

Annual Evaluation Summary Report
for the
Regulatory and Abandoned Mine Land Reclamation Programs
Administered by the State

of

WEST VIRGINIA

for

Evaluation Year 2002
October 1, 2001 to September 30, 2002

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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. This report contains summary information regarding the West Virginia Program and the effectiveness of the West Virginia program in meeting the applicable purposes of SMCRA as specified in section 102. This report covers the period of October 1, 2001, to September 30, 2002. Detailed background information and comprehensive reports for the program elements evaluated during the period are available for review and copying at the OSM Charleston Field Office.

The following acronyms are used in this report:

ABS	Alternative bonding system
ACSP	Appalachian Clean Streams Program
AMD	Acid Mine Drainage
AML	Abandoned Mine Land
AMLR	Abandoned Mine Land Reclamation
AOC	Approximate Original Contour
CHIA	Cumulative Hydrologic Impact Assessment
CHFO	Charleston Field Office
COE	U.S. Army Corps of Engineers
CWA	Clean Water Act
EIS	Environmental Impact Statement
EY 2002	Evaluation Year 2002 (October 1, 2001 to September 30, 2002)
FTE	Full Time Equivalent
HCPA	Hominy Creek Preservation Association
KFTC	Kentuckians for the Commonwealth, Inc.
MCCC	Martin County Coal Company
OEB	Office of Explosives and Blasting
OSM	Office of Surface Mining Reclamation and Enforcement
OVEC	Ohio River Valley Environmental Coalition, Inc.
PMLU	Postmining Land Use
SMCRA	Surface Mining Control and Reclamation Act of 1977
SRP	Special Reclamation Program
WCMS	Watershed Characterization and Modeling
WVDEP	West Virginia Department of Environmental Protection
WVHC	West Virginia Highlands Conservancy
WVSCMRA	West Virginia Surface Coal Mining Reclamation Act

II. Overview of the West Virginia Coal Mining Industry

Coal has been mined in West Virginia using underground methods since the early 1700's. Underground mining increased throughout the 1800's and into the 1950's. Surface mining began around 1916, but significant production from surface mining did not occur until World War II.

Mining activities occurring before passage of the Surface Coal Mining and Reclamation Act (SMCRA) in 1977 resulted in many unreclaimed or under

reclaimed areas within the State. Currently, there are 3,828 sites listed in the Abandoned Mine Land (AML) inventory for West Virginia. Two percent of the sites are undergoing reclamation, 62 percent are awaiting reclamation and 36 percent have been reclaimed through the State's AML Program.

West Virginia's demonstrated coal reserve base totals 34.5 billion tons. The State's estimated recoverable coal reserves at producing mines totaled 1.56 billion tons in 2000. West Virginia ranks fourth in the country in demonstrated coal reserves and second in recoverable coal reserves. Coal occurs in all but two of the State's 55 counties. Minable seams occur in 43 of the 55 counties. Of the 117 identified coal seams in the State, 62 seams are minable using current technology.

Coal production in West Virginia accounts for about 15 percent of the Nation's total production. In 2001, West Virginia produced 175 million tons of coal, allowing it to retain its ranking as the second largest coal producing State (see Table 1, Appendix A for coal production based on sales). Coal was produced from 50 different seams. The Coalburg, Pittsburgh, Lower Kittanning, Eagle, Stockton-Lewiston, and Powellton coal seams accounted for about 62 percent of the State's total coal production. Coal is produced in twenty-six counties in West Virginia. The top six coal producing counties in 2001 by production were: Boone, Mingo, Kanawha, Logan, Monongalia, and Wyoming Counties. The State's producing mines had an average coal recovery of 61 percent. The average price per ton of coal mined in West Virginia during 2000 was \$25.37. The price of West Virginia coal dropped slightly from 1999. The average price per ton of coal nationwide was \$16.78 in 2000.

Underground mines produce approximately 63 percent of the State's total coal production. Longwall mining occurs in eleven States. Fourteen of the Nation's seventy-six longwall mining operations are in West Virginia. Longwall coal production continues to increase in the State. Longwall mining operations accounted for 38 percent of the State's underground coal production and 24 percent of the State's total coal production in 2001. However, continuous mining operations continue to account for most of the State's underground production.

Contour, area, auger, and mountaintop, which includes steep slope, mountaintop removal, and multiple seam, mining operations are the most common methods of surface mining in the State. Thirty-seven percent of the coal produced in West Virginia is by surface mining methods. Surface coal production increased by 7.5 percent in 2001, whereas underground production increased by only 1.1 percent. Since 1991, underground coal production in the State has an average annual decrease of 2.2 percent, while surface mine production has increased by 2.6 percent. Mountaintop mining operations are largely responsible for the increased surface coal production. Eighty-one percent of the State's surface coal production was produced by mountaintop mining operations. There are approximately 216 mountaintop mining operations permitted in the State. Production from mountaintop mining operations in 2001 was down slightly from the prior year, but increases in production from contour and auger operations boosted overall surface coal production.

West Virginia has 2,425 inspectable units. The average number of acres per inspectable unit is 122 acres. Surface mine permits average 265 acres, whereas underground mine permits which include only the area of surface disturbance average 32 acres per unit. The number of new permits issued annually by the State has declined. Approximately 63 percent of the State's permits are active and require monthly inspections by the West Virginia Department of Environmental Protection (WVDEP). Underground mines account for about 41 percent of the total inspectable units and surface mines account for 34 percent. The remaining 25 percent consists of other facilities, including such things as preparation plants, refuse piles, loading facilities, and haulroads.

Approximately 87 percent of the coal produced in West Virginia is used domestically, with 16 percent of that coal being consumed within the State. Most coal produced in West Virginia is used to generate electricity. Seventy-six percent of the State's domestic coal production is used by electric utilities in 23 States, including West Virginia. Coal produces 98 percent of the electricity generated in State. During 2000, coal was imported for the first time from Wyoming to produce electricity within the State. Approximately 14 percent of the State's domestic coal production is used by coke plants and the remaining 10 percent is for industrial, commercial, and residential use. Thirty-eight percent of the State's domestic coal production is transported by water, 54 percent is transported by railroad, and the remainder by truck or conveyor.

West Virginia is the Nation's leading coal exporter with 38 percent of the country's foreign exports. Canada, France, Italy, Brazil, and the United Kingdom are the leading importers of West Virginia coal. These countries account for 56 percent of the Nation's exports. Metallurgical coal comprises 80 percent of West Virginia's coal exports to foreign countries. Although 49 percent of the Nation's metallurgical coal exports come from West Virginia, the State's metallurgical coal exports to foreign countries have declined by about 13 percent per year since 1996.

About 310 companies produce coal in West Virginia. Due to increased mechanization and consolidation in the mining industry, more than 13,298 mining jobs have been lost in the State since 1991. Even though production has remained fairly constant, employment at both surface and underground mines has declined steadily since 1991. However, most of the decline in employment has been at underground mines. During 2001, the State's coal mining industry employed approximately 15,729 people with a payroll of about \$900 million. Total employment, including independent contractors, is nearly 45,000 employees. Seventy-three percent of the miners in the State work in underground mines. Boone, Mingo, Kanawha, Monongalia, Logan, and Wyoming Counties employ 59 percent of the miners in the State. Unions represent 38 percent of the miners in the State, and the remainder are non-union. Since 1991, the number of miners in the State has declined by nearly 7 percent annually, with most of the jobs being lost in the northern part of the State. West Virginia's miners are among the most productive in the Nation producing approximately 4.9 tons of coal per miner per hour. Estimates are that the State's coal industry generates approximately 60,000 additional coal-related jobs.

Coal accounts for nearly 13 percent of the Gross State Product, a measure of the total value of all goods and services produced in the State. West

Virginia's coal industry pays more than \$215 million annually in business and severance taxes to State and local governments and another \$180 million in Federal taxes. The coal industry accounts for nearly 27 percent of the State's business tax, and approximately 10 percent of the statewide property tax collections. Overall, it is estimated that every \$1 billion worth of coal production generates \$3.5 billion throughout the economy.

III. Overview of the Public Participation Opportunities in the Oversight Process and the State Program

Throughout the EY 2002 evaluation year, WVDEP and OSM officials met with representatives of various citizen, environmental, and industry groups including:

- West Virginia Highlands Conservancy (WVHC),
- West Virginia Coal Association,
- Ohio River Valley Environmental Coalition (OVEC),
- Contractor's Association of West Virginia,
- River of Promise,
- Coal River Watch,
- West Virginia Watershed Network, and
- Plateau Action Network.

Additionally, OSM attended public meetings associated with the following activities:

- West Virginia Watershed Management Framework,
- Friends of the Cheat Annual Festival, and
- Watershed Cooperative Agreement Grant Program.

The Charleston Field Office (CHFO) maintains a mailing list of organizations and individuals that have been active in regulatory and AML issues in West Virginia. Office staff routinely interacts with individuals and groups throughout the year.

OSM has maintained contact with many watershed groups throughout the State through a network of summer interns funded through the OSM budget. These interns work with local watershed groups and provide additional feedback to the CHFO concerning citizen concerns. OSM conducted training for these interns, and additional training for the various watershed groups in acquiring and managing OSM cooperative agreement funds.

West Virginia's approved regulatory program provides many additional opportunities for public participation. In the permitting process, the State must advertise each application for a new or revised permit and must provide interested citizens the opportunity to comment. Citizens may request that the WVDEP hold an informal conference to discuss the application before making a decision to issue or deny the permit. Filing written citizen complaints concerning specific issues also gives citizens the opportunity to participate in the inspection and enforcement process at particular mine sites. They may also seek administrative review of WVDEP decisions by the West Virginia Surface Mine Board or judicial review through the state court system.

During Evaluation Year 2002 (EY 2002), OSM published notices requesting public comment on several significant rulemaking activities. We sent these to various State and Federal agencies along with public interest groups such as the WVHC. We also published these requests for public comment in the Federal Register.

As part of our outreach efforts, OSM's web page in Washington, D.C. has a link to a form for citizens to report suspected violations of mining and reclamation laws. There are also links to information packages that citizens can request about specific areas of the SMCRA. These include educational packets for schools and civic groups.

The WVDEP has aided in the development of the watershed management framework and other initiatives to preserve, protect, and restore stream water quality. The WVDEP's Office of Environmental Advocate also offers a means for public participation. This office works on a variety of environmental issues within the state. They encourage participation on the regulatory process by individuals and groups.

The approved Abandoned Mine Land Reclamation Plan provides opportunities for public participation. These include public interaction during the processing of citizen complaints concerning AML problems. WVDEP also publishes newspaper notices seeking comment on each proposed construction project before requesting funding approval from OSM.

IV. Major Accomplishments/Issues/Innovations in the West Virginia State Program

A. Accomplishments/Innovations

1. Hydrologic Assessment Model

During the evaluation period, West Virginia University in cooperation with WVDEP continued development of a hydrologic assessment model known as the Watershed Characterization and Modeling System (WCMS). The WCMS will be a useful tool for the geologic/hydrologic permit reviewer as well as for the cumulative hydrologic impact assessment (CHIA) preparer. Planned uses for the model include:

- predicting mine impacts from surface and underground mines on surface waters that affect the hydrologic balance;
- preparing CHIAs;
- assessing stream loadings;
- setting effluent limits; and
- conducting water quality investigations.

During the evaluation period, several improvements to the existing software program were made. These included separating the database from the program so that the software could operate more easily from the users desktop computer. Also, the software operating platform was updated to the current version.

2. Watershed Management Framework and Clean Water Action Plan

During the evaluation period, both WVDEP and OSM continued to participate with other State and Federal agencies in efforts associated with the West Virginia Watershed Management Framework and the Clean Water Action Plan. The Watershed Management Framework is West Virginia's plan for coordinating the operations of existing water quality programs and activities. Its goal is to better achieve water resource management and involves using watersheds as a way to organize and focus Federal and State agencies in cooperative efforts statewide.

3. Bonding Program Improvements

During the evaluation period, WVDEP undertook several actions in an effort to improve the State's alternative bonding system (ABS). All of these actions have resulted in a much improved ABS. OSM and the State are committed to making sure that the ABS has sufficient funds to complete the reclamation, including water treatment, at all existing and future bond forfeiture sites.

As noted last year, during a special legislative session, the West Virginia Legislature passed legislation that was intended to eliminate the deficit in the State's ABS. Enrolled Senate Bill 5003 was signed by the Governor on October 4, 2001. The State submitted the legislation to OSM as a program amendment on September 24, 2001. Under Enrolled Senate Bill 5003, the State's special reclamation tax rate was increased from 3 cents per ton of clean coal mined to 14 cents for 39 months. Thereafter, the tax rate would be reduced to 7 cents per ton, but it cannot be reduced further until the State demonstrates that its ABS has sufficient money to meet all of its bond forfeiture reclamation responsibilities. The tax rate is reviewed, and if necessary, adjusted annually by the Legislature upon recommendation by the Special Reclamation Fund Advisory Council (Advisory Council).

OSM approved the amendment on December 28, 2001, but we deferred making a decision on whether the amendment would eliminate the deficit in the State's ABS. At the same time, OSM published a Federal Register notice providing for a 90-day comment period on whether the amendment satisfied 30 CFR 948.16(l11). By bifurcating the approval process, OSM was able to solicit additional comments from the public on this issue and conduct a thorough evaluation of the information that had been submitted as a result of the program amendment.

On May 29, 2002, OSM announced its decision to fully approve the State's ABS. OSM took this action because the State increased the special reclamation tax rate, which will eventually eliminate the ABS deficit; created the Advisory Council to monitor the progress of the ABS in meeting future bond forfeiture reclamation demands; and removed the limitation on funding for treating pollutional discharges at bond forfeiture sites. The amendment provides a basis from which WVDEP can initiate action to ensure the long-term success of its ABS. The passage of this legislation will enable WVDEP to eliminate the backlog of more than 400 unreclaimed bond forfeiture sites within the State and to initiate treatment of pollutional discharges at sites that require such treatment.

To date, the increased special reclamation tax rate has generated more than \$11.5 million in funding for bond forfeiture reclamation, including water treatment. The Special Reclamation Program (SRP) within WVDEP, which is responsible for conducting bond forfeiture reclamation throughout the State, is increasing its staffing level to meet the increased workload. The SRP is in the process of hiring seventeen additional employees to conduct land reclamation and treat polluttional discharges at existing and future bond forfeiture sites.

During the evaluation period, the SRP, in cooperation with OSM, revised its inventory of bond forfeiture sites requiring water treatment. This is an ongoing process that will result in the identification and treatment of bond forfeiture sites with polluttional discharges. The kinds of information captured through the inventory will enable the State to plan, design, and construct water treatment systems at existing and future bond forfeiture sites. The bond forfeiture inventory includes 172 permanent program permits. As of October 21, 2002, WVDEP estimated that the capitol construction costs for its bond forfeiture permits with acid mine drainage (AMD) will be approximately \$22 million and the annual treatment costs will be approximately \$4.9 million. The State's inventory of active mines with AMD treatment includes 352 permits with an estimated annual treatment cost of approximately \$25 million.

On September 8, 2002, WVDEP finalized an action plan that furthers the purposes and objectives of Senate Bill 5003. The action plan describes the measures that WVDEP intends to take to improve its inventories of active and bond forfeiture sites with polluttional discharges and to schedule and complete the timely reclamation of bond forfeiture sites. The document also describes measures being taken to ensure that permits will not be issued in the future with the potential for causing perpetual water treatment problems.

OSM is confident that these recent actions demonstrate WVDEP's commitment to improving its ABS. Existing data and new information that is being developed as a result of the action plan described above should enable WVDEP and the Advisory Council to ensure the long-term success of the ABS. OSM will continue to closely monitor the implementation of the new bonding provisions to ensure that the State's ABS remains financially sound.

4. Program Amendments to Satisfy Required Amendments

As discussed in detail in Section VII.E, WVDEP submitted program amendments to OSM that satisfied several outstanding required amendments during the reporting period. OSM announced its approval of the amendments in the Federal Register on May 1, 2002, and removed twenty-five required amendments at 30 CFR 948.16 (67 FR 21904-21932). This action was the result of a series of amendments that the State had submitted to OSM since November 30, 2000. These efforts ensure that the State's permanent regulatory program is consistent with the Federal regulations and SMCRA. Many of the required amendments that were satisfied by the State had been outstanding for several years.

In addition, as announced in Federal Register notices published on December 28, 2001, and May 29, 2002, OSM approved amendments to the State's ABS and removed three required amendments at 30 CFR 948.16 (66 FR

67446-67454 and 67 FR 37610-37626). OSM determined that these program amendments satisfied the corrective actions required under OSM's Part 733 notification of June 29, 2001, regarding the State's ABS. As a result, on June 20, 2002, OSM notified WVDEP that it was terminating its Part 733 action against the State (Administrative Record Number WV-1315).

OSM is pleased with the progress that the State has made in resolving these longstanding problems. OSM will continue to work with the State in implementing these new requirements, and to satisfy the remaining required amendments and 732 issues as discussed in Section VII.E.

5. Funding Increase for Staffing Under the Program Improvement Cooperative Agreement (PICA)

As discussed last year, OSM awarded WVDEP a Regulatory Program Improvement Cooperative Agreement (PICA) on November 1, 2000, in the amount of \$3.6 million to hire 59 additional employees. The agreement requires the State to provide 50 percent matching funds for these positions. The source of funding is a 50-cents per ton synfuels tax that was passed during a special legislative session and signed by the Governor on November 14, 2000. The synfuels tax generates an additional \$4 million in revenue for WVDEP per year. This tax has enabled the WVDEP to meet its funding obligations under PICA and to increase staffing for its surface mining regulatory program. Without this increased funding, the State would not have been able to fulfill its obligations under PICA. At the end of the reporting period, WVDEP had expended 43.5 percent of the funds awarded under PICA.

6. Program Enhancement Cooperative Agreement (PECA) Achievements

On February 1, 2001, OSM awarded WVDEP a Regulatory Program Enhancement Cooperative Agreement (PECA) for \$6.2 million. Through PECA, the State was provided 100 percent Federal funding to make certain improvements in its permitting program. Under terms of the agreement, OSM and WVDEP further agreed to have an OSM employee through an interagency personal assignment (IPA) assist the State in the management of the agreement. To date, WVDEP has made significant progress in procuring hardware and modifying software for electronic permitting; developing a centralized database for geologic, chemical and hydrologic data; populating a geospatial database; customizing existing software for watershed modeling; purchasing network software and hardware for a communication system that will serve as the backbone for its electronic permitting system; issuing a contract for the establishment of a watershed trend station monitoring program; and purchasing an airborne imaging/remote sensing system to monitor the effects of mining operations on watersheds within the State.

During the reporting period, work was temporarily suspended on the electronic permitting system. Three contract programmers working on the system were dismissed because they were abusing WVDEP's server space. The WVDEP Information Technology Office (ITO) immediately assessed the status of the programming work and the additional tasks needed to complete the project. Since a significant number of programming tasks had already been completed, ITO will use their existing staff and several other in-house contract programmers to complete the project. WVDEP anticipates that the project will be completed next year.

The agency's centralized database (EQuIS) is designed for the management of geophysical, chemical, and hydrological information concerning surface water and ground water conditions. The software has been purchased and essentially all programming and training have been completed. In order to minimize data integrity issues, it was decided to capture data from permits issued during the past five years and data entry into EQuIS is in progress for existing hydrologic and geologic data in paper format from 426 permits. To date, data from 112 permits has been converted and data from 314 permits remains to be completed. The data entry work should be completed next year.

Several contracts were awarded during the evaluation period for the placement of trend stations, enhancements to existing modeling software, and for the procurement of airborne imaging/remote sensing equipment and other equipment. The trend stations were placed strategically throughout the State at the lowest point in the watershed by using a computer program. The same computer program used to determine the placement of the trend stations was also used to determine CHIA areas. The trend stations will also be used to test the predictions of the watershed modeling software. Water quality and flow data are currently being recorded. In addition, WVDEP has contracted with the U.S. Geological Survey (USGS) to use several existing gauging stations and to add several new ones to provide water flow data to complement the trend station data and to provide additional hourly flow data for the watershed modeling software. At least ten additional tools have been developed by West Virginia University (WVU) to enhance the State's existing watershed modeling software. WVDEP is currently considering using a USGS modeling program, Hydrologic System Planning Fortran, for flow analysis and incorporating it into the State's watershed modeling software. The watershed modeling software should become operational later next year.

The digitizing of existing permit maps for WVDEP to populate its geospatial database is essentially complete. To date, 3,798 permit maps have been digitized. In addition, a contract was issued to allow for the purchase of airborne imaging/remote sensing equipment to monitor the effects of mining operations on watersheds. This equipment is being installed on a helicopter that is owned by the State. Overflights should begin in the near future.

As of September 30, 2002, WVDEP has obligated 43 percent of the funds awarded under PECA, and all projects are about 43 percent complete. Under the current agreement, the State has until January 31, 2003, to complete these projects. However, the State has requested that PECA be extended through December 31, 2003, to provide it sufficient time to complete all of the remaining tasks under PECA.

7. Active and Bond Forfeiture Mine Drainage Inventory

WVDEP continued to refine and upgrade its Bond Forfeiture AMD Inventory during the evaluation year. Additionally, WVDEP developed a comprehensive action plan that includes positive changes for maintaining and upgrading its active AMD Inventory. The action plan and status of the AMD inventories are further discussed in section IV.A.3. of this report.

8. Flood Study

On July 8, 2001, portions of southern West Virginia experienced a major rainfall that exceeded six inches in some locations. The area experienced disastrous flooding that caused widespread damage and devastated many communities. Following the flood, many concerns were expressed about the effects of mining and timbering on the severity of the flood. As a result, Governor Bob Wise issued an Executive Order directing an investigation to determine the impacts of the mining and timber industries. Two groups were established by the Order. One was an Advisory Committee consisting of sixteen members with twelve appointed from the public, and the other was a Technical Team comprising five professionals within the WVDEP's Division of Mining and Reclamation.

The Technical Team was to prepare a report addressing the cause of the flooding, investigate alternative mining or timbering practices if those industries were found to have effected peak storm flows, and to prepare recommendations for the Secretary of WVDEP. The Teams final report was released on June 14, 2002. Following the recommendations of the Team, Emergency Regulations were prepared by WVDEP and submitted to the Governor shortly after the release of the report. The Emergency Regulations were still under review by the Governor at the close of the Evaluation Year.

B. Issues

1. Program Maintenance

During the evaluation period, WVDEP satisfied twenty-eight required amendments, and OSM modified one existing required amendment. At the end of the reporting period, the State had twenty-eight outstanding required amendments relating to commercial forestry and homesteading. These regulations were promulgated in response to the Consent Decree that settled the mountaintop mining litigation. The State has submitted revisions to OSM that may satisfy eighteen of the outstanding required amendments. These revisions are still under review by OSM.

According to State officials, the remaining ten outstanding required amendments involve parts of the negotiated rulemaking which settled the mountaintop mining litigation and will require additional input from all involved parties.

Currently, the State has twenty-nine deficiencies in its program resulting from the issuance of five 30 CFR Part 732 notifications by OSM. These Part 732 issues are the result of changes in the Federal regulations. The State has submitted revisions to OSM which may satisfy fourteen of the Part 732 issues. State officials have agreed to reevaluate the other Part 732 issues to determine if additional revisions are necessary. WVDEP and OSM officials have agreed to continue working toward the timely resolution of all of these issues.

2. *Litigation*

Bragg v. Robertson, Civil Action No. 2:98-0636 (S.D. W.Va.)

On July 16, 1998, the WVHC and ten other individuals sued the WVDEP and the U.S. Army Corps of Engineers (COE) in the U.S. District Court for the Southern District of West Virginia. The lawsuit concerns the loss and degradation of West Virginia streams resulting from the construction of excess spoil fills associated with surface mining activities, including mountaintop-removal, steep slope, and multiple seam mining operations.

On October 20, 1999, Chief U.S. District Judge Charles H. Haden II ruled that the placement of excess spoil from surface mining operations in intermittent and perennial streams violates Federal and State surface mining laws and the Clean Water Act (CWA). On October 29, 1999, Judge Haden stayed his ruling prohibiting the placement of excess spoil fills in intermittent or perennial streams. WVDEP and coal industry attorneys appealed the decision to the U.S. Court of Appeals for the Fourth Circuit.

On April 24, 2001, the Court of Appeals vacated the October 20, 1999, injunction and remanded the decision to the District Court with instructions to dismiss the citizens' complaint without prejudice so that they could refile in State court. The Appeals Court ruled that the 11th Amendment to the Constitution bars citizens from bringing suit against State officials in Federal court when the suit concerns the alleged failure of a State official to perform any act or duty under an approved State program adopted pursuant to SMCRA. The Appeals Court, however, affirmed the validity of the February 17, 2000, consent decree, noting that, by agreeing to that decree, the State voluntarily waived its immunity under the 11th Amendment with respect to the claims settled by the decree.

On October 11, 2001, lawyers for the WVHC filed a petition for a writ of certiorari with the U.S. Supreme Court. The Supreme Court denied the petition to hear the case on January 22, 2002.

Kentuckians v. Rivenburgh, Civil Action No. 2:01-0770 (S.D. W.Va.)

In a related case, on August 21, 2001, the Kentuckians for the Commonwealth, Inc. (KFTC) filed a complaint for declaratory and injunctive relief with the U.S. District Court for the Southern District of West Virginia against the COE alleging that the issuance of Nationwide Permit, NWP, 21 to Martin County Coal Company (MCCC) was illegal, and the COE had no authority under Section 404 of the CWA to allow placement of mining waste in streams.

On May 8, 2002, Judge Haden granted KFTC's motion for summary judgment and enjoined the COE from issuing any further Section 404 permits that have no primary purpose or use but the disposal of waste. In his decision, Judge Haden ruled that Section 404 does not allow the filling of waters of the United States solely for waste disposal. He also ruled that fills were permissible for construction, development, or property protection, and other activities defined by constructive or beneficial purpose. Some, but not all, surface mining fills may qualify as a constructive or beneficial purpose depending upon the planned postmining activity on the fill.

On May 13, 2002, the U.S. Department of Justice, on behalf of the COE, filed a motion seeking a stay of District Court's decision pending an appeal to the 4th U.S. Circuit Court of Appeals.

On June 17, 2002, Judge Haden refused to grant a stay of his May 8 decision. In addition, Judge Haden ruled that the COE is enjoined from issuing further Section 404 permits within the Huntington District that have no primary purpose or use but the disposal of waste, except dredged spoil disposal. In particular, the issuance of mountaintop removal overburden valley fill permits solely for waste disposal under Section 404 is enjoined.

During 2002, the KFTC, the Federal government, the Kentucky Coal Association, the National Mining Association, MCCC, and the Pocahontas Development Corporation filed a series of briefs and reply briefs with the Appeals Court. Given the effect of the District Court's decision, motions were filed to expedite the oral arguments in the case. Oral arguments were heard by the Appeals Court on December 4, 2002.

West Virginia Highlands Conservancy v. Norton, et al, Civil Action No. 2:00-1062 (S.D. W.Va.)

On November 14, 2000, the WVHC filed a complaint in U.S. District Court for the Southern District of West Virginia against OSM and WVDEP. The suit had several counts relating to the failure of State's ABS to have sufficient revenue to complete reclamation, including water treatment, at all bond forfeiture sites and the failure of the WVDEP to satisfy several outstanding required program amendments. On May 15, 2001, the WVHC filed a motion for a preliminary injunction on Count 4 of the complaint relating to bonding.

On May 29, 2001, Chief U.S. District Judge Charles H. Haden II denied WVHC's request for a preliminary injunction and dismissed the WVDEP from the suit, noting that the State had immunity from such lawsuits under the 11th Amendment to the Constitution.

On June 19, 2001, the WVHC filed a motion for a partial summary judgment and a permanent injunction against OSM asserting its failure to perform certain nondiscretionary duties related to State program maintenance and oversight under SMCRA.

On June 29, 2001, OSM notified WVDEP that, pursuant to 30 CFR 733.12, it had reason to believe that West Virginia was failing to properly maintain its ABS and required the State to take certain corrective actions. The Federal defendants' reply brief in support of its opposition to WVHC's motion of partial summary judgment and for a permanent injunction was filed on July 23, 2001.

On August 31, 2001, Judge Haden issued a decision partially granting the WVHC's motion for summary judgment, denying the Federal defendant's motion to dismiss the suit, but denying the WVHC's motion for a permanent injunction, because the Court held that the deadlines set for compliance by OSM's Part 733 notification were reasonable. In addition, the Court ordered that the parties may continue discovery as WVHC requested; the parties must provide reports to the Court every six weeks on the State's

progress in meeting OSM's Part 733 deadlines; proposed statutory amendments are to be made available to the Court when presented to OSM; and entry of the final order is deferred until the earlier of the presentation to OSM of final enacted legislation or 45 days after the close of the 2002 State legislative session.

As discussed in more detail under Section IV.B.1, on December 28, 2001, OSM approved the State's proposed statutory revisions regarding its ABS, but it delayed rendering a decision on whether the revisions were sufficient to eliminate the deficit in the State's ABS and to ensure that sufficient money would be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites. OSM advised the Court that by May 28, 2002, it would continue its Part 733 action if it determined that the proposed State revisions did not fully satisfy the required amendment at 30 CFR 948.16(l11).

On January 2, 2002, the WVHC filed a motion for partial summary judgment and permanent injunction listing twenty five required program amendments as deficiencies sufficient to cause the withdrawal of the State's program approval, because the corrections were not made in a timely fashion. On January 23, 2002, the Federal defendants filed a motion in opposition to WVHC's motion and a declaration stating that OSM would render a decision on those required amendments that have not been satisfied by WVDEP by May 15, 2002. The WVHC filed two reply briefs on February 8, 2002.

On March 19, 2002, Judge Haden issued an order granting WVHC's request to file an amended and supplemental complaint, but denying their motions for partial summary judgment and injunctive relief on Counts 2, 3, and 8 and a motion by the West Virginia Coal Association to dismiss the action. The WVHC filed an amended and supplemental complaint for declaratory and injunctive relief on the same day.

As discussed above under Section IV.B.1, on May 1, 2002, OSM approved revisions to the State's program and removed twenty-five required amendments. In addition, OSM fully approved the State's ABS on May 29, 2002.

In response to the District Court's order, OSM filed its sixth and final status report with the Court on May 10, 2002. On June 20, 2002, OSM also filed an administrative record with the District Court consisting of two volumes of documents pertaining to West Virginia's ABS and two volumes relating to the State's outstanding required amendments.

On June 26, 2002, WVHC filed a second amended and supplemental complaint for declaratory and injunctive relief based on OSM's decisions of May 1 and May 29, 2002. The Federal defendants filed an answer to WVHC's second amended complaint on July 11, 2002.

WVHC filed a motion and memorandum for summary judgment and permanent injunction on Count 9 on August 30, 2002. WVHC requested that the District Court set aside OSM's decisions and require it to take over West Virginia's ABS and other parts of the State's approved program. The Federal government filed a memorandum in opposition to WVHC's motion for summary judgment and permanent injunction on September 27, 2002.

On October 11, 2002, WVHC filed a memorandum in response to the Federal government's memorandum of September 27, 2002, opposing its motion for summary judgment. On October 31, 2002, the Federal defendants filed a surreply to WVHC's response to its memorandum in opposition to the plaintiff's motion for summary judgement. The WVHC filed a notice of supplemental authority in support of its motion for summary judgment on November 5, 2002. Judge Haden is expected to render a decision in this case in the near future.

Ohio River Valley Environmental Coalition, Inc., et al., v. Michael Callaghan, et al., Civil Action No. 3:00-0058, (S.D. W.Va.)

On January 21, 2000, the Ohio River Valley Environmental Coalition, Inc. (OVEC) and the Hominy Creek Preservation Association (HCPA) filed suit in U.S. District Court for the Southern District of West Virginia at Huntington. The suit asked the court to compel the WVDEP to perform certain functions that the plaintiffs allege are nondiscretionary legal obligations under SMCRA. The suit alleged that WVDEP had approved permits and significant amendments without doing adequate CHIAs, without requiring adequate baseline data and without requiring adequate hydrologic monitoring and reclamation plans. The plaintiffs further alleged that the WVDEP carried out a program amendment as the May 18, 1999, CHIA Guidance Memorandum without OSM approval or public review.

In a February response, the WVDEP filed a motion for dismissal of the case for lack of jurisdiction because the plaintiffs had failed to exhaust their administrative remedies before filing the suit. In a May 1, 2000, order, Judge Chambers denied the WVDEP motion. After the April 24, 2001, decision of the U.S. Court of Appeal for the Fourth Circuit in the Bragg v. West Virginia Coal Association litigation, the WVDEP asked the Court to revisit the May 1 decision and dismiss the case for lack of jurisdiction. They argued that if the doctrine of sovereign immunity barred plaintiffs in the Bragg case from bringing their claims against WVDEP in Federal court, this case should not be in Federal court either.

On June 14, 2001, the plaintiffs filed a motion to amend their existing complaint against the WVDEP and other intervenor-defendants to seek relief against a new defendant, the U.S. Department of the Interior. On September 20, Judge Chambers granted the plaintiff's motion to amend their complaint and denied the defendants motion to dismiss the case on the jurisdictional issue. The Court held that the claim regarding use of the CHIA Guidance Memorandum without first obtaining federal approval keeps the State within the jurisdiction of this case. The State has appealed this decision.

On September 25, 2001, the plaintiffs filed an amended complaint that also named the U.S. Department of the Interior as a defendant. The plaintiffs argued that the alleged WVDEP actions set out in the complaint are a failure to perform non-discretionary duties. This is a failure to carry out the approved program. Therefore, the plaintiffs argue that the Secretary must promulgate and implement a Federal regulatory program for West Virginia within a specific, reasonable amount of time.

There has not been any significant progress on this case in EY 2002. OSM and the Justice Department are waiting on a schedule from Judge Chambers.

The State of West Virginia has appealed Chambers' jurisdictional ruling to the Fourth Circuit Court of Appeals.

3. Surety Bankruptcy and Bond Replacement

In May 2000, the U.S. Department of the Treasury removed Frontier Insurance Company (Frontier) of Rock Hill, New York from the list of approved surety companies that can underwrite Federal surety bonds. The New York State Insurance Department took control of the financially ailing insurance company in August 2001.

Because Frontier is a large surety company that underwrites reclamation bonds in West Virginia and other states, OSM and those state regulatory authorities which includes WVDEP have been monitoring Frontier's financial situation very closely. In West Virginia, the West Virginia Insurance Department has also been actively involved. State records show that, as of December 2001, 315 permits involving 36 different coal companies had Frontier bonds. These bonds amount to \$78.1 million and guarantee reclamation on approximately 18 percent of the State's permitted acreage. Practically all of Frontier's bonds are associated with mining operations in the southern part of the State. One company, AEI Resources, accounted for 85 percent of Frontier's outstanding bond obligation. Bankrupt/bond forfeited companies in the State accounted for 8 percent of the Frontier bonds.

On April 9, 2001, Frontier entered into an Agreed Order with the West Virginia Insurance Commissioner to cease and desist writing any new or renewal insurance in West Virginia as of March 16, 2001. Policies in existence on March 16, 2001, could be renewed until March 30, 2001, after which those policies would cease to be renewed.

On October 15, 2001, a New York State Court ruled that Frontier was insolvent. On November 1, 2001, WVDEP began issuing notices of violation requiring operators to replace reclamation bonds that had been underwritten by Frontier within 15 days, as required by the approved State program. Because of various external events, such as the World Trade Center disaster and the Enron financial scandal, replacement bonds have been more difficult to obtain.

State officials are continuing to work with Frontier and other surety companies to find replacement bonds. Horizon Natural Resources, formerly AEI Resources, has replaced all of its Frontier bonds. There are currently twenty-eight Frontier bonds spread over twenty-six permits involving the following companies that have yet to be replaced:

- Antaeus Coal - 1 bond on 1 permit;
- Bluestone Coal - 1 bond on 1 permit;
- Chicopee Coal - 14 bonds on 14 permits;
- Falcon Land Company - 5 bonds on 2 permits;
- Lodestar - 6 bonds on 7 permits; and,
- Pritchard Mining - 1 bond on 1 permit

Antaeus has been ordered to show cause why its permit should not be suspended or revoked, Falcon Land has appealed cessation orders for not replacing Frontier bonds to the Surface Mine Board, and Lodestar is in

bankruptcy with all sites backfilled and regraded. Chicopee sites are in reclamation with no coal being mined.

4. Staffing

As discussed last year, OSM provided WVDEP a 30 CFR Part 732 notification regarding staffing on February 8, 2000. Since then, the State has increased revenue for staffing and entered a Regulatory Program Improvement Cooperative Agreement (PICA) to hire 59 additional employees.

During the reporting period, OSM agreed to WVDEP's proposal to replace two clerical positions with one technical position. In addition, OSM agreed to let WVDEP contract the hearings officer position, rather than fill it as a full time equivalent (FTE) position. These modifications resulted in WVDEP having to fill 57 FTE positions under PICA.

At of September 30, 2002, WVDEP had filled 88 percent or 50 of the 57 new positions authorized under PICA. However, additional vacancies resulted due to normal attrition and filling the new positions with existing employees from within the agency. At the end of the reporting period, WVDEP had filled 71 percent of its backfill positions and 51 percent of its regular vacancies. Due to these vacancies, WVDEP has a net gain of 20 employees. The State still needs to hire 36 additional employees to reach its agreed staffing level of 284 positions.

As discussed in Section IV.A.3 above, WVDEP is planning to fill 17 positions in the SRP to perform bond forfeiture reclamation, including water treatment. These positions will be in addition to the 10 positions that currently exist in the program. Once these positions and the other vacancies are filled, WVDEP's full staffing level will total 295 FTE positions (See Table 8). Most of the existing vacancies in WVDEP are in the permitting and blasting units.

At the end of reporting period, the State had expended 43.5 percent of the funds awarded under PICA. PICA is due to expire on October 31, 2002. WVDEP has requested that the agreement be extended through December 31, 2003, to provide it additional time to fill the current vacancies and to expend the remaining funds.

5. Bond Forfeiture Site Reclamation

In an oversight study this year, OSM noted WVDEP was not following the planting plan for permits with regard to tree planting at sites reclaimed with bond forfeiture funds. The WVDEP agreed to change its procedures to more closely follow the reclamation plans.

V. Success in Achieving the Purposes of SMCRA as Determined by Measuring and Reporting End Results

To further the concept of reporting end results, the findings from performance standard and public participation evaluations are being collected for a national perspective in terms of the number and extent of observed off-site impacts, the number and percentage of inspectable units free of off-site impacts, the number of acres that have been mined and

reclaimed and which meet the bond release requirements and have been released for the various phases of reclamation, and the effectiveness of customer service provided by the State. Individual topic reports are available in the CHFO which provide additional details on how the following evaluations and measurements were conducted.

A. Off-Site Impacts

We conducted an evaluation of all West Virginia non-forfeited coal mining permits to determine the effectiveness of the State program in protecting the environment and the public from off-site impacts resulting from surface coal mining and reclamation operations. The evaluation revealed that 93 percent of the State's 2003 permits were off-site impact free.

During this evaluation period, the State conducted 18,370 inspections and issued 1407 enforcement actions. Of these enforcement actions, 234 off-site impacts were found on 148 permits. In comparison to last years 216 impacts on 135 permits, the number of impacts off-site has increased by 8 percent, and the number of permits with off-site impacts by 10 percent. Most of the off-site impacts (97 percent) were categorized as minor. The figures representing resources affected, degree of impact, and type of impact can be found on Table 4.

Hydrology, representing 76 percent of the type of impact affected this year, still remains the most common type of impact affected by the mining operations. This category has increased 6 percent from last year's 70 percent.

The State's SRP group conducted an off-site impact evaluation of the forfeited permits for the review period of July 1, 2001, through June 30, 2002. During this period of review 9 permits were forfeited and these sites were added to the inventory. One of these sites has off-site impacts relating to hydrology. The degree of impact for this new site is moderate. The State reported that 23 bond forfeiture sites were reclaimed during the review period, resulting in 5 off-site impacts relating to water quality problems being corrected.

OSM worked with the SRP group during the year to upgrade and better characterize the individual bond forfeiture permits with water quality problems. The off-site impacts related to water were previously being reported only when degradation to the receiving stream was apparent. This years off-site report includes all revoked permanent program permits with polluted discharges whether or not there is a readily apparent stream impact. With this effort the total number of forfeited, unreclaimed permits increased to 433 permits and the number with off-site impacts to 138. Of these 138 off-site impacts, 3 are related to land problems and 135 are related to water quality problems.

The SRP group continues to maintain the inventory of the State's forfeited permits and is responsible for the reclamation of these sites. Some of the sites with off-site impacts are being monitored with plans being prepared to bring these sites into regulatory compliance, while others are in various planning stages in preparation for remedial work to be performed.

B. Reclamation Success

The success of the State program in ensuring reclamation of lands affected by surface coal mining operations is based on the number of acres meeting the bond release standards and subsequently released by the state. Phase I release indicates that the land contour has been returned to its approximate original configuration or an approved variation. The phase II release verifies that the vegetative cover or other erosion control techniques have adequately stabilized the surface from erosion and the soil resources are adequate to support that cover. The phase III, or final release, verifies that the mine site is fully reclaimed to achieve the approved postmining land use (PMLU). Restoration of the vegetative cover and surface and ground water are reflected by this release.

During the evaluation year, WVDEP granted 7,830 acres in phase III bond release based on the successful completion of all reclamation requirements. Phase I and phase II bond releases during the year were 2,728 and 7,170 acres respectively.

C. Customer Service - Preblast Surveys

The WVDEP's Office of Explosives and Blasting (OEB) is responsible for regulating blasting on all surface mine operations. The OEB has been in existence for approximately three years. Among OEB's various responsibilities are reviewing preblast surveys for completeness and accuracy, and training preblast surveyors, and evaluating citizen complaints.

A preblast survey documents the preexisting condition of man-made structures before blasting begins. Preblast survey requirements and procedures are outlined under Section 22-3-13a. of the West Virginia Surface Coal Mining and Reclamation Act and Section 38-2-6.8. of the West Virginia Surface Mining Reclamation Regulations. These laws and rules require the permittee and the OEB to provide notification to the property owner thirty days prior to commencement of blasting operations. The permittee and the OEB must also give the property owner an opportunity to comment on the documentation of the condition of their dwelling or structure.

The permittee is required to inform, in writing and at least 30 days prior to the beginning of blasting operations, all residents or owners of man-made structures located within 7/10 mile of the permit area on how to request a preblast survey. Upon a written request to the OEB from a resident or owner, the permittee must also conduct a preblast survey of the dwelling or structure at least fifteen days prior to the commencement of any production blasting unless a signed waiver or refusal is submitted. Two copies of the survey must be submitted to the OEB.

The responsibilities of the OEB include: (1) reviewing each preblast survey with regard to form and completeness, and notifying the permittee of any deficiencies; (2) forwarding completed and accepted surveys to the structure owner and/or occupant, and maintaining a copy as a confidential record.

The WVDEP approves more than 50 coal mining permits per year. A sample of permits containing blasting operations, approved during 2000 and 2001, were randomly selected from each of the four WVDEP Regional Offices (Logan, Welch, Oak Hill, and Philippi) for review. Each permit was evaluated to determine the timeliness, accuracy, completeness, and appropriateness of the OEB actions related to customer service/preblast surveys. In this case the customers are the owners and/or occupants of dwellings or other structures within one-half mile of the permitted area.

We reviewed Section T: Blasting Plan of the Surface Mine Application to compare the structures identified on the Preblast Survey Map with the list of names and addresses for each owner or resident of manmade dwellings or structures located within one-half mile of the permit area. The OEB provided a listing of all notices (surveys, waivers, refusals, updates) they received for each of the permits reviewed. We contacted each company to confirm the date of the first blast on each of the permits.

The results of our reviews were:

1. The permittees are properly identifying all dwellings and man-made structures within the one-half mile radius of the permit boundary in the permit application.
2. The number of notices (surveys, waivers, refusals) that the OEB received was less than the number of structures identified on the blasting map in 4 of the 36 permits reviewed. The magnitude of this discrepancy ranged from a difference of 3 to 82. Some of these discrepancies are likely record keeping errors.
3. The date of the first blast was compared to the date the OEB received the last preblast notice from the permittee. Of the 36 permits reviewed, 4 showed the date of the first blast occurring before the last preblast survey had been received by the OEB. Some of these discrepancies are likely data entry errors.

In January 2002, the OEB began sending notification letters to permittees indicating that all surveys, waivers, and affidavits received have been reviewed and are complete and adequate. The letter also states that before blasting commences to verify that the permittee has a survey, waiver, or affidavit for each owner and resident listed in the permit. A memorandum containing this information is also sent to the WVDEP inspector assigned to the permit. The OEB is also now involved in the review of the blasting section of new permit applications. This new procedure should eliminate the problems described in findings 2 and 3. All of the permits in this review were issued prior to the implementation of this procedure.

OSM worked with OEB to resolve all of the discrepancies noted in the initial findings on individual permits. Some of the discrepancies were related to record keeping within the OEB and are not actual violations created by operator actions. The OEB has taken appropriate enforcement action where needed.

VI. OSM Assistance - Regulatory Program

A. Site Specific Technical Assistance

OSM provided site specific technical assistance to the WVDEP regulatory program on eight instances during this evaluation year. Staff from the OSM Appalachian Regional Coordinating Center in Pittsburgh provided assistance in evaluating potential impacts from water well losses, stream losses, underground mine subsidence and blasting. Assistance was also provided through the use of the OSM Bore-Hole camera to investigate a potential mine subsidence problem.

B. Mountaintop Interim Interagency Permit Evaluation

OSM Technical Assistance in the review of certain permit applications has been provided to WVDEP since April 1999. The assistance efforts were outlined in a Memorandum of Understanding and specifically identified in a work plan signed by OSM and WVDEP in 1999. They were designed to assist WVDEP in the review of large surface mining applications likely to require the issuance of a CWA Section 404 Individual Permit.

As of September 30, 2002, OSM was providing assistance on eight permit applications. During EY 2002, WVDEP approved two applications subject to the efforts under the April 1999 MOU.

C. OSM Technical Training

As part of our technical transfer program, OSM conducted courses throughout the year in the latest technology related to active and abandoned mine reclamation. During EY 2002, OSM provided technical training to 51 WVDEP regulatory personnel through this program.

D. Underground Mine Hydrology/Mon Pool Research

OSM continued to conduct technical analysis regarding the flooding of underground mine voids. Decades of underground mining on the Pittsburgh Coal Seam have left approximately 25,000 acres of abandoned mine voids. These mine voids are either flooded or currently flooding. In 1996, these mine voids filled to a near-land surface. Mounting concern that the pool would start discharging into the Monongahela River prompted various agencies to collaborate on the problem in 1998. These included OSM, EPA, WVDEP, and the National Mine Land Reclamation Center (NMLRC), along with Consolidated Coal Company. These agencies are studying the effects of mine pool buildup and considering possible solutions to the problem. Currently, the level of water in the mine pool is controlled by pumping and treating of water.

In EY 2002, OSM continued to monitor and collect data from a total of eight boreholes. Two additional previously unknown boreholes were discovered and water level monitoring commenced at those locations. During the evaluation period, OSM determined that there was the need for additional mine pool elevation data in parts of the pool in which there was no data. A plan was proposed to drill the additional wells beginning in October, 2002. Monitoring and analysis will continue in EY 2003.

E. Permitting Consistency Phase I

In 2000, OSM agreed to assist WVDEP update agency guidance documents to reflect current requirements and policies. Six areas were chosen for development of revised policy documents during the first phase of the project. The areas chosen were: probable hydrologic consequences and hydrologic reclamation plans; CHIAs; geology; topsoil and revegetation; subsidence; and, approximate original contour (AOC). A training program for WVDEP permit review staff and industry personnel involved in preparing applications is planned for each of the areas. As of September 30, Guidance for AOC determinations has been completed and training was provided in 2000. In addition, draft geology guidance should be ready for public input by early 2003. The remaining topics are in various stages of development.

F. O&C Investigation of Bond Forfeiture Sites

In June 2002, the WVDEP requested investigative assistance from the OSM Applicant Violator System Office for 98 permits held by 33 companies with performance bonds forfeited since January 1, 2000. A list of companies and permit numbers with information about the bond type, bonding institution, and the county and location of the permit was provided to OSM. Certain companies and sites were identified as priorities for investigation.

In addition to the ownership and control investigations to determine who owned or controlled the permittee at the time of the forfeiture, the investigations will also determine the net worth of the permittee and those persons found to be responsible for the forfeitures. The information collection strategies include field trips, collecting public information using the Internet, interviews, and the issuance and serving of subpoenas. When the investigations are completed, final recommendations will be made to the WVDEP including alternative enforcement recommendations as appropriate. The WVDEP will then determine the next course of action in the pursuit of reclamation of the sites and whether additional investigative assistance may be required.

Investigations are underway for 19 of the 33 companies including two of the three identified priorities. These investigations cover 73 of the 98 permits.

VII. General Oversight Topic Evaluations - Regulatory Program

A. Oversight Inspections

During EY 2002, the CHFO conducted 477 inspections to evaluate West Virginia's program. Also, as part of the oversight inspection process, we conducted a review of West Virginia's bond release activities, and an aerial review of selected sites. Our findings for these review activities follow. The following is a breakdown of the inspections by type.

Assistance	3
Citizen Complaint	7
Citizen Complaint Follow-up	3

Citizen Complaint Referral	14
Federal Partial	1
Other Follow-up	8
Sample Inspection - Complete	77
Sample Inspection - Partial	181
Bond Release Review - Partial	27
Bond Release Review - AMD	16
Document Review - AMD	43
Document Review - Blasting	36
Impoundments - Partial	13
Special Reclamation - Partial	5
AMD Review (On-Site)	<u>43</u>
	477

Forty-three of the inspections consisted only of review of documents pertaining to AMD. The reviews were conducted to determine if the State had properly removed the sites from the AMD inventory. If a determination could not be made by reviewing the documentation, an on-the-ground review was conducted. Thirty-six of the inspections consisted of a review of blasting records to determine if nearby residents were afforded the opportunity to have a preblast survey conducted.

A total of 398 on-the-ground inspections were conducted. One hundred eighty-four violations of the State Program were observed on 104 of the 398 inspections. This shows that violations of the State Program were observed on 26.1 percent of the inspections.

Most of the identified state program violations were properly handled by the State. Twenty-two of the violations had been previously cited by the State, 122 were cited at the time of the inspection, two were abated during the OSM inspection and 38 violations resulted in the issuance of Ten-Day Notices (TDN). State responses have been determined to be appropriate on 26 of the TDN violations. Responses have been received on the remaining 12 violations and are currently being evaluated. Following is a breakdown of violations by type.

Administrative

Mining Within Valid Permit	6
Mining Within Bonded Area	6
Terms and Conditions of Permit	29
Liability Insurance	1
Temporary Cessation	1
Administrative - Other	2

Hydrologic Balance

Drainage Control	14
Inspections and Certifications	10
Siltation Structures	8
Discharge Structure	1
Diversions	3
Effluent Limits	12
Ground Water Monitoring	4
Surface Water Monitoring	3

Drainage-Acid/Toxic Materials	2
Hydrologic Balance - Other	13
<u>Backfilling and Grading</u>	
Exposed Openings	3
Contemporaneous Reclamation	5
Approximate Original Contour	1
Highwall Elimination	5
Steep Slopes (includes Downslope)	8
Handling of Acid & Toxic Materials	2
Stabilization (rills and gullies)	3
Backfilling and Grading - Other	2
<u>Excess Spoil Disposal</u>	
Placement	2
Drainage Control	1
Inspections & Certifications	3
<u>Coal Mine Waste (Refuse Piles and Impoundments)</u>	
Drainage Control	2
Surface Stabilization	3
Placement	4
Inspections and Certifications	1
Impounding Structures	1
<u>Use of Explosives</u>	
Distance Prohibitions	1
Control of Adverse Effects	1
Blast Survey/Schedule	1
Warnings and Records	5
<u>Subsidence Control Plan</u>	
Subsidence - Other	3
<u>Roads</u>	
Drainage	1
Surfacing and Maintenance	3
<u>Signs and Markers</u>	
Signs	2
Markers	3
<u>Distance Prohibitions</u>	
Distance Prohibitions	1
<u>Revegetation</u>	
Vegetative Cover	<u>1</u>
	184

Bond Release

This review consisted of on-the-ground inspections as well as an aerial review of bond released sites. Our on-the-ground review consisted of sites which were in varying stages of release. In addition to randomly selecting sites for review, OSM conducts an inspection on any site for which a release is requested, if the site is listed on the AMD inventory. Site reviews included: 35 - Phase I, 28 - Phase II, and 29 sites on which Phase III release had been granted.

Overall, the sites inspected demonstrated satisfactory reclamation and show that West Virginia is conducting its bond release program in accordance with applicable law, regulations and policies. The reported bond release activities can be used as indicators of standards of reclamation success. Except for those instances discussed below, our review found release standards were properly applied on most of the sites.

One site was granted a Phase III release when the highwall was not completely eliminated. The WVDEP had denied the bond release request. The permittee appealed the denial to the West Virginia Surface Mine Board (WVSMB). The WVSMB ordered the bond to be released because the permittee had used spoil from the permit to reclaim some pre-law highwall and did not have enough material to completely eliminate the highwall created by their mining operation. OSM issued a TDN to the WVDEP for the violation. WVDEP chose to take no action and OSM is in the process of making a final determination on the State's response.

On another site, the permittee verbally requested the WVDEP bond release specialist to look at its permit area to see if it would qualify for a Phase I bond release. When the bond release specialist looked at the site, he told the permittee, verbally, that the site would not qualify for Phase I release because the highwall had not been eliminated. The permittee appealed the verbal decision that the site would not qualify for release to the WVSMB. The WVSMB accepted the appeal, viewed the site, held a hearing and found the site was eligible for bond release even though the highwall had not been eliminated. The reason stated by the WVSMB was the same as described in the previous case. Spoil was used to reclaim pre-law highwall and the permittee did not have sufficient spoil to reclaim the highwall. OSM has investigated this matter and has issued a TDN to the WVDEP.

On another site, the WVDEP was in the process of approving a Phase I release on a permit even though there were outstanding violations on the site. WVDEP regulations prohibit bond release if there are outstanding violations. The WVDEP inspector and the bond release specialist each said they didn't consider a violation to be outstanding unless it had gone to a cessation order. The release had been approved at the WVDEP regional office and forwarded to Nitro for final action. After discussions between OSM and the WVDEP, the WVDEP had the release package returned from their Nitro office and bond release was not approved.

Results of our aerial review are contained in the following section.

Aerial Inspections

This evaluation utilizing aerial inspections focused on sites which received a Phase III bond release since October 1, 2000. The review was conducted in counties which have been determined to have a high probability for AMD. The sites were reviewed to see if seeps, which had not been previously identified, were present and to see if the approved PMLU had been achieved.

The sites to be reviewed were randomly selected from a list of sites which had received a Phase III release between January 1, 2001, and December 31, 2001.

Thirty-two sites, which had received Phase III bond release, were reviewed. No probable AMD problems were observed on the released sites and the approved post mining land use had been achieved.

In addition to reviewing sites which had been bond released, inspectors conducted aerial reviews of selected sites which had been forfeited and reclaimed by WVDEP SRP.

B. Reclamation Success at Bond Forfeiture Sites

This study evaluated the reclamation work performed by the WVDEP SRP on a variety of revoked permits. Specifically, bond forfeiture sites were examined to determine if the reclamation performed was in accordance with the reclamation plans in the approved permits and the general performance standards of the State's regulatory program. Special emphasis was placed on PMLU, revegetation, and backfilling and grading. A review of fifteen bond forfeiture permits was conducted from a group of one hundred sixty "complete" bond forfeiture permits where reclamation was reported as complete within the last three Evaluation Years. Water quality issues were not evaluated as a part of this study because that issue is being addressed by other studies.

With a few exceptions, the State complied with or exceeded the general performance standards. Drainage was properly controlled on the various sites with the use of surface and subsurface drains. The overall regrading and highwall elimination activities on the sites were in compliance, and in many cases, above the minimum requirements. Material was taken from the road and sediment berms and used to backfill the exposed highwalls. Although minor problems with the regrading were found, these consisted primarily of maintenance issues, including sloughs/slumps, rills/gullies, and settlement of the backfill material. The overall regrading was very successful.

The planting plans in the permits were compared to the revegetation mix utilized by the State in reclamation activities. In several instances, the seed mix of the proposed reclamation work varied greatly from the mix approved in the permit. Many of the changes involved the substitution of one grass species for another, and in most cases, the seed mixes used by the State included a greater variety and higher seeding rates than the

permit. The herbaceous cover on all sites was adequate for ground cover and stabilization, and most areas were well vegetated.

Problems were seen with the woody vegetation and PMLU. On several sites, the proposed land use was forest land or wildlife habitat, and the approved permit plans called for the planting of several tree and shrub species. The reclamation conducted by the State did not include any seedlings, plants or shrubs, but instead included black locust seed in the seed mix. Although the PMLU was not technically changed, the significance in the change of tree species would have an impact on the quality and success of the PMLU. In response to our findings, the state has agreed to implement the tree and shrub planting plan on all permits with a forest or wildlife PMLU, including those that are currently under contract.

C. Slurry Impoundment Inventory

As discussed last year, OSM, in cooperation with WVDEP, initiated the compilation of an inventory of coal-related impoundments in the State with storage volumes of 20-acre feet or more. The inventory was developed using the State's dam control inventory, the impoundment inventory dated November 8, 2000, of the U.S. Mine Safety and Health Administration (MSHA), and OSM oversight inspection reports. In addition, OSM reviewed all State permit files that were believed to include a coal refuse impoundment. As discussed in VII.G, this effort was part of a larger oversight initiative to ensure that coal refuse impoundment breakthroughs into underground mine workings do not occur in the future.

As discussed last year, the initial review found that there were inconsistencies between the various State and Federal databases. MSHA officials conceded that their nationwide inventory only identifies impoundments with breakthrough potential. That is why OSM had earlier identified 80 impoundments that were not on MSHA's impoundment inventory. MSHA officials acknowledged that it maintains the inventory to comply with the Federal Dam Control Act which is administered by the COE. During the evaluation period, MSHA District 3 and 4 officials provided OSM with updated inventories. The revised MSHA inventories, which included all of the impoundments in Districts 3 and 4, regardless of their breakthrough potential, compared favorably with OSM's inventory.

At the same time, OSM worked with WVDEP in resolving the inconsistencies that were identified in its inventory. Last year, OSM identified 21 impoundments that were not on the State's impoundment inventory, and 15 impoundments that lacked storage volume data. Several meetings were held to resolve the differences. As a result of these meetings, some of the impoundments that were identified last year were removed from the inventory, because they were not impounding structures or they had been reclaimed. The review found that there are 136 sediment, slurry, freshwater, or other impoundments that impound more than 20-acre feet of slurry or water within the State. In addition, OSM, in cooperation with WVDEP, ranked the breakthrough potential at each of these sites. All of this information was provided to WVDEP for further evaluation. WVDEP intends to include this information in its Environmental Resources Information System so that the data will be updated on a routine basis.

D. AMD Inventories for Active and Bond Forfeiture Sites

At the beginning of the evaluation year, a work plan was developed to assess and validate the completeness and accuracy of the West Virginia Active and Bond Forfeiture Mine Drainage Inventories. The study involved file and field reviews of active and bond forfeited permits for comparing information contained in the inventories against the permit files and field conditions. These reviews were completed by the end of the evaluation year, but the compilation and analysis of the data was not.

Coordination with WVDEP on modifications to the Bond Forfeiture Mine Drainage Inventory extended beyond the end of the evaluation year, delaying the final report for this study. Therefore, the final report will be completed during the first part of the next evaluation period and discussed further in the 2003 annual oversight report.

E. Program Amendment Status

Alternative Bonding System

On September 24, 2001, WVDEP formally submitted to OSM statutory revisions concerning its ABS, as amended by Enrolled Senate Bill 5003 (Administrative Record Number WV-1238). The amendment was submitted in response to OSM's Part 733 notification of June 29, 2001, and certain outstanding required amendments at 30 CFR 948.16(jjj), (kkk) and (lll). The amendment increased the special reclamation tax going into the State's ABS and established the Special Reclamation Fund Advisory Council (Advisory Council) to monitor the ABS and recommend changes as appropriate to ensure its solvency.

On October 24, 2001, OSM published a Federal Register notice announcing receipt of the proposed amendment and soliciting public comments on it (66 FR 53749-53754). The public comment period closed on November 23, 2001. On December 28, 2001, OSM announced in the Federal Register its decision to approve the ABS amendment, but it reopened the comment period on whether the amendment fully resolves the State's ABS deficiencies and satisfies the required amendment at 30 CFR 948.16(lll) concerning the long-term financial solvency of the ABS (66 FR 67446-67454). The 90-day public comment period closed on March 28, 2002 (66 FR 67455-67457).

On April 9, 2002, WVDEP submitted an amendment to its Surface Mining Reclamation Regulations (Administrative Record Number WV-1296A). The revision was intended to resolve the required amendment at 30 CFR 948.16(jjj) by not limiting the amount of ABS funds the State could use to treat polluttional discharges from bond forfeiture sites. OSM published a Federal Register notice on May 6, 2002, announcing the receipt and a reopening of the public comment period on the amendment (67 FR 30336-30338). The public comment period closed on May 21, 2002.

Upon completion of the comment period, OSM had to decide whether the State's amendment would eliminate the deficit in the ABS and ensure that sufficient money would be available in the future to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites. On May 29, 2002, OSM published a notice in the Federal Register announcing its decision that West Virginia had fully satisfied

the two remaining required program amendments regarding its ABS (67 FR 37610-37626). OSM found the amendment to be adequate because the Legislature had increased funding for the ABS, established an Advisory Council to help ensure the long-term effectiveness of the ABS, and removed the limitation on funding for water treatment at bond forfeiture sites.

Required Amendments

On November 30, 2000, the WVDEP submitted an amendment to its program consisting of a written response and numerous attachments (Administrative Record Number WV-1189). The amendment was submitted in response to the following required amendments: 30 CFR 948.16(a), (dd), (ee), (oo), (tt), (xx), (mmm), (nnn), (ooo), (qqq), (sss), (vvv)(1), (2), (3), (www), (xxx), (zzz), (aaaa), (bbbb), (ffff), (gggg), (hhhh), (iiii), (jjjj), (kkkk), (llll), (mmmm), (nnnn), (oooo), and (pppp). OSM announced receipt of the proposed amendment in the January 3, 2001, Federal Register, and invited public comments on the adequacy of the proposed amendment (66 FR 335-340). The public comment period closed on February 2, 2001. However, a public commenter requested an extension of the public comment period, and to accommodate that request we accepted comments through February 28, 2001.

On May 1, 2001, WVDEP submitted Enrolled Committee Substitute for House Bill 2663 (Administrative Record Number WV-1210). A notice announcing receipt and a public comment period on the amendment was published in the Federal Register on May 24, 2001 (66 FR 28682-28685). The public comment period closed on June 25, 2001. A portion of the amendment was intended to satisfy the required amendments at 30 CFR 948.16(xx), (qqq), (zzz), (ffff), (gggg), (hhhh), (jjjj), (nnnn), and (pppp).

On November 28, 2001, WVDEP submitted an amendment containing Enrolled Senate Bill 689 relating to blasting (Administrative Record Number WV-1258). OSM published a Federal Register notice on January 31, 2002, announcing receipt and a public comment period on the amendment (67 FR 4689-4692). The public comment period closed on March 4, 2002. A portion of the amendment was intended to satisfy the required amendments at 30 CFR 948.16(kkkk), (llll) and (mmmm).

On January 15, 2002, OSM and WVDEP officials met to discuss the required amendments. During the meeting, State officials agreed to provide additional information to OSM. By letter dated February 26, 2002, WVDEP provided OSM a status report regarding the required amendments (Administrative Record Number WV-1276). The report included fourteen attachments and outlined actions taken by WVDEP in an attempt to satisfy the required program amendments.

On March 8, 2002, WVDEP submitted revisions to two of the attachments submitted earlier and included an attachment to address the required amendment at 30 CFR 948.16(sss). OSM published a Federal Register notice on March 25, 2002, providing the public an opportunity to review and comment on all of the attachments and related information that had been submitted by WVDEP (67 FR 13577-13585). The public comment period closed on April 9, 2002.

On May 1, 2002, OSM announced its approval of the State's amendments in the Federal Register (67 FR 21904-21932). As a result of the State's

efforts, OSM removed the following twenty-five required amendments from the State program: 30 CFR 948.16(a), (dd), (ee), (oo), (tt), (xx), (nnn), (ooo), (qqq), (sss), (vvv), (zzz), (aaaa), (bbbb), (ffff), (gggg), (hhhh), (iiii), (jjjj), (kkkk), (llll), (mmmm), (nnnn), (oooo), and (pppp).

30 CFR Part 732 Issues

On December 20, 2000, WVDEP submitted an amendment consisting of written responses to letters sent by OSM as required by 30 CFR 732.17(d). The Federal regulations at 30 CFR 732.17(d) provide that OSM must notify the State of all changes in SMCRA and its regulations which will require an amendment to the State program. Such letters sent by OSM are often referred to as "732 letters." The State's amendment was intended to satisfy thirty-one deficiencies that are set forth in seven Part 732 letters from OSM. A notice announcing receipt and a public comment period on the amendment was published in the Federal Register on January 12, 2001 (66 FR 2866-2869). The public comment period closed on February 12, 2001.

On April 9, 2002, WVDEP submitted Enrolled House Bill 4163 which authorized the revision of several requirements contained in the State's Surface Mining Reclamation Regulations and created the Coal Related Dam Safety Rule at 38 CSR 4. The revisions are intended to satisfy several of OSM's Part 732 issues. A notice announcing receipt and a public comment period on the amendment was published in the Federal Register on June 6, 2002 (67 FR 38919-38924). Because some revisions were inadvertently omitted from the initial Federal Register notice, on August 16, 2002, OSM reopened the comment period on the regulatory revisions (67 FR 53542-53545). The comment period closed on September 16, 2002.

On September 5 and 6, 2002, a teleconference call was conducted by State and Federal officials to discuss all of the outstanding Part 732 issues. Given recent developments, it was determined that the State would not have to take any action at this time regarding OSM's Part 732 letter of December 26, 1996, relating to ownership and control and OSM's Part 732 letter of August 22, 2000, concerning subsidence. As a result of the call, OSM and WVDEP officials agreed to reevaluate certain outstanding Part 732 issues. Additional changes in rules, policies, etc., may be necessary to fully resolve all of these issues. State and Federal officials may hold additional meetings to discuss these issues. Before a final decision is rendered on this matter, the public will be provided an opportunity to review and comment on any additional information that the State may submit to OSM.

Blasting

On October 30, 2000, the WVDEP submitted an amendment to its blasting program (Administrative Record Number WV-1187). The amendment consists of West Virginia Title 199, Series 1 regulations, entitled Surface Mine Blasting Rule. On November 12, 1999, OSM approved, with certain exceptions, the State's statutory revisions regarding blasting (64 FR 61507-61518). The current amendment is intended to revise the State's blasting rules and implement the approved statutory provisions. On December 5, 2000, OSM published a Federal Register notice announcing receipt and a public comment period on the amendment (65 FR 75889-75897).

On November 28, 2001, WVDEP submitted an amendment consisting of Enrolled Senate Bill 689 (Administrative Record Number WV-1258). The amendment is intended to revise the State's Surface Mine Blasting Rule, and amend State statutory requirements regarding preblast surveys, site specific blasting designs, and liability and civil penalties in the event of property damage due to blasting. OSM published a Federal Register notice on January 31, 2002, announcing receipt and a public comment period on the amendment (67 FR 4689-4692). The comment period closed on March 4, 2002. As mentioned above under the section entitled, Required Amendments, a portion of this amendment was approved in the Federal Register on May 1, 2002 (67 FR 21904-21932). The remaining statutory and regulatory revisions are still under review by OSM.

House Bill 2663

On May 2, 2001, WVDEP submitted another amendment to its program consisting of revisions to West Virginia's Surface Mining Reclamation Regulations, as amended by Enrolled Committee Substitute for House Bill 2663 (Administrative Record Number WV-1209). OSM announced receipt of the proposed amendment in the May 24, 2001, Federal Register and invited public comment on the adequacy of the proposed amendment (66 FR 28682-28685). The public comment period was to initially close on June 25, 2001. However, upon request of two individuals, the deadline for submitting comments was extended to July 13, 2001. As discussed above under the section entitled, Required Amendments, a portion of this amendment was approved by OSM in the Federal Register on May 1, 2002 (67 FR 21904-21932). The rest of the amendment is still under review by OSM.

Master Land Use Plan

On May 21, 2001, WVDEP submitted an amendment to its program which was authorized by Enrolled Senate Bill 603 (Administrative Record Number WV-1217). The amendment concerns reclamation plan requirements and authorizes the submittal of a master land use plan for PMLU. The amendment also revises provisions regarding the Office of Coalfield Community Development. On June 20, 2001, OSM published a Federal Register notice announcing receipt and a public comment period on the amendment (65 FR 33032-33034).

On August 12, 2002, WVDEP submitted additional revisions that were authorized by Enrolled Senate Bill 698 (Administrative Record Number WV-1326). The amendment consists of statutory revisions and emergency regulations relating to the Office of Coalfield Community Development. A Federal Register notice announcing receipt and a public comment period on the amendment will be announced in the near future.

Contemporaneous Reclamation

As discussed above, on April 9, 2002, WVDEP submitted revisions to its Surface Mining Reclamation Regulations that were authorized by Enrolled House Bill 4163. A notice announcing receipt and a public comment period on the amendment was published in the Federal Register on June 6, 2002 (67 FR 38919-38924). The comment period closed on July 8, 2002.

On June 19, 2002, WVDEP submitted additional revisions to its regulations authorized by Enrolled Senate Bill 2002. OSM announced receipt and a public comment period on the regulatory revisions in the Federal Register on August 16, 2002 (67 FR 53542-53545). The public comment period closed on September 16, 2002. To expedite the review of the State's contemporaneous reclamation standards, OSM separated those standards from the other requirements submitted with the amendments discussed above. A final decision on the State's contemporaneous reclamation standards will be announced in the Federal Register in the near future.

F. AMD Prevention

SMCRA requires that disturbances to the hydrologic balance created by a surface coal mining operation be minimized. Preventing the creation of future AMD discharges into the ground or surface water is highly dependent upon adequate and accurate data and information and upon the utilization of a suite of predictive, containment, neutralization, and avoidance technology in the development of the operational plans.

This oversight evaluation was initiated as a first step in trying to determine whether the potential for long-term AMD problems was being identified during the permit application review and whether the approved operational plans failed to prevent the occurrence. We believe that the better we can identify and understand the factors which created existing AMD sources, the better we will be able to develop procedures to prevent future occurrences. We considered possible factors to be inadequate permit requirements, inadequacy of either the development of plans or information/data collection, unplanned operational issues during the mining process or a failure to properly implement the operational plans in the approved permit. The review also attempted to determine what preventive or remedial measures, if any, were taken after the regulatory authority and/or the operator became aware of the probable long-term AMD problem.

It was found that the permit applicants and regulatory authority generally recognized that toxic materials were going to be encountered during the mining process and included toxic materials handling plans to prevent any long term problems due to AMD. Although long-term AMD discharges existed at these sites, the review of inspection and enforcement records which included the inspection reports and violation notices did not suggest significant problems were encountered with implementation of the toxic materials handling plans.

The reviewers concluded that further evaluation of the technical adequacy of the data collection and analysis and operational plans, such as toxic materials handling, was warranted. It was also concluded that the lack of documentation or other record of reevaluation of permit plans and conclusions after determination of a probable long-term AMD discharge should also be considered when evaluating policy and procedures related to AMD and the evaluation of mining proposals in close proximity to known toxic, acid-forming overburden materials.

G. Impoundment Investigation/ Breakthrough Potential

As discussed last year, OSM initiated an oversight effort to ensure that coal refuse impoundment breakthroughs into underground mine workings do not occur in the future. As part of that initiative, OSM and WVDEP signed a detailed workplan on December 6, 2000.

The workplan required OSM to conduct a side-by-side analysis of the State's coal refuse impoundment regulations. Last year, differences between the State and Federal regulations were identified and provided the State. OSM is considering these differences in its other oversight reviews to determine if there is any real impact on how permits are issued or operations completed. Depending upon that outcome, further action may be required.

During the evaluation period, OSM, in cooperation with WVDEP, finalized an inventory of all coal refuse, freshwater, and sediment control impoundments in the State with a storage capacity of 20 acre-feet or more. The revised inventory identified 136 impoundments within the State. During the evaluation period, OSM, in cooperation with WVDEP, prioritized the inventory to identify impoundments that pose the highest risk. See VII.C for further discussion of this issue.

During the evaluation period, OSM developed criteria to assist permit reviewers in evaluating the breakthrough potential of impoundments. OSM tested the review criteria by evaluating two sites each in West Virginia and Kentucky. The review criteria was finalized and provided WVDEP. It should enable permit reviewers to recognize those impoundments that have the greatest breakthrough potential.

As part of the workplan, OSM and WVDEP also agreed to conduct technical reviews and field investigations of those impoundments that may pose a threat to public health and safety or the environment. During the evaluation period, OSM, in cooperation with WVDEP, initiated review of impoundments within the State. Two of the investigations were part of OSM's effort to validate the impoundment review criteria mentioned above. Five other impoundments were selected for evaluation based on their hazard potential. All of these reviews are in various stages of completion. Once all of these reports are finalized, OSM and WVDEP will decide if additional impoundments need to be evaluated.

H. Underground Mine Hydrology/Impacts to Surface Water

In EY 2000, OSM and WVDEP began to see interest from several different parties on the impact of underground mining on the amount of surface water available to a stream. Citizen groups and individual citizens expressed concern about not only how much water, but also the changes in streambed shape and how this affects stream flow characteristics.

In EY 2001, WVDEP and OSM conducted a limited inventory of impacts to stream flow from underground mining. WVDEP staff contacted field supervisors and individual inspectors to inventory their institutional knowledge of these types of impacts. Based on this limited initial inventory, both agencies determined they needed additional study to quantify the impacts further, and determine if they needed to make any

changes in the regulatory approach. Because of these efforts, OSM and WVDEP prepared and signed a work plan to conduct additional study on these impacts during EY 2002.

The review consists primarily of looking at mine maps and interviewing State inspectors. Work was somewhat delayed on this study until EY 2003 because of other commitments and workload.

I. Mountaintop Mining Action Plan

In 1999, OSM and WVDEP signed an action plan to resolve certain mountaintop mining issues. The following summarizes the outstanding components of the action plan and discusses the activities required to finalize each item.

- In 2000, WVDEP finalized criteria for demonstrating whether a proposed operation would achieve AOC. The criteria have been used in the review of all permit applications submitted after March 24, 2000, including the larger permits being jointly reviewed by WVDEP and OSM under the Mountaintop Interim Interagency Permit Evaluation discussed in Section VI.B., above.

As soon as sufficient permits have been approved using the new criteria, OSM plans to select a sample of recently approved permits (those not jointly reviewed by OSM) to evaluate the implementation of the State's criteria.

- On August 18, 2000, OSM approved a program amendment (65 FR 50410) requiring mountaintop mining permit applications that request an AOC variance demonstrate the expected need and present market data for the proposed PMLU. OSM has been providing assistance in this area with certain large mountaintop applications as described in Section VI.B. As soon as a sufficient number of permits that were not jointly reviewed by OSM are approved by WVDEP, oversight will be conducted to evaluate how well these criteria are applied.
- WVDEP agreed to review the approved PMLUs on approved mountaintop removal and steep-slope mining permits. To assist the State, in 2000 published a PMLU policy clarifying allowable PMLUs and related permitting requirements for mountaintop removal and steep slope mining operations with AOC variances.

In 2001, the State issued letters to five operators of not started operations approved with unallowable PMLUs requiring them to submit modifications before beginning operations. During this evaluation year, WVDEP instructed six operators of mountaintop removal operations to modify the approved PMLU to an acceptable use or reclaim their operations to AOC. OSM has scheduled oversight inspections at these operations to verify that appropriate action is being taken. During the coming evaluation year, OSM will evaluate previously identified steep-slope operations with an inappropriately approved PMLU.

- WVDEP has modified its permit application form to require specific findings for mountaintop removal and steep-slope mining AOC

variances. During the coming evaluation year, OSM will sample permits issued since the forms were modified to ensure compliance with the revisions.

- WVDEP and OSM are participating with five other agencies in the preparation of the environmental impact statement (EIS) on mountaintop mining and valley fill operations in the Appalachian coal fields in accordance with the 1998 Settlement Agreement in the Bragg v. Robertson litigation. Completion of the EIS will assist the WVDEP in clarifying how the West Virginia Surface Coal Mining Reclamation Act is to be applied with regard to protecting riparian vegetation, natural watercourses, and the buffer zones of intermittent or perennial streams while allowing the disposal of excess spoil in streams.
- The State has modified its permitting procedures to require site-specific written findings for permits with contemporaneous reclamation variances. During the coming evaluation year, OSM will evaluate newly approved permits to ensure that the required findings are being made.

VIII. Abandoned Mine Land Reclamation Program (AMLR)

A. General

The mission of the AMLR program is to reclaim abandoned mine sites by abating hazards, reducing/mitigating adverse effects of past mining, and restoring adversely affected lands and water to beneficial uses. WVDEP's Office of AML is successfully accomplishing this mission in West Virginia.

1. General Program Information

The State conducts all AML reclamation in West Virginia. OSM has approved four primary AML components:

- The regular construction program abates high priority, nonemergency problems. OSM approved it on February 23, 1981.
- The emergency program abates emergency problems caused by abandoned coal mining practices. OSM approved it on August 26, 1988.
- Water supply provisions allow the State to repair or replace water supplies where the damage results from mining occurring primarily before August 3, 1977. OSM approved them on July 25, 1990.
- The AMD set-aside program allows the State to use 10 percent of its annual grant allocation to reclaim watersheds impacted by AMD. OSM approved the program on March 26, 1993, and WVDEP funded the first project on August 23, 1995.

2. Appalachian Clean Streams Initiatives (ACSI)

In 1994, OSM started a new program within the AML program called the Appalachian Clean Steams Initiative, later changed to the Appalachian

Clean Steams Program (ACSP). An original goal of the ACSP was to raise awareness about the polluted condition of streams and rivers caused by AMD from abandoned coal mines. Additionally, ACSP was developed to coordinate with researchers, academia, the industry, and others to improve AMD remediation technologies and to facilitate and provide assistance to State and Federal agencies and private organizations in addressing and remediating AMD problems.

Beginning in 1997, OSM received funding from Congress for this program. Funding for the program is distributed to State AML Programs to help fund AMD clean up projects at abandoned sites causing stream pollution. Over the past five years, West Virginia has received \$7,395,149 for ACSP projects. The WVDEP has earmarked these funds for AMD remediation at 12 abandoned coal mine sites. At the end of FY 2001, WVDEP had expended \$3,635,815 of the total award amount and completed construction on 7 of the 12 projects.

Measures to improve water quality at the completed projects involved construction of various passive treatment systems including wetlands, open limestone channels, and successive alkalinity producing systems. Additionally, land reclamation accounts for a portion of any water quality improvement as several sites involved covering and vegetating exposed toxic refuse material.

The WVDEP completed reclamation at three AMD cleanup projects where it had partnered with local watershed organizations that received funding from OSM's Watershed Cooperative Agreement Program. The watershed partnering organizations included the following groups: Lower Paint Creek Association, Friends of the Cheat, and Friends of Deckers Creek. Funding by these partners provided nearly \$240,000 to help with construction costs. During this evaluation year close-out, reviews were conducted at all three sites with the partnering watershed groups, OSM and WVDEP. The WVDEP is conducting post water quality monitoring at these sites to determine the discharge and stream improvements.

3. Drawdown Analysis

The grants staff at OSM's Appalachian Regional Coordinating Center conducted quarterly drawdown analysis at the WVDEP during the period of October 2001 through September 2002. Drawdown activities were found to be in compliance with applicable requirements as follows: 1) fund disbursement was as close to fund receipt as was administratively feasible; and, 2) funds were not drawn in excess of immediate disbursement needs.

B. Noteworthy Accomplishments

1. Construction Activities

Table 10 of Appendix A lists the cumulative accomplishments in West Virginia. A comparison of this table with the EY 2001 West Virginia Evaluation Report shows that during EY 2002 West Virginia reclaimed:

- 2.0 miles of clogged streams;
- 4,245 linear feet of dangerous highwalls;

- 66 dangerous impoundments;
- 372 acres of dangerous piles and embankments;
- 13.2 acres of dangerous slides;
- 46.8 hazardous equipment and facilities;
- 1 hazardous water bodies;
- 1 industrial and residential waste sites;
- 182 portals;
- 9.4 acres of polluted waters used for agriculture and industry;
- 2,273 acres of polluted water used for human consumption¹;
- 36.1 acres of subsidence;
- 21.2 acres of burning mine waste material;
- 9 vertical openings;
- 215 acres of gob piles;
- 4,500 lineal feet of highwall, and
- 4 acres of spoil areas.

2. Emergencies

During FY 2002, 50 AML emergencies were initiated by the State of West Virginia at an estimated cost of \$2,411,345 or an average of \$48,226.90 per project. Of these, OSM reviewed four separate sites: two during pre-bid stage; three during construction and three after reclamation was complete. No problems were noted in the site reviews.

Included in this group were 19 subsidence sites, 12 portals, 11 landslides, 8 burning refuse piles, 5 clogged streams, 2 dangerous impoundments, 1 vertical opening, 1 gases from underground burning, and 1 hazardous equipment and facilities. Some of the 50 sites had multiple problems.

C. OSM Technical Assistance

1. Technical Training

As part of our technical transfer program, OSM conducted courses throughout the year in the latest technology related to active and abandoned mine reclamation. During EY 2002, OSM provided technical training to nine WVDEP AML personnel through this program.

2. Site Specific Assistance

During EY 2002, OSM provided some on site guidance to State Emergency Coordinators about the appropriateness of certain projects for emergency funding or status. This coordination occasionally resulted in modification to the planned abatement procedures. There were no other site specific requests for assistance in the AML program in 2002.

¹ Reporting units changed for this problem code from numbers of hookups to acres of area impacted. This large jump from last year is a by-product of the change in reporting procedures.

D. Results of Enhancement and Performance Reviews

1. Abandoned Mine Land Emergency Oversight

For every potential AML emergency project submitted, a paper review of the submittal is generally conducted to ensure it meets AML guidelines and established grant criteria. This file review was done for 29 of the 50 sites approved during FY 2002. OSM reviewed 33 of the approved AML emergencies to obtain final cost data. These 33 sites had an average final construction contract cost of \$29,191. The file reviews did not find any problems.

During the fiscal year OSM conducted site reviews on four AML-funded emergency projects at various stages of completion. Two sites were reviewed during the prebid conference, one was reviewed during construction and 3 were reviewed after construction was completed. No serious problems were noted from the reviews.

2. Site Inspections (AML)

During EY 2002, the CHFO issued 32 notices to proceed for nonemergency AML construction projects. Field inspectors noted no problem with any of the sites.

APPENDIX A: TABULAR SUMMARY

These tables present data pertinent to mining operations and State and Federal regulatory activities within West Virginia. They also summarize funding provided by OSM and West Virginia staffing. Unless otherwise specified, the reporting period for the data contained in all tables is the same as the evaluation. Additional data used by OSM in its evaluation of West Virginia's performance is available for review in the evaluation files maintained by the Charleston Field Office.

TABLE 1

COAL PRODUCTION (Millions of short tons)			
Period	Surface mines	Underground mines	Total
Coal Production ^A for entire State:			
<u>Calendar Year</u>			
1999	54.3	103.4	157.7
2000	59.8	98.8	158.6
2001	62.5	100.7	163.2
Total	176.6	302.9	479.5
<p>^ACoal production as reported in this table is the gross tonnage which includes coal that is sold, used, or transferred as reported to OSM by each mining company on form OSM-1 line 8(a). Gross tonnage does not provide for a moisture reduction. OSM verifies tonnage reported through routine auditing of mining companies. This production may vary from that reported by States or other sources due to varying methods of determining and reporting coal production.</p>			

TABLE 2

INSPECTABLE UNITS As of September 30, 2002												
Coal mines and related facilities	Number and status of permits								Insp. Units	Permitted acreage (hundreds of acres)		
	Active or temporarily inactive		Inactive		Abandoned		Totals					
			IP	PP						Phase II bond release		
	IP	PP	IP	PP	IP	PP	IP	PP		IP	PP	Total
STATE and PRIVATE LANDS REGULATORY AUTHORITY: STATE												
Surface mines	0	431	3	193	11	195	14	819	833	9	2,220	2,209
Underground mines	0	632	0	202	0	160	0	994	994	0	322	322
Other facilities	0	466	1	56	2	64	3	586	589	0	431	431
Subtotals	0	1,529	40	451	13	419	17	2,399	2,416	9	2,953	2,962
FEDERAL LANDS REGULATORY AUTHORITY: STATE												
Surface mines	0	0	0	0	0	0	0	0	0	0	0	0
Underground mines	0	1	0	3	0	1	0	5	0	0	1	1
Other facilities	0	0	0	4	0	0	0	4	4	0	0	0
Subtotals	0	1	0	7	0	1	0	9	9	0	1	1
ALL LANDS												
Surface mines	0	431	3	193	11	195	14	819	833	9	2,200	2,209
Underground mines	0	633	0	205	0	161	0	999	999	0	323	323
Other facilities	0	466	1	60	2	64	3	590	593	0	431	431
Totals	0	1,530	4	458	13	420	17	2,408	2,425	9	2,954	2,963
Average number of permits per inspectable unit (excluding exploration sites)												<u>1</u>
Average number of acres per inspectable unit (excluding exploration sites)												<u>122</u>
Number of exploration permits on State and private lands: <u>0</u>												On Federal lands: <u>0</u> ^A
Number of exploration notices on State and private lands: <u>114</u>												On Federal lands: <u>0</u> ^A
IP: Initial regulatory program sites. PP: Permanent regulatory program sites.												
^A Includes only exploration activities regulated by the State pursuant to a cooperative agreement with OSM or by OSM pursuant to a Federal lands program. Excludes exploration regulated by the Bureau of Land Management.												

TABLE 3

**STATE PERMITTING ACTIVITY
As of September 30, 2002**

Type of application	Surface mines			Underground mines			Other facilities			Totals		
	App. Rec.	Issued	Acres	App. Rec.	Issued	Acres ^A	App. Rec.	Issued	Acres	App. Rec.	Issued	Acres
New permits	25	20	8,004	24	33	461	6	5	348	55	58	8,813
Renewals	81	52	23,426	125	62	1,988	156	54	3,604	362	168	29,018
Transfers, sales and assignments of permit rights	NA	85		NA	65		NA	40		211	190	
Small operator assistance												
Exploration permits	0	0		0	0		0	0		0	0	
Exploration notices ^B		NA			NA			NA			90	
Revisions (exclusive of incidental boundary revisions)		125			115			65			305	
Incidental boundary revisions		111	1,033		102	266		42	474		255	1,743
Totals	1,060	393	32,433	149	377	2,715	162	206	4,426	628	1,066	39,574

NA Information not available by permit type.

^A Includes only the number of acres of proposed surface disturbance.

^B Involves removal of less than 250 tons of coal.

TABLE 4

OFF-SITE IMPACTS EY 2002															
DEGREE OF IMPACT		RESOURCES AFFECTED												Total	
		People			Land			Water			Structures				
		minor	moderate	major	minor	moderate	major	minor	moderate	major	minor	moderate	major		
TYPE OF IMPACT	Blasting	13	2	0	0	0	0	0	0	0	0	0	0	0	15
	Land Stability	0	0	0	30	0	0	0	0	0	0	0	0	0	30
	Hydrology	0	0	0	0	0	0	174	3	1	0	0	0	0	178
	Encroachment	2	0	0	9	0	0	0	0	0	0	0	0	0	11
	Other	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	Total	15	2	0	39	0	0	174	3	1	0	0	0	0	234
Total number of inspectable units: <u>2,003</u>															
Inspectable units free of off-site impacts: <u>1,855</u>															
OFF-SITE IMPACTS ON BOND FORFEITURE SITES															
DEGREE OF IMPACT		RESOURCES AFFECTED												Total	
		People			Land			Water			Structures				
		minor	moderate	major	minor	moderate	major	minor	moderate	major	minor	moderate	major		
TYPE OF IMPACT	Blasting														
	Land Stability	0	0	0	0	0	1	0	0	0	0	0	0	0	1
	Hydrology	0	0	0	0	0	0	80	23	32	0	0	0	0	135
	Encroachment	0	0	0	0	2	0	0	0	0	0	0	0	0	2
	Other	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	Total	0	0	0	0	2	1	80	23	32	0	0	0	0	138
Total number of inspectable units: <u>433</u>															
Inspectable units free of off-site impacts: <u>295</u>															

TABLE 5

ANNUAL STATE MINING AND RECLAMATION RESULTS EY 2002		
Bond release phase	Applicable performance standard	Acreage released during this evaluation period
Phase I	<ul style="list-style-type: none"> • Approximate original contour restored • Topsoil or approved alternative replaced 	2,728
Phase II	<ul style="list-style-type: none"> • Surface stability • Establishment of vegetation 	7,170
Phase III	<ul style="list-style-type: none"> • Postmining land use/productivity restored • Successful permanent vegetation • Groundwater recharge, quality and quantity restored • Surface water quality and quantity restored 	7,830
	Bonded Acreage Status ^A	Acres
	Total number of bonded acres at end of last review period ^B	288,460
	Total number of acres bonded during this evaluation year	10,556
	Number of acres bonded during this evaluation year that are considered remaining, if available	NA
	Number of acres where bond was forfeited during this evaluation year (also report this acreage on Table 7)	146
<p>^A Bonded acreage is considered to be approximate and represent the number of acres disturbed by surface coal mining and reclamation operations.</p> <p>^B Bonded acres in this category are those that have not received a Phase III or other final bond release (State maintains jurisdiction).</p>		

TABLE 6 (A)

STATE OF WEST VIRGINIA INSPECTION ACTIVITY		
PERIOD: OCTOBER 1, 2001 - SEPTEMBER 30, 2002		
Inspectable Unit Status	Numbers of Inspections Conducted	
	Partial	Complete
Active*	5,531	10,640
Inactive*	1,649	595
Abandoned*	1	4
Exploration*	254	89
Total	7,435	11,328
* Use terms as defined by the approved State program.		

TABLE 6 (B)

STATE OF WEST VIRGINIA ENFORCEMENT ACTIVITY		
PERIOD: OCTOBER 1, 2001 - SEPTEMBER 30, 2002		
Type of Enforcement Action	Number of Actions*	Number of Violations*
Notice of Violation	1,359	1,359
Failure-to-Abate Cessation Order	91	91
Imminent Harm Cessation Order	25	25
<i>* Does not include those violations that were vacated.</i>		

TABLE 6 (C)

STATE OF WEST VIRGINIA LANDS UNSUITABLE ACTIVITY			
PERIOD: OCTOBER 1, 2001 - SEPTEMBER 30, 2002			
Number of Petitions Received	0		
Number of Petitions Accepted	0		
Number of Petitions Rejected	0		
Number of Decisions Declaring Lands Unsuitable	0	Acreage Declared as Being Unsuitable	-
Number of Decisions Denying Lands Unsuitable	0	Acreage Declared as Being Unsuitable	-

TABLE 7

STATE BOND FORFEITURE ACTIVITY* (Permanent Program Permits) EY 2002		
Bond Forfeiture Reclamation Activity by SRA	Number of Sites	Permit Acres
Sites with bonds forfeited that were unreclaimed as of September 30, 2001 (end of previous evaluation year) ^A	429	24,581
Sites with bonds forfeited during Evaluation Year 2002 (current year)	9	146
Sites with bonds forfeited that were repermited during Evaluation Year 2002 (current year)	0	0
Sites with bonds forfeited that were reclaimed during Evaluation Year 2002 (current year)	9	667
Sites with bonds forfeited and requiring no further reclamation as of September 30, 2002 (end of current year)	524	15,666
Sites with bonds forfeited that were unreclaimed as of September 30, 2002 (end of current year)	420	2,356
Surety/Other Reclamation (In Lieu of Forfeiture)		
Sites being reclaimed by surety/other party as of September 30, 2001 (end of previous evaluation year) ^B	16	1,124
Sites where surety/other party agreed to do reclamation during Evaluation Year 2002 (current year)		
Sites being reclaimed by surety/other party that were repermited during Evaluation Year 2002 (current year)		
Sites with reclamation completed by surety/other party during Evaluation Year 2002 (current year) ^C		
Sites being reclaimed by surety/other party as of September 30, 2002 (current year) ^B	14	1,026
<p>^A Includes data only for those forfeiture sites not fully reclaimed as of this date.</p> <p>^B Includes all sites where surety or other party has agreed to complete reclamation and site is not fully reclaimed as of this date.</p> <p>^C This number also is reported in Table 5 as Phase III bond release has been granted on these sites.</p>		
<p>* Inconsistencies exist between the number of sites and the acreage reclaimed and/or to be reclaimed reported on this table and reported in other tables and narrative discussions. These inconsistencies are due in large part to the nature of the WVDEP stand-alone database utilized for the Special Reclamation Fund (SRF) activities. WVDEP is taking actions to correct this problem including the hiring of a person to manage the database and redesign it in such a manner that it will be integrated with the other WVDEP systems for inspection and enforcement activities and financial activities. OSM is working closely with the WVDEP to review and verify the inventory of sites with either land reclamation or water quality liabilities for the SRF and anticipate completion of this effort by the end of the next evaluation year.</p>		

TABLE 8

WEST VIRGINIA STAFFING (Full-time equivalents at end of evaluation year)	
Function	EY 2002
Abandoned Mine Land Program Total	69.55
Regulatory Program	
Permit review ^A	50
Inspection ^B	80
Blasting ^C	15
Other (administrative, fiscal, personnel, etc.) ^D	150
Total for Regulatory Program	295
TOTAL	364.55
^A Includes 13 vacant positions. ^B Includes 12 vacant positions. ^C Includes 6 vacant positions. ^D Includes 18 vacant positions.	

TABLE 9

FUNDS GRANTED TO WEST VIRGINIA BY OSM (Millions of dollars) EY 2002		
Type of grant	Federal funds awarded	Federal funding as a percentage of total program costs
Abandoned Mine Lands	\$ 32,602,846	100%
Administration and Enforcement	\$ 8,287,841	50%
Small Operator Assistance	\$ 84,743	100%
Program Improvement Cooperative Agreement (PICA)	\$ 3,599,000	50%
Program Enhancement Cooperative Agreement (PECA)	\$ 6,222,000	100%
Totals	\$ 50,796,430	

TABLE 10

ABANDONED MINE LAND RECLAMATION NEEDS AND ACCOMPLISHMENTS SINCE PROGRAM APPROVAL					
Problem Type	Units	Unfunded	Funded	Completed	Total
Priority 1 & 2 (Protection of public health, safety, and general welfare)					
Clogged Streams	Miles	273.5	1.4	47.3	322.2
Clogged Stream Lands	Acres	166.8	0.0	160.3	327.1
Dangerous Highwalls	Lin feet	1,403,202.0	5,200.0	232,543.0	1,640,945.0
Dangerous Impoundments	Count	651.0	51.3	528.2	1,230.5
Dangerous Piles & Embankments	Acres	1,190.4	151.5	5,111.6	6,453.5
Dangerous Slides	Acres	336.9	4.0	504.9	845.8
Gases: Hazardous/Explosive	Count	0.0	0.0	4.3	4.3
Hazardous equip. & facilities	Count	609.0	36.0	593.8	1,238.8
Hazardous Water Bodies	Count	17.0	0.0	11.0	28.0
Industrial/Residential Waste	Acres	6.2	1.5	35.8	43.5
Portals	Count	1,906.0	51.0	2,368.0	4,325.0
Polluted Water: Agri & Indus	Count	121.0	17.7	47.4	186.1
Polluted Water: Human Consum	Count	2,876.0	338.0	9,250.0	12,464.0
Subsidence	Acres	754.7	12.0	299.2	1,065.9
Surface Burning	Acres	79.2	2.5	472.0	553.7
Underground Mine Fires	Acres	1,937.5	0.0	19.3	1,956.8
Vertical Openings	Count	145.0	4.0	143.3	292.3
Priority 3 (Environmental restoration)					
Benches	Acres	221.8	0.0	27.0	248.8
Ind/Res Waste	Acres	49.5	0.0	2.0	51.5
Equipment/facilities	Count	129.0	0.0	9.0	138.0
Gob Piles	Acres	1,846.9	59.0	279.0	2,184.9
Haulroads	Acres	11.1	0.0	0.0	11.1
Highwalls	Feet	3,299,293.0	20,616.0	64,462.0	3,383,371.0
Mine Openings	Count	32.0	0.0	9.0	41.0
Other		154.0	0.0	0.0	154.0
Pits	Acres	47.1	0.0	11.0	58.1
Slumps	Acres	35.3	0.0	0.0	35.3
Slurry	Acres	12.0	0.0	0.0	12.0
Spoil Areas	Acres	744.3	0.0	246.5	990.8
Water problems	Gal./min	13,154.5	0.0	722.0	13,876.5
Note: All data in this table are taken from the Abandoned Mine Land Inventory System (AMLIS)					