

STATE OF WEST VIRGINIA

**FULL PERFORMANCE EVALUATION OF THE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF MINING AND RECLAMATION**

**Lack of Accountability for Assessment
Officers has Created Inefficiencies in the Due
Process Procedure and has Resulted in Loss of
Penalty Revenue to the State**

**OFFICE OF LEGISLATIVE AUDITOR
Performance Evaluation and Research Division
Building 1, Room W-314
State Capitol Complex**

**CHARLESTON, WEST VIRGINIA 25305
(304) 347-4890**

June 2002

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Executive Summary

Issue 1: The Lack of Accountability for Assessment Officers has Created Inefficiencies in the Due Process Procedure and has Resulted in Loss of Penalty Revenue to the State.

Mining operations within the state are inspected by DEP to assure compliance with the West Virginia Surface Coal Mining and Reclamation Act. Violations by coal companies may be assessed civil penalties. DEP inspectors provide reports of violations and proposed penalties to one of two Assessment Officers, who are employees of DEP, to review the assessment of the DEP Inspector for accuracy and fairness of the violation and/or penalty amount. After the Assessment Officer reviews the inspection report he may concur with the Inspector's penalty or modify it and then he issues the proposed penalty assessment to the coal company. Under state law (§22-3-17), coal companies may request an informal conference before an Assessment Officer to contest either the penalty or violation. **The Legislative Auditor found significant inefficiencies and loss of revenue to the state because of the following items:**

1. Over the last four and a half years, 72% of all assessments issued to coal companies resulted in a request for an informal conference, totaling 3,800 conferences. In nearly 77% of these conferences, Assessment Officers reduced assessment amounts by 35% to 40%, or by \$1.6 million over the last five years.
2. When assessment amounts are reduced, Assessment Officers provide little or no documentation to justify or explain the reduction. However, legislative rules (38CSR20.6.c) requires the Assessment Officer to document in the file the reasons for penalty adjustments.
3. It is likely that so many conferences are requested because it is apparent to coal companies that Assessment Officers invariably reduce the penalty significantly.
4. Hundreds of conferences are held for coal companies who eventually do not pay the penalty amounts due to bankruptcy, even after they have been reduced. These hearings cost the state thousands of dollars in order to have an Assessment Officer and Inspectors present at the meetings.

Causes and Effects for Inefficiencies in the Assessment Process

During the review, the Legislative Auditor's Office identified the following causes as attributing to inefficiencies in the assessment process:

1. Under the law, the Assessment Officer is an employee of DEP, **not an independent adjudicator**. However, Assessment Officers generally make their decisions at the end of conferences before DEP officials have opportunity to review the decision and

have it issued as the official position of DEP. By rule (38 CSR2 20.6.e), the Assessment Officer has up to 30 days to render a decision after the conference is held. It is apparent from the Legislative Auditor's review that DEP inspectors and officials do not always agree with or understand the reason for Assessment Officers' decisions.

2. The penalty matrix established by rule has broad leeway which allows substantial freedom and variation in assessing penalties.
3. Assessment officers indicate that they sometimes change assessments to compensate for bias on the part of the inspectors. Inspectors believe that assessment officers change assessments because they are biased toward the coal operators.

Furthermore, the causes stated above have the following effects:

1. A loss of penalty revenue due the State likely in the amount of several hundred thousand dollars. It is clear that decisions of the Assessment Officers are not always agreed with by DEP and if their decisions were first reviewed by DEP prior to a final decision, many of the reductions would not have occurred.
2. An opportunity cost to the State in that Inspectors must attend informal conferences instead of conducting inspections of mining facilities.

Recommendations:

1. *The Department of Environment Protection should enforce the rule requiring Assessment Officers to have on file documentation explaining the reason for adjustments to penalty assessments.*
2. *The Department of Environment Protection should require Assessment Officers to withhold their decisions until sometime after the conference, during which DEP officials can have opportunity to review and approve the decision before it is sent to the operators.*
3. *The DEP should consider making coal operators prepay proposed assessments prior to having an informal conference.*

Review Objective, Scope and Methodology

This Full Performance Evaluation of the West Virginia Department of Environmental Protection is required and authorized by the West Virginia Sunset Law, Chapter 4, Article 10 of the West Virginia *Code*, as amended. The mission of the DEP is to use all available resources to protect and restore West Virginia's environment in concert with the needs of present and future generations.

The **Objective** of this review was to determine if the Office of Mining and Reclamation is assessing civil penalties in an effective and efficient manner. The **Scope** of this evaluation covers the period from January 1997 to June 2001. The **Methodology** included but was not limited to interviews, conversations and correspondence with the Department of Environmental Protection and the Department of Mining and Reclamation. Data received from the Department included: 1) A list of all delinquent civil penalties 2) A list of all penalties assessed from January 1997 to June 2001; and 3) A list of all operators requesting an informal assessment conference, the initial penalty amount as well as the revised penalty amount. The review also included a sample of 378 assessment conference worksheets; annual reports from FY 1994 to FY 2001; and Legislative Rule, Title 38, Series 2. Every aspect of this review complied with Generally Accepted Government Auditing Standards (GAGAS).

Issue 1: The Lack of Accountability for Assessment Officers has Created Inefficiencies in the Due Process Procedure and has Resulted in Loss of Penalty Revenue to the State.

Mining operations within the state are inspected by DEP to assure compliance with the West Virginia Surface Coal Mining and Reclamation Act. Violations by coal companies may be assessed civil penalties. DEP inspectors provide reports of violations and proposed penalties to one of two Assessment Officers, who are employees of DEP, to review the assessment of the DEP Inspector for accuracy and fairness of the violation and/or penalty amount. After the Assessment Officer reviews the inspection report he may concur with the Inspector's penalty or modify it and then he issues the proposed penalty assessment to the coal company. Under state law (§22-3-17), coal companies may request an informal conference before an Assessment Officer to contest either the penalty or violation. **The Legislative Auditor found significant inefficiencies and loss of revenue to the state because of the following items:**

1. Over the last four and a half years, 72% of all assessments issued to coal companies resulted in a request for an informal conference, totaling 3,800 conferences. In nearly 77% of these conferences, Assessment Officers reduced assessment amounts by 36% to 40%, or by \$1.6 million over the last five years. **Assessment Officers reviewed and issued the penalties and then lowered their own penalty assessments in conference despite the fact that the violations were rarely disputed and companies generally do not provide any additional information to what Inspectors provided. In fact, in many cases the Assessment Officer actually increased the Inspectors' proposed penalty amounts, issued it to the coal company and then lowered it in conference closer to (or back to) the Inspector's original proposed penalty.**
2. When assessment amounts are reduced, Assessment Officers provide little or no documentation to justify or explain the reduction. However, legislative rules (38CSR20.6.c) requires the Assessment Officer to document in the file the reasons for penalty adjustments.
3. It is likely that so many conferences are requested because it is apparent to coal companies that Assessment Officers invariably reduce the penalty significantly.
4. Hundreds of conferences are held for coal companies who eventually do not pay the penalty amounts due to bankruptcy, even after they have been reduced. These hearings cost the state thousands of dollars in order to have an Assessment Officer and Inspectors present at the meetings.

Causes and Effects for Inefficiencies in the Assessment Process

During the review, the Legislative Auditor's Office identified the following causes as attributing to inefficiencies in the assessment process:

1. Under the law, the Assessment Officer is an employee of DEP, **not an independent adjudicator**. However, Assessment Officers generally make their decisions at the end of conferences before DEP officials have opportunity to review the decision and have it issued as the official position of DEP. By rule (38 CSR2 20.6.e), the Assessment Officer has up to 30 days to render a decision after the conference is held. It is apparent from the Legislative Auditor's review that DEP inspectors and officials do not always agree with or understand the reason for Assessment Officers' decisions.
2. The penalty matrix established by rule has broad leeway which allows substantial freedom and variation in assessing penalties.
3. Assessment officers indicate that they sometimes change assessments to compensate for bias on the part of the inspectors. Inspectors believe that assessment officers change assessments because they are biased toward the coal operators. Assessment Officers do not have superior expertise or training than Inspectors and, in fact, the violations are rarely disputed. It may also be a possibility that assessment officers make unnecessary changes to give the impression that their function is needed. Therefore, subjectivity, bias or job security can be a significant factor in the process.

Furthermore, the causes stated above have the following effects:

1. A loss of penalty revenue due the State likely in the amount of several hundred thousand dollars. It is clear that decisions of the Assessment Officers are not always agreed with by DEP and if their decisions were first reviewed by DEP prior to a final decision, many of the reductions would not have occurred.
2. An opportunity cost to the State in that Inspectors must attend informal conferences instead of conducting inspections of mining facilities.

The Assessment Process

According to WV *Code §22-3-17(c)*, anyone in violation of the Surface Mining and Reclamation act may be assessed a civil penalty. Determinations of civil penalty amounts take into consideration the following factors:

1. the operator's history of previous violations at the particular surface-mining operation;
2. the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public;
3. whether the operator was negligent; and,
4. the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of the violation.

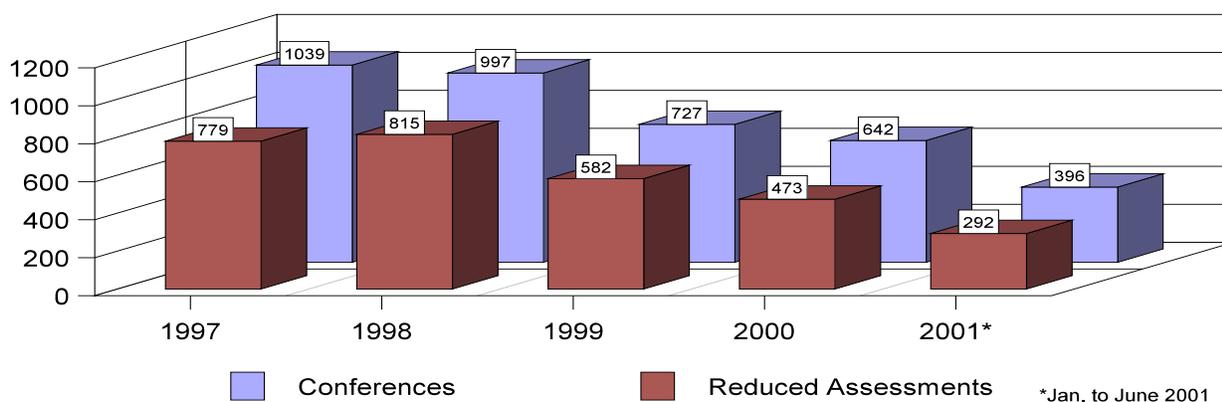
The process as it currently exists in the Office of Mining Reclamation (OMR), is for the inspector to conduct inspections on mining facilities. When the inspector notes a violation, he then documents the facts of the violation, and makes a recommendation to the assessment officer on a proposed penalty amount. The assessment officer then reviews the assessment before it is sent to the company to ensure that it is in accordance with the penalty matrix and that it is consistent with the manner in which other inspectors are assessing the same violation. In a sample of 378 violations taken by the Legislative Auditor’s Office, approximately 30% of recommended assessments were changed by the assessment officer. Nearly all were increased by the assessment officer prior to being sent to the company.

According to §22-3-17(d)(1), “ *if the operator wishes to contest either the **amount** of the penalty or the **fact** of violation, an informal conference with the assessment officer may be requested.*” However, often the fact of the violation is not in question. Of the 378 penalty assessments sampled, 17% (59 penalties) were vacated by the assessment officer. This is consistent with the population of conferences where 15% (570) of all conferences result in the penalty being vacated. **However, of those 59 sampled penalties which were vacated, 49 (83%) of those upheld the fact of the violation of but vacated the penalty without documentation.**

Between January 1997 and June 2001, the OMR conducted nearly 850 conferences a year, giving a average reduction in penalty assessment of \$412 to 77% of permittees requesting a conference. As was previously stated, 30% of the time assessment officers increase penalties prior to sending them to the company. Only a small percentage of the time (10%) are these penalties reduced to the amount suggested by the inspector. The rest of the time, assessments are reduced to a lower amount than was recommended by the inspector and assessment officer. Figure 1 shows the number of conferences by year and the number receiving a reduction in the penalty amount.

FIGURE 1

Conferences & Assessments Resulting in a Reduced Penalty



Lack of Oversight of Assessment Officers

During an assessment conference, the assessment officers record on a form the original penalty assessment score for each factor as well as the new penalty assessment score. **However, typically little documentation is provided on the form to justify the actions of the assessment officer.** Typically, the only comments contained on the assessment conference sheets are general comments which influenced the assessment officer. However, there is no explanation as to why the original assessment was incorrect or why it should be changed. Therefore, the Legislative Auditor’s Office was unable to determine the exact reason that penalties were decreased.

Until last year, the assessment officers acted as an independent unit within the DEP and reported directly to the Secretary. However, last year the assessment officers were placed under the supervision of the OMR. The supervisor of the assessment officer is stationed in Nitro while the assessment officers are stationed in Oak Hill. Also, the supervisor of the assessment officers has never attended an assessment conference while acting as their supervisor. Therefore, the DEP was unable to explain the exact reasons for reduction of penalty amounts.

Broad Leeway of Penalty Guidelines Leads to Wide Variation of Decisions

Assessment officers receive no more additional training in making assessments than do inspectors. Therefore, assessment officers are not making a more qualified opinion, they are merely offering an additional opinion. This is complicated by the broad interpretation of the penalty system. For each of the penalty assessment mechanisms described above (operator good faith, violation history, operator negligence, and seriousness of the violation) a numerical score (typically 0 to 8 see Table 1) is assigned and a certain dollar amount is attached to each numerical score (for example \$100 for each previous violation in history). Clearly the assessment process needs to be subjective enough that it is applicable to all situations and can allow for clear exceptions or unusual circumstances. Following is an excerpt from the penalty guidelines contained in 38 CSR. This portion is used to determine the degree of operator negligence involved in a violation.

Table 1 20.7.c. Operator Negligence.	
Score Assigned	Explanation of Score
0	This violation is considered beyond the control of the operator or his employees and no negligence can be attributed to this violation.
1-2	This violation was a result of an oversight on the part of the operator and may have been avoided if more conscientious effort and/or reasonable care were given.
3-4	This violation was obvious and/or no action was taken by the operator to prevent the problem.
5-6	The operator failed to adequately respond to previous written instructions of the inspector to prevent this event.
7-8	The operator had been officially notified, in writing, of this problem and did not make any effort at correcting the problem.

In terms of penalty amounts, a score of 3 in seriousness would result in a penalty amount of \$350 while a score of 6 would result in a penalty amount of \$725.

Inspector or Assessment Officer Bias

Subjectivity by itself would not result in the volume of changes which has been demonstrated from year to year. Another factor which can influence penalty assessments is bias on the part of either the inspector or the assessment officer. According to the assessment officers, inspectors who are in the field and working very closely with operators may develop a bias against those individuals or companies and it is the job of the assessment officer to compensate for this bias. However, according to one inspector supervisor, the assessment officers are biased and give unwarranted discounts to coal operators. Without proper oversight and without proper documentation, it cannot be determine if bias may be affecting penalty assessments. **Given the fact that 77% of all assessment conferences lead to a reduction in the penalty amount, it appears that either inspectors are incapable of making an accurate initial assessment or assessment officers are not accurately assessing penalties.** It may also be a possibility that Assessment Officers change Inspectors' proposed penalty assessments simply to give the impression that they are needed and they add value to the process, when in fact the changes may not be necessary or warranted.

The Loss of Revenue to the State is Substantial

If the initial assessment made by the inspector is accurate, then the amount that the penalty has been reduced by the Assessment Officer during the conference is money which should have actually been collected by the State. The supervisor of assessment officers indicated that coal companies do not generally provide any additional information at conference than what the Assessment Officer already has, the Legislative Auditor's Office observed five conferences and also witnessed no added information being provided by operators, and the Assessment Officer does not document the reasons for his decision which would include additional operator information. Given that there is no documentation associated with the reductions to assessments, that assessments were reviewed by the Assessment Officer prior to being sent to the company, and that little added information is provided at conferences by operators, the Legislative Auditor concludes that the initial proposed penalty was likely adequate in most of these conferences. Therefore, the loss to the state may be several hundred thousand dollars. Between January 1997 and June 2001, assessment officers held an average of 845 conferences a year, reducing the average penalty of \$1,194 by \$412. Table 2 shows the initial amount assessed and reduced for all permittees requesting a conference by year for January 1997 to June 2001.

Table 2			
Assessed Versus Reduced Assessments by Year*			
Year	Initial Assessment	Reduced Assessment	Difference
1997	\$1,300,908	\$839,803	\$461,105
1998	\$1,207,231	\$769,426	\$437,805
1999	\$866,226	\$540,254	\$325,972
2000	\$737,550	\$493,515	\$244,035
2001†	\$471,452	\$332,309	\$139,143
Total	\$4,583,367	\$2,975,307	\$1,608,060
* Source: DMR			
† January 1997 to June 2001			

System Improvements

In addition to requiring documentation for assessment reductions, there are two other ways to immediately improve the assessment mechanism. First, according to 38 CSR2 20.6.e, the assessment officer has up to 30 days in which to render his decision after an assessment conference. However, currently assessment officers make their decisions at the time of the meeting and issue the revised assessment to the operator at the assessment conference. This provides no time for DEP to review and approve the assessment. By requiring assessment officers to delay final assessment prior to notifying the company, the DEP could review documentation from assessment conferences to determine not only if changes were warranted but also where deficiencies may exist in the current process. Deficiencies which could be addressed in this manner include additional training or modification of the penalty matrix.

Second, according to WV Code §22-3-17(d)(1)(B), “When a formal hearing is requested (an appeal to the Surface Mine Board), the amount of the proposed penalty assessment shall be forwarded to the director for placement in an escrow account.” This provision helps to deter unfounded appeals to the Surface Mine Board by imposing an immediate cost to operators who wish to make a formal appeal. **This same provision could be applied to the informal conference process. This could reduce the number of assessment conferences because approximately 8% of companies requesting a conference (282) do not pay the penalty amount because they eventually file for bankruptcy. By prepaying the penalty, these conferences may be eliminated.**

Conclusion

Although an appeal process is inherent in any regulatory environment, it is clear that the informal conference process is inefficient. The Assessment Officer is spending half his time reviewing Inspectors’ reports and approving or modifying Inspectors’ proposed penalty assessments,

only to reduce his own proposed assessment at 77% of the conferences. This high rate of reductions has encouraged a high rate (72%) of assessments resulting in requests for informal conferences. These reductions would likely be eliminated or reduced if Assessment Officers comply with the rule to document their decisions and to withhold decisions until DEP has reviewed their decisions. Furthermore, requiring prepayment of penalty will discourage frivolous conferences or conferences by operators who are likely unable to pay the penalty anyway. DEP efficiency would be enhanced by reducing the need for inspectors attending conferences instead of performing valuable inspections. Revenue due the state would be protected. Also, reducing the number of unnecessary conferences may reduce the need for two assessment officers.

Recommendations:

1. *The Department of Environment Protection should enforce the rule requiring Assessment Officers to have on file documentation explaining the reason for adjustments to penalty assessments.*
2. *The Department of Environment Protection should require Assessment Officers to withhold their decisions until sometime after the conference, during which DEP officials can have opportunity to review and approve the decision before it is sent to the operators.*
3. *The DEP should consider making coal operators prepay proposed assessments prior to having an informal conference.*