

that is constructed in accordance with one of the listed national consensus standards.

\* \* \* \* \*

28. Paragraph (b) of § 1918.104 is revised to read as follows:

**§ 1918.104 Foot protection.**

\* \* \* \* \*

(b)(1) The employer shall ensure that the protective footwear is constructed in accordance with good design standards. Protective footwear that is constructed in accordance with an equipment design standard that meets the following criteria will be presumed to be constructed in accordance with good design standards:

(i) The standard specifies the safety requirements for the particular equipment;

(ii) The standard is recognized in the United States as providing specifications that result in an adequate level of safety; and

(iii) The standard was developed by a standards development organization under a method providing for input and consideration of views of industry groups, experts, users, governmental authorities, and others having broad experience and expertise in issues related to the design and construction of the particular equipment.

(2) Non-mandatory appendix A to this subpart contains examples of national consensus standards that OSHA has determined meet the criteria of paragraph (b)(1) of this section. Protective footwear that is constructed in accordance with any of the listed national consensus standards will be deemed to meet the good design requirement of paragraph (b)(1). Protective footwear is not required to be constructed in accordance with one of the listed standards, but the protective footwear must be constructed in accordance with good design standards. To meet this requirement, the protective footwear must provide protection equivalent to or greater than protective footwear of the same type that is constructed in accordance with one of the listed national consensus standards.

29. Appendix A to subpart J is added to read as follows:

**Appendix A to Subpart J of Part 1918—Criteria for Personal Protective Equipment (Non-Mandatory)**

This appendix lists equipment design standards that OSHA has determined are “good design standards” as that phrase is used in sections 1918.101(a)(1), 1918.103(b), and 1918.104(b).

1. *Good design standards for protective eye and face devices (1918.101(a)(1))*

ANSI Z87.1–2003, “American National Standard Practice for Occupational and Educational Eye and Face Protection”

ANSI Z87.1–1998, “American National Standard Practice for Occupational and Educational Eye and Face Protection”

ANSI Z87.1–1989, “American National Standard Practice for Occupational and Educational Eye and Face Protection”

2. *Good design standards for protective helmets (1918.103(b))*

ANSI Z89.1–2003, “American National Standard for Personnel Protection—Protective Headwear for Industrial Workers—Requirements”

ANSI Z89.1–1997, “American National Standard for Personnel Protection—Protective Headwear for Industrial Workers—Requirements”

ANSI Z89.1–1986, “American National Standard for Personnel Protection—Protective Headwear for Industrial Workers—Requirements”

3. *Good design standards for protective footwear (1918.104(b))*

ASTM F–2412–2005, “Standard Test Methods for Foot Protection,” and ASTM F–2413–2005, “Specification for Performance Requirements for Protective Footwear.” These two standards together constitute a good design standard.

ANSI Z41–1999, “American National Standard for Personal Protection—Protective Footwear”

ANSI Z41–1991, “American National Standard for Personal Protection—Protective Footwear”

[FR Doc. E7–9315 Filed 5–16–07; 8:45 am]

**BILLING CODE 4510–26–P**

**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 948**

**[WV–112–FOR]**

**West Virginia Regulatory Program**

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

**ACTION:** Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

**SUMMARY:** We are announcing receipt of a proposed amendment to the West Virginia regulatory program (the West Virginia program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). West Virginia is re-submitting a proposed amendment to revise the West Virginia Code of State Regulations (CSR) concerning the hydrologic impacts of surface mining operations. The amendments are intended to repeal a definition of “cumulative impact,” and add a definition of “material damage” to the

hydrologic balance outside the permit area. OSM had approved an earlier submittal of these same amendments on December 1, 2003 (68 FR 67035), but that approval was vacated and remanded by the United States District Court for the Southern District of West Virginia on September 30, 2005. The United States Court of Appeals for the Fourth Circuit affirmed the lower court’s ruling on December 12, 2006. We are expressly seeking comment on whether the proposed amendments and the supporting arguments and explanations presented by the State are consistent with the Federal hydrologic protection requirements under SMCRA.

**DATES:** We will accept written comments on this amendment until 4 p.m. (local time), on June 18, 2007. If requested, we will hold a public hearing on the amendment on June 11, 2007. We will accept requests to speak at a hearing until 4:00 p.m. (local time), on June 1, 2007.

**ADDRESSES:** You may submit comments, identified by WV–112–FOR, by any of the following methods:

- *E-mail:* [chfo@osmre.gov](mailto:chfo@osmre.gov). Include WV–112–FOR in the subject line of the message;

- *Mail/Hand Delivery:* Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301; or

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Instructions:* All submissions received must include the agency docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comment Procedures” heading in the **SUPPLEMENTARY INFORMATION** section of this document. You may also request to speak at a public hearing by any of the methods listed above or by contacting the individual listed under **FOR FURTHER INFORMATION CONTACT**.

*Docket:* You may review copies of the West Virginia program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may also receive one free copy of this amendment by contacting OSM’s Charleston Field Office listed below.

Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East,

Charleston, West Virginia 25301, Telephone: (304) 347-7158. E-mail: [chfo@osmre.gov](mailto:chfo@osmre.gov).

West Virginia Department of Environmental Protection, 601 57th Street, SE., Charleston, WV 25304, Telephone: (304) 926-0490.

In addition, you may review a copy of the amendment during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, 604 Cheat Road, Suite 150, Morgantown, West Virginia 26508, Telephone: (304) 291-4004. (By Appointment Only)

Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 313 Harper Park Drive, Suite 3, Beckley, West Virginia 25801, Telephone: (304) 255-5265.

**FOR FURTHER INFORMATION CONTACT:** Mr. Roger W. Calhoun, Director, Charleston Field Office, Telephone: (304) 347-7158. E-mail: [chfo@osmre.gov](mailto:chfo@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the West Virginia Program
- II. Background on the Previous Submittal of This Amendment
- III. Description of the Proposed Amendment
- IV. Public Comment Procedures
- V. Procedural Determinations

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

Section 503(a) of the Act 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 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 of the West Virginia program 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. Background on the Previous Submittal of this Amendment**

In 2001, West Virginia House Bill 2663 was enacted as State law. House

Bill 2663 deleted the definition of cumulative impact at CSR 38-2-2.39 and added a definition of material damage at CSR 38-2-3.22.e, a provision that concerns cumulative hydrologic impact assessments (CHIA) of surface coal mining and reclamation operations. By letter dated May 2, 2001, West Virginia submitted the proposed changes as an amendment to its permanent regulatory program (Administrative Record Number WV-1209). OSM approved the deletion of the definition of cumulative impact and the addition of the definition of material damage 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 Citizens Coal Council filed a complaint and petition for judicial review in 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 OSM’s decision of December 1, 2003, and remanded the matter to the Secretary for further proceedings consistent with the Court’s decision (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 the State had 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 (Administrative Record Number WV-1454). In its amended order, the Court directed the Secretary to instruct the State that it may not implement either the new language nor the deletion of 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, as such, must be implemented by the State, and that the definition of “material damage” is not approved and can not be implemented.

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 (Administrative Record Number WV-1479). The Fourth Circuit Court ruled that OSM failed to comply with the rulemaking procedures set forth in section 553 of the Administrative Procedure Act. 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.

**III. Description of the Proposed Amendment**

By letter dated March 22, 2007 (Administrative Record Number WV-1485), the West Virginia Department of Environmental Protection (WVDEP) re-submitted an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). See Section II above, for the background on the previous submittal of this amendment. The amendment revises the West Virginia Code of State Regulations (CSR) concerning the potential hydrologic impacts of surface and underground mining operations. The amendment is intended to repeal a definition of “cumulative impact,” and add a definition of “material damage” to the hydrologic balance outside the permit area.

In its March 22, 2007, re-submittal letter, the State provided the following information in support of its proposed amendment: A description of the proposed amendment; a 13-page explanation of why it believes the amendment is no less stringent than SMCRA and no less effective than the Federal regulations; a copy of the State’s Requirements Governing Water Quality Standards at 47 CSR 2; and a copy of the United States District Court for the Southern District of West Virginia decision *Ohio River Valley Environmental Coalition, Inc. (OVEC), et al., v. Callaghan, et al., Civil Action No. 3:00-0058*, dated March 8, 2001. You may receive a copy of this information by contacting the person listed above under **FOR FURTHER INFORMATION CONTACT**.

It must be noted that WVDEP stated in its March 22, 2007, letter that it is resubmitting the program amendment pursuant to 30 CFR 732.17(h)(9). The Federal regulations at 30 CFR 732.17(h)(8) provide that if the Director disapproves an amendment, the State regulatory authority will have 30 days after publication of the Director’s decision to resubmit a revised amendment request for consideration by the Director. The Federal regulations at 30 CFR 732.17(h)(9) specify the minimum public comment period to be

provided and the time period within which the Director should approve or disapprove an amendment resubmission. This program amendment does not qualify as a resubmission pursuant to 30 CFR 732.17(h)(8) and (9) because this amendment has been the subject of litigation and the time period provided at 30 CFR 732.17(h)(8) for resubmission has expired. Therefore, OSM will treat the amendment as a new request and initiate review procedures in accordance with 30 CFR 732.17(h).

#### *West Virginia Proposes the Following Amendments*

##### 1. CSR 38–2–2.39 Definition of “cumulative impact”

This definition is proposed for deletion from the West Virginia program, and provides as follows:

Cumulative impact means the hydrologic impact that results from the cumulation 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, they constitute material damage.

##### 2. CSR 38–2–3.22.e Cumulative Hydrologic Impact Assessment (CHIA)

This provision is proposed to be amended by adding a definition of material damage to the existing language. The proposed definition of material damage provides 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 provide 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.

In support of the proposed amendments described above, the

WVDEP provided a 13-page explanation that we have summarized below.

#### *Application of the Material Damage Definition*

In its submittal, the WVDEP stated that the new definition of material damage at CSR 38–2–3.22.e focuses on the impact of mining operation(s) on the ability of a water resource to “support existing conditions and uses”. The principle use of the term “material damage” in the hydrologic context in SMCRA, is as a test for evaluating the potential hydrologic impacts of a permit application before the mining operation (and any potential enforcement) takes place. This new definition effectively requires the State to consider the water quality standards it has promulgated pursuant to section 303(a) of the Federal Clean Water Act as part of the material damage inquiry under the surface mining law. These water quality standards are codified in the State regulations at CSR 47–2–1 to –9.4. By definition at CSR 47–2–2.21, “water quality standards” means the “combination of water uses to be protected and the water quality criteria to be maintained by these rules.” The phrase used in this definition, “water quality criteria”, is also a defined term at CSR 47–2–2.20, and its definition reiterates this direct link between protection of stream uses and application of water quality standards:

“Water quality criteria” shall mean levels of parameters or stream conditions that are required to be maintained by these regulations [state water quality standards]. Criteria may be expressed as a constituent concentration, levels, or narrative statement, representing a quality of water that supports a designated use or uses.

The WVDEP stated that CSR 47–2–6 establishes various categories of uses for the water resources of the State. For protection of each of these categories of use, Appendix E, Table 1 of the water quality standards rules establishes a specific set of water quality criteria (see CSR 47–2–8.1). These sets of criteria include numeric limits for various pollutant parameters that are intended to protect the category of use to which they apply. Most, if not all, of these State numeric limits are based on scientific studies conducted by or for the U.S. Environmental Protection Agency for the purpose of providing technical guidance to state regulators as to the limits that must be placed on the concentrations of various pollutants in order to provide protection for each category of stream use.

The WVDEP stated that 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 these uses. If upon review of a permit application and assessment of the probable cumulative impact of all anticipated mining in the cumulative impact area on the hydrologic balance, the WVDEP is able to determine that the proposed operation has been designed so as to consistently comply with the water quality standards that protect the uses of the water into which discharges from the operation will flow, the WVDEP will make a finding that the proposed operation has been designed so as to prevent material damage to the hydrologic balance outside the permit area.

Consistent with the concept that mining operations must be designed to prevent material damage, isolated or random exceedences of water quality standards by a slight margin which do not affect the capability of the affected water resource to support its uses will not be regarded as “material” damage.

In making the material damage finding upon a proposed operation’s capability, as designed, to consistently comply with water quality standards, the WVDEP does not intend to create the impression that it will consider every pollutant for which a water quality standard has been promulgated. Water quality standards have been promulgated for a wide variety of parameters, many of which have no potential to be in the effluent from a mining operation. Instead, the agency’s consideration will be limited to standards for those parameters which, based on its experience with other mining operations in the area and the geochemical data which the provisions at CSR 38–2–3.23 require to be included in the application, have the potential to have an impact on water quality if the application is granted.

#### *Comparison of the Material Damage and Cumulative Impact Definitions*

The WVDEP stated that for the most part, there is very little difference between the definition of “cumulative impact” that is proposed to be deleted, which included a definition of material damage, and the material damage definition that is proposed to be added. The cumulative impact definition at CSR 38–2–2.39 provides that material damage occurs when “the magnitude of cumulative impact exceeds threshold limits or ranges as predetermined by the [WVDEP]”.

The agency's guidance to its permit reviewers stated that water quality standards should be used as material damage limits under this definition. As with the material damage definition at CSR 38-2-3.22.e that is being proposed, isolated or random exceedences of water quality standards by a slight margin which did not affect the capability of the affected water resource to support its uses were not regarded as "material" damage under the cumulative impact definition. Accordingly, regardless of whether a permit reviewer made a material damage finding based on application of threshold limits or ranges under the old cumulative impact definition or makes such a finding based on whether there will be a significant adverse impact on the capability of the affected water resource to support its uses under the new material damage definition, the real focus under both definitions is on the question of whether water quality standards will be met consistently so stream uses are protected.

The WVDEP stated that there are three distinctions between the old cumulative impact definition and the new material damage definition. First, by requiring the material damage finding to be made upon the capability of the stream to support its uses, the new definition clearly requires the material damage inquiry to be made by reference to the State's water quality standards that have been promulgated to protect these uses. On its face, the old cumulative impact definition only required this finding to be based on threshold limits or ranges. Outside the agency's guidance, which lacked the binding effect of a regulation, there was no requirement that any particular set of "limits or ranges" be used. Accordingly, individual permit reviewers may have believed that they had discretion to arbitrarily make up their own criteria on a case by case basis. Where such criteria varied from water quality standards, there was potential for conflict with the Clean Water Act in violation of 30 U.S.C. 1292(a)(3) of SMCRA. By requiring the finding to be made upon the capability of a stream to support its uses, which requires this judgment to be based on the ability of the operation to comply with water quality standards, the potential for both arbitrarily established limits and conflict with the Clean Water Act is eliminated. Therefore, the new definition is more objective.

Second, the WVDEP stated that the old definition could be read to mean that a single, minor exceedence of threshold limits or ranges which did not result in any perceptible damage constitutes material damage. For

example, if the iron level in a trout stream is measured at 0.52 mg/l at any single point in time, which exceeds the water quality standard of 0.50 mg/l for the iron concentration in trout streams, some would argue that the stream has been materially damaged, even in the absence of any evidence that this single exceedence has contributed to impairment of any aspect of the trout's life cycle or the supporting ecology. The new definition makes it clear that single or random, minor exceedences which do not affect the capability of a water resource to support its uses do not constitute "material" damage. By equating "material" damage with a "significant" adverse impact on the capability of the affected water resource to support its uses, the new definition is truer to the plain meaning of "material damage" as used in the statute.

Third, the WVDEP stated that the old definition, which is proposed to be deleted, focuses only on whether "cumulative impacts" exceed the threshold limits or ranges, to the exclusion of consideration of other individual hydrologic impacts of the proposed operation. This exclusive focus may not be consistent with 30 CFR sections 780.21(g) and 784.14(f) which require the material damage finding to be based on a determination of "whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area". Under the new definition, this potential shortcoming is eliminated. The new material damage definition provides for consideration of the design of the proposed operation as well as cumulative impacts through its focus on whether there has been a "change in the hydrologic balance caused by surface mining operation(s)".

The WVDEP concluded that the State's proposed material damage definition is consistent with the plain meaning of the term as it is used in SMCRA, its use in the context of hydrologic protection in SMCRA, the meaning it is given in other contexts in SMCRA, as well as the overall focus of SMCRA. By focusing on the protection of stream uses, based on whether a proposed mining operation has been designed to consistently comply with water quality standards that have been promulgated to protect such uses, based upon scientific study, the material damage definition provides a seamless interface between the State's clean water regulatory program and regulation of impacts from mining on the hydrologic balance under the surface mining regulatory program. In the opinion of the State, these amendments render the

State program more consistent with SMCRA rather than less so.

#### IV. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether these amendments and the supporting arguments and explanations presented by the State satisfy the applicable program approval criteria of 30 CFR 732.15. If we approve these revisions, they will become part of the West Virginia program.

##### *Written Comments*

Send your written or electronic comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We may not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (see **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an address other than the Charleston Field Office may not be logged in.

##### *Electronic Comments*

Please submit Internet comments as an E-mail or Word file avoiding the use of special characters and any form of encryption. Please also include Attn: SATS NO. WV-112-FOR and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Charleston Field office at (304) 347-7158.

##### *Availability of Comments*

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

##### *Public Hearing*

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m. (local time), on June 1, 2007. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We

will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

#### *Public Meeting*

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the Administrative Record.

### **V. 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 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 Governments*

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 the 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 analysis performed under various laws and executive orders for the counterpart Federal regulations.

#### *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 analysis performed under various

laws and executive orders for the counterpart Federal regulations.

### List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 19, 2007.

**Michael K. Robinson,**

*Acting Regional Director, Appalachian Region.*

[FR Doc. E7-9506 Filed 5-16-07; 8:45 am]

BILLING CODE 4310-05-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2007-0027; FRL-8316-3]

### Approval and Promulgation of Air Quality Implementation Plans; Delaware; Electric Generating Unit Multi-Pollutant Regulation

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Delaware. This revision pertains to establishing limits on the emissions of nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>) from Delaware's large electric generation units (EGUs). This action is being taken under the Clean Air Act (CAA or the Act).

**DATES:** Written comments must be received on or before June 18, 2007.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA-R03-OAR-2007-0027 by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-mail:* miller.linda@epa.gov.

C. *Mail:* EPA-R03-OAR-2007-0027, Linda Miller, Acting Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

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**FOR FURTHER INFORMATION CONTACT:** Rose Quinto, (215) 814-2182, or by e-mail at *quinto.rose@epa.gov*.

**SUPPLEMENTARY INFORMATION:** On November 16, 2006, the Delaware Department of Natural Resources and Environmental Control (DNREC) submitted a revision to its State Implementation Plan (SIP) for Regulation No. 1146—Electric

Generating Unit Multi-Pollutant Regulation.

### I. Background

Regulation No. 1146 establishes NO<sub>x</sub>, SO<sub>2</sub> and mercury emissions limits to achieve reductions of those pollutants from Delaware's large EGUs of coal-fired and residual oil-fired EGUs with a nameplate capacity rating of 25 megawatts (MW) or greater generating capacity. Only the NO<sub>x</sub> and SO<sub>2</sub> sections of this regulation will be discussed in this rulemaking. The mercury sections of this regulation will be discussed in a separate rulemaking.

Regulation No. 1146 will help Delaware attain and maintain the national ambient air quality standards (NAAQS) for ozone and particulate matter (PM<sub>2.5</sub>) and will assist Delaware in achieving the emissions reductions needed to support Delaware's 8-hour ozone reasonable further progress plan (RFP). This multi-pollutant regulation will not replace the Federal Clean Air Interstate Rule (CAIR) requirements and does not relieve affected sources from participating in and complying with all CAIR cap-and-trade program requirements.

### II. Summary of SIP Revision

Regulation No. 1146 applies to coal-fired and residual oil-fired EGUs located in Delaware with a nameplate capacity rating of 25 MW or greater. The large EGUs subject to Regulation No. 1146 are Conective Delmarva Generating, Inc.'s Edge Moor Generating Station Units 3, 4 and 5 located in New Castle County; the City of Dover's McKee Run Generating Station Unit 3 located in Kent County; and NRG Energy, Inc.'s Indian River Generating Station Units 1, 2, 3 and 4 located in Sussex County.

Regulation No. 1146 also contains definitions; emissions limitations for NO<sub>x</sub> and SO<sub>2</sub>; recordkeeping and reporting; compliance plan; and annual mass emission limits for NO<sub>x</sub> and SO<sub>2</sub>.

#### A. Emissions Limitations

##### 1. NO<sub>x</sub>

Regulation No. 1146 includes short term NO<sub>x</sub> emission rate limits and will be implemented in a phased manner. For Phase I, May 1, 2009 through December 31, 2011, the short term NO<sub>x</sub> emission rate limit is 0.15 lb/MMBTU of heat input on a rolling 24-hour average basis. For Phase II, January 1, 2012 and beyond, the short term NO<sub>x</sub> emission rate limit is 0.125 lb/MMBTU of heat input on a rolling 24-hour average basis.

A unit subject to this regulation shall not emit annual NO<sub>x</sub> mass emissions that exceed the values shown in Table I on or after January 1, 2009.