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MEMORANDUM

TO: DIANNE R. NIELSON, Director
Division of Oil, Gas and Mining

FROM: BARBARA W. ROBERTS
Assistant Attorney General

DATE: May 16, 1989

RE: Castle Gate NOV #89-31-1-2, 1 of 2.

You may remember our discussion last week about Castle Gate's request to hold an assessment conference prior to submittal of all information required by the Division for abatement. In response to Lowell's letter to Richard Allison dated May 12, 1989, Richard called me to dispute the Division's claim that Castle Gate must survey the sediment pond as a part of the required abatement for the above-referenced violation.

I explained to Richard that, if he was concerned with the abatement requirements, he could either submit the information and then dispute the necessity of doing so in the assessment conference or he could petition the Board for temporary relief.

I also explained that the reason the Division has given in the past for requiring a post-cleaning survey was to verify that the pond was cleaned to the "as-built" standard. Richard objected in that there is no rule requiring such a survey.

Since Richard was getting into the merits of the NOV dispute, I interrupted him and again explained that I, as Assessment Conference Officer, could not entertain a discussion

of the matter until the actual conference. We then ended our conversation.

Afterward, I looked up the rule that I assume was cited as having been violated: UMC 817.46(h). That rule requires that a sediment pond be cleaned out when sediment reaches 60% of the pond's capacity. Stepping briefly back into my role as legal advisor for the Division, I offer the following advice.

First, UMC 817.46(h) was specifically disapproved by OSM when Utah received primacy in 1981. 30 CFR 944.12(24). I went back to read the applicable Flannery decision to determine the reason for OSM's action and found that this particular rule was a "government concession" during the litigation, i.e. the Secretary suspended this rule apparently because he agreed with the industry that the 60% requirement would result in "excessive maintenance and construction costs." Flannery I, Round II, page 20. By affidavit, the government stated that "amendments will be proposed to the required frequency of sediment removal from sedimentation ponds." Ibid.

OSM did change the rule. In 30 CFR 817.46(c)(iii)(F), OSM requires the operator to "provide periodic sediment removal sufficient to maintain adequate volume for the design event." This clearly leaves with the operator the more flexible decision as to when to clean a particular pond so long as the design event can be accommodated.

The Division clearly has a problem in that the specific rule that I assume was relied upon is not available to the State. Since the initial disapproval by OSM was based upon OSM's concession that the 60% requirement was unreasonable, I believe that we have no basis upon which to enforce the cited rule.

It seems that, under the circumstances, that this NOV should be vacated. Let's discuss this with Lowell as soon as possible.

cc: Lowell P. Braxton

is not required by the EPA. The Heine affidavit, paragraph 4(j), suspends this regulation. It states that "[a]n amendment will be proposed to provide new design requirements for minimum sediment storage volume of sedimentation ponds."

30 C.F.R. § 816.46(c) & 817.46(c), 44 Fed. Reg. 15400 & 15426 (1979), requires a sedimentation pond to contain the capacity to detain water for a 24-hour period. The NCA alleges this necessitates doubling the capacity of sedimentation ponds required by the EPA. The NCA also objects to the OSM's method of calculation for reduction of detention time. The Heine affidavit, paragraph 4(k) states:

OSM will reconsider and repropose requirements for the theoretical detention time standard for water in sedimentation ponds, as well as measures which can be taken to reduce the theoretical detention time.

30 C.F.R. §§ 816.46(h) & 817.46(h), 44 Fed. Reg. 15400 § 15427 (1979), requires coal operators to clean out sedimentation ponds when sediment constitutes 60% of the sediment storage capacity. The NCA believes this requires excessive maintenance and construction costs by mandating the construction of ponds with unusable and excess sediment storage capacity. The Heine affidavit, paragraph 4(m) states: "Amendments will be proposed to the required frequency of sediment removal from sedimentation ponds."

IV. OTHER PERFORMANCE STANDARDS

1. Application of Reclamation Standards to Lands Approved for Alternate Use

Illinois presents several objections to the application of the Secretary's performance standards to approved,

control practices, singly or in combination. Sediment control methods include but are not limited to—

(1) Disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation as required in § 817.111(b);

(2) Stabilizing the backfilled material to promote a reduction of the rate and volume of runoff in accordance with the requirements of § 817.102;

(3) Retaining sediment within disturbed areas;

(4) Diverting runoff away from disturbed areas;

(5) Diverting runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion;

(6) Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland flow velocity, reduce runoff volume, or trap sediment;

(7) Treating with chemicals; and

(8) Treating mine drainage in underground sumps.

(44 FR 15422, Mar. 13, 1979, as amended at 48 FR 44781, Sept. 30, 1983)

§ 817.46 Hydrologic balance: Siltation structures.

(a) *Definitions.* For purposes of this section only:

(1) *Siltation structures* shall mean a sedimentation pond, a series of sedimentation ponds, or other treatment facility.

(2) *Disturbed area* shall not include those areas (i) in which the only underground mining activities include diversion ditches, siltation structures, or roads that are designed, constructed and maintained in accordance with this part; and (ii) for which the upstream area is not otherwise disturbed by the operator.

(3) *Other treatment facilities* means any chemical treatments, such as flocculation, or mechanical structures, such as clarifiers, that have a point-source discharge and that are utilized to prevent additional contribution of suspended solids to streamflow or runoff outside the permit area.

(b) *General requirements.* (1) Additional contributions of suspended

solids and sediment to streamflow or runoff outside the permit area shall be prevented to the extent possible using the best technology currently available.

(2) All surface drainage from the disturbed area shall be passed through a siltation structure before leaving the permit area, except as provided in paragraph (b)(5) or (e) of this section.

(3) Siltation structures for an area shall be constructed before beginning any underground mining activities in that area and, upon construction, shall be certified by a qualified registered professional engineer to be constructed as designed and as approved in the reclamation plan.

(4) Any siltation structure which impounds water shall be designed, constructed and maintained in accordance with § 817.49 of this chapter.

(5) Siltation structures shall be maintained until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated. In no case shall the structure be removed sooner than 2 years after the last augmented seeding.

(6) When the siltation structure is removed, the land on which the siltation structure was located shall be regraded and revegetated in accordance with the reclamation plan and §§ 817.111 through 817.116 of this chapter. Sedimentation ponds approved by the regulatory authority for retention as permanent impoundments may be exempted from this requirement.

(7) Any point-source discharge of water from underground workings to surface waters which does not meet the effluent limitations of § 817.42 shall be passed through a siltation structure before leaving the permit area.

(c) *Sedimentation ponds.* (1) Sedimentation ponds, when used, shall—

(i) Be used individually or in series;

(ii) Be located as near as possible to the disturbed area and out of perennial streams unless approved by the regulatory authority; and

(iii) Be designed, constructed, and maintained to—

(A) Provide adequate sediment storage volume;

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(B) Provide adequate detention time to allow the effluent from the ponds to meet State and Federal effluent limitations;

(C) Contain or treat the 10-year, 24-hour precipitation event ("design event") unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions and on a demonstration by the operator that the effluent limitations of § 817.42 will be met;

(D) Provide a nonclogging dewatering device adequate to maintain the detention time required under paragraph (c)(1)(iii)(B) of this section;

(E) Minimize, to the extent possible, short circuiting;

(F) Provide periodic sediment removal sufficient to maintain adequate volume for the design event;

(G) Ensure against excessive settlement;

(H) Be free of sod, large roots, frozen soil, and acid- or toxic-forming coal-processing waste; and

(I) Be compacted properly.

(2)(i) Sedimentation ponds meeting the size or other qualifying criteria of § 776.216(a) of this title shall comply with all the requirements of that section, and shall have principal and emergency spillways that in combination will safely pass a 100-year, 6-hour precipitation event.

(ii) Sedimentation ponds not meeting the size or other qualifying criteria of § 77.216(a) of this title shall provide a combination of principal and emergency spillways that will safely discharge a 25-year, 6-hour precipitation event. Such ponds may use a single spillway if the spillway (A) is an open channel of nonerodable construction and capable of maintaining sustained flows; and (B) is not earth- or grass-lined.

(d) *Other treatment facilities.* (1) Other treatment facilities shall be designed to treat the 10-year, 24-hour precipitation event unless a lesser design event is approved by the regulatory authority based on terrain, climate, other site-specific conditions and a demonstration by the operator that the effluent limitations of § 817.42 will met.

(2) Other treatment facilities shall be designed in accordance with the applicable requirements of paragraph (c) of this section.

(e) *Exemptions.* Exemptions to the requirements of this section may be granted if—

(1) The disturbed drainage area within the total disturbed area is small; and

(2) The operator demonstrates that siltation structures and alternate sediment control measures are not necessary for drainage from the disturbed drainage areas to meet the effluent limitations under § 817.42 and the applicable State and Federal water quality standards for the receiving waters.

[48 FR 44051, Sept. 26, 1983]

EDITORIAL NOTE: At 51 FR 41962, Nov. 20, 1986, paragraph (b)(2) of § 817.46 was suspended.

§ 817.47 Hydrologic balance: Discharge structures.

Discharge from sedimentation ponds, permanent and temporary impoundments, coal processing waste dams and embankments, and diversions shall be controlled, by energy dissipators, riprap channels, and other devices, where necessary, to reduce erosion, to prevent deepening or enlargement of stream channels, and to minimize disturbance of the hydrologic balance. Discharge structures shall be designed according to standard engineering design procedures.

§ 817.49 Impoundments.

(a) *General requirements.* The requirements of this paragraph apply to both temporary and permanent impoundments.

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

(2) *Design certification.* The design of impoundments shall be certified in accordance with § 784.16(a) of this chapter as designed to meet the requirements of this part using current,

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