

order to “properly ensure protection of health and safety of all persons as well as the protection of the environment.” 48 FR 43994–44000 (September 26, 1983).

The criteria for approving proposed State program amendments are that they be no less effective than the Federal rule in meeting the requirements of SMCRA. We recognize that, since the regulations require the identification of potentially hazardous conditions, not conducting inspections/examinations where there is no potential for hazardous conditions is no less effective than conducting such inspections/examinations. The issue then, in deciding whether or not these two amendments can be approved, is whether or not there is a reasonable potential for hazardous conditions in the limited exemptions provided for in the proposals.

The issues related to impoundment inspection/examination requirements raised by these two proposals are not new. OSM has previously addressed the applicability of the impoundment inspection/examination requirements, particularly where there is no embankment, in ways with some relevance to the decisions on these two proposals.

In 1987, OSM issued Directive TSR–2, which states “If an impoundment is constructed without an embankment, OSMRE policy will exempt these impoundments from the quarterly examination requirement [now 30 CFR 816.49(a)(12)] since there is no embankment to examine for structural weaknesses or other hazardous conditions.” The Directive goes on to state that the decision as to which structures are exempt should be made on a case-by-case basis by the regulatory authority during the permitting process.

In September 1990, guidance was developed by the Technical Assistance Division of OSM’s Eastern Field Operations Office specifically to assist Illinois in developing a limited exemption from the requirements of current 30 CFR 816.49(a)(11). This 1990 guidance addressed incised impoundments as well as impoundments which do not facilitate mining or reclamation and, under certain conditions, small non-hazardous impoundments with embankments. For incised impoundments, that guidance stated they should not equate to building an embankment-type dam and, for those with hydraulic gradients, there needs to be a demonstration by the operator that the impoundment poses no risk. For impoundments that don’t facilitate mining or reclamation, there should be a showing that no drainage entering the impoundment would be

from a disturbed area and the exiting drainage would not enter an impoundment that facilitates mining.

This guidance was referenced in the December 1991 **Federal Register** Notice approving Illinois’ exemption for impounding structures, including those with embankments, designed for a water elevation not more than 5 feet above the upstream toe of the structure and with a storage volume of less than 20 acre-feet. To obtain, the exemption requires a certified engineer’s report describing the hazard potential of the structure. The 1990 guidance was also relied on when OSM approved a proposed amendment to Indiana’s program containing a similar limited exemption. In 1995, OSM issued Directive TSR–14, which is intended to promote the creation of wetlands, to supplement and enhance post-mining land use and address the perception that regulatory barriers prohibit such activities. The Directive notes that OSM’s regulations (including specific reference to the impoundment regulations at issue here) allow and encourage construction of wetlands that supplement and enhance fish and wildlife habitat. It goes on to state that OSM’s regulations provide three options to leave wetlands on completed mine sites; small depressions, fish and wildlife habitat, and impoundments. Thus, small depressions and fish and wildlife habitat are distinguished from impoundments and the inspection requirements that go with them.

Concerning small depressions, it also states that surface area and depth of water which would qualify as “small” are not defined by Federal rules. Therefore, “depressions may be of any size compatible with the postmining land use and must not pose a safety risk associated with potential failure of an impoundment.” It also states small depressions must be a dugout or basin as opposed to an embankment-type construction and that deep pits with steep sloping sides are not suitable small depressions for the purposes of wetland habitat. Regarding impoundments, it states that when the crest of a dam is reduced to the elevation necessary to only saturate the sediment to the extent necessary to sustain a wetland ecosystem and any possible safety issues have been eliminated, OSM would consider it a wetland constructed for wildlife enhancement rather than an impounding structure.

In 2000, OSM approved an amendment to the Colorado program waiving, for certain impoundments and in limited circumstances, the requirements for quarterly

impoundment examinations and allowing the annual inspection to be conducted by a qualified person other than an engineer. To qualify for the waiver, the impoundment must either be completely incised or must not exceed two acre-feet in capacity nor have embankments larger than five feet in height measured from the bottom of the channel. In approving this amendment, OSM relied in part on Directive TSR–2 and also referenced the 1991 Illinois decision discussed above.

In 2001, OSM’s Western region developed guidance for evaluation of small depressions under the Indian Lands program, which among other things, addressed the distinction between small depressions and impoundments.

We will now turn to the two exemptions Kentucky has proposed and discuss them separately. The proposed exemption from engineer inspection requirements to the State counterpart to 30 CFR 816.49(a)(11) has some overlap but does not match either the Illinois or Indiana approved exemptions.

Kentucky asserted in its letter dated August 10, 2000, that the proposed exemption is extremely limited and not available for impoundments that are sedimentation ponds, coal mine waste impoundments, or are otherwise intended to facilitate active mining. Since the impoundments subject to the exemption do not have embankments that could fail or present safety hazards or other environmental concerns, Kentucky does not see the need to require the impoundments be inspected or to have the certified reports prepared. There is some merit to that argument. Unfortunately, that validity of that argument does not extend as far as the exemption.

It is inappropriate to presume all incised impoundments, particularly larger impoundments or those in steeper slopes as occur in Eastern Kentucky, have no hazard potential. Even completely incised impoundments may pose a risk as discussed in OSM’s 1990 guidance to Illinois. For example, an incised impoundment could pose a risk if the impoundment contained a substantial amount of water and was built out of material that could fail (such as bulked spoil or natural material of deep colluvium or alluvium). Most of Kentucky’s coal mining operations are conducted in the mountainous region of Eastern Kentucky and not in Western Kentucky where the terrain is relatively flat and similar to the terrain in Illinois and Indiana. Another example is where the impoundment, which doesn’t facilitate active mining, is upstream of and drains into a sedimentation pond.