



COALEX STATE INQUIRY REPORT – 143
June 19, 1990 [Updated September, 1990]

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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).

Nickel Plate Mining was cited 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.]

MARCH 13, 1979 (44 FR 15312). Permanent program rules.

[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.]

SEPTEMBER 26, 1983 (48 FR 43994). Final rule. Permanent and temporary impoundments.

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.]

APRIL 24, 1985 (50 FR 16195). Final rule. Preparation and certification of plans; Design of impoundments.

"[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.)

OCTOBER 27, 1988 (53 FR 43584). Final rule. Permanent and temporary impoundments.

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."

NATIONAL WILDLIFE FEDERATION v LUJAN (ROUND II), Civil Action Nos. 88-2416, 88-3345, 88-3586, 88-3635, 89-0039, 89-0136, 89-0141 (Consolidated) (D DC August 30, 1990).

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).
- E. TURNER BROTHERS, INC. v OSM, Docket Nos. TU 7-3-R, TU 7-25-R (August 10, 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).
- I. JUNE 21, 1982 (47 FR 26754). Proposed rules. Permanent and temporary impoundments.



- J. SEPTEMBER 26, 1983 (48 FR 43994). Final rules. Permanent and temporary impoundments.
- K. APRIL 24, 1985 (50 FR 16195). Final Rule. Preparation and certification of plans; Design of impoundments.
- L. NOVEMBER 20, 1986 (51 FR 41958). Final rule; suspension.
- M. OCTOBER 27, 1988 (53 FR 43584). Final rule. Permanent and temporary impoundments.
- N. NATIONAL WILDLIFE FEDERATION v LUJAN (ROUND II), Civil Action Nos. 88-2416, 88-3345, 88-3586, 88-3635, 89-0039, 89-0136, 89-0141 (Consolidated) (D DC August 30, 1990).
- O. COLORADO: December 11, 1989 (54 FR 50739).
- P. ILLINOIS:
 - 1. August 24, 1989 (54 FR 35205).
 - 2. September 6, 1989 (54 FR 36963).
 - 3. May 11, 1990 (55 FR 19751).
- Q. KENTUCKY: April 9, 1990 (55 FR 13158).
- R. MARYLAND:
 - 1. January 22, 1990 (55 FR 2111).
 - 2. April 25, 1990 (55 FR 17455).
- S. MISSOURI: August 4, 1989 (54 FR 32094).
- T. MONTANA: May 11, 1990 (55 FR 19727).
- U. NEW MEXICO: August 4, 1989 (54 FR 32095).
- V. NORTH DAKOTA: January 19, 1990 (55 FR 1813).
- W. OHIO: December 22, 1988 (53 FR 51543).
- X. OKLAHOMA:
 - 1. March 27, 1990 (55 FR 11169).
 - 2. May 15, 1990 (55 FR 20138).
- Y. WEST VIRGINIA:
 - 1. May 23, 1990 (55 FR 21304).
 - 2. June 12, 1990 (55 FR 23703).
- 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.)

STATE

REGULATION SECTION (EFF. DATE)

- o **ALABAMA**
Rules of the Alabama Surface Mining Commission, Sec. 880-X-2A-.06 (9/86).
- o **ALASKA***
11 AAC 90.911 (AAC = Alaska Admin. Code) (12/83).
- o **ARKANSAS***
Ark. Surface Coal Mining & Reclamation Code, Sec. 701.5 (3/88).
- o **ILLINOIS**
Ill. Admin. Code title 62, Sec. 1701.5 (1/89).
- o **INDIANA**
310 IAC 12-1-3 (IAC = Ind. Admin. Code) (3/86).
- o **IOWA**
Iowa Admin. Code r. 4.1(2) (1/81).
- o **KENTUCKY**
405 KAR 7:020, Sec. 1 (KAR = Ky. Admin. Regs.) (8/86).
- o **LOUISIANA**
La. Surface Mining Regulations Statewide Order 29-0-1, Sec. 100.5 (10/80).
- o **MARYLAND**
Md. Regs. Code title 08, Sec. 08.13.09.01 (1/87).
- o **MISSISSIPPI**
Miss. Surface Coal Mining & Reclamation Regulations, Part 101 (4/80).
- o **MISSOURI**
10 CSR 40-2.010 (CSR = Code of State Regulations) (1/79).
- o **MONTANA**
Mont. Admin. R. 26.4.301 (4/80).

The language of the following state regulations is **SIMILAR** to the 1979 definition:

(* Copies of the asterisked sections are attached.)

STATE

REGULATION SECTION (EFF. DATE)

- o **COLORADO***
Rules & Regulations of the Colo. Mined Land Reclamation Board, Rule 1, Sec. 1.04 (3/89).
- o **WEST VIRGINIA***
W. Va. Surface Mining Reclamation Regs., Chap. 20-6, Series VII, Sec. 2 (7/83).

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)

- o **OHIO ***
Ohio Admin Code, Sec. 1501:13-1-02 (12/88).
- o **VIRGINIA ***
Va. Coal Surface Mining Reclamation Regs., Program Amendments, Sec. 480-03-19.700.5 (6/88).

- 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)

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

- o **VIRGINIA ***
Water Pollution Control Laws, Va. Code Ann. Sec. 62.1-104 through 106 (3/80).
State Water Control Board, Regulation No. 9, Sec. 2.01, 5.01, 5.03 (7/78).
Mining Laws of Va., Va. Code Ann. Sec. 45.1-225 (3/80).
- o **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)

- o **ALABAMA**
Rules of the Alabama Surface Mining Commission, Sec. 880-X-10C-.20 (7/84).
- o **ALASKA**
11 AAC 90.337 (AAC = Alaska Admin. Code) (5/83).
- o **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**
Ill. Admin. Code, title 62, Sec. 1816.49 (10/88).
- **INDIANA**
310 IAC 12-3-49 (IAC = Ind. Admin. Code) (5/82).
310 IAC 12-5-24 (5/85).
- **IOWA**
Iowa Admin. Code r. 4.522(18) (1/81).
- **KANSAS**
State Corp. Comm. Mined-Land Conservation and Reclamation Board; Permanent Admin. Regs., Sec. 47-9-1 (10/88).
- **KENTUCKY**
405 KAR 16:100E, Preamble (KAR = Ky. Admin. Regs.) (5/82).
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**
10 CSR 40-3.040 (CSR = Code of State Regulations) (2/88).
- **MONTANA**
Mont. Admin. R. 26.4.504 (4/80).
Mont. Admin. R. 26.4.642 (4/80).
Mont. Admin. R. 26.4.1818 (4/75).
- **NEW MEXICO**
State of N. Mex. (Proposed) Surface Mining Regs., Part 20, Sec. 20-49 (5/80).
- **NORTH DAKOTA**
N.D. Cent. Code, Sec. 38-14.1-24 (7/84).
N.D. Admin. Code, Sec. 69-05.2-16-09 (10/86).
N.D. Admin. Code, Sec. 69-05.2-16-12 (8/80).
N.D. Admin. Code, Sec. 89-04-09-01 (3/80).
- **OHIO**
Ohio Admin. Code, Sec. 1501:13-9-04 (12/88).
- **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).



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

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**

State Program Submission, Prepared by the Railroad Comm. of Tex., Sec. 051.07.04.347 (2/80).

○ **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 Pollution Control Laws Va. Code Ann., title 62.1, Preamble (3/80).

State Water Pollution Control Laws Va. Code Ann., Secs. 62.1-104, 62.1-104.1, 62.1-105 through 62.1-115 (3/80).

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

Va. Coal Surface Mining Reclamation Regs., Program Amendments, Sec. 480-03-19.816.49 (11/86).

Virginia Technical Handbook, Part II, Drainage Control Design Standards (12/81).

○ **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).