

***OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT***

Annual Evaluation Summary Report

for the

Regulatory Program

Administered by the Knoxville Field Office

of

Tennessee

for

Evaluation Year 2001

(October 1, 2000, to September 30, 2001)

(November 2001)

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I. INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) created the Office of Surface Mining Reclamation and Enforcement (OSM) in the Department of the Interior. SMCRA provides authority to OSM to oversee the implementation of and provide Federal funding for State regulatory programs that have been approved by OSM as meeting the minimum standards specified by SMCRA. The Act also provides authority for OSM to implement a Federal regulatory program in the States without approved regulatory programs. In Tennessee, OSM implemented the Federal regulatory program in October 1984 when the State repealed its surface mining law. This report contains summary information regarding the Tennessee Federal Program and the effectiveness of the Federal Program in meeting the applicable purposes of SMCRA as specified in section 102. This report covers the period of October 1, 2000, to September 30, 2001. Detailed background information and comprehensive reports for the program elements evaluated during the period are available for review and copying at the Knoxville, Tennessee OSM Office.

The following list of acronyms are used in this report:

ACSI	Appalachian Clean Streams Initiative
AMD	Acid Mine Drainage
BTTI	Branch of Technical Training
CA	Cooperative Agreement
EIS	Environmental Impact Statement
EP	Electronic Permitting
IUL	Inspectable Unit List
KFO	Knoxville Field Office
MEIR	Minesite Evaluation Inspection Report
MTR	Mountain Top Removal
NRCS	Natural Resources Conservation Service
NOI	Notice of Intent to Explore for Coal
OSM	Office of Surface Mining
SMCRA	Surface Mining Control and Reclamation Act
TDEC	Tennessee Department of Environment and Conservation
TWRA	Tennessee Wildlife Resources Agency
TMHP	Toxic Material Handling Plan

II. OVERVIEW OF THE TENNESSEE COAL MINING INDUSTRY

Tennessee's coal resources are in 22 mining counties located in the Appalachian Region of the Eastern United States extending from the Kentucky border to the Alabama border in the east central portion of Tennessee. Mining in the northern counties is primarily in the steep slope areas of the Cumberland Mountain Range. Mining in the southern counties is confined to area-type operations due to the relatively flat terrain associated with the Cumberland Plateau.

Tennessee's recoverable coal reserves of 75.5 million short tons exist in bituminous coal beds 28 to 42 inches in thickness at depths of up to 1,000 feet. Tennessee coal is used primarily for the generation of electric power.

Tennessee ranks nineteenth in production of coal among the 26 coal producing states thus far in calendar year 2001. Coal production steadily declined from a high of 11,260,000 tons in 1972 to 2,680,888 tons in 1998. During 1999 and 2000, coal production has increased slightly and is fluctuating around 3 million tons annually. Currently, there are 25 active coal-producing mines that have permitted 5,588 acres for mining. Underground mines have permitted 218.4 acres (excluding shadow areas) at 11 active mines, and surface operations have permitted 5,369 acres at 14 active mines.

III. OVERVIEW OF THE PUBLIC PARTICIPATION OPPORTUNITIES IN THE TENNESSEE FEDERAL PROGRAM

The Tennessee Federal Program provides numerous public participation opportunities in its program activities. Efforts are made to encourage participation and to inform the public of the avenues to participate in the regulatory program.

C Public/Citizen Participation in the Regulatory Process

Citizens, environmental groups, and industry representatives have complete access to all regulatory program files including permitting, inspection and enforcement, and bonding program files. Managers and staff have open-door policies for any segment of the public to discuss issues that may arise.

The KFO meets with individual citizens, during the permitting process, who have expressed concerns or have an interest in a pending permit. The purpose of these meetings are to answer questions relative to the concerns and to provide information/explanations with respect to the permitting actions at issue.

Public participation opportunities have been provided to the public in the review of four new permit applications processed/issued by KFO this year.

C Industry Meetings

C Pre-Permit Application Meetings with the Industry.

KFO continues to meet with individual coal companies or their consultant prior to submittal of a permit application to discuss potential issues that might arise during the permitting process and to seek resolution of concerns/problems that address regulatory requirements as well as the needs of the industry stakeholder. Because of the success of this initiative and the acceptance of this endeavor by the permit applicants, consultants, other participating agencies and OSM, this activity has become routine in the normal permitting process.

C Post-Permit Issuance Meetings.

Following the issuance of permits, KFO technical staff, as appropriate, are visiting these minesites to review the effectiveness of the approved plan and to discuss with the operator potential modifications/improvements to the approved plan. The purpose of this outreach effort is to improve the permitting process and to answer questions that the operator and/or the inspector might have about the mining operation and reclamation plan, during initial stages of implementation.

IV. MAJOR ACCOMPLISHMENTS/ISSUES/INNOVATIONS IN THE TENNESSEE FEDERAL PROGRAM

C Identification of Potential Problems

To assist operators in preventing environmental problems and reduce follow-up inspection hours, after issuance of notices of violation, the field office continued to place additional emphasis on inspectors identifying and advising operators of potential problems observed during inspections before they became citable violations. This initiative has reduced the number of notices of violation being issued and the number of required follow-up inspections.

C AMD Inspection/Evaluation Initiative

The Knoxville Field Office continued its acid mine drainage (AMD) inspection/evaluation initiative of identification of potential AMD producers. The purpose of these inspections is to determine if the approved toxic material handling plans (TMHP) are effective in preventing acid mine drainage. Information from these inspections is used to determine if mining practices need to be modified or if permit revisions are required.

During evaluation year 2001, the KFO conducted an initial AMD inspection at one surface minesite (Appolo Fuels, Inc., permit #3054). This site was found to have an effective TMHP. Follow up inspections were also conducted at five additional minesites. Four of these sites were previously referred to the KFO Technical Group for needed permit revisions and/or possible recalculations of bonds for long-term water treatment. Two of these sites (Tennessee Consolidation Coal Company, permits #2982 and #2927) have had subsequent bond recalculations. Two other sites Cumberland Coal, permit #2981, and Skyline Coal #2846/2959 have had permit revisions initiated to address inadequate TMHP and/or noncompliant effluent discharges. The remaining site (Tennessee Consolidated Coal, permit #2904) is now fully reclaimed with previous effluent impacts showing a trend towards stabilization.

C **Abandoned Mined Lands Projects in Tennessee**

The Office of Surface Mining (OSM) allocates approximately one million dollars of the Secretary of Interior's discretionary funding to reclaim high priority abandoned mined land sites in Tennessee annually. High priority refers to sites that are considered hazardous to the health and safety of the public or are causing harm to the environment. The OSM's Federal Reclamation Program staff from the Appalachian Regional Coordinating Center in Pittsburgh, Pennsylvania works very closely with the Tennessee Department of Environment and Conservation (TDEC), Abandoned Mined Lands Section, in selecting and reclaiming the sites. The State and OSM use the "cooperative agreement" method where OSM funds the projects and the State's staff designs the projects, hires contractors to perform the work, and ensures the work is performed as designed.

OSM received a second application for a Watershed Cooperative Agreement with the Cumberland Mountain Natural Resources Conservation and Development Council for mitigation of acid mine drainage from abandoned mines in Scott County and the Bear Creek Watershed. This is an initiative to provide the final funding needed to complete the construction of a project.

C **Appalachian Clean Streams Initiative (ACSI)**

The Federal Program in Tennessee participates in the Appalachian Clean Streams Initiative as facilitator with local watershed efforts to mitigate the effects of acid mine drainage being discharged into watersheds from abandoned coal mines. The TDEC completed on-the-ground work using monies provided by local, State, and Federal agencies and OSM's Abandoned Mined Land (AML) fund. OSM provided one summer intern during 2001 to support the efforts of watershed groups in Tennessee. Also, OSM initiated a watershed assistance program in Tennessee with the Volunteers in Service To America, VISTA, on two-year assignments to support the efforts of two watershed groups and another volunteer to organize watershed groups in two other areas. These volunteers started during August 2001. In evaluation year 2000, the Coal Creek Watershed Foundation formed and joined three other groups that have been designated ACSI watershed groups:

North Chickamauga Creek. This is a watershed near Chattanooga that has a formal citizen's group leading the clean-up effort. The North Chickamauga Creek Conservancy has been the driving force behind the watershed restoration activities, which include AMD treatment systems, land acquisitions for watershed preservation, stream bank stabilization projects, water monitoring programs, and Greenway trails and pathways. To date, cooperating agencies, private and corporate contributors, and in-kind services from the local communities have provided \$5,287,512.00 toward the restoration and preservation activities with OSM providing \$274,555.

Bear Creek. This is a watershed near Oneida in Scott County that flows into Big South Fork National River and Recreation Area. The TDEC installed numerous passive treatment systems at abandoned coal mines in the watershed and additional facilities will be installed in the future as funds become available. The TDEC, the Environmental

Protection Agency, the Natural Resources and Conservation Service (NRCS) and OSM have contributed \$1,423,438.00 in funds and in-kind services. During FY '99, the Knoxville Field Office provided technical assistance to the NRCS for design of AMD treatment facilities, which will be installed by the NRCS contractors. In 2000, OSM agreed to provide \$80,000.00, under OSM's Watershed Cooperative Agreement Program, for AMD mitigation projects with NRCS providing \$260,000.00 and the local community providing \$20,000.00.

Big Laurel Creek. This is a watershed in Fentress County, Tennessee. The Tennessee Wildlife Resources Agency (TWRA), in cooperation with the TDEC is taking the lead for the mitigation projects. The State agencies have installed several passive treatment systems in the watershed using State and OSM's AML funds. The TDEC, the TWRA, and OSM have spent \$1,264,311.00.

Coal Creek. This watershed is about thirty miles North of Knoxville and the creek flows through Lake City and empties into the Clinch River, one of Tennessee's most used trout fisheries. The mission statement of the Coal Creek Watershed Foundation is to "Improve the quality of Life in the Coal Creek Watershed". The group formed in late 1999 and has already been very active with clean-up, educational, and outreach efforts. Many State, local, and Federal agencies are initiating studies in the watershed to determine the best approaches to meet the goals of the group.

C **Litigation**

Appolo Fuels, Inc. v. United States

On January 3, 2000, the plaintiff filed a complaint alleging permanent and temporary takings of its coal reserves and mining rights. The plaintiff's claims are based on OSM's designation of the watershed of Little Yellow Creek in Claiborne County, Tennessee, as unsuitable for surface coal mining operations (but not underground mining from portals outside the petition area), as well as OSM's alleged delay in making a decision on the petition, which requested the designation.

The designated area encompasses Fern Lake, the sole water supply for the city of Middlesboro, Kentucky. The primary basis for the designation was the adverse impacts of surface coal mining operations on the Fern Lake water supply. Additionally, mining in the petition area would adversely affect the blackside dace, a State-listed endangered species and a Federally-listed threatened species, and adversely affect the viewshed from an overlook in the Cumberland Gap National Historic Park. The plaintiff's valuation experts have valued the property at approximately \$21,432,000 as of the alleged date of taking. Discovery is continuing.

Eastern Minerals International, Inc., et al. v. United States

The plaintiffs filed this action seeking compensation for an alleged regulatory taking under the Fifth Amendment resulting from OSM's alleged delay in processing Eastern Minerals'

1984 permit application. OSM originally denied Eastern Minerals' application in 1986. After an Administrative Law Judge ordered OSM to specify what adverse impacts would be caused by the proposed mining operation, OSM conducted a technical review of the hydrological effects, and sought additional geological and hydrological information from Eastern Minerals. When Eastern Minerals failed to provide the required technical information, OSM denied the permit again in 1994. The plaintiffs claimed that OSM's delay in processing their permit application caused them to lose their leasehold interest in the coal as of August 31, 1990.

On October 2, 1996, Judge Robert Hodges of the U.S. Court of Federal Claims issued a decision finding a permanent regulatory taking of the plaintiffs' property interests. On December 22, 1998, the Clerk of the Court of Federal Claims entered judgment against the United States in the amount of \$13,700,000 plus compound interest at the tax overpayment rate. The plaintiffs also seek an award of attorneys' fees equal to one third of the final judgment, or, in the alternative, the lodestar amount of approximately \$1,100,000, and an award of costs of approximately \$200,000.

This case is on appeal to the U.S. Court of Appeals for the Federal Circuit. The initial briefing concluded on October 25, 1999 and oral arguments were held on March 6, 2000.

Cane Tennessee, Inc. v. United States and Colten, Inc. and Cane Tennessee, Inc. v. United States

The plaintiffs in these cases (Cane Tennessee, Inc. and Colten, Inc.) are the fee holders of the property at issue in the Eastern Minerals case. In Eastern Minerals, Judge Hodges ruled that OSM's "extraordinary delay" in processing the Eastern Minerals' (Cane's lessee's) permit application effected a permanent regulatory taking of Eastern Minerals' right to mine coal under its lease with Cane. However, he dismissed the claim of Van Buren Minerals (Colten's lessee) as unripe, since Van Buren had never applied for a permit.

In the case, Cane Tennessee, Inc. v. United States, the plaintiffs seek just compensation for an alleged regulatory taking of their "lessor's interest" in the subject property based on the same government action, delay in processing Eastern Minerals' permit application, that is at issue in Eastern Minerals. On September 30, 1999, Judge Emily Hewitt granted in part and denied in part the government's motion for summary judgment. In the government's motion, filed on June 20, 1997, the government argued that the plaintiffs' claims are: (1) barred by the doctrine of laches, due to plaintiffs' unexcused and prejudicial delay in filing their complaint; (2) not ripe for review, since plaintiffs never sought permits to mine the subject property, and because the claim of Colten is wholly derivative of Van Buren Minerals, which was a dismissed party in Eastern Minerals; and (3) noncompensable under the Supreme Court's decision in *Omnia Commercial Co. v. United States* and its progeny in that the claim amounts to mere frustration of contractual expectations. In her decision, Judge Hewitt dismissed the claim of Colten as unripe since neither Colten nor Van Buren has ever applied for a permit; held that Cane's property interest was a royalty rather than a contractual expectation and therefore rejected the government's contractual frustration defense; and held that there were genuine issues of material fact with regard to our laches

defense. The plaintiffs' valuation expert has valued Cane's "lessor's interests" in the subject property at \$5,116,000, while the government's expert valued this interest at approximately \$175,000.

In the case, *Colten, Inc. and Cane Tennessee, Inc. v. United States*, the plaintiffs filed their complaint on August 25, 2000. Plaintiffs allege a compensable taking of the same property that is at issue in *Eastern Minerals*, as a result of the Secretary of the Interior's decision to designate certain lands as unsuitable for surface coal mining pursuant to §522 of SMCRA. The designation occurred on June 17, 2000. The plaintiffs have valued the subject properties at \$4,351,000 (assuming a June 2000 date of taking) and the government has valued the properties at \$770,000 or \$1,990,000 (depending on the quantum of property valued).

Trial in these consolidated cases has been informally stayed pending resolution of the appeal in *Eastern Minerals International, Inc. v. United States* (see item No. 2 above). Discovery is set to close on December 14, 2001.

Rith Energy, Inc. v. United States

On May 2, 2001, the U.S. Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims' grant of summary of judgment in favor of the government in this regulatory takings case. The plaintiff filed this action in August 1992, claiming that OSM had effected a compensable taking of plaintiff's leasehold when it suspended the company's mining permit because the company did not have a toxic material handling plan adequate to prevent acid mine drainage (AMD). The trial court held that there had not been a taking because OSM's actions "represented an exercise of regulatory authority indistinguishable in purpose and result from that to which the plaintiff was always subject under Tennessee nuisance law." In affirming the lower court, the Federal Circuit did not reach the nuisance issue, but instead held that "the government's conduct at issue in this case did not result in a categorical taking of Rith's property" and "Rith did not have reasonable investment-backed expectations that it would be permitted to mine in a way that would create a high risk of acid mine drainage." Of particular significance to the court was the fact that Rith acquired the subject leases long after the enactment of SMCRA, which includes provisions directly addressing AMD and its consequences in the permitting process. In light of this statutory backdrop, the court reasoned that Rith "could not reasonably have expected that it would be free from regulatory oversight with regard to the potential for acid mine drainage...."

On July 6, 2001, Rith filed a petition for rehearing for the proposition that lack of investment backed expectations cannot be dispositive of this case. The Government's response brief was filed August 20, 2001.

National Mining Association v. Norton

The National Mining Association (NMA) challenges OSM's Knoxville Field Office's (KFO) issuance of Field Office Policy Memorandum No. 37 which establishes procedures for revising permits and increasing reclamation bonds where there is long-term treatment for

acid mine drainage (“AMD”). The plaintiff asserts that the Tennessee federal program had not previously recalculated the bond upon the occurrence of AMD and had released the bond though continued water treatment could be required to meet applicable effluent limitations. Accordingly, NMA argues that KFO’s new procedures for recalculating bond amounts to account for long-term treatment of AMD are violative of both the Administrative Procedures Act and SMCRA. OSM met with the NMA on July 24, 2001, in response to NMA’s request that the parties jointly explore the potential for “compromise” of AMD bonding issues. OSM has prepared a response document for NMA, setting forth the agency’s understanding of the issues raised at the meeting for further discussion.

C Reforestation Enhancement Initiative

The Knoxville Field Office has developed a Reforestation Enhancement Initiative and issued policy to encourage the selection of postmining land uses, which include the planting of trees. This is being coordinated with the national reforestation enhancement initiative, which is managed by the OSM Reforestation Steering Committee.

As part of this effort, the Program Support Group has worked with the Western Regional Coordinating Center to produce a video entitled, “Reforestation: Build a Forest for the Future”. This video will be used to provide education and to promote the OSM Reforestation Enhancement Initiative at a national level.

The Knoxville Field Office has worked with Gatliff Coal Company to revise the reclamation plan of two permits to include the principles of reforestation enhancement. This will include the planting of commercially valuable hardwood trees, which will provide a postmining benefit to the landowner and community, and provide environmental and wildlife enhancement.

• Market Base Reclamation of Mined Lands

The Knoxville Field Office is participating as a member of a core group, which is developing an OSM program to promote the concept of market-based approaches to mined land reclamation. This group includes members from OSM, DOE, and the Electric Power Research Institute (EPRI). This approach is based on the emerging field of eco-asset management, in which ecological resources, such as forestland, wetlands, endangered species habitat, and carbon sequestration, are developed and treated as financial assets. These assets are then considered in the development of the mining permit and reclamation plan.

C Summary of Successes

The Knoxville Field Office continues to improve its relationships with its customers and stakeholders by providing increased opportunities for participation in the regulatory functions of the Field Office and by meeting with the State, citizens, landowners, and industry to discuss concerns and to foster better working relationships. The results have produced enhancements in compliance with respect to operators anticipating and

addressing potential problems before they develop into violations. There have also been enhancements in communications with operators and landowners, based on industry feedback since the outreach efforts began. This feedback has consisted of improved oral communications as well as input in draft (written) field office policies and procedures that affect industry operations.

V. TECHNICAL ASSISTANCE

The Knoxville Field Office (KFO) continues to have a number of its employees, primarily the Technical Group staff, serving on different projects, teams, and assignments that are of common interest to the Appalachian Region and to all of OSM. Several of these technical assistance activities are cooperative efforts with PSD and ARCC. For the evaluation year, the Technical Group has spent approximately 64 percent of its time on Federal program activities and 36 percent on technical assistance activities. The projects/activities which involve KFO employees are as follows:

- C Monongahela River Project in Pennsylvania and West Virginia.
- C Valley Fill Impact Study, Appalachian Region.
- C Technical Information Processing System (TIPS) operation and next generation.
- C Appalachian Region Technical Coordinating Committee.
- C Experimental Practices in Kentucky, Virginia and Ohio.
- C West Virginia Permit Review Team
- C West Virginia Process Improvement Team
- C West Virginia Interagency Process Improvement Team
- C Bond Handbook Committee
- C National Blasting Work Group
- C National Dam Safety Group
- C Instructors for BTTI Training Courses
- C Instructors for TIPS Training Courses
- C Medical Requirements Team
- C AMD Bonding

- C Revegetation Issues
- C Revegetation Task Force
- C Reforestation Steering Committee
- C Provide Technical Guidance in Bond Release to Various OSM Offices.
- C Technical Support to OSM's Lexington and Charleston Field Offices for Federal Lands Issues
- C Technical Support to Bureau of Land Management and Tennessee Valley Authority on Federal Lands issues such as leasing and NEPA requirements
- C TIPS Hydrology Software Committee
- C Hydrologic Issues Team for PHC/CHIA
- C West Virginia Citizen Complaint
- C AVS – National ownership and control rule redesign team and the Appalachian Region EP Team, AVS-EP Interface Subteam
- C Tennessee GIS Work Group
- C Valley Fill Stability and Flooding Team (Part of the MTR EIS)
- C State Program Amendments
- C Market-Base Reclamation of Mined Lands Core Group Member

An Inspection Group staff person assisted the U.S. Park Service and the University of Tennessee with Aviation Safety Training, a safety training course required for all persons using helicopters in DOI's missions. The course was provided in Knoxville.

VI. SUCCESS IN ACHIEVING THE PURPOSES OF SMCRA AS MEASURED BY THE NUMBER OF OBSERVED OFF-SITE IMPACTS AND THE NUMBER OF ACRES MEETING THE PERFORMANCE STANDARDS AT THE TIME OF BOND RELEASE

To further the concept of reporting end results, the findings from performance standard evaluations are being collected for a national perspective in terms of the number and extent of observed off-site impacts and the number of acres that have been mined and reclaimed which meet the bond release requirements for the various phases of reclamation. Individual topic

reports are available in the Knoxville Office, which provide additional details on how the following evaluations and measurements were conducted.

A. Off-Site Impacts

Active Sites:

One of the intents of SMCRA is to prevent adverse effects to the public and to the environmental resources adjacent to a permitted surface coal mining operation. While conducting complete and partial inspections during EY 2001 KFO Reclamation Specialists evaluated all active minesites for off-site impacts. Off-site impacts resulting from SMCRA violations were directly reported via the "Minesite Evaluation Inspection Report" (MEIR). The MEIR data was transferred to a database and a summary report was developed for year-end reporting purposes. In addition to MEIR data collection, citizen complaint files were evaluated and interviews with individual inspectors were conducted to determine if off-site impacts from other sources had occurred.

Ten permits were identified as having eighteen people, land, water and structure impacts. Seven off-site impacts to water (6 minor and 1 major) occurred due to changes in water chemistry during mining, sediment laden run-off leaving the sites for a short distance and subsidence which impacted a tributary stream. Six impacts to land (2 minor and 4 moderate) resulted due to blast flyrock, subsidence, encroachment off permit and a spoil slide. One minor impact to a structure occurred due to the subsidence incident. Four minor impacts to people resulted due to road impacts and nuisance caused by blasting operations.

All violations were considered to be either permittee negligence or related to high precipitation events. For this reason, improvements in the regulatory functions or processes are not deemed necessary at this time.

Bond Forfeiture Sites

The Knoxville Field Office (KFO) is responsible for conducting inspections of bond forfeited sites at reduced frequencies including at least one complete inspection per year. Many of these sites have remained in abandoned status for several years and natural vegetative processes have stabilized the disturbances. KFO Reclamation Specialists were asked to report off-site impacts resulting from EY 2001 complete inspections.

Two off-site impacts (one minor and one moderate) were reported during EY '01. These impacts resulted from low pH discharges at two separate sites.

B. Bond Releases

During the period October 1, 2000, through September 30, 2001, the Field Office processed 34 bond release requests. A total of 27 release actions were approved,

consisting of 9 Phase I, 11 Phase II, and 7 Phase III releases. These actions resulted in returning all or a portion of the bond on more than 3,761 acres of reclaimed mine lands (see attached table). During this same period four bond release requests were disapproved, and three bond release requests were withdrawn.

APPENDIX A:

These tables present data pertinent to mining operations and Federal regulatory activities within Tennessee. Unless otherwise specified, the reporting period for the data contained in all tables is the same as the evaluation year. Additional data used by the Knoxville Field Office in its evaluation of performance is available for review in the evaluation files maintained by the Knoxville OSM Office.

TABULAR SUMMARY OF CORE DATA TO CHARACTERIZE THE PROGRAM

Table 1: Coal Production

Table 2: Inspectable Units

Table 3: Tennessee Permitting Activity

Table 4: Off-Site Impacts

Table 5: Annual State Mining and Reclamation Results

Table 7: State Bond Forfeiture Activity

Table 8: Tennessee Staffing

Table 9: Funds Granted to Tennessee by OSM *(Not Applicable to Tennessee)*

Table 10: Inspection Activity

Table 11: Enforcement Activity

Table 12: Lands Unsuitable Activity