Danny Brown, Commissioner  
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Department of Mines, Minerals and Energy  
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**TOPICS: IMPOUNDMENTS**

**INQUIRY:** Please locate rulings, policies or other state regulations which evaluate the definition of impoundments found in 30 CFR 701.5.

**SEARCH RESULTS:** The materials listed below were identified using the COALEX Library and other materials in LEXIS. Unless otherwise indicated, copies of relevant materials are attached.

**DIRECTIVES**

Subject No. TSR-2, Transmittal No. 375, "Quarterly Examination of Water Impoundments"  
(Issued Sept. 14, 1987).

30 CFR 816.49(a)(11) and 817.49(a)(11) require that all impoundments that do not meet the size or other criteria contained in the Mine Safety and Health Administration (MSHA) regulations at 30 CFR 77.216(a) be examined at least quarterly. OSM policy will exempt impoundments constructed without embankments from the quarterly examination requirement "since there is no embankment to examine for structural weaknesses or other hazardous conditions....The decision as to which structures are exempt should be made on a case-by-case basis by the Regulatory Authority (RA) according to information provided in the permit application when it is approved."

**OHA DECISIONS***
*COALEX contains decisions through 2/89 only

**TURNER BROTHERS, INC. v OSM, 98 IBLA, IBLA 86-244 (August 6, 1987).**

"OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to obtain prior approval for the construction of small depressions where there is no proof that the permittee, whether by design or otherwise, actually constructed the depressions."

**L W OVERLY COAL CO. v OSM, Docket No. CH 4-13-P (September 28, 1987).**
The ALJ affirmed the issuance of the Notice of Violation (NOV) and Cessation Order (CO) for Overly Coal's failure to properly construct a sedimentation pond: "a small depressed area...positioned behind [plastic] pipes" was inadequate "to be considered a sedimentation pond".

NICKEL PLATE MINING CO. v OSM, Docket No. NX 5-112-R (September 3, 1987).

TNickel Plate Mining was sited for "failure to return disturbed area to approximate original contour" rather than for specific "highwall", "depression" or "spoil pile" violations. The ALJ ruled that Nickel Plate had "met its burden of showing the premining configuration of the subject site" and that the site had been returned to its approximate original contour. Specifically, while there was a depression, it "was not one of 'substantial nature'".

TURNER BROTHERS, INC. v OSM, Docket Nos. TU 7-3-R, TU 7-25-R (August 10, 1987).

 Turner Brothers were cited for failure to obtain approval before constructing a small depression. They did not perform the required remedial work nor did they appear at the hearing. The issuance of the NOV and CO were affirmed.

BLACK BUTTE COAL CO. v OSM, Docket No. TU 5-1 PR (August 18, 1986).

As part of the settlement of its litigation, Black Butte, in the "Revised Federal Permit Conditions", agreed to comply with the "standards for permanent impoundments".

UTAH INTERNATIONAL INC. v OSM, Docket No. TU 4-36-R (February 8, 1985).

"The fact that in the permit approval process the applicant communicated its intention to utilize small depressions, or the fact that the regulatory authority did not previously object to small depressions, cannot be substituted for compliance with, and cannot operate to relieve the applicant of the responsibility of meeting the approval requirements of [25 CFR] Section 216.105(d)."

FALCON COAL CO., INC. v OSM, Docket No NX 1-7-R (January 21, 1982).

In affirming the issuance of the NOV, the ALJ concluded that Falcon Coal "did not have the right to rely on the oral statements made by the state inspector" that the small depression which had appeared after heavy rainfall could be left. The "approval to leave small depressions required a permit revision."

HISTORY OF THE FEDERAL REGULATIONS
[Taken from 53 FR 43583 (OCTOBER 27, 1988. Final rule.) and the "Summary" sections of the final rule notices.]

[See the Tables of Regulations for text of some of these sections.]
The regulations for impoundments were set in the following sections:

30 CFR 701.5 Definitions.

Permitting requirements for reclamation and operation plans
Surface mining: 30 CFR 780.25
Underground mining: 30 CFR 784.16

Performance standards -- Surface mining:
30 CFR 816.46 Hydrologic balance: Sedimentation ponds (later Siltation structures)
30 CFR 816.49 Impoundments (Permanent and Temporary)
30 CFR 816.84 Coal mine waste: Impounding structures

Performance standards -- Underground mining:
30 CFR 817.46 Hydrologic balance: Sedimentation ponds (later Siltation structures)
30 CFR 817.49 Impoundments (Permanent and Temporary)
30 CFR 817.84 Coal mine waste: Impounding structures

The regulatory provisions for surface and underground mining are the same; therefore, rule changes discussed in terms of surface mining also apply to underground mining requirements. The Federal Register notices listed below and the state sections included focus primarily on the definition of "impoundments" and on sections 816.49/817.49.

JUNE 21, 1982 (47 FR 26754). Proposed rule. Permanent and temporary impoundments. [Text of the proposed rule is attached.]


These rules were adopted: "to simplify the requirements for design and construction of impoundments, which include all water, sediment, slurry or other liquid or semi-liquid holding structures and depressions, either naturally formed or artificially built. These rules provide design latitude to professionals, remove inconsistencies among previous rules, and clarify definitions."

NOVEMBER 4, 1983. Amendment to SMCRA (Sec. 115, Pub L 98-146, 97 Stat 938 (1983)). [Text of the amendment is not attached.]

The Act was amended to authorize land surveyors to prepare and certify cross sections, maps and plans.

IN RE PERMANENT SURFACE MINING REGULATION LITIGATION (IN RE PERMANENT II (ROUND III)), 620 F Supp 1519 (D DC July 15, 1985). [Text of this decision is not attached.]
The following sections were remanded: "(1) Section 816.49(a)(3) and (a)(5)(i) because 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 (47 FR 26754)...and (2) Sections 816.49 and 816.84(b) to the extent they deferred to the Mine Safety and Health Administration (MSHA) impoundment classification standards when OSMRE had not separately justified reliance on such standards."

In addition, in response to the challenge to the combination spillway requirements of Sections 816.49(a)(8) and 816.84(b)(1): "the Secretary of the Interior agreed to propose a rule specifying that one spillway that can safely pass the design precipitation event may serve as a combination principal and emergency spillway."

OCTOBER 2, 1984 (49 FR 38958). Proposed rule. [Text of this notice not included with the report.]


"[OSM] is amending its rules governing: (1) Preparation and certification of cross sections, maps and plans required in permit applications for surface and underground coal mining; (2) preparation and certification of general and detailed design plans for sedimentation ponds, water impoundments, and coal processing waste banks, dams and embankments; and (3) certification of the design of impoundments.

"This final rule implements a November 4, 1983 amendment to [SMCRA], and authorizes qualified, registered, professional, land surveyors to prepare and certify the cross sections, maps and plans required in an application for a surface coal mining and reclamation permit in any State which authorizes land surveyors to prepare and certify such documents. In addition, it increases the qualifications a land surveyor must have to prepare and certify detailed design plans for small structures. It also eliminates an inconsistency in the previous rules regarding the authority of land surveyors to certify the design of small impoundments."

NOVEMBER 20, 1986 (51 FR 41958). Final rule; suspension. [Excerpts only included from this notice.]

Certain portions of the regulations were suspended as a result of the IN RE PERMANENT II (ROUND III) District Court decision. (See above.)


OSM amended "certain portions" of the regulations governing permanent and temporary impoundments. "Most of the revisions respond to a court decision; others respond to a 1986 amendment" to SMCRA.
"The rule, which includes design, construction and inspection requirements for impoundments: (1) Requires a minimum static safety factor for small impoundments; (2) requires stable foundations and abutments during all phases of construction for small impoundments; (3) establishes new spillway requirements for impoundments; (4) establishes a distinction between impoundments based on size and potential adverse effects resulting from impoundment failure; and (5) authorizes qualified registered professional land surveyors to inspect small impoundments and to certify the construction of siltation structures."


The court rejected a challenge by NWF to regulations setting safety standards for water impoundments.

APPROVAL OF STATE PROGRAM AMENDMENTS

The following is a list of the attached excerpts from Federal Register notices which discuss the approval or disapproval of relevant amendments to state surface mining programs. Only notices published after the October 27, 1988 final federal regulations are included.

COLORADO
December 11, 1989 (54 FR 50739)

ILLINOIS
August 24, 1989 (54 FR 35205)
September 6, 1989 (54 FR 36963)
May 11, 1990 (55 FR 19751)

KENTUCKY
April 9, 1990 (55 FR 13158)

MARYLAND
January 22, 1990 (55 FR 2111)
April 25, 1990 (55 FR 17455)

MISSOURI
August 4, 1989 (54 FR 32094)

MONTANA
May 11, 1990 (55 FR 19727)

NEW MEXICO
August 4, 1989 (54 FR 32095)
NORTH DAKOTA  
January 19, 1990 (55 FR 1813)

OHIO  
December 22, 1988 (53 FR 51543)

OKLAHOMA  
March 27, 1990 (55 FR 11169)  
May 15, 1990 (55 FR 20138)

WEST VIRGINIA  
May 23, 1990 (55 FR 21304)  
June 12, 1990 (55 FR 23703)

TABLES OF REGULATIONS*  
* State regulations contained in the COALEX Library are current through mid-1989. See the attached Federal Register notices which discuss the approval or disapproval of state program amendments for more current material.

State program regulations corresponding to the following federal regulations are listed in Attachment Z.

I. 1979 definition of "impoundments" (30 CFR 701.5)
II. 1983 definition of "impoundments" (30 CFR 701.5)
III. 30 CFR 816.49 Impoundments

Copies of several of the state program sections corresponding to the 30 CFR 701.5 Definitions are included with this report. Copies of all of the state program sections identified in COALEX as corresponding to 30 CFR 816.49 are attached; state sections which also correspond to 30 CFR 817.46 have been appropriately annotated.

ATTACHMENTS

A. OSM DIRECTIVE, Subject No TSR-2, Transmittal No 375, "Quarterly Examination of Water Impoundments", (Issued Sept. 14, 1987).
B. TURNER BROTHERS, INC. v OSM, 98 IBLA, IBLA 86-244 (August 6, 1987).
C. L W OVERLY COAL CO. v OSM, Docket No. CH 4-13-P (September 28, 1987).
D. NICKEL PLATE MINING CO. v OSM, Docket No. NX 5-112-R (September 3, 1987).
F. BLACK BUTTE COAL CO. v OSM, Docket No. TU 5-1 PR (August 18, 1986).
G. UTAH INTERNATIONAL INC. v OSM, Docket No. TU 4-36-R (February 8, 1985).
H. FALCON COAL CO., INC. v OSM, Docket No NX 1-7-R (January 21, 1982).
L. NOVEMBER 20, 1986 (51 FR 41958). Final rule; suspension.
O. COLORADO: December 11, 1989 (54 FR 50739).
P. ILLINOIS:
   2. September 6, 1989 (54 FR 36963).
Q. KENTUCKY: April 9, 1990 (55 FR 13158).
R. MARYLAND:
S. MISSOURI: August 4, 1989 (54 FR 32094).
V. NORTH DAKOTA: January 19, 1990 (55 FR 1813).
X. OKLAHOMA:
   1. March 27, 1990 (55 FR 11169).
Y. WEST VIRGINIA:
Z. TABLES OF REGULATIONS
   I. March 13, 1979 definition of "impoundment" (30 CFR 701.5)
   II. September 26, 1983 definition of "impoundment" (48 FR 43994)
   III. 30 CFR 816.49 Impoundments

TABLES OF REGULATIONS

(Reformatted from original)

I. March 13, 1979 definition of "impoundment" (30 CFR 701.5):

"Impoundment means a closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water, sediment, or waste."
A. The language of the following state regulations is IDENTICAL to the 1979 definition:
(* Copies of the asterisked sections are attached.)

<table>
<thead>
<tr>
<th>STATE</th>
<th>REGULATION SECTION (EFF. DATE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALABAMA</td>
<td>Rules of the Alabama Surface Mining Commission, Sec. 880-X-2A-.06 (9/86).</td>
</tr>
<tr>
<td>ARKANSAS *</td>
<td>Ark. Surface Coal Mining &amp; Reclamation Code, Sec. 701.5 (3/88).</td>
</tr>
<tr>
<td>IOWA</td>
<td>Iowa Admin. Code r. 4.1(2) (1/81).</td>
</tr>
<tr>
<td>LOUISIANA</td>
<td>La. Surface Mining Regulations Statewide Order 29-0-1, Sec. 100.5 (10/80).</td>
</tr>
<tr>
<td>MARYLAND</td>
<td>Md. Regs. Code title 08, Sec. 08.13.09.01 (1/87).</td>
</tr>
<tr>
<td>MISSISSIPPI</td>
<td>Miss. Surface Coal Mining &amp; Reclamation Regulations, Part 101 (4/80).</td>
</tr>
<tr>
<td>MISSOURI</td>
<td>10 CSR 40-2.010 (CSR = Code of State Regulations) (1/79).</td>
</tr>
</tbody>
</table>

The language of the following state regulations is SIMILAR to the 1979 definition:
(* Copies of the asterisked sections are attached.)

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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>COLORADO *</td>
<td>Rules &amp; Regulations of the Colo. Mined Land Reclamation Board, Rule 1, Sec. 1.04 (3/89).</td>
</tr>
<tr>
<td>WEST VIRGINIA *</td>
<td>W. Va. Surface Mining Reclamation Regs., Chap. 20-6, Series VII, Sec. 2 (7/83).</td>
</tr>
</tbody>
</table>

II. September 26, 1983 definition of "impoundment" (48 FR 43994):

"Impoundment means all water, sediment, slurry or other liquid or semi-liquid holding structures and depressions, either naturally formed or artificially built."
A. The language of the following state regulations is IDENTICAL to the 1983 definition:

(* Copies of the asterisked sections are attached.)

**STATE**

REGULATION SECTION (EFF. DATE)

- **OHIO** *
  Ohio Admin Code, Sec. 1501:13-1-02 (12/88).

- **VIRGINIA** *

B. The language of the following state regulations is SIMILAR to the 1983 definition:

(* Copies of the asterisked sections are attached.)

**STATE**

REGULATION SECTION (EFF. DATE)

- **MISSOURI** *
  10 CSR 40-8.010 (CSR = Code of State Regulations) (10/88).

- **WYOMING** *
  Land Quality Div. of the Dept. of Environmental Quality; Rules & Regulations, Chap. I, Sec. 2 & 3 (11/86).

THE FOLLOWING ADDITIONAL MATERIALS ARE ENCLOSED:

(* Copies of the asterisked sections are attached.)

**STATE**

SECTIONS FROM THESE RULES:

- **VIRGINIA** *
  State Water Control Board, Regulation No. 9, Sec. 2.01, 5.01, 5.03 (7/78).

- **WEST VIRGINIA** *
  Coal Refuse Disposal Regulations, Chap. 20-6, Series VII, Sec. C.01 (5/82)

III. Performance standards - Permanent and temporary impoundments (30 CFR 816.49/817.49)*:

* Copies of all of the sections listed below are attached.

**STATE**

REGULATION SECTION (EFF. DATE)

- **ALABAMA**
  Rules of the Alabama Surface Mining Commission, Sec. 880-X-10C-.20 (7/84).

- **ALASKA**

- **ARKANSAS**
  Ark. Surface Coal Mining & Reclamation Code, Sec. 816.49 (3/88).
COLORADO
Rules & Regulations of the Colo. Mined Land Reclamation Board, Rule 4, Sec. 4.05.9 (12/82).

ILLINOIS

INDIANA
310 IAC 12-5-24 (5/85).

IOWA
Iowa Admin. Code r. 4.522(18) (1/81).

KANSAS

KENTUCKY
405 KAR 16:100E, Sec. 1 through 3 (5/82).
405 KAR 16:100E, Sec. 5 (1/83).

LOUISIANA
La. Surface Mining Regulations Statewide Order 29-0-1, Sec. 216.49 (10/80).

MARYLAND
Md. Regs. Code title 08, Sec. 08.13.09.24 (12/80).

MISSISSIPPI
Miss. Surface Coal Mining & Reclamation Regs., Part 216, Sec. 216.47 (4/80).

MISSOURI

MONTANA

NEW MEXICO

NORTH DAKOTA
N.D. Admin. Code, Sec. 69-05.2-16-09 (10/86).
N.D. Admin. Code, Sec. 69-05.2-16-12 (8/80).

OHIO

OKLAHOMA
Okla. Permanent Regulatory Program Regs., Sec. 816.49 (1/82).

PENNSYLVANIA
Pa. Dept. of Environmental Resources Coal Mining Regs., title 25, Sec. 87.111 & 87.113 (7/82).
Pa. Dept. of Environmental Resources Coal Mining Regs., title 25, Sec. 87.112 (5/84).
Pa. Dept. of Environmental Resources Coal Mining Regs., title 25, Secs. 89.21, 89.89, 89.101 & 89.102, 89.111 through 89.113 (7/82).

- **TEXAS**

- **UTAH**
  - Coal Mining & Reclamation Permanent Program, Final Rules of the Utah Board & Div. of Oil, Gas & Mining, Sec. UMC 817.49 (1/81).

- **VIRGINIA**
  - State Water Control Board, Regulation No. 9, Sec. 11.01 (7/78).

- **WYOMING**
  - Wyoming Environmental Quality Act, State of Wy. Dept. of Environmental Quality, Article 4, Sec. 35-11-407 (3/75).
  - Land Quality Div. of the Dept. of Environmental Quality; Rules & Regs., Chapter IV, Sec. 3 (11/86).