

FEDERAL REGISTER: 59 FR 53022 (October 20, 1994)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Parts 701, 780, 784, 816, and 817

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program;
Performance Standards; Permanent and Temporary Impoundments; Part II

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the United States Department of the Interior (DOI) is amending certain portions of its permanent program regulations governing permanent and temporary impoundments at surface and underground mining operations. The revisions are in response to a court action, and for clarification. OSM is also addressing issues raised in a petition to initiate rulemaking that would define the statutory distinction between temporary and permanent impoundments.

EFFECTIVE DATE: This regulation is effective November 21, 1994. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of November 21, 1994.

FOR FURTHER INFORMATION CONTACT: Donald E. Stump Jr., P.E., Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, Ten Parkway Center, Pittsburgh, PA 15220; Telephone: 412-937-2164.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Final Rule and Comments
- III. Procedural Matters

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977 (the Act, or SMCRA), *30 U.S.C. 1201 et seq.*, sets forth general regulatory requirements governing surface coal mining and the surface impacts of underground coal mining. Environmental protection performance standards for permanent water impoundments constructed during surface mining activities appear in section 515(b)(8) of the Act, *30 U.S.C. 1265(b)(8)*; provisions governing the construction of siltation structures, a type of impoundment, appear in section 515(b)(10)(B), *30 U.S.C. 1265(b)(10)(B)*. Section 516(b)(10) of the Act, *30 U.S.C. 1266(b)(10)*, imposes similar requirements for water impoundments that are used for underground mining activities, but provides that the Secretary shall make such modifications in the requirements as are necessary to accommodate the distinct differences between surface and underground mining.

OSM's regulations governing the design, construction and inspection of impoundments call upon criteria established by the Soil Conservation Service (SCS) and the Mining Safety and Health Administration (MSHA). SMCRA at section 515(b)(8)(B) specifically references SCS's Public Law 83-566 as a performance requirement that must be met in the design and construction of permanent impoundments. Existing OSM regulations governing impoundment stability and margin of safety include MSHA regulations by reference.

OSM has defined "impoundment" at 30 CFR 701.5 to be any holding structure containing water, sediment, slurry, or other liquid or semi-liquid. OSM rules regulate both temporary and permanent impoundments. Sediment ponds and siltation structures are by current OSM definition specific types of impoundments.

The permanent regulatory program for surface coal mining and reclamation operations was promulgated on March 13, 1979 (*44 FR 15312*). Requirements for sedimentation ponds and siltation structures at surface mining activities were established at 30 CFR 816.46 (*44 FR 15400*), while those for underground mining at 30 CFR 817.46 (*44 FR 15426*) to implement the provisions of section 515(b)(10)(B) of the Act. Requirements for permanent and temporary impoundments at surface mining activities and underground mining activities were established in the 1979 rules at 30 CFR 816.49 (*44 FR 15401*) and 30 CFR 817.49 (*44 FR 15428*), respectively to implement provisions of section 515(b)(8) of the Act. Permitting requirements for reclamation and operation plans for impoundments at surface mining activities and

underground mining activities were established in the 1979 rules at 30 CFR 780.25 (*44 FR 15360*) and 30 CFR 784.25 (*44 FR 15368*), respectively.

During revisions to the permanent regulatory program in 1983, OSM replaced most of the specific design criteria in 30 CFR 816.46 (*48 FR 44051*) and 816.49 (*48 FR 44004*) with performance standards. Furthermore, Section 816.46 was renamed, "Hydrologic balance: Siltation Structures," to be consistent with the wording of section 515(b)(1)(B)(ii) of the Act and to reflect rule changes which provided for the use of certain siltation structures other than sedimentation ponds, such as chemical treatment facilities or mechanical structures that have a point-source discharge.

Upon issuance, the 1983 rules for 30 CFR 816.46 and 816.49 were challenged in the U.S. District Court for the District of Columbia in *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C. July 15, 1985) (*In Re: Permanent (II)*). The court remanded:

(1) Sections 816.49 (a)(3) and (a)(5)(i) on the basis that they included requirements for a static safety factor and for foundation investigation and laboratory testing of small sedimentation ponds without having included such requirements when the rule was proposed on June 21, 1982, as required by the Administrative procedure Act; and

(2) Section 816.49 to the extent it relied only on MSHA impoundment size classification standards when OSM had not justified reliance solely on such standards. Slip op. at 30-32 and 102-117. Additionally, in response to plaintiff's challenge of the combination spillway requirement of Section 816.49(a)(8), the Secretary of the Interior agreed to reexamine the issue and consider proposing a rule specifying that one spillway that can safely pass the design precipitation event may serve as a combination principal and emergency spillway. (*Id.* at 1538 and 1571-1572.)

On October 27, 1988 (*53 FR 43584*), OSM amended the permanent program regulations governing permanent and temporary impoundments at surface and underground mining operations. The 1988 rules incorporated design and performance requirements for impoundments and spillways that were based on MSHA criteria and SCS classification for Class B and C structures. n1 The 1988 rules also authorized the approval of sediment ponds that rely primarily on storage to control the runoff from the design precipitation event, as opposed to relying on both principal and emergency spillways.

n1 Earth Dams and Reservoirs, Technical Release No. 60, Revised October 1985, as amended in October 1990 and distributed via Amendment 1, January 30, 1991, U.S. Department of Agriculture, Soil Conservation Service Engineering Division defines three classes of dams, Class (a).-Dams located in rural or agricultural areas where failure may damage farm buildings, agricultural land, or township and country roads. Class (b).-Dams located in predominantly rural or agricultural areas where failure may damage isolated homes, main highways or minor railroads or cause interruption of use or service of relatively important public utilities. Class (c).-Dams located where failure may cause loss of life, serious damage to homes, industrial and commercial buildings, important public utilities, main highways, or railroads.

30 CFR 816.49 of the 1988 rules on impoundments was challenged by environmental groups who incorrectly interpreted that the 1988 rules were based only on MSHA criteria. In its decision in *NWF v. Lujan*, No. 88-3345 (D.D.C. August 30, 1990), the court noted the issue involved the interplay of three laws and three Federal agencies charged with writing regulations to carry out those laws. Each of the laws governs water impoundments, but with different goals in mind. In addition to SMCRA, the laws are: (1) the Watershed Protection and Flood Prevention Act, Pub. L. 83-566, and rules issued under it by the SCS, including technical standards for the design and construction of impoundments found in Technical Release Number 60 (TR-60) "Earth Dams and Reservoirs," and Practice Standard 378 "Ponds"; and (2) the Federal Mine Safety and Health Act and rules issued under it by the MSHA. Section 515(b)(8)(B) of SMCRA has a mandate to ensure that impoundments meet the stability requirements of the Watershed Protection and Flood Prevention Act.

The court found that the SCS standards referred to in the preamble to 30 CFR 816.49(a)(3)(i) are, as the Secretary noted, the SCS Class B and C dams. Furthermore, the court stated "[i]ndeed, in the Secretary's view, he has provided greater protection in this rule than does SCS because he mandated the stricter design standard when an impoundment meets either SCS's qualitative standard for Class B and C dams or the MSHA's size standard, which covers more impoundments than does the SCS's looser size standard." *NWF v. Lujan*, supra, slip. op. at p. 65.

The court did note that a plain reading of the preamble may result in some ambiguity. To clarify this issue for all water impoundments design, construction, and performance, OSM proposed regulations to reference specifically both SCS Class B and C impoundments and MSHA impoundments in all rules at 30 CFR 780.25 and 816.49 where impoundment-related criteria are found.

On June 28, 1991 (*56 FR 29774*), OSM proposed to amend its permanent program regulations governing permanent and temporary impoundments at surface and underground mining operations. In addition to soliciting public comments and providing an opportunity for public hearings upon request, OSM provided a 146-day comment period. The comment period was extended beyond its original 60-days in response to a request for an extension and to coordinate this rulemaking with OSM's evaluation and decision on a petition to initiate rulemaking.

OSM received a letter on September 12, 1991, from the Joint National Coal Association and the American Mining Congress (NCA/AMC) Committee on Surface Mining Regulations, as a petition for rulemaking. The petitioners requested that OSM propose rulemaking which incorporates a "statutory" distinction between temporary and permanent impoundments as it pertains to the incorporation of standards issued under Public Law 83-566 including TR-60. The petition to initiate rulemaking was published on October 21, 1991 (*56 FR 52494*).

OSM received 11 comments on the proposed rulemaking and 3 comments on the petition from 11 organizations, including State regulatory authorities, environmental groups, representatives of the coal industry, and professional organizations. No public meeting was requested and none was held.

II. DISCUSSION OF FINAL RULE AND COMMENTS

After consideration of the Administrative Record of these regulations; as well as the legislative history of the Act; the August 30, 1990 decision in the United States District Court for the District of Columbia; other opinions of the court; and in light of current technical information on impoundment design, construction, and inspection, OSM is making the following revisions to its permanent regulatory program. Consistent with its findings when it promulgated the 1979, 1983, and 1988 rules, OSM has not identified any differences between impoundments for surface and underground mines that would appear to necessitate different regulatory provisions under this final rulemaking. Therefore, the permitting rule applicable to impoundments for surface mining activities at 30 CFR 780.25 and the rule for underground mining activities at 30 CFR 784.16 are identical. Similarly, the performance rules for surface mining activities at 30 CFR 816.46 and 816.49 are identical to the final rules for underground mining activities at 30 CFR 817.46 and 817.49, respectively.

On March 6, 1992 (*57 FR 8102*), OSM published a notice of decision denying the petition for rulemaking. In OSM's decision, the Director stated that the issues raised in the petitioners' letter would be discussed concurrently with the comments to the proposed rule published on June 28, 1991 (*56 FR 29774*). This preamble contains that discussion.

GENERAL COMMENTS

In addition to comments received on specific provisions of the June 28, 1991, proposed rule, OSM received several general comments. One commenter supported the proposed rule because the SCS publications TR-60 and Practice Standard 378 are widely used in the design profession and the adoption of these by reference will lead to better construction and performance of impoundments. Two commenters supported the proposed rule because it required more stringent standards for plans, designs, and construction for impoundments meeting the SCS Class B and C hazard criteria; and made the regulations consistent with section 515(b)(8) of the Act. OSM appreciates these comments, which in part, constitute the support for this rule.

Three commenters were concerned that most of the sedimentation ponds in the West would have to be reconstructed. They noted that according to TR-60 (Table 2-5, footnote 2) Class A (low hazard) dams containing industrial water are to be designed to the more stringent criteria required for Class B dams. The commenters feared that all Class A ponds used in surface coal mining operations would have to be reconstructed to meet Class B design and performance criteria. OSM wishes to alleviate the commenters' concerns. OSM intends the dam classifications to be based solely on the hazard potential of the structure and its location which is independent of the purpose for which impoundment was constructed. Therefore, there need not be any wholesale reconstruction of Class A ponds used in surface coal mining operations to meet Class B design and performance criteria simply because the pond is used to contain industrial water.

Two commenters requested that OSM incorporate a distinction between temporary and permanent impoundments because they believed it is contrary to SMCRA section 515(b)(8) which refers specifically to permanent impoundments. Also, during the comment period for the proposed rule, the NCA/AMC petitioned OSM to amend its rules to incorporate a "statutory" distinction between temporary and permanent impoundments when applying SCS criteria and regulations. Three commenters supported the petition and reinforced the petitioners' position that OSM should recognize the significant differences between temporary and permanent impoundments.

OSM has defined the terms "permanent impoundment" and "temporary impoundment" in prior rulemakings and both definitions appear in 30 CFR 701.5. These definitions recognize the difference between temporary and permanent impoundments in terms of whether or not the impoundment is designed to remain as a postmining land use feature. For instance, under OSM's definition, impoundments that may be used for at least several years (probably more) during mining, reclamation, and which could be retained until shortly before bond release, would be classified as "temporary." From an engineering perspective, the term "temporary" is also used to represent an impoundment constructed to last for the relatively short time period while "permanent" structures are being built.

Regardless of these distinctions, OSM has determined that the key criteria to use in determining the construction standards to be followed by operators constructing impoundments is the structure's hazard potential-regardless of whether it is to be used as a temporary or permanent impoundment. Therefore requiring "temporary impoundments" [in OSM's sense of the word, i.e., to be removed following completion or surface mining activities] to meet SCS hazard criteria is appropriate because typically these impoundments will be used for the life of the mining operation and are not constructed as a precursor to a permanent structure. Thus, while certain impoundments may be built to different standards, the key distinction is not whether the impoundments are temporary or permanent, but rather whether or not the impoundments meet the SCS B or C hazard classification or the MSHA size criteria.

Application of these performance standards to temporary impoundments is not new policy. OSM is continuing to follow the policy discussed in the preamble for the October 27, 1988, rules (*53 FR 43589*). In that preamble, OSM concluded that in view of the broad mandate of section 102(a) of the Act, "to protect society and the environment," OSM has adopted a rule that is based on the hazard classifications established by the SCS, yet incorporates the more stringent MSHA criteria when their size criteria applies. Section 515 of SMCRA establishes minimum general performance standards for surface coal mining and reclamation operations. In this instance, the Secretary has concluded that the standards imposed by this rule are warranted because of the hazard potential in the event of failure. Application of this rule to temporary impoundments is supported by section 515(b)(8)(B) which may be construed to cover impoundments that will be retained for a period of years over the life of the mine, as well as the broad rulemaking authority of sections 201(b)(2) and 501.

One commenter requested that if OSM finalizes these rules without distinctions between temporary and permanent impoundments, then existing temporary structures presently meeting performance standards should be grandfathered and not be required to be reconstructed. OSM does not agree. All impoundments must be evaluated by operators and regulatory authorities and reconstructed where necessary as determined by the impoundment's current hazard classification. Impoundments currently constructed to meet the standards for SCS Class B or C hazard criteria or the MSHA size criteria need not be reconstructed. Similarly, impoundments not meeting such criteria need not be reconstructed. Those which upon evaluation are determined to meet the size or SCS Class B or C classifications but do not currently meet the standards will need to be reconstructed. However, since the rules finalized today clarify the 1988 rules which applied SCS dam classifications to impoundments, changes should not be required to the extent changes have been implemented in State or Federal programs.

One commenter was concerned about the design, construction, certification, and performance requirements for SCS Class A permanent impoundments since the rule changes deal strictly with SCS Class B and C impoundments. The commenter noted that many permanent impoundments meeting the Class A criteria are constructed in accordance with appropriate specifications and wanted to know what the requirements would now be for these Class A impoundments. The commenter is correct: The regulations for Class A impoundments are not being changed by this rulemaking.

SECTION 701.5 - DEFINITIONS: SILTATION STRUCTURE

As proposed, the definition of siltation structure has been moved to 30 CFR 701.5 from 30 CFR 816.46(a)(1). The definition appearing in 30 CFR 817.46 (a)(1) is being removed. This is an organizational change only. Section 701.5

already includes definitions of related terms such as impounding structure, impoundments, and sedimentation pond. Moving the definition of siltation structure from section 816.46(a)(1) to 701.5 centralizes the location of these related definitions.

SECTION 701.5 - DEFINITIONS: OTHER TREATMENT FACILITIES

Also as proposed, the definition of other treatment facilities, a term related to siltation structures, has been moved to 30 CFR 701.5. This definition of other treatment facilities is similar to the definitions previously appearing in 30 CFR 816/817.46(a)(3) which are being removed. The new definition adds the words "neutralization" and "precipitators", to indicate common water quality treatment processes, and the phrase, "to comply with all applicable State and Federal water-quality laws and regulations." These additions to the definition clarify that the purpose of another treatment facility is to comply with water quality laws, as well as to prevent additional contributions of dissolved or suspended solids to streamflow or off-site runoff. Revising the definition does not change the thrust of the performance standards in 30 CFR 816/817.41-49. Moving the definition of other treatment facilities from Section 816.46(a)(3) to 701.5 centralizes OSM's definitions and logically follows the relocation of the definition of siltation structure.

Two commenters were concerned that revisions to the definition of "other treatment facilities" will allow approval of facilities that cannot meet effluent limits for sediment. Moving the definition of other treatment facilities to section 701.5 does not affect or alter the requirement to meet the effluent limits which appears in 30 CFR 816.42.

SECTIONS 780.25/784.16 - PERMITTING REQUIREMENTS FOR RECLAMATION PLANS: SILTATION STRUCTURES, IMPOUNDMENTS, BANKS, DAMS, AND EMBANKMENTS

Section 30 CFR 780.25 establishes permitting requirements applicable to the design of each siltation structure, water impoundment, and coal processing waste bank, dam, or embankment within the proposed permit area. Section 780.25 is being revised to add specific references to the SCS criteria for dam classification found in their Technical Release No. 60 (TR-60) and to include editorial changes as described below. These changes, which are being issued as proposed, were needed to ensure that the permitting requirements for impoundments are consistent with the performance standards for impoundments and that both are tied to SCS and MSHA requirements.

For editorial purposes, OSM revised the heading of 30 CFR 780.25 and the text of Section 780.25(a) by removing the word "Ponds" and replacing it with "Siltation structures." This revision makes the section title consistent with the broader classification of structures intended to be covered by Section 780.25 and with similar changes at section 816.46 that will be discussed later.

In final 30 CFR 780.25(a)(2), OSM references the SCS dam classification in TR-60 as proposed. This additional language clarifies that the SCS classification criteria as well as the MSHA criteria are components of OSM rules. This approach clarifies that impoundments that do not meet the MSHA criteria in 30 CFR 77.216(a), but are determined to be Class B or C impoundments by SCS criteria in TR-60, must comply with the more rigorous standards that apply to impoundments that meet those classifications.

OSM revised 30 CFR 780.25(a)(3) by removing the reference to 30 CFR 77.216(a) and by replacing it with a reference to Section 780.25(a)(2), where the SCS and MSHA impoundment classification criteria are both now located since both apply.

In 30 CFR 780.25(b), OSM replaced the phrase "sedimentation ponds" with "siltation structures" to be consistent with the revised title for the section. OSM also removed the last two sentences of Section 780.25(b) because the same requirements already exist in 30 CFR 780.25(c)(1) and (2). In all cases the final rules are the same as those proposed.

OSM revised 30 CFR 780.25(c)(3) as proposed by removing the reference to "Section 77.216(a) of this title" and the phrase "located where failure would not be expected to cause loss of life or serious property damage," and by replacing it with a reference to Section 780.25(a)(2), where equivalent MSHA standards and the added SCS impoundment classification criteria are now located. This is consistent with changes described above.

In 30 CFR 780.25(f), OSM is replacing, as proposed, the phrase, "is 20 feet or higher or impounds more than 20 acre-feet," with the phrase, "meets the SCS Class B or C criteria for dams in TR-60 or meets the MSHA size or other

criteria of section 77.216(a) of this chapter." This revision has the same effect as the existing regulations and makes Section 780.25(f) consistent with the regulation changes referencing structure classification previously discussed.

SECTIONS 816.46/817.46 - HYDROLOGIC BALANCE: SILTATION STRUCTURES

30 CFR 816.46 of OSM's permanent program regulations establishes performance standards applicable to siltation structures. The proposed revisions to move the definitions of siltation structures and other treatment facilities at Section 816.46(a)(1) and (a)(3) to Section 701.5 are being implemented as proposed. This relocation of the definitions is an organizational change, the reason for which has been previously discussed.

Also as proposed, in 30 CFR 816.46(c)(2), OSM removed the spillway design requirements at Section 816.46(c)(2)(i) through (iii) and replaced them with a reference to the requirements in newly designated Section 816.49(a)(9). The spillway design requirements in Section 816.49(a)(9) are the same as those in existing Section 816.46(c)(2)(i) through (iii). Therefore, for clarity and conciseness, OSM revised Section 816.46(c)(2) to reference Section 816.49(a)(9) and removed Section 816.46(c)(2)(i) through (iii) instead of duplicating the same design requirements in two places in the rules.

One commenter was concerned that revisions to Section 816.46(c) would remove the authority to use storage based sedimentation ponds instead of ponds with spillways. OSM continues to allow the use of storage based sediment ponds. The authority to use these structures is found in Section 816.49(a)(9) which refers to Section 816.49(c)(2).

SECTION 816.49/817.49 - IMPOUNDMENTS

30 CFR 816.49 of OSM's permanent program regulations establishes performance standards for impoundments. The revisions incorporate by reference the criteria in TR-60 and require impoundments meeting SCS Class B or C criteria in TR-60 to meet the same stability, spillway, foundation investigation, freeboard hydrograph, inspection, and examination requirements as impoundments meeting MSHA criteria in 30 CFR 77.216(a). The specific sections revised in 30 CFR 816.49 are summarized below. The rationale for these revisions as previously discussed is based on the August 30, 1990, decision in *NWF v. Lujan* and would achieve the necessary clarification.

As proposed, OSM is adding a new section, 30 CFR 816.49(a)(1), which incorporates by reference the SCS guidance document TR-60 as it relates to minimum emergency spillway hydrologic criteria. This addition requires the redesignation of the existing sections in Section 816.49(a). Former sections (a)(1) through (a)(12) are therefore, redesignated as paragraphs (a)(2) through (a)(13) respectively. A minor change from the proposal is the change in OSM's address for its Administrative Record which is now located at 800 North Capitol Street instead of the former location at 1100 L Street.

One commenter objected to the cross-reference to TR-60 because it could lead to the implication that the document including standards are being incorporated. The commenter suggested OSM should repeat the pertinent classification criteria in the rules. OSM does not intend to imply or to require that all the standards in TR-60 will have to be met, except those for minimum emergency spillway hydrologic criteria. OSM is not repeating these criteria in the regulations because they are established by SCS through TR-60 and referencing that document will insure compatibility with the appropriate criteria.

As proposed, existing 30 CFR 816.49(a)(3) is redesignated as Section 816.49(a)(4). Section 816.49(a)(4)(i) is added so that impoundments meeting the SCS Class B or C criteria for dams in TR-60 would be subject to the stability and margin of safety requirements of this section. OSM also removed the phrase, "located where failure would be expected to cause loss of life or serious property damage" because it is now redundant with the cited SCS reference.

In redesignated 30 CFR 816.49(a)(4)(ii), OSM removed the reference to 30 CFR 77.216(a) and replaced it with a reference to Section 816.49(a)(4)(i). This clarifies which safety factors are related to specific types of impoundment classification. This is being issued as proposed.

Existing 30 CFR 816.49(a)(4) is redesignated as Section 816.49(a)(5). OSM revised redesignated Section 816.49(a)(5) by specifying that impoundments meeting the SCS Class B or C criteria for dams in TR-60 shall comply

with the freeboard hydrograph criteria in the "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60, in order to be compatible with SCS requirements.

Existing 30 CFR 816.49(a)(5) is redesignated as 816.49(a)(6). In redesignated Section 816.49(a)(6)(i), OSM is conforming the scope of this provision to the other paragraphs in this section by adding the phrase, "Class B or C for dams in TR-60, or" to the final sentence. The final version is identical to the proposal.

Existing 30 CFR 816.49(a)(8) redesignated as 816.49(a)(9). OSM revised as proposed redesignated Section 816.49(a)(9)(ii) by redesignating Sections 816.49 (a)(9)(ii) (A) and (B) to be Sections 816.49 (a)(9)(ii) (B) and (C), respectively, and adding as proposed the spillway requirements for impoundments meeting the SCS Class B or C criteria for dams in TR-60 as new Section 816.49 (a)(9)(ii)(A). Two commenters believe the spillway hydrograph requirements are not consistent with TR-60. Specifically, they felt the "freeboard hydrograph" from Table 2-5 should be used instead of the "emergency spillway hydrograph" in Section 816.49(a)(9)(ii)(A). The commenters asserted that the emergency spillway hydrograph is not to be used to determine capacity of the spillway, but is used to proportion the spillway to ensure safe water velocities. The commenters also asserted that it is the freeboard hydrograph that is to be used to set the spillway capacities.

OSM disagrees with the commenters. OSM intends the freeboard hydrograph and the emergency spillway hydrograph to be used as they are defined by SCS. The "emergency spillway hydrograph" is the hydrograph used to establish the dimensions of the emergency spillway. The "freeboard hydrograph" is the hydrograph used to establish the minimum settled elevation of the top of the dam. It is also used to evaluate the structural integrity of the spillway system. OSM disagrees with the suggested change to Section 816.49(a)(9)(ii)(A) and believes it has already appropriately referenced the "freeboard hydrograph" in the citation at Section 816.49(a)(5) and it would go beyond the requirements of TR-60 to also reference it in Section 816.49(a)(9)(ii)(A).

Two commenters suggested that 30 CFR 816.49(a)(9)(ii) (A) and (B) be clarified to ensure that structures meeting SCS Class B or C criteria and the MSHA size criteria are designed and constructed to safely pass the precipitation event specified by SCS and not the 100-year 6-hour event. OSM does not agree that clarification is necessary, because the rule is clear that impoundments meeting MSHA criteria must be designed and constructed to MSHA requirements and impoundments meeting the SCS Class B or C criteria, regardless of size, have to be designed and constructed to safely pass the emergency spillway hydrograph specified in Section 816.49(a)(9)(ii)(A). Therefore, OSM is issuing the final rule as it was proposed.

As proposed, existing 30 CFR 816.49(a)(10) is redesignated as Section 816.49(a)(11). OSM revised redesignated Section 816.49(a)(11)(iv) to clarify that impoundments meeting the SCS Class B or C criteria for dams in TR-60, like those meeting MSHA criteria, may not be inspected by a qualified registered professional land surveyor.

Existing 30 CFR 816.49(a)(11) is redesignated as Section 816.49(a)(12). OSM revised redesignated Section 816.49(a)(12) to add the requirement that impoundments meeting the SCS Class B or C criteria for dams in TR-60 be examined in accordance with the requirements in 30 CFR 77.216-3 of the MSHA rules. In the preamble to the proposed rules (June 28, 1991 (*56 FR 29777*)), the word not was left out of a sentence and reversed the intention of a part of the discussion. The sentence should have read "OSM agrees with MSHA's proposed revisions to 30 CFR 77.216-3 but does not need to modify its proposed regulatory text for 30 CFR 816.49(a)(12) to be consistent with the MSHA proposal at this time." Three commenters submitted their opposition to OSM's apparent adoption of the proposed MSHA regulations without adequate public comment. OSM did not intend to adopt MSHA's proposed rules. OSM regrets this misunderstanding. However, on March 2, 1992, MSHA published its final rules for 30 CFR 77.216-3. These final rules are incorporated by reference through OSM's redesignated 30 CFR 816.49(a)(12). The last sentence of the final version Section 816.49(a)(12) is reworded for clarity from the proposal. There was no substantive change only grammatical improvement.

One commenter opposed the requirement that impoundments meeting the SCS Class B and C criteria, but not the MSHA size criteria, be examined in accordance with the requirements of 30 CFR 77.216-3 of the MSHA rules. OSM disagrees with this comment because the hazard associated with impoundments meeting the SCS Class B or C justifies the examination requirements of the MSHA rules.

OSM revised 30 CFR 816.49(c)(2)(i), dealing with requirements for temporary impoundments, by adding the requirement that impoundments meeting the SCS Class B or C criteria for dams in TR-60 as well as impoundments meeting the size or other criteria of 30 CFR 77.216(a), shall be designed to control the precipitation of the probable maximum precipitation of a 6-hour or greater event specified by the regulatory authority. Two commenters suggested rethinking the allowance of storage based impoundments where failure could cause loss of life or serious property damage. They believe there should be requirements to have onsite personnel to insure structural integrity. OSM disagrees with this comment because existing design, performance, inspection, and maintenance requirements of the regulations provide adequate safeguards. OSM believes this allowance is useful for those impoundments where the runoff area is small, or where pumps or a decant structure would be used to control the water level in the facility. OSM believes that current, prudent, engineering practice requires that at least 90 percent of the water stored during the design precipitation event be removed within the 10-day period following the event. OSM also recognizes that the safety of such structures can be reasonably assured by requiring that they meet especially stringent design precipitation event requirements. 30 CFR 816.49(c)(2) (i) and (ii) reflect this philosophy by requiring such stringent requirements.

OSM revised 30 CFR 816.49(c)(2)(ii) as proposed by referencing paragraph (c)(2)(i) and thus identify which impoundments must meet the requirements of paragraph (c)(2)(ii).

Finally, OSM revised Sections 784.10 and 816.10 which contain data on the information collection requirements for Parts 784 and 816, respectively. These revisions update the data contained in the sections by including the estimated reporting burden per respondent for complying with the information collection requirements previously approved by the Office of Management and Budget.

REFERENCE MATERIALS

Reference materials used to develop this final rule are as follows:

U.S. Soil Conservation Service, Earth Dams and Reservoirs: Technical Release 60, 1985.

U.S. Soil Conservation Service, Pond: Practice Standard 378, 1985.

U.S. Mining Enforcement and Safety Administration, Engineering and Design Manual-Coal Refuse Disposal Facilities: Prepared by D'Appolonia Consulting Engineers, Inc., Pittsburgh, Pa., 1975.

III. PROCEDURAL MATTERS

Effect in Federal Program States and on Indian Lands

The rule applies through cross-referencing in those States with Federal programs. This includes California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The rule also applies through cross-referencing to Indian lands under the Federal program for Indian lands as provided in 30 CFR Part 750.

Effect on State Programs

Following promulgation of the final rule, OSM will evaluate permanent State regulatory programs approved under section 503 of SMCRA to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended in order to be made no less effective than the revised Federal rules, the individual States will not be notified in accordance with provisions of 30 CFR 732.17.

Federal Paperwork Reduction Act

The collections of information contained in this rule have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance numbers 1029-0036, 1029-0039, 1029-0047 and 1029-0048.

Executive Order 12778; Civil Justice Reform Certification

This final rule has been reviewed under the applicable standards of section 2(b)(2) of Executive Order 12778, Civil Justice Reform (*56 FR 55195*). In general, the requirements of section 2(b)(2) of Executive Order 12778 are covered by

the preamble discussion of the final rule. Additional remarks follow concerning individual elements of the Executive Order:

A. What Is the Preemptive Effect, If Any, To Be Given to the Regulation?

The final rule would have the same preemptive effect as other standards adopted pursuant to SMCRA. To retain primacy, States have to adopt and apply standards for their regulatory programs that are no less effective than those set forth in OSM's rules. Any State law is inconsistent with, or that would preclude implementation of this final rule, would be subject to preemption under SMCRA section 505 and implementing regulations at 30 CFR 730.11. To the extent that the final rules would result in preemption of State law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations. This approach is established in SMCRA, and has been judicially affirmed. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

B. What Is the Effect on Existing Federal Law or Regulation, If Any, Including All Provisions Repealed or Modified?

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

C. Does the Rule Provide a Clear and Certain Legal Standard for Affected Conduct Rather Than a General Standard, While Promoting Simplification and Burden Reduction?

The standards established by this rule are as clear and certain as practicable, given the complexity of topics covered and the mandates of SMCRA.

D. What Is the Retroactive Effect, If Any, To Be Given to the Regulation?

This rule is not intended to have a retroactive effect.

E. Are Administrative Proceedings Required Before Parties May File Suit in Court? Which Proceedings Apply? Is the Exhaustion of Administrative Remedies Required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a).

Prior to any judicial challenge to this application of the rule, however, administrative procedures must be exhausted. In situations involving OSM application of the rule, applicable administrative procedures may be found at 43 CFR Part 4. In situations involving State regulatory authority application of provisions equivalent to those contained in this rule, applicable administrative procedures are set forth in the particular State program.

F. Does the Rule Define Key Terms, Either Explicitly or By Reference to Other Regulations or Statutes That Explicitly Define Those Items?

Terms which are important to the understanding of this rule are set forth in 30 CFR 700.5 and 701.5.

G. Does the Rule Address Other Important Issues Affecting Clarity and General Draftsmanship of Regulations Set Forth by the Attorney General, With the Concurrence of the Director of the Office of Management and Budget, That Are Determined To Be in Accordance With the Purpose of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

Executive Order 12866

This rule has been reviewed under Executive Order 12866.

Regulatory Flexibility Act

The DOI has determined that this final rule will not have a significant effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 *U.S.C. 601* et seq. The rule would affect a relatively small number of surface coal mining operations. The rule does not distinguish between small and large entities. The economic effects of the proposed rule are estimated to be minor, and no incremental economic effects are anticipated as a result of the rule.

National Environmental Policy Act

OSM has prepared an environmental assessment (EA), and has made a finding of no significant impact (FONSI) that this rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 *U.S.C. 4332(2)(C)*. The EA and FONSI are on file in the OSM Administrative Record in Room 660, 800 North Capitol Street, NW., Washington, DC.

Agency Approval

Section 516(a) requires that, with respect to rules directed toward the surface effects of underground mining, OSM must obtain written concurrence from the head of the department which administers the Federal Mine Safety and Health Act of 1977, the successor to the Federal Coal Mine Health and Safety Act of 1969. OSM has obtained the written concurrence of the Assistant Secretary for Mine Safety and Health Administration, U.S. Department of Labor.

Author

The principal author of this rule is Donald E. Stump Jr., P.E., OSM, Ten Parkway Center, Pittsburgh, PA 15220; Telephone: 412-937-2164.

LIST OF SUBJECTS

30 CFR Part 701

Law enforcement, Surface mining, Underground mining.

30 CFR Part 780

Incorporation by reference, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 784

Incorporation by reference, Reporting and recordkeeping, Underground mining.

30 CFR Part 816

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 817

Environmental protection, Incorporation by reference, Reporting and recordkeeping requirements, Underground mining.

Dated: July 22, 1994.

Bob Armstrong, Assistant Secretary for Land and Minerals Management.

Accordingly 30 CFR Parts 701, 780, 784, 816, and 817 are amended as set forth below.

PART 701 - PERMANENT REGULATORY PROGRAM

1. The authority citation for Part 701 continues to read as follows:

Authority: Pub. L. 95-87 (30 *U.S.C. 1201* et seq.), and Pub. L. 100-34.

2. In Section 701.5, the definition of other treatment facilities is added as set forth below; the definition of siltation structure in Section 816.46(a)(1) is transferred in alphabetical order to Section 701.5; and in Section 816.46 the designation (a)(1) is reserved:

SECTION 701.5 -- DEFINITIONS.

* * * * *

Other treatment facilities mean any chemical treatments, such as flocculation or neutralization, or mechanical structures, such as clarifiers or precipitators, that have a point source discharge and are utilized:

(a) To prevent additional contributions of dissolved or suspended solids to streamflow or runoff outside the permit area, or

(b) To comply with all applicable State and Federal water-quality laws and regulations.

* * * * *

PART 780 - SURFACE MINING PERMIT APPLICATIONS-MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

3. The authority citation for Part 780 continues to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq., as amended; Section 115 of Pub. L. 98-146, *30 U.S.C. 1257*; *16 U.S.C. 470* et seq.; and Pub. L. 100-34.

4. Section 780.10 is revised to read as follows:

SECTION 780.10 -- INFORMATION COLLECTION.

(a) The collections of information contained in Part 780 have been approved by the Office of Management and Budget under *44 U.S.C. 3501* et seq. and assigned clearance number 1029-0036. The information will be used by the regulatory authority to determine whether the applicant can comply with the applicable performance and environmental standards in Public Law 95-87. Response is required to obtain a benefit.

(b) Public Reporting burden for this information is estimated to average 28 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 640 NC, Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project 1029-0036, Washington, DC 20503.

5. Section 780.25 is amended by revising the heading and introductory text of paragraph (a), and by revising paragraphs (a)(2) introductory text, (a)(3) introductory text, (b), (c)(3), and the first sentence of paragraph (f) to read as follows:

SECTION 780.25 -- RECLAMATION PLAN: SILTATION STRUCTURES, IMPOUNDMENTS, BANKS, DAMS, AND EMBANKMENTS.

(a) General. Each application shall include a general plan and a detailed design plan for each proposed siltation structure, water impoundment, and coal processing waste bank, dam, or embankment within the proposed permit area.

(1) * * *

(2) Impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210-VI-TR60, Oct. 1985), "Earth Dams and Reservoirs," Technical Release No. 60 (TR-60) shall comply with the requirements of this section for structures that meet or exceed the size of other criteria of the Mine Safety and Health Administration (MSHA). The technical release is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 *U.S.C.* 552(a) and 1 CFR Part 51. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, order No. PB 87-157509/AS. Copies can be inspected at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 660, 800 North Capitol Street, Washington, DC or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. Each detailed design plan for a structure that meets or exceeds the size or other criteria of MSHA, Section 77.216(a) of this chapter shall:

* * * * *

(3) Each detailed design plan for structures not included in paragraph (a)(2) of this section shall:

* * * * *

(b) Siltation structures. Siltation structures shall be designed in compliance with the requirements of Section 816.46 of this chapter.

(c) * * *

(3) For impoundments not included in paragraph (a)(2) of this section, the regulatory authority may establish through the State program approval process, engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in Section 816.49(a)(4)(ii) of this chapter.

* * * * *

(f) If the structure meets the Class B or C criteria for dams in TR-60 or meets the size or other criteria of Section 77.216(a) of this chapter, each plan under paragraphs (b), (c), and (e) of this section shall include a stability analysis of the structure. * * *

* * * * *

PART 784 - UNDERGROUND MINING PERMIT APPLICATIONS-MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

6. The authority citation for Part 784 continues to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq., as amended; Section 115 of Pub. L. 98-146, *30 U.S.C. 1257; 16 U.S.C. 470* et seq.; and Pub. L. 100-34.

7. Section 784.16 is amended by revising the heading and introductory text of paragraph (a), and by revising paragraphs (a)(2) introductory text, (a)(3) introductory text, (b), (c)(3), and the first sentence of paragraph (f) to read as follows:

SECTION 784.16 -- RECLAMATION PLAN: SILTATION STRUCTURES, IMPOUNDMENTS, BANKS, DAMS, AND EMBANKMENTS.

(a) General. Each application shall include a general plan and a detailed design plan for each proposed siltation structure, water impoundment, and coal processing waste bank, dam, or embankment within the proposed permit area.

(1) * * *

(2) Impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210-VI-TR60, Oct. 1985), "Earth Dams and Reservoirs," Technical Release No. 60 (TR-60) shall comply with the requirements of this section for structures that meet or exceed the size or other criteria of the Mine Safety and Health Administration (MSHA). The technical release is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 *U.S.C.* 552(a) and 1 CFR part 51. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, order No. PB 87-157509/AS. Copies can be inspected at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 660, 800 North Capitol Street, Washington, DC or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. Each detailed design plan for a structure that meets or exceeds the size or other criteria of MSHA, Section 77.216(a) of this chapter shall:

* * * * *

(3) Each detailed design plan for structures not included in paragraph (a)(2) of this section shall:

* * * * *

(b) Siltation structures. Siltation structures shall be designed in compliance with the requirements of Section 817.46 of this chapter.

(c) * * *

(3) For impoundments not included in paragraph (a)(2) of this section the regulatory authority may establish through the State program approval process engineering design standards that ensure stability comparable to a 1.3 minimum static safety factor in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3 specified in Section 817.49(a)(4)(ii) of this chapter.

* * * * *

(f) If the structure meets the Class B or C criteria for dams in TR-60 or meets the size or other criteria of Section 77.216(a) of this chapter, each plan under paragraphs (b), (c), and (e) of this section shall include a stability analysis of the structure. * * *

* * * * *

PART 816 - PERMANENT PROGRAM PERFORMANCE STANDARDS-SURFACE MINING ACTIVITIES

8. The authority citation for Part 816 continues to read as follows:

Authority: Pub. L. 95-87, 30 *U.S.C.* 1201 et seq., as amended; Section 115 of Pub. L. 98-146, 30 *U.S.C.* 1257; and Pub. L. 100-34.

9. Section 816.10 is revised to read as follows:

SECTION 816.10 -- INFORMATION COLLECTION.

(a) The collections of information contained in part 816 have been approved by the Office of Management and Budget under 44 *U.S.C.* 3501 et seq. and assigned clearance number 1029-0047. The information will be used by the regulatory authority to monitor and inspect surface coal mining activities to ensure that they are in compliance with the Surface Mining Control and Reclamation Act. Response is required to obtain a benefit.

(b) Public Reporting Burden for this information is estimated to average 1 hour per response, including the time for

reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 640 NC, Washington, DC 20240; and the Office of Management and Budget, Paperwork Reduction Project (1029-0047), Washington, DC 20503.

10. In Section 816.46, paragraph (a) is revised to read as follows:

SECTION 816.46 -- HYDROLOGIC BALANCE: SILTATION STRUCTURES.

- (a) For the purpose of this section only, disturbed areas shall not include those areas-
 - (1) In which the only surface mining activities include diversion ditches, siltation structures, or roads that are designed constructed and maintained in accordance with this part; and
 - (2) For which the upstream area is not otherwise disturbed by the operator.

* * * * *

11. Section 816.46 is amended by revising paragraph (c)(2) to read as follows:

SECTION 816.46 -- HYDROLOGIC BALANCE: SILTATION STRUCTURES.

* * * * *

- (c) * * *
 - (2) Spillways. A sedimentation pond shall include either a combination of principal and emergency spillways or single spillway configured as specified in Section 816.49(a)(9).

* * * * *

12. Section 816.49 is amended by redesignating paragraphs (a)(1) through (a)(12) as paragraphs (a)(2) through (a)(13) and adding new paragraph (a)(1) to read as follows:

SECTION 816.49 -- IMPOUNDMENTS.

- (a) * * *
 - (1) Impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210-VI-TR60, Oct. 1985), "Earth Dams and Reservoirs," 1985 shall comply with "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60 and the requirements of this section. The technical release is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, order No. PB 87-157509/AS. Copies can be inspected at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 660, 800 North Capitol Street, Washington, DC, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

* * * * *

13. Section 816.49 is amended by revising newly redesignated paragraph (a)(4) to read as follows:

SECTION 816.49 -- IMPOUNDMENTS.

(a) * * *

(4) Stability.

(i) An impoundment meeting the Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216(a) of this title shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2.

(ii) Impoundments not included in paragraph (a)(4)(i) of this section, except for a coal mine waste impounding structure, shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of Section 780.25(c)(3).

* * * * *

14. Section 816.49 is amended by adding the following sentence to end of newly redesignated paragraph (a)(5) to read as follows:

SECTION 816.49 -- IMPOUNDMENTS.

(a) * * *

(5) * * * Impoundments meeting the Class B or C criteria for dams in TR-60 shall comply with the freeboard hydrograph criteria in the "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60.

* * * * *

15. Section 816.49 is amended by revising the last sentence of newly redesignated paragraph (a)(6)(i) to read as follows:

SECTION 816.49 -- IMPOUNDMENTS.

(a) * * *

(6) * * *

(i) * * * For an impoundment meeting the Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216(a) of this title, foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

* * * * *

16. Section 816.49 is amended by revising newly redesignated paragraphs (a)(9)(ii) (A) and (B) and adding a new (C) to read as follows:

SECTION 816.49 -- IMPOUNDMENTS.

(a) * * *

(9) * * *

(ii) * * *

(A) For an impoundment meeting the Class B or C criteria for dams in TR-60, the emergency spillway hydrograph criteria in the "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60, or greater event as specified by the regulatory authority.

(B) For an impoundment meeting or exceeding the size or other criteria of Section 77.216(a)

of this title, a 100-year 6-hour event, or greater event as specified by the regulatory authority.

(C) For an impoundment not included in paragraph (a)(9)(ii) (A) and (B) of this section, a 25-year 6-hour or greater event as specified by the regulatory authority.

* * * * *

17. Section 816.49 is amended by revising the first sentence of newly redesignated paragraph (a)(11)(iv) to read as follows:

SECTION 816.49 -- IMPOUNDMENTS.

(a) * * *

(11) * * *

(iv) In any State which authorizes land surveyors to prepare and certify plans in accordance with Section 780.25(a) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the SCS Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216(a) of this title and certify and submit the report required by paragraph (a)(11)(ii) of this section, except that all coal mine waste impounding structures covered by Section 816.84 of this chapter shall be certified by a qualified registered professional engineer. * * *

* * * * *

18. Section 816.49 is amended by revising newly redesignated paragraph (a)(12) to read as follows:

SECTION 816.49 -- IMPOUNDMENTS.

(a) * * *

(12) Impoundments meeting the SCS Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216 of this title must be examined in accordance with Section 77.216-3 of this title. Impoundments not meeting the SCS Class B or C criteria for dams in TR-60, or subject to Section 77.216 of this title, shall be examined at least quarterly. A qualified person designated by the operator shall examine impoundments for the appearance of structural weakness and other hazardous conditions.

* * * * *

19. Section 816.49 is amended by revising paragraph (c)(2) (i) and (ii) to read as follows:

SECTION 816.49 -- IMPOUNDMENTS.

* * * * *

(c) * * *

(2) * * *

(i) Impoundments meeting the SCS Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216(a) of this title shall be designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event specified by the regulatory authority.

(ii) Impoundments not included in paragraph (c)(2)(i) of this section shall be designed to control the precipitation of the 100-year 6-hour event, or greater event specified by the regulatory authority.

* * * * *

PART 817 - PERMANENT PROGRAM PERFORMANCE STANDARDS-UNDERGROUND MINING ACTIVITIES

20. The authority citation for Part 817 continues to read as follows:

Authority: Pub. L. 95-87, *30 U.S.C. 1201* et seq., as amended; Section 115 of Pub. L. 98-146, *30 U.S.C. 1257*; and Pub. L. 100-34.

21. In Section 817.46, paragraph (a) is revised to read as follows:

SECTION 817.46 -- HYDROLOGIC BALANCE: SILTATION STRUCTURES.

- (a) For the purposes of this section only, disturbed areas shall not include those areas-
 - (1) In which the only surface mining activities include diversion ditches, siltation structures, or roads that are designed, constructed and maintained in accordance with this part; and
 - (2) For which the upstream area is not otherwise distributed by the operator.

* * * * *

22. Section 817.46 is amended by revising paragraph (c)(2) to read as follows:

SECTION 817.46 -- HYDROLOGIC BALANCE: SILTATION STRUCTURES.

* * * * *

- (c) * * *
 - (2) Spillways. A sedimentation pond shall include either a combination of principal and emergency spillways or single spillway configured as specified in Section 817.49(a)(9).

* * * * *

23. Section 817.49 is amended by redesignating paragraphs (a)(1) through (a)(12) as paragraphs (a)(2) through (a)(13) and adding new paragraph (a)(1) to read as follows:

SECTION 817.49 -- IMPOUNDMENTS.

- (a) * * *
 - (1) Impoundments meeting the Class B or C criteria for dams in the U.S. Department of Agriculture, Soil Conservation Service Technical Release No. 60 (210-VI-TR60, Oct. 1985), "Earth Dams and Reservoirs," shall comply with the, "Minimum Emergency Spillway Hydrologic Criteria," table in TR-60 and the requirements of this section. The technical release is hereby incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with *5 U.S.C. 552(a)* and 1 CFR Part 51. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, order No. PB 87-157509-AS. Copies can be inspected at the OSM Headquarters Office, Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 660, 800 North Capitol Street, Washington, DC or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

* * * * *

24. Section 817.49 is amended by revising newly redesignated paragraph (a)(4) to read as follows:

SECTION 817.49 -- IMPOUNDMENTS.

(a) * * *

(4) Stability.

(i) An Impoundment meeting the SCS Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216(a) of this title shall have a minimum static safety factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2.

(ii) Impoundments not included in paragraph (a)(4)(i) of this section, except for a coal mine waste impounding structure, shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of Section 784.16(c)(3).

* * * * *

25. Section 817.49 is amended by adding the following sentence to the end of newly designated paragraph (a)(5) to read as follows:

SECTION 817.49 -- IMPOUNDMENTS.

(a) * * *

(5) * * * Impoundments meeting the SCS Class B or C criteria for dams in TR-60 shall comply with the freeboard hydrograph criteria in the "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60.

* * * * *

26. Section 817.49 is amended by revising the last sentence of newly redesignated paragraph (a)(6)(i) to read as follows:

SECTION 817.49 -- IMPOUNDMENTS.

(a) * * *

(6) * * *

(i) * * * For an impoundment meeting the SCS Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216(a) of this title, foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

* * * * *

27. Section 817.49 is amended by revising newly redesignated paragraphs (a)(9)(ii) (A) and (B) and adding a new (C) to read as follows:

SECTION 817.49 -- IMPOUNDMENTS.

(a) * * *

(9) * * *

(ii) * * *

(A) For an impoundment meeting the SCS Class B or C criteria for dams in TR-60, the emergency spillway hydrograph criteria in the "Minimum Emergency Spillway Hydrologic Criteria" table in TR-60, or greater event as specified by the regulatory authority.

(B) For an impoundment meeting or exceeding the size or other criteria of Section 77.216(a) of this title, a 100-year 6-hour event, or greater event as specified by the regulatory authority.

(C) For an impoundment not included in paragraph (a)(9)(ii) (A) and (B) of this section, a 25-year 6-hour event, or greater event as specified by the regulatory authority.

* * * * *

28. Section 817.49 is amended by revising the first sentence of newly redesignated paragraph (a)(11)(iv) to read as follows:

SECTION 817.49 -- IMPOUNDMENTS.

(a) * * *

(11) * * *

(iv) In any State which authorizes land surveyors to prepare and certify plans in accordance with Section 784.16(a) of this chapter, a qualified registered professional land surveyor may inspect any temporary or permanent impoundment that does not meet the SCS Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216(a) of this title and certify and submit the report required by paragraph (a)(11)(ii) of this section, except that all coal mine waste impounding structures covered by Section 817.84 of this chapter shall be certified by a qualified registered professional engineer. * * *

* * * * *

29. Section 817.49 is amended by revising newly redesignated paragraph (a)(12) to read as follows:

SECTION 817.49 -- IMPOUNDMENTS.

(a) * * *

(12) Impoundments meeting the SCS Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216 of this title must be examined in accordance with Section 77.216-3 of this title. Impoundments not meeting the SCS Class B or C Criteria for dams in TR-60, or subject to Section 77.216 of this title, shall be examined at least quarterly. A qualified person designated by the operator shall examine impoundments for the appearance of structural weakness and other hazardous conditions.

* * * * *

30. Section 817.49 is amended by revising paragraphs (c)(2) (i) and (ii) to read as follows:

SECTION 817.49 -- IMPOUNDMENTS.

* * * * *

(c) * * *

(2) * * *

(i) Impoundments meeting the SCS Class B or C criteria for dams in TR-60, or the size or other criteria of Section 77.216(a) of this title shall be designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event specified by the regulatory authority.

(ii) Impoundments not included in paragraph (c)(2)(i) of this section shall be designed to control the precipitation of the 100-year 6-hour event, or greater event specified by the regulatory authority.

* * * * *

[FR Doc. 94-25959 Filed 10-19-94; 8:45 am]
BILLING CODE 4310-05-M