

STATE OF WEST VIRGINIA
PERFORMANCE AUDIT
OF THE
**DIVISION OF ENVIRONMENTAL
PROTECTION**

AML Not Following Priority System

OMR Obtains Performance Bonds

OMR Collects 75% of Outstanding Civil
Penalties

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January 6, 1996

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Gentlemen:

Pursuant to the West Virginia Sunset Law, we are transmitting this Performance Audit of the Division of Environmental Protection, which will be reported to the Joint Committee on Government Operations on Saturday, January 6, 1996. The issues covered herein are "AML Not Following Priority System, OMR Obtains Performance Bonds, and OMR Collects 75% of Outstanding Civil Penalties."

Sincerely,

A handwritten signature in cursive script that reads "Antonio E. Jones".

Antonio E. Jones

AEJ/wsc

Enclosure

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Division of Environmental Protection

Executive Summary

ISSUE AREA 1: THE OFFICE OF ABANDONED MINE LANDS AND RECLAMATION DOES NOT FOLLOW ITS PRIORITY SYSTEM WHEN SELECTING RECLAMATION PROJECTS.

The state's Abandoned Mine Lands Program (AMLP) was created pursuant to Public Law 95-87, the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) and *West Virginia Code* §22-2-1, et seq. The purpose of the program is to reclaim areas impacted by mining activities which were abandoned prior to enactment of the federal act in 1977. Thirty-five of the State's fifty-five counties contain areas impacted by mining activities eligible for reclamation under the abandoned mine lands program

To date, the Office of Abandoned Mine Lands and Reclamation has identified 3422 Priority 1 and Priority 2 mining sites with problems that are eligible for reclamation under the abandoned mine lands program. Of the 3422 sites identified by AML, 75% of the Priority 1 sites have been reclaimed. **However, there are still 248 Priority 1 sites that have not been reclaimed.** In the worst cases these problems present a threat to the public of injury, death or property damage. The costs associated with the inventory of problem sites currently exceeds \$735 million and is continually increasing as AML receives approximately 250 new complaints yearly.¹ In order to address these problems, the Office receives between \$25 and \$30 million annually to address such sites. Since it is not possible to address all of the problem sites at once, the Office is required to prioritize each site in terms of the degree of risk each site poses to public health and safety. Under the priority ranking system, more dangerous sites are given higher priority rankings. The ranking system should be used as a tool for selecting sites given limited resources available. **However, in more recent years, AML has not followed the priority system when selecting projects for reclamation. As a result, projects determined to be the most significant threat to public health and safety are left in the environment while sites deemed to be lower in priority are selected for reclamation.**

ISSUE AREA 2: OMR OBTAINS PERFORMANCE BONDS FROM PERMIT HOLDERS.

OMR obtains performance bonds from permittees to cover the costs of unreclaimed mine lands. Therefore, the audit examined whether the Office had obtained performance bonds for all permittees. All but two of the permits examined had performance bonds in place. The two

¹ Of the \$735 million in costs for Priority 1 and 2 projects, \$185 million of the projects have been completed, leaving approximately \$550 million in pending projects. However, a significant number of AML-related problems have yet to be realized and can be expected to manifest in the future as more abandoned mine facilities, many of which have not yet been discovered, begin to deteriorate.

permits that had no performance bond were for quarries and are not required to have a performance bond in place. Fourteen permits, or 20% had expired as of September, 1995. However, 12 of these permits were in phase 1 or 2 reclamation and are not required to get a permit renewal. None of the permits sampled were forfeited. However, forfeitures have occurred throughout the history of the program.

ISSUE AREA 3: OMR COLLECTS 75% OF OUTSTANDING CIVIL PENALTIES.

The evaluation examined whether OMR's collected civil penalties at a reasonable rate. Civil penalties are the monetary fines assessed as a result of permit violations. Therefore, civil penalties are an important enforcement mechanism that provide permittees an incentive to abide by the provisions of their permit. If civil penalties are not being collected at an acceptable rate, then the penalty will not have the deterrent effect envisioned for this enforcement mechanism. Also, civil penalties are a major source of funding for the Special Reclamation Fund.

The civil penalty collection rate was 75% (77 out of 102). The total amount of delinquent civil penalties came to \$32,268.43. The amount of civil penalties collected was \$61,202.43 or **a monetary collection rate of approximately 66%**. Also, out of the 25 permits that had delinquent civil penalties, two were involved in Chapter 11 bankruptcy.

Division of Environmental Protection

Audit Objective, Scope and Methodology

Audit Objective, Scope and Methodology

This performance audit of the Division of Environmental Protection is conducted in accordance with the West Virginia Sunset Law, *West Virginia Code*, Chapter 4, Article 10. The objectives of a performance audit are to determine:

- whether the Division is acquiring, protecting and using its resources economically and efficiently;
- whether the Division has complied with laws and regulations;
- whether the desired results and benefits established by the Legislature are being achieved; and
- the effectiveness of the Division's program and functions.

The performance audit will assist the Joint Committee on Government Operations in making one of three recommendations:

- the department, agency or board be terminated as scheduled;
- the department, agency or board be continued and reestablished;
- the department, agency or board be continued and reestablished, but the statutes governing it be amended in specific ways to correct ineffective or discriminatory practices or procedures, burdensome rules and regulations, lack of protection of the public interest, overlapping of jurisdiction with other governmental entities, unwarranted exercise of authority either in law or in fact or any other deficiencies.

The Division is composed of seven offices which include: Abandoned Mine Lands; Mining and Reclamation; Water Resources; Waste Management; Air Quality; Oil and Gas; and Administration. Each office in the organization is distinctive and implements environmental protection programs related to its respective area. As a result, each office was treated as a semi-autonomous unit during the performance review. The performance audit covers the period of July 1, 1992 through January 1996. However, the review may include events prior to this period when necessary. The performance audit included: a planning process; identification of the agency's mission; development of a risk assessment to identify factors that may impede accomplishment of the Division's mission; and the development of audit steps to examine whether the risks were realized. Information collected in the performance audit was obtained through interviews, inspections of facilities and operations, and a review of the Division's records.

MISSION OF THE OFFICE OF ABANDONED MINE LANDS AND RECLAMATION

...to restore land and water resources impacted by current and past coal mining practices and left unabated or unreclaimed in order to protect public health, safety and general welfare, including minimizing the potential for significant property damage and minimizing adverse environmental impacts.

Pursuant to achieving its mission, the Office of Abandoned Mine Lands and Reclamation (AML) implements the Governor's stream restoration program, the special reclamation program and the state abandoned mine lands program.

Stream Restoration Program

The stream restoration program was created to enhance the ecological integrity of West Virginia's streams and water resources affected by coal mining or acid mine drainage. The program consists of a Steering Committee made up of representatives of the coal industry, environmentalists, state government representatives and federal government representatives. Also, a Technical Subcommittee was created in 1992 to collect, analyze and coordinate data. Funding for the program is from a portion of grant revenue available to the state abandoned mine lands program and other state and federal grants that may be available for water treatment.² The Committees have developed a priority list of the state's watersheds significantly impacted by acid mine drainage that require abatement action.

Special Reclamation Bond Forfeiture Program

The Special Reclamation Bond Forfeiture Program, established under the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), is a self-supporting program administered under AML to reclaim lands. The program applies to mining operators regulated under the Surface Coal Mining and Reclamation Act (WVC §22-3-1 et seq.) and the Surface Mining and Reclamation of Minerals Other Than Coal (WVC §22-4-1 et seq.). Under the provisions of the program, operators are required to obtain a permit, post a performance bond and develop and adhere to reclamation plans.³ Funding for the program is derived from three primary sources: (1) performance bonds forfeited by permittees that failed to reclaim their site in accordance with permit requirements; (2) a three cents per ton fee on coal production; and (3) revenue from civil penalties assessed on companies that did not comply with their permit

² *West Virginia Code* §22-2-4, authorizes the Director of the Division of Environmental Protection to retain up to 10% of the revenue made available to the Abandoned Mine Lands Fund annually for allocation to the Acid Mine Drainage Abatement Fund which helps fund projects recommended by the Governor's Stream Restoration Program.

³ Under current law, non-coal mining operations such as limestone, sandstone and sand mining operations are exempt from provisions requiring reclamation and bonding.

conditions or committed some other violations of state and/or federal mining laws.

TABLE 1				
SPECIAL RECLAMATION FUND				
REVENUE COLLECTED BY SOURCES				
(FY 1992-1994)				
Year	Revenue Source	Amount Due	Amount Collected	Collection Rate
1992	Bond Forfeitures	\$2,953,710	\$1,839,539	62%
	Civil Penalties	-----	\$1,756,462	-----
	Coal Tax (@ .03/ton)	\$5,016,209	\$4,752,759	95%
	Total		\$8,348,760	
Coal tax based on 167,206,979 tons of coal produced in FY92.				
1993	Bond Forfeitures	\$2,847,001	\$2,332,332	82%
	Civil Penalties	\$8,822,988	\$2,435,976	28%
	Coal Tax (@ .03/ton)	\$4,590,997	\$4,565,511	99%
	Total	\$16,269,986	\$9,334,284	57%
Coal Tax based on 153,033,219 tons of coal produced in FY93.				
1994	Bond Forfeitures	\$3,049,994	\$1,856,703	61%
	Civil Penalties	\$8,914,941	\$2,174,792	24%
	Coal Tax (@ .03/ton)	\$4,200,110	\$3,753,213	89%
	Total	\$16,165,045	\$7,784,708	48%
Coal tax based on 149,003,671 tons of coal produced in FY94.				

Under the Special Reclamation program, AML is authorized to administer the Special Reclamation Fund for the purpose of reclaiming land and water resources affected by companies subject to state and federal mining regulation. It is not uncommon for costs of reclaiming a site to exceed the amount of the bond forfeited. In such instances, AML is authorized to spend such amounts necessary from the Special Reclamation Fund to reclaim the site in accordance with the approved reclamation plan.⁴ Furthermore, for instances in which reclamation costs exceed bond forfeiture amounts, DEP is authorized to initiate efforts to collect the difference.⁵

⁴ The Special Reclamation Fund consists of revenue from a three cents per ton tax on coal production, proceeds from civil penalties collected, as well as bond forfeitures. The three revenue sources are combined into what is referred to as an alternative bonding system to achieve a balance between fund solvency while reducing the burden placed on mining operations through excessive bonding.

⁵ State and federal regulations authorize the DEP to initiate lawsuits, file liens or other actions to recover differences in actual reclamation costs and bond forfeiture amounts. However, PERD's review found that such authority is rarely exercised.

An increased number of bond forfeitures, increasing costs associated with reclamation efforts and limited amount of resources available under the special reclamation program have led to a growing number of sites awaiting activity. In managing its backlog of Special Reclamation sites, the AML identifies priority sites using the criteria described in Table 2.

TABLE 2 SPECIAL RECLAMATION PROGRAM INVENTORY PRIORITY SYSTEM	
Priority 1	Sites which pose an extreme danger to public health, safety, general welfare and property.
Priority 2	Sites which pose a threat to public health, safety, welfare and property value. For example sites with a high potential for landslides, derelict structures or a dangerous highwall or sites that discharge significant acid mine drainage into valuable water resources.
Priority 3a	Sites which are causing or have high potential to cause off-site environmental damage to land or water resources, due to erosion or heavy acid mine drainage.
Priority 3b	Sites which are of a lower priority but in close geographic proximity to a priority 1 or 2 site , in which it would be more cost effective to group such with an ongoing project.
Priority 3c	Sites which are near high-use public recreation areas and major thoroughfares.
Priority 3d	Sites nearly fully reclaimed by the operator and only requiring monitoring .

The process by which sites are reclaimed under the special reclamation program once bond forfeiture has occurred can be summarized as follows. First, there is the **Planning and Design** phase. The primary objective of this process is to determine if costs to implement reclamation in accordance with the approved reclamation plan will exceed the bond forfeiture amount and subsequently be a drain on the Special Reclamation Fund. If so, a design team may be formed to develop an alternative plan for reclaiming the site which will attempt to maintain the post-mining use in accordance with the approved reclamation plan, maintaining adequate environmental protection, while reducing costs. The team, consisting of environmental resource specialists, an engineer and a surveyor also develops technical specifications for the potential reclamation project which are subsequently submitted for competitive bidding. Second, there is a **Pre-Bidding Conference**. During this stage a requisition for purchase is developed and the project is submitted for a pre-bid conference. The purpose of the pre-bid conference is to allow prospective bidders to familiarize themselves with the project. Attendance at the pre-bid conference is required in order to be eligible to bid on a project. Third, **Bidding and a Pre-Construction Conference** occurs. Projects are awarded through a competitive bidding process. The selected bidder must provide proof of insurance and post a performance bond. The bidder is provided a Notice to Proceed which establishes beginning and completion dates and other milestones for reclamation projects. The fourth stage is **Inspection**. Special Reclamation program staff conducts periodic inspections of reclamation activities and conducts a final inspection of the construction site when construction is completed. The final stages of the reclamation process include a **three year monitoring** period and **phased bond release**. In the event of a bond forfeiture, proceeds are directed to the Special Reclamation Fund.

Abandoned Mine Lands Reclamation Program

The state's Abandoned Mine Lands Program (AMLPL) was created pursuant to Public Law 95-87, the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) and *West Virginia Code* §22-2-1, et seq. The purpose of the program is to reclaim areas impacted by mining activities which were abandoned prior to enactment of the federal act in 1977. Thirty-five of the State's fifty-five counties contain areas impacted by mining activities eligible for reclamation under the abandoned mine lands program.⁶

AML is divided into the four functional groups which coordinate activities in reclaiming sites under the AMLP. First, the **Grants/Administration Group** is responsible for securing various grants, including construction, administration and emergency grants used to fund activities and perform accounting functions for the Division. The group tracks expenditures relating to administrative and construction functions. Second, the **Realty Group** is responsible for identifying property owners for which reclamation activities are set to begin and gaining rights of entry from property owners. The Realty Group also conducts appraisals on reclaimed property in order to initiate lien actions, when appropriate. Third, the **Planning/Construction Group** is responsible for selecting abandoned mine lands to be reclaimed under any given grant period and preparing grant applications to the federal Office of Surface Mining Reclamation and Enforcement (OSM). Additionally, the Planning/Construction Group maintains the Abandoned Mine Land Inventory System (AMLIS). Finally, the Planning/Construction Group evaluates potential emergency sites and initiates activities under the emergency program. Reclamation projects are contracted out by AML. Contractors are selected through a competitive bidding process. The Planning/Construction Group is responsible for conducting pre-bid conferences and participates in the bidding process. The primary responsibility of the Planning/Construction Group involves oversight of construction activity and inspection of sites during construction and the maintenance period. This group is also responsible for developing change orders for project specifications. Fourth, the **Design Group** is responsible for approving consultant plans and specifications involving AML projects. These plans and specifications are used to bid on jobs. Furthermore, the Design Group evaluates and selects organizations which are on call to design corrections and renovations to abandoned mine land problems. Ten firms are selected as consultants, for three-year terms through a competitive bidding process to develop specifications for reclamation projects put out for bid. Federal guidelines prohibit such firms from being eligible to bid on any project during their term in which the firm participates in the development of specifications. The design group also administers exploratory drilling, aerial mapping and surveying contracts.

Reclamation activities performed under AMLP are funded through a 35 cents per ton fee on surface coal mining production, 15 cents per ton fee on underground coal mining production and a 10 cents per ton fee on the extraction of lignite coal. The fees are paid to the United

⁶ In order to be eligible for reclamation under the state Abandoned Mine Lands Program, a site must be evaluated and determined to meet the following criteria: (1) the problem must be occurring as a result of mining activity; and (2) the problem must result from mining activity occurring prior to the enactment of SMCRA (1977).

States Department of the Interior. Subsequently the revenue is allocated to various states through a grant application process. The state abandoned mine lands program is subject to oversight and approval by the federal Office of Surface Mining Reclamation and Enforcement (OSM).

AML maintains an inventory of pending projects eligible for reclamation as a management tool for carrying out activities under the AML program.⁷ The inventory consists of sites identified during a 1981 survey of abandoned mine sites throughout the state. The inventory was updated in 1986 with a follow up survey. The inventory is also updated with complaints received and investigated by AML field personnel. Under the AML program, each site in the inventory is evaluated and ranked in accordance with a classification scheme (Table 3). A site's classification is determined by the potential for danger to health, safety, property and the environment that the site represents.

There are currently 5000 sites on which reclamation is pending. Of the 5000 pending sites, approximately 3422 are classified as Priority 1 or Priority 2 problems. AML is required by the Office of Surface Mining to maintain information relating to Priority 1 and Priority 2 sites in the Abandoned Mine Lands Inventory System (AMLIS). AMLIS is a nationwide computerized database used for project evaluation, cost analysis and to record the progress toward completion of abandoned mine land projects. When a site is entered into the inventory, it is assigned a four digit AMLIS identification number. Sites are usually numbered sequentially according to the date in which each site was received into the system or evaluated.⁸ Sites ranked as Priority 1 or Priority 2, and a limited number of Priority 3 sites are addressed through the regular AML funding source and through the normal reclamation process. On the other hand, sites deemed Emergencies are reclaimed under a separate program. After an Emergency site is completed, it is entered in the inventory as a completed Priority 1 project.

⁷ According to an OSM issued policy directive, the inventory is to be maintained for the purposes of planning and evaluation of reclamation projects. An up to date inventory is used to assure that the states are completing priority sites.

⁸ Data reviewed throughout the evaluation focused on Priority 1, Priority 2 and Emergency sites. Therefore, the report only addresses the approximately 3422 projects identified as Priority 1, Priority 2 and Emergency sites.

TABLE 3
AML PROJECT INVENTORY CLASSIFICATION SYSTEM

<p><u>Priority 1</u> An AML problem category meeting the conditions of SMCRA concerning the protection of public health, safety, general welfare and property from extreme danger or adverse affects of mining practices or a condition that could reasonably be expected to cause substantial physical harm to persons or property and to which persons or improvements on real property are currently exposed.</p>
<p><u>Priority 2</u> An AML problem category meeting the conditions of SMCRA concerning the protection of public health, safety and general welfare from adverse effects of mining practices or a condition that is threatening but is not an extreme danger.</p>
<p><u>Priority 3</u> An AML problem category meeting the conditions of SMCRA concerning the restoration of land and water resources and the environment previously degraded by adverse effects of mining practices or a condition that is causing degradation of soil, water, woodland, fish, wildlife, recreational resources or agricultural productivity as opposed to well being of people.</p>
<p><u>Priority 4</u> Research and demonstration projects relating to the development of surface coal mining reclamation and water quality control program methods and techniques.</p>
<p><u>Priority 5</u> The protection, repair, replacement, construction or enhancement of public facilities adversely affected by coal mining practices.</p>
<p><u>Priority 6</u> The development of publicly owned land adversely affected by coal mining practices including land acquired for recreation and historic purposes, conservation and reclamation purposes and open space benefits.</p>
<p><u>Emergency</u> A project to correct a sudden imminent danger or impairment, caused by past coal mining, that presents a high probability of substantial physical harm to the health, safety or general welfare before the danger can be abated under the normal program operation.</p>

The Office's primary objective in implementing the state's AML program is the protection of public health, safety and general welfare. Occasionally abandoned mine land problems are realized where public health, safety and welfare are suddenly threatened and it is not practical to abate the problem under the regular AML program. It often takes several years for a project to be processed through the various phases to completion under the regular program. Therefore, AML implements an emergency abatement program. Under this program, a site meeting emergency criteria (see Table 3), while still receiving evaluation by AML staff and subsequent approval by OSM, is addressed immediately to assure public safety. Emergency sites are funded through a separate grant process. For example, for each potential emergency project, AML forwards an emergency grant request, including information on construction and administrative costs, to OSM. Grants are then awarded by the United States Department of the Interior to address the emergency. Table 4 illustrates reclamation activities conducted under the state's AML program during the evaluation period.

TABLE 4
RECLAMATION CONDUCTED BY AML
IN THE ABANDONED MINE LANDS PROGRAM
(Fiscal Years 1992-1994)

YEAR	GRANT AMOUNT (REGULAR)	# OF SITES (REGULAR)	GRANT AMOUNT (EMERGENCY)	# OF SITES (EMERGENCY)
1992	\$20,113,435	34	\$3,217,985	39
1993	\$2,2504,438	37	\$2,366,534	46
1994	\$6,428,320	24	\$3,746,748	69

ISSUE AREA 1. THE OFFICE OF ABANDONED MINE LANDS AND RECLAMATION DOES NOT FOLLOW ITS PRIORITY SYSTEM WHEN SELECTING RECLAMATION PROJECTS.

To date, the Office of Abandoned Mine Lands and Reclamation has identified 3422 Priority 1 and Priority 2 mining sites with problems that are eligible for reclamation under the abandoned mine lands program. Of the 3422 sites identified by AML, 75% of the Priority 1 sites have been reclaimed. **However, there are still 248 Priority 1 sites that have not been reclaimed.** In the worst cases these problems present a threat to the public of injury, death or property damage. The costs associated with the inventory of problem sites currently exceed \$735 million and are continually increasing as AML receives approximately 250 new complaints yearly.⁹ In order to address these problems, the Office receives between \$25 and \$30 million annually to address such sites. Since it is not possible to address all of the problem sites at once, the Office is required to prioritize each site in terms of the degree of risk each site poses to public health and safety. Under the priority ranking system, more dangerous sites are given higher priority rankings. The ranking system should be used as a tool for selecting sites given limited resources available. **However, in more recent years, AML has not followed the priority system when selecting projects for reclamation. As a result, projects determined to be the most significant threat to public health and safety are left in the environment while sites deemed to be lower in priority are selected for reclamation.**

Overview of AML Projects

Table 5 presents all AML Priority 1 and Priority 2 projects that have been identified by the Office and entered into the project inventory. The 3422 Priority 1 and Priority 2 problems are further divided into one of seventeen problem categories. Additionally, Table 5 provides a breakdown of the 3422 Priority 1 and Priority 2 sites in the Office's inventory by the number of projects completed and the percentage of the projects completed in a particular category.

⁹ Of the \$735 million in costs for Priority 1 and 2 projects, \$185 million of the projects have been completed, leaving approximately \$550 million in pending projects. However, a significant number of AML-related problems have yet to be realized and can be expected to manifest in the future as more abandoned mine facilities, many of which have not yet been discovered, begin to deteriorate.

TABLE 5
AML PRIORITY 1 AND 2 PROJECTS
(As of October 27, 1995)

Problem Type	Priority 1's			Priority 2's		
	Total	Completed	%Completed	Total	Completed	%Completed
Clogged Stream	35	28	80.00	69	30	43.48
Clogged Stream Lands	18	12	66.67	25	6	24.00
Dangerous Highwall	87	18	20.69	471	46	9.77
Dangerous Impoundment	64	48	75.00	154	17	11.04
Dangerous Piles and Embankments	99	92	92.93	297	86	28.96
Dangerous Slides	134	102	76.12	91	16	17.58
Gases (Hazardous/Explosive)	3	2	66.67	0	0	NA
Underground Mine Fire	6	4	66.67	7	1	14.29
Hazardous Equipment/Facility	41	36	87.80	374	72	19.25
Hazardous Water Body	3	2	66.67	18	1	5.56
Industrial/Residential Waste	3	3	100.00	16	9	56.25
Portals	178	155	87.08	656	115	17.53
Polluted Water (Agricultural/Industrial)	9	7	77.78	19	1	5.26
Polluted Water (Human Use)	8	6	75.00	24	1	4.17
Subsidence	201	134	66.67	50	9	18.00
Surface Burning	78	74	94.87	48	22	45.83
Vertical Opening	43	38	88.37	93	13	13.98
Total	1010	762	75.45	2412	445	18.45

Source: OSM Abandoned Mine Land Inventory System.

From Table 5 it appears as though the AML has generally addressed the most significant projects ahead of others. For example, since the beginning of the program 762 of the 1010 Priority 1 projects in the AML inventory (75%) have been completed while 445 of 2412 Priority 2 (18%) projects have been reclaimed. However, further review of AML activities reinvigorates the question of whether the Office is addressing the most significant problems in priority. First, in recent years (1992-1995) **Priority 2's have been the most commonly funded projects** even though there are still 248 identified Priority 1 projects in the inventory. Second, **most Priority 1 projects are funded as Emergencies**. Finally, **complaints are more frequently identified as Priority 1 problems** suggesting that the inventory is growing in this category while AML is placing most resources into Priority 2 projects.

AML is funding Priority 2 Projects

A survey of 42 of the 118 reclamation projects implemented during the evaluation period (1992-1995) found that 7 of 42 sites selected (17%) were Priority 1 sites, 34 sites or 83% were ranked as Priority 2 and 1 of 42 sites or 2% was ranked as Priority 3. From the sample information, it appears that AML has been shifting its focus from Priority 1 projects to Priority 2 projects. With the 75% completion rate on Priority 1 projects the shifting of resources may be reasonable. However, as indicated in Table 6 below, there are still 248 Priority 1 projects uncompleted. The list includes 67 instances of subsidence, 2 underground mine fires and 16 dangerous impoundments. To place these problems into perspective, the Board of Risk and Insurance Management paid \$1.6 million in claims related to subsidence induced property damage between 1992 and 1995.¹⁰ Finally, the dangers associated to dangerous impoundments or coal dams are well known to the citizens of southern West Virginia through the various accounts of the Buffalo Creek Disaster.

Discretion in Selection of AML-Related Sites

There is no requirement that the Office strictly follow the priority ranking system and reclaim all Priority 1 sites before addressing Priority 2 sites. As a result, the site selection process is such that planning leaders in the Northern and Southern Regional Offices have tremendous influence in selecting what sites receive attention. Project leaders scan the inventory, select what he or she feels to be the most urgent of the pending projects and enters those on the project tracking list. Sites are then selected from the list depending on grant amount received and subject to approval of the AML chief.

Based on the sample described above, the Office selected lower priority sites in a majority of cases. The number of outstanding Priority 2 sites is more than double the number of Priority 1 sites. While Priority 2 sites are potentially dangerous, Priority 1 sites are substantially more dangerous, according to AML criteria. Furthermore, sites on the project tracking list, which identifies projects selected for reclamation, are mostly Priority 2, despite the outstanding Priority 1 sites. Therefore, the discretion in project selection has allowed the planners to react to the larger proportion of Priority 2 sites not reclaimed resulting in a shift of resources from Priority 1 sites.

¹⁰ The Board of Risk data could not be disaggregated into AML eligible sites and current operations. Therefore, not all of the \$1.6 of the subsidence related damage is attributable to activities covered by AML

TABLE 6 AML PRIORITY 1 PROJECTS UNCOMPLETED AND RANKED BY LIKELIHOOD TO BE FUNDED AS AN EMERGENCY	
Problem Type*	Priority 1 Projects Uncompleted
1.) Subsidence	67
2.) Underground Mine Fire	2
3.) Dangerous Impoundment	16
4.) Vertical Opening	5
5.) Dangerous Slides	32
6.) Gases (Hazardous/Explosive)	0
7.) Surface Burning	4
8.) Polluted Water (Human Use)	2
9.) Portals	24
10.) Clogged Stream	7
11.) Polluted Water (Agricultural/Industrial)	2
12.) Clogged Stream Lands	6
13.) Dangerous Highwall	68
14.) Dangerous Pile/Embankment	7
15.) Hazardous Equipment/Facility	5
16.) Hazardous Water Body	1
17.) Industrial/Residential Waste	0
Total	248

NOTES: * Problem types most likely to be funded as an Emergency have lower numbers and appear first.

Reliance on Emergency Program

Under the regular AML program, states are awarded grants in order to fund reclamation activities. Based on grant amount the office selects projects from the earlier described project tracking list. Additionally, when an emergency occurs, the Office submits a request to reclaim the site under a program which uses a separate funding mechanism.¹¹ Table 1 of this report shows that from 1992 to 1994, there have been continual increases in the number of projects funded as Emergencies, while at the same time projects funded under the Regular program have remained about constant.

¹¹ While funds used to finance emergency projects are generated from the same 15 and 35 cent tax on coal production, the pool of revenue used to abate emergencies are separate from Regular AML funds allotted to states. Furthermore, Emergency projects must be approved through the federal OSMRE prior to expenditure.

The OSM has praised the Office's Emergency activity in previous evaluations.¹² In many cases emergencies are abated in a matter of days. However, emergency status represents the greatest level of danger under the program. Furthermore, when an emergency arises some adverse condition is likely to have already occurred, either personal injury or significant property damage and action needs to be taken rapidly to prevent more significant problems.

Analysis of the type of grant used to fund the various projects indicates that only 303 of the 762 Priority 1 projects have been reclaimed under the Regular program, while 336 Priority 1 sites were reclaimed as Emergencies (See Table 7). Thus, while 303 Priority 1 projects were reclaimed under the Regular program, 445 Priority 1 projects have been reclaimed under the Emergency program or Other programs. An attempt to identify the number of Emergency projects that were part of the exiting inventory of Priority 1 proved to be too problematic to accomplish under the existing management process at AML. Projects could not be traced from the project list back to the inventory. Therefore, it is difficult to conclude whether AML is allowing projects in the existing inventory to deteriorate into Emergencies situations or whether Emergencies are derived from another work flow such as complaints. The review of complaints in the Northern District provided below indicates that the Emergencies worked on by the Office were not derived from the Complaint Log.

¹² The federal Office of Surface Mining Reclamation and Enforcement conducts annual performance evaluations on portions of the State's Office of Abandoned Mine Lands and Reclamation Program in addition to the Office of Mining and Reclamation.

**TABLE 7
PRIORITY 1 RECLAMATION PROJECTS COMPLETED**

Problem Type	Type of Grant			
	Regular	Emergency	Other*	Total
Clogged Streams	20	7	1	28
Clogged Stream Lands	10	1	1	12
Dangerous Highwalls	13	1	5	19
Dangerous Impoundment	11	36	1	48
Dangerous Pile/Embankment	46	2	44	92
Dangerous Slides	28	74	0	102
Gases (Hazardous/Explosive)	1	2	0	3
Underground Mine Fire	0	4	0	4
Hazardous Water Body	0	0	2	2
Hazardous Equipment/Facility	31	1	4	36
Industrial/Residual. Waste	3	0	0	3
Portals	74	30	50	154
Polluted Water (Agri./Ind.)	5	1	1	7
Polluted Water (Hum. Use)	3	2	1	6
Subsidence	25	103	6	134
Surface Burning	24	46	4	74
Vertical Opening	9	26	3	38
Total	303	336	123	762

SOURCE: OSM Abandoned Mine Lands Inventory System.
 NOTES: * Other includes 123 reclamation projects completed under programs such as the Rural Abandoned Mine Program or sites reclaimed by federal agencies prior to approval of the State Program.

It should be noted that OSM plans to revise its policies regarding addressing Emergencies. The proposed changes would place a \$50,000 cap on the amount spent for reclaiming Emergencies. Any cost over \$50,000 would generally be addressed through the Regular program. Approximately 30% of emergency AML-related activities have exceeded that cap. Therefore, these changes may significantly impact office operations.

Complaints

Above, it was shown that a majority of the sites selected for reclamation during the evaluation period were Priority 2 sites. It was also shown that a large proportion of Priority 1 projects were completed as Emergencies by AML during the audit period. At the same time, a majority of complaints received by AML in the Northern District were rated as Priority 1 (Table 8). From 1992 to 1994, **only 8 of 741 complaints investigated by AML staff were rated as Emergencies**, in the Northern Region. However, during that time period, **at least 50 emergency projects were completed** for the Northern Region. An attempt to trace projects from the initial complaint, to placement of the project into the inventory, to project completion. Therefore, one is then left to wonder, what occurs with the Priority 1-rated sites? Either many sites are misclassified or they get reclaimed as Emergencies, or a combination of both. Since, under the Emergency classification, instances of injury or significant property damage are imminent, the current system may not adequately protect public health, safety and welfare.

Complaint Type	1992	1993	1994	Total
Complaints rated Priority 1	96	80	83	259
Complaints rated Priority 2	38	42	37	117
Complaints rated Priority 3	13	13	35	61
Complaints rated Emergencies	6	1	1	8
Other*	4	8	23	35
Complaints deemed ineligible**	80	98	83	261
Total	237	242	262	741

NOTES:

*Complaints falling under the category "other" indicate those currently being investigated as a potential subsidence complaint, denoted as (S) or (D) in the complaint log.

**Complaints deemed ineligible include those determined to be a result of active mining operations or nonmining related, denoted as (A) or by a blank space in the complaint log.

Conclusion

Since its inception the Office of Abandoned Mine Lands and Reclamation has reclaimed over 1200 sites costing in excess of \$180 million. Without the program, citizens of this state would no doubt suffer from the effects of deteriorating abandoned mine facilities. With the thousands of cases not reclaimed there is a continuing need for the program. However, AML has strayed away from the prioritization policy that has enabled them to address 75% of the most significant problems that have been identified. The pending restriction on Emergency grants, the number of complaints entered into the inventory as Priority 1 projects suggests that AML needs to reassess the status of its inventory to determine if they should be applying more resources to Priority 1 projects.

Recommendation 1

Due to the existence of 248 pending Priority 1 projects, the large number of Priority 1 projects completed as Emergencies, and the large proportion of complaints added to the inventory as Priority 1 projects the Office of Abandoned Mine Lands and Reclamation should reassess the decision making process that has resulted in a large number of Priority 2 projects being funded. The reassessment should conclude with the establishment of a goal that defines the proportion of Priority 1 projects that will receive funding under the Regular grant in a given year. As Emergency Grant funds are diminished by the Federal government, the proportion of Regular Grant dollars should increase so that most of the dangerous projects receive attention first.

MISSION OF THE OFFICE OF MINING AND RECLAMATION

...to assure prompt, effective and high quality reclamation of all surface mining sites in West Virginia; to assure appropriate and adequate protection of the environment and public welfare; to effect an efficient permitting program which enhances and assures permit quality; and to promote effective communication and dialogue with constituencies affected by actions involving OMR.

Background

The Division of Environmental Protection was created during the 1991 Second Extraordinary Session with the passage of H.B. 217. The Office of Mining and Reclamation (OMR) was transferred from the former Division of Mines and Minerals of the Department of Energy in 1991 by the same Act. The Office implements the West Virginia Surface Coal Mining and Reclamation Act (WVC §22-3-1 et. seq.), the federal Surface Mining Control and Reclamation Act or SMCRA (Public Law 95-87) and other applicable state and federal laws and regulations.

OMR's 235 person staff is divided into the seven functional units that coordinate activities to control the environmental effects of surface mining and reclamation. First, the **Permitting Unit** reviews and processes all permit applications related to coal and non-coal facilities. The Permitting Unit has staff at all of the regional offices in addition to its staff in Nitro. Second, the **Inspection and Enforcement Unit** assures prompt compliance with laws and regulations and proper reclamation. The Inspection and Enforcement Unit has staff at all of the regional offices in addition to its staff at Nitro. Third, the **Civil Penalties Unit** is responsible for the tracking and collection of civil penalties. All of its staff is located in Nitro. Fourth, the **Ownership and Control Unit** tracks and quantifies ownership and control information pertaining to forfeitures, violations, complaints, and Freedom of Information Act requests. All of its staff is located in Nitro. Fifth, the **Hydrologic Protection Unit** administers programs for the protection of water resource, such as the National Pollution Discharge Elimination System. All of its staff is located in Nitro. Sixth, the **Program Management and Technical Support Unit** performs administrative functions through systems for purchasing, accounting, budgeting, personnel, computer resources, and the development of forms. All of its staff is located in Charleston. Finally, the **Field Operations Unit** is the headquarters staff that coordinates the activities of the Northern and Southern Units which are based in Phillippi and Oak Hill, respectively. This staff oversees the actions of the five regional OMR offices. The Northern Unit consists of offices for Region 1 in Fairmont and Region 2 in Phillippi. The Southern Unit consists of offices for Region 3 in Oak Hill, Region 4 in Welch, and Region 5 in Logan. OMR has an annual budget of over \$17 million, approximately \$9 million of which is from the federal government.

OMR processes around 2,000 permit applications per year. The permit applications fall under five main categories: Surface Mine Application (SMA); Incidental Boundary Revision (IBR); Permit Revision; Prospect Application; and Permit Renewal (see Table #10). Currently,

OMR charges a filing fee of \$1,500 for Surface Mine Applications and \$2,100 for Permit Renewals.

TABLE 9 PERMIT APPLICATIONS BY OMR PERMITS UNIT			
TYPE	1992	1993	1994
SMA	181	128	78
IBR	316	376	248
REVISION	739	1029	566
PROSPECTS	116	123	88
RENEWALS	832	514	323
TOTAL	2184	2170	1915

OMR inspects over 3,500 surface mining facilities in the state. The units inspected by OMR can be broken down into five main groups: active sites; inactive sites; sites under reclamation; sites where mining has not yet started; and sites where prospecting is taking place (see Table 11).

TABLE 10 INSPECTABLE UNITS FROM OMR'S INSPECTION AND ENFORCEMENT UNIT			
STATUS	1992	1993	1994
ACTIVE	1949	1773	1742
INACTIVE	380	361	398
RECLAMATION	707	773	1117
NOT STARTED	192	97	53
PROSPECTS	528	413	224
TOTAL	4356	3417	3534

OMR collects around \$2 million per year in civil penalties for permit violations. The collection rate averages around 20% (see Table 11). The civil penalty system goes into effect once a notice of violation is made on a permittee. The violation is given an initial assessment or fine. If the permittee disagrees with the violation or the amount of the civil penalty, the permittee may request an informal assessment conference. At the conference, the permittee will argue their case to the assessment officer who then decides if the civil penalty should be affirmed, modified, or vacated. Such conferences are requested quite often with an average reduction of 17% of the civil penalty. If the permittee disagrees with the results of the informal

assessment conference, they may request a hearing before the Surface Mine Board. Before such a hearing is held, the permittee must put up the amount of the civil penalty in escrow. The Board then decides if the civil penalty should be affirmed, modified, or vacated. Depending on the outcome of the hearing, the money that the permittee has put into escrow is partially returned if the civil penalty was reduced, fully returned if the civil penalty was revoked, or given to OMR if the civil penalty was left unchanged.

YEAR	INITIAL ASSESSMENT	FINAL ASSESSMENT	AMOUNT COLLECTED	COLLECTION RATE
1992	\$12,218,506.00	\$9,831,198.50	\$1,820,591.62	19%
1993	10,053,404.00	8,558,256.00	1,958,276.96	23%
1994	12,986,494.00	10,801,525.00	2,135,664.58	20%
TOTAL	35,258,404.00	29,190,979.50	5,914,533.16	20%

Objectives for Survey of OMR Mining Permits

Three areas of concern were identified as potential risks for OMR operations during the evaluation. First, OMR is responsible for obtaining a performance bond for each permittee (WVC §22-3-11). The potential loss capital put into the performance bond provides an incentive to permittees to comply with the reclamation requirements of their permit. The performance bond also provides OMR with a potential source of revenue to perform reclamation should a company fail to reclaim its site. **Therefore, the evaluation included an examined of whether OMR had secured performance bonds for all permit holders.**

The second area examined during the evaluation was whether OMR's collected civil penalties at a reasonable rate. Civil penalties are the monetary fines assessed as a result of permit violations. Therefore, civil penalties are an important enforcement mechanism that provide permittees an incentive to abide by the provisions of their permit. If civil penalties are not being collected at an acceptable rate, then the penalty will not have the deterrent effect envisioned for this enforcement mechanism. Also, civil penalties are a major source of funding for the Special Reclamation Fund.

The third, and final, area of analysis focused on the level of performance bond forfeitures. If there is a large proportion of bond forfeitures, then it could be concluded that it is cheaper to forfeit the bonds than carry-out reclamation. Ultimately, the decision would depend on a cost-benefit comparison of the per acre cost of bonding rates versus the cost of reclamation. If performance bond amounts are too low, then the company would have an incentive to not reclaim its site and allow the bond amount to pass to the state.

Methodology

In order to evaluate the three issues, a random sample of 70 permit numbers from the 3,350 (the total number of permits) on OMR's Inspection and Enforcement Unit's inspectable unit report was selected. The report lists all the permit numbers that are still active in the sense that they are still inspected by OMR. A questionnaire was completed for each randomly-selected permit number that included the information listed below. The data used to complete the questionnaire came from OMR's computerized Surface Mining Information System (SMIS) and the Civil Penalties logs produced by OMR's Civil Penalty Unit.

Questionnaire Data

- the type of mining activity permitted;
- if the permit had a performance bond in place;
- if the permit has made phase 1 or 2 reclamation;
- if the permit had civil penalties assessed against it;
- if a permit did have civil penalties were they paid or not;
- the collection rate of civil penalties;
- the amount of civil penalties not paid;
- the amount of civil penalties paid;
- the monetary collection rate of civil penalties; and
- if the permit had been forfeited.

ISSUE AREA 2: OMR OBTAINS PERFORMANCE BONDS FROM PERMIT HOLDERS.

The data from the questionnaires was compiled into a spreadsheet. From the data, the various types of mining permits were represented by the following frequencies and proportions: 21 or 30% are surface mines; 22 or 31% are underground mines; 2 or 3% are quarries; 2 or 3% are prospecting; and 23 or 33% are classified as "other." Permits classified as "other" are for installations such as a haulroad, preparation plant, refuse facility, loading facility, or belt line. Half of the permits surveyed had civil penalties assessed against them. Twenty permits, or 29% had accomplished phase 1 or 2 reclamation. **All but two of the permits sampled had performance bonds in place. The two permits that had no performance bond were for quarries and are not required to have a performance bond in place.** Fourteen permits, or 20% had expired as of September 1995. However, 12 of these permits were in phase 1 or 2 reclamation and are not required to get a permit renewal. **None of the permits sampled were forfeited.** However, forfeitures have occurred throughout the history of the program.

ISSUE AREA 3: OMR COLLECTS 75% OF OUTSTANDING CIVIL PENALTIES.

A second spreadsheet was completed using only the permit numbers that had civil penalties assessed against them. This spreadsheet was used to calculate the rate of collection, the amount delinquent, the amount collected, and the monetary collection rate. **The civil penalty collection rate was 75% (77 out of 102).** The total amount of delinquent civil penalties came to \$32,268.43. The amount of civil penalties collected was \$61,202.43 or a **monetary collection rate of approximately 66%**. Also, out of the 25 permits that had delinquent civil penalties, two were involved in Chapter 11 bankruptcy.

The results of this survey were compared to total figures for all permits provided by OMR to see how representative the survey was of the total population of permits. The total number of permits that are in phase 1 or 2 of reclamation is 1,075 or 32%. This compares favorably to the 29% result found in the survey. However, the total figure for the monetary collection rate does not compare as favorably. The rate for 1993 and 1994¹³ equals approximately 21% while the survey showed a monetary collection rate of 66%. One explanation provided for the differing result by the Civil Penalties Unit is that much of the delinquent civil penalties can be traced to a small number of companies. For example, 30 companies account for slightly less than 5% of all the companies permitted to mine in West Virginia. Alternatively, these companies represent a large portion of the delinquent civil penalties, accounting for approximately \$17.5 million or 35% of all delinquent civil penalties. The survey results support this explanation. If delinquent civil penalties had a more even distribution throughout the population of permits, then it would have show up in the results making the collection rate lower than the 75% that was calculated. Since much of the delinquent civil penalties are concentrated with a small number of companies, whose delinquent civil penalties total anywhere from \$300,000 to \$2,000,000, it is possible for a random sample to miss one of these companies.

Conclusion

The results of the survey do not appear to show any critical findings. It could be said that the collection rate of either 75% calculated by the survey or the 21% from figures supplied by OMR should be improved. However, it should be noted that 90% of the money associated with delinquent civil penalties is owed by companies that have declared bankruptcy, dissolved, or forfeited their permits. This is especially true for the 40% of delinquent civil penalties lost due to bankruptcy. It should also be noted that a company does not get "off the hook" by not paying its civil penalties. If they do not pay, then the companies officers are blocked from receiving a new permit(s) or revisions to its existing permit(s) under state and federal law. However, such a company can still get an existing permit renewed but only to the original guidelines. In addition to being permit-blocked, companies and their officers that have not paid their civil penalties and wish to return to the mining industry are required to pay delinquent civil

¹³ 1993 is the starting year that will be used because SMIS didn't begin operating until 1993. Also 1995 data is not yet available.

penalties before they are permitted to restart operations.

Recommendation 2

OMR should establish an internal goal that defines what is an acceptable collection rate for civil penalties.

APPENDIX A

**DIVISION OF ENVIRONMENTAL PROTECTION**GASTON CAPERTON
GOVERNOR10 McJunkin Road
Nitro, WV 25143-2506LAIDLEY ELI MCCOY, PH.D.
DIRECTOR

December 29, 1995

Mr. Antonio E. Jones
West Virginia Legislature
Performance Evaluation and Research Division
Building 5, Room 751A
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0592

Dear Mr. Jones:

Enclosed are the Division's comments regarding the performance audit of the Division of Environmental Protection, Office of Abandoned Mine Lands and Reclamation. We have several concerns regarding the audit's finding, "AML Not Following Priority System," and have detailed these in our comments. It is my belief that the Office of Abandoned Mine Lands and Reclamation is following the Priority System and is adequately protecting the citizens of West Virginia from problems caused by past mining.

Please contact my office if you wish to discuss this further.

Sincerely,

Laidley Eli McCoy
Laidley Eli McCoy, Ph.D.
Director

LEM:jrb

Enclosure

cc: Mark A. Scott (w/enc.)
James E. Pitsenbarger (w/enc.)
Mary M. Hunt (w/enc.)

COMMENTS ON PERFORMANCE AUDIT OF WVDEP
(AML Not Following Priority System)

The following comments were collaborated by the Office of Abandoned Mine Lands and Reclamation Administrative Personnel.

Page numbers are used when referring to statements made in report.

Page 5 Footnote #2: Change "help" to "may" - projects will be recommended to the Office for consideration in the preparation of a Acid Mine Drainage Plan in accordance to state and federal law.

Remove the "Governor's Stream Restoration Program" from second sentence of first paragraph.

Page 6 In the second sentence remove and/or federal mining. Our staff does not write violations of federal law, only state law violations are written.

In the third sentence of paragraph beneath Table 1, omit and federal mining.

Page 7 Paragraph beneath Table 2, third sentence; remove the next two (2) sentences starting with The primary and ending with reducing costs. The site must be reclaimed no matter what the cost may be.

Paragraph beneath Table 2, correct sentence as stated, "The team, consisting of environmental resources specialists, an engineer and a surveyor.....for competitive bidding." Should be "The team, consisting of environmental resources specialists and an engineer.....for competitive bidding.

Page 8 In the eighth sentence from top of page, place period after the word period. Leave out rest of paragraph. Second paragraph under "Abandoned Mine Lands Reclamation Program" second sentence, change "Division" to "Office".

Second paragraph under "Abandoned Mine Lands Reclamation Program" first sentence, change four (4) to six (6).

Second paragraph under "Abandoned Mine Lands Reclamation Program" starting with the eighth sentence should be written as follows:

Third, the Planning/Emergency Group is responsible for selecting abandoned mine land projects to be reclaimed under any given grant period and preparing grant applications. Additionally, the Planning/Emergency group maintains the Abandoned Mine Land Inventory System (AMLIS). Finally, the Planning/Emergency group evaluated potential emergency sites and initiates activities under the emergency program. Reclamation of those sites declared as emergencies are contracted out by the Planning/Emergency group. Contractors are selected through a competitive bidding process. This group also holds pre-bid conferences and inspects the Emergency project until completed.

The fourth group is Construction. The construction group is totally separate from the Emergency group. They review the bids and make recommendation to the Department of Administration who in turn award the construction contract. Construction group conducts pre-construction conferences with the contractors, gives the notice to proceed and inspects all the work. They make findings that the construction is completed and then release the contractor from the contract. This group also prepares and approves change orders and reviews all invoices before they are submitted for payment.

The fifth group, Design; is responsible for approving consultant plans and specifications involving AML projects. They conduct pre-bid conferences where the plans & specifications are explained to potential bidders.

The sixth group, Stream Restoration; was transferred to AML&R on July 1, 1995. The stream restoration program was created to enhance the ecological integrity of West Virginia's streams and water resources affected by coal mining or acid mine drainage. The program consists of a Steering Committee made up of representatives of the coal industry, environmentalists, state government representatives and federal government representatives. Also, a Technical Subcommittee was created in 1992 to collect, analyze and coordinate data. Funding for the program is from a portion of grant revenue available to the state abandoned mine lands program and other state and federal grants that may be available for water treatment.² The Committees have developed a priority list of the state's watersheds significantly impacted by acid mine drainage that require abatement action.

The group identified in the report as Planning/Construction does not exist. The Planning/Emergency Group maintains the Abandoned Mine Land Inventory System (AMLIS), evaluates potential emergency sites, prepares Environmental Assessments, and selects sites to be funded by OSM, among other duties.

Page 9 Third paragraph, next to last sentence, change "a classification scheme" to "Public Law 95-87 section 403 and West Virginia Code Chapter 22-2.1." This correction specifies the purpose of the program.

Page 11 Table 3 -

- remove language under Priority 1 "or a condition that could reasonably be expected to cause substantial physical harm to persons or property and to which persons or improvements on real property are currently exposed".
- remove language under Priority 2 "or a condition that is threatening but is not an extreme danger".
- remove language under Priority 3 "or a condition that is causing degradation of soil, water, woodland, fish, wildlife, recreational resources or agricultural productivity as opposed to well being of people".
- remove language under Priority 4.
- change Priority 5 to 4.
- Change Priority 6 to 5

The Priorities are stated in Public Law 95-87 section 403 and West Virginia Code; Chapter 22-2-1. These are the "Objectives of Fund".

First paragraph, first sentence should read, "The Office's primary objective in implementing the state's AML program is the protection of public health, safety, general welfare and property from extreme/adverse effects of past mining practices (see Table 3). Sixth, seventh and eighth sentence to be removed from paragraph. Statements are inaccurate.

Table 4-Table as shown has no relevance in comparing the regular AML program with the Emergency program. The regular AML grant for construction program is for a three (3) year period while the Emergency program is a one (1) year period. How do you compare apples vs. oranges? Suggest deletion of the table.

Page 15 First paragraph, first sentence, change "are" to "may be". Projects eligibility may change after Problem Area data sheets have been completed and submitted to the inventory. ie. Area permitted and bonded under Title 5 after problem area data sheet was completed.

The report states that "in recent years AML has not followed the priority system when selecting projects for reclamation. As a result, problems determined to be the most significant threat to public health and safety are left in the environment while sites deemed to be lower in priority are selected for reclamation." The Federal Office of Surface Mining, which oversees the State AML Program, has never directed that all Priority One sites must be completed before Priority Two sites can be addressed. This is because the two classifications are almost equal in their severity. For example, a potential Buffalo Creek situation could be investigated and entered, correctly, into AMLIS as a priority 2. This is because it would be a refuse area with the potential to impound water. State guidelines, which follow the Federal and State statutes for interpretation of prioritization, direct that a problem is not entered into AMLIS as a Priority One unless (1) It can be documented that an individual has been injured or killed as a direct result of the problem and/or (2) improved property has been damaged as a direct result of the problem. The impoundment that collapsed and caused the Buffalo Creek disaster had not killed or injured anyone prior to its collapse nor had it directly damaged improved property. Thus, chances are it would have been entered into AMLIS as a Priority Two, but still worked on immediately if the AML Program existed at that time (and the impoundment was eligible according to AML criteria).

Page 16 The report states that "Priority twos are the most commonly funded projects even though there are still 248 Priority one problems left in the Inventory. Please see my previous comment.

Report states "most priority one projects are funded as emergencies", indicating that the regular AML program ignores the Priority One projects in AMLIS. This is not accurate. Of the 122 emergency projects completed by the Office of Abandoned Mine Lands and Reclamation in 1994 and 1995, only 10 (or 8.2 Percent) had been entered into AMLIS. An emergency is a "sudden event" that cannot be foreseen. In 1994 and 1995 112 sudden events occurred that were AML related but were not in

AMLIS because it was not possible for anyone to have any knowledge of the problems, including people who lived in the vicinity or were impacted by the problem.

Some of the emergency problems were entered into AMLIS as Priority twos and deteriorated quickly to an emergency. For example, Doris Miller Highwall was placed in AMLIS as a priority two project and was scheduled for construction under the regular program. A seep had developed behind a home and quickly deteriorated in that more and more water began emerging from the seep, creating a quagmire behind the house and damaging the house. It was a sudden event that occurred and OSM allowed OAML&R to classify the site as an emergency. I point this out to emphasize that priority one and two problems are almost equal in severity.

The report states that "complaints are more frequently identified as Priority One problems suggesting that AMLIS is growing in this category while AML is placing most resources into Priority 2 projects." This is a false assumption which the authors back up with bad data. It is stated later in the report that the authors got their complaint data from the Northern field office. The vast majority of complaints from that Office are subsidence complaints. These complaints are not automatically entered into AMLIS as Priority ones. They must be verified, usually by core drilling to determine if they are mine related. In order to be placed in AMLIS the problem must be related to an abandoned mine. A vast majority of subsidence complaints are not AML related, but are tentatively classified as priority ones because property damage is involved. Thus, the inventory is not growing with additional priority one problems. The table presented on page 21 of this report is not accurate. The authors took the data that was meant for internal use and placed it in this report. See the comment for page 21 for a further explanation of this.

Page 17 Third paragraph, last sentence, correct "AML" to "AML&R".

AML is Funding Priority 2 Projects: The auditors state that sixteen priority one dangerous impoundments are still unreclaimed and that they are potential Buffalo Creek situations. This is not true. The AMLIS definition for dangerous impoundments is a large water impoundment such as a mine waste embankment, sedimentation pond, OR UNDERGROUND MINE WATER POOL which poses a threat of flooding downstream property and human health, safety, and general welfare in the event of a rupture or breach of the water retention structure. The 16 problems referred to here are simply collapsed portals or seeps from old mines that are coming out of the hillside. In the unlikely event that they could "blow-out" it could cause a problem. All large earthen impoundments that are AML related have either been reclaimed or are in the process of being reclaimed. The 67 subsidence related problems are single dwelling problems. This Office has had a policy in the past which may be re-evaluated, to only do area-wide subsidence involving several structures.

Discretion in Selection of AML Projects: The report states that there is no requirement that OAML&R strictly follow the priority ranking system and reclaim all priority one sites before addressing priority two sites. OSM, which oversees this program for the Federal Government, realized early in the program that there is scant difference

between priority one and two projects, and that has not been a requirement placed by OSM on OAML&R.

Page 18 Reliance on Emergency Program: First paragraph, fourth sentence, correct "Table 1" to "Table 4".

Page 19 Second paragraph, last two sentences, delete for reasons that has been stated.

"Analysis of the type of grant used to fund the various projects indicates that only 303 of the 762 priority 1 projects have been reclaimed under the regular program while 336 priority 1 sites were reclaimed as emergencies." This statement implies that the 336 priority one sites were already in AMLIS and known to OAML&R. As was stated earlier in this memo, emergencies are sudden events and the vast majority are not known until they occur. In 1994 and 1995, 122 emergency projects were completed by OAML&R. Only 10 of these were on the Inventory (8.2%). I don't understand why the author of the report could not identify the number of emergencies that were part of the existing Inventory. Given the fact that the vast majority of emergency projects are sudden events not in AMLIS, the fact that OAML&R did 336 emergency projects that were priority 1 sites, and the regular program did only 306 is meaningless in the context of this report.

Page 20 First paragraph should be deleted from text. This requirement is a draft proposal of the Federal Assistance Manual (FAM) as submitted by the Office of Surface Mining (OSM). All states/tribes have submitted comments and OSM has not finalized the FAM.

Page 21 Complaints: Report "From 1992-1994 only 8 of 741 complaints were rated as emergencies, but 50 emergency projects were completed." This fact was explained earlier in this memo. The author of the report states one is left to wonder what occurs with the priority ranked sites. These reports were derived from the Northern Regional Office. In spite of what is shown on table 8 on this page, a vast majority of the priority 1 sites should be classified as tentative priority 1 sites. This is because a vast majority of the 259 sites are subsidence complaints that had not been confirmed as AML related. Most of the complaints belong in the other category on Table 8, not complaints noted on Page 15. The Northern field office supplied the auditors with the complaints log, but the author misunderstood or misinterpreted the complaint log. The numbering system has not yet been revised to indicate complaints as a potential subsidence complaint. In fact, the numbering system was for internal use only, and not meant to reflect a ranking of complaints.

There is an incomplete sentence in the paragraph on this page. (1st paragraph, 7th sentence.)

Page 22 Conclusion. The conclusion of this report states that AMLIS contains 248 priority 1 projects. Actually, the Inventory contains 241 priority ones. The conclusion also states that a large proportion of complaints are added to the Inventory as priority 1 projects.

The facts do not back up this statement. As explained earlier the table 8 is wrong. The vast majority of priority 1 complaints are tentative, priority 1 subsidence complaints which must be verified by drilling. Most subsidence complaints are non-mine related. Also, most emergency projects were sudden events not known to OAML&R. The implication in the conclusion is that the regular program has ignored priority 1 projects that then deteriorated which made them into emergencies. This is not the case because it is impossible to ignore what is not in the Inventory. The vast majority (over 90%) of the emergency projects done between 1994 and 1995 were not in AMLIS.

The legislature must be assured that the citizens of West Virginia are being protected from harm by the Office of Abandoned Mine Lands and Reclamation. This is because all citizen complaints are answered by experienced Reclamation Specialists who are assigned to the Emergency Program. If as a result of the complaints the Specialists discover problems which occurred suddenly and are extreme dangers, they are immediately addressed by AML's emergency program. If the problem is close to being an emergency, but is not, that problem is handed over to the regular program for action. These problems are addressed as soon as possible given the constraints of the regular AML program. All "near" emergencies have been documented and have been disposed of by the OAML&R.

APPENDIX B



DIVISION OF ENVIRONMENTAL PROTECTION

GASTON CAPERTON
GOVERNOR

10 McJunkin Road
Nitro, WV 25143-2506
December 28, 1995

LAIDLEY ELI MCCOY, PH.D.
DIRECTOR

Antonio E. Jones
West Virginia Legislature
Performance Evaluation and Research Division
Building 5, Room 751A
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0592

Dear Mr. Jones:

We have reviewed the performance audit of the Division of Environmental Protection, Office of Mining and Reclamation and offer the following response:

First, we appreciate the professionalism and assistance exhibited by the individuals conducting the audit and certainly hope the office provided the same courtesy.

The background section of the audit mentions that the Civil Penalty Section, Ownership and Control and Hydrologic Protection Units only have personnel in Nitro. Actually, all these units have some support personnel at the regional office locations to enhance the review and administrative processes.

The discussions concerning issue area 3 regarding civil penalty collections is an accurate representation of this issue and focuses on a primary problem area regarding a small percentage of permittees owing a substantial portion of the penalties. Moreover, the sampling and survey process support this issue and addresses the fact that the vast majority of these entities are bankrupt, forfeited or out of business.

While the audit conclusion does not show any critical findings and does a satisfactory job of explaining the factual issues involved it does not mean this agency will not seek to improve our collection efforts.

One critical factor that affects the collection process involves the legal redress contained in OMR's enabling legislation's (also Federal). These mainly focus on permit blocks and recovery efforts through the court system and does

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not consider an array of collection tools that may be available to other agencies. Moreover, monitoring the bankruptcy process has proven difficult, time-consuming and not particularly fruitful. Although recently we have had greater success with bankruptcy cases, partly due to agency efforts and gained experience along with the bankruptcy courts priority elevation of environmental issues.

It should be noted that this agency's collection total exceeds all other states combined total that have similar programs. Our collection rate compares favorably with or exceeds other states and possibly OSM. However, the short turnaround on this response and the Federal shutdown did not allow us to adequately verify other collection rates.

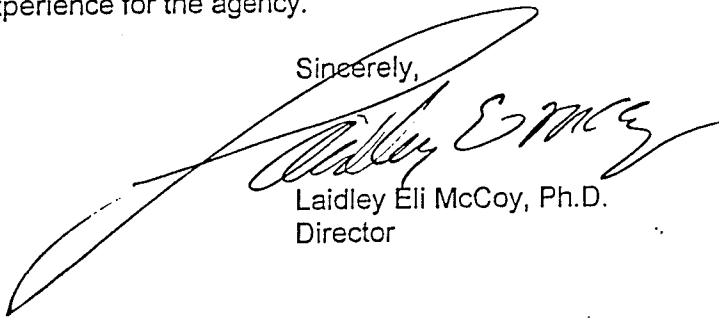
This agency accepts recommendation 2 and intends to establish a goal that defines an acceptable collection rate for penalties. Some of the immediate efforts will focus in the following areas:

- 1) Cost/benefit analysis to justify pursuing litigation.
- 2) Seek additional authority to bolster collection efforts.
- 3) Ensure legal resources are available and timely.
- 4) Additional accounting procedures to establish non-collectibility while preserving permit blocks.

The agency will continue to explore improvement efforts and solicit advice from other agencies experienced with collections.

We appreciate the opportunity to respond and feel the performance audit was a positive experience for the agency.

Sincerely,



Laidley Eli McCoy, Ph.D.
Director

LEM/cm

cc: Mark Scott
John Ailes