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PE 12-06-519

## AGENCY REVIEW

# THE DIVISION OF MINING AND RECLAMATION DEPARTMENT OF ENVIRONMENTAL PROTECTION

## AUDIT OVERVIEW

The Division of Mining and Reclamation Is Experiencing Declining Performance in Important Areas Resulting From a Few Factors Including a Relatively High Number of Vacant Positions

The West Virginia Division of Mining and Reclamation's Website Can Benefit From More Improvements



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## EXECUTIVE SUMMARY

The Legislative Auditor conducted a performance evaluation of the Division of Mining and Reclamation (DMR) as part of the Agency Review of the West Virginia Department of Environmental Protection (DEP) authorized pursuant to West Virginia Code §4-10-8. The report contains the following issues:

### Report Highlights

#### **Issue 1: The Division of Mining and Reclamation Is Experiencing Declining Performance in Important Areas Resulting From a Few Factors Including a Relatively High Number of Vacant Positions.**

- The mission statement developed by DMR is fully supported by statute. West Virginia Code assigns the DMR with mandates to manage the coal and non-coal mining and reclamation programs.
- The performance measures reported by DMR represent important functions of the agency's responsibilities; however, the agency is not reaching its performance goals for the inspection and permitting units.
- The agency is dealing with issues of staff turnover and position vacancies, and should create performance goals and measures related to these staffing issues.
- The DMR identified three reasons for the decrease in performance: (1) increased scrutiny by the United States Environmental Protection Agency, (2) a relatively high number of vacant positions; and (3) responding to an increase in FOIA requests.

#### **Issue 2: The West Virginia Division of Mining and Reclamation's Website Can Benefit From More Improvements.**

- The DMR website needs more improvement in both user-friendliness and transparency, scoring 9 out of 18 points for user-friendliness and 13 out of 32 points for transparency, resulting in a total score of 22 out of 50 total points, or 44 percent.

### Recommendations

1. *The Division of Mining and Reclamation should establish performance goals and measures for reducing the number of vacant positions for its permitting and inspection units.*

2. *The Division of Mining and Reclamation should include its performance goals and measures in its annual report and on its website.*
3. *The DMR should consider providing public access to its performance goals and measures via its website and include current and historical performance measures, budget information, and other user-friendly and transparency website elements identified by the Legislative Auditor.*

## ISSUE 1

### **The Division of Mining and Reclamation Is Experiencing Declining Performance in Important Areas Resulting From a Few Factors Including a Relatively High Number of Vacant Positions.**

#### **Issue Summary**

The Division of Mining and Reclamation (DMR) has developed important performance goals and measures as listed in the State's *Executive Budget Operating Detail* (Executive Budget). What makes these measures important is that they are relevant to significant areas of the agency's operations. The measures as listed in the 2012 Executive Budget indicate that performance has declined over the last few years in the areas of mining inspections but more so in the mine permitting process. A few factors are slowing the permitting process, one of which is a heightened review of mining permits by the United States Environment Protection Agency (EPA), and another factor is a relatively high number of vacancies in DMR's permitting and inspection units for the past four years. The agency also has a number of employees in these areas that will be eligible to retire in the near future that could add to the number of vacant positions. In order for the DMR to successfully fulfill its mission, it needs to have the necessary number of inspectors in the field and permitting review staff processing applications. **Therefore, the Legislative Auditor recommends that the DMR develop goals and measures for reducing the number of vacant positions in the permit and inspection units.**

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*The measures as listed in the 2012 Executive Budget indicate that performance has declined over the last few years in the areas of mining inspections but more so in the mine permitting process.*

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### **The Division of Mining and Reclamation Is Responsible for Regulating West Virginia's Mining and Quarrying Industries**

The DMR reported in the 2012 Executive Budget its mission as follows:

Division of Mining and Reclamation  
Mission Statement

Assure compliance with the West Virginia Surface Mining and Reclamation Act and other applicable state laws and rules by means of effective and high quality reclamation of mining sites, an efficient permitting program, and constructive communications between the public and regulated industry.

The Legislative Auditor examined the agency’s mission statement to determine if its focus is statutorily supported. The performance of an agency is tied to what the agency considers its mission. Therefore, the mission should be clearly understood by the agency and it should not be more or less than what is statutorily required. The Legislative Auditor determines that the agency’s mission statement is statutorily supported as indicated in the following table.

<b>The Division of Mining and Reclamation’s mission statement is:</b>	
fully supported by statute.	X
not supported by statute.	
less than statutorily mandated.	
more than statutorily mandated.	
determined administratively as allowed by statute.	

The DMR is responsible for enforcing *West Virginia Code* Chapter 22, Articles 3 through 4, respectively known as the West Virginia Surface Mining and Reclamation Act, Office of Explosives and Blasting, and the Quarry Reclamation Act. Under §22-3-2(b) the DEP is required to:

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*The DMR is responsible for enforcing West Virginia Code Chapter 22, Articles 3 through 4, respectively known as the West Virginia Surface Mining and Reclamation Act, Office of Explosives and Blasting, and the Quarry Reclamation Act.*

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- (1) Expand the established and effective statewide program to protect the public and the environment from the adverse effects of surface-mining operations;*
- (2) Assure that the rights of surface and mineral owners and other persons with legal interest in the land or appurtenances to land are adequately protected from such operations;*
- (3) Assure that surface-mining operations are not conducted where reclamation as required by this article is not feasible;*
- (4) Assure that surface-mining operations are conducted in a manner to adequately protect the environment;*
- (5) Assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface-mining operations;*
- (6) Assure that adequate procedures are provided for public participation where appropriate under this article;*



*(7) Assure the exercise of the full reach of state common law, statutory and constitutional powers for the protection of the public interest through effective control of surface-mining operations; and*

*(8) Assure that the coal production essential to the nation's energy requirements and to the state's economic and social well-being is provided.*

Furthermore, §22-4-2 states:

*...the Legislature finds that the quarrying of minerals and reclamation of quarry lands as provided by this article will allow the use of valuable minerals and will provide for the protection of the state's environment and for the subsequent beneficial use of the quarry and reclaimed land.*

The performance measures for the DMR should measure the agency's success of ensuring that these activities are done in accordance with the law and that reclamation at mining/quarrying sites is completed contemporaneously.

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*Goals and measures can be created for various performance aspects of an agency such as its outcomes, outputs, inputs, and processes. The agency included output goals and measures for its inspections unit, permitting unit, and response time to complaints.*

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## **The DMR's Performance Goals and Measures Focus On Important Functions**

The following table replicates the DMR's performance goals and measures from the 2012 Executive Budget. The three goals and measures listed below represent important functions of the agency's responsibilities. Goals and measures can be created for various performance aspects of an agency such as its outcomes, outputs, inputs, and processes. The agency included output goals and measures for its inspections unit, permitting unit, and response time to complaints.

Fiscal Year	Actual 2008	Actual 2009	Estimated 2010	Actual 2010	Estimated 2011	Estimated 2012
<b>Increase mine site inspection frequency to 100% as required by 38-2-20 of West Virginia Surface Mining Rules.</b>						
Mine inspection frequency	91%	96%	100%	82%	100%	100%
<b>Increase to 75% by FY 2011 the percentage of application decisions made within 12 months from submittal for complete surface mining and ongoing National Pollutant Discharge Elimination System (NPDES) applications.</b>						
Application decisions made within time frame	N/A	55%	75%	45%	75%	75%
<b>Respond to all complaints within 48 hours.</b>						
Complaint responses within 48 hours	100%	100%	100%	100%	100%	100%
<i>Source: FY 2012 Executive Budget: Volume II, Operating Details. The data contained in this table were not audited by the Legislative Auditor.</i>						

Although the DMR did not identify the criteria for the mine site inspection frequency in the measure, the agency provided them to the Legislative Auditor for this review. The DMR stated that its goal for active mine sites is monthly inspections, and the goal for active quarries is quarterly inspections. For inactive mine sites, the goal is quarterly inspections, and for inactive quarries the goal is bi-annual inspections. These inspections include processing facilities, refuse sites, sludge ponds, and other types of operations at mine and quarry sites. According to the DMR, it was meeting this goal over 90 percent of the time in 2008 and 2009, but the agency’s performance dropped to 82 percent in 2010. A drop in inspection frequency can have significant environmental and safety impacts. One possible factor in the 2010 drop in performance is inadequate staffing. The agency is experiencing some problems in filling vacant inspector positions. This staffing issue is discussed in greater detail later in this report. The DMR may want to consider distinguishing the inspection performance measure between inactive and active sites in order to reveal its performance between the two types of sites.

The agency is having difficulties meeting its permitting goal to make decisions within a 12-month period on 75 percent of surface mine and National Pollution Discharge Elimination Systems (NPDES) permit applications. The agency’s ability to meet this goal is important for the mining industry and the State’s economy. According to the agency, this measure includes applications for underground mines, refuse impoundments, preparation plants, and other smaller facilities such as roads and stockpiles. The agency’s performance in this area has been well below desired performance at 55 percent in 2009 and 45 percent in 2010. There are several explanations for the low performance. One cause is inadequate staffing. Another cause, according to the agency, is greater involvement in the permitting process by the United States Environmental

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*The agency is experiencing some problems in filling vacant inspector positions.*

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*The agency is having difficulties meeting its permitting goal to make decisions within a 12-month period on 75 percent of surface mine and National Pollution Discharge Elimination Systems (NPDES) permit applications.*

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Protection Agency (EPA).<sup>1</sup> This issue is also discussed in greater detail in the next section of this report.

The DMR has been successful at meeting its goal for its complaint response measure; however, the Legislative Auditor believes the measure should be based upon the agency's success at completing the complaint investigation in addition to making the initial response. The DMR's ability to respond to citizens complaints in a timely manner is important to protecting the health and property of West Virginia's citizens. The response goal of 48 hours is an initial response or contact with the complainant, not the final response that represents a completed investigation of a complaint. The DMR meets the initial response goal 100 percent of the time. According to the DMR, it has the capability to determine the average time to complete an investigation and issue a report, called a MR-35, to the complainant. In 2010 the average time to complete an investigation was eight days. To provide a complete performance measure of the agency's complaint process, **the DMR should consider establishing goals and measures for the complete investigation of complaints.**

### **The DMR Should Create Performance Goals and Measures for Reducing Vacancies**

The DMR is having significant issues with staff turnover and an increase in position vacancies in the permitting and inspection units, which is likely affecting the agency's ability to achieve its goals for issuing permits and maintaining its inspection frequency. Without an adequate number of inspectors, inspection frequency will decline and the agency's ability to ensure mining companies are complying with state and federal laws will suffer. Similarly, permits will not be reviewed in a timely manner if the agency has an inadequate number of permitting staff.

The United States Office of Surface Mining (OSM), the federal agency that oversees the State's mining program, has noted the DMR's issue with its high vacancy rate. In its EY2011 Annual Evaluation Report, the OSM stated:

*Although the State increased its hiring efforts, the number of vacancies remained about the same. Seventy percent of the vacancies are in permitting and inspection and*

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*The DMR has been successful at meeting its goal for its complaint response measure; however, the Legislative Auditor believes the measure should be based upon the agency's success at completing the complaint investigation in addition to making the initial response.*

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<sup>1</sup>The agency requested the Legislative Auditor change this statement to include the language quoted in the first bullet in the letter in Appendix D. This letter was received on July 16, 2012 and the Legislative Auditor did not have sufficient time to verify the statement. Therefore, the agency's requested changes were not made.

*enforcement.... Given the number of people at WVDEP who will be eligible to retire in the near future, State officials anticipate that this problem will not abate any time soon and they will be faced with filling more vacancies in the future.*

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*Although the agency is hiring new personnel to reduce vacant positions as well as manage normal turnover, the agency is not hiring at a rate that will reduce vacant positions.*

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The DMR has been dealing with turnover and vacancy issues for several years. Table 1 shows that the permitting and inspection units continue to have several vacant positions. These units also experience the normal turnover of positions (employees leaving the agency). Having to address turnover adds to the difficulty of reducing vacant positions. Although the agency is hiring new personnel to reduce vacant positions as well as manage normal turnover, the agency is not hiring at a rate that will reduce vacant positions.

	2008	2009	2010	2011
<b>Permitting Unit</b>				
<b>Technical Positions</b>	63.6	66	63.5	64.25
<b>Vacant Technical Positions at Year's End</b>	5	14	10	7
<b>Turnover</b>	3	5	4	2
<b>Inspection Unit</b>				
<b>Inspector Positions</b>	96	100	103	102
<b>Vacant Inspector Positions at Year's End</b>	1	6	6	11
<b>Turnover</b>	11	4	5	10

*Sources: Legislative Auditor's analysis of data from the West Virginia Department of Environmental Protection.*

The inspection unit experienced a relatively high amount of turnover (10) late in the year of 2011. This high turnover will likely impact the unit's ability to perform its duties in calendar year 2012. Furthermore, there is a growing number of individuals who will be eligible for retirement in future years. For example, five employees left for retirement reasons in 2011. These and future retirements will exacerbate the difficulty in reducing vacant positions. In order for the DMR to maintain inspection performance and improve permitting performance, the number of vacant positions needs to be reduced. **Therefore, the Legislative Auditor recommends that the DMR create performance goals and measures for reducing the number of vacancies for the permitting and inspection units.**

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*In order for the DMR to maintain inspection performance and improve permitting performance, the number of vacant positions needs to be reduced.*

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## Other Factors Are Affecting Performance for Completing Permit Decisions

The DMR identified other factors in addition to staffing problems that are contributing to the decline in permitting timeliness. The most significant cause of delays, according to the agency, derives from the EPA increased scrutiny of applications for Clean Water Act and NPDES permits. This increased scrutiny was declared in a July 2009 letter from the EPA to the DEP that states the EPA's decision to review "all NPDES permits for discharges associated with surface coal mining permits." Although the EPA has the authority to review all NPDES permits pursuant to the Clean Water Act and federal regulations (40 C.F.R. Section 123.44), it had previously waived its authority to review these permits in a 1982 Memorandum of Agreement (MOA)<sup>2</sup> as allowed by Section 402(e) of the Clean Water Act, and federal regulations (40 C.F.R. Section 123.24(d)). However, the 1982 MOA and federal regulations (40 C.F.R. Section 123.24(e)) grant the EPA the option to revoke its waiver to review at any time with written notice, which it exercised in the July 2009 letter. The letter specifically states:<sup>3</sup>

*At this time, EPA is revoking its waiver of review for all NPDES permits for discharges associated with surface coal mining permits. In order for EPA to complete its review, please provide to EPA copies of all permit applications, draft permits, and supporting documentation for NPDES permits for discharges associated with surface coal mining permits. This request applies to both currently pending NPDES permit applications and those applications received in the future. EPA will, consistent with the MOA, provide comments and or any objections within thirty (30) days of receipt. EPA may narrow the scope of its review in the future after we have had an opportunity to familiarize ourselves with this category of NPDES permits.*

*The purpose of this limited withdrawal of EPA's waiver of review is to ensure that permits contain the necessary effluent and monitoring conditions to achieve water quality standards, including narrative and numeric criteria, and incorporate NPDES regulatory requirements. As discussed with your staff, EPA is also conducting a Permit Quality Review (PQR) of mining permits in all of the Region III*

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*The most significant cause of delays, according to the agency, derives from the EPA increased scrutiny of applications for Clean Water Act and NPDES permits.*

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*Although the EPA has the authority to review all NPDES permits pursuant to the Clean Water Act and federal regulations (40 C.F.R. Section 123.44), it had previously waived its authority to review these permits in a 1982 Memorandum of Agreement (MOA) as allowed by Section 402(e) of the Clean Water Act, and federal regulations (40 C.F.R. Section 123.24(d)).*

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<sup>2</sup>An MOA between the EPA Regional Administrator and the state regulator is a requirement under §40CFR 123.24.

<sup>3</sup>The agency requested the Legislative Auditor change its statement to include the language from the second bullet in Appendix D. This letter was received on July 16, 2012 and the Legislative Auditor did not have sufficient time to verify the statements. Therefore, the agency's requested changes were not made.



*states with significant coal mining operations. The PQR process will be similar to the review recently completed for other aspects of West Virginia’s NPDES Program. The PQR will cover the central tenets of the NPDES Program as well as focus on areas of special interest.*<sup>4</sup>

The Legislative Auditor recognizes that the EPA’s review of NPDES permits has added time to the DMR’s permit review process; however, the agency is unable to provide information that quantifies the extent the EPA is slowing DMR’s permitting process.<sup>5</sup> Pursuant to the MOA, the EPA has 30 days after the receipt of the application to provide comments and/or objections. The DMR has to respond to these objections before making any final decisions on permit applications, which therefore, contributes additional time to the permitting process. The DMR states that it tracks the dates of each comment letter, general objection letter, and specific objections letter submitted by the EPA, but it is difficult to quantify the amount of time the EPA has added to the process.

The permitting process may also be affected by an increase in public scrutiny. As Table 2 shows, the number of FOIA requests received by the DMR has ranged from 237 to 708 from calendar year 2008 through June 2011 and is on track to surpass 800 in 2012. The agency also has a short timetable to respond, since West Virginia Code §29B-1-3(4) requires the agency to reply within a maximum of five days of receipt. It would be difficult to quantify the influence the large number of FOIA requests has on the slower performance of the permitting unit; however, the required timetable for a response and the significant number of requests, compounded by the issues related to staffing previously discussed, likely has a significant impact on the permitting staffs’ workload and its ability to process permit applications.

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*The Legislative Auditor recognizes that the EPA’s review of NPDES permits has added time to the DMR’s permit review process; however, the agency is unable to provide information that quantifies the extent the EPA is slowing DMR’s permitting process.*

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*Since the Executive Budget allows only five goals and measures to be listed per division, the DMR should provide other goals and measures that it has developed in its annual report and on its website for greater transparency.*

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**Table 2**  
**Numbers of FOIA Request Received by Division of Mining Reclamation, 2008- June 2012**

2008	2009	2010	2011	2012 (through June)
318	237	549	708	431

*Source: West Virginia Department of Environmental Protection  
The data contained in this table were not audited by the Legislative Auditor.*

<sup>4</sup>See Appendix C for the July 7, 2009 EPA letter in its entirety.

<sup>5</sup>In its letter dated July 16, 2012 (see Appendix D), the agency provided a statement to quantify the average number of days it took to process permit applications before and during the EPA’s review. Due to the time constraints, the Legislative Auditor could not verify the accuracy of the cited numbers, and therefore, did not include them in the report. However, the Legislative Auditor will attempt to calculate the additional time the EPA has added to the application review process and will issue this information in a future report.

If the DMR establishes performance goals and measures for staffing as recommended, it should provide them for the Executive Budget. Since the Executive Budget allows only five goals and measures to be listed per division, the DMR should provide other goals and measures that it has developed in its annual report and on its website for greater transparency.

## Conclusion

The Division of Mining and Reclamation has performance goals and measures for important areas of operation. However, the agency's performance in some of these areas is suffering. The Legislative Auditor acknowledges that part of the lower performance in permitting is attributed to increased scrutiny by the EPA, but it is difficult to quantify the EPA's effect. Another contributing factor to a slower permitting process and concerns for future performance in the inspection functions is the relatively large number of vacant positions for inspectors and permitting. Moreover, filling these vacant positions will become more difficult as a number of DMR employees will be eligible to retire in the near future. Given the importance of staffing inputs towards good performance, the DMR should develop goals and measures for reducing the number of vacant positions. Such measures should be made available in the Executive Budget as space allows but also in the agency's annual reports and website to increase transparency.

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*Given the importance of staffing inputs towards good performance, the DMR should develop goals and measures for reducing the number of vacant positions.*

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## Recommendations

1. *The Division of Mining and Reclamation should establish performance goals and measures for reducing the number of vacant positions for its permitting and inspection units.*
2. *The Division of Mining and Reclamation should include its performance goals and measures in its annual report and on its website.*





## Issue 2

### The West Virginia Division of Mining and Reclamation’s Website Can Benefit From More Improvements.

#### Issue Summary

The Legislative Auditor’s Office conducted a literature review on assessments of governmental websites and, using this information, developed a list of attributes that should be considered for state agency websites. The most common elements in previous studies were applied to establish a set of criteria used to measure how the Division of Mining and Reclamation (DMR) website supports online citizen engagement (see Appendix E). The website checklist had two major components, User-friendliness and Transparency, which were evaluated to create a total score for the agency. As illustrated in Table 3, DMR integrates 44% of the checklist items within its website. This score indicates that more improvements can be made in the agency’s website, particularly in the area of transparency.

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*DMR integrates 44% of the checklist items within its website. This score indicates that more improvements can be made in the agency’s website, particularly in the area of transparency.*

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<b>Table 3</b> <b>Division of Mining and Reclamation</b> <b>Website Evaluation Score</b>			
Substantial Improvement Needed	More Improvement Needed	Modest Improvement Needed	Little or No Improvement Needed
0-25%	26-50%	51-75%	76-100%
	DMR 44%		

*Source: The Legislative Auditor’s review of the Division of Mining and Reclamation’s website.*

### The DMR’s Website Scores Well in User-Friendliness But Needs More Improvements in Its Transparency

In order for a citizen to actively engage with an agency online, the citizen must first be able to access and comprehend information on the agency’s website; therefore, governmental websites should be designed with citizens in mind. A user-friendly website is readable and allows a citizen to easily navigate from page to page. Governmental websites should also be transparent and provide citizens with confidence and trust in the agency. Transparency promotes accountability and provides information for citizens about what the government is doing. As illustrated in Table 4, the DMR website indicates more improvements needed in both user-friendliness and transparency but more so with respect to transparency.

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*A user-friendly website is readable and allows a citizen to easily navigate from page to page. Governmental websites should also be transparent and provide citizens with confidence and trust in the agency.*

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**Table 4**  
**West Virginia DMR Website Evaluation Score**

Category	Possible Points	Agency Points	Percentage
User-Friendly	18	9	50
Transparent	32	13	41
<b>Total</b>	<b>50</b>	<b>22</b>	<b>44</b>

*Source: Legislative Auditor's assessment of the DMR website.*

## The DMR Website Is Well Designed But Needs More Improvements

The DMR website is easy to navigate and includes many of the core elements such as public records and a site map, which act as an index of the entire website. Users can access the homepage by clicking on the home button on the navigation bar on any page of the website or browse the website's content using the site map. The website also contains a search box that allows users to search out information throughout the Department of Environmental Protection's entire website. The DMR website can also be comprehended by most citizens. The DMR's website contains ten pages and the readability of the text on average is on an 8<sup>th</sup> grade reading level making it readable for a large portion of citizens.

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*The DMR's website contains ten pages and the readability of the text on average is on an 8<sup>th</sup> grade reading level making it readable for a large portion of citizens.*

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### User-Friendly Considerations

Overall, the DMR website is designed to allow for active citizen engagement but there are some additional improvements that could enhance the website. The following are a few attributes that could lead to a more user-friendly website:

- **Foreign Language Accessibility** - A link to translate all webpages into other languages other than English.
- **RSS Feed**- RSS stands for "Really Simple Syndication" and allows subscribers to receive regularly updated information (i.e. blog posts, news stories, audio/visual content, etc.) in a standardized format.
- **FAQ Section**- A page that lists the agency's most frequently asked questions with responses.

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*Overall, the DMR website is designed to allow for active citizen engagement but there are some additional improvements that could enhance the website.*

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## The DMR Website Is Transparent but It Could Benefit From Additional Content Elements

A website that is transparent will have elements such as email contact information, the location of the agency, the agency's phone number, as well as public records, the budget and performance measures. A transparent website also allows interaction between the agency and

citizens concerning a host of issues. Appendix E demonstrates that the DMR's website has less than half of core elements that are necessary for a general understanding of the department. Items such as the location and telephone number of the division, a complaint form and a privacy policy enable citizens to adequately communicate with the agency.

### **Transparency Considerations**

The DMR's website is somewhat transparent, but as with the user-friendly section, it could use modest improvements. The following are a few attributes that could be beneficial to the DMR in increasing its transparency:

- **Administrator(s) Biography** – Biography explaining the professional qualifications and experience of the division director and other division administrators.
- **DMR Budget**- A link to the annual DMR budget.
- **FOIA Information** – Information on how to submit a DMR FOIA request, ideally with an online submission form.
- **Agency History** – A page explaining how the agency was created, what it has done, and how, if applicable, its mission has changed over time.
- **Website Updates** – A website update status, ideally for every page.
- **DMR Performance Measures**- A link from the homepage providing the agency's goals and performance measures.
- **Complaint Form**- A specific page that contains a form to file a complaint, with the ability to submit the form electronically.

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*The DMR's website is somewhat transparent, but as with the user-friendly section, it could use modest improvements.*

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*The Legislative Auditor acknowledges that the DMR has a website with many features promoting user-friendliness and transparency; however, the site can be significantly enhanced by incorporating additional features, particularly in the area of transparency.*

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### **Conclusion**

As internet technology continually improves and becomes more accessible, state agencies are utilizing websites to engage citizens as active participants in the government process. Few studies have focused on state agency websites and those that have use a variety of criteria when reviewing sites. The Legislative Auditor acknowledges that the DMR has a website with many features promoting user-friendliness and transparency; however, the site can be significantly enhanced by incorporating additional features, particularly in the area of transparency.

## **Recommendation**

3. *The DMR should consider providing public access to its performance goals and measures via its website and include current and historical performance measures, budget information, and other user-friendly and transparency website elements identified by the Legislative Auditor.*

## Appendix A: Transmittal Letter

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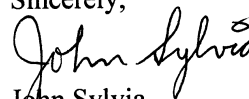
Dear Ms. Casto:

This is to transmit a draft copy of the Performance Review of the West Virginia Division of Mining and Reclamation. This report is scheduled to be presented during the July 23-25, 2012 interim meetings of the Joint Committee on Government Operations, and Joint Committee on Government Organizations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committees may have.

We need to schedule an exit conference to discuss any concerns you may have with the report. We would like to have the meeting on July 11 or 12, 2012. Please notify us to schedule an exact time. In addition, we need your written response by noon on July 16, 2012 in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 304.340.3192 by Thursday, July 19, 2012 to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

  
John Sylvia

c: Tom Clarke, Director, Division of Mining and Reclamation

***Joint Committee on Government and Finance***



## Appendix B: Objective, Scope and Methodology

### Objective

The Legislative Auditor conducted an evaluation of the Division of Mining and Reclamation as part of the Agency Review of the Department of Environmental Protection required by West Virginia Code §4-10-8. The objective of this review is to examine the effectiveness of DMR's regulation of the mining industry and the user-friendliness and transparency of the DMR's website.

### Scope

The scope of the performance measures issue is the performance measures reported in the *Executive Budget Operating Details* for FY 2012. The scope of the website evaluation is user-friendliness and transparency demonstrated on the agency website as of July 2012.

### Methodology

In order to evaluate the relevancy of the DMR's performance measures, the Legislative Auditor reviewed current regulations in West Virginia Code, conducted interviews with administrators and staff from the DMR and OSM; conducted site visits with DEP staff; and reviewed agency documents. The Legislative Auditor also reviewed DMR staffing data to determine the amount of staff turnover and position vacancies between 2008 through 2011.

In evaluating DMR's website, the Legislative Auditor conducted a literature review of government website studies and performed a review of top ranked government websites and groups that rate government websites in order to establish a master list of elements that would increase citizen engagement. The Brookings Institute's "2008 State and Federal E-Government in the United States" and the Rutgers University's 2008 "U.S. States E-Governance Survey (2008): An Assessment of State Websites" helped identify the top ranked states in regards to e-government. The Legislative Auditor indentified three states (Indiana, Maine and Massachusetts) that were ranked in the top ten in both studies and reviewed all three states' main portals for trends and common similarities in transparency and open government. The Legislative Auditor also reviewed a 2010 report from the West Virginia Center on Budget and Policy that was useful in identifying a group of core elements from the master list that should be incorporated into every state and local website to increase its transparency and e-governance. It is understood that not every item listed in the master list is to be found in a department or agency website because some of the technology would not be practical or useful. Therefore, the Legislative Auditor is recommending that an agency or department determine if it is progressing in step with the e-government movement that is emphasizing transparency and user-friendliness. We conducted this performance audit in accordance with generally

accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.



## Appendix C: EPA Letter to DEP Regarding Permit Review



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

JUL - 7 2008

Scott Mandirola  
West Virginia Department of Environmental Protection  
Division of Water and Waste Management  
601 57th Street  
Charleston, WV 25304

Tom Clarke  
West Virginia Department of Environmental Protection  
Division of Mining and Reclamation  
601 57th Street  
Charleston, WV 25304

Dear Messrs. Mandirola and Clarke:

I am sending this letter to request that the West Virginia Department of Environmental Protection (WVDEP), pursuant to the *Memorandum of Agreement Regarding the Administration and Enforcement of the National Pollutant Discharge Elimination System in West Virginia* (1982) (1982 MOA), provide to the U.S. Environmental Protection Agency (EPA) Region III copies of draft National Pollutant Discharge Elimination System (NPDES) permits for discharges associated with surface coal mining operations and a monthly list of applications for NPDES permits received by WVDEP from this specified class of dischargers as further described below.

Pursuant to Section 402(d) of the Clean Water Act and 40 C.F.R. Section 123.44, EPA has the authority to review NPDES permits issued by WVDEP. Waiver of NPDES permit review by EPA is expressly provided for by Section 402(e) of the Clean Water Act, 40 C.F.R. 123.24(d) and also in Section II, Part (B) of the 1982 MOA. Termination of the waiver of review also is expressly provided for by 40 C.F.R. 123.24(e) and the 1982 MOA.

In the 1982 MOA, EPA waived review of certain classes of permits that do not exceed 500,000 gallons per day, one of which was NPDES permits for discharges from coal mining operations. By letter dated September 29, 1998, EPA partially terminated this waiver of review, and requested that it receive all draft NPDES permit actions for facilities which discharge pollutants related to total maximum daily loads (TMDLs) established for the receiving stream. By letter dated October 27, 2005, EPA notified WVDEP that it would no longer be necessary to send on a regular basis to EPA for review draft NPDES permits for coal mining discharges to TMDL waters.

Our October 27, 2005 letter also stated: "On occasion, however, we may wish to exercise our authority under the Memorandum of Agreement, Section II, Part (B) (1)(e), and under 40 C.F.R. 123.24(d)(6) to request submittal of specific draft NPDES permits for coal mining discharges for our review and comment." At this time, EPA is revoking its waiver of review for all NPDES permits for discharges associated with surface coal mining permits. In order for EPA to complete its review, please provide to EPA copies of all permit applications, draft permits, and supporting documentation for NPDES permits for discharges associated with surface coal mining permits. This request applies to both currently pending NPDES permit applications and those applications received in the future. EPA will, consistent with the MOA, provide comments and or any objections within thirty (30) days of receipt. EPA may narrow the scope of its review in the future after we have had an opportunity to familiarize ourselves with this category of NPDES permits.

The purpose of this limited withdrawal of EPA's waiver of review is to ensure that permits contain the necessary effluent and monitoring conditions to achieve water quality standards, including narrative and numeric criteria, and incorporate NPDES regulatory requirements. As discussed with your staff, EPA is also conducting a Permit Quality Review (PQR) of mining permits in all of the Region III states with significant coal mining operations. The PQR process will be similar to the review recently completed for other aspects of West Virginia's NPDES Program. The PQR will cover the central tenets of the NPDES Program as well as focus on areas of special interest.

In addition, EPA has been in discussions with WVDEP regarding the potential impacts of surface mining operations with valley fills. At this time, EPA is requesting copies of NPDES permits or draft NPDES permits associated with the specific surface coal mining operations listed below. Please indicate the status of each permit, whether draft, pending Director signature, or issued. For those operations listed below for which NPDES permits have not been issued, please provide a copy of the draft permit, application, reasonable potential analysis, and any necessary supporting documentation to EPA for review prior to permit issuance. Consistent with the MOA, EPA will respond in writing within thirty (30) days of receipt of a draft permit to provide comments and objections, if appropriate. If NPDES permits have been issued for any of the operations listed below, EPA requests that you provide a copy of the issued permit. Accordingly, please provide EPA with a copy at your earliest convenience of the NPDES permits for discharges associated with the following Surface Mining Control and Reclamation Act (SMCRA) permits:

Alex Energy Republic No. 1 Surface Mine (S-302500)  
Consol of Kentucky (S-501807), (S-5002-07)  
Colony Bay Coal Company (S-000781)  
Highland Mining Company Reylas Surface Mine (S-501506)  
Consol of Kentucky – Peg Fork Surface Mine (S-5018-06)

In addition to the foregoing, EPA is requesting that you provide on the fifteenth day of each month a list of all NPDES permit applications received by WVDEP for discharges from surface mining operations with valley fills and identify the corresponding SMCRA permit number, Corps of Engineers Public Notice number, the receiving waters, whether Total Maximum Daily Loads (TMDLs) have been established and where known, the number and size of valley fills and the proposed post-mining land use. Please note that EPA intends to use this list to focus its review and comments on specific draft NPDES permits for coal mining discharges.

Please provide the requested NPDES permits and lists to the attention of:

David McGuigan, Ph.D., Associate Director  
Office of NPDES Permits and Enforcement  
U.S. Environmental Protection Agency  
Region III 3WP40  
1650 Arch Street  
Philadelphia, PA 19103

Please be aware that EPA may use its information gathering authorities pursuant to Section 308 of the Clean Water Act, 33 U.S.C. §1318, to require an applicant to conduct appropriate instream monitoring, effluent characterization and monitoring, and a reasonable potential analysis to ensure that the permittee does not violate water quality standards.

Thank you for your prompt attention to this matter. If you have any questions, please feel free to contact me at (215) 814-5422, or David McGuigan at (215) 814-2158.

Sincerely,



Jon M. Capacasa, Director  
Water Protection Division

cc: Randy Huffman, WV DEP



## Appendix D: Agency Comments on The Draft Version of the Performance Review



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west virginia department of environmental protection

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Division of Water and Waste Management  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304  
Phone: (304) 926-0495  
Fax: (304) 926-0496

Earl Ray Tomblin, Governor  
Randy C. Huffman, Cabinet Secretary  
dep.wv.gov

July 16, 2012

Mr. Keith Brown  
WV Legislature  
Performance Evaluation and Research Division  
Building 1, Room W-314  
Charleston, WV 25305-0610

Dear Mr. Brown:

Please consider this as our comments on the Legislative Auditor's draft report on the results of his review of the Division of Mining and Reclamation.

As we discussed in our close-out meeting, the agency believes that the primary cause of the increase in NPDES permitting timeframes are changes that result from EPA involvement in the process on two levels. One is the time that results just from the process of EPA review. The discussion in your report captures this. A second, more significant element of the increase, which is not captured in your report, is the increase that results from the interjection of entirely new issues in coal mine permitting by EPA, EPA's attempt to override and supersede the State's interpretation of its own water quality standards and the moving target presented by EPA's shifting position on these issues. To capture the DMR's position on this in your report, we suggest:

- The next to last sentence in the first full paragraph on page 4 of your letter be re-worded to state: "Another cause, according to the agency, is the interjection of new issues and greater involvement in the permitting process by the United States Environmental Protection Agency (EPA)."
- The first paragraph under the heading, "Other Factors Are Affecting Performance for Completing Permit Decisions" should be split into two paragraphs and re-worded to read as follows:

Promoting a healthy environment.



The DMR identified other factors in addition to staffing problems that are contributing to the decline in permitting timeliness. The most significant cause of delays, according to the agency, derives from the interjection of new issues in coal mine permitting by EPA and increased scrutiny of applications for Clean Water Act and NPDES permits. According to the DMR, EPA began to interject itself in the coal mine permitting process on January 20, 2009 with a series of letters which raised new issues in coal mine permitting. According to the DMR, as a result, the proper interpretation and application of West Virginia's narrative water quality standard for the protection of the aquatic ecosystem has become an issue in all permitting for coal mines. According to the DMR, EPA and the State do not agree on the proper interpretation and application of the narrative standard in this context and are litigating this issue. According to the DMR, EPA's demands for permit content have been evolving, presenting the State and the regulated community with a moving target. According to the DMR, uncertainty created by EPA's unlawful attempt to unlawfully commandeer the state's function under the Clean Water Act among the State's permit reviewers, permit consultants for industry and permit applicants has continued since then, negatively affecting timely issuance of NPDES permits.

On June 11, 2009, EPA and other federal agencies entered into a MOU in which they more formally agreed to more closely scrutinize coal mine permitting. Direct EPA scrutiny of West Virginia's NPDES permit program for coal mining was declared in a July 2009 letter from the EPA to the DEP that states the EPA's decision to review "all NPDES permits for discharges associated with surface coal mining permits." Although the EPA has the authority to review all NPDES permits pursuant to the Clean Water Act and federal regulations (40 C.F.R. Section 123.44), it had previously waived its authority to review these permits in a 1982 Memorandum of Agreement (MOA)<sup>1</sup> as allowed by Section 402(e) of the Clean Water Act, and federal regulations (40 C.F.R. Section 123.24(d)). However, the 1982 MOA and federal regulations (40 C.F.R. Section 123.24(e)) grant the EPA the option to revoke its waiver to review at any time with written notice, which it exercised in the July 2009 letter. The letter specifically states:

Also, at our close-out meeting, we discussed that the DMR believes that the delay in NPDES permit processing as a result of EPA's various actions could be quantified by comparing the average length of time it took the DMR to process the NPDES permits it issued in 2007 and 2008, before EPA's actions and involvement, with the average length of time it took the DMR to process the permits it issued in 2011, after EPA's actions and involvement. These averages for 2007, 2008 and 2011, respectively were 210, 231 and 516 days. To capture this in your report, we suggest that the first paragraph after your quote of EPA's July 2009 letter be revised to begin as follows:

The Legislative Auditor recognizes that the EPA's review of NPDES permits has added time to the DMR's permit review process. The agency reports that the average time NPDES permits issued in 2007 and 2008 were pending prior to issuance, before EPA involvement in State NPDES permitting began, was 210 and 231 days, respectively. The agency further reports that for NPDES permits issued in 2011, after EPA involvement, the average length of time had increased to 516 days. The agency attributes

<sup>1</sup> An MOA between the EPA Regional Administrator and the state regulator is a requirement under §40 CFR 123.24.

nearly the entirety of this increase to new substantive issues EPA has interjected into the permit process and to the addition of EPA review to the permit process.

Thank you for the opportunity to comment on your draft report. Please let us know if you have any questions or need additional information.

Sincerely,



Thomas L. Clarke  
Director





## Appendix E: Website Criteria Checklist and Points System

<b>Website Criteria Checklist and Points System</b> <b>Division of Mining and Reclamation</b>			
User-Friendly	Description	Total Points Possible	Total Agency Points
<b>Criteria</b>	The ease of navigation from page to page along with the usefulness of the website.	<b>18</b>	<b>09</b>
		<b>Individual Points Possible</b>	<b>Individual Agency Points</b>
Search Tool	The website should contain a search box (1), preferably on every page (1).	2 points	2 points
Help Link	There should be a link that allows users to access a FAQ section (1) and agency contact information (1) on a single page. The link's text does not have to contain the word help, but it should contain language that clearly indicates that the user can find assistance by clicking the link (i.e. "How do I...", "Questions?" or "Need assistance?")	2 points	0 points
Foreign language accessibility	A link to translate all webpages into languages other than English.	1 point	0 points
Content Readability	The website should be written on a 6 <sup>th</sup> -7 <sup>th</sup> grade reading level. The Flesch-Kincaid Test is widely used by Federal and State agencies to measure readability.	No points, see narrative	
Site Functionality	The website should use sans serif fonts (1), the website should include buttons to adjust the font size (1), and resizing of text should not distort site graphics or text (1).	3 points	3 points
Site Map	A list of pages contained in a website that can be accessed by web crawlers and users. The Site Map acts as an index of the entire website and a link to the department's entire site should be located on the bottom of every page.	1 point	1 point
Mobile Functionality	The agency's website is available in a mobile version (1) and/or the agency has created mobile applications (apps) (1).	2 points	0 points
Navigation	Every page should be linked to the agency's homepage (1) and should have a navigation bar at the top of every page (1).	2 points	2 points

<b>Website Criteria Checklist and Points System</b> <b>Division of Mining and Reclamation</b>			
FAQ Section	A page that lists the agency's most frequent asked questions and responses.	1 point	0 points
Feedback Options	A page where users can voluntarily submit feedback about the website or particular section of the website.	1 point	1 point
Online survey/poll	A short survey that pops up and requests users to evaluate the website.	1 point	0 points
Social Media Links	The website should contain buttons that allow users to post an agency's content to social media pages such as Facebook and Twitter.	1 point	0 points
RSS Feeds	RSS stands for "Really Simple Syndication" and allows subscribers to receive regularly updated work (i.e. blog posts, news stories, audio/video, etc.) in a standardized format. All agency websites should have a RSS link on their websites.	1 point	0 points
<b>Transparency</b>	<b>Description</b>	<b>Total Points Possible</b>	<b>Total Agency Points</b>
<b>Criteria</b>	A website which promotes accountability and provides information for citizens about what the agency is doing. It encourages public participation while also utilizing tools and methods to collaborate across all levels of government.	<b>32</b>	<b>13</b>
		<b>Individual Points Possible</b>	<b>Individual Agency Points</b>
Email	General website contact.	1 point	0 points
Physical Address	General address of stage agency.	1 point	1 point
Phone Number	Correct phone number of state agency.	1 point	1 point
Location of Agency Headquarters	The agency's contact page should include an embedded map that shows the agency's location.	1 point	1 point
Administrative officials	Names (1) and contact information (1) of administrative officials.	2 points	2 points
Administrator(s) biography	A biography explaining the administrator's professional qualifications and experience.	1 point	0 points

<b>Website Criteria Checklist and Points System</b> <b>Division of Mining and Reclamation</b>			
Privacy policy	A clear explanation of the agency/state's online privacy policy.	1 point	1 point
Public Records	<p>The website should contain all applicable public records relating to the agency's function. If the website contains more than one of the following criteria the agency will receive two points:</p> <ul style="list-style-type: none"> <li>• Statutes</li> <li>• Rules and/or regulations</li> <li>• Contracts</li> <li>• Permits/licensees</li> <li>• Audits</li> <li>• Violations/disciplinary actions</li> <li>• Meeting Minutes</li> <li>• Grants</li> </ul>	2 points	2 points
Complaint form	A specific page that contains a form to file a complaint (1), preferably an online form (1).	2 points	0 points
Budget	Budget data is available (1) at the checkbook level (1), ideally in a searchable database (1).	3 points	0 points
Mission statement	The agency's mission statement should be located on the homepage.	1 point	1 point
Calendar of events	Information on events, meetings, etc. (1) ideally imbedded using a calendar program (1).	2 points	0 points
e-Publications	Agency publications should be online (1) and downloadable (1).	2 points	2 points
Agency Organizational Chart	A narrative describing the agency organization (1), preferably in a pictorial representation such as a hierarchy/organizational chart (1).	2 points	1 point
Graphic capabilities	Allows users to access relevant graphics such as maps, diagrams, etc.	1 point	0 points
Audio/video features	Allows users to access and download relevant audio and video content.	1 point	0 points

<b>Website Criteria Checklist and Points System</b> <b>Division of Mining and Reclamation</b>			
FOIA information	Information on how to submit a FOIA request (1), ideally with an online submission form (1).	2 points	0 points
Performance measures/ outcomes	A page linked to the homepage explaining the agency's performance measures and outcomes.	1 point	0 points
Agency history	The agency's website should include a page explaining how the agency was created, what it has done, and how, if applicable, has its mission changed over time.	1 point	0 points
Website updates	The website should have a website update status on screen (1) and ideally for every page (1).	2 points	0 points
Job Postings/links to Personnel Division website	The agency should have a section on homepage for open job postings (1) and a link to the application page Personnel Division (1).	2 points	1 point

## Appendix F: Agency Response



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west virginia department of environmental protection

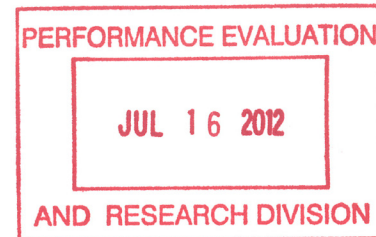
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Division of Water and Waste Management  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304  
Phone: (304) 926-0495  
Fax: (304) 926-0496

Earl Ray Tomblin, Governor  
Randy C. Huffman, Cabinet Secretary  
dep.wv.gov

July 16, 2012

Mr. John Sylvia  
WV Legislature  
Performance Evaluation and Research Division  
Building 1, Room W-314  
Charleston, WV 25305-0610



Dear Mr. Sylvia:

Please consider this as our response to the Legislative Auditor's review of the Division of Mining and Reclamation.

Issue 1: The Division of Mining and Reclamation Is Experiencing Declining Performance in Important Areas Resulting From a Few Factors Including a Relatively High Number of Vacant Positions.

- The Division of Mining and Reclamation will adopt your recommendation and establish a goal of maintaining its vacancy rate at or below 10%.
- The Division of Mining and Reclamation will adopt your recommendation and place its performance goals and measures in its annual report and on its website.
- The Division of Mining and Reclamation believes that establishing goals and measures for the completion of investigation of complaints in addition to those it already has for initiation of investigations might lead to the undesired result of sacrificing thorough, high quality investigations for the sake of meeting an arbitrary time frame for completion of investigations. Each investigation involves different circumstances and requires a different approach. Both the public and the regulated community benefit from thorough, high quality investigations that reach the correct conclusion. The Division's historic averages for completion of investigations have been reasonable and it intends to continue to devote the necessary resources to complete each investigation as promptly as the circumstances of the complaint allow.

Promoting a healthy environment.

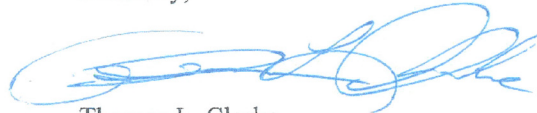
Page Two  
July 16, 2012

Issue 2: The West Virginia Division of Mining and Reclamation's Website Could Benefit From More Improvements.

- The Division of Mining and Reclamation continues to improve its website to ensure it is easy to use and has valuable information for the public. We will take the recommendations of the Legislative Auditor under advisement and make any necessary changes to improve our website. We anticipate that we will be able to address most, if not all of the issues you have identified.

Thank you for the opportunity to respond to these issues. Please let us know if you have any questions or need additional information.

Sincerely,



Thomas L. Clarke  
Director



WEST VIRGINIA LEGISLATIVE AUDITOR

**PERFORMANCE EVALUATION & RESEARCH DIVISION**

Building 1, Room W-314, State Capitol Complex, Charleston, West Virginia 25305

telephone: 1-304-347-4890 | [www.legis.state.wv.us/Joint/PERD/perd.cfm](http://www.legis.state.wv.us/Joint/PERD/perd.cfm) | fax: 1-304-347-4939