

regulations are necessary to provide clarity to parties engaging in reorganizations of insolvent corporations, both inside and outside of bankruptcy. These final regulations affect corporations, their creditors, and their shareholders.

**DATES:** *Effective Date:* This correction is effective December 24, 2008, and is applicable on December 12, 2008.

**FOR FURTHER INFORMATION CONTACT:** Jean Brenner (202) 622-7790, Douglas Bates (202) 622-7550, or Bruce Decker (202) 622-7550 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**Background**

The final regulations that are the subject of this document are under section 368 of the Internal Revenue Code.

**Need for Correction**

As published, final regulations (TD 9434) contains an error that may prove to be misleading and is in need of clarification.

**Correction of Publication**

Accordingly, the publication of the final regulations (TD 9434), which was the subject of FR Doc. E8-29271, is corrected as follows:

On page 75566, column 3, in the preamble, under the paragraph heading "Explanation of Provisions", second paragraph of the column, line 13, the language "amount of acquiring corporation stock" is corrected to read "amount of issuing corporation stock".

LaNita Van Dyke,

*Chief, Publications and Regulations, Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

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**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 948**

[WV-112-FOR; OSM-2008-0024]

**West Virginia Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Final rule; approval of amendment.

**SUMMARY:** We are approving two proposed amendments to the West Virginia regulatory program related to the State's cumulative hydrologic

impact assessment (CHIA) process and regarding material damage to the hydrologic balance. The West Virginia Department of Environmental Protection (WVDEP) proposed to delete its existing definition of "cumulative impact." The WVDEP also proposed to amend its regulation outlining CHIA requirements by adding a sentence defining "material damage to the hydrologic balance outside the permit area." We are approving both proposed amendments.

**DATES:** *Effective Date:* December 24, 2008.

**FOR FURTHER INFORMATION CONTACT:**

Roger Calhoun, Director, Charleston Field Office, Office of Surface Mining, 1027 Virginia Street East, Charleston, West Virginia 25301. Telephone: 304-347-7158, e-mail: [rcalhoun@osmre.gov](mailto:rcalhoun@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the West Virginia Program
- II. Submission of the Amendments
- III. OSM's Findings
- IV. Summary and Disposition of Comments
- V. OSM's Decisions
- VI. Procedural Determinations

**I. Background on the West Virginia Program**

Section 503(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. 1253(a), permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the West Virginia regulatory program on January 21, 1981. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and conditions of approval in the January 21, 1981, Federal Register (46 FR 5915).

You can also find later actions concerning West Virginia's program and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

**II. Submission of the Amendments**

*A. Previous Submittal of the Amendments*

In 2001, West Virginia House Bill 2663 was enacted as State law which, among other things, deleted the

definition of cumulative impact at West Virginia Code of State Regulations (CSR) 38-2-2.39 and added a sentence defining material damage to the hydrologic balance outside the permit area to CSR 38-2-3.22.e. The latter provision contains CHIA requirements that WVDEP must follow when processing permit applications for surface coal mining operations. By letter dated May 2, 2001, West Virginia submitted the proposed revisions as amendments to its permanent regulatory program (Administrative Record Number WV-1209). OSM approved both changes, along with several other proposed program amendments, on December 1, 2003 (68 FR 67035) (Administrative Record Number WV-1379).

On January 30, 2004, the Ohio River Valley Environmental Coalition, Inc., Hominy Creek Preservation Association, Inc., and the Citizens Coal Council filed a complaint and petition for judicial review of these two decisions with the United States District Court for the Southern District of West Virginia (Administrative Record Number WV-1382). On September 30, 2005, the United States District Court for the Southern District of West Virginia vacated both of OSM's decisions of December 1, 2003, at issue in the case and remanded the matter to the Secretary for further proceedings consistent with the court's decision. *Ohio River Valley Environmental Coalition v. Norton*, 2005 U.S. Dist. LEXIS 22265 (S.D. W.Va. 2005). (Administrative Record Number WV-1439).

In response to the court's decision of September 30, 2005, OSM notified the State on November 1, 2005, that its definition of material damage was not approved and could not be implemented. OSM also stated that the deletion of the definition of cumulative impact was not approved and directed the State to take action to add it back into the program. On November 22, 2005, the United States District Court for the Southern District of West Virginia amended its earlier decision. *Ohio River Valley Environmental Coalition v. Norton*, No. 3:04-0084 (S.D. W.Va. Nov. 22, 2005) (amended judgment order). In the amended decision, the court directed the Secretary to instruct the State that it may not implement the new language nor delete language from the State's program, and that the State must enforce only the State program approved by OSM prior to the amendments.

By letter dated January 5, 2006, OSM notified the State that the court's amended judgment order makes it clear

that the definition of "cumulative impact" at CSR 38-2-2.39 remains part of the approved West Virginia program and must be implemented by the State, and that the definition of "material damage" is not approved and cannot be implemented (Administrative Record Number WV-1456).

On December 12, 2006, the U.S. Court of Appeals for the Fourth Circuit affirmed the District Court's ruling of September 30, 2005, to vacate and remand OSM's approval of West Virginia's amendments. *Ohio River Valley Environmental Coalition v. Kempthorne*, 473 F.3d 94 (4th Cir. 2006). (Administrative Record Number WV-1479). The court ruled that OSM's decisions on proposed State program amendments are subject to the rulemaking procedures set forth in Section 553 of the Administrative Procedures Act, 5 U.S.C. 553. The court also stated that OSM's failure to properly analyze and explain its decision to approve the State's program amendment rendered that action arbitrary and capricious.

In its decision, the U.S. Court of Appeals for the Fourth Circuit noted that OSM "based the decision to approve the deletion of the 'cumulative impact' definition exclusively on the absence of a corresponding definition in the Federal regulations, ignoring any actual effect the change might have on West Virginia's program." The court went on to state that "OSM acknowledged that the change may have weakened the program" but then failed to explain how such a change "is nevertheless consistent with SMCRA's minimum requirements." The court then concluded that "SMCRA requires OSM to find not only that the amended program contains counterparts to all Federal regulations, but also that it is no less stringent than SMCRA and no less effective than the Federal regulations in meeting SMCRA's requirements." 473 F.3d at 103.

In addressing OSM's approval of the proposed addition of a sentence to the State's CHIA requirements that defined "material damage to the hydrologic balance outside the permit area", the court stated that "the added definition made West Virginia's proposed program different than the nationwide program. OSM's obligation is to analyze that different feature and explain whether and why the added provision renders the amended State program more, less, or equally effective compared to federal requirements. At a minimum, it must address the potential affect of the amendment on the State program and provide a reasoned analysis of its decision to approve it." *Id.*

It is with the guidance provided by the court in mind that OSM has conducted this review of these two proposed amendments.

#### B. Current Submittal of the Amendments

By letter dated March 22, 2007 (Administrative Record Number WV-1485), West Virginia re-submitted amendments to its program under SMCRA. The amendments propose to delete the definition of "cumulative impact," and to add a sentence defining "material damage to the hydrologic balance outside the permit area."

In its March 22, 2007, re-submittal letter, West Virginia provided a description of each of the proposed amendments, an explanation of why it considers its new material damage definition no less stringent than SMCRA, an explanation on the application of the material damage definition, a comparison of the material damage and cumulative impact definitions, and a discussion of the plaintiff's arguments in *OVEC v. Kempthorne, supra*. The letter concluded with a constitutional argument in support of approval. Enclosures to the letter included a copy of the State's Requirements Governing Water Quality Standards at 47 CSR 2 and a copy of the decision in *Ohio River Valley Environmental Coalition, Inc. (OVEC), et al., v. Callaghan, et al., Civil Action No. 3:00-0058*, (S.D. W.Va. 2001). However, the letter made it clear that the enclosures were being supplied for informational purposes only and that West Virginia was not seeking OSM approval of the water quality standards document, which had been approved by the U.S. Environmental Protection Agency (EPA).

West Virginia proposed the following revisions to its approved regulatory program:

#### 1. CSR 38-2-2.39 Definition of "cumulative impact"

The following definition is proposed for deletion from the West Virginia program: Cumulative impact means the hydrologic impact that results from the accumulation of flows from all coal mining sites to common channels or aquifers in a cumulative impact area. Individual mines within a given cumulative impact area may be in full compliance with effluent standards and all other regulatory requirements, but as a result of the co-mingling of their off-site flows, there is a cumulative impact. The Act does not prohibit cumulative impacts but does emphasize that they be minimized. When the magnitude of cumulative impact exceeds threshold

limits or ranges as predetermined by the Division [WVDEP], they constitute material damage.

#### 2. CSR 38-2-3.22.e Cumulative Hydrologic Impact Assessment

This existing provision, which contains the mandate for the WVDEP to prepare a CHIA for each permit application, is proposed to be revised by adding a new sentence that defines material damage to the hydrologic balance outside the permit area. The proposed sentence reads as follows:

Material damage to the hydrologic balance outside the permit area[s] 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 conditions and uses.

As amended, CSR 38-2-3.22.e would read as follows:

The Director [Secretary] shall perform a separate CHIA for the cumulative impact area of each permit application. This evaluation shall be sufficient to determine whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Material damage to the hydrologic balance outside the permit area[s] 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 conditions and uses.

We announced receipt of West Virginia's proposed amendments in the May 17, 2007, **Federal Register** (72 FR 27782). In that notice, we opened the public comment period and provided an opportunity for a public hearing or meeting on the amendments. The May 17, 2007, proposed rule provides a background on previous submissions of this amendment as well as the current submission. The public comment period ended on June 18, 2007. We did not hold a public hearing or a public meeting because no one requested one.

We received written comments from Geo-Hydro, Inc., (Administrative Record Number WV-1496); a private citizen (Administrative Record Number WV-1498); a combined set of comments on behalf of the Hominy Creek Preservation Association, Inc., Ohio River Valley Environmental Coalition, Inc., and West Virginia Highlands Conservancy, Inc. (Administrative Record Number WV-1495). We also received comments from two Federal agencies: The United States Department of the Interior Fish and

Wildlife Service, West Virginia Field Office (Administrative Record Number WV-1491) and the United States Environmental Protection Agency, Region III (Administrative Record Number WV-1497).

### III. OSM's Findings

As noted by the Fourth Circuit, "[r]eview of a State program amendment utilizes the same criteria applicable to approval or disapproval of a State program in the first instance. 30 CFR 732.17(h)(10)." 473 F.3d at 98. Consequently, the Secretary must find the altered State program to be no less stringent than SMCRA and no less effective than the Federal regulations in meeting SMCRA's requirements in order to approve it. Further, the court made clear that in applying those standards, OSM must do more than simply compare whether State regulations still contain counterparts to relevant Federal requirements, (or, in the case of an addition, that there is no Federal counterpart and no other Federal requirements that would conflict with the proposed addition), but it also must examine how each proposed change would affect program implementation in order to determine that the program will remain no less effective than Federal regulations in meeting the requirements of SMCRA.

#### A. General Discussion—Prevention of Material Damage to the Hydrologic Balance Outside the Permit Area

Because each of the proposed amendments before us relate to the term "prevent material damage to the hydrologic balance outside the permit area", it is important to understand the context for that term in SMCRA and the Secretary's regulations in order to determine whether either or both of the amendments West Virginia has proposed will render its program less effective than Federal regulations. This is particularly important in this case because of interpretations and positions presented by the plaintiffs in the prior litigation discussed above as well as comments on this rulemaking discussed below.

The term "material damage to the hydrologic balance outside the permit area" occurs only once in SMCRA at Section 510(b)(3), which states "the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in Section 507(b) has been made by the regulatory authority and the proposed operation thereof has been designed to prevent material damage to the hydrologic balance outside the permit area."

The same phrase occurs in four separate contexts in the Secretary's regulations for surface and underground mining operations. The first, as in SMCRA, is in the context of a written finding that the regulatory authority perform an assessment and determine that "the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area" as required by 30 CFR 773.15(e). In addition, a finding is required by the regulatory authority as contained in 30 CFR 780.21(g) and 784.14(f), which states in relevant part "The CHIA shall be sufficient to determine, for the purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area."

The second context, with slight modification, is as a permit application requirement for the applicant to provide a Hydrologic Reclamation Plan as mandated by 30 CFR 780.21(h) and 784.14(g), which states in relevant part that the plan "shall contain the steps to be taken during mining and reclamation through bond release to minimize disturbances to the hydrologic balance within the permit and adjacent areas; to prevent material damage outside the permit area." Third, the phrase is used in the context of a performance standard in 30 CFR 816.41(a) and 817.41(a), which requires that mining and reclamation activities be conducted "to prevent material damage to the hydrologic balance outside the permit area." The fourth context relates to monitoring requirements and is contained in that same paragraph. It authorizes the regulatory authority to "require additional preventive, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented." The Federal regulations at 30 CFR 816.41(c) and (e) /817.41(c) and (e) authorize the regulatory authority to modify the monitoring requirements, including parameters and frequency, if the monitoring data demonstrates that the operation has "prevented material damage to the hydrologic balance outside the permit area."

These requirements, when taken together, clearly show that (1) the regulatory authority must make a written finding that the operation is designed to prevent material damage to the hydrologic balance outside the permit area before the permit can be issued; (2) a permit application must include a plan that shows the operation has been designed to prevent such damage; (3) the operation must be

conducted to prevent such damage; and (4) the water monitoring requirements are used to determine whether or not such damage is occurring.

The Federal regulatory framework outlined above demonstrates that the parameters for material damage must be reflected in the hydrologic monitoring requirements. This relationship between water monitoring and material damage detection is confirmed by the fact that, for groundwater, monitoring of an aquifer may be waived upon a demonstration that it does not significantly ensure the hydrologic balance within the cumulative impact area in accordance with 30 CFR 780.21(i)(2) and 784.14(h)(2). The ground and surface-water monitoring requirements at 30 CFR 780.21(i) and (j) and 784.14(h) and (i) state that the plan shall provide for monitoring of parameters that relate to the suitability of the water resource "for current and approved postmining land uses" and the objectives of the hydrologic reclamation plan. Minimum parameters that must be monitored are also specified separately for ground and surface water. Thus, the Federal regulations provide minimum parameters for measuring material damage.

Material damage thresholds or standards for those parameters are not specified. However, 30 CFR 816.42 and 817.42 mandate that discharges from mining operations be in compliance with applicable State and Federal water quality laws and the effluent limitations promulgated by EPA at 40 CFR part 434, which apply to some of the parameters for which monitoring is mandated in 30 CFR 780.21 and 784.14. In accordance with 30 CFR 773.15(e), a permit cannot be issued without a written finding that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. In addition, 30 CFR 780.21(h) and 784.14(g) require that the application contain steps to be taken during mining and reclamation and through bond release to meet applicable State and Federal water quality laws and regulations. Thus, EPA's effluent limitations at 40 CFR Part 434 may constitute reasonable material damage criteria for some of the parameters specified in monitoring requirements. This relationship is discussed in the September 26, 1983 preamble requirement for the regulatory authority to make a material damage finding as follows: "OSM has not established fixed criteria, except for those established at 30 CFR 816.42 and 817.42 related to compliance with water-quality standards and effluent limitations."

With this background in mind, we have evaluated each of the proposed amendments to the West Virginia program in relation to Federal requirements for preventing damage to the hydrologic balance outside the permit area.

### *B. Specific WVDEP Amendment Language and Interpretation*

#### 1. West Virginia's Cumulative Impact Definition

The West Virginia program was conditionally approved in January 1981 based upon Federal regulations in existence at that time. None of the conditions on that approval related to the CHIA process or requirements to prevent material damage to the hydrologic balance outside the permit area. However, when OSM revised its hydrologic balance regulations on September 26, 1983, (48 FR 43956), among other things, a definition of "cumulative impact area" was added. On August 19, 1986, OSM notified West Virginia through a 30 CFR Part 732 letter, as clarified on December 18, 1987 (Administrative Record Numbers WV-711 and WV-748) that, among other changes unrelated to this rulemaking, West Virginia must amend its program to add a definition of "cumulative impact area" to bring its program into compliance with the revised 1983 Federal rules. In responding to those requirements, West Virginia submitted proposed emergency and legislative rules in August 1988 that contained a definition of "cumulative impact", as well as the mandated definition of "cumulative impact area" (Administrative Record Numbers WV-760 and WV-766).

On May 23, 1990, OSM published a Federal Register notice announcing the approval of several State program amendments, which included West Virginia's definitions of cumulative impact and cumulative impact area at Finding 2.10 (55 FR 21309). OSM found that although the Federal regulations do not specifically define cumulative impact, the Federal requirements at 30 CFR 780.21(g) and 784.14(f) contain provisions regarding the cumulative impact of mining on the hydrologic balance which form the basis for the State's definition. Furthermore, the State's definition of cumulative impact area is identical to the corresponding Federal definition at 30 CFR 701.5. Therefore, we found that CSR 38-2-2.38 and 38-2-2.39 of the proposed State regulations were not inconsistent with the Federal regulations at 30 CFR 701.5, 780.21(g) and 784.14(f).

#### 2. Effect of Deleting the Definition of Cumulative Impact

The definition of the term cumulative impact that is proposed for deletion from the WVDEP program is:

Cumulative impact means the hydrologic impact that results from the accumulation of flows from all coal mining sites to common channels or aquifers in a cumulative impact area. Individual mines within a given cumulative impact area may be in full compliance with effluent standards and all other regulatory requirements, but as a result of the co-mingling of their off-site flows, there is a cumulative impact. The Act does not prohibit cumulative impacts but does emphasize that they be minimized. When the magnitude of cumulative impact exceeds threshold limits or ranges as predetermined by the Division [WVDEP], they constitute material damage.

As previously noted, neither SMCRA nor the Federal regulations have a corresponding definition of "cumulative impact" and West Virginia added this definition in 1988 on its own volition. Therefore, on its face, removal of this definition would leave the State program consistent with Federal regulations. However, in accordance with the decision of the Circuit Court, OSM must also evaluate the effect the proposed removal of the cumulative impact definition will have on State program implementation in order to assure that any such effect will not render that program less effective than the Federal regulations at meeting the purposes of SMCRA.

Much of the controversy surrounding the proposed removal of West Virginia's cumulative impact definition has focused on the last sentence, which essentially defines material damage in terms quite different than the proposed definition of material damage to hydrologic balance outside the permit area that is discussed later in this notice. The discussion here only focuses upon the effect of removing the definition of cumulative impact with its definition of material damage contained in the last sentence.

First, the definition proposed for removal from the West Virginia program defines material damage in the context of cumulative impacts. This is in contrast to SMCRA and the Secretary's regulations, which state that the proposed operation must be designed to prevent material damage. WVDEP makes this point, on page four of its letter accompanying the submittal, by stating that the focus of the material damage finding required by 30 CFR 780.21(g) and section 510(b)(3) of

SMCRA is more limited than the scope of the full CHIA analysis of which it is a part. The CHIA is to assess the impacts of all anticipated mining in the cumulative impact area, while the material damage finding only deals with whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. This distinction is also noted in the preamble to OSM's Permanent Regulatory Program published on March 13, 1979 (44 FR 14902-15309) at page 15101 which, in explaining the CHIA requirement then at 30 CFR 786.19(c), states "Section 510(b)(3) of the Act requires that the regulatory authority assess the probable cumulative impact on the hydrologic balance of all mining anticipated in an area. In addition, it must also find, prior to approval, that a proposed operation will minimize damage to the hydrologic balance outside the permit area."

When OSM modified its CHIA requirements, it made clear that the CHIA must be sufficient to make the required finding that material damage will be prevented outside the permit area. The preamble to those changes, published on September 26, 1983, (48 FR at 43972-3) discussing 30 CFR 780.21(g), states that the CHIA need not result in judgments balancing current coal development and possible future development. It also states that "the final rule allows a 'first come first served' analysis with each subsequent operation being based upon its potential for material damage with respect to any preceding operations." OSM further noted in that same preamble that "If any material damage would result to the hydrologic balance from the cumulative impacts of a newly proposed operation and any previously permitted operation, the new operation could not be permitted \* \* \*". *Id.* At 43857.

Each permit must establish a cumulative impact area as set forth at 30 CFR 780.21(c) and 784.14(c). The West Virginia definition of cumulative impact area at CSR 38-2-2.39, and the Federal definition at 30 CFR 701.5 are virtually the same and mean: the area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface and groundwater systems. Anticipated mining shall include the entire projected lives through bond releases of (a) the proposed operation, (b) all existing operations, (c) any operation for which a permit application has been submitted to the Secretary/Regulatory Authority, and (d) all operations required to meet diligent development requirements for leased Federal coal for

which there is actual mine development information available. Therefore, while the West Virginia definition proposed for removal requires prevention of material damage from cumulative impacts rather than from the proposed operation as required by SMCRA and the Federal regulations, this is a distinction without a practical difference. In any case, whether the definition is removed or not, the West Virginia program still requires that the proposed operation be designed to prevent material damage to hydrologic balance outside the permit area as required by SMCRA and Federal regulations. The State's obligation and responsibility to properly prepare a CHIA and to make the finding regarding material damage on a case by case basis as required by SMCRA remains an integral component of the West Virginia program even without this definition.

Second, the final sentence of the definition proposed for removal states that "When the magnitude of cumulative impact exceeds threshold limits or ranges as predetermined by the Division, they constitute material damage." It is debatable whether this sentence mandates (as some argue) that the Division predetermine threshold limits or ranges for all material damage parameters or only mandates that, where the Division has, in fact, predetermined threshold limits or ranges, exceeding them constitutes material damage. OSM stated in the preamble to the 1983 hydrology regulations at page 43973 that "OSM agrees that the regulatory authorities should establish criteria to measure material damage for the purposes of the CHIA's." However, the CHIA regulation does not mandate that States do so. This is in sharp contrast to 30 CFR 816.116 (a)(1) for revegetation success standards, also finalized in September 1983, where OSM mandated that regulatory authorities must select standards for success and sampling techniques for evaluating vegetation success and include them in the approved regulatory program (OSM removed the requirement for OSM's prior approval of these success standards and sampling techniques on August 30, 2006, (71 FR 51684, 51688–51695, 51705–51706)). Instead, the hydrology regulations provide general guidance to regulatory authorities in the water monitoring requirements at 30 CFR 780.21 and 784.14, as discussed above. Further, in the 25 years since the hydrology rules were revised, OSM has not put States on notice, under 30 CFR Part 732, of an obligation to establish material damage criteria or that 30 CFR 816.42 or 817.42

must be used for such criteria. The only mandate imposed on States as a result of the 1983 hydrology revised rules was the 1986 mandate under 30 CFR Part 732 that they each must establish a definition of "cumulative impact area" consistent with the new Federal definition added in 1983.

In 1997, some 14 years after revising the CHIA and material damage requirements discussed above, OSM issued a National policy statement on acid mine drainage (AMD) in which it stated "Regulatory authorities should establish criteria to measure and assess material damage. Material damage guidelines, to be applied on a case-by-case basis, are necessary to effectively assess the adequacy of mining and reclamation plans in addressing AMD prevention." The policy goes on to state that "surface and groundwater monitoring data should be evaluated against established material damage criteria." In response to comments on the policy, OSM stated that:

Section 510(b)(3) of SMCRA requires regulatory authorities to determine whether proposed operations have been designed to prevent material damage to the hydrologic balance outside the permit area. This provision inherently requires the use of guidelines or criteria, since even case-by-case determinations require the application of some type of damage threshold and impact measures." And " \* \* \* the policy is consistent with the Act, its implementing regulations, and their preambles in that it encourages States to develop material damage guidelines but does not establish national criteria or guidelines. Instead of establishing rigid guidelines to implement this policy, the regulatory authority could develop a flexible list of factors to consider in establishing thresholds and assessing material damage on a case-by-case basis."

The water monitoring requirements at 30 CFR 780.21 and 784.14 separately mandate minimum parameters for surface and groundwater that relate to both water quality and quantity. Some of those relate to AMD. It is apparent from the above discussion that, while regulatory authorities are expected to provide material damage guidelines, they have considerable flexibility in doing so. Even with the deletion of the current definition of "cumulative impact," West Virginia is still obligated to establish criteria for determining what constitutes material damage to the hydrologic balance outside the permit area consistent with the Federal requirements, as discussed above.

Based upon the foregoing discussion, we find that approving the State's

proposed amendment to delete its definition of "cumulative impact" at CSR 38–2–2.39 would have no adverse effect on the WVDEP's ability or obligation under its approved program to assess and determine whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

In addition, we find, as discussed below, that this deletion is further ameliorated by the addition of a new definition of "material damage to the hydrologic balance."

Furthermore, we find that the deletion of the definition does not make the State program less effective than the hydrologic protection requirements set forth in the Federal regulations nor less stringent than those in SMCRA, and its removal can be approved.

### 3. Effect of Adding a Definition of Material Damage

West Virginia is proposing to add a sentence to its CHIA requirements at CSR 38–2–3.22.e that would define material damage to the hydrologic balance outside the permit area. It reads 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 conditions and uses.

The question before us is whether West Virginia's proposed addition of a sentence defining material damage to the hydrologic balance outside the permit area to its CHIA requirements would leave the State program no less stringent than SMCRA and no less effective than Federal regulations in achieving the purposes of SMCRA. Since neither SMCRA nor the Federal regulations define material damage or require that States define the term as part of their approved programs, at issue before us is whether the definition proposed by West Virginia limits the reach of material damage in a way that reduces the effectiveness of its program so that it would be less effective than Federal rules in achieving the purposes of SMCRA.

In light of that framework, there are three aspects of the proposed definition that must be considered in evaluating whether it can be approved. These are: (1) *Long term or permanent* change, (2) *significant* adverse impact, and (3) *capability* of the affected water resources to support *existing conditions* and *uses* (emphasis added).

These three facets of the proposed definition can be viewed as giving meaning to "material" as it modifies damage. As part of its explanation for its proposed definition, West Virginia focuses on "material," both in its plain meaning and its use in other SMCRA contexts for the phrase "material damage," e.g. subsidence damage and protection of alluvial valley floors. Just as West Virginia is proposing here, the word "significant" in the Federal regulatory definitions appears to be relevant in applying material damage in both of those cases. Further, the word "significant" is used in 30 CFR 780.21 and 784.14 related to groundwater monitoring in determining whether a particular aquifer needs to be monitored. Since material damage certainly implies something more than minor damage and it is a word that OSM has used in Federal regulations for material damage in other contexts, the use of "significant" by West Virginia in this definition is not on its face unreasonable.

In discussing how the phrase "support existing conditions and uses" would be applied, West Virginia states that it effectively requires the State to consider the water quality standards it has promulgated under its Clean Water Act that have been approved by EPA. "By definition, 'water quality standards' means the 'combination of water uses to be protected and the water quality to be maintained' by the rules setting forth those standards." West Virginia also notes that "water quality criteria" is also a defined term that references designated uses, as well as existing uses as specifically provided by the proposed definition. Designated use specifies how the water can be used, such as warm water fishery or primary contact recreation. States are required by the Clean Water Act to assign one or more uses to each of its waters. These uses must be taken into consideration by the State when approving a proposed mining operation. West Virginia then states that, under the proposed definition, in order to assure that mining will not result in a long term or permanent change in the hydrologic balance which has a significant adverse impact on the capability of a receiving stream to support its uses, a proposed mining operation must be designed so as to consistently comply with the water quality standards for the designated uses for the receiving stream. West Virginia further notes it does not intend to consider every pollutant for which a water quality standard has been promulgated. Instead, consideration will be limited to standards for those

parameters which, based upon its experience with other mining operations in the area and the geochemical data required in the application, have the potential to have an impact on water quality if the application is granted.

The Federal water monitoring requirements at 30 CFR 780.21 and 784.14, which, as discussed above are linked to detecting material damage, state that current and approved postmining land use should be considered in establishing parameters to be monitored for both surface and groundwater. West Virginia's proposed link of material damage to existing water uses is not inconsistent with that concept, particularly with its explanation of how it would be applied since water quality standards established under the Clean Water Act are linked to both existing and designated uses. We do note that those standards do not extend to surface water quantity or to ground water quality or quantity. Therefore, there are additional material damage criteria for which the State must consider how it will determine material damage. However, the proposed definition does not limit West Virginia's authority or obligation to do so. By including its Water Quality Standards with the amendment, we understand that West Virginia intends to apply the requirements set forth at CSR 46-1-1 *et seq.* when determining when material damage to the hydrologic balance has occurred.

In regard to the issue of long-term or permanent change, West Virginia states that, while the operation must be designed to consistently comply with applicable standards, isolated or random exceedance of water quality standards will not be regarded as material damage. The idea that material damage to the hydrologic balance is linked to long-term trends rather than an isolated spike in relation to threshold levels or ranges is consistent with the requirement that monitoring data need only be submitted every three months and gives reasonable meaning to "material" damage. While OSM recognizes that there have been a few individual events of enormous magnitude and impact that would certainly qualify as material damage to the hydrologic balance outside the permit area, there are numerous performance standards that could be cited in enforcement actions in such cases to mandate corrective measures under approved State programs. Further, OSM does not view the proposed State definition as limiting West Virginia's ability to cite the State counterpart (CSR 38-2-14.5) to 30 CFR

816.41(a) and 817.41(a) for causing material damage to the hydrologic balance outside the permit area in such cases. OSM believes that all of these issues related to the material damage finding should be addressed by the regulatory authority on a case-by-case basis as mining permit applications are reviewed and approved, in concert with the CHIA. In reviewing West Virginia's proposed material damage definition, OSM finds that it does provide reasonable guidance on what would constitute material damage to the hydrologic balance outside the permit area without imposing limitations on the reach of that phrase that would make the West Virginia program less effective than the Federal regulations at achieving the purposes of SMCRA.

West Virginia has stated that it intends to implement its proposed definition in a manner that provides objective criteria for determining whether a proposed operation is designed to prevent material damage to the hydrologic balance outside the permit area. Further, it has stated that it would do so in a manner that gives reasonable meaning to the phrase "material" while providing consistent application understandable to all parties. Therefore, OSM finds that the proposed new definition of material damage at CSR 38-2-3.22.e is no less stringent than SMCRA and no less effective than Federal regulations in achieving the purposes of the Act and it can be approved. This finding is based upon West Virginia implementing this new definition consistent with its explanation provided with the proposed amendment as summarized above and consistent with the intent of SMCRA as discussed in this notice. Should we later find that this definition is not being implemented in a manner consistent with the above discussion, OSM may revisit this finding.

#### IV. Summary and Disposition of Comments

We received written comments from Geo-Hydro, Inc. (Administrative Record Number WV-1496); a private citizen (Administrative Record Number WV-1498); a combined set of comments on behalf of the Hominy Creek Preservation Association, Inc., Ohio River Valley Environmental Coalition, Inc., and West Virginia Highlands Conservancy, Inc. (Administrative Record Number WV-1495). We also received comments from two Federal agencies; the United States Department of the Interior Fish and Wildlife Service, West Virginia Field Office (Administrative Record Number WV-1491) and the United States Environmental Protection Agency,

Region III (Administrative Record Number WV-1497).

#### Public Comments

Extensive comments were received from Walton D. Morris, Jr. on behalf of Hominy Creek Preservation Association, Inc., Ohio River Valley Environmental Coalition, Inc. (OVEC), and West Virginia Highlands Conservancy, Inc. OSM will refer to these comments collectively as those of OVEC.

OVEC contends that OSM's publication of a proposed rule "which merely invites public comment on West Virginia's resubmission documents falls short of the requirement which the Administrative Procedure Act (APA), 5 U.S.C. 553, imposes on the agency \* \* \*". In support of this comment, OVEC lists several alleged deficiencies in the proposed amendment, all of which, according to OVEC, were noted by "courts". In addition the WVDEP's new explanatory letter "does not have the force of law and therefore does not cure the defects in the proposed amendments which led the reviewing courts to strike down OSM's approval decision", according to OVEC. "Specifically", OVEC argues, "there remains no definition in the proposed amendments of 'long-term change' or 'significant adverse impact.' There are no regulatory provisions or other provisions with the force of law that indicate 'how the regulatory authority propose[s] to measure such an impact or determine when it would occur.'" Finally, OVEC contends that, "[i]f OSM proposes to re-approve these very same proposed program amendments, the agency has an obligation first to inform the public of the basis on which it proposes to do so", and "to perform and present the analysis which the reviewing courts found missing from the agency's earlier program approval decision and to request further public comment on that analysis."

First, we note that the Fourth Circuit, unlike the District Court, did not point to any alleged deficiencies in the amendments themselves, such as the failure to define certain terms. Rather, its decision was based on OSM's failure to determine, based upon a thorough analysis, whether the amendments rendered the State's program less stringent than SMCRA and less effective than the Federal regulations. 473 F.3d at 103. Thus, we disagree with OVEC that either OSM or the State is obligated to "cure the defects in the text of the proposed amendments" by way of explanation in the proposed rule.

Second, we disagree with OVEC's assertion that we are obliged to "inform the public of the basis" for our proposed

re-approval of the amendments, because this assertion proceeds from the false premise that OSM's proposed rule proposes approval of the amendments.

To the contrary, our proposed rule merely announces receipt of the amendments as required by 30 CFR 732.17, and asks for public and agency comment on the question of whether the amendments can be approved. At the proposed rule stage, we take no position as to whether an amendment should be approved; therefore, we are not required to provide an analysis in the proposed rule that advocates approval.

This approach is fully consistent with the APA as described by the Fourth Circuit in this case wherein the court stated "An agency engaged in rulemaking pursuant to APA 553 must 'follow [] a three-step process—issuance of a notice of proposed rulemaking, followed by receipt and consideration of comments on the proposal, followed by promulgation of a final rule that incorporates a statement of basis and purpose.'" 473 F.3d at 102 (quoting Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 7.4 (3rd ed. 1994)). The Court goes on to note that the agency followed that process in concluding that the Secretary was engaged in rulemaking pursuant to APA Section 553.

Each of OVEC's comments on the proposed rule suffers from a fundamental misinterpretation of the requirements of Section 553 of the Administrative Procedure Act, 5 U.S.C. 553. With respect to proposed rules, the APA merely requires that the reviewing agency include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Cat Run Coal Co. v. Babbitt*, 932 F. Supp. 772, 777 (S.D. W.Va. 1996) (quoting 5 U.S.C. 553(b)(3)). "The notice must be 'sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rule making.'" 932 F. Supp. at 777 (quoting *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985) (citations omitted)).

In our May 17, 2007, proposed rule, we set forth the full text of the amendment, which includes the deletion of the "cumulative impact" definition, as well as the addition of a definition of "material damage", in CSR 38-2-3.22.e. Next, we presented, in considerable detail, the WVDEP's explanation of how the "material damage" definition will be interpreted and employed in the context of a permitting review. Finally, we included the WVDEP's rationale for removing the definition of "cumulative impact". 72 FR 27782, 27784-5 (May 17, 2007).

Together, the text and explanatory narrative accompanying it satisfy the APA's requirement that the proposed rule include "the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). Indeed, our proposed rule surpasses the APA's mandate, since it includes both a description of the proposed amendments' "terms" and "substance", as well as a "description of the subjects and issues involved." As such, the proposed rule is sufficient to ensure that the public and other interested parties will have a fair opportunity to comment and to participate in the rulemaking process.

In addition OVEC provides three primary reasons why OSM should disapprove the proposed program amendments. These reasons are summarized below along with OSM's responses.

I. WVDEP's explanatory letter lacks the force of law, is inconsistent with both the text of pertinent West Virginia Statutes and Regulations and with WVDEP's prior explanations of the proposed amendments; and thus does not provide a rationale basis for evaluating or approving the amendments.

OVEC comments that the explanation provided by WVDEP in support of the proposed amendments is inconsistent with previous explanations provided by the agency, is inconsistent with statutory and regulatory texts regarding water quality statutes, and is inconsistent with the testimony of the WVDEP in a deposition with regard to what constitutes material damage. In addition, OVEC states that OSM should require WVDEP to furnish an opinion of the Attorney General of West Virginia that the " \* \* \* legal interpretations set forth in the explanatory letter are correct, both with respect to the proposed amendments and the water quality statutes and regulations which WVDEP invokes, and that the letter has the force of law."

Before addressing OVEC's specific comments under this heading, it is important to note that 30 CFR 732.17 does not require a State to submit an explanation or rationale as a part of submitting proposed program amendments. The extent to which OSM has relied upon material other than the language of proposed amendments themselves in relation to Federal requirements in reaching its decision is described above in the findings section. While we found the State's explanation useful, the extent to which we have relied on it in reaching our decision is limited to the extent we have referenced it in the findings section above. The

understanding upon which our approval is based is explained in the findings section and largely relies, as discussed, upon the reach of Federal requirements. Further, OSM has two decisions before it. While OVEC's comments treat these decisions as one without delineating which decision it is commenting on, there is generally more discussion of the material damage definition that is proposed for addition to the West Virginia program.

OVEC's sole basis for claiming inconsistency between the WVDEP's July 1, 2003, clarification and its March 22, 2007, letter is that the former document stated that the amendments "set forth some objective criteria" for determining material damage, while the latter document argues that the material damage determination must be a "qualitative, rather than a quantitative," judgment.

However, OVEC fails to note that in its 2007 letter, the WVDEP also contends that the new material damage standard is more objective than its predecessor, since it clearly requires the determination to be based on the ability of the proposed mining operation to comply with water quality standards, whereas the old "cumulative impact" definition referred to undefined "threshold limits and ranges." Thus, in both its 2003 and 2007 explanations of the amendments, the WVDEP contends that the new definition of material damage adds objectivity to the determination. The State did acknowledge in 2007 that the new definition does not adhere to a mathematically precise formula for producing a finding of material damage; however, a lack of mathematical precision does not equal a lack of objectivity. West Virginia states that water quality standards will be used to determine whether an operation has been designed to prevent material damage to the hydrologic balance outside the permit area since the new definition references use and the State's water quality standards are set to protect existing and designated uses. Thus, material damage determinations, though made on a case-by-case basis, will be objective in nature. For these same reasons, we disagree with OVEC that the WVDEP's 2007 explanation somehow attempts to thwart the West Virginia Legislature's intent "to set forth some objective criteria" for material damage determinations.

OVEC asserts that the State's March 22, 2007, letter contains erroneous interpretations of West Virginia's water quality statutes and regulations. First of all, OSM's decision to approve both of these amendments is unaffected by any

disputes between OVEC and West Virginia over the proper interpretation of West Virginia's water quality statutes and regulations. The basis for our decisions to approve both of these proposed amendments is explained above under the findings section. The SMCRA mandate that proposed mines be designed to prevent material damage to the hydrologic balance is not a vehicle for using SMCRA to enforce CWA requirements.

Further, disputes over a State's proposal to revise its program requirements related to preventing material damage to the hydrologic balance under SMCRA are not a proper vehicle for resolving or addressing disputes over how the State's CWA requirements should be interpreted. In short, this dispute is not relevant to our decisions because those decisions are not based upon any particular interpretation of the State's CWA application. Having said that, OVEC's argument herein appears to rest on its assertion that a single, isolated violation of any such water quality law or regulations constitutes material damage. However, OVEC cites no law or regulation supporting this argument. To the contrary, as discussed above, States have considerable discretion in establishing their CHIA process and establishing criteria for making the required material damage finding, including the extent to which they utilize CWA standards or criteria in doing so. Moreover, the WVDEP's letter does not purport to carry the force of law, and we do not accord it such weight. In any event, there is no Federal regulatory requirement for OSM to request an Attorney General's opinion to accompany a state program amendment.

Finally, we acknowledge an apparent inconsistency between the March 22, 2007, letter and the WVDEP employee's deposition testimony with regard to what constitutes "material damage". We have given the preponderance of weight to the March 22, 2007, letter, since it is subsequent to the deposition testimony, which was given in 2003, and, more important, because it was offered in support of this re-submission and was signed by the head of the agency. Regardless of anything submitted by the WVDEP, however, the ultimate burden is on OSM to determine whether these amendments are no less stringent than SMCRA and no less effective than the implementing Federal regulations. We have met that burden.

II. The proposed amendments would render the West Virginia Program inconsistent with the Federal requirement that regulatory authorities define material damage in terms of

predetermined limits and ranges for specific hydrologic parameters.

OVEC comments that the proposed amendments are inconsistent with SMCRA and less effective than the Federal regulations because they " \* \* \* fail to establish \* \* \* usable criterion for determining material damage to the hydrologic balance outside the permit area."

As discussed extensively above, OVEC vastly overstates the Federal mandate. No such mandate is contained in SMCRA or the Federal regulations and no other State or Federal program contains, as part of its regulations, the definition that West Virginia proposes to remove. While OSM stated in the preamble to the 1983 hydrology regulations (48 FR 43973) " \* \* \* that the RA's should establish criteria to measure material damage for the purposes of CHIA's," it did not establish a regulatory mandate that States do so nor require OSM approval of such criteria. The only mandate imposed on States as a result of the 1983 hydrology revised rules was the 1986 mandate under Part 732 that they each must establish a definition of "cumulative impact area" consistent with the new Federal definition at 30 CFR 701.5 added in 1983. With that said, OSM is approving the proposed amendments with the understanding that the State will determine on a case-by-case basis meaningful objective material damage criteria in order to make the finding regarding material damage required by 30 CFR 773.15(e).

OVEC comments further on this issue that " \* \* \* regulatory authorities must include pertinent, applicable numeric water quality standards and effluent limitations in a set of predetermined material damage criteria contained in the CHIA for each proposed surface and coal mining operation." In addition OVEC is concerned that WVDEP would only consider a stream materially damaged if the stream were "completely sterilized" or a use "destroyed". In addition, there were concerns raised about the WVDEP position that a "minor" exceedance of water quality standards would not constitute material damage.

OSM disagrees with the statement that effluent limitations and water quality standards constitute predetermined material damage criteria. OVEC is under the misguided impression that 30 CFR 816.42 and 817.42 establish fixed material damage criteria for coal mining operations. While the plain language of these regulations require discharges of water from mining operations to be in compliance with applicable State and

Federal water quality laws and regulations as well as the EPA effluent limitations for coal mining operations, there is no assertion that discharges that violate such laws and regulations somehow automatically constitute material damage to the hydrologic balance. Obviously discharges that do not comply with either the effluent limitations or water quality standards should be considered performance standard violations by the regulatory agency, but whether such discharges constitute material damage to the hydrologic balance is another issue entirely. OSM believes that a discharge of any magnitude or duration into a stream that results in the loss of an existing or designated use is not an acceptable impact to the hydrologic balance from SMCRA regulated coal mining operations, even if the discharge does not violate effluent limitations or water quality standards. Clearly the discharge does not have to reach the severity necessary to result in the total destruction of a stream in order to constitute material damage. On the other hand, one single minor violation of effluent limitations could easily occur and result in no detectable impact to a receiving stream's existing or designated use.

OVEC further elaborates on this issue to the extent that "WVDEP proposes to rewrite West Virginia's pertinent, applicable water quality standards to adopt more lenient pollutant limits, etc. \* \* \*." OVEC makes this leap as a result of its previous erroneous conclusion that SMCRA mandates the use of water quality standards and effluent limits for coal mining operations as predetermined material damage criteria. The water quality standards and effluent limits are established by State and Federal law pursuant to the CWA. As provided by section 702(a)(3), nothing in SMCRA, or a State program amendment approved by OSM, can alter or modify these standards or limits. OSM cannot, in its approval of a State program amendment, alter existing CWA laws in any State. Indeed, OSM does not agree that WVDEP is proposing to rewrite any CWA laws through these State program amendments. OSM agrees with WVDEP as addressed in the previous comment response that water quality standards and coal mining effluent limits do not constitute predetermined material damage criteria unless the State, at its discretion, decides to apply them that way. Our approval of these two amendments is not based upon the State deciding to do so.

OVEC comments that the WVDEP amendment does not guarantee that new

mining operations will be prevented from discharging additional pollutants into streams listed as impaired pursuant to Section 303(d) of the Clean Water Act, nor does the amendment prevent WVDEP from allowing permits to discharge into waters for which no TMDL has been prepared. In addition OVEC requests that " \* \* \* OSM investigate the situation (issuing permits allowing discharges into 303(d) listed streams for which there is no TMDL) as part of its evaluation of these proposed amendments."

Allegations of improper implementation of a State's CWA program are beyond the scope of review for a State SMCRA program amendment. However, when considering material damage impacts, it is certainly appropriate for a State to consider the fact that 303(d) listed streams (i.e., those already impaired) are in need of restoration and a reduction of pollutant loadings in order to achieve their designated use. OSM, in cooperation with other agencies and local watershed groups, expends millions of dollars through the abandoned mine land program to restore streams biologically impaired from abandoned coal mines. These efforts would be meaningless if current mine operators are allowed to discharge pollutants into these impaired waters that would offset restoration efforts. Thus, there is value in using State water quality criteria (both numeric and narrative standards) in such a manner that existing and designated uses are protected, and to ensure that impaired streams are not further degraded as a result of SMCRA regulated mining activities. On the other hand, we do not construe Federal material damage requirements as mandating, where there is a choice between discharging in compliance with effluent standards into a 303(d) impaired stream or discharging into a high quality pristine stream, that the discharge must go into the high quality stream. In short, SMCRA material damage requirements should not be construed as a mechanism for enforcing CWA TMDL requirements through SMCRA. OSM believes that protecting the hydrologic balance from material damage requires a comprehensive analytical approach, considering both short-term (during mining and reclamation) and long-term (those that are projected to extend beyond the release of reclamation performance bonds) impacts.

III. Approval of the proposed amendments would impair or preclude effective citizen participation in the administration and enforcement of the West Virginia Program.

The commenter asserts that the amendments 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 would fatally chill public participation in its enforcement.

OSM disagrees with this comment. Neither of the amendments that the State is proposing effect in any way the public participation provisions of the approved West Virginia program. In addition, it should be noted that with every permit application filed, the public has the opportunity to provide comment and input regarding the proposed application. In addition, once the application is approved, the public has another opportunity for review through the administrative review process under the State counterpart to 30 CFR 775.11. Further, as discussed repeatedly above, OVEC's comments represent a serious mischaracterization of the two amendments.

There are also a few other aspects of OVEC's comments that warrant a response. The background section seriously mischaracterizes Federal CHIA and material damage requirements. The draft CHIA guidelines that OSM released in 1985 quoted from in the comments are just that—draft. They have never been finalized and certainly do not represent an agency position enforceable by regulation, including the State program amendment process. Further, the introduction to the draft guidelines states clearly that they were only intended as technical guidance and should not be construed as enforceable standards. Contrary to OVEC's assertion, OSM did not approve the 1993 West Virginia CHIA handbook nor has OSM considered the handbook, or revisions to it, as requiring OSM approval. Finally, OSM has considered OVEC's request for a delay in the effective date of any decision. The benefits of making this decision effective immediately are no different than with other State program amendments that OSM processes. By regulation in 30 CFR part 732, OSM has limited time to process proposed State program amendments. OSM often, as in this case, has difficulty meeting those time frames. Delaying the effective date would only exacerbate the problem in meeting the regulatory time frame, and making sure that State program requirements are consistent with Federal requirements as required

by SMCRA. Therefore, this rule will be effective immediately upon publication.

Additional comments were also received from Charles H. Norris, on behalf of Hominy Creek Preservation Association, Inc. (HCPA), Ohio Valley Environmental Coalition, Inc. and West Virginia Highlands Conservancy, Inc. OSM will refer to these comments collectively as those of HCPA.

HCPA commented regarding a quality review panel established for the purpose of assessing the performance of the West Virginia State regulatory authority with respect to cumulative hydrologic impact assessment (CHIA). HCPA commented that the study indicated that "The CHIA's for eleven of the twelve permits that the panel reviewed failed to define conditions that would constitute material damage for the cumulative impact area for each permit." OSM participated in this same study of the WVDEP CHIA process. The study's report was finalized in February of 2007, and concluded, among other things, that WVDEP did not establish material damage limits in its CHIA process. The commenter went on to state that " \* \* \* the almost universal failure to define objective criteria for material damage constituted a recurring, fatal flaw in the CHIAs \* \* \* ". OSM acknowledges that WVDEP needs to improve its application of CHIA requirements as noted in the 2007 report. Those basic conclusions are unaffected by the amendments approved here. We find this to be more related to the technical implementation of the program than to its regulatory obligations addressed in this decision. OSM finds that allowing the State to amend the program to allow a definition that the WVDEP believes more correctly aligns with its Clean Water Act will create a more stable regulatory platform for consistent application of regulatory requirements. As part of its oversight process, OSM will continue to monitor WVDEP's progress in addressing the findings noted in the 2007 CHIA report.

HCPA indicated its concern that WVDEP had not specifically addressed other aspects of the hydrologic balance beyond surface water quality such as " \* \* \* material damage to stream flow \* \* \* ", and " \* \* \* material damage with respect to the other elements of the hydrologic balance; surface water quantity, groundwater quantity, and groundwater quality."

While OSM embraces the applicability of water quality standards as a component of a comprehensive approach to protect and restore surface waters, as discussed in the finding section above, other water criteria must also be factored into the consideration

of material damage. The approval of these two amendments today is based upon that understanding. As the commenter points out various other elements of the hydrologic balance " \* \* \* surface water quantity, groundwater quantity, and groundwater quality \* \* \* " must also be assessed with regard to the specific material damage criteria necessary to assure protection of existing and foreseeable uses of these water resources.

#### *Federal Agency Comments*

Under Federal regulations at 30 CFR 732.17(h)(11)(i) and section 503(b) of SMCRA, we requested comments on April 27, 2007, regarding the amendments from various Federal agencies with an actual or potential interest in the West Virginia program (Administrative Record No. 1488). The results of this consultation are presented below.

U.S. Fish and Wildlife Service (USFWS) provided comments on May 29, 2007, on the proposed amendments to the West Virginia program. The USFWS expressed its concern with the WVDEP interpretation and application of water quality standards relative to its proposed definition of material damage. Specifically, the USFWS is concerned with the cumulative impacts of minor exceedances of the water quality standards. It is also concerned with the allowable one-time events on certain aquatic populations such as fish and mussels. All discharges from mining operations must be made in compliance with the applicable water quality standards and effluent standards. Discharges that violate these standards are subject to the enforcement provisions of the State program. Multiple discharges resulting in violations over time, even if they do not materially damage a stream, are not to be taken lightly by either a mine operator or the State RA. Pursuant to 30 CFR 843.13, the State could suspend or revoke a permit when a pattern of violations is found to exist. In addition, OSM does not consider the amendments approved today as limiting the State's authority or obligation to consider whether a significant individual event caused or may cause material damage to the hydrologic balance outside the permit area.

The USFWS also recommended retention of the definition of cumulative impact, while suggesting the definition be revised to expand its applicability to the water quality standards. OSM has decided to approve West Virginia's request to remove the existing definition as it has been effectively replaced by the new definition of material damage in

the West Virginia program, and the desired outcome can be achieved through the appropriate interpretation and application of the State's existing definitions of CIA and CHIA, along with the approved definition of material damage. In addition, WVDEP has stated in its submission that it intends to " \* \* \* consider the water quality standards it has promulgated \* \* \* as part of the material damage inquiry under the surface mining law." OSM is approving this amendment with the understanding that the State will utilize its water quality standards as a means of protecting streams from mining related material damage. However, the material damage finding is not limited to water quality standards, and therefore OSM does not desire that States adopt a definition that could be interpreted so narrowly as to only focus on water quality standards. OSM anticipates that the material damage finding will be used to address impacts to other water resources, such as surface water quantity and groundwater quantity and quality, as discussed in this decision. OSM believes that the approved WVDEP program includes all of the necessary hydrologic requirements within the existing law and regulations, and that the program will be implemented in a manner consistent with the intent of SMCRA and the Federal regulations with regard to preventing material damage to the hydrologic balance outside the permit area.

#### *Environmental Protection Agency (EPA) Concurrence and Comments*

Under Federal regulations at 30 CFR 732.17(h)(11)(i) and (ii), we are required to get a 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 April 27, 2007 we requested concurrence and comments on the amendment from EPA (Administrative Record No. WV 1487).

EPA provided comments on June 21, 2007, and stated that the proposed amendment may be subject to interpretations that could be inconsistent with the CWA. It is not clear to which of the two proposed amendments EPA was referring. However, nothing in either of these amendments would affect or interfere with the State's implementation of the CWA. To the contrary, we believe they will improve coordination. OSM finds that WVDEP has stated its intent in such a manner that the new definition of material damage will not jeopardize the obligation of mining operations to be

conducted in compliance with the applicable water quality standards and effluent standards as required by 30 CFR 816/817.42 or the State counterpart at CSR 38–2–14.5b. Nothing in our approval of this program amendment affords any variance from compliance with the CWA or any provisions of SMCRA. With respect to deleting the definition of cumulative impact, OSM finds that the State's existing regulations, together with the proposed definition of material damage, provide comparable protection. All mining operations must be designed to minimize impacts to the hydrologic balance within the permit area and adjacent areas pursuant to 30 CFR 816/817.41 (a) and CSR 38–2–14.5. Using a cumulative impact area based upon information provided by the applicant or other agencies as required by 30 CFR 780.21(g), 784.14(f) and CSR 38–2–3.22d and .e, the State must evaluate the cumulative hydrologic impacts of all anticipated mining upon surface and ground water systems so as to prevent material damage to the hydrologic balance outside the permit area. By definition, this evaluation must take into account the combined impacts of all mining and anticipated mining in the cumulative impact area as required by 30 CFR 701.5 and CSR 38–2–2.39. The CHIA determines cumulative impact and specifies if material damage is expected to occur; therefore deleting the proposed definition of cumulative impact does not make the West Virginia program inconsistent with the requirements of SMCRA.

EPA, while expressing its concerns as outlined above, concurred with the proposed revisions, with the understanding that all coal mining operations would be conducted in full compliance with all relevant provisions of the CWA. EPA provided its concurrence based on the understanding that 30 U.S.C. 1292 requires that the proposed State amendments must be construed and implemented consistent with the CWA, NPDES regulations and other relevant environmental statutes.

## V. OSM's Decisions

### A. Decision on Deletion of Definition of Cumulative Impact

OSM has reviewed the corresponding changes in regulations, the relevant existing regulations, and the current interpretation of the proposed regulations as provided by the State. OSM finds that the WVDEP has the authority to require proper preparation of PHCs and CHIAs and to establish realistic delineations of cumulative impact areas under its existing

regulations without relying on the current definition of cumulative impact. The revision to delete the definition of cumulative impact, as it applies to the applicability of the West Virginia program, is no less stringent than SMCRA and is no less effective than the Federal regulations; therefore the proposed deletion of the definition is approved.

### B. Decision on the Proposed Definition of Material Damage

OSM finds that the proposed definition of "material damage" and OSM's corresponding interpretation of its applicability to the approved program as stated in this notice, is no less stringent than SMCRA, and no less effective than the Federal regulations; therefore the proposed definition, as further described in this notice, is approved.

To implement these decisions, 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 regulation 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 exempted 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 applicable standards of Subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10),

decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

### Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and Section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

### Executive Order 13175—Consultation and Coordination With Indian Tribal Government

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian tribes and have determined that the rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The basis for this determination is that our decision is on a State Regulatory program and does not involve a Federal Regulation Involving Indian Lands.

### Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

**National Environmental Policy Act**

This rule does not require an environmental impact statement because Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

**Paperwork Reduction Act**

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

**Regulatory Flexibility Act**

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether

this rule would have a significant economic impact, the Department relied upon data and assumptions for the counterpart Federal regulations.

**Small Business Regulatory Enforcement Fairness Act**

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the West Virginia submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

**Unfunded Mandates**

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector

of \$100 million or more in any given year. This determination is based upon the fact that the West Virginia submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

**List of Subjects in 30 CFR Part 948**

Intergovernmental relations, Surface mining, Underground mining.

Dated: December 18, 2008.

**Brent Wahlquist,**  
*Director.*

■ For the reasons set out in the preamble, 30 CFR part 948 is amended as set forth below:

**PART 948—WEST VIRGINIA**

■ 1. The authority citation for part 948 continues to read as follows:

*Authority:* 30 U.S.C. 1201 *et seq.*

■ 3. Section 948.15 is amended by adding a new entry in the table in chronological order by "Date of final publication" to read as follows:

**§ 948.15 Approval of West Virginia regulatory program amendments.**

\* \* \* \* \*

Original amendment submission date	Date of final publication	Citation/description
March 22, 2007	December 24, 2008	CSR 38-2-2.39 (deletion of cumulative impact definition). CSR 38-2-3.22.e (approval of material damage to the hydrologic balance definition).

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BILLING CODE 4310-05-P

**POSTAL SERVICE**

**39 CFR Parts 1-11**

**Bylaws of the Board of Governors**

**AGENCY:** Postal Service.

**ACTION:** Final rule.

**SUMMARY:** The Board of Governors of the United States Postal Service has adopted a considerable number of amendments to its Bylaws, set forth in subchapter A, parts 1 through 11, of title 39 of the Code of Federal Regulations. These amendments implement changes in the authority, responsibilities, and procedures of the Board made necessary by the Postal Accountability and Enhancement Act of 2006 (PAEA),

Public Law 109-435. The Postal Service hereby publishes this final rule revising subchapter A to reflect the changes in the Board's Bylaws.

**DATES:** *Effective Date:* December 24, 2008.

**FOR FURTHER INFORMATION CONTACT:** Julie S. Moore, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260-1000; (202) 268-4800, or Christopher T. Klepac, (202) 268-3006.

**SUPPLEMENTARY INFORMATION:** This document revises subchapter A, incorporating parts 1 through 11 of 39 CFR, to reflect numerous changes to the Bylaws of the Postal Service's Board of Governors necessitated by the enactment of the Postal Accountability and Enhancement Act of 2006 (PAEA), Public Law 109-435. A large number of these changes are editorial or technical in nature, and do not alter the authority,

responsibilities, or procedures of the Board. Others reflect substantive changes in these matters, particularly with reference to the establishment of postal rates and fees under the new legislation. For the convenience of the user, subchapter A has been republished in its entirety, as revised by the Board of Governors. The following section-by-section analysis identifies the new or modified provisions of revised subchapter A.

**Section-by-Section Analysis**  
**Part 1—Postal Policy (Article I)**

The authority citation for part 1 has been updated to reflect changes under Public Law 109-435.

**Section 1.1 Establishment of the U.S. Postal Service**

Language has been added to this section to reflect the enactment of