



**COALEX STATE INQUIRY REPORT - 79**  
**April 10, 1987**

Ann Laubach  
Division of Reclamation  
Department of Natural Resources  
Fountain Square, B-3  
Columbus, Ohio 43224

**TOPIC: OVERLAPPING MSHA/SMCRA IMPOUNDMENTS**

**INQUIRY:** Search the Federal Register to determine if State regulatory authorities are required to issue NOV's for violations of performance standards relating to impoundments which are also required to be inspected by MSHA, if an MSHA inspector has already issued an NOV for the same defect.

**SEARCH RESULTS:** 30 CFR Sec. 816.49 (a) (1) reads:

"Impoundments meeting the criteria of Sec. 77.216(a) of this title shall comply with the requirements of Sec. 77.216 of this title and this section. The plan required to be submitted to the District Manager of MSHA under Sec. 77.216 of this title shall also be submitted to the regulatory authority as part of the permit application."

Under this regulation, certain impoundments are required to meet the specifications of two regulatory agencies - MSHA and OSM. Thus, there arises a question as to whether both agencies are required to inspect these impoundments, and, if a violation is found, whether both agencies are required to cite the operator for noncompliance.

---

A search of the Federal Register revealed a final ruling published September 26, 1983 addressing in part the relationship between OSM and MSHA with respect to regulation of impoundments. On June 21, 1982 OSM proposed to allocate to MSHA, primary responsibility for impoundment design review and emergency action. One of the reasons for the proposed rule was the desire to avoid duplicative reviews of impoundment plans by MSHA and OSM and duplicative enforcement and emergency notification.

The comments received by OSM about the proposed rule varied. Some of the commenters in favor of the proposed rule liked it because it would eliminate existing duplication of regulatory control. Others felt that MSHA should be the lead agency" in dam approvals, while still others noted that MSHA implementation of emergency provisions would clarify MSHA's responsibility.

Among the commenters opposing the proposed rule were some State regulatory authorities who felt that the rules gave authority to MSHA which should be delegated to the States. Some State

Research conducted by: Todd Leatherman



authorities were also concerned that their authority would be preempted unless the language of the proposed rule was amended. Other critics of the proposed rule were those who felt that OSM was improperly relinquishing the approval or enforcement authority of the States to another federal agency.

The proposed rule was not adopted. As stated by OSM:

"The final rule retains independent regulatory authority responsible under section 515, 506, 507, 508 and 510 of the Act for permitting and ensuring operator compliance with the performance standards found in section 515(b)(8) of the Act and with Pub. L. 83-566."

In declaring the relationship of OSM and MSHA in the approval process, OSM stated:

"Under the final rule, MSHA's approval of the design and construction of impoundments subject to the Act will not satisfy the requirement for approval by the regulatory authority. Thus, under final Sec. 816.49 and the= permitting rules, the regulatory authority must review and approve plans for impoundments to ensure that the structures are designed to be in compliance with appropriate standards. Final Sec. 816.49(a) requires that plans for the construction of large impoundments must be submitted both to MSHA and the regulatory authority. The regulatory authority may consider MSHA's action on plans for impoundments, but is independently charged to make its own findings with regard to plan approval."

As to the relationship of OSM and MSHA in the enforcement process, one commenter stated that the regulatory authorities should not have the responsibility for monitoring and enforcing compliance with provisions of 30 CFR Part 77 for those impoundments which meet the criteria of 30 CFR Sec. 77.216 (MSHA criteria). In response to this comment, OSM stated:

"OSM has not adopted proposed Sec. 816.49(b)(1)(iii) which would have required the regulatory authority to regulate for compliance with MSHA requirements. Under these final rules, the regulatory authority is responsible for assuring compliance with requirements imposed under the Act. However, to the extent that MSHA's rules are referenced, they will be enforced under the Act.

## **ATTACHMENTS**

48 FR 43994 (SEPTEMBER 26, 1983)