

**WEST VIRGINIA
REGULATORY PERFORMANCE AGREEMENT
EVALUATION YEARS FY-2004 AND FY-2005**

DEPT OF INTERIOR
2004 JAN -9 PM 12:45
OSM - CHARLESTON

West Virginia Department of Environmental Protection

And

Office of Surface Mining

Charleston Field Office

December 2003

Index

BACKGROUND.....	1
OVERVIEW	1
OVERSIGHT INSPECTIONS.....	1
OVERSIGHT REVIEW/TECHNICAL ASSISTANCE	2
PROBLEM RESOLUTION	6
INFORMATION EXCHANGE	6
EXCHANGE OF DOCUMENTS.....	6
ANNUAL EVALUATION REPORT TABLES.....	6
PUBLIC OUTREACH.....	7
INNOVATIVE STATE ACTIONS.....	7
CITIZEN COMPLAINTS	7
SIGNATURES.....	8
APPENDIX A	9
APPENDIX B	10
APPENDIX C	11

BACKGROUND

On January 21, 1981, the Secretary of the U. S. Department of the Interior approved West Virginia's permanent regulatory program under the provisions of the Federal Surface Mining Control and Reclamation Act (SMCRA). With that approval, the State of West Virginia assumed primary authority for regulating surface mining activities within the State. The West Virginia Department of Environmental Protection (WVDEP) through the Division of Mining and Reclamation (DMR) administers the permanent regulatory program. DMR has four regional offices in Philippi, Logan, Oak Hill, and Welch. As provided by SMCRA, following program approval, the Office of Surface Mining (OSM) is responsible for overseeing the State's administration of its approved program. The Charleston Field Office (CHFO), under the Appalachian Regional Coordinating Center (ARCC), carries out this responsibility.

OVERVIEW

To measure the State's success in meeting the environmental protection goals of SMCRA, OSM and WVDEP have cooperatively developed this Regulatory Performance Agreement. The Agreement focuses on measuring the on-the-ground success of the approved program and identifying the need for financial, technical, and other program assistance. OSM Directive REG-8, *Oversight of State Regulatory Programs*, dated July 28, 1999, forms the basis for this agreement.

OSM is also committed to providing the WVDEP technical assistance to resolve complex site-specific issues. The oversight review and technical assistance efforts may blend in many instances where WVDEP and OSM are working together to resolve program issues. This agreement provides flexibility for these processes to be intermingled during the development of specific work plans and subsequent evaluation reports.

Since the oversight review and technical assistance processes are continuous and not limited to one year, this Agreement contains the basic framework for oversight/technical assistance activities in West Virginia for the periods of October 1, 2003, to June 30, 2004, Evaluation Year 2004 (EY 2004) and July 1, 2004, to June 30, 2005, Evaluation Year 2005 (EY 2005). Both parties may amend this Agreement at any time to include additional review topics or technical assistance requests during either evaluation period. This arrangement will also provide the necessary flexibility to include unforeseen program problems as review topics at any time. Issues identified in the topical reviews or technical assistance requests that warrant further consideration may be included in this Agreement. Any evaluation topic or technical assistance request not completed during the evaluation period will move into the subsequent period for conclusion. Workload demands and staffing limitations of either party may affect the completion of the actions in this Agreement.

OVERSIGHT INSPECTIONS

The *Oversight Inspection Agreement* appended to this document as Appendix A will govern the selection of sites for oversight inspections.

OVERSIGHT REVIEW/TECHNICAL ASSISTANCE

Staff from both WVDEP and OSM will plan, implement, and document all oversight evaluations, including technical assistance initiatives. State participation will minimize misinterpretations and provide for continual feedback. Review teams will conduct evaluations throughout the evaluation year. They will provide draft detailed evaluation reports for topics included in the Annual Evaluation Report to WVDEP for final comment no later than June 30 of each evaluation period. This will enable the State to review the reports and provide final comments to the CHFO before the summaries appear in the Annual Evaluation Report.

Each agency will assign at least one staff member to jointly lead the evaluation of each selected review topic. The team leaders will determine the need for other staff as part of the evaluation design process. They will establish the period for the evaluation and the completion schedule for the detailed evaluation report.

Review teams will prepare detailed work plans for each evaluation and technical assistance initiative in this Agreement. As the agencies develop and approve the work plans, they will be appended to this Agreement in Appendix B. Team members will develop detailed work plans at the beginning of each evaluation period. These evaluations may require a year or more to complete.

The EY 2004 and EY 2005 oversight review topics and technical assistance initiatives have the following priorities. Priority 1 topics will start and normally finish during the applicable year. Priority 2 topics will start as staff becomes available after they finish Priority 1 topics. Topics not started or completed during the evaluation year may be deferred to the subsequent year. Both parties to this Agreement should reevaluate any uncompleted oversight review topics no later than three months after the close of the review period. Priority rankings may then be adjusted and/or new review topics may be added.

The priority 1 oversight review topics, including technical assistance initiatives, are:

Slurry Impoundment – During EY 2004, OSM and WVDEP will continue the oversight reviews of the permitting processes used for slurry impoundments in West Virginia. OSM will also work with MSHA and continue to participate in interagency impoundment studies.

Excess Spoil Fills and Flooding Oversight and Technical Assistance Agreement – OSM and WVDEP will continue the corrective actions in the December 2, 2002 plan developed after the flood at Lyburn, West Virginia.

Bonding Adequacy – OSM will monitor progress on the backlog of reclamation, success of water treatment efforts, and actions by the Special Reclamation Advisory Council to address the future adequacy of the Fund. Emphasis will also be placed on the accuracy of the inventory of both forfeited sites and currently permitted mines with regard to the costs of water treatment. This will also include monitoring of State actions under the September 8, 2002, action plan.

Program Enhancement Cooperative Agreement – OSM and WVDEP will complete actions approved under this grant and continue the enhancements into the future as funding allows.

Interim Interagency Permit Evaluation Procedures – OSM will continue to coordinate with other Federal agencies and assist WVDEP in the evaluation of pending surface mining permit applications that may require individual 404 Clean Water Act (CWA) Permits.

Permitting Consistency – OSM will continue to assist WVDEP to improve consistency and compliance with the State's approved permitting requirements and enhance the system where possible to compliment the review and issuance of CWA permits. OSM will use the same personnel involved in previous technical assistance on large surface mining permits to assist WVDEP in developing guidance documents and technical training.

Staffing – OSM will continue to monitor the State's progress toward solving their staffing shortfall. Emphasis will be placed on the WVDEP commitments under the Program Improvement Cooperative Agreement and the State's ability to review slurry impoundments and storm water runoff analysis associated with large surface mines.

Customer Service – OSM Oversight Directive REG-8, dated July 28, 1999, requires a customer service evaluation as part of OSM's routine oversight activities. Each evaluation year, CHFO is to monitor WVDEP's response to citizen complaints and requests for services and assistance. Areas to be evaluated include, but are not limited to, permitting actions, citizen complaints, bond releases, lands unsuitable petitions, administrative judicial review, and ownership and control determinations.

During EY 2004, CHFO and WVDEP will develop an oversight work plan to record the availability of underground mining documents and notifications provided to landowners for new and existing deep mine operations. For EY 2005, CHFO and WVDEP will conduct a follow-up study to evaluate citizen complaints concerning blasting. The results of these reports will be summarized and included in the Annual Evaluation Report. Detailed work plans will be developed and provided for these topics at a later date.

AMD Prediction Phase II – OSM and WVDEP will review permits that have developed AMD to determine the cause in relation to the permit application and review.

Blackwater Discharge – OSM and WVDEP will complete the study of blackwater discharges to determine if there are trends and adequate remedial measures for these events.

Oversight Inspections – OSM will conduct the following types of oversight inspections to ensure compliance with the approved State program.

Random Inspections – CHFO will conduct complete, partial, and bond release inspections to evaluate the general effectiveness of the State program and to facilitate special studies. The complete and partial inspections will also evaluate Phase I and II bond releases that have occurred within the past two years. In

addition to these evaluation parameters, partial inspections will include the evaluation of performance standards related to backfilling and grading, hydrologic balance, and blasting. Appendix A contains a copy of the oversight inspection agreement for 2004 which emphasizes large surface mines. Both parties to this agreement will establish the appropriate number of yearly inspections.

Bond Release Inspections – CHFO will evaluate and report on the effectiveness of reclamation success during Phase I, II, and III bond releases, with special emphasis on final bond release. CHFO will also monitor all bond releases associated with sites which at any time were on the State's AMD inventory. Inspectors may use aerial oversight inspections to evaluate final bond releases.

Aerial Oversight Inspections – OSM will conduct aerial oversight inspections over randomly selected mining operations throughout the State. These may be video taped for use by either party. Inspectors will give priority to large surface mines and areas prone to AMD.

Offsite Impacts – CHFO will continue to use WVDEP inspection data and observations from random sample inspections to evaluate offsite impacts associated with permitted and bond forfeiture sites. Both agencies will work together to resolve any problems identified through this study. WVDEP will modify any practices or procedures to prevent any future offsite impacts from occurring.

Maintenance of the Approved Program – In cooperation with CHFO, WVDEP is to develop program amendments that will resolve existing required amendments and satisfy the outstanding 30 CFR 732 notifications.

Mon Pool Monitoring – During EY 2004 and subsequent evaluation periods, OSM will continue to work with WVDEP and other Federal agencies to evaluate the extent and likely impact of the Monongahela Mine Pool in Northern West Virginia. This effort will involve technical assistance to the State and assistance with monitoring boreholes.

Underground Mine Injection Review – OSM and WVDEP will evaluate the impact of water and slurry pumped into below-drainage underground mines to the watershed.

Reclamation Success – OSM will compare and evaluate the number of acres being mined to the number of acres being reclaimed.

Alternative Enforcement – OSM will continue to provide advice and technical assistance to the WVDEP to identify and pursue prospective alternative enforcement cases.

Revegetation – OSM will continue to provide advice and technical assistance to the WVDEP to develop standards and implement methods to measure revegetation success in accordance with the approved program.

Stream Impacts from Underground Mining – OSM and WVDEP will complete the inventory efforts on the study of potential stream impacts from underground mining and then review the success of restoration.

Mountaintop Mining Action Plan Follow-up – After a sufficient number of permits have been approved without OSM involvement in the application review, OSM will sample large surface mines to check for compliance with postmining land use, AOC, contemporaneous reclamation, topsoil substitution, and storm water runoff analysis.

NEPA Fish and Wildlife Coordination – OSM and WVDEP will select several recently issued permits and review the files to determine if the fish and wildlife coordination process has been implemented and documented.

The Priority 2 oversight review topics follow. These topics will be reviewed for potential initiation as time allows after Priority 1 evaluations.

Downslope Spoil Placement – This is a follow-up to a previous evaluation. The team will evaluate State enforcement actions regarding patterns of violation for downslope spoil placement.

Sedimentation and Stream Scouring – This review will determine if sediment control structures are functioning properly, and if they are producing a secondary impact by concentrating flows, thereby enlarging and scouring streambeds and banks.

Groundwater Monitoring Review – OSM and WVDEP will evaluate the PHC and HRP monitoring points to determine if the monitoring sites will provide the data to assess changes in the hydrologic regime to ultimately determine if the reclamation process was successful. To the extent possible, monitoring data will be used to measure changes in the hydrologic regime, including heavy metals and impoundment seep assessments, to determine if the quality and quantity of the groundwater impacts or compromises the postmining land use.

Surface Water Monitoring Review – OSM and WVDEP will evaluate the PHC and HRP monitoring points to determine if the monitoring sites will provide the data to assess changes in the hydrologic regime to ultimately determine if the reclamation process was successful. To the extent possible, monitoring data will be used to measure changes in the hydrologic regime, including heavy metals and impoundment seep assessments, to determine if the quality and quantity of the surface water impacts or compromises the postmining land use.

Forfeiture Reclamation – OSM and WVDEP will conduct a follow-up review to determine if the agreed upon changes regarding tree planting have been implemented.

Hydrology Completeness Review – OSM will conduct a detailed review of randomly selected issued permits to determine if the state is following its approved program regarding cumulative hydrologic impact, probable hydrologic consequences and hydrologic reclamation plans

Team members will complete detailed Oversight Work Plans for each Priority 1 topic identified above before the review starts. Teams are encouraged to schedule work plan completion dates dictated by the work effort rather than by the evaluation year. Review teams will develop detailed Work Plans for Priority 2 topics after the Priority 1 topics are finished. Both parties will approve detailed Work Plans before placing them in Appendix B.

PROBLEM RESOLUTION

One main objective of OSM's oversight of State programs is to resolve identified problems as expeditiously as possible. CHFO and WVDEP will focus resources on resolving any problems that are identified during the oversight review. Issues identified will be resolved through action plans. However, selected issues may require modified procedures to ensure prompt resolution. These procedures will be developed jointly by WVDEP and CHFO on a case-by-case basis. CHFO will report resolved problems and incremental improvements toward resolving problems, as well as any new issues, in the Annual Evaluation Report.

INFORMATION EXCHANGE

CHFO and WVDEP agree that the exchange of information is critical to the oversight process. State information is needed by OSM to complete day-to-day oversight activities, to maintain the nationwide Inspection & Enforcement Tracking System's inspectable units list, and to provide data to satisfy OSM's oversight reporting requirements. The CHFO staff has been granted access to WVDEP's Environmental Resources Information System (ERIS) through OSM's Wide Area Network. This provides all OSM office locations in West Virginia direct access to permitting, bonding, inspection, and enforcement information maintained on the State system. The use of this system has eliminated much of the document exchanges which were necessary in the past. In addition, CHFO has been granted data rights to download information from ERIS on an as needed basis. CHFO's Computer Specialist has ERIS access to extract the required data.

Other information may be required from data systems maintained by WVDEP staff, but not incorporated into ERIS. Detailed Oversight Work Plans for each individual oversight review topic will identify this data and the method to provide it.

Both CHFO and WVDEP agree to cooperatively develop adequate information and assurances to ensure proper evaluations for measuring and reporting the results of bond releases. Both parties will develop these from guidelines provided in REG-8, Section II C.2, Measurements and Reporting of End Results.

EXCHANGE OF DOCUMENTS

While access to ERIS has eliminated the need for many of the documents exchanged in the past, certain documents still must be routinely exchanged. Both parties will exchange the documents identified in Appendix C, Exchange of Documents, as specified or as they are finished. WVDEP will provide all registered ERIS users unrestricted access to the system.

ANNUAL EVALUATION REPORT TABLES

WVDEP agrees to provide State data to CHFO to complete Table 3, State Permitting Activity; Table 5, Annual State Mining and Reclamation Results; Table 6, State Bond Forfeiture Activity;

and Table 7, Staffing. Formats for the Tables are contained in OSM Oversight Directive REG-8. WVDEP will provide the data to CHFO at the end of each evaluation period.

Table 1, Coal Production; Table 2, Inspectable Units; Table 4, Off-Site Impacts; and Table 8, Funds Granted to West Virginia by OSM will be prepared by CHFO using State and other data. Table 1 will be completed with OSM fee compliance data. Table 2 will be completed with data supplied by the State to update OSM's Inspection & Enforcement Tracking System's inspectable units list. Table 4 will be completed with data from WVDEP's ERIS and civil penalty database. A detailed description of the method used to develop the data for Table 4 can be found in the regulatory program Detailed Oversight Work Plan for Off-Site Damage in Appendix B.

PUBLIC OUTREACH

OSM and WVDEP are committed to interacting with citizen, environmental, and industry organizations on a continuing basis. CHFO maintains a mailing list of organizations and individuals who have previously participated in regulatory activities. These groups/individuals will be requested to provide input into oversight activities throughout the evaluation year and will be encouraged to provide suggestions for improvement of future annual evaluation reports. In addition, CHFO staff will be available to meet with individual citizens or organizations at any time during the evaluation year. WVDEP will be invited to participate in these meetings, and a record of the meetings will be placed in OSM's public review file. Further, a copy of the Annual Evaluation Report will be provided to each individual and organization when the report is finalized. OSM will participate in WVDEP's Reclamation Tour and Citizen's Surface Mine Tours, when scheduled. OSM encourages groups to request and schedule meetings related to specific issues. Other opportunities for public outreach will be pursued throughout the evaluation year, as appropriate.

INNOVATIVE STATE ACTIONS

REG-8 has added recognition for innovative approaches related to managerial efficiency, problem resolution, environmental protection, and program implementation as a reporting element. To identify these accomplishments, each Detailed Oversight Work Plan will incorporate provisions to highlight activities that would qualify as innovative approaches. Additionally, WVDEP will identify and report to CHFO, on an ongoing basis, any activities that in its judgment deserve recognition. Activities identified by either OSM or WVDEP will be discussed in the Annual Evaluation Report.

CITIZEN COMPLAINTS

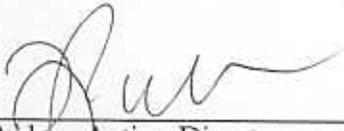
CHFO will process citizen complaints using the procedures in OSM Directives INE-24 and INE-35.

SIGNATURES

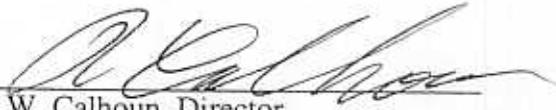
Signed in agreement by the parties this 31 day of December, 2003.

For the West Virginia Department
of Environmental Protection

For the Office of Surface Mining



F. Joe Parker, Acting Director
Division of Mining and Reclamation



Roger W. Calhoun, Director
Charleston Field Office

OVERSIGHT INSPECTION AGREEMENT

APPENDIX B

DETAILED OVERSIGHT WORK PLANS

Individual Detailed Oversight Work Plans will be appended as they are developed.

EXCHANGE OF DOCUMENTS

WVDEP Notifications to CHFO

WVDEP will provide the following documents to CHFO:

- Administrative/Judicial Review Decisions
- Notification of Bond Release Requests
- Bond Forfeiture Land Reclamation and Water Quality Reclamation Reports
- AMD Inventory of Active and Forfeited Sites
- Notification of Lands Unsuitable for Mining Petitions
- Listing of Show Cause Actions
- Policy and Procedural Documents All directives, policy memoranda, handbooks, etc.
- Proposed Legislation/Regulations as they are developed
- Final Legislation/Regulations
- State Court Decisions Pertaining to the Approved Program
- WVDEP's monthly newsletter *in-depth*

CHFO Notifications to WVDEP

CHFO will provide the following documents to WVDEP:

- Annual Evaluation Report - The draft West Virginia Annual Evaluation Report will be prepared and forwarded to the State for review and comment within 30 days of the close of each annual evaluation period. The State will have a minimum of 15 days to provide comments to CHFO.
- Federal Court Decisions Relating to Challenges to Federal Law or Regulations
- Federal Enforcement Actions
- Federal Inspection Reports
- Federal Statutory or Regulatory Revisions
- IBLA Decisions
- Policy Documents All directives, policy memoranda, handbooks, etc.
- Quarterly Oversight Inspection List
- Technical Assistance Reports
- Federal Register Notices Regarding WV Program Amendment Decisions