

In the mountainous area of Eastern Kentucky, such an impoundment could affect the performance of the downstream sedimentation pond. While Kentucky's proposed exemption allows for the possibility for inspections it does not require the demonstration of suitability for exemption from inspections prior to allowing the exemption.

It is not clear what is intended by the proposed amendment in relation to depressions left by backfilling and grading. Kentucky's guidelines for determining Approximate Original Contour (AOC) state all depressions, except small depressions, shall be eliminated (administrative record no. KY-1582). As noted above, OSM policy does not consider small depressions as impoundments and, therefore, no exemption is needed. Large depressions would be inconsistent with Kentucky's AOC guidance. It should be noted that Kentucky allows the construction of small depressions on backfilled areas under certain, limited circumstances and the regulations appear at 405 KAR 16/18:190 section 2(5)(a)-(e).

Accordingly, OSM is not approving Kentucky's proposed regulations at 16/18:100 section 1(9)(c) because they are less effective than the Federal regulations at 30 CFR 816/817.49(a)(11). However, this action should not be construed as applying those Federal inspection requirements to small depressions left or incisions made to facilitate construction of wetlands as a post-mining land use consistent with OSM's Directive TSR-14.

The second exemption proposed by Kentucky is to subsection (10)(b) and allows an exemption from examinations of impoundments with no embankment structure that are completely incised or created by a depression left by backfilling and grading but not meeting MSHA requirements set forth at 30 CFR 77.216 or not meeting the Class B and C classifications. The rationale for the change was because the impoundments are small, non-hazardous impoundments without embankment structures. (See Kentucky's letter dated August 10, 2000).

This is an exemption from the same examination requirement addressed in OSM Directive TSR-2 discussed above. The Colorado exemption discussed above also addressed this requirement. However, it also included small embankments and contained a rigorous case-by-case protocol to qualify for the exemption.

We concur in the rationale for this amendment since it is consistent with the rationale contained in Directive TSR-2. Our one concern with this

proposal is that it does not address how determinations will be made on which impoundments qualify for the exemption. Directive TSR-2 states that the decision on which impoundments are exempt should be made on a case-by-case basis. We anticipate that in applying this exemption, Kentucky will consider, on a case-by-case basis, whether a particular structure meets the limitations of the exemption. That will include a determination that the impoundment does not meet the Class B or C impoundment hazard criteria.

Based on the above discussion, the Director finds that Kentucky's proposed rule at 405 KAR 16/18:100 section 1(10)(b) is not inconsistent with the Federal regulations at 30 CFR 816/817.49(a)(12) and we are approving the revision to the extent that it is implemented and managed in accordance with the provisions of OSM Directive TSR-2. Again, we note that we do not consider small depressions in the backfill as impoundments at issue in this decision and that other depressions should have been eliminated under Kentucky's AOC guidance.

3. *405 KAR 16/18:160*. At section 1(3), Kentucky is requiring that an impounding structure constructed of coal mine waste or intended to impound coal mine waste not be retained permanently as part of the approved postmining land use. Kentucky is also changing "coal processing waste" to "coal mine waste" in this and subsequent sections. We find that Kentucky's proposed regulations are no less effective than the Federal regulations at 30 CFR 816/817.84(b)(1), which prohibit the permanent retention of such structures. We also find Kentucky's change from the term "coal processing waste" to "coal mine waste" is consistent with the Federal rules at 30 CFR 816/817.81 *et seq.*, which use the term "coal mine waste."

At section 2(2), Kentucky is proposing to require that diversions be designed to carry the peak runoff from a 100-year, 6-hour precipitation event. Twenty-four hours may be used in lieu of six hours for the duration of the 100-year design precipitation event. The current regulations require a 100-year, 24-hour event. We find that Kentucky's proposed regulations are no less effective than the Federal regulations at 30 CFR 816/817.84(b) and (d). Please refer to the discussion presented at section 2 above for 405 KAR 16/18:100 section 1(6).

At section 3(1)(b) 1 through 4, Kentucky is proposing requirements for closed conduit principal spillways for impounding structures with a drainage area of 10 square miles or less without

open channel emergency spillways. The impounding structure must have sufficient storage capacity to store the entire runoff from the probable maximum precipitation event while maintaining the required freeboard and disregarding flow through the principal spillway. In general, the spillway requirements ensure passing routed freeboard hydrograph peak discharges without clogging. The Federal rules at 30 CFR 816/817.49(a)(5) require that impoundments have adequate freeboard to resist overtopping by waves and by sudden increases in storage volume. The Kentucky rules also require that impounding structures maintain the required freeboard against overtopping. The Federal rules at 30 CFR 816/817.49(a)(9) also require that the spillways be designed and constructed to safely pass the applicable design precipitation event. Likewise, Kentucky requires that the conduit meet the probable maximum precipitation event and the impounding structure have sufficient storage capacity available to store the entire runoff from the probable maximum precipitation event, disregarding flow through the principal spillway. Additionally, Kentucky has specific requirements for spillways that are not specified in the rules. We find that Kentucky's proposed requirements are no less effective than the Federal regulations pertaining to freeboard and spillways at 30 CFR 816/817.49(a).

At section 3(1)(c), Kentucky is proposing that for impounding structures not meeting the criteria of 30 CFR 77.216(a), the maximum water elevation must be determined by the freeboard hydrograph criteria for the appropriate structure hazard classification under 405 KAR 7:040 section 5 and 401 KAR 4:030. The Federal regulations at 30 CFR 816/817.49(a)(5) require compliance with the criteria in the Minimum Emergency Spillway Hydrologic Criteria in TR-60. Kentucky's referenced regulations and the Kentucky regulations cross-reference to the Division of Water Engineering Memorandum No. 5 (2-1-75) achieve the same design precipitation values for the freeboard hydrograph criteria as does the Federal regulations. Therefore, based on Kentucky's referenced regulations and the Division of Water Engineering Memorandum No. 5, we find the proposed language at 3(1)(c) no less effective than 30 CFR 816/817.49(a)(5).