impact area. In addition, the State explained in its July 1, 2003, letter, that the WVDEP's CHIA process considers the numerical limits and water resource uses designated at CSR 46–1 to make the required CHIA. Therefore, under the approved State program, the State will continue to evaluate cumulative hydrologic impacts. Furthermore, actions of State regulatory authorities under their approved State coal regulatory programs are not subject to NEPA review.

2. CSR 38–2–3.22.e Definition of Material Damage to the Hydrologic Balance

The USFWS stated that in the new language added to CSR 38–2–3.22.e., the terms “long term” and “significant adverse impact” are not defined and therefore are open to individual interpretation. The USFWS recommended that this subsection contain a definition of these terms. Also, the USFWS stated, this definition effectively eliminates any consideration of short-term impacts to the hydrologic balance with no regard to the degree of those impacts. The USFWS further stated that it considers the elimination of any consideration of short-term impacts to be “a serious shortcoming in protection of fish and wildlife resources.” The USFWS recommended that these changes not be approved.

In response, there are, indeed, undefined words in the definition of “material damage to the hydrologic balance outside the permit areas.” However, the State's use of such words as “long term” and “significant adverse impact” in defining material damage does not render the State's definition less effective than SMCRA or the Federal regulations, because there is no Federal counterpart to this term. In accordance with SMCRA and the Federal regulations, the State provision requires a CHIA to determine whether the proposed operation has been designed to prevent material damage outside the permit area. Finally, the State's proposed definition does not supersede or prohibit compliance with any State or Federal water quality standards. Furthermore, short-term impacts will be considered. The NPDES effluent limitations established for a proposed permit will apply, as will all

applicable State and Federal water quality standards. As we noted above in Finding 2, we determined that the definition of “material damage to the hydrologic balance outside the permit areas” does not render the West Virginia program less effective than the Federal CHIA regulations and can be approved.

3. CSR 38–2–5.2.a Intermittent or Perennial Stream

The USFWS stated that it opposes the changes to this provision. The USFWS specifically objected to the deletion of the language that required that mining activity within one hundred feet of an intermittent or perennial stream not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values or materially damage water quantity or quality. The USFWS stated that given that hundreds of miles of West Virginia's headwater streams have been permanently filled as a result of surface coal mining, it believes that protection of aquatic resources should be strengthened in the West Virginia program. The USFWS recommended that these changes not be approved. In response, and as we stated above in Finding 5, as amended, section CSR 38–2–5.2.a is substantively identical to the counterpart Federal regulations at 30 CFR 816.57(a)(1) and (b) and can be approved. We also noted that the State counterpart to the Federal regulations at 30 CFR 816.57(a)(2) concerning stream diversions was previously approved and is located at CSR 38–2–5.3.

By letter dated August 27, 2003, and an e-mail message dated August 19, 2003 (Administrative Record Numbers WV–1375 and WV–1374, respectively), the U.S. Department of Labor, Mine Safety and Health Administration (MSHA) responded and stated that it has reviewed the additions and changes, and has determined that there is no inconsistency with MSHA's regulations. Most of the changes pertain to hydrologic impacts of mining and do not affect MSHA programs.

Environmental Protection Agency (EPA) Comments/Concurrence

Under 30 CFR 732.17(h)(11)(ii), we are required to obtain written concurrence from EPA for those provisions of the program amendment that relate to air or water quality standards issued under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

On May 29, 2003, we asked for concurrence on the amendments from EPA (Administrative Record Number WV–1214). On November 23, 2001

(Administrative Record Number WV–1252) EPA sent us its written concurrence with comments. EPA stated that there are no apparent inconsistencies with the CWA, NPDES regulations, or other statutes and regulations under the authority of EPA. EPA said that it is providing its concurrence with the understanding that implementation of the amendments must comply with the CWA, NPDES regulations, and other statutes and regulations under its authority. On July 25, 2003, we asked the EPA for its concurrence on the July 1, 2003, letter from the WVDEP that provided further clarification concerning proposed amendments regarding cumulative impact, material damage, and government-financed construction at CSR 38–2–2.39, 3.22.e, and 3.31.c, respectively (Administrative Record Number WV–1368). On August 19, 2003, EPA sent us its written concurrence with comments (Administrative Record Number WV–1372).

In its August 19, 2003, letter, EPA stated that WVDEP's clarification letter addresses “cumulative impact” and “material damage,” two of the issues that the EPA had concerns and recommendations. EPA stated that it feels that its recommendations on these issues as well as others addressed in its November 23, 2001, letter still have merit and should be considered for inclusion. Nevertheless, EPA stated, WVDEP's July 1, 2003, clarification letter stresses its commitment to require compliance with water quality standards, EPA's main concern.

EPA provided the following comments on the proposed amendments in its November 23, 2001, letter.

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

EPA recommended that the definition of cumulative impact not be deleted, and that wording be added to the definition to clarify that it includes impacts from past, present, and reasonably foreseeable future activities. EPA stated that it is concerned that the deletion of the definition would leave that term cumulative impact vague and would subject it to individual interpretation. EPA stated that this could result in less environmental focus during preparation of a CHIA which is required for new mining operations. EPA stated that where cumulative impacts are large enough to cause non-compliance with water quality standards, including the anti-degradation policy, they constitute a violation of the CWA, even if the NPDES permits require compliance with