

applicable technology-based effluent guideline limits.

As we noted above in Finding 1, the deletion of the definition of "cumulative impact" does not render the West Virginia program less effective because there is no Federal definition of cumulative impact as the term relates to CHIA. We also noted that the State's existing definition of "cumulative impact area" at CSR 38-2-2.39 clearly states that cumulative impact area means the area, including the permit area, within which impacts resulting from the proposed mining operation may interact with the impacts of all anticipated mining on surface and groundwater systems. The State's definition of "cumulative impact area" was determined earlier to be substantively identical to the counterpart Federal definition of "cumulative impact area" at 30 CFR 701.5. We believe that the impacts due to past mining are captured via the surface and ground water baseline data required by CSR 38-2-3.22. Therefore, in its CHIA assessment, the State will be considering the impacts from past, present, and anticipated future mining operations in the cumulative impact area. The WVDEP's July 1, 2003, letter further clarified that other sections of the State rules require the applicant to show no material outside the permit area and to assess cumulative impacts within the cumulative impact area. We concur with EPA's comment that where cumulative impacts are large enough to cause non-compliance with water quality standards, including the anti-degradation policy, they could constitute a violation of the CWA, even if the NPDES permits require compliance with applicable technology-based effluent guideline limits.

2. CSR 38-2-3.22.e Definition of "Material Damage" Added to This Provision

EPA recommended that the definition of material damage be expanded to include "violation of water quality standards." EPA stated that water quality standards require protection of designated uses as well as existing uses, compliance with anti-degradation policy, and do not exempt short term adverse impacts. We agree that water quality standards require protection of designated uses as well as existing uses, compliance with anti-degradation policy, and do not exempt short term adverse impacts. In its July 1, 2003, letter, the WVDEP stated that the WVDEP approach considers the numerical water quality limits and the water resource use designated by the water quality programs. The WVDEP

further stated that the uses are outlined in the State's rules at CSR 46-1. Under SMCRA and the Federal regulations, the purpose of the CHIA is to determine, for permit approval purposes, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. We believe, as discussed above in Finding 2, that the State's program amendment does not render the West Virginia program less effective than the Federal CHIA provisions and can be approved.

3. CSR 38-2-3.32.g Unanticipated Event or Condition

EPA stated that, although unanticipated remining discharges may not be a cause for blocking future SMCRA permits, it wants to make sure that it is understood that remining companies are not exempt from NPDES permit violations which may arise from unanticipated discharges. EPA stated that where there may be a question about a potential unanticipated discharge during remining, such as release of water caused by breaking into an adjacent abandoned mine pool, EPA recommended that pre-remining exploration, boreholing, and reviewing of old mine maps be conducted to minimize this possibility. We concur that remining operations are not exempt from NPDES permit violations that arise from unanticipated discharges, and that appropriate pre-mining exploration should be conducted to minimize the possibility of breaking into adjacent abandoned mine pools. The State's approved program would allow such exploration if it is deemed necessary during remining operations.

4. CSR 38-2-5.2.a Intermittent or Perennial Stream Buffer Zones

EPA recommended that the entire current definition be retained, since it is more comprehensive about measures for environmental protection. EPA also stated that the most important part of the definition has been kept—the requirement for compliance with water quality standards. EPA stated that the proposed wording which prohibits adverse effects on water quantity and quality and other environmental resources should provide an added measure of environmental protection, with one exception—the proposed change from "or" to "and" in reference to "water quantity or quality." EPA stated that the proposed word "and" implies that there must be adverse effects to both water quantity and quality before the activities are prohibited. EPA recommended keeping the word "or" which clarifies that

adverse effects to either water quantity or quality are prohibited. EPA also stated that the proposed deletion of adverse effects on stream gradient and fish migration, as a reason for prohibiting surface mining activities, appears to be designed to accommodate construction of valley fills. EPA stated that filling of the waters of the U.S. requires authorization under Section 404 of the CWA. As we stated above in Finding 5, the State's proposed stream buffer zone requirements at CSR 38-2-5.2.a (along with CSR 38-2-5.3) are substantively identical to the counterpart Federal regulations at 30 CFR 816/817.57(a) and, therefore, can be approved. In addition, there is nothing in the proposed amendment that prevents or prohibits compliance with section 404 of the Clean Water Act.

V. OSM's Decision

Based on the findings above, we are approving the amendments to the West Virginia program sent to us on May 2, 2001, and clarified by letter dated July 1, 2003. However, we are deferring our decision on the amendments at CSR 38-2-3.31.a and c regarding funding for government-financed construction until the State adds counterparts to the Federal regulations at 30 CFR 707.5 and 874.17.

To implement this decision, we are amending the Federal regulations at 30 CFR part 948, which codify decisions concerning the West Virginia program. We find that good cause exists under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Section 503(a) of SMCRA requires that a State program demonstrate that such State has the capability of carrying out the provisions of the Act and meeting its purposes. Making this rule effective immediately will expedite that process. SMCRA requires consistency of State and Federal standards.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempt from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the