

**STATE OF WEST VIRGINIA**

**DIVISION OF ENVIRONMENTAL PROTECTION  
Office of Mining and Reclamation**

**Special Report**

---

**Part 1: Analysis of Approval Time for  
Coal Mining Permits**

**Part 2: Causes of Lengthy Coal Mine  
Permit Process**

---

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

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

**November 1999**

**PE 99-23-149**

# **JOINT COMMITTEE ON GOVERNMENT OPERATIONS**

## **House of Delegates**

Vicki V. Douglas, Chair  
David "O.B." Collins, Vice Chair  
Scott G. Varner  
Douglas Stalnaker  
James E. Willison

## **Senate**

Edwin J. Bowman, Chair  
Billy Wayne Bailey, Jr., Vice Chair  
Oshel B. Craigo  
Martha Y. Walker  
Sarah M. Minear

## **Citizen Members**

Dwight Calhoun  
John A. Canfield  
Willard (Bill) Phillips, Jr.  
Mayor Jean Dean  
W. Joseph McCoy

Aaron Allred, Legislative Auditor  
Office of the Legislative Auditor

Antonio E. Jones, Ph.D., Director  
Performance Evaluation and Research Division

John Sylvia, Research Manager  
Paul Barnette, Research Analyst

**November 1999**

## Table of Contents

<b>Part 1:</b>	Analysis of Approval Time for Coal Mining Permits .....	3
<b>Overview of the Permit Process</b>	.....	5
<b>Part 2:</b>	Causes of Lengthy Coal Mine Permit Process .....	13
<b>Issue Area 1:</b>	Indecisiveness, Federal Oversight, and Policy Changes have Caused Significant Delays In Issuing Surface Mining Permits .....	15

## LIST OF TABLES

### **Part 1: Analysis of Approval Time for Coal Mining Permits**

<b>Table 1:</b>	Coal Mining Permits Issued for New Operations, 1996 to 1999* .....	6
<b>Table 2:</b>	Federal Agency Responsibility of DEP Issued Permits .....	9
<b>Table 3:</b>	Decision of Surface Mine Applications Pending as of 4/20/99 .....	10
<b>Table 4:</b>	Number of Applicants Required to Submit Additional Information .....	11

### **Part 11: Causes of Lengthy Coal Mine Permit Process**

<b>Table 1:</b>	Coal Mining Permits Issued for New Operations, 1996 to 1999 .....	15
<b>Table 2:</b>	Federal Agency Responsibility of DEP Issued Permits .....	18
<b>Table 3:</b>	Decision of Surface Mine Applications Pending as of 4/20/99 .....	19
<b>Table 4:</b>	Corrections Summary for Permits Issued in 1999 For New Coal Mining Activities .....	20
<b>Table 5:</b>	Number of Applicants Required to Submit Additional Information .....	27



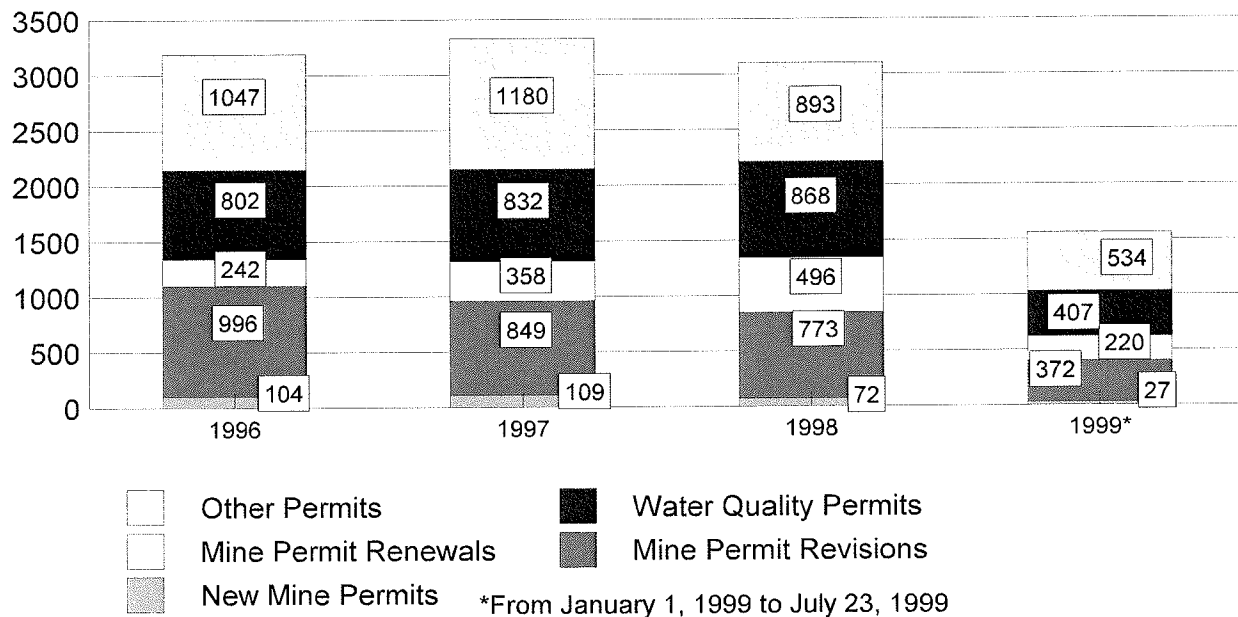
## Analysis of Approval Time for Coal Mining Permits

The Office of Mining and Reclamation (OMR) within the Division of Environmental Protection (DEP) is the state agency responsible for issuing coal mining permits. OMR oversees all mining activities including reviewing permit applications for surface and underground coal mines, preparation plants, coal loading facilities, haulage ways and coal-related dams. The office also reviews permit applications for non-coal quarry operations (sand, gravel, limestone, etc.).

Each year OMR approves nearly three thousand permitting applications, many of which are for permit renewals or revisions of existing mining operations.<sup>1</sup> Some of these applications are also for water quality permits which a coal company may have to receive that certifies that the mining activity will be in compliance with maintaining the state's water quality standards. A relatively small number of permitting applications (around 100) are approved each year to establish new coal mining operations. Figure 1 shows the yearly totals of permitting applications approved.

**Figure 1**

### OMR Approved Permits, 1996 - 1999



### Overview of the Permit Process

---

<sup>1</sup> Many permits must be renewed because they are issued for terms not to exceed five years. Revisions may be to expand the mining boundaries specified within a permit for an active mining operation, or to make changes within the boundaries specified in a permit for an active operation.

---

Coal mining activities that require a permit from OMR generally are within one of three categories: *surface mining*; *underground mining*; and *other activities*. Surface mining represents strip mining activities or the more familiar mountaintop removal. Underground mining involves underground excavations of coal. The Other Activities category includes coal-related activities such as:

- Haul or access roads;
- Preparation plants for coal;
- Coal refuse areas;
- Coal-related dams or impoundments;
- Conveyance systems such as slurry lines, conveyor belts, etc.; and,
- Storage facilities.

These three categories are used to describe not only applications for new coal mining permits, but also revisions to current mining permits.

Since the circumstances surrounding the issuance of new mining permits vary largely from permit to permit and from company to company, there is a large variance in issuance times for these permits. Because of this variance, it is more useful to examine the median time to issue permits for new mine activity than the average time to issue permits. As Table 1 illustrates, the median time to issue permits for new surface mining activities has gradually increased from 232 days (half of the permits being issued in less than 232 days while half of the permits took longer than 232 days) to 323 days between calendar year 1996 and 1999. Table 1 also shows that the minimum time that the OMR issued a surface mine permit has increased from a low of 106 days in 1998 to high of 221 days in 1999. From 1996 to 1998, the median time to issue other mining permits (haul or access roads, preparation plants, coal refuse areas, coal related dams or impoundments, conveyance systems and storage facilities) as well as underground mine permits was gradually decreasing. However, as Table 1 shows, as of 1999 the median time to issue these permits has increased. In the case of underground mine permits, the median time to issue these permits has increased dramatically to the longest time in the last four years. Furthermore, the shortest time to issue an underground permit is higher than in past years, and more than twice the time in 1998.

**Table 1**  
**Median Time to Issue Coal Mining Permits for New Operations\***

Permit Type	Calendar Year	Number of Permits Issued	Median Time	High	Low
Other Mining Activities	1996	11	371 Days	1206 Days	150 Days
	1997	15	229 Days	1292 Days	122 Days
	1998	9	192 Days	2379 Days	141 Days
	1999*	3	246 Days	546 Days	204 Days
Surface Mine	1996	43	232 Days	703 Days	165 Days
	1997	44	240 Days	1574 Days	107 Days
	1998	21	285 Days	923 Days	106 Days
	1999*	7	323 Days	838 Days	221 Days
Underground	1996	44	272 Days	1433 Days	119 Days
	1997	37	250 Days	1432 Days	114 Days
	1998	36	202 Days	2324 Days	65 Days
	1999*	16	347 Days	1386 Days	161 Days
* Represents January 1, 1999 through June 30, 1999					

As the median time to issue permits increases, and the number of permits received stays constant, fewer permits will be issued. As Figure 2 shows, based on an extrapolation of data for the first half of 1999, the OMR is projected to issue the lowest number of coal mining permits in the last four years. As the number of permits issued decreases, Figure 2 also shows that the final number of permits pending at the end of the year will increase.

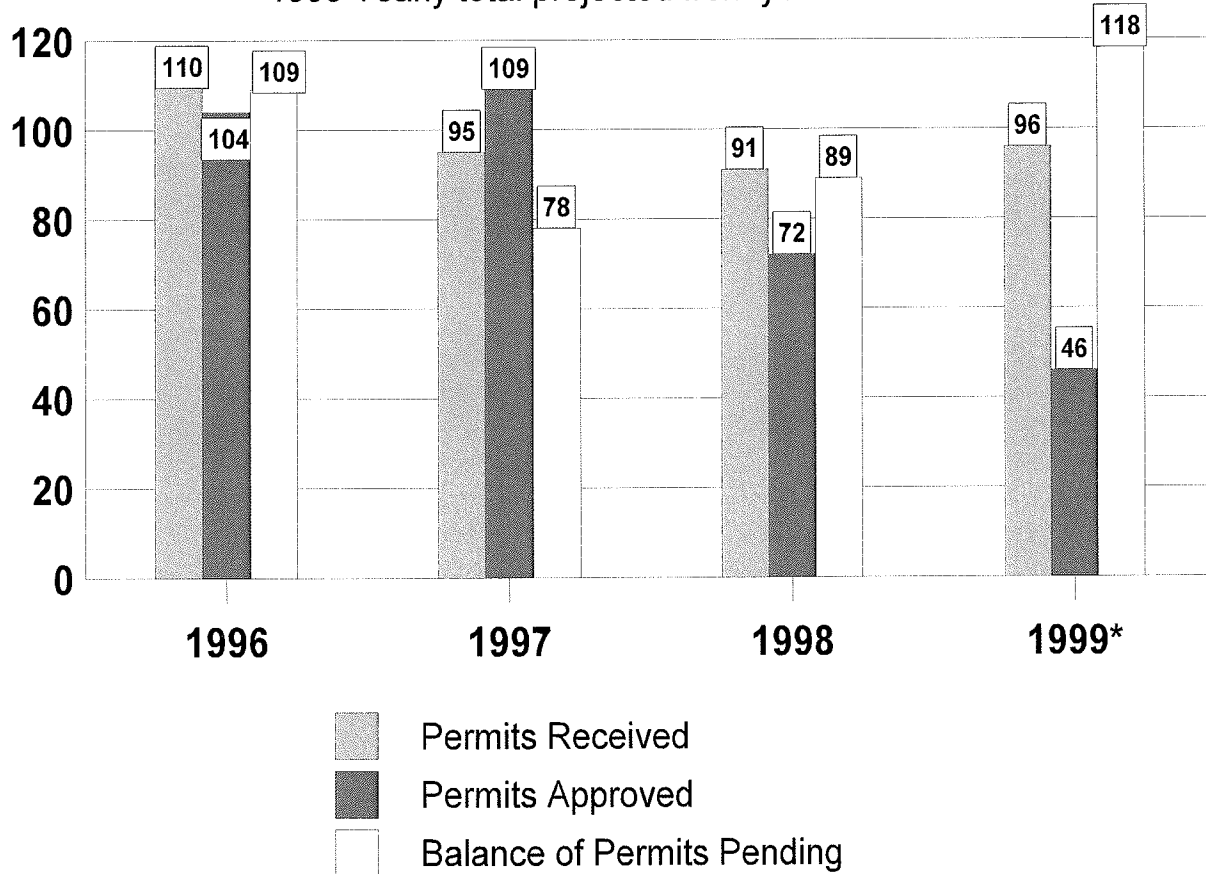


Delays on Water Quality Permit Issuance

Figure 2

# Permits for New Coal Mining Activity

\*1999 Yearly total projected from year to date totals

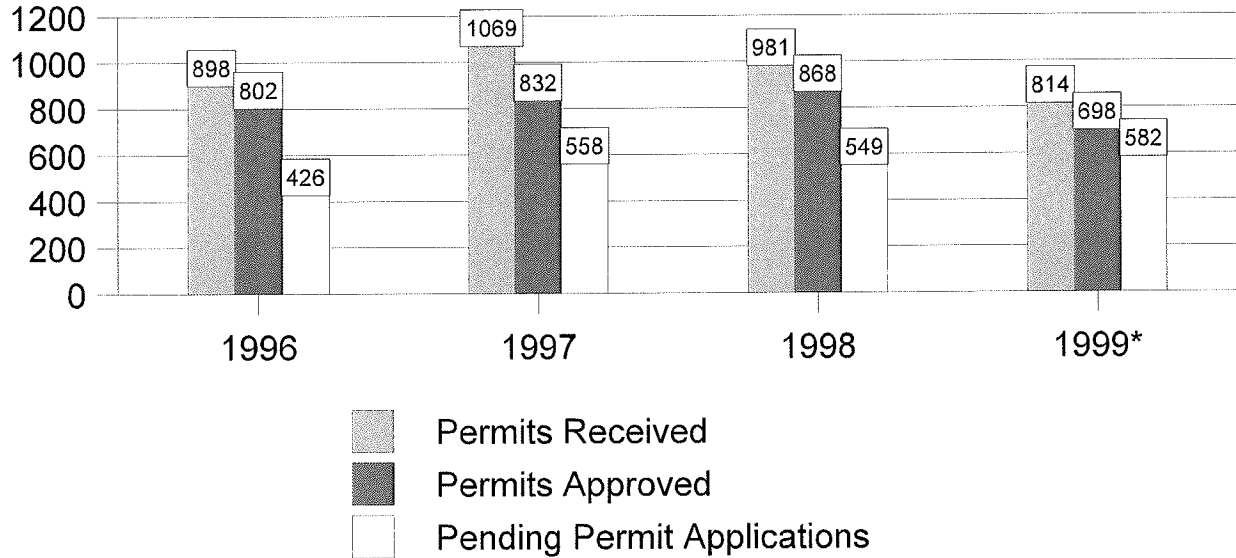


Delays are also being experienced in the issuance of water quality permits, which are called National Pollutant Discharge Elimination System (NPDES) permits, for mine related activities. The NPDES permits certify that a specific activity is in compliance with the state's water quality standards. NPDES permits for coal related activities are processed by the OMR, and are issued by the Office of Water Resources. Figure 3 shows that, like surface mine applications, based on extrapolation of data for the first half of 1999, it is projected that the number of NPDES permits issued this year will be the lowest in the last four years.

Figure 3

# Water Quality Permit Activity

\*1999 Yearly Totals are projected based on current data



## Permit Revisions

Applications for new proposed mining activities represent a small portion of the applications received by the OMR, while permit revisions for existing operations constitute a large portion of the applications received. There are two types of revisions: (1) revisions to the boundaries of an existing permit, and (2) revisions within the boundaries to the actual mine. The median time to issue permits for revisions has seen only a minor increase, and has remained relatively constant over a four year period. It is interesting to note that for Boundary Revisions, the highest time to issue the permit has increased steadily each year, while the highest time to issue permits for Revisions within Boundaries has declined significantly each year. Table 2 shows the median time to issue permits for revisions.

**Table 2**  
**Boundary Revision's Average and Median Time**

Permit Type	Year	Number of Permits	Average Time	Median Time	Low	High
Other Mining Related Activities Permits	1996	87	119 Days	66 Days	1 Day	785 Days
	1997	85	101 Days	54 Days	1 Day	874 Days
	1998	63	129 Days	62 Days	1 Day	902 Days
	1999	21	118 Days	86 Days	14 Days	555 Days
Surface Mining Permits	1996	99	93 Days	66 Days	1 Day	738 Days
	1997	91	79 Days	51 Days	1 Day	563 Days
	1998	90	111 Days	73 Days	2 Days	474 Days
	1999	41	106 Days	63 Days	1 Day	1146 Days
Underground Mining Permits	1996	165	77 Days	56 Days	1 Day	342 Days
	1997	175	91 Days	69 Days	1 Day	568 Days
	1998	158	97 Days	67 Days	1 Day	830 Days
	1999	68	109 Days	72 Days	1 Day	730 Days
<b>Revision's Average and Median Time</b>						
Permit Type	Year	Number of Permits	Average Time	Median Time	Low	High
Other Mining Related Activities Permits	1996	115	99 Days	55 Days	1 Day	1464 Days
	1997	102	94 Days	48 Days	1 Day	1532 Days
	1998	88	87 Days	56 Days	1 Day	395 Days
	1999	53	157 Days	75 Days	1 Day	717 Days
Surface Mining Permits	1996	269	67 Days	39 Days	1 Day	671 Days
	1997	182	73 Days	49 Days	1 Day	379 Days
	1998	188	95 Days	73 Days	1 Day	525 Days
	1999	85	98 Days	71 Days	1 Day	398 Days
Underground Mining Permits	1996	210	73 Days	45 Days	1 Day	816 Days
	1997	176	87 Days	49 Days	1 Day	636 Days
	1998	152	80 Days	59 Days	1 Day	397 Days
	1999	99	95 Days	50 Days	1 Day	569 Days

## Affects of the Settlements on Permit Renewals

Renewals, like revisions, also constitute a large portion of the applications received by the OMR. The median time to issue renewals for coal mining activities does not indicate any significant affects of the factors affecting new permit issuance. Table 3 shows the median time to issue permit Renewals.

**Table 3**  
**Average and Median Time for Renewals**

Category	Year	Number	Average	Median	High	Low
Other Mining Related Activities Permits	1996	33	146 Days	124 Days	328 Days	61 Days
	1997	157	135 Days	115 Days	314 Days	64 Days
	1998	178	169 Days	148 Days	573 Days	64 Days
	1999	42	195 Days	166 Days	448 Days	71 Days
Surface Mining Permits	1996	47	169 Days	140 Days	453 Days	78 Days
	1997	64	159 Days	124 Days	563 Days	67 Days
	1998	50	202 Days	172 Days	483 Days	76 Days
	1999	18	151 Days	138 Days	276 Days	83 Days
Underground Mining Permits	1996	51	142 Days	135 Days	585 Days	63 Days
	1997	96	171 Days	163 Days	365 Days	71 Days
	1998	137	171 Days	154 Days	503 Days	63 Days
	1999	73	184 Days	145 Days	687 Days	60 Days

## Affects of Delays on Permit Backlog

As permit applications pending at the end of the year increases and the number of permit applications received each year stays relatively stable, the OMR will likely see an increase in the permit application backlog. Currently, the OMR has four regional offices. Table 3 shows the current number of total pending permit applications for each regional office. These offices are located at Logan, Welch, Philippi, and Oak Hill. Oak Hill and Logan are the largest of these regional offices. According to the OMR, anything over 300 pending applications for Oak Hill and Logan constitutes a backlog. Welch and Philippi have no established backlog standard, however, since they are not as large of an office as either Oak Hill or Logan, it is implied that if they have more than 300 permits pending, then they also have a backlog. Therefore, based on OMR's criteria for what constitutes a backlog, three of the four regional offices have a backlog of pending permit applications.

**Table 4  
Pending Permits by Regional Office**

Office	Permits Pending	Review Not Started
Welch	211	17
Oak Hill	346	81
Philippi	331	118
Logan	387	102
<i>Current as of July 23, 1999</i>		

**Conclusion**

Coal mining permit activity for the first seven months of 1999 reveals that the median time to issue coal mining permits has increased. This increase in median time affects permits for underground mines, surface mines, as well as other mining related permits. In the case of underground mine permits, the median time to issue these permits has increased dramatically to the longest time in the last four years. Although the factors which impact the issuance of mining permits have not affected revisions to permits, it has affected the issuance of water quality permits. It is expected that the number of permits issued this year will be significantly less this year than in previous years. The causes of these delays is uncertain; however, an examination of causes of increased time to issue permits will be the subject of a subsequent report.

## **Part II. Causes of Lengthy Coal Mine Permit Process**



**Issue Area One: Indecisiveness, Federal Oversight, and Policy Changes have Caused Significant Delays in Issuing Surface Mining Permits.**

The Legislative Auditor's Office issued a report during the August 1999 interim projecting that for 1999, the Division of Environmental Protection (DEP) will issue significantly less permits for new coal mining operations compared to the previous three years. The previous report indicated that through June of 1999, only 26 permits were issued for new coal mining operations. As of the end of September 1999, 34 permits had been issued. The rate of new permits issued through the first 9 months of this year is still on line with the projection of the previous report that at the end of 1999, only 46 new permits are expected to be issued, compared to 70 to 100 new permits the last three years.

However, the decline in the issuance of new coal mining permits actually began in 1998. Table 1 shows that in 1996 and 1997 there were 98 and 96 new permits issued respectively. In 1998 the number declined to 66, and as previously stated, 46 new permits are expected to be issued in 1999. Table 1 also shows that **new surface mine permits are the primary type that are declining.** There were 43 and 44 new surface mine permits issued in 1996 and 1997 respectively. However, that number dropped to 21 in 1998, and it is expected to decline to 14 in 1999.

**Table 1  
Coal Mining Permits Issued for New Operations, 1996 to 1999\***

Year	Surface Mining	Underground Mining	Other Mining Activities	Total
1996	43	44	11	98
1997	44	37	15	96
1998	21	36	9	66
1999*	14	27	5	46

\* Totals for 1999 are estimates based on yearly totals through September 1999

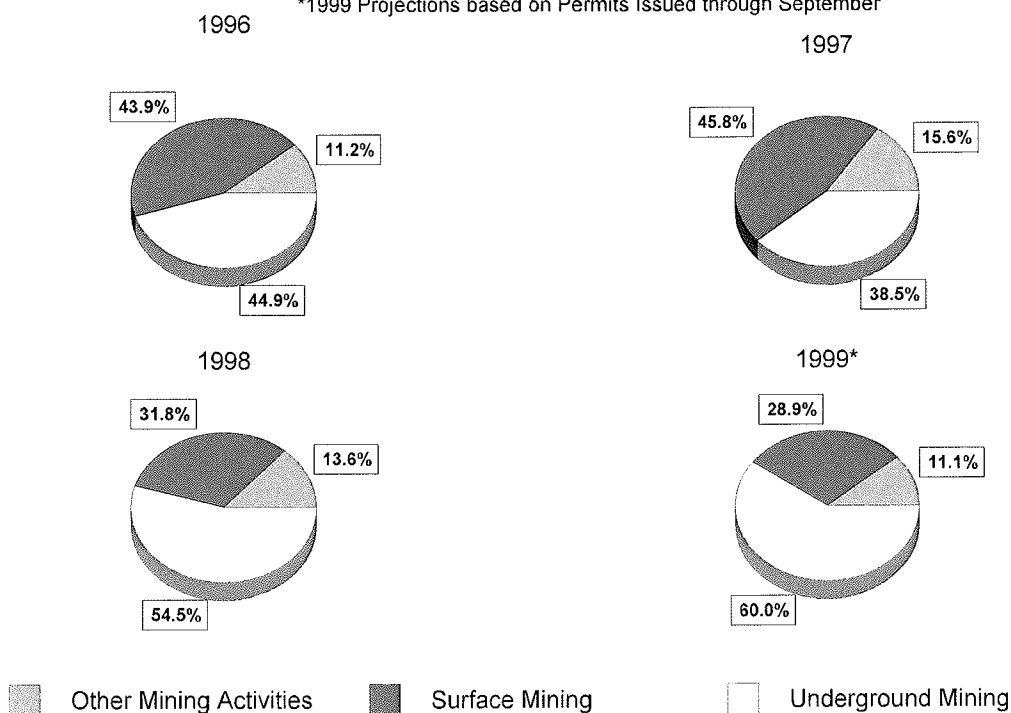
As a result, the composition of new permits has changed significantly. Figure 1 shows that in 1996 and 1997, approximately 45% of new permits issued were for surface mining. However, for 1998 and 1999 less than 30% of new permits are for surface mining.



Figure 4

Projected Permit Issuance for 1999

\*1999 Projections based on Permits Issued through September



### Summary of the Causes of the Delays

In the August report, it was identified that DEP was taking more time to issue permits which will result in fewer permits being issued for 1999 than in the previous three years. The purpose of this current report is to identify why DEP is taking longer, particularly in issuing new surface mine permits. After further review, the major causes identified for the delays in issuing new surface coal mining permits as well as the lengthy and complex decisions on all types of mining permits can be summarized as follows:

1. **Indecisiveness** on the part of DEP, COE, and OSM have caused some applications to languish, while frustrated coal companies wonder why a final decision cannot be reached on their applications. Staff from one coal company indicated that his impression was that OSM does not appear to have devoted the time or resources needed to review all permits in a timely manner, while staff from another company stated that in his opinion the delays are deliberate with the intention of waiting for a ruling by the Judge in the lawsuit on the Consent Decree, which has not been finalized. In addition, OSM has been slow in clarifying policy changes for DEP staff and companies.

2. **Federal Technical Review** over certain applications has duplicated DEP's review process. OSM is directly involved in reviewing certain permits concurrently with DEP staff. This results in delays because DEP staff has to wait on OSM's review before it can proceed. Furthermore, corrections cannot go to the company until after other federal agencies have had the opportunity to review the application. These are two new steps that have been added to DEP's process.
3. **Policy changes** have resulted in several procedural changes. Some of these changes require additional information from the applicants, more detailed analysis by DEP, additional internal reviews through peer reviews, and improved documentation by DEP to justify permit decisions.

### **Cause 1: Indecisiveness in the Permit Process**

Despite the court cases that have clouded decision making for mining permits in the past 18 months and continues to leave unanswered questions about the meaning of certain provisions of the *Surface Mining Control and Reclamation Act*, two critical factors in coal mining permits have long contributed to a lengthy and complex decision process. The first factor is the multi-jurisdiction of federal and state agencies; the second is the variation in interpretation, or professional judgment of those involved in the permit process. Studies of public policy implementation have long established the rather common sense notion that the probability of successful implementation decreases dramatically as the number of jurisdictions increases.<sup>2</sup>

A recent lawsuit<sup>3</sup> alleged deficiencies in the coal mining permit process within the jurisdiction of DEP and the U.S. Army Corp of Engineers (COE). A principle complaint was that some coal mining permits issued by the COE were issued under the COE's **General** permit instead of an **Individual** permit. The difference between these permits is that a General permit is issued when the COE determined that the mining activities would have minimal adverse environmental effects, while an Individual permit is required when the mining activity will have environmental impacts that are more than minimal. Another difference is that Individual permits could take longer for the COE to issue than a General permit. It should also be noted that the COE has yet to issue an Individual permit for surface mining in West Virginia. **Therefore, it is not clear what a complete application for an Individual permit should contain.**

A settlement agreement was entered into by DEP, the COE, the U.S. Office of Surface Mining (OSM), the U.S. Environmental Protection Agency (EPA), and the U.S. Fish and Wildlife Services (FWS). Part of the agreement required interagency coordination between these agencies for more consistent and environmentally sound decisions that would address the complaints raised in the lawsuit. This was implemented by a Memorandum of Understanding (MOU) which was signed

---

<sup>2</sup>Pressman, J and Wildonsky, A. *Implementation Berkeley Ca: University of California Press, 1973.*

<sup>3</sup>Bragg, et. Al., v. Robertson, et.al., Civil No. 2:98-0636 (S.D. W.Va).

by each agency on April 7, 1999.

These agencies were included in the MOU because they have certain responsibilities within the permit process (see Table 2). Prior to the lawsuit, the general procedure was for DEP to issue its permit usually with little input from other federal agencies. The permit could be reviewed, revised or nullified by OSM if it had any concerns of whether the permit violated federal regulations. If the permitted mining activity affected U.S. waters, then the applicant would be required to file an application with the COE. Furthermore, the COE would invariably issue a General permit before the applicant would receive their permit from DEP. However, under the MOU, now the COE partially reviews the application prior to DEP issuing the permit with the purpose of providing only a preliminary indication to the applicant of whether the COE will issue a General or Individual permit. Prior to the lawsuit this was usually not a concern because a General permit would always be issued. Part of DEP's permit includes a state water quality permit (issued within DEP by the Office of Water Resources) that determines that the mining activities will be in compliance with the federal Clean Water Act. The EPA has oversight authority over the Federal Clean Water Act, and therefore, it can review, revise or nullify (veto authority) DEP's water permit, which in effect would nullify the entire mining permit because mining cannot occur unless the water permit is issued. The federal agencies (OSM, EPA, COE) are required under the Fish and Wildlife Coordination Act, and the Endangered Species Act to coordinate and consult with the Fish and Wildlife Services to determine if permitted mining activities will threaten endangered species or will inhibit the preservation of wildlife.

**Table 2**  
**Federal Agency Responsibility of DEP Issued Permits**

Agency	Permit Type	
	<u>Mining Permit</u>	<u>Water Quality Permits</u>
WV DEP	The DEP is the primary issuer	The DEP is the primary issuer
EPA	The EPA has no authority over mining permits	The EPA has direct veto power over water quality permits
OSM	The OSM has indirect authority to review, amend, or nullify the permit	The OSM has no authority over water quality permits
F & WS	The F & WS has only consultative role for both the mining and water quality permits	
COE	The COE receives proof of DEP's permits for the purpose of determining whether the applicant will require an Individual or General COE permit to impact U.S. waters.	

One of the first coordinated decisions that was made was to review all pending applications to determine which should go through a General or Individual permit from the COE. The first 38 pending surface mine applications that were reviewed in February of 1999 were categorized as shown in Table 3.

**Table 3**  
**Decision of Surface Mine Applications Pending as of 4/20/99**

General Permit	Individual Permit	Split Decision
16	16	6

A unanimous decision was made on 32 applications. The agencies (OSM, EPA, COE, and F & WS) agreed that 16 of the applications could appropriately receive a General permit, and that 16 would likely need an Individual permit. Split decisions were reached on 6 applications.<sup>4</sup> Generally, the deciding factor as to which category an application should be placed in is the size of the valley fills. Applications with impacted watersheds that are below 250 acres would likely need the General permit. Applications with impacted watersheds greater than 250 acres invariably were categorized as needing an Individual permit. Applications that had a split decision involved affected watershed areas that were less than 250 acres. However, because the applications had several valley fills and other operations in the watershed, the U.S. Fish and Wildlife Service felt that the cumulative impact warranted Individual permits.

It is at this stage (i.e. determining which applications with fills that impact less than 250 watershed acres would need an Individual permit based on cumulative impacts) significant problems are occurring. Most companies would like to avoid going through the process of obtaining an Individual permit because of the length of time involved and because **it is not clear what is involved in obtaining an Individual permit**. As stated previously, virtually all new coal mining applications received a General permit from the COE prior to the lawsuit, regardless of the valley fill sizes.

As a result, several companies that have applications in the Individual or Split Decision category have made attempts to change the design of their proposed coal mining operation in order to be able to get a General permit. Many companies believed that the way to accomplish this is to reduce the size of the valley fills below 250 watershed acres. This normally results in less coal being mined and additional expenses incurred for application redesign. Also, when the application is redesigned, DEP must review it as though it were a new application which essentially starts the review process all over. It is expected by companies that once the application meets the criteria for a General permit that the application would proceed similar to the pre-litigation process. However, companies did not take into account that other federal agencies may consider their revised application still contains "cumulative impacts." This confusion is the result of there not being strict definition of "cumulative impact."<sup>5</sup> Nevertheless, **companies that have redesigned their**

---

<sup>4</sup>There are other pending applications since April 20, 1999. However, applications are no longer categorized as General or Individual.

<sup>5</sup>DEP indicated that defining "cumulative impact" was under discussion for possible resolution.

**applications to fit the criteria for a General permit are still frustrated that they have not received a final decision.** Furthermore, companies are not getting clear explanations as to why a final decision is not made. Instead, they receive further requests for corrections. Moreover, since applications are no longer categorized into Individual or General, companies are uncertain if their application will fit the General permit criteria. In one instance, COE notified a company after a site visit that the application may meet the criteria for a General permit.

The process of requesting “corrections” by DEP, OSM, COE, or others is often a misnomer. One top DEP official agreed that most “corrections” are not corrections, but a need for additional data from the company. Further, in field interviews, we were told by permit reviewers that sometimes it is not always possible to identify the need for “corrections” at one time. “In reviewing corrections, you can see things you didn’t notice during previous reviews that need to be corrected.” There are also time when Federal review requires corrections that are different than DEP’s and sometimes at odds with DEP, according to DEP field staff.

To illustrate the “ping-pong” game, we counted the corrections and the time in the process taken up by corrections. Table 4 contains all new coal mining activity permits issued in 1999. We reviewed 18 underground, 9 surface, and 4 “other” mining permits. These was an average of 4 corrections for each permit, with one underground permit requiring 13 corrections and one surface permit requiring 8 corrections.

But as Table 4 also reports, the proportion of time spent on corrections in the total time from application to issuance averaged almost 75%, with some taking 80 - 99 percent of the time.

**Table 4**  
**Corrections Summary for Permits Issued in 1999 for New Coal Mining Activities**

	Average	Median	Lowest	Highest
Number Of Corrections	3.81	3	2	13
Percentage of Time Spent on Corrections	73.08%	81.52%	16.16%	99.93%

Note: Total corrections include both technical and Administrative corrections.

The indecision and lack of clear guidance is also illustrated in the decision regarding post-mining land uses. In May 1999, the Office of Surface Mining (OSM) released a report entitled “*An Evaluation of Approximate Original Contour and Post Mining Land Use in West Virginia.*” OSM completed this report as part of its oversight evaluation of the State’s surface mining program. The report stated that the WVDEP was issuing mountaintop removal permits with post-mining land uses which were not authorized under the approved State program. To resolve this issue, the WVDEP agreed to discontinue issuing permits with unauthorized post-mining land uses. Furthermore, OSM agreed to issue an official position on all post-mining land uses related to AOC variances by July 12, 1999. The report was intended to clarify land use categories “*that have proved difficult to interpret consistently.*” However, this document was not issued until October 13, 1999. This means that for

nearly two months, DEP staff and applicants were unclear as to what type of post-mining land uses were acceptable.

In its report on Post Mining Land use; OSM cites the Federal State requiring certain land uses (30 USC 1265 (c)(3) and 30 USC 1265(e)(2), but adds:

Considerable confusion exists, however, regarding how broadly or narrowly to interpret SMCRA's categories of acceptable post-mining land uses (p3).

The standard applied to post-mining land use which requires a waiver from the approximate original contour (AOC) requires the alternative land use be "higher and better than per-mining uses". Higher and better mean "higher economic value or monetary benefit to the land owner or community". However, the report acknowledges that there is no definition or explanation of equal or better economic or public use in the land or regulations.

The interpretive nature of the permitting process is further documented in OSM's October guidelines on post-mining land use by the following assertion, after lists of required elements of a plan for land use making references to "reasonableness and practicality".

Determinations of reasonableness or practicality are judgment calls on the part of the regulatory authority" (p 17).

Following are two case examples that illustrate the problems coal companies have faced with their applications.

**Case Example #1**  
**Vandalia Resources, Ike Fork, #1**  
**Clay County**

August 17, 1998	Application was submitted. The application had 2 valley fills the largest being 435 acres.
April 6, 1999	The Philippi regional office sent the application to the Central office in Nitro recommending approval. The regional staff indicated that prior to the lawsuit this application would have been approved and a permit would have been issued soon after it was sent to Nitro.
May, 1999	Because of the Memorandum of Understanding, the application was reviewed by DEP, OSM, COE, EPA, and FWS. It was unanimously decided that the application would need an Individual permit. An application was filed with the COE for an Individual permit under the assumption that the process would take only 90 days. The company was later told that an Individual permit would take much longer than 90 days. Because the company needed the permit by August to avoid layoffs, the application was revised by reducing the affected watershed acres to under 250. This would result in less coal mined by approximately 4 million tons. After the meeting, the company thought the application met the criteria for a General permit.
June 14, 1999	The company met with DEP, and the federal agencies to determine if they could receive some defined timeline on when its application could be approved, and what issues needed to be resolved to expedite the process. In a letter to the COE, the company indicated that it received direct comments from the EPA, however, the company received minimal feedback from FWS. Given the minimal feedback, the company was left with no indication when it could receive a permit.
June, 1999	OSM's June report to the West Virginia Congressional Delegation indicated that the estimated decision date on the application was moved from July to October of 1999.
July 7, 1999	Although the revised application can receive a General permit, OSM continued to request corrections to the application, and duplicating DEP's review. It was the company's understanding that once a General permit was agreed upon that the application would go through the pre-litigation process where OSM is no longer involved. On July 7, the company met with DEP and the federal agencies to see what would be needed to get the application approved by August. After several hours of discussion, nothing was accomplished and no decision was made on the application.
September, 1999	Vandalia lays off 26 employees because of the delays in the permit being issued.
October, 1999	The latest set of corrections made by the company still did not satisfy OSM. Because of the delays and need to redesign the application, the company has incurred additional expenses.

**Case Example #2**  
**Marrowbone Development, Big Sang Mine #2**

July 7, 1998	Marrowbone Development submitted an application for the Big Sang Kill Surface Mine #2 to WVDEP. The application had 4 valley fills, the largest being 143 acres.
April, 1999	While the permit was still being evaluated in the regional office, the application was selected for interagency review by OSM. At the time of the inter-agency review, there was a split decision as to whether the application would require a General permit or an Individual permit. During the inter-agency review, OSM, EPA, COE, and WVDEP all agreed that the site should receive a General Permit. However, the FWS stated that the site should receive an Individual permit because of cumulative impacts.
July 11, 1999	The COE performed a site visit and issued a letter stating that the site “ <i>may meet the criteria for Nationwide Permit #21 (General Permit).</i> ”
July 13, 1999	Despite the fact that the COE indicated that the application might be eligible for a General permit, a coordinated meeting between the company and the five signatory agencies was scheduled to take place. However, EPA, COE, and FWS (the agency which indicated concern with the permit) decided not to attend. The primary discussion was a concern over the post-mining land use.
July 14 to August 17, 1999	During this time period, the land owners issue letters to OSM requesting that the requested post-mining land use be allowed. OSM issues requests for various information and that information is submitted.
August 18, 1999	The permit is approved at the regional office and sent to DEP headquarters.
August 19, 1999	Despite approval at the regional level, the company receives an additional series of comments from OSM concerning the hydrology section.
August 27, 1999	Despite the fact that the company, DEP and OSM have met and discussed the post-mining land use, and despite the fact that the land owners have requested that the post-mining land use be approved, an additional series of comments from OSM concerning the post-mining land use section of the permit are submitted to the company. Responses returned the same day.
September 8, 1999	Another joint meeting was scheduled at the DEP headquarters. The meeting was subsequently changed to a conference call between OSM and DEP., excluding the company representatives. Two additional series of comments requested by OSM/ WVDEP regarding topsoil, post mine land use, and hydrology.
September 15, 1999	To date, the company has received four requests for more information from OSM after the permit has been approved by the regional DEP office. A joint meeting between OSM, DEP, and the company is scheduled and held. Once again, more information is requested regarding the landowner commitment to the post-mining land use.
September 18, 1999	Corrections submitted by the company to WVDEP on this date.



According to company representatives, delays in the permit process have cost the company additional expenses. Furthermore, if the permit is not issued soon, the company faces the likelihood of layoffs for employees. Surface mining for this site accounts for 103 employees and over \$5 million in annual wages.

## **Cause 2: Federal Technical Assistance in the Permit Process**

A significant change in DEP's permit process has occurred in the "*Technical Review*" of the application. At this stage of the process, the application is examined to determine if the proposed mining operation is consistent with state and federal regulations, and is environmentally sound. If the application is determined to have technical deficiencies, then DEP will request corrections to be made by the company to the operation design. These corrections may take days, weeks or months for the company to make depending on the correction.

Because of the complexity of mining operation designs, most surface mine applications will require at least one technical correction. However, it is common for DEP to request different corrections at different times, instead of requesting all necessary corrections at one time. In talking to permit reviewers, they indicate that sometimes second or third requests may result because the company did not make the corrections completely or accurately. However, they also acknowledged that due to the complexity of the application, some corrections can be overlooked on the initial review of the application.<sup>6</sup>

The technical review was compounded by the fact that 22 new surface mine applications with valley fills are being reviewed by both DEP and OSM staff. This resulted from the MOU. A primary reason that OSM is involved in DEP's permit process is to provide technical assistance to ensure that applications that may require an Individual permit will have all of the necessary information for COE to make its decision. This will prevent the need for any additional delays. Under the revised technical review process, DEP and OSM identify correction needs separately. After each agency has completed its review, correction requests from both agencies are combined into one document. The enhanced review process can result in more corrections being identified, and some corrections identified by one agency that was not identified by the other.

One would think that with the greater amount of scrutiny that applications are undergoing that correction requests would be completed after the initial review. However, in some applications additional requests for corrections still occur. Furthermore, both agencies do not finish their reviews at the same time. So when DEP is finished with its review, it may have to wait for OSM to provide its corrections in order to have both agency's corrections incorporated. DEP placed early emphasis on OSM reviewers being present on-site during the review process. This did not happen initially and subsequent discussions with OSM has resulted in present improvements in this regard.

OSM's involvement in the review process is only the first major change in the technical

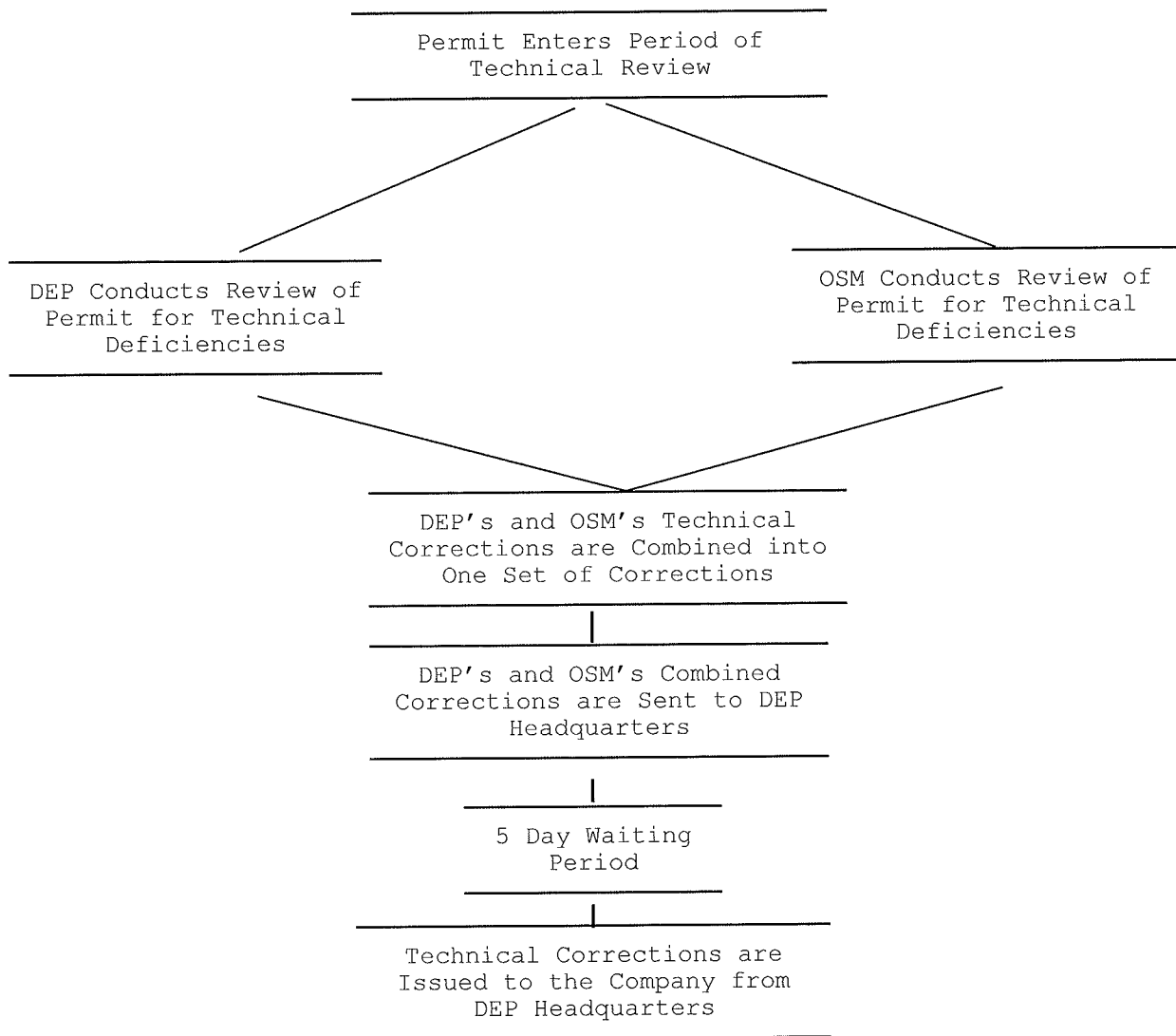
---

<sup>6</sup>The problem of frequent requests for corrections is recognized by DEP, and it stated that there will be continued emphasis on all correction requests being accomplished at the same time to the extent practical.

review. Once the corrections have been incorporated, the document is sent to DEP headquarters. This step is also a new addition to the process. The purpose for sending corrections to DEP headquarters before sending them to the company is to allow DEP to send them to the other federal agencies for their review. According to internal policy, each agency, except OSM, is given 5 days to review the request for corrections. OSM has no time constraint on its review of the document. Although OSM's regional staff was involved in identifying the corrections, there may be additional corrections that the agency may find at this point. If no further corrections are identified by the federal agencies within 5 days, and when OSM gives its approval of the corrections, the request for corrections is then sent to the company.

These two additional steps of the technical review can add weeks to the process. Prior to the MOU, DEP staff would identify corrections and immediately send them to the company. Now it must wait for OSM's corrections, then send the incorporated corrections to headquarters and then wait at least a week before they can be sent to the company. Figure 2 illustrates the new combined review process.

**Figure 2**



**Cause 3: Policy Changes by DEP**

In addition to changes in the permit process in general, WVDEP has made several policy changes as part of the settlement agreement which they have entered into. The main complaint against the WVDEP was that they were not withholding approval of permit applications that are not *“accurate, complete, and in compliance with the approved State surface mining program.”*

Many of the policy changes required applicants to provide more detailed and additional information than was previously provided. For example, the proposed settlement agreement states that the Director (of DEP) shall *“require a separate hydrologic reclamation plan section in the permit application.”* This information was previously contained in various sections of the application, however, now a separate section is required. Also required is more detailed testing of

water samples. Previously, water samples were tested for 10 parameters, and are now tested for more than 20 parameters. Another example is when applicants seek an exemption from returning the mountain to approximate original contour (AOC). When an applicant seeks an exemption of this type, they must show that the use of the land after mining will be at least as good if not better than the land use before mining. Applicants are now required to submit additional justification for why the exemption is needed and should be granted. Furthermore, if applicants are going to get the exemption, they need to provide information stating that there is an expected need and market for the new and improved post mining land use.

On July 22, 1999, the assistant chief in charge of permitting for DEP's Office of Mining and Reclamation sent a memo to the permit supervisors in the regional offices. This memo stated that due to policy changes in the permitting process, 80 applicants were required to submit additional information. Of those 80, 30 have provided all of the additional information that was requested. Table 5 shows the number of applicants who needed to submit additional information and those who have submitted it.

**Table 5**  
**Number of Applicants Required to Submit Additional Information**

Number of Applicants Receiving Notice	Completed Submission*	Percentage Complete
80	30	37.5%
*Current as of September 1999		

When applicants are required to submit more detailed and additional information than was previously required, it is not only costly and time consuming to the applicants, but it is also time consuming to DEP during the review of the applications. One example is when applicants are required to place spoil back on the mountain or to return the mountain to AOC. This previously done by the permit reviewers using their own discretion. Now, there is a substantially longer and more complex formula that must be applied in every situation. Perhaps the best example of the increase to DEP's review time is the Cumulative Hydro-logic Impact Assessment (CHIA). The CHIA analyzes the effects that mining and mine related activity has on the aquatic life and habitat. Previously this information was done for all aquatic life and habitat within the given boundaries of the mining activity. Now, this analysis is being expanded to encompass the entire watershed where a mining activity is taking place. Analysis that was previously contained in 3 to 10 pages will now take 15 to 40 pages depending on the size of the watershed and the level of mining activity occurring within the watershed.

DEP has recognized the interpretation and judgmental nature of the mining permit process, which, was further complicated by the changing roles of various jurisdictions, new guidelines from OSM, and recent court cases. Peer reviews involve the permit staff of a local office as well as the permit staff from other offices. These staff members get together and review current pending permits. Initial efforts indicate that not only is certain policy not being applied consistently but interpretation of policy varies among the permit staff. One staff member indicated that in an

engineering review of three permits, only one was agreed to be complete and accurate.

To date of this report 30 permits were reviewed on six different days regarding the engineering and geology. While the PEER review process may not have had enough experience for an evaluation of its effectiveness in achieving, as DEP wrote in its guidelines, “quality control and . . . ensure consistency among the reviewers”, one reviewer and supervisor agreed it was working to achieve consensus, however, it also wasted time in travel and all-day meetings.

## Conclusion

The Memorandum of Understanding between the signatory agencies was entered into with a stated goal of “*improving timelines and predictability in the permit process.*” However, the MOU has not accomplished either of these two goals. Timeliness has suffered as a result of OSM’s duplication of efforts and added steps to the process, and there is significant uncertainty for applicants because DEP and OSM have been slow in making final decisions. Coal mining companies have expressed frustration with the permit process and have incurred additional expenses in attempts to have their application meet stated criteria. Because of the indecision of DEP and OSM, one company has laid off workers, and another company is considering the same.

On Wednesday October 20, 1999, Chief U.S. District Judge Charles Haden II issued a Memorandum Opinion Order regarding valley fills. According to the Order, it is illegal to place valley fills in perennial and intermittent streams. This means that fills will only be permitted in streams that only flow when it rains or snows. This order prompted the Director of DEP to issue an order on October 21, 1999 which has prevented any permits from being issued that propose valley fills in perennial or intermittent streams. According to DEP, of the 62 pending applications for surface mines with valley fills, all but three propose fills in perennial or intermittent streams.

It is unclear what affect Judge Haden’s ruling will have on mining in West Virginia. There has already been an appeal as well as a motion for stay filed regarding the ruling.<sup>7</sup> The possibility of Legislative changes are also being discussed. However, if Judge Haden’s ruling is reversed, it is clear that the current permit process with its duplication and indecision cannot be allowed to continue. DEP has a statutory responsibility to issue coal mining permits in a timely manner, regardless of the MOU it has entered into. The MOU does not preclude DEP’s responsibility. It is understandable if DEP may feel an obligation to cooperate with the signatory agencies, particularly OSM since it has federal oversight over DEP. However, **the companies and coal miners of this state are being adversely affected by a permit process that is not working in the manner that the MOU intended.** DEP should discuss the problems present in the process with OSM in order to establish a timely permit process. If the discussion does not lead to a resolution to the problem, DEP should consider issuing permits based on its review of the applications. If OSM desires to exercise its authority to review, revise or nullify any permit issued by DEP, that will be its prerogative.

---

<sup>7</sup>A stay was issued by Judge Haden.

**Recommendation 1:**

*The Legislative Auditor recommends that DEP consider exercising its legal authority and issue mining permits in a timely fashion based on its own review of the application and any technical assistance from OSM that is deemed necessary.*