

JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

WV Department of Environmental Protection Division of Mining & Reclamation - Special Reclamation Funds Report

Legislative Auditor: Aaron Allred
Post Audit Division Director: Justin Robinson



MODIFIED GENERALLY ACCEPTED GOVERNMENT AUDITING STANDARDS STATEMENT

We conducted this performance audit mostly in accordance with the Generally Accepted Government Auditing Standards issued by the United States Government Accountability Office. 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. With the exception of sections 6.65 and 6.66 of the 2011 Generally Accepted Government Auditing Standards, all applicable standards were followed. The specific information concerning the deviation from those standards may be found in Appendix B of this report. Based on our professional judgment, we believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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*WV Department of Environmental
Protection Division of Mining &
Reclamation - Special Reclamation
Funds Report*

June 7, 2021

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WV Department of Environmental Protection Response to Audit Report

Report Foreword

This Legislative Auditor's report is the third in a series of reports concerning the WV Department of Environmental Protection (DEP). The audit focuses on the DEP's surface coal mining and reclamation bonding program and the long-term solvency of the Special Reclamation Funds (SRFs).

West Virginia's surface coal mining and reclamation program was established by Chapter 22, Article 3 of the West Virginia Code. The Legislative Rule that primarily governs the program is Title 38, Series 02 of the Code of State Rules (38CSR2). Once signed into law, the initial code, rules, and subsequent amendments applicable to the state's mine reclamation program must be submitted to the United States Office of Surface Mining Reclamation and Enforcement (OSMRE) for approval. The OSMRE was established by Congress with the passage of the 1977 *Surface Mining Reclamation and Control Act*.

The SRFs provide funding for reclamation when a coal company forfeits its coal mining permit. Forfeiture occurs when a mining company can no longer fulfill its reclamation duties, generally via bankruptcy or an inability to adhere to DEP requirements. The SRFs are funded primarily by a 27.9 cent tax levied on every short ton of coal produced within the state. Bond forfeitures and investment income comprise much of the remaining revenue for the funds.

The following issues are derived from data and information requested from the DEP, the WV State Tax Department, the WV Secretary of State, and the WV Governor's Office. The Legislative Auditor thanks all agencies and agency personnel for providing assistance and fulfilling documentation requests during the audit.

Executive Summary

The Legislative Auditor conducted this audit on the WV Department of Environmental Protection pursuant to W.Va. Code §4-2-5. The objective of this audit was to evaluate the solvency and efficacy of the state's surface coal mining reclamation bonding program.

Frequently Used Acronyms in This Report

CFR: Code of Federal Regulations

CSR: Code of State Rules

DEP: Department of Environmental Protection

DMR: Division of Mining and Reclamation

ERP: ERP Environmental Fund

ESS: Electronic Submission System

OSMRE: Office of Surface Mining Reclamation and Enforcement

SMCRA: Surface Mining Control and Reclamation Act

SRTF: Special Reclamation Trust Fund (Fund 3321)

SRFs: Special Reclamation Funds (Funds 3312, 3317, 3321, 3482)

SRFAC: Special Reclamation Fund Advisory Council

SRWTF: Special Reclamation Water Trust Fund (Fund 3482)

Report Highlights:

Issue 1: Current Per Acre Coal Mining Reclamation Bond Limits May Not Be Sufficient to Guarantee the Solvency of the State's Mining Reclamation Program.

- Bonds are set between \$1,000 and \$5,000 per acre.
- Increasing reclamation costs have devalued permit bonds since the current bonding limits were established by W.Va. Code §22-3-11(a) in September 2001, while the cost of reclamation has increased significantly since bond rates were established.
- The Legislative Auditor estimates bonds cover 10% of reclamation cost.
- The DEP filed a lawsuit installing a special receiver to handle the business of one mining company, ERP Environmental Fund¹ (ERP), due to the possibility the company's forfeiture would result in, "...*financially overwhelming the Special Reclamation Fund....*"

Recommendation:

- 1.1 The Legislative Auditor recommends the DEP consider the adequacy of the bonding rates currently in effect with regard to the requirements of Title 30, Section 733.11 of the Code

¹ Although the name of this company may imply otherwise, ERP Environmental Fund is a major coal mining company operating within West Virginia.

of Federal Regulations, and adjust the rates as necessary to ensure that the cost of reclamation does not become a greater financial liability to the state.

Issue 2: A Lack of Limitations on Amounts Permitted to be Underwritten by Single Insurers for Mining Reclamation Surety Bonds Increases the Risk of Insolvency of the Special Reclamation Funds.

- Unlike multiple other states' mining reclamation programs, WV has no statutory limits on the amount of reclamation surety bond coverage a surety company may issue either in the case of individual bonds or in the aggregate.
- Five companies hold 90.7% of the state's coal mining reclamation bonds.
- Indemnity National Insurance Company holds approximately \$620 million in coal mining reclamation bonds, 66.9% of the total.
- Indemnity held \$125 million in reclamation bonds for ERP, a coal company operating in WV, when ERP walked off the job in March 2020. ERP's potential reclamation liability was so great the DEP was concerned ERP's forfeiture would bankrupt Indemnity resulting in a circumstance that could render the Special Reclamation Funds (SRFs) insolvent.
- Companies that are permitted to issue surety bonds without limitation expose the SRFs to potentially large liabilities that could result in the insolvency of the funds if mass forfeitures were to occur.

Recommendation:

- 2.1 The Legislative Auditor recommends the Legislature consider amending W.Va. Code §22-3-11 by imposing maximum thresholds on the face value of reclamation bonds permitted to be underwritten by a single surety company. Such limits should include both single bond issuances as well as the company's aggregate issuances of reclamation bonds.

Issue 3: The DEP Does Not Require Coal Companies to Maintain Bonds Equal to the Estimated Reclamation Cost as Required for Inactive Extensions. Further, the DEP Does Not Ensure that Applications for Inactive Status Extensions are Complete and Accurate as Required by Legislative Rule 38 CSR 2-14.11 and the Code of Federal Regulations 30 CFR §816.131.

- As of December 2020, there were 160 permits listed as *Inactive* in DEP's records. These permits were bonded for \$72.2 million.
- Legislative Rule 38CSR2 establishes specific requirements before a permit may be classified as *Inactive* and specifies time limits in which such inactive sites can remain inactive.
- Permit holders may request extensions beyond these timeframes. However, 38CSR2 requires permit holders to post full cost bonding" for extensions.
- 61 permits exceeded the initial approved timeframes as of December 2020; however, only five had full cost bonding. If the 56 permits that do not have full cost bonding were to forfeit, estimates based on historical data indicate the costs to reclaim these sites to be approximately \$279 million.

- Each inactive request must meet multiple federal requirements to be eligible for inactive status. However, we noted 171 separate instances on 100 applications² where requirements for inactive status were not satisfied.
- 320 permits were listed with permit statuses that indicate the sites are active, but not currently mining coal. Due to the lack of statutory definition for such statuses, the Legislative Auditor is unable to determine what activity, if any, is occurring at these sites.

Recommendations:

- 3.1 The Legislative Auditor recommends the DEP comply with the WV Surface Mining Reclamation Legislative Rule 38CSR2, Section 14.11; the Code of Federal Regulations 30 CFR §816.131-Cessation of Operations, and W.Va. Code §22-1-6(c), by:
- (a.) Requiring mining permit holders submit reclamation bonds equal to the estimated reclamation costs for permit sites prior to granting extensions for inactive statuses;
 - (b.) Verifying that applications for extensions to inactive statuses are complete and accurate before such extensions are considered;
 - (c.) Ensuring permits do not remain inactive for periods longer than what is permissible as delineated in 38CSR2, Section 14.11; and,
 - (d.) Ensuring all mine status categories are properly defined by state statute or rule and that such categories are only implemented for use after consultation with, and approval of, the OSMRE.

Issue 4: Reclamation Awards That Result in Decreased Bond Amounts May Increase the State’s Liability for Mining Reclamation and Potentially Contribute to the Insolvency of the Special Reclamation Fund. Additionally, the DEP Does Not Maintain a Complete Record of Companies That Have Received Reclamation Awards Resulting in Bond Reductions or the Reduction Amounts Received.

- The DEP currently accepts mining reclamation awards that can reduce the amount of bonding required to obtain coal mining permits.
- The DEP does not keep full records of various aspects of the reclamation awards program, which precludes the precise determination of actual bond reductions resulting from the program.
- At least 52 companies have a total of \$14.3 million in active coal mining performance bond reductions.
- Reclamation awards may be used indefinitely, and one award may be applied across all sites owned by the company that received it.
- Two companies with bond reductions are known to have 41 forfeited permits. The Legislative Auditor reviewed the bond calculations for nine permit sites and noted for these sites the DEP collected \$952,880 in forfeited bonds. However, as of August 2019, the DEP had expended \$4.5 million in reclamation costs for these nine permit sites. The reclamation

² Several inactive applications had multiple requirements that were not met; hence, the number of non-compliance issues noted exceed the number of applications audited.

costs for all 41 permits held by these two companies exceeded \$18.6 million as of August 2019, with reclamation ongoing.

Recommendations:

- 4.1 The Legislative Auditor recommends the DEP comply with W.Va. Code §5A-8-9 and develop a system to track and maintain a record of all reclamation awards submitted by coal companies including, but not necessarily limited to, a listing of all companies to whom the awards were given, the specific permits that received bond reductions resulting from awards, the amount of bond reductions resulting from the awards in the aggregate and for each individual permit, and the organizations from which the awards were received. The Legislative Auditor further recommends the DEP establish minimum eligibility requirements for entities that grant reclamation awards.
- 4.2 The Legislative Auditor recommends the DEP analyze the effect of accepting reclamation awards as a mechanism to reduce reclamation bonding; particularly, as it pertains to the solvency of the Special Reclamation Funds. It is further recommended the DEP report the results of this analysis and its methodology to the Post Audits Subcommittee no later than November 30, 2021.

Issue 5: According to the State Tax Department, as of May 21, 2021, 70 Mining Companies That Filed Coal Reclamation Tax Returns Had Delinquent Coal Reclamation Tax Accounts Totaling \$5.3 Million.

- A State Tax Department report listed a total of 70 different companies with reclamation tax delinquencies that had accrued over a 16-year period from December 2004 through April 2021.
- Ten companies are responsible for 80% of the \$5.3 million in total reclamation tax delinquencies.

Recommendations:

- 5.1 The Legislative Auditor recommends the DEP comply with the Division of Mining and Reclamation (DMR) *Permitting Handbook* and **not** approve applications for permit renewals and revisions or grant inactive statuses for companies found delinquent in paying Special Reclamation Taxes.
- 5.2 The Legislative Auditor recommends the Legislature consider amending W.Va. Code §22-3-11(l) to require the DEP monitor, on a monthly basis, the State Tax Department's reclamation tax reports and identify those companies that are delinquent in the remittance of reclamation taxes.
- 5.3 The Legislative Auditor recommends the Legislature, in conjunction with the DEP, consider establishing procedures within statute that would allow the DEP to impose actions such as the revocation of a company's mining permit in the event a company fails to properly file a tax return, a company's unpaid tax delinquencies exceed a stipulated amount, or a company's tax delinquency exceeds a specified duration to compel more prompt payment of special reclamation taxes and ensure the collection of those taxes.

Issue 6: The DEP Does Not Adequately Verify that Coal Companies Are Remitting the Proper Taxes to the Special Reclamation Fund.

- A 2012 Post Audit report found the DEP was not recording the coal tonnage mined by companies.
- If the DEP enacted an auditing procedure whereby the coal tonnage mined in the state was reconciled to the taxes remitted for a given period, the DEP could significantly bolster the confidence that reclamation taxes are being paid as required by law.

Recommendation:

- 6.1 The Legislative Auditor recommends the DEP fulfill its responsibility under W.Va. Code §22-3-2 by developing a method to properly track coal production and periodically reconcile the production to the special reclamation taxes collected to verify the Special Reclamation Trust Fund and the Special Reclamation Water Trust Fund are properly funded.

Issue 7: The DEP and the State Tax Department Granted Several Million Dollars in Reclamation Tax Credits Prior to the Tax Credit Program Receiving the Required Approval From the OSMRE in Violation of Federal Law.

- The DEP implemented an amendment before OSMRE approval that allowed companies to reclaim sites forfeited by other companies and claim the cost of the reclamation as a reclamation tax credit. Federal law dictates amendments to a state’s reclamation program must be approved by the OSMRE prior to the implementation.
- The DEP did not notify the State Tax Department of the federal law requiring amendments be approved before implementation.
- The Legislative Auditor cannot determine the extent to which the DEP has implemented amendments without approval but has identified two additional situations in which the DEP has implemented amendments without obtaining OSMRE approval. One issue involves inactive permit extension approvals (Issue 3), and the other pertains to tax credits (Issue 8).

Recommendations:

- 7.1 The Legislative Auditor recommends the DEP comply with §30 CFR 732.17 and not implement amendments to the W.Va. Code and the Code of State Rules until approved by the OSMRE.
- 7.2 The Legislative Auditor recommends the DEP officially notify other state agencies or departments that perform functions associated with the state’s mining reclamation program of the OSMRE requirements pertaining to the approval process for amendments to the state’s regulatory program.

Issue 8: The DEP is Not Commencing Reclamation Proceedings for Forfeited Coal Mining Sites Within One Hundred Eighty Days as Required by 38CSR2 12.4.c (Legislative Rule).

- The Legislature passed legislation removing the requirement to begin reclamation within 180 days of forfeiture. However, this legislation has not been approved by the OSMRE which must occur prior to the DEP enacting this requirement.
- The DEP produced data for 512 permits with completed land reclamation. The median starting time for reclamation was 67 months. Only 46 permits began reclamation within 180 days, and the longest time for reclamation to commence was 345 months.

- In a 2012 Post Audit report, the DEP acknowledged the backlog and planned to have reclamation current as of 2015. Since then, reclamation commenced within six months for 17 of the 19 sites with completed reclamation. However, documents indicate another 36 sites forfeited before August 2018 have not yet commenced reclamation.
- The longer sites remain unclaimed, the greater the risk of pollution and environmental damage to the local community. Further, due to increasing reclamation costs the percentage of reclamation on forfeited sites covered by reclamation bonds will decrease over time.

Recommendation:

- 8.1 The Legislative Auditor recommends the DEP commence reclamation of forfeited sites within 180 days as stipulated by current OSMRE approved 38CSR2 12.4.c. until the revision removing the 180-day requirement is approved by the OSMRE.

Issue 9: The DEP is Not in Compliance with State and Federal Laws that Require the Use of Funds Collected for Forfeited Bonds be Used to Reclaim Those Properties for which the Bond was Posted.

- W.Va. Code requires forfeited funds to be expended upon the sites for which they were forfeited. However, collected bond monies are not encumbered by the DEP for a specific site.
- The median length of time between forfeiture and commencement of reclamation operations is 67 months.
- In the event of insolvency of the Special Reclamation Fund during this intervening period, there is a risk collected bond monies may not be available to contribute to the reclamation of properties for which they were posted.

Recommendation:

- 9.1 The Legislative Auditor recommends the DEP adhere to W.Va. Code §22-3-17(b) and properly encumber forfeited bond funds to ensure the funds are used for reclamation costs for which the bonds were posted.

Issue 10: The DEP Records Regarding Mining Permit Statuses are Inadequate, and Thus, Deter Auditing the State’s Reclamation Program and Assessing the Future Solvency of the Special Reclamation Funds.

- The DEP maintains records on its website and in its in-house database. However, these records do not fully document all mine status changes, especially changes from *Inactive* to *Active* status. This does not allow the DEP to accurately track the history of mining permits.
- Lack of record-keeping has been identified by the Special Reclamation Fund Advisory Council (SRFAC) as a detriment to its ability to analyze the SRFs, provide proper information to the independent actuary, and make proper recommendations.

Recommendation:

- 10.1 The Legislative Auditor recommends the DEP comply with W.Va. Code §5A-8-9 and maintain and make public a full historical record of permit changes to allow for proper oversight and analysis of mining sites.

Issue 11: The Special Reclamation Fund Advisory Council (SRFAC) Has Experienced Extended Vacancies and Expired Terms for Council Members Due to a Lack of Timely Appointments.

- The SRFAC is composed of eight members who analyze the state of the Special Reclamation Funds and make recommendations to the Legislature.
- One position, representing the interests of the general public, was vacant for at least four years.
- The member representing the environmental groups was documented to have been removed by the Governor via letter issued to the Senate Confirmations Chair on January 8, 2018. However, this individual continues to serve on the SRFAC.
- Members may remain in their seats until their terms are renewed or reappointed. Two members are still actively serving on the SRFAC, although their oaths expired in June 2018. A third member's term expired June 2020.

Recommendation:

- 11.1 The Legislative Auditor recommends the Governor's Office fill SRFAC vacancies in a more expeditious manner to reduce the number of SRFAC meetings occurring when the SRFAC is not fully represented by all council member positions established by W.Va. Code §22-1-17.

Report Conclusion

The issues highlighted in this audit report are largely interconnected, emphasizing the benefits of a concerted study or analysis that may provide a more in-depth picture of the coal mining reclamation program. One example of this interconnectivity occurs when reclamation awards are applied for discounted bonding rates. Historical data and future projections indicate only a small fraction of reclamation costs are covered by forfeited bonds. The discounts provided by reclamation awards reduce that fraction even further. Although each issue presented in the report should be addressed individually, further analysis could uncover more relationships, or provide a method for the Legislature to properly analyze the issues presented herein.

Legislative studies have not been conducted to analyze the efficacy and solvency of the state's reclamation program. The 2017, 2018, and 2019 Special Reclamation Fund Advisory Council (SRFAC) annual reports stated the following regarding the need for such a study:

*...The SRFAC further recommends that the State Legislature **form a panel to examine the elements of our State code that result in uncontrolled liabilities**, how other states deal with such issues and finally to propose a State legislative initiative to rationalize water quality regulation to meet the conditions of the Federal Clean Water Act while adding rationality and certainty to the process.... **(emphasis added)***

West Virginia's coal mining reclamation program will continue to require hundreds of millions of dollars to reclaim permit sites in accordance with federal regulations. The program has no known contingency plans if the reclamation funds were to become insolvent. If the current funding sources for the program were to prove insufficient to meet the demands of reclamation, **the resulting additional financial obligations could prove to be detrimental to the state's**

budget. Further, such conditions present the risk that the state's program may be taken over by the Federal OSMRE due to the state's inability to adequately manage and provide funds for the SRF. Therefore, it is the opinion of the Legislative Auditor that it would be fiscally prudent for the Legislature to authorize a panel to perform an analysis of the state's reclamation program for the purpose of aiding the DEP and the SRFAC in formulating recommendations designed to ensure long-term program solvency.

Recommendation:

The Legislative Auditor recommends the Legislature commission a study to evaluate the state's coal mining reclamation program and, as deemed necessary, provide recommendations to ensure the long-term solvency of the program.

BACKGROUND

In 1977, the United States Congress passed the *Surface Mining Control and Reclamation Act* (SMCRA). The SMCRA created a federal program to help regulate the mining and reclamation industries. The Act gives states the right to create oversight programs with rules and regulations upon the approval by the U.S. Office of Surface Mining, Reclamation, and Enforcement (OSMRE). The Act designates the WV Department of Environmental Protection (DEP) as the OSMRE-approved regulatory authority for the state's mining and reclamation program. W.Va. Code Chapter 22, Article 3 established the *WV Surface Coal Mining and Reclamation Act*.³ The OSMRE conditionally approved WV's program in 1981.

The SMCRA requires the state regulatory authority to “...*have available sufficient money to complete the reclamation plan for any areas...*” where a permit holder defaults on the obligation to reclaim the mining permit site. States are given the option of requiring full cost bonding by the coal companies for reclamation costs. However, SMCRA also allows an “*alternative bonding system*” to exist in lieu of requiring mining permit holders to post full cost bonds to cover the entire estimated cost of reclamation for permit sites once operations have ceased. The state's reclamation program as currently conceived allows the coal operators to post bonds at amounts the DEP acknowledges will not cover the full cost of the reclamation in the event permit holders fail to reclaim mine sites and forfeit reclamation bonds. West Virginia's *alternative bonding system* is based primarily on a *Special Reclamation Tax*. The tax is codified in W.Va. Code §22-3-11 and, since July 1, 2012, is set at “...*twenty-seven and nine-tenths cents per ton of clean coal mined...*” within the state.⁴

The SMCRA requires “...*bond or bonds for performance made payable to the regulatory authority and conditioned upon the faithful performance of all the requirements of the Act, the regulatory program, the permit, and the reclamation plan....*” States are given the right to create and regulate bonding programs “*no less stringent*” than federal guidelines. Approximately 97% of the state's bond liabilities (in dollars) are insured via *surety bonds* with the remaining 3% covered by *collateral bonds*.

Forfeiture of a bond occurs when the DEP revokes a company's permit, usually due to a bankruptcy or a pattern of official violations. The third-party surety may reclaim the land in lieu of paying the bond if it is willing and able to do so. When a permit site is forfeited and the insurer does not reclaim the land, the bond monies are collected from the insurer and deposited into the SRTF. This fund, along with three additional funds, are used by the DEP to administer the state's mining reclamation program. Collectively, in this report, the funds are referred to as the SRFs. The funds and fund purposes are shown in Table 1:

³ The Act codifies bond amounts and requirements, the Special Reclamation Tax, the Special Reclamation Funds, and a Special Reclamation Tax credit, in addition to other requirements.

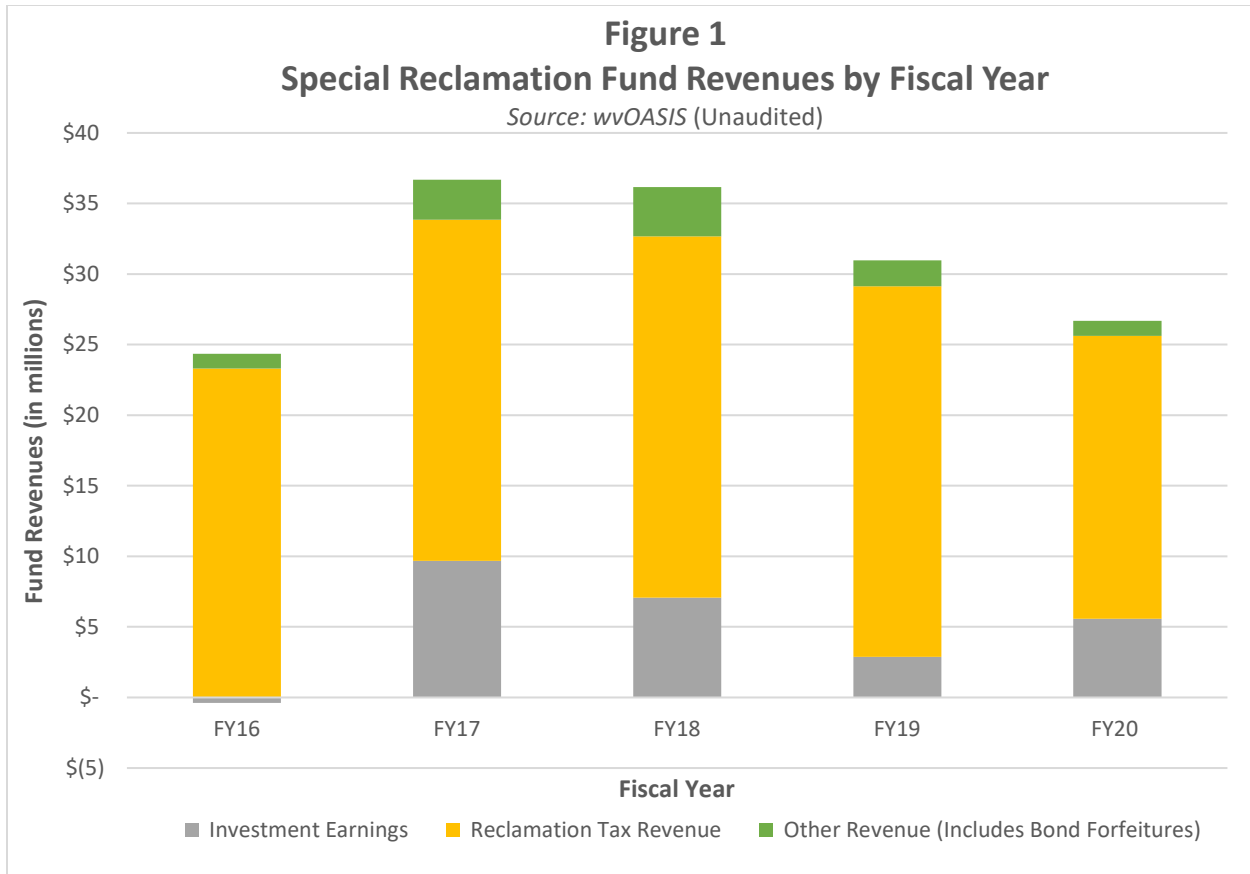
⁴ The Special Reclamation Tax 27.9 cents is divided between the Special Reclamation Trust Fund (SRTF) (12.9 cents) and the Special Reclamation Water Trust Fund (SRWTF) (15.0 cents).

Table 1
Summary of Special Reclamation Funds

<u>Fund</u>	<u>No.</u>	<u>Purpose</u>	<u>Balance as of 3/1/21</u>
Special Reclamation Water Quality Fund	3312	Coal fees from fund 3321, land sale, & gas royalties for water quality ground improvements not to exceed 25% of the clean-up & remedial action resulting from contamination of groundwater or related environment.	\$1,867,315
Special Reclamation Administration Fund	3317	Transfers from fund 3321 for reclamation administration not to exceed 10% of the total annual assets of fund 3321.	\$286,407
Special Reclamation Trust Fund	3321	Bond forfeitures, fines, investment income, & <i>Special Reclamation Tax</i> for reclamation of lands subjected to surface mining operations.	\$35,828,485
Special Reclamation Water Trust Fund	3482	Investment earnings & Reclamation Tax Fees (Reclamation Taxes) used solely to reasonably ensure that sufficient funds will be available to complete reclamation, restoration, and abatement provisions for permit areas which may be in default at any time.	\$151,638,456
Total			\$189,620,663

Source: Fund Balances obtained from wvOASIS as of March 1, 2021

The SRFs' revenue sources comprise the *Special Reclamation Tax*, investment income, bond forfeitures, civil penalties, and other minor revenue sources. The *Special Reclamation Tax*, along with income generated from investments, comprises a significant portion of the SRFs' revenue as shown in Figure 1:



RECLAMATION COST ESTIMATES

W.Va. Code §22-1-17 created the Special Reclamation Fund Advisory Council (SRFAC) *“to ensure the effective, efficient and financially stable operation of the special reclamation fund.”* The SRFAC is comprised *“...eight members, including the secretary of the Department of Environmental Protection or his or her designee, the treasurer of the State of West Virginia or his or her designee, the director of the national mine land reclamation center at West Virginia University and five members to be appointed by the Governor with the advice and consent of the Senate....”*

Actuarial projections of future reclamation costs provided to the SRFAC and the DEP increased from 2013 to 2019 (Appendix C). The data in Table 2 shows the predicted future reclamation costs per acre as calculated by Taylor and Mulder Property and Casualty Consulting Actuaries in its report to the SRFAC in 2019:

	<u>Surface Mine</u>	<u>Underground Mine</u>	<u>Other Types¹</u>
Land Capital	\$2,765	\$10,880	\$8,095
Water Capital	\$3,490	\$5,690	\$8,095
Water Treatment	\$100	\$145	\$140
Total Capital	\$6,355	\$16,715	\$16,330

¹ “Other Types” include coal haul roads, coal loading facilities, coal refuse sites, and coal prep plants.
Source: DEP 2019 SRFAC Annual Report

Reclamation bonds were statutorily set in 2001 at a minimum of \$1,000 to a maximum of \$5,000 per acre. The average original bond rates for all types of mining permits as listed in DEP’s records average \$2,882 per acre. Therefore, it is apparent bonds fall short of covering the predicted costs of reclamation. On certain sites the reclamation costs covered by bond monies received must be subsidized by millions of dollars from the state SRFs. Current bond ceilings set by statute limit the state’s ability to require bonding that would cover a substantial portion of reclamation costs.

As shown in Table 3 the four types of permits analyzed were underground mine permits, surface mine permits, prospecting permits, and permits deemed as “other” (prep plants, refuse plants, haul roads, and loadout facilities). The table presents all forfeited permits through August of 2019 and the difference between the actual reclamation costs and the bonds available to cover the cost of reclamation. For all types of forfeited mining permits, historically only 10% of reclamation has been covered by reclamation bonds. Further, only 7.6% of total permit reclamation costs are covered by forfeited bonds that have been collected. Analysis of reclamation costs covered by bonding for the different mine types revealed underground mine permits have the lowest percentage of reclamation costs covered by bonds.

<u>Type of Mining Permit</u>	<u>Total Reclamation Costs</u>	<u>Total Bond Amounts</u>	<u>Total Recovered Bond Amounts</u>	<u>Percentage Covered by Bonds:</u>		<u>Avg. Cost Per Site</u>
				<u>Total</u>	<u>Recovered</u>	
Underground	\$93,687,626	\$4,449,741	\$3,523,815	4.8%	3.8%	\$390,365
Surface	\$202,625,566	\$23,420,797	\$17,108,299	11.6%	8.4%	\$604,852
Prospecting	\$1,459,137	\$108,066	\$88,448	7.4%	6.1%	\$27,531
Other	\$60,962,965	\$7,906,577	\$6,460,304	13.0%	10.6%	\$580,600
Totals	\$358,735,295	\$35,885,181	\$27,180,866	10.0%	7.6%	\$400,837

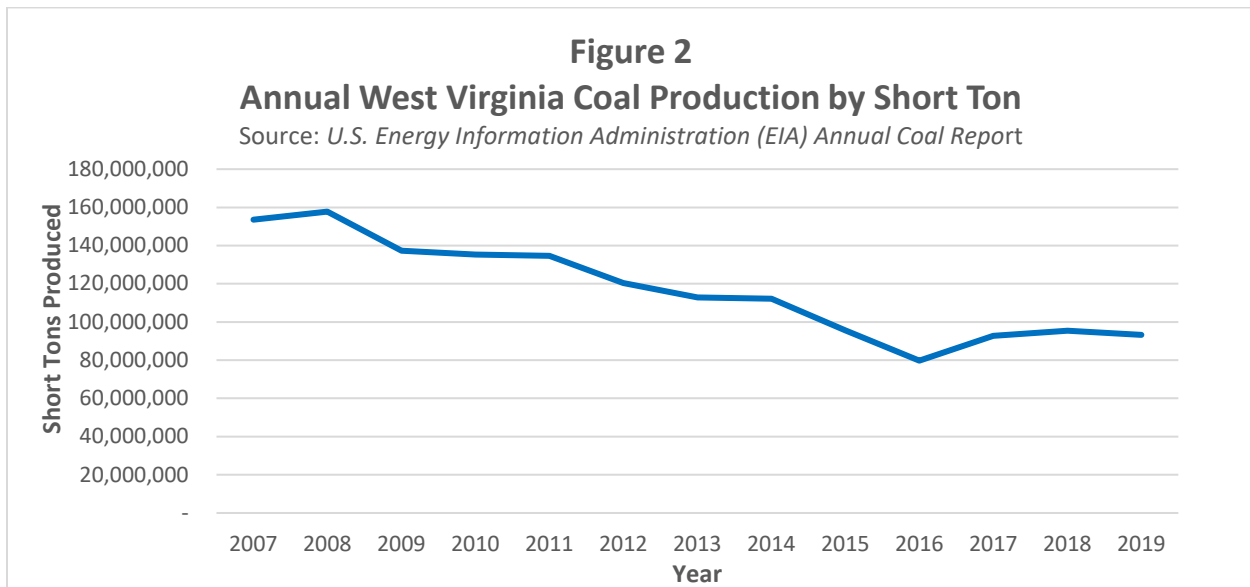
Source: Information provided by DEP upon request.

Of \$358,735,295 in reclamation costs, only \$27,180,866 in forfeited bonds was collected. The estimated 7.6% of total reclamation costs funded by recovered bonds means that over 90% of funding for mine site reclamation relies upon the 27.9 cents per ton reclamation tax and other revenue sources that comprise the SRFs. In the 2017 SRFAC Annual Report the SRFAC actuary concluded:

...With the current bond limit of \$5,000 per acre, the expected receipts from permits issued in the future will not be sufficient to cover the expected reclamation costs for Underground Permits or Other Permits....

WV Coal Production

As previously mentioned, a primary funding source of the SRFs is the 27.9 cents per ton reclamation tax on mined coal in WV. The stability of this funding is dependent upon the production of mined coal in the state. In 2001, WV had 304 operating mines. After a drop to 249 in 2003, total mine sites rebounded to 301 in 2008. Then, the number of operating mines fell to a low of 123 in 2016 before increasing to 162 in 2019. Figure 2 shows the coal production in WV from 2007 through 2019.



Since 2008, coal production in WV has seen a steady decline with a notable rebound from 2016 to 2019; although, production during this period remained far below 2008. Since the collection of the Special Reclamation Tax of 27.9 cents per ton is based on the tonnage mined, decreased coal production in the state has had an adverse effect on the SRFs, resulting in a decline in the tax revenues for three of the last four calendar years. These declines, in combination with increased reclamation costs, increase the likelihood of reduced funding available for future reclamation responsibilities.

Coal Companies Operating in WV with Increased Risk of Bond Forfeiture

When a coal company undergoes bankruptcy, assets of the company are often placed for sale to satisfy company debts. Other coal companies often purchase these assets to gain mining acreage and permits. Six publicly traded coal companies, holding 52% of the permits and 59% of the mines in the state, declared bankruptcy between April 2014 and January 2016. **According to the OSMRE's 2018 Annual Report-West Virginia, none of the six major companies that declared bankruptcy had forfeited bonds as of 2018.** The DEP has negotiated financial arrangements as a way of avoiding forfeiture of the bonds. It should be noted, however, that the SRFAC and its independent actuary added a **30% increase in likelihood of forfeiture** for bankrupted companies in the actuary's model provided for the 2019 SRFAC Annual Report.

Lexington Coal Company and ERP hold a substantial number of mining permits in the state. Lexington purchased a significant portion of Alpha Natural Resources' idle assets after Alpha Natural Resources declared bankruptcy in 2015. Between 2014 and 2016, following its bankruptcy, Patriot Coal sold most of its assets to ERP and Blackhawk Mining. In 2018, ERP had at least two subsidiaries declare bankruptcy. In March 2020, ERP laid off its entire staff necessitating the DEP to obtain a special receiver to avoid the forfeiture of an estimated 111 permits held by ERP and the potential bankruptcy of the reclamation bond surety company.

Blackhawk Mining declared bankruptcy in the summer of 2019. In the fall of the same year, Murray Energy, the nation's largest privately held coal company, also declared bankruptcy. As of August 20, 2019, Blackhawk was responsible for 151 permits, and 181 bonds, totaling \$39.4 million. Also as of August 20, 2019, Murray had 26 permits and 147 bonds, totaling \$41.3 million. Table 4 that follows lists the five companies who are the primary permit holders for the bankrupted permits discussed in the preceding paragraphs:

Table 4		
At-Risk Bond Amounts Held By Select Coal Companies^a		
<u>Parent Company</u>	<u>Bond Amounts</u>	<u>% Total State Bonds</u>
Lexington Coal Company	\$166,700,263	17.6%
Alpha Metallurgical Resources	\$150,261,129	15.9%
ERP Environmental Fund^b	\$83,004,169	8.8%
Blackhawk Mining	\$79,569,312	8.4%
American Consolidated Natural Resources^c	\$45,674,911	4.8%
TOTAL	\$525,209,784	55.5%
^a Companies listed were derived from publicly available information. There are additional companies not included due to confidentiality requirements. ^b Bond totals were \$123,080,625 before the DEP obtained a special receiver to handle ERP's business. ^c Formerly Murray Energy. <i>Source: Information obtained from DEP, analysis performed by Post Audit team.</i>		

The most obvious effect on the Special Reclamation Funds is the presumption that companies going through bankruptcy are the most vulnerable financially. The largest companies have been able to reorganize or sell off assets and re-emerge from bankruptcy. However, the large number of sites going through multiple companies and/or bankruptcies is a potential indicator that these sites may not be sustainable long-term.

Issue 1: Current Per Acre Coal Mining Reclamation Bond Limits May Not Be Sufficient to Guarantee the Solvency of the State’s Mining Reclamation Program.

An analysis by the Legislative Auditor indicates permit bonds have historically covered 10% of actual reclamation cost. The remaining cost of reclamation is subsidized through West Virginia’s *alternative bonding system*, which consists of the Special Reclamation Funds (SRFs). While in recent years the DEP has made strides to improve the speed in which mining sites are reclaimed, a sizable backlog of sites either currently under reclamation or waiting to be reclaimed remains. The SRFAC actuary projects liabilities for permits **already in existence** to be \$496.7 million over the next twenty years. This projection does not include estimates for permits issued after June 30, 2019. The balance of the SRFs as of March 1, 2021 was approximately \$190 million, which is less than 40% of the projected 20-year liability.

A key issue contributing to the insufficiency of permit reclamation bonds is the devaluation of permit bonds since the current bonding limits were established by W.Va. Code §22-3-11(a) in September 2001. SRFAC projected reclamation costs indicate a 45% increase in reclamation costs from 2013-2019 between the three types of mining permits. Several factors have likely contributed to this increase, especially issues with water treatment. Recent litigation has led to the enforcement of more stringent regulations and subsequent increases in water treatment costs. The SRFAC and its actuary consider water treatment costs difficult to gauge, and treatment is often required for extended periods of time.

W. Va. Code §22-3-11(a), as amended in September 2001, established a minimum \$1,000 per acre and a maximum \$5,000 per acre for mining reclamation bonds. The previous rate was a flat \$1,000 per acre. Legislative Rule, Title 38, Series 2 (38CSR2), Section 11.5 promulgates the matrices for specifically determining bond amounts. Even when initially adopted in 2001, the provisions outlined in these governing instruments provided for bonding levels far below the total costs of reclamation. Since 2001, the remaining cost for reclamation after the application of bond funds has increased considerably as the overall cost to perform reclamation has significantly increased during the intervening 20 years.

The solvency of the SRFs is at risk as current bond limits are inadequate to cover the rising cost of reclamation. Current statutory bond calculation constraints have resulted in the state’s aggregate reclamation bonds falling short of the potential reclamation liabilities if permit holders fail to meet obligations to reclaim permitted sites. Further, there is no indication of contingency plans in case the SRFs become insolvent, at which point the OSMRE may revoke the state’s “primacy” of its mining and reclamation program.

A state is considered to have “primacy” when it establishes an OSMRE-approved state-wide surface coal mining program “*no less stringent*” than the requirements set forth in the SMCRA. A loss of primacy would prevent an individual state from tailoring its surface coal mining programs to meet its individual and unique needs, as mining and reclamation conditions vary from state-to-state. A primacy state can pass state-specific legislation crafted and voted on by legislators with the knowledge and recognition of the specific needs of the state and its citizens.

Recent developments regarding the coal company ERP are a prime example of the potential hazards to the solvency of the state’s reclamation program. A March 26, 2020 court filing by the DEP petitioning the court for special receivership for ERP stated in part:

*...Indeed, DEP stands at the precipice of having to revoke the Defendant's permits, forfeiting the associated surety bonds, and transferring the responsibility for cleaning up the Defendant's mess to the State's Special Reclamation Fund, potentially bankrupting the Defendant's principal surety and administratively **and financially overwhelming the Special Reclamation Fund**, the State's principal backstop for all revoked and forfeited sites in West Virginia.... (emphasis added)*

At the time of the lawsuit filing in March of 2020, ERP held 111 permits totaling \$123 million in bonds. The SRFs hold approximately \$190 million as of April 1, 2021. Since March of 2020 when ERP laid off all its workers, ERP has forfeited several permits and several others were sold off leaving the company holding 91 permits with bonds totaling \$83 million. If the remainder of ERP's permits are unable to be sold and are forfeited, DEP's prospective liability to reclaim these sites would likely exceed the combined amount of forfeited bonds and the balance of the SRFs. If ERP forfeited and its surety was able to payout the bonds for ERP's permits, \$83 million would be added to the SRFs. Based on historical data, bonds currently cover roughly 10% of total reclamation cost. This means the DEP's total reclamation cost for ERP's permits could potentially reach \$830 million. As noted by the DEP in the lawsuit, the forfeiture of one company's bonds would be enough to render the SRFs insolvent.

The current level of SRFs funding, even with the surety payout for ERP permits, would not cover a quarter of the cost of reclamation, and that is without considering the DEP's additional financial obligations for current and future non-ERP reclamation projects. ERP had assumed permits resulting from the Patriot Coal bankruptcy only to face its own financial issues a few years later. These financial issues coupled with ERP pulling its entire staff from the mining sites has forced the DEP to obtain a special receiver to control ERP's obligations to avoid bankruptcy. Without this intervention, these permits and sites may have gone through bankruptcy a second time in five years.

The current bonding rate limit established twenty years ago may prove insufficient to provide adequate funding to the SRFs. Historical data indicates bonds cover less than 10% of reclamation costs, and the SRFAC's actuary estimates a total of \$300 million dollars will need to be deposited into the SRFs over the next twenty years to cover the liabilities arising from currently in-force permits. It is important to note that this \$300 million projection does not include costs for permits issued after June 30, 2019. ERP's situation highlights the issues that may arise if one large company is faced with mass forfeitures. These facts, combined with increased costs of reclamation, indicate a review of the bonding limits to be prudent.

Recommendation:

- 1.1 The Legislative Auditor recommends the DEP consider the adequacy of the bonding rates currently in effect with regard to the requirements of Title 30, Section 733.11 of the Code of Federal Regulations, and adjust the rates as necessary to ensure that the cost of reclamation does not become a greater financial liability to the state.

Issue 2: A Lack of Limitations on Amounts Permitted to be Underwritten by Single Insurers for Mining Reclamation Surety Bonds Increases the Risk of Insolvency of the Special Reclamation Funds.

A surety bond is a promise to be liable for the debt, default, or failure of another. It is a three-party contract by which one party (the surety) guarantees the performance or obligations of a second party (the principal) to a third party (the obligee). In the case of the state’s mining reclamation surety bonds, the mining permit holder is the principal, and the DEP is the obligee. Unlike multiple other states’ mining reclamation programs, WV has no statutory limits on the amount of reclamation surety bond coverage a surety company may issue either in the case of individual bonds or in the aggregate.

As of March 29, 2021, the DEP’s records indicated surety companies had issued approximately \$900 million in surety bonds in the state. Table 5 below shows five of the state’s more significant mining reclamation surety companies. These five companies are the sureties for 90.7% of all reclamation bonds issued in the state. The principals for the surety bonds issued by the five individual surety companies listed in Table 5 comprise numerous coal companies. For each company listed, the table depicts the largest single WV mining reclamation bond issued by the surety, the federal bond underwriting limit as set by Federal Circular 570,⁵ the total dollar amount of coal mining reclamation bonds issued in WV, and the dollar amount percentage of the state’s total reclamation surety bonds underwritten by the surety:

Table 5				
Significant Reclamation Bonding Companies in the State				
<u>Company</u>	<u>Largest Reclamation Surety Bond Issued in WV</u>	<u>Federal Single Bond Underwriting Limit (Circular 570)</u>	<u>Total Dollar Amount Active Bonds Issued</u>	<u>% of Dollar Amount of Active Bonds</u>
Indemnity National	\$11,955,000	\$7,254,000	\$619,953,934	66.9%
Lexon	\$5,355,000	\$6,882,000	\$51,432,312	5.6%
Continental Heritage	\$3,083,820	\$2,569,000	\$84,595,277	9.1%
Aspen American	\$5,605,000	\$54,531,000	\$58,110,362	6.3%
First Surety	\$2,280,000	Not Approved	\$26,334,106	2.8%
All Other Companies⁶	\$7,423,877	Various	\$86,353,533	9.3%
TOTALS			\$926,779,524	100%

Source: DEP’S March 29, 2021 All Bond Report

The underwriting limit listed in Table 5 is the maximum single bond a company may issue for federal bonds without reinsurance or coinsurance. The limit is calculated as 10% of a

⁵ Inclusion on the U.S. Department of Treasury Circular 570 authorizes the company as an acceptable surety for federal bonds. This inclusion is commonly referred to as being “T-Listed.”

⁶ Includes other surety companies as well as financial institutions such as banks.

company's paid-in capital and surplus account, which is a key indicator of a company's financial solvency. The five largest reclamation surety issuers each have reclamation bonds that are larger than each company's surplus account and two of these companies have single bonds greater than the federal underwriting limit. Because First Surety Corporation is **not** an approved insurer of federal bonds, the company does not have a federal underwriting limit. However, an analysis by the Legislative Auditor⁷ estimated the company's surplus account would result in a currently issued bond more than the Circular 570 underwriting limit if the company was an approved insurer of federal bonds.

As shown in the previous table, Indemnity holds 66.9% of the total coal mining reclamation bonds issued in the state as of March 29, 2021. The total face value of Indemnity's West Virginia reclamation surety bonds is approximately \$620 million. However, it is important to note this total is only inclusive of coal mining reclamation bonds issued in WV as the company's portfolio includes additional bonds it has underwritten, but not included in Table 5, such as: oil and gas, above ground tanks, and bonds underwritten for other states.

Since Indemnity holds such a significant portion of the state's bonds, the Legislative Auditor performed an analysis of the coal company principals for Indemnity's coal mining reclamation bonds issued in the state. Table 6 is limited to those coal companies that have a minimum of \$4 million in surety bonds underwritten by Indemnity as of December 3, 2020. The table also provides information regarding whether the mining company has any noted current or past financial issues. The results of the analysis are summarized in Table 6 as follows:

⁷ Legislative Audit Report published 2019 titled: *WV Department of Environmental Protection - Rule 38 CSR 2 Section 11.3.a.3 Surety Bond Requirements*, p.14

Table 6
Coal Company Principals with Indemnity National Surety Bonds (\$4 million min.)

<u>Company</u>	<u>Amt. Insured (In Millions)</u>	<u>Noted Financial Issues</u>
Alex Energy (Alpha) ¹	\$9.0	Past Bankruptcy
Appalachian Resource WV, LLC	\$12.9	None
Aracoma (Alpha) ¹	\$4.8	Past Bankruptcy
Bandmill Coal (Alpha) ¹	\$5.1	Past Bankruptcy
Black Castle (Alpha) ¹	\$34.9	Past Bankruptcy
CM Energy	\$6.3	None
Coal-Mac	\$56.4	Past Bankruptcy
Elk Run (Alpha) ¹	\$5.0	Past Bankruptcy
ERP Environmental Fund	\$67.9	Employees Walked Off Job, Sued by DEP
Highland Mining (Alpha) ¹	\$13.8	Past Bankruptcy
ICG Eastern	\$5.3	Past Bankruptcy
Jacks Branch (Alpha) ¹	\$8.9	Past Bankruptcy
Lexington Coal Company ²	\$160.3	Purchased Permits Held by Bankrupt Companies
Markfork Coal Company (Alpha) ¹	\$6.6	Past Bankruptcy
Mingo Logan Coal	\$4.9	Past Bankruptcy
Harrison County Coal Company (American Consolidated) ³	\$10.0	Past Bankruptcy
Marion County Coal Company (American Consolidated) ³	\$6.7	Past Bankruptcy
Marshall County Coal Company (American Consolidated) ³	\$11.1	Past Bankruptcy
Monongalia County Coal Co. (American Consolidated) ³	\$7.3	Past Bankruptcy
Nicholas Contura LLC. (Alpha) ¹	\$5.9	Past Bankruptcy
Ohio County Coal Company (American Consolidated) ³	\$5.7	Past Bankruptcy
Panther Creek	\$57.2	Past Bankruptcy
Quinwood Coal	\$4.3	None
Republic Energy	\$36.2	Past Bankruptcy
Rockwell Mining, LLC.	\$12.9	Past Bankruptcy
Upshur Property, LLC.	\$7.4	Past Bankruptcy
West Virginia Waters Resources, Inc.	\$4.4	None

¹ Companies were originally subsidiaries of Alpha. After Alpha declared bankruptcy, Contura purchased these companies from Alpha and later changed its name to Alpha Metallurgical Resources

² Lexington Coal is a sister company to Revelation Energy, which declared bankruptcy. Comparable to ERP Environmental Fund, Lexington Coal entered the WV coal market by purchasing permits from bankrupt companies.

³ Murray Energy assets are now American Consolidated Natural Resources.

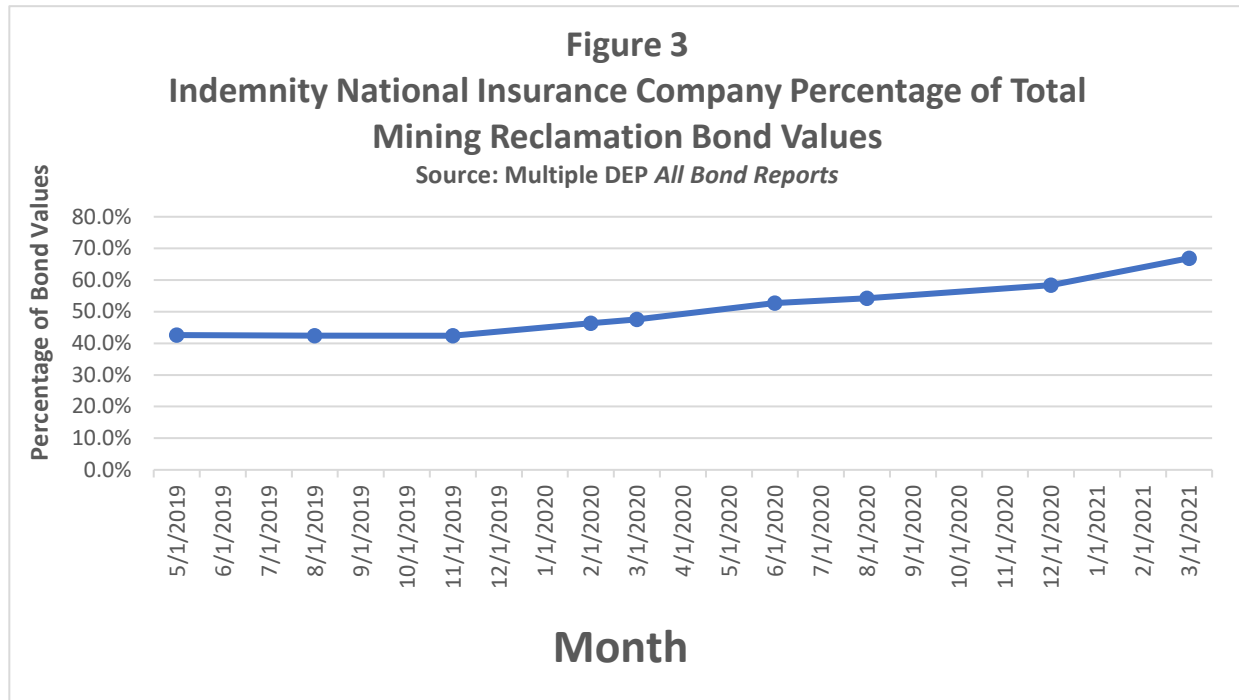
Sources: DEP's March 2021 All Bond Report; Alpha Natural Resources Bankruptcy Filings; March 26, 2020 Lawsuit Filed by DEP; Assorted News Articles.

The companies listed in the preceding table account for \$571.2 million of the \$620 million of the West Virginia mining reclamation bonds underwritten by Indemnity. All but four of the companies listed have experienced financial difficulty. The remaining companies underwritten by

Indemnity have either directly experienced some sort of financial difficulty or are affiliated with companies that have experienced past, or are experiencing current, financial distress.

ERP had approximately \$125 million in reclamation bonds underwritten by Indemnity. In March 2020, ERP pulled all employees off the job and abandoned all permitted mine sites. On March 26, 2020, the DEP filed a temporary restraining order requesting the Court appoint a special receiver for ERP. This filing provides an avenue for the DEP to avoid calling ERP’s reclamation surety bonds. Calling all the bonds is not a viable option for the DEP as Indemnity would almost certainly not be able to meet its surety obligations. Due to forfeitures and the sale of some assets, ERP’s reclamation bonds were reduced to \$83 million as of December 3, 2020.

Indemnity’s surety liability increased from approximately \$450 million as of March 31, 2020, to approximately \$620 million as of March 29, 2021 as shown in Figure 3 below. This increase occurred **after** Indemnity was named in the DEP’s lawsuit that commented in detail on Indemnity’s financial instability and noted a forfeiture of one company’s permits would bankrupt the surety company. Nevertheless, the DEP approved Indemnity’s underwriting increase of approximately \$170 million in mining reclamation bonds.



Surety companies whose bond portfolios include significant portions of available equities in reclamation bonds have an increased risk of becoming insolvent if such bonds were to be forfeited. If this were to occur, the situation would result in two adverse outcomes:

- (1) If the surety is unable to honor forfeited bonds the resulting shortfall would need to be supplemented by the DEP and the state through the use of the SRFs; or**
- (2) Permit holders bonded by the surety, but not involved in forfeitures, would be required to promptly elicit another surety company to provide reclamation bonding.**

Regarding the second outcome, premiums and risk acceptability of surety companies differ, which may complicate a mining company's ability to find a surety willing to underwrite the company's reclamation bonds. There is also the possibility Company A may have reclamation bonds underwritten by a surety company that has been bankrupted due to forfeitures of Company B. If then Company A declares bankruptcy before obtaining another surety the state's liability would be further increased.

It is the opinion of the Legislative Auditor that these are indicators of an increased risk that the state would be responsible for the reclamation costs associated with these companies through the SRFs. Companies that are permitted to issue surety bonds without limitation expose the SRFs to potentially large liabilities that could result in the insolvency of the funds. As the SRFs hold approximately \$190 million, any mass forfeiture would result in hundreds of millions of dollars in cleanup costs in excess of the SRFs. If one or more surety companies are unable to meet surety obligations, the funds would be strained even further as the DEP would be unable to collect on the forfeited reclamation bonds underwritten.

Surety bonding is the preferred method of surface coal mining reclamation bonding in WV as they comprise approximately 97% of all reclamation bonds. If a coal mining company's permit is revoked and the bond is forfeited, the surety company that issued the reclamation bonds must either complete site reclamation or remit payment to the DEP for the bond. As surety companies issue more bonds, the companies' potential liabilities increase. Indemnity National Insurance Company increased its bond issuances from \$450 million to \$620 million in one year—even after the DEP filed a request to obtain a special receiver, preventing the surety company from insolvency if ERP was forced to forfeit its bonds. Indemnity insures multiple large mining companies. Therefore, one major adverse event or forfeiture could render the SRFs insolvent. The risk to the SRFs is further increased if one or more surety companies would be unable to pay bond obligations to the DEP. As such, the Legislative Auditor questions the prudence of allowing surety companies to issue reclamation bonds without limitations on both the aggregate and single bond amounts.

Recommendation:

- 2.1 The Legislative Auditor recommends the Legislature consider amending W.Va. Code §22-3-11 by imposing maximum thresholds on the face value of reclamation bonds permitted to be underwritten by a single surety company. Such limits should include both single bond issuances as well as the company's aggregate issuances of reclamation bonds.

Issue 3: The DEP Does Not Require Coal Companies to Maintain Bonds Equal to the Estimated Reclamation Cost as Required for Inactive Extensions. Further, the DEP Does Not Ensure that Applications for Inactive Status Extensions are Complete and Accurate as Required by Legislative Rule 38 CSR 2-14.11 and the Code of Federal Regulations 30 CFR §816.131.

For permittees to obtain inactive statuses, permits must meet certain requirements and criteria at both the state and federal level. Inactive status allows coal companies to cease mining and reclamation operations for longer than 30 days. The West Virginia Surface Mining and Reclamation Legislative Rule 38CSR2 14.11 addresses the state-level requirements for obtaining inactive status. These requirements include the permittee having no outstanding violations and penalties, maintaining a well-secured site, having proper bonding for disturbed areas, and continuing with contemporaneous reclamation of permit sites. However, the most essential requirement is a “...*detailed showing by the permittee that the cessation is necessary because of temporary market conditions which are likely to change in the period for which the temporarily inactive status is sought...*”

W.Va. Code §22-1-3 provides the DEP with the “...*power and authority to propose legislative rules for promulgation...to carry out and implement the provisions...*” of Chapter 22. The DEP issues various categories of mining permits including *Surface Mining Permits*, *Underground Mining Permits*, and “*Other*” Permits. Permits categorized as “*Other*” include permits for *Coal Refuse*, *Preparation Plants*, and *Loadouts*. There are 160 *inactive permits* documented in DEP records as of December 2020, and the total bond amounts held by these *inactive permits* total \$72.2 million. This amount comprises \$11.2 million for *underground permits*; \$39.7 million for *surface mining permits*; and \$21.3 million for “*other*” permits.

According to the OSMRE-approved WV Coal Surface Mining Rule 38CSR2, Sections 14.11.d., 14.11.e., 14.11.f., and 14.11.g. **within the bounds of established bonding requirements for active permit statuses**, the Secretary of the DEP can grant inactive statuses to mining permits not to exceed the following durations for each of the following categories of permits:

- A. Surface Mining Permits: *Not to Exceed Three Years Unless the Permittee Can Show an Extension is Necessary by Reason Of:*** (1) Litigation precluding reactivation of the site; (2) Labor strikes; **or** (3) Substantial equipment necessary for extraction, e.g. draglines, shovels, etc., remain on the site and are being maintained in working order.
- B. Coal Refuse Permits: *Not to Exceed Ten Years.***
- C. Preparations Plants and Load-Out Facilities: *Not to Exceed Ten Years.***
- D. Underground Mining Operations: *Remaining Permit Term Plus Five Years:*** Considering 14.11 limits the initial granting of inactive statuses for underground mines to one-half the permit term and permit terms are five years, the maximum inactive status set by the rule, within established bonding requirements for active permits, is seven and one-half years.

The Legislative Auditor analyzed the 160 inactive permits in the DEP’s records and found a total of 61 permits with “*approved inactive*” statuses that exceeded the timeframes outlined above: including 34 underground permits, 20 surface mining permits and seven “*Other*” permits. Of these 61 inactive permits, 26 permits have been inactive for over ten years with nine of the 26

permits inactive for over 20 years. According to DEP records, the longest period a permit has remained inactive is 28 years.

56 of 61 Inactive Permits are Not in Compliance with Full Cost Bonding Requirements for Inactive Status Extensions.

To obtain an **extension** to inactive status beyond the timeframes stipulated in Section 14.11 of 38CSR2 for Preparation Plants, Load-out facilities and Underground permits, Section 14.11.h of the rule requires the permittee to “... *furnish and maintain bond that is equal to the estimated actual reclamation cost, as determined by the Secretary.*” **However, only five of 61 “Approved Inactive” permits are currently bonded at full cost resulting in 56 of the inactive status permits being in noncompliance with the rule.**

The bond amounts held for the 56 inactive status permits total approximately \$31 million (that includes \$4.4 million for underground permits, \$25.9 million for surface permits and \$0.7 million for other permits). **Forfeited bonds have only covered approximately 10% of the total reclamation cost** according to an historical analysis performed by the Legislative Auditor based on the reclamation cost data provided by the DEP. Therefore, based on this historical analysis, if permit holders for these 56 sites forfeit on the obligation to reclaim the permit sites and bond amounts would only cover 10% of the total reclamation cost, **potentially 90% of the reclamation cost, or approximately \$279 million, would need to be provided from monies maintained in the SRFs.**

At Least 15 Surface Mining Permits are Not in Compliance with Requirements for Granting Extensions to Inactive Statuses.

The Legislative Auditor found at least 15 surface mining permits were granted inactive status extensions despite not meeting **any** of the criteria for inactive extensions as outlined in the OSMRE-approved Surface Mining Reclamation Rule 38CSR2, Section 14.11.d,⁸ which states:

...In no event may the total time granted for inactive status for any given surface coal extraction permit be in excess of three (3) years, provided, That further extensions may be granted on the basis of showing by the permittee that such extension is necessary by reason of:

14.11.d.1. Litigation precluding reactivation of the site;

14.11.d.2. Labor strikes; or

14.11.d.3. Substantial equipment necessary for extraction, e.g. draglines, shovels, etc., remain on the site and are being maintained in working order.

Four Refuse Mining Permits are Not in Compliance with Requirements for Granting Extensions to Inactive Statuses.

In addition, four coal refuse sites were granted extensions exceeding the ten-year maximum specified in 38CSR2 14.11.g, which delineates the requirements for obtaining inactive statuses for coal refuse sites. However, the rule provides for **no extensions** beyond the ten years stipulated in Subsection g which states:

⁸ The rule has been amended by the Legislature for an effective date of July 1, 2020; however, this amended rule has not been approved by the OSMRE and, therefore, is not enforceable.

...The Secretary may grant inactive status for a period not to exceed ten years for coal refuse sites. Provided, the completed lifts of the coal refuse site is regraded (which may include top soiling), seeded and drainage control (e.g. diversions etc.); where possible, have been installed in accordance with the terms and conditions of the permit.

Non-Compliance with Notification Requirements for Temporary Cessation of Activity

When a permit holder is applying for temporary cessation of activity beyond 30 days, Code of Federal Regulations 30 CFR §816.131(a) requires the permit holder to “...*effectively secure surface facilities in areas in which there are no current operations...*” and 30 CFR §816.131(b) requires permit holders to notify the regulatory authority (DEP) a notice of the intent to cease mining operations. The notice is required to include, “...*a statement of the exact number of acres which will have been affected in the permit area, prior to such temporary cessation, the extent and kind of reclamation of those areas which will have been accomplished...*”

Since data for all requirements necessary for the granting of *inactive statuses* were not included with the records made previously available by the DEP, a separate request was made for records documenting permit holder notification requirements for inactive statuses. In June 2020, the DEP provided such documentation on 100 applications for *Inactive Status*.

The *notice of intention to cease statement* completed and submitted by the permit holders of these 100 permits had the following noncompliance issues:

- The notices for 31 permits failed to indicate whether the mining sites were adequately secured;
- The notices for 87 permits did not include the exact number of affected acres; and,
- The notices for 53 permits failed to indicate the kind and extent of reclamation accomplished in the mining areas.

Based on the documentation provided by the DEP, the Legislative Auditor found eight permits with outstanding violations and/or penalties when inactive statuses were granted by the DEP resulting in non-compliance with the Code of State Rules. Legislative Rule 38CSR2, *Section 14.11.a*, states in part:

A permittee may not cease mining and reclamation operations for a period of thirty (30) days or more unless the Secretary finds in writing that all the following requirements have been fully satisfied:

*14.11.a.1. The site is in full compliance with all standards of the program and permit, including but not limited to contemporaneous reclamation, **no outstanding violations or penalties exist**, and adequate pictorial and narrative description of site conditions to date has been placed in the file;...**(emphasis added)***

Use of Unapproved and Undefined Permit Statuses

The Legislative Auditor found that of 1,003 permits listed as “*Active*” in DEP’s records, 320 permits were listed as “*Active No Coal Removed*.” According to DEP records the total reclamation bond amount posted for these 320 permits totaled approximately \$148.9 million. These mining statuses are neither defined in federal or state code nor in DEP’s rules or policies. **Since such statuses are neither authorized nor defined, the Legislative Auditor questions**

whether these 320 permits are active and, if not, whether the use of such undefined statuses is a method for circumventing the requirements for the posting of full cost reclamation bonding for Inactive Status Extensions and/or as a means of avoiding or delaying the commencement of permit site reclamation.

The coal industry has suffered a downturn in recent years resulting in many coal companies not actively extracting coal even though these companies remain listed as having “*Active*” permits by the DEP. WV coal production in 2019 was approximately 77.5% of what it was in 2012. When many of the currently inactive sites obtained inactive status, coal production was substantially higher in comparison to recent years.

Also, during this period there has been a practice of the DEP moving permit statuses from “*Approved Inactive*” to “*Active No Coal Removed*.” For example, for the twelve-month period of January 2020 through December 2020, the Legislative Auditor identified 55 permit statuses that were documented as changed from “*Approved Inactive*” to “*Active No Coal Removed*.”

WV Surface Mining Reclamation Rule 38CSR2 14.11.a.6., dictates that applications for inactive status are to be granted, “...*based on a detailed showing by the permittee that the cessation is necessary because of temporary market conditions which are likely to change in the period for which the temporarily inactive status is sought.*”

Marshall University’s Center for Business and Economic Research (CBER) projects the market’s decline to continue into the foreseeable future. Due to the recent history of the coal market and Marshall’s CBER projection, it would seem probable that the coal market will not return to the production levels of when many of the currently inactive sites obtained *inactive status*. As such, market conditions may result in a significant number of currently inactive sites never returning to *active status* and resuming production.

As a result of the DEP not requiring the full cost reclamation bonds be posted as required by 38 CSR 2-14.11, **there is a potential shortfall of approximately \$279 million in bonding on inactive sites** assuming the bonds cover only 10% of the total reclamation cost. **There are 61 sites which have exceeded the initial allowable period a mine may remain inactive.** Permit holders may request an extension beyond this period provided the companies provide full cost bonding, but only five of these 61 sites have full cost bonds. Twenty-six (26) sites have been inactive for more than ten years, which includes nine permits that have been inactive for more than twenty years. This cessation of activity increases the risk of harmful environmental events such as flooding or landslides and may harm local communities and businesses by reducing the number of jobs in an area.

Recommendation:

- 3.1 The Legislative Auditor recommends the DEP comply with the WV Surface Mining Reclamation Legislative Rule 38CSR2, Section 14.11, the Code of Federal Regulation 30 CFR §816.131-Cessation of Operations, and W.Va. Code §22-1-6(c) by:
 - a) Requiring mining permit holders submit reclamation bonds equal to the estimated reclamation cost for permit sites prior to granting extensions for inactive statuses;
 - b) Verifying that applications for extensions to inactive statuses are complete and accurate before such extensions are considered;

- c) Ensuring permits do not remain inactive for periods longer than what is permissible as delineated in 38CSR2, Section 14.11; and,
- d) Ensuring that all mine status categories are properly defined by state statute or rule and that such categories are only implemented for use after consultation with and approval of the OSMRE.

Issue 4: Reclamation Awards That Result in Decreased Bonding Amounts May Increase the State’s Liability for Mining Reclamation and Potentially Contribute to the Insolvency of the Special Reclamation Fund. Additionally, the DEP Does Not Maintain a Complete Record of Companies That Have Received Reclamation Awards Resulting in Bond Reductions or the Reduction Amounts Received.

The DEP considers several different factors, including reclamation awards, when calculating coal mining reclamation bond amounts. Reclamation awards are “...*recognition for excellence in reclamation through local and/or national awards, from awards programs sanctioned by a regulatory authority...*” The awards are presented by organizations recognized by the DEP and are often presented at events such as symposiums.

Reclamation awards considered by the DEP can be local or national, with national awards resulting in a larger discount. The WV Coal Association holds annual symposiums where it issues reclamation awards in various categories, resulting in awards mining companies may submit for a state-level reduction. The OSMRE is an example of an organization whose awards are accepted by the DEP for national reductions. In response to a Legislative Auditor request, the DEP listed several organizations from which it accepts reclamation awards. The DEP further stated that:

...38CSR2-11.5 allows for the bond reduction to be granted for local or national awards from award programs sanctioned by any regulatory authority as defined by Public Law 95-87. Therefore, WVDEP evaluates this on a case by case basis....

The DEP provided a listing of seven entities that historically have granted reclamation awards as follows: DMR in conjunction with the WV Coal Association, Interstate Mining Compact Commission, the OSMRE, National Wild Turkey Federation, Ducks Unlimited, WV Society of American Foresters, and the Appalachian Region Reforestation Initiative.

Legislative Rule 38CSR2, Section 11.5 establishes a bond matrix which the DEP and the mining and reclamation companies use to determine the bond per acre rate. The matrix provides for companies to receive bond reductions for reclamation awards. Depending on the type of permit, as well as the number and type of awards, the face value required for surety may be reduced up to \$600 per acre per bond. One bond reduction for one permit reduced the required bonding by \$527,400. This permit originally contained 879 acres and received a reduction of \$600 per acre. If this permit holder were to default on its obligation to perform reclamation of the permit site once mining operations cease, there would be over a half a million dollars less of available funds provided by reclamation bonds to supplement the cost of reclamation paid from the SRFs.

Given that reclamation awards can result in such a large reduction in a bond amount, the Legislative Auditor performed an analysis of all permits that currently utilize a reclamation award. As a result, the audit team requested a record of the companies that have received awards and the corresponding bond reductions applied in calculating the required bond amounts for the award recipients. The DEP responded by stating:

This would need to be done on a permit by permit case. We do not have a definitive list of companies who have received awards; therefore, we require documentation in the permit application seeking the reduction. Similarly, we would have to look at each permit specifically to see how awards are applied, if at all. Since it the [sic]

company's responsibility to fill out the bond matrix and provide documentation, it is possible different permits issued at different times may have used different criteria on the matrix, depending on how many awards they had at the time of review.

As a result of this information, the Legislative Auditor concludes the DEP does not maintain a record of organizations that grant reclamation awards. Also, the DEP does not keep full records of those companies that have received awards, nor does it keep track of all acceptable reclamation award issuers. **Further, in an October 28, 2019 response to a Legislative Auditor request, the DEP acknowledged the agency does not keep a complete record of the bond reductions resulting from reclamation awards.**

While the DEP does not maintain a sufficient way to track and record reclamation awards, this information may still be identified within the DEP's record of bond matrices by reviewing individual permits. Utilizing this data, the Legislative Auditor was able to perform two analyses for the purpose of gauging the effects of the utilization of reclamation awards. The first analysis attempted to determine the current actual reductions from awards applied to permits, while the second analysis identified reductions for 231 permits and then projected reductions across all eligible permits held by companies with known reclamation awards.

The analysis of current reductions identified 52 companies with at least \$14.4 million in active bond reductions amongst 233 permits with a total of 533 reclamation bonds. The largest reduction was for approximately \$527,000. As every eligible permit does not have a reclamation bond reduction applied, the Legislative Auditor estimated based on the application of companies' largest known per acre reduction to every eligible permit. This analysis estimates reclamation bonds could potentially be reduced by \$85.7 million via reclamation awards. Approximately 2,039 bonds would be eligible for reduction amongst 52 companies.

Another concern pertaining to reclamation awards is mining and reclamation companies may use the same reclamation award indefinitely for every permit associated with that company. For example, an award issued for one mining site in 2002 may be used on all mining sites owned by the company today. Additionally, these reductions remain on a permit even if the permit is to change ownership. For instance, if Company A has a permit with an award reduction and Company A then forfeits the bond for said permit, Company B may now take over the permit and utilize the reduction.

In an October 28, 2019 response, the DEP informed the Legislative Auditor of two companies with reclamation award reductions that had forfeited bonds. An analysis of forfeited permits, provided by the DEP on January 21, 2020, determined these two companies had forfeited 41 permits of which 31 required reclamation expenditures by the DEP, seven were transferred via the tax credit program, two had bond collections pending, and one achieved phase release.⁹ On June 30, 2020, the DEP provided copies of reclamation awards and the bond matrices used for nine of the 41 permits. Through a review of the reclamation awards it was identified that the nine permits had \$453,480 in bond reductions on 1,019 acres. The bonds collected for these permits totaled \$952,880, with reclamation costs exceeding \$4.5 million. The DEP had expended \$18.6

⁹ Reclamation occurs in phases. Phase I is complete after backfilling, regrading, and drainage control is finished. At this point, 60% of the bond is released. Phase II is complete after revegetation has been completed. Phase III is completed when reclamation is completed successfully. All remaining bond is released at this point.

million from the SRFs in reclamation costs for all forfeited permits for these two companies. The DEP's records show reclamation is ongoing for four of these permits, so it is reasonable to assume additional reclamation costs will persist for these sites.

Reclamation awards may incentivize and reward companies that are historically less likely to forfeit a bond. However, because the DEP does not have an adequate way to track and record these awards, the audit team was unable to determine to what extent reclamation awards impact the solvency of the SRFs. Further, improper recordkeeping makes it difficult to ascertain whether discounts are applied accurately and properly. A lack of such records may result in a scenario where a company, that has not received an award, nevertheless, benefits from a bond reduction. For example, if Company X owns a permit and has earned and submitted a reclamation award, Company X will receive a reduction on its eligible permits. If Company X then transfers the permit to Company Y, this reduction should be removed unless Company Y submits its own reclamation awards. However, due to a lack of proper tracking of reclamation award recipients it is plausible that these awards are improperly attributed to a company that did not actually receive the award resulting in improper bond amounts.

Also, a lack of such records precludes an audit of bond reduction calculations since there is no practical method of determining those companies that received permit bond reductions resulting from reclamation awards. A record of coal companies that received awards would allow for a reconciliation with the applied bond matrices and calculated bond rates to verify that bond reductions were applied correctly. Incorrectly applied awards could result in permits being bonded at improper amounts. **If a permit has an incorrectly applied award resulting in under bonding, a permit forfeiture will increase the reclamation liability of the DEP. As the matrix allows for reductions up to \$600 per acre and some permits are bonded for hundreds, or in some cases, thousands of acres, the added liability to the state could reach over a million dollars for a single permit forfeiture.**

Further, determining precisely how much available funding is diminished as a result of reclamation awards is indeterminable given the fact that the DEP does not maintain suitable records of bond reductions or the reclamation awards for which the reductions are attributable. Therefore, in the opinion of the Legislative Auditor the DEP is not in compliance with the state's recordkeeping requirements of W.Va. Code §5A-8-9, which states in part:

...(c) Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities;...

Data collection is the objective pillar for measuring the costs of a program, as well as the extent to which a program achieves its intended goals. Since rudimentary data regarding the reclamation awards program has not been captured and compiled into a usable format, neither the audit team nor DEP management can perform a results analysis of the program. Such fundamental records should include:

- **A Listing of Companies Which Issue and Receive Reclamation Awards:** This would allow the DEP to easily track and record the transfer of awards when permits utilizing the awards are sold or purchased among different mining companies. Further, collecting this data would allow the DEP to historically see which companies issue and receive

reclamation awards and if the awards properly incentivize or reward companies that are less likely to forfeit a bond.

- **The Amount of Bond Reductions Resulting from Awards:** This would allow the DEP to create a database to track and account for all bond reductions resulting from reclamation awards. This information then could be used to quickly calculate the total amount of awards issued or to project how much additional strain would be placed on the SRFs if companies utilizing reclamation awards were to forfeit reclamation bonds.

In conclusion, reclamation awards provide an incentive for companies to perform reclamation, but such incentives come with the added risk of bond forfeiture revenues being limited in the event a company with reclamation award bond reductions forfeits its bonds. Millions of dollars of bond reductions have already been given. The DEP also does not maintain detailed records of the companies issuing reclamation awards or a listing of companies receiving awards. The lack of record keeping may allow bias in the reclamation award reduction approval process and allow for companies to receive unwarranted reductions.

Recommendations:

- 4.1 The Legislative Auditor recommends the DEP comply with W.Va. Code §5A-8-9 and develop a system to track and maintain a record of all reclamation awards submitted by coal companies including, but not necessarily limited to, a listing of all companies to whom the awards were given, the specific permits that received bond reductions resulting from awards, the amount of bond reductions resulting from the awards in the aggregate and for each individual permit, and the organizations from which the awards were received. The Legislative Auditor further recommends the DEP establish minimum eligibility requirements for entities that grant reclamation awards.
- 4.2 The Legislative Auditor recommends the DEP analyze the effect of accepting reclamation awards as a mechanism to reduce reclamation bonding; particularly, as it pertains to the solvency of the Special Reclamation Funds. It is further recommended the DEP report the results of this analysis and its methodology to the Post Audits Subcommittee no later than November 30, 2021.

Issue 5: According to the State Tax Department, as of May 21, 2021, 70 Mining Companies That Filed Coal Reclamation Tax Returns Had Delinquent Coal Reclamation Tax Accounts Totaling \$5.3 Million.

On March 30, 2020, the Legislative Auditor requested the State Tax Commissioner provide a current listing of those mining companies that are delinquent in the payment of the Special Reclamation Taxes along with the aggregate amount of all delinquencies. The State Tax Commissioner's April 8, 2020 letter in response to this request is quoted in part as follows:

...As of Wednesday, April 1, 2020 coal companies who filed a Coal Reclamation tax return owed \$4,863,202.78 to the West Virginia State Tax Department. This can be seen in further detail on the attached report. Please see Attachment 2-Delinquent Coal Reclamation Accounts.

The total liability of \$4,863,202.78 can be broken into various categories. A portion (39%) of the total liabilities are current liabilities and relate to the recent periods [redacted]. A large portion of the remaining total liability (35%) was estimated by the Department for year [redacted] and relates to companies that ceased operation in [redacted]. Liabilities estimated by the Department tend to be high in order to get the taxpayer's attention and may not be reflective of actual liabilities. Another portion (12%) of the total liability is related to companies that are bankrupt. Another portion (7%) are from businesses that are dormant or have ceased business. The remainder to the total liability (7%) relates to liabilities from [redacted] ... (emphasis added)¹⁰

In a February 28, 2020 letter, the State Tax Commissioner described the information provided by the State Tax Department to the DEP regarding Coal Reclamation Tax Delinquencies:

*...Tax provides a **Delinquency/Non-filer report to the DEP monthly that incorporates all information necessary to determine whether a company is delinquent in the payment of coal reclamation taxes...**(emphasis added)*

The Legislative Auditor reviewed the tax delinquencies detailed in the State Tax Department's *Delinquent Coal Reclamation Accounts* report that was included as an attachment to the State Tax Commissioner's April 8, 2020 letter. For each company with a reclamation tax delinquency, the report listed the amount of the unpaid tax by the tax month for which it was accrued, as well as the combined amount due for each company as of the report date. The Legislative Auditor subsequently requested updated numbers, and the following information was provided on May 21, 2021.

The report listed a total of 70 different companies with reclamation tax delinquencies that had accrued over a 16-year period from December 2004 through April 2021. However, ten companies are responsible for 80% of the \$5.3 million in total reclamation tax delinquencies. These companies comprise a significant portion of the total surety bonds held by the state.

¹⁰ Sections redacted by the Legislative Auditor in order to ensure compliance with taxpayer confidentiality requirements pursuant to W.Va. Code §11-10-5d.

The Legislative Auditor determined there are two primary causes contributing to the significant reclamation tax delinquencies reported by the State Tax Department:

(1) DEP Has Not Complied with the Existing Statute and the DEP Policy Enacted to Encourage Payment of Reclamation Taxes.

W.Va. Code §22-3-11(l) states in part that “...[t]he secretary may take the delinquencies into account in making determinations on the issuance, renewal or revision of any permit....” Further, Page 43, Section G of the DMR’s *Permitting Handbook* stipulates that the DEP is to review the monthly reclamation tax delinquency report provided by the Tax Department’s *Excise Tax Unit* prior to approval of a company’s application for a new or revised mining permit. Section G of the handbook states in part that “...[i]f the report indicates applicant noncompliance, the application will not be approved until compliance is achieved....”

The Legislative Auditor compared the State Tax Department’s *Delinquent Coal Reclamation Accounts* report to the permitting activities as documented in the DEP’s records accessible from the DEP’s website. **Through this analysis it was determined that during an approximate 11-year period from January 2009 through June 2020, there were a total of 138 instances where the DEP approved applications for mining permit issuances, renewals, or revisions for companies that had reclamation tax delinquencies.** Approval by the DEP of permit revisions when a company had a tax delinquency of two months or less were not included in the total as it is understood that any given month’s delinquency will not be reported by the Tax Department to the DEP until the conclusion of the month to which the delinquency was ascribed.

Of the 138 improper approvals, a total of 106 instances included a checklist form in the DEP’s records that was intended to be used by the DEP permit reviewers as a tool to confirm if applicants met the requirements necessary to receive approval. Line 14 on the checklist form asks the permit reviewer if the applicant is “[o]n the delinquent list for special reclamation tax.” Nevertheless, the permit reviewer approved the 106 applications despite the fact all the applicants had tax delinquencies. In response to line 14 on the forms, the permit reviewer **did not answer** the question on 29 occasions, indicated there **was** a tax delinquency on 16 occasions, and indicated there was **no** tax delinquency on 61 occasions even though the applicant did have a delinquency. The Legislative Auditor questions whether the improper notation of “no tax delinquency” for the 61 applicants was done intentionally, as well as questions the judgment to approve permits for the 29 instances where the reviewer did not answer the question and the 16 instances where a tax delinquency was indicated. A total of 20 different companies were the recipients of DEP’s 138 improper permit approvals. The Legislative Auditor is unable to provide more detailed information on the specific companies these delinquencies are attributable to as the Tax Department has indicated doing so would violate W.Va. Code § 11-10-5d(g), which is meant to protect the taxpayer/company’s identity even when there is a delinquency present.

(2) The Enforcement Methods Provided for in Statute and Policy Enacted to Encourage Prompt Payment of Reclamation Taxes Are Inadequate.

W.Va. Code §22-3-11(l) and Section G of the DMR’s *Permitting Handbook* do not provide for an adequate course of action to ensure reclamation taxes are remitted in a timely and efficient manner to the State Tax Department. The statute grants the Secretary the authority to consider reclamation tax delinquencies in determinations regarding the issuance, renewal, or revision of a mining permit. Additionally, the handbook provides that permit applications are not to be approved if a company is delinquent in its payment of reclamation taxes. However, no additional

enforcement methods are stipulated in either the statute or the handbook. Mining permits are required to be renewed after five years. **Therefore, unless a company undergoes a permit revision or applies for a new permit, it is possible for a company to accrue reclamation tax delinquencies for five years before the handbook requires that measures be undertaken to collect the unpaid taxes.** As a result, the company could possibly continue unabated operations despite having significant outstanding reclamation tax delinquencies due to the State Tax Department.

The previously described scenario is not just hypothetical as such occurrences were noted by the audit team. According to the State Tax Department, reclamation tax delinquencies totaled \$5.3 million as of April 2021. When mining companies fail to remit reclamation taxes in a timely manner, the SRFs lose potential revenues as well as future investment earnings. Additionally, those companies that are actively mining without paying reclamation taxes pose the greatest risk to the solvency of the reclamation funds given a delinquent company could forfeit its reclamation bonds placing the financial responsibility of reclamation on the DEP and the SRFs.

Further, the ability of companies to acquire permit renewals, permit revisions, and obtain inactive statuses while being delinquent provides little incentive for companies to pay Special Reclamation Taxes on time. It also disadvantages those companies that are meeting tax obligations. Lastly, the uneven enforcement generally weakens the ability of the DEP to apply prompt payment measures to limit the accumulation of sizable Special Reclamation Tax delinquencies.

Recommendations:

- 5.1. The Legislative Auditor recommends the DEP comply with the DMR *Permitting Handbook* and **not** approve applications for permit renewals and revisions or grant inactive statuses for companies found delinquent in paying Special Reclamation Taxes.
- 5.2. The Legislative Auditor recommends the Legislature consider amending W.Va. Code §22-3-11(1) to require the DEP monitor, on a monthly basis, the State Tax Department's reclamation tax reports and identify those companies that are delinquent in the remittance of reclamation taxes.
- 5.3. The Legislative Auditor recommends the Legislature, in conjunction with the DEP, consider establishing procedures within statute that would allow the DEP to impose actions such as the revocation of a company's mining permit in the event a company fails to properly file a tax return, a company's unpaid tax delinquencies exceed a stipulated amount, or a company's tax delinquency exceeds a specified duration to compel more prompt payment of special reclamation taxes and ensure the collection of those taxes.

Issue 6: The DEP Does Not Collect Data on Coal Tonnage Mined in the State. If Such Data Were Obtained, the DEP Could Substantiate that Mining Companies are Properly Remitting Reclamation Taxes as Such Taxes are Critical to the Long-Term Solvency of the Special Reclamation Funds.

The state's *Surface Mining and Reclamation Act* is codified as Chapter 22, Article 3, of the W.Va. Code. Section §22-3-2 vests jurisdiction for the Act with the DEP. As such, **the DEP is responsible for enforcing the rules promulgated pursuant to the chapter and ensuring the state adheres to requirements of the federal Surface Mining Control and Reclamation Act of 1977, as amended.** Confirming the state has adequate funding for its reclamation program is a fundamental responsibility of the DEP and is an essential component of federal mining reclamation law. The DEP not obtaining coal tonnage information may result in situations in which the DEP cannot identify and correct issues that may adversely affect the long-term solvency of SRFs.

The Special Reclamation Tax is the **primary** source of funding for coal mine reclamation when sites are forfeited. The tax rate of 27.9 cents is applied to each ton of coal mined within the state. It is vital to the state's ability to reclaim land. Coal companies that fail to pay the full amount of reclamation taxes due deprive the special reclamation funds of much needed revenue. Further, the SRTF and SRWTF assets are invested. If mining companies fail to remit proper amounts for reclamation taxes, less money is available for investment earnings further diminishing revenues for the state's reclamation program.

The Legislative Auditor asked the DEP how it reconciles its records with the State Tax Department's regarding the remittance of Special Reclamation Taxes. The DEP responded as follows:

The DEP continues to rely on the internal controls of the State Tax Department to ensure the correct amounts are deposited into the appropriate funds. Agency staff does not consider available information sufficient to complete a reconciliation. As a compensating measure, DEP reviews money collected by the Tax Department and transferred to DEP for reasonableness, based on previous collections.

Reviewing previous collections may allow the DEP to partially reconcile deposited funds, but several factors limit the effectiveness of this measure. Permits may experience events such as bankruptcy, transfer, status changes (especially to and from inactive status), coal demand, and other situations that increase volatility in coal production. This volatility diminishes the efficacy of reconciliation based solely on previous collections.

In the 2012 Post Audit reports on the SRFs, the Legislative Auditor noted the DEP lacked proper records of coal tonnage mined in the state. If such data were collected by the DEP, the DEP could reconcile the tonnage mined to the amount of reclamation taxes collected by the State Tax Department. The data would provide a useful tool in determining if the aggregate remittances of reclamation taxes by coal companies is analogous to the aggregate amount of coal mined for any given period. The proper remittance of reclamation taxes is critical to the long-term solvency of the state's reclamation program as the taxes are the primary funding source for reclamation of forfeited mining permit sites.

It should be noted the State Tax Department does conduct audits on companies mining coal to verify proper remittance of reclamation taxes. These audits use methods such as reconciling sales invoices with the measured weight of coal trucks for a particular company to determine the

accuracy of the Special Reclamation Tax remitted by the company. Upon inquiry, the State Tax Department stated the following regarding the frequency of reclamation tax audits:

A coal reclamation tax audit would be conducted any time we conduct a coal severance tax audit. Severance tax audits take a long time to complete so we typically have a few a year that we do in the severance area, depending on the focus between the different severance activities (coal, oil and gas). One year may be a focus on coal, the next it may be oil and gas depending on changes in legislation, industry trends that change how the taxpayer operates (for example oil and gas moving from vertical wells to horizontal), or occasionally the very rare request for an audit by the taxpayer.

Although the State Tax Department does employ auditing procedures to verify the remittance of reclamation taxes, the measures employed are limited. If the DEP enacted an auditing procedure whereby the coal tonnage mined in the state was reconciled to the taxes remitted for a given period, the DEP could significantly bolster the confidence that reclamation taxes are being paid as required by law. Should it be determined that tax remittances are not reasonably commensurate to tonnage mined, the DEP could perform additional procedures on a micro-level to determine the specific reason for the inconsistency.

Several statutes indicate the DEP should take a more proactive role in maintaining records and performing reconciliation of coal tonnage, including:

- The Secretary has within his jurisdiction all areas of the state, and he shall administer the provisions of the surface coal mining and reclamation code (W.Va. Code §22-3-4.a). The Secretary is responsible for all code and regulations pertaining to mining. Several statutes require proper management of the SRFs, and any weaknesses in administering the surface coal mining and reclamation program could result in the federal government claiming jurisdiction.
- A requirement that the Secretary may approve an alternative bonding system if it reasonably assures that sufficient funds will be available for reclamation (W.Va. Code §22-3-11.c.2). The authority to implement the alternative bonding system is predicated on the Secretary's ability to verify the availability of funds. A lack of reconciliation prohibits the Secretary from performing proper analysis of the SRFs.
- A requirement that permit applications include anticipated annual and total coal production (38CSR2 3.6.a). Proper reconciliation allows the Secretary to verify whether this information is accurate, and provides the Secretary with information that may be used in future determinations.
- The Secretary shall conduct formal actuarial studies and conduct reviews on the SRFs (W. Va. Code §22-3-11.i.2). Adequate recordkeeping and reconciliation enhances the Secretary's ability to conduct proper studies and reviews by improving accuracy and increasing the likelihood mistakes may be caught.
- The Secretary advises the State Tax Commissioner and Governor of the assets of the funds (W.Va. Code §22-3-11.n). A lack of reconciliation inhibits the Secretary's ability to accurately advise the State Tax Commissioner and Governor and may adversely affect decisions made based on unverified data.

As stated earlier, the reclamation tax is the most critical component of available funding for the state's reclamation program. Therefore, it stands to reason that all practical measures to safeguard and maximize this funding should be applied by the DEP. Data on coal tonnage would provide the Secretary with beneficial information that could assist the Secretary in fulfilling the statutory duties of the mining reclamation program. The Special Reclamation Fund Advisory Council (SRFAC) would likely also benefit from such information in its duty to "*...ensure the effective, efficient and financially stable operation of the special reclamation fund....*" A reconciliation of coal tonnage mined within the state to reclamation tax remittances would seem to be a fundamental measure to achieve these objectives.

Recommendation:

- 6.1 The Legislative Auditor recommends the DEP fulfill its responsibility under W.Va. Code §22-3-2 by developing a method to properly track coal production and periodically reconcile the production to the special reclamation taxes collected to verify the Special Reclamation Trust Fund and the Special Reclamation Water Trust Fund are properly funded.

Issue 7: The DEP and the State Tax Department Granted Several Million Dollars in Reclamation Tax Credits Prior to Tax Credit Program Receiving the Required Approval from the *Federal Office of Surface Mining Reclamation and Enforcement (OSMRE)*, in Violation of Federal Law.

Federal law requires amendments to the state's mining reclamation program receive approval of the Federal Office of Surface Mining Reclamation and Enforcement (OSMRE) prior to implementation. The Code of Federal Regulations (30 CFR §732.17) states, in part:

Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the Director as an amendment. No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.

On July 1, 2020, Legislative Services issued a legal opinion pertaining to the required approval of amendments to the state's coal mining program. The opinion stated in part:

...it is [Legislative Services] opinion that all parties are operating under the assumption that OSMRE approval is needed in order to effectuate reclamation program amendments, and that this is what needs to happen in order for such amendments to be effective.

Ascertaining the full extent to which the DEP has implemented program amendments prior to OSMRE approval would be a difficult and time-consuming undertaking. However, this audit has disclosed at least three such violations.

The first violation pertains to 38CSR2, section 14.11 changing timeframe and conditions for qualification for Inactive Statuses for permits, as was discussed in Issue 3 in this report. The second violation pertains to the DEP's non-compliance with 38CSR2, section 12.4.c, which requires reclamation to commence within 180 days of notice of forfeiture as noted in Issue 8 in this report.

The third violation pertains to the amendment of W.Va. Code §22-3-11 to establish a *Special Reclamation Tax Credit*. The DEP submitted an amendment to the OSMRE on August 14, 2013, which grants a reclamation tax credit for mining companies that assume the responsibility of reclaiming sites. The amendment was not approved by the OSMRE until March 4, 2020; nonetheless, the DEP issued several million dollars in tax credits¹¹ prior to this approval.

In July 2013, W.Va. Code §22-3-11 was amended to establish a *Special Reclamation Tax Credit* that provides for an offset of reclamation taxes due from mine operators that have assumed the responsibility of reclaiming certain mine sites when the initial mine permit holders fail to reclaim the sites and forfeit the reclamation bonds. Prior to the legislation, all such forfeited mine site reclamations were financed from the SRFs. When a company applies for the tax credit, the Secretary of the DEP provides the Tax Commissioner with records of the approximate costs DEP would have expended on the forfeited site in question. The State Tax Commissioner subsequently approves or denies the tax credit. If approved, the State Tax Commissioner issues a tax credit equal

¹¹ To ensure compliance with the taxpayer confidentiality requirements established by the *West Virginia Tax Procedure and Administration Act* (W.Va. Code §11-10-5d), the specific amount of tax credits issued cannot be disclosed in this report.

to the projected costs provided by the DEP. The costs provided are estimates based on historical data.

On August 14, 2013, the Special Reclamation Tax Credit Rule amendment to W.Va. Code §22-3-11(g) and (h) was submitted to the Federal Register. However, it appears the passage and publishing of the final rule on the Federal Register did not occur until March 4, 2020.

Upon inquiry of the DEP, the DEP stated it did not “...seek temporary approval from OSM for the Special Reclamation Tax Credits...” prior to OSRME granting final approval of the tax credit program on March 4, 2020. Regarding the submission of the Tax Credit to the OSMRE, the DEP stated the following:

...The DEP submitted an amendment to its permanent regulatory plan under SMCRA, in August of 2013 to reflect proposed legislation that provided tax incentives for mine operators who reclaim bond forfeiture sites...

The DEP stated the following regarding the implementation of the tax credit program prior to the approval of the tax credit by the OSMRE:

The State Tax Department filed a Special Reclamation Tax Credit Rule that implemented the special reclamation tax. The DEP did respond to a request from Mark S. Morton, General Counsel for Revenue Operation State Tax Department to Kristen Boggs, General Counsel for the DEP in November of 2015 relating to the [redacted] application. OSR verified the information provided by [redacted] in its application to the State Tax Department but was not involved in the decision to grant the tax credits. The State Tax Commissioner made the decision to grant the tax credits.... (emphasis added)

The statute provides a retroactive effective date for the tax credit by allowing mine operators to apply for the credit for reclamation or remediation performed on or after January 1, 2012. This statute further stipulates that to claim the credit the mine operator shall “...file with the Tax Commissioner a written application seeking the amount of the credit earned. Within thirty days of receipt of the application, the Tax Commissioner shall issue a certification of the amount of tax credit, if any, to be allocated to the eligible taxpayer....”

The implementation of the tax credit, unquestionably, represents a perceptible change to the state’s reclamation program. Nevertheless, tax credits were first granted by the Tax Department in 2015, approximately five years before the program change received OSMRE approval.

The DEP asserted, on June 3, 2020, the following regarding when changes in the state’s reclamation program are implemented:

DEP follows the federal regulation as stated at §30 CFR 732.17, “...No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.” (emphasis added)

On August 11, 2020, the Legislative Auditor issued a request to the State Tax Department to determine whether the DEP communicated to the State Tax Department that state surface mining regulatory program amendments must be approved by the OSMRE prior to implementation. When asked if the State Tax Department had knowledge of the surface mining amendment approval process, the State Tax Department responded on August 31, 2020 with the following:

...The Tax Department has no detailed knowledge of the process required by the Federal Office of Surface Mining Reclamation and Enforcement (OSM) for approval of amendments to the state's Surface Mining and Reclamation Act....

Federal Code §30 CFR 732.17 states in part that “...[t]he State regulatory authority shall promptly notify the Director, in writing, of any significant events or proposed changes which affect the implementation, administration or enforcement of the approved State program....” The DEP is the federally designated mine reclamation authority for the state. As such, **it is the opinion of the Legislative Auditor that the DEP, and not the State Tax Department, was responsible for ensuring the tax credit program was approved by the OSMRE prior to its implementation.**

Implementing program amendments before OSMRE approval is a violation of federal law. The OSMRE not only decides whether the amendments are within Surface Mining Control and Reclamation Act (SMCRA) guidelines, it also verifies the amendments fall within the guidelines of other federal agencies, such as the Environmental Protection Agency (EPA). The OSMRE also solicits public comments. This process verifies the amendments are legal and helps mitigate the probability that some amendments may be implemented that pose risks to the public welfare.

To date, only one company has applied for and received approval into the Tax Credit program. However, this company has not received the tax credit; instead, the credit was issued to its sister companies. The company that received approval for the tax credits, and the sister companies that received the tax credits are owned by the same parent company. This discrepancy may potentially hinder the DEP's ability to properly track the issuance of tax credits.

The tax credit program was implemented prior to receiving federal OSMRE approval resulting in reclamation tax credits being issued in noncompliance with §30 CFR 732.17. Implementing these tax credits before approval from the OSMRE results in the underfunding of the Special Reclamation Funds which funds reclamation of mine sites upon forfeiture. The lack of revenue coming from the tax also results in a loss of investment income for the fund.

The tax credit program is one of several surface coal mining program amendments the Legislative Auditor identified as enacted prior to OSMRE approval. The submission of program amendments to the OSMRE is not only required by federal law, but the process also allows the OSMRE to analyze potential effects of the amendment, to solicit the opinion of other federal agencies, and to provide a forum for public discussion.

As the DEP is the state's federally designated mine reclamation regulatory authority, the DEP is obliged to perform all necessary oversight duties to ensure program compliance with federal and state requirements. Failure to pause implementation of amendments until approval could result in varied and potentially unknown consequences if the amendment is not approved. These actions may also limit the ability of the DEP to properly communicate with fellow state agencies in the event these agencies enact code or regulations related to the state's reclamation program that has not received the required approval of the OSMRE.

Recommendations:

- 7.1 The Legislative Auditor recommends the DEP comply with §30 CFR 732.17 and not implement amendments to the W.Va. Code and the Code of State Rules until approved by the OSMRE.

7.2 The Legislative Auditor recommends the DEP officially notify other state agencies or departments that perform functions associated with the state's mining reclamation program of the OSMRE requirements pertaining to the approval process for amendments to the state's regulatory program.

Issue 8: The DEP is Not Commencing Reclamation Proceedings for Forfeited Coal Mining Sites Within One Hundred Eighty Days as Required by 38CSR 2-12.4.c (Legislative Rule).

Federal law requires amendments to a state's mining reclamation regulatory program receive approval from the OSMRE prior to implementation. The OSMRE approved version of 38CSR 2-12.4.c., as listed on the DEP's website, states:

After the notice of forfeiture has been served, the Secretary shall in a timely manner, but not later than one hundred eighty (180) days after such notice, initiate reclamation operations to reclaim the site in accordance with the approved reclamation plan or modification thereof, including action to remediate any acid mine drainage from the site. The Secretary shall take the most effective actions possible to remediate acid mine drainage, including chemical treatment where appropriate, with the resources available.

It should be noted the Legislature passed an amendment to the Legislative Rule that removed the requirement to commence reclamation within 180 days (6 months) after notice of forfeiture. However, this removal has not been approved by the OSMRE. The DEP website site includes both a link to the OSMRE approved rule as well as a separate link to the rule, as amended by the Legislature, that includes revisions not approved by the OSMRE. A notation adjacent to the website link for the amended rule states “[t]his rule denotes all changes approved by the WV Legislature and are still pending action from OSM[RE].”

On November 4, 2019, the DEP provided the Legislative Auditor with documentation listing the forfeiture date, the reclamation commencement date, and the reclamation completion date of 512 permit sites where land reclamation was complete. An analysis of this data determined the **median start time for the commencement of reclamation was 67 months**. Reclamation began within six months (roughly 180 days) on 46 permits while the longest time from forfeiture to the start of reclamation was 345 months, or nearly 29 years. (See Appendix D)

The issue of reclamation not commencing within the time constraints imposed by Legislative Rule was included as a finding in the 2012 Post Audit Division audit and the 2012 follow-up report performed on the SRFs. In the DEP's response to the finding, “*West Virginia Department of Environmental Protection Special Reclamation Funds & Fund 8796*,” the DEP stated:

The DEP agrees that the historical backlog resulted in reclamation schedules that exceeded 180 days. To correct this finding, the DEP will stay committed to the current reclamation schedule that has all site reclamation current in 2015.

Since the release of the 2012 report, reclamation commenced within six months for 17 of 19 permits where reclamation was initiated. However, another document provided on November 4, 2019 by the DEP lists 36 permits with “TBC,” or *To Be Contracted*, as the Land Reclamation Status indicating that reclamation has not yet commenced for these sites. The forfeiture dates for these 36 sites range from October 2002 to August 2018—all of which would exceed the Legislative Rule requirement that reclamation commence by 180 days from the notice of forfeiture.

The contracting and pre-construction process for reclamation appears to be lengthy. However, forfeited funds are not always collected quickly. Other issues related to delays in reclaiming forfeited sites were identified by the SRFAC as documented in the November 2018 council meeting minutes. According to the minutes, the DEP's Office of Special Reclamation (OSR) "*...was short staffed, being faced with more consent decrees, more stringent NPDES requirements and Administrative Orders...*"¹²

During a May 30, 2019 meeting, the DEP stated it prioritizes the reclamation of certain sites if the OSR identifies a need to begin reclamation promptly, such as the site being deemed imminently hazardous to the community. While this process may address the more immediate risks to the community, it also causes other sites to remain on the "to be contracted" list for an additional period, contributing to the failure to meet the 180 day start time for reclamation.

The DEP is out of compliance with 38CSR2 12.4.c. as there has been no reclamation work performed on numerous forfeited sites for multiple years after the notice of forfeiture. As stated earlier, the median start time for reclamation after permit forfeiture is approximately 67 months. Delays in the commencement of reclamation may result in heightened danger to local communities. Forfeited sites where reclamation has not commenced are more likely to remain in a hazardous state with an increased risk of pollution. In addition, in the interim period between forfeiture and the commencement of reclamation, sites where reclamation has not commenced may acquire environmental issues which were not initially evident. Since such sites would likely not have as many workers and inspectors regularly on-site as those being reclaimed, these issues could possibly remain unnoticed for extended periods resulting in environmental harm that otherwise would not have occurred, potentially increasing the cost of reclamation. As a result, environmental harm may occur that otherwise would not have happened had the sites been reclaimed within the time frame of 180 days as stipulated by legislative rule.

In addition, due to the rising cost of reclamation, the percentage of reclamation costs on forfeited sites covered by reclamation bonds will decrease over time. The bonding requirement for mining permits, as established by W. Va. Code §22-3-11(a), is set at a minimum of \$1,000 to a maximum of \$5,000 per acre. Since the cost of reclamation has increased since these bond limits were established in 2001, the coverage offered by mining bonds has diminished resulting in greater liability to the state to cover these costs from SRFs. Since these limits are set by statute and are not adjusted periodically based on increased reclamation cost estimates by actuarial projections, the amount of reclamation costs covered by the bonds will gradually diminish with the passage of time resulting in a corresponding increase in the percentage of the costs that must be provided from other revenue sources, such as the SRFs.

Recommendation:

- 8.1 The Legislative Auditor recommends the DEP commence reclamation of forfeited sites within 180 days as stipulated by current OSMRE approved 38CSR2 12.4.c. until the revision removing the 180-day requirement is approved by the OSMRE.

¹² Obtained from the November 8, 2018 SRFAC meeting minutes provided by the DEP. A consent decree is a legal settlement or agreement between two parties. The National Pollutant Discharge Elimination System (NPDES) allows permitholders to discharge a specified amount of pollutants into the waters of the state.

Issue 9: The DEP is Not in Compliance with State and Federal Laws that Require the Use of Funds Collected for Forfeited Bonds be Used to Reclaim Those Properties for which the Bond was Posted.

When a bond is forfeited and the revenue from the bond is collected, the monies are deposited into the SRTF. W.Va. Code §22-3-17(b) states, in part:

*...That the entire proceeds of such forfeiture shall be deposited with the treasurer of the State of West Virginia to the credit of the special reclamation fund. All forfeitures collected shall be deposited in the special reclamation fund **and shall be expended back upon the areas for which the bond was posted**: Provided, however, That any excess therefrom shall remain in the special reclamation fund. (emphasis added)*

Collected bond monies are not encumbered by the DEP to restrict their use to the reclamation costs for the permit site for which they were posted. In addition to forfeited bonds, the SRFs are comprised of taxes assessed on mined coal, civil penalties, and other sources of revenue. Reclamation may take months, if not years, and the money expended on the reclamation of forfeited sites is derived from the SRFs without distinction regarding the source of the funds provided from the SRFs to pay for reclamation. As such, the actual source of funds used to pay for the reclamation of a specific site cannot be determined.

According to the Legislative Auditor's analysis of documents provided by the DEP, bonds have historically covered approximately 10% of total reclamation costs per site. The actual cost to fully reclaim an individual site varies based on many factors, but few, if any sites, are bonded at amounts that would cover the full cost of reclamation in the event of forfeiture. Therefore, to pay for reclamation on forfeited sites, alternative funding deposited in the SRFs, primarily derived from reclamation taxes, is used to supplement reclamation costs.

If the SRFs remain solvent, the DEP should be able to fund all future reclamations and the source of funding to pay for any specific reclamation would be of no consequence. However, the Legislative Auditor estimates the median length of time between forfeiture and commencement of reclamation operations at 67 months. In the event of insolvency of the SRFs during this intervening period, there is a risk collected bond monies may not be available to contribute to the reclamation for properties for which they were posted. This could potentially result in sites not being reclaimed in accordance with federal law despite the fact bonds for the reclamation were forfeited to the DEP and the proceeds deposited into the SRTF. Federal Code 30 CFR §800.50(d)(1) dictates:

*In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the operator shall be liable for remaining costs. The regulatory authority may complete, or authorize completion of, reclamation of the bonded area and **may recover from the operator all costs of reclamation in excess of the amount forfeited** (emphasis added).*

It is unclear whether this stipulation would apply in the case of a properly submitted bond if the bond proceeds were used to reclaim another site. Moreover, forfeited sites are often connected to permit holders who have undergone bankruptcy or are experiencing other financial issues. As a result, the state may not necessarily have the capability to recover additional funds from the permit holder.

Recommendation:

- 9.1 The Legislative Auditor recommends the DEP adhere to W.Va. Code §22-3-17(b) and properly encumber forfeited bond funds to ensure the funds are used for reclamation costs for which the bonds were posted.

Issue 10: DEP Records Regarding Mining Permit Statuses are Inadequate, and Thus, Complicate the Auditing of the State’s Reclamation Program and Assessing the Future Solvency of the Special Reclamation Funds.

Mining permit holders can apply to the DEP to obtain *inactive status*, which allows the operators to temporarily cease mining activity due to market conditions without being required to commence reclamation activity. The status also typically reduces the required the DEP inspections from an average of once per month to once per quarter. Other requirements for *Inactive status* stipulate that bonding remain in effect for all disturbed acreage, the site be guarded against hazards to the public, and permit holders continue maintenance and monitoring of on-site conditions.

The DEP maintains information related to mining permits on its website as well as on its in-house database. However, **neither of these records adequately document when permit sites are moved from *Inactive status* to *Active status***. As a result, a historical record of permit status changes is not maintained; and thus, the ability to effectively and efficiently conduct audit procedures designed to determine the status of mining permits for any given point in time is significantly compromised. Therefore, the Legislative Auditor was unable to determine, for all instances, if the DEP adhered to time constraints and other requirements for *Inactive statuses* as delineated in Section 14.11 of Legislative Rule 38CSR2.

Further, the lack of DEP data on mine operation statuses has been detrimental to actuarial calculations used to predict the future solvency of the SRFs. The SRFAC partially relies on actuarial reviews in formulating and recommending to the DEP and the Legislature those actions vital to ensuring the continued solvency of the Special Reclamation Funds. However, as part of the actuarial review included in 2019 SRFAC Annual Report, the reviewers lamented on the lack of available information on the history of permit status changes with the following:

*Permit Status History: Permit databases were provided evaluated [sic] as of a specific date. However, because this study estimates anticipated changes in permit status over time, it is necessary to make assumptions about how permit statuses change in order to develop forfeiture models. **If records exist, it could be possible to produce more accurate models if a full history of each permit (including all status changes over time and dates when status changes occurred) were available. (emphasis added)***

Therefore, in the opinion of the Legislative Auditor the DEP is not in compliance with the state’s recordkeeping requirements of W.Va. Code §5A-8-9, which states in part:

...(c) Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency’s activities;...

The Legislative Auditor issued a request on July 13, 2020 pertaining to several issues regarding *Inactive statuses*. A July 27, 2020 response by the DEP stated:

The record of all permit status changes, including when a site exits Inactive Status and the mining of coal or reclamation activities are resumed or initiated, is found on MR-6 Mine Inspection Reports by reviewing the “Mine Status” code.

The Mine Inspection Reports are summarized on the DEP's website under the Division of Mining and Reclamation's "Permit Search" functions. When a permit is searched, a list of all inspection dates is provided and these dates link to the summary of the corresponding inspection report. This page lists the type and reason of inspection, the mine status (active, inactive, etc.), and the time the inspector spent on the permit review, inspection, travel, and reporting of the inspection (in quarter hour increments), among other information.

While the mine status code can be used to determine if a permit goes from *Inactive* to *Active* status, it is necessary to review scanned inspection reports to determine when the change in status occurred. The mine status code also does not explicitly state the status changed from *Inactive* to *Active* as it must be inferred from the codes listed for the current and previous months. **This practice does not allow for an efficient determination of mine statuses for any given point in time.**

The DEP's lack of an in-depth and accurate permit tracking system does not allow for the DEP, the public, or independent reviewers to properly track permit status changes. The actuary stated in the 2019 SRFAC Annual Report that the actuarial projection model would be more accurate "*if a full history of each permit were available.*" The lack of this data results in a less accurate model and weakens the ability of the SRFAC to analyze the future solvency of the SRFs. This, in turn, does not allow the SRFAC to provide the Legislature with fully informed recommendations pertaining to the SRFs.

Title 38, Series 2, Section 14.11 of the WV Code of State Rules (38CSR2) establishes constraints on the length of time a company may remain in Inactive status. When these limitations have been met, extensions must be requested, and additional documentation submitted in support of the requests. Full and proper records would allow all stakeholders the opportunity to readily verify that DEP is granting extensions equitably and in accordance with Section 14.11.

Also, proper accounting of site statuses would allow the DEP to monitor permit sites more efficiently. Inactive status is often a result of market forces. Therefore, permit holders for such sites are apt to be under financial duress and, as a result, more likely to forfeit permits or neglect reclamation responsibilities.

Additionally, coal mining permits often have public notices and meetings where the public may make comments or discuss coal mining situations that arise. For the public to be properly informed, full accounting of the status of sites is essential.

Lastly, inadequate status tracking complicates the determination of those instances in which the DEP is legally required to utilize full cost bonding for permit sites. Full cost bonding is the addition of a bond that, when used in conjunction with currently issued bonds, results in bonding equal to the estimated actual reclamation costs for the permit.

The DEP's lack of full and complete records documenting changes in mining status precludes the DEP and others from properly administering and analyzing the SRFs. The lack of such records also limited the audit team's ability to verify compliance with rules and regulations regarding mining statuses. Further, the SRFAC's actuary asserted in the 2019 SRFAC Annual Report that DEP's incomplete mining status histories inhibits the accuracy of actuarial projection models.

Recommendation:

- 10.1 The Legislative Auditor recommends the DEP comply with W.Va. Code §5A-8-9 and maintain and make public a full historical record of permit changes to allow for proper oversight and analysis of mining sites.

Issue 11: The Special Reclamation Fund Advisory Council Has Experienced Extended Vacancies and Expired Terms for Council Members Due to a Lack of Timely Appointments.

W.Va. Code §22-1-17 establishes the Special Reclamation Fund Advisory Council (SRFAC) and its duties. These duties include:

- Studying the effectiveness of the special reclamation fund;
- Identifying problems associated with the fund;
- Evaluating bond forfeiture collection and reclamation efforts;
- Providing a forum for discussion;
- Contracting an independent actuary to study the effectiveness of the funds;
- Studying and recommending alternative approaches to the Legislature; and
- Submitting a report to the Legislature and Governor annually.

Subsections (a) and (b) of Section 17 sets out the SRFAC membership. The SRFAC consists of eight members. Three members are ex officio, and five are appointed by the Governor with the advice and consent of the Senate. The positions are as follows:

- The Secretary of the DEP or his or her designee (ex officio);
- The Treasurer of the State of West Virginia or his or her designee (ex officio);
- The Director of the National Mine Land Reclamation Center at West Virginia University (ex officio);
- A member representing the interests of the major coal industry trade association;
- A member representing the interests of environmental protection organizations;
- A member trained as an economist or actuary;
- A member representing the interests of coal miners; and
- A member representing the interests of the general public.

Subsection (c) of W.Va. Code §22-1-17, which dictates the terms of the members of the SRFAC, states:

The terms of all members shall begin on July 1, 2002. The secretary shall be an ex officio, nonvoting member and serve as chairperson of the council. The terms of the Governor's appointees shall be for six years. Appointees may be reappointed to serve on the council. The terms of the appointed members first taking office are to be expired as designated by the Governor at the time of the nomination, two at the end of the second year, two at the end of the fourth year and one at the end of the sixth year. As the original appointments expire, each subsequent appointment will be for a full six-year term. Any appointed member whose term has expired shall serve until a successor has been duly appointed and qualified. Any person appointed to fill a vacancy is to serve only for the unexpired term.

The composition of the membership, as set out in statute for the SRFAC, would seem to indicate an effort by the Legislature to ensure representation of the various major interest groups associated with the coal mining industry. Nonetheless, we noted there were extended periods and multiple successive SRFAC meetings when some interest groups failed to have such representation as SRFAC vacancies remained unfilled for multiple years. This has been an ongoing issue.

The Legislative Auditor issued two reports on the DEP Mining and Reclamation Program in 2012. The reports noted several issues regarding the SRFAC, including an extended vacancy in the SRFAC membership position representing the interests of the general public. The DEP acknowledged the vacancy in its response to the audit finding and asserted it would work with the Governor to fill the position. Still, the SRFAC annual reports submitted to the Legislature from 2013 through 2016 continually listed the member's position as vacant. Further, a review of the SRFAC meeting minutes for calendar years 2014 through 2016 indicated there was no member in attendance for council meetings representing the interests of the general public. Ultimately, records from the West Virginia Secretary of State showed an oath was submitted for appointment to fill the vacancy in July 2017.

In addition, there have been more recent instances of extended periods of unfilled vacancies in the SRFAC membership. A letter dated January 8, 2018 from the Office of the Governor to the Senate Confirmations Chair withdrew the appointment of the member representing the interests of environmental organizations. The individual was not listed as an attendee in the minutes of the first two quarterly meetings of the SRFAC in 2018 and, as a result, the interests of environmental groups had no representation during these meetings. However, this individual was listed in the minutes as attending the November 2018 meeting and every SRFAC meeting thereafter. Further, the individual received reimbursements for meals and mileage for this attendance, even though it appears his appointment was withdrawn based on the January 8, 2018 letter.

Lastly, we noted the appointment terms of two additional SRFAC members have been expired since June 30, 2018. One of the members was originally appointed to represent the interests of the coal miners, while the other member was originally appointed as the actuary/economist. Although the members' terms have been expired for approximately two years, the members have continued to serve in their capacity since the expiration of their terms.

The General Counsel for the Office of the Governor responded, in a letter dated August 16, 2019, to inquire regarding SRFAC member vacancies. In response to specific inquiries regarding the removal of the member representing the interests of environmental groups, the General Counsel stated in part:

...[The member] was removed because, after continued inquiry, it was learned [the member] had become a resident of Kentucky, rather than West Virginia. The Intergovernmental Affairs office for Governor Justice is actively seeking someone to fill the seat. We expect that search to be concluded and an appointment to be made for this seat in the coming months....

The General Counsel also stated in his response that two other members, whose terms had expired on June 30, 2018, had not been reappointed but remain members of the SRFAC as reappointments are generally made as a whole, or with several members at a time. However, the practice of reappointing en masse increases the likelihood of extended periods of expired terms and member vacancies on the SRFAC. The Legislative Auditor conducted a follow-up review of data listed on the Secretary of State's website and found it continues to list the two members as active with terms that expired June 30, 2018. A subsequent review identified a third Council member whose term expired June 30, 2020. In addition, the membership position designated by statute as representing the interest of environmental groups continued to be listed as vacant.

The Legislative Auditor was unable to determine the reason for the vacancy identified in the 2012 Post Audit report regarding the member representing the interests of the general public.

In its response to the finding in the report, the DEP stated it would work with the Governor to fill the position. However, the vacancy was not filled until July 2017.

The issue pertaining to the status of the member representing the interests of environmental groups is less clear. The Governor provided the withdrawal letter to the Senate Confirmations Committee, but it is unknown if the DEP was formally notified of the withdrawal. The SRFAC minutes did not list the member as attending three consecutive quarterly meetings held immediately after the date of the letter, and the individual is not listed on the Secretary of State's website as an active board member. The information obtained from the website was further confirmed in a letter from the Secretary of State's office.

Members are permitted to serve beyond their terms until replacements are appointed. This permits the two members whose terms expired on June 30, 2018 to continue to serve after the expiration of their terms. Moreover, the provision in statute that allows members to serve beyond their expired term does not appear to apply to those members whose appointment has been rescinded by the Governor—as is the case with the member whose original appointment was to represent the interests of the environmental groups.

W.Va. Code 22-1-17(c) specifies the term lengths of the members of the SRFAC. The statute specifies six-year terms for each member. While members may be reappointed, the statute does not mandate lifetime appointments. This allows different administrations to evaluate the progress and efficacy of the members of the SRFAC.

The timely appointment of members to the SRFAC is an ongoing issue, raised first in 2012. The positions of four out of five appointees need to be addressed. Three individuals are serving past their term expiration, with one being ineligible for reappointment, and a fourth has been serving after being removed. The terms of the appointees are to be staggered on a two-year basis according to Code. The SRFAC plays an important role in the monitoring of the SRFs and providing guidance to the DEP. Stability needs to be provided to the SRFAC through timely appointments.

Recommendation:

- 11.1 The Legislative Auditor recommends the Governor's Office fill SRFAC vacancies in a more expeditious manner to reduce the number of SRFAC meetings occurring when the SRFAC is not fully represented by all council member positions established by W.Va. Code §22-1-17.

Report Conclusion

The issues highlighted in this audit report are largely interconnected, emphasizing the benefits of a concerted study or analysis that may provide a more in-depth picture of the coal mining reclamation program. One example of this interconnectivity occurs when reclamation awards are applied for discounted bonding rates. Historical data and future projections indicate only a small fraction of reclamation costs are covered by forfeited bonds. The discounts provided by reclamation awards reduce that fraction even further. Although each issue presented in the report should be addressed individually, further analysis could uncover more relationships, or provide a method for the Legislature to properly analyze the issues presented herein.

Legislative studies have not been conducted to analyze the efficacy and solvency of the state's reclamation program. The 2017, 2018, and 2019 Special Reclamation Fund Advisory Council (SRFAC) annual reports stated the following regarding the need for such a study:

*...The SRFAC further recommends that the State Legislature **form a panel to examine the elements of our State code that result in uncontrolled liabilities**, how other states deal with such issues and finally to propose a State legislative initiative to rationalize water quality regulation to meet the conditions of the Federal Clean Water Act while adding rationality and certainty to the process.... **(emphasis added)***

West Virginia's coal mining reclamation program will continue to require hundreds of millions of dollars to reclaim permit sites in accordance with federal regulations. The program has no known contingency plans if the reclamation funds were to become insolvent. If the current funding sources for the program were to prove insufficient to meet the demands of reclamation, **the resulting additional financial obligations could prove to be detrimental to the state's budget**. Further, such conditions present the risk that the state's program may be taken over by the Federal OSMRE due to the state's inability to adequately manage and provide funds for the SRF. Therefore, it is the opinion of the Legislative Auditor that it would be fiscally prudent for the Legislature to authorize a panel to perform an analysis of the state's reclamation program for the purpose of aiding the DEP and the SRFAC in formulating recommendations designed to ensure long-term program solvency.

Recommendation:

- 12.1 The Legislative Auditor recommends the Legislature commission a study to evaluate the state's coal mining reclamation program and, as deemed necessary, provide recommendations to ensure the long-term solvency of the program.

Appendix A

WEST VIRGINIA LEGISLATIVE AUDITOR'S OFFICE

Post Audit Division

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Charleston, WV 25305-0610
(304) 347-4880



Justin Robinson
Director

May 26, 2021

Harold D. Ward, Cabinet Secretary
WV Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Dear Cabinet Secretary Ward:

This is to transmit a draft copy of the Post Audit Division's report on the Department of Environmental Protection – Division of Mining and Reclamation. This report focuses on the DEP's surface coal mining and reclamation bonding program and the long-term solvency of the Special Reclamation Funds. The report is scheduled to be presented during the Monday, June 7, 2021 interim meeting of the Post Audits Subcommittee, which is currently scheduled for 3:00 p.m. in the Senate Finance Committee Room (451-M).

We recommend a representative from your agency be present for the meeting to respond to the report and answer any questions committee members may have during or after the meeting. Due to Covid 19, the Subcommittee is permitting representatives to attend virtually. If this is an option you would prefer, please notify our office in advance so that we may make the necessary accommodations.

You may also schedule a meeting with our office, either virtually or in person, to discuss the report prior to its release. Please contact Terri Stowers, Executive Assistant, at 304-347-4880 at your earliest convenience to schedule this meeting and/or to make arrangements for virtual attendance at the Subcommittee meeting. In addition, if you would like to provide a response to the report to be included in the final draft, please provide your written response to us no later than noon on Friday, June 4, 2021 for it to be included in the final report. Thank you in advance for your cooperation, and feel free to contact me with any questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads "Justin Robinson".

Justin Robinson

C: Jane S. Caswell

Appendix B

Objective, Scope, and Methodology

The Post Audit Division within the Office of the Legislative Auditor conducted this audit of the Department of Environmental Protection's [DEP] Division of Mining and Reclamation [DMR] as authorized by Chapter 4, Article 2, Section 5 of the *West Virginia Code*, as amended. The post audit was conducted in accordance with the standards applicable to performance audits contained in the Generally Accepted Government Auditing Standards (GAGAS) issued by the Government Accountability Office, except for the deviations from sections 6.65 and 6.66 as specifically noted in the following paragraph.

The auditors did not perform data reliability analyses for the following information obtained for the audit: (1) Mining reclamation start dates provided by the DEP upon request; (2) Actuarial data obtained from SRFAC Annual Reports; (3) EIA Annual Report information obtained from a federal government website; and (4) A listing of mining companies with reclamation tax delinquencies and the amount of each company's delinquency provided by the West Virginia State Tax Department upon request.

The Legislative Auditor's Office reviews the statewide single audit and the DOH financial audit annually with regards to any issues related to the wvOASIS financial system. The Legislative Auditor's Office on a quarterly basis requests and reviews any external and internal audits of the wvOASIS financial system. Through its numerous audits, the Legislative Auditor's Office is constantly testing the financial information contained in the wvOASIS financial system. In addition, the Legislative Auditor's Office has sought the professional opinion of the reliability of wvOASIS from the Joint Committee on Government and Finance's Fiscal Officer, who along with her staff uses the wvOASIS system daily. Based upon these actions, along with the audit tests conducted on the audited agency, it is our professional judgement that the information in the wvOASIS system is reliable for auditing purposes under the applicable 2011 and 2018 Yellowbook. However, in no manner should this statement be construed as a statement that 100 percent of the information or calculations in the wvOASIS financial system is accurate.

Objective 1

The objectives of this review were to determine whether the DEP is keeping accurate record of reclamation bonds, and all necessary follow-up on bonding especially as it relates to expiration and permitting, in addition to meeting bonding fund requirements.

Objective 2

To analyze the efficacy of the WV Coal Special Reclamation Funds.

Scope

The scope of this objective was limited to all non-quarry reclamation permits and bonds issued or held by the Division of Mining and Reclamation, as well as any fiduciary companies involved in the issuance of said bonds (i.e., bank, surety company, etc.) The time period of the review focused mostly on the permits and bonds issued in the last 10-20 years; however, due to the nature of the industry, some bonds which date back to the late 1980's and 1990's are still active and therefore would be included in the scope of the audit. Additionally, state agency reports from 2012-2021, *West Virginia Code*, and applicable *Code of State Rules* are encompassed in the scope

of the audit as well. This includes any amendments, changes, and other documentation pertaining to the Division of Mining and Reclamation from 2001-2021.

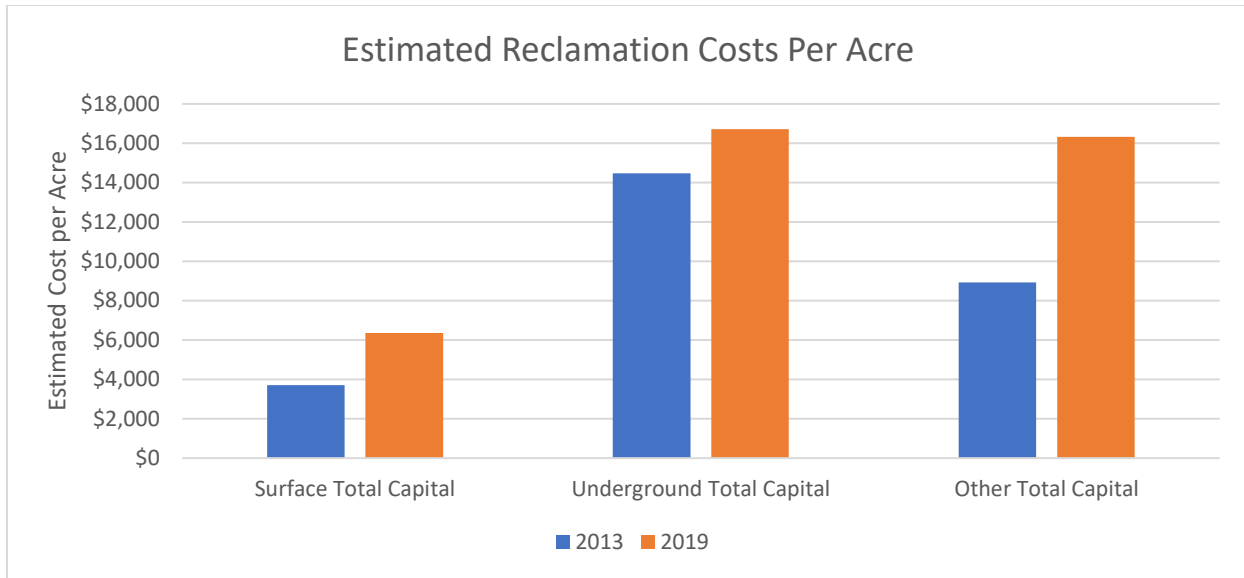
Methodology

Post Audit staff gathered and analyzed several sources of information and assessed the sufficiency and appropriateness of the information used as evidence. Testimonial evidence was gathered through correspondence with various agencies that oversee, collect, or maintain information pertaining to the business of the DMR. The purpose for testimonial evidence was to gain a better understanding or clarification of certain issues, to confirm the existence or non-existence of a condition, or to understand the respective agency's position on an issue. Such testimonial evidence was confirmed by either written statements or the receipt of corroborating or physical evidence.

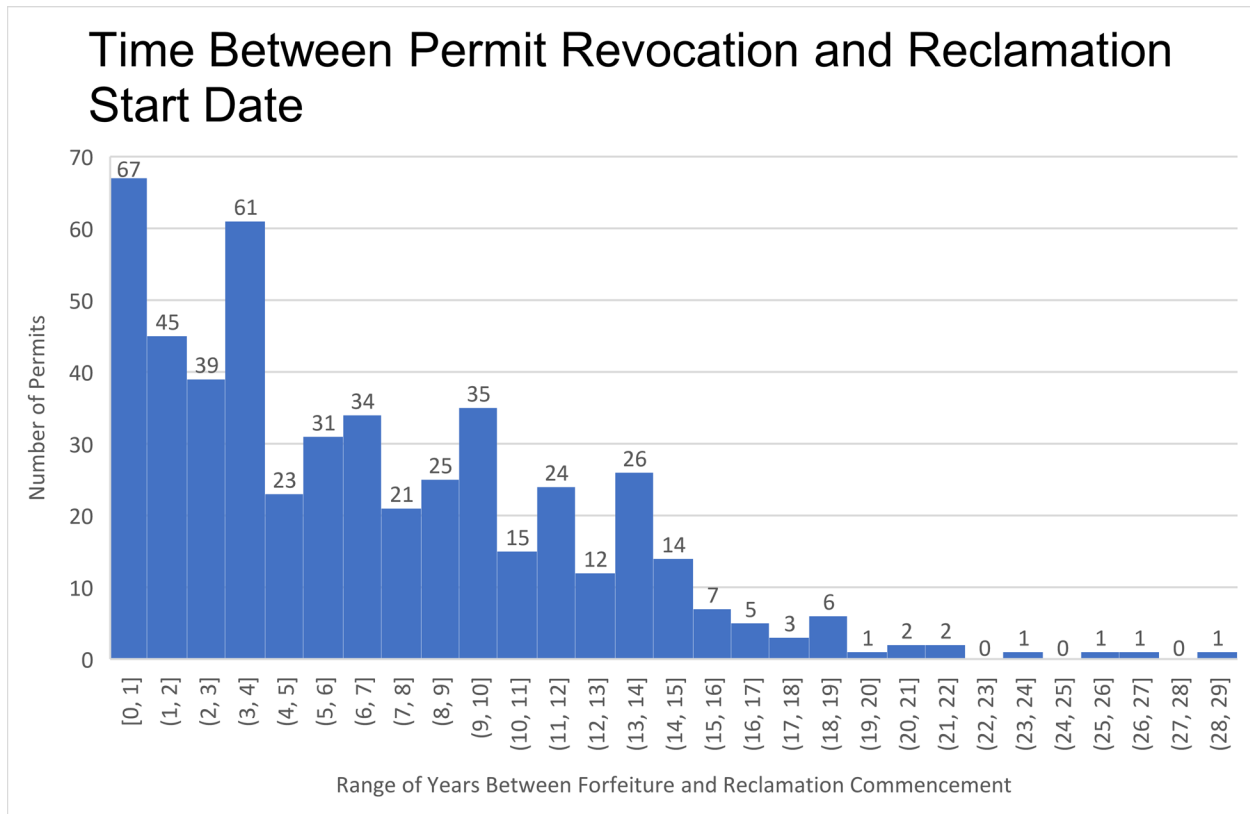
Specifically, audit staff reviewed the records of the Division of Mining and Reclamation as well as applicable information on file with the Office of the Secretary of State, the U.S. Department of the Treasury, and the West Virginia Tax Department. Through this review the audit team was then able to determine if the permits issued and bonds held by DMR followed applicable federal and state statutes, Legislative rules, policies, and procedures.

Further, 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 objective.

Appendix C



Appendix D





west virginia department of environmental protection

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Harold D. Ward, Cabinet Secretary
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June 4, 2021

Justin Robinson, Director
West Virginia Legislative Auditor's Office
Post Audit Division
1900 Kanawha Blvd, E, Rm. W-239
Charleston, WV 25305-0610

**Subject: Draft Post Audit Division Report
West Virginia Department of Environmental Protection's Division of Mining
and Reclamation's Surface Coal Mining and Reclamation Bonding Program**

Dear Director Robinson:

Thank you for providing the May 26, 2021 draft of the Post Audit Division's report on the West Virginia Department of Environmental Protection's Division of Mining and Reclamation's surface coal mining and reclamation bonding program.

The long-term solvency of the Special Reclamation Funds is vitally important to the success of the DEP's mining program. I believe the information provided below will help you further understand the agency's program and will answer some questions about it.

In specific response to your draft report, we submit the following.

Audit Issue and Recommendation One: Current per acre coal mining reclamation bond limits may not be sufficient to guarantee the solvency of the state's mining reclamation program. The Legislative Auditor recommends the DEP consider the adequacy of the bonding rates currently in effect with regard to the requirements of Title 30, Section 733.11 of the Code of Federal Regulations, and adjust the rates as necessary to ensure that the cost of reclamation does not become a greater financial liability to the state.

DEP Response: The DEP recognizes the Post Audit Division's concerns about the solvency of the Special Reclamation Fund ("SRF") and has spent decades implementing and administering the system by which the State currently ensures that the reclamation is completed at coal mining sites where the permit has been revoked and the associated bond forfeited. Some history about the program may provide insight.

West Virginia's bonding for reclamation coal mining disturbances has a very long history and, in fact, pre-dates the federal Surface Mining Control & Reclamation Act ("SMCRA"). In 1939, the West Virginia Legislature enacted Senate Bill 390, the first mining-related environmental statute in the state. The law required operators to obtain permits, set minimum performance standards and required operators to post a performance bonds to guarantee reclamation. In 1963, the Legislature amended the original statute and imposed a fee of \$35 per acre of area disturbed. The collections were placed in the SRF and were used to reclaim "high-hazard" abandoned mine sites. The site specific reclamation bonding amount was increased to \$750 per acre.

In 1971 the statute was again revised, placing coal mining regulation within the Department of Natural Resources ("DNR") and increasing the per-acre fee to \$60.00 per acre. Amendments in 1974 and 1976 gave DNR authority to regulate the surface effects of underground mining.

With the passage of SMCRA by Congress in 1977, state laws were revised in 1978 and the SRF was re-crafted as an Alternative Bonding System ("ABS"). Under the federal statute, mine sites that were subject to reclamation under the "old" SRF passed to the federal Abandoned Mine Lands fund for sites mined pre-1977 and the "new" SRF was created as an ABS to satisfy the minimum federal requirements for program primacy. As part of the revisions, the per-acre bonding amount was increased from \$750 to \$1,000 per acre and per-ton tax on all coal produced of 1.5 cents was imposed to address the shortfall between the amount of the bond collected and the actual costs to reclaim a post-primacy forfeiture site.

In 1980, West Virginia submitted its permanent regulatory program to the federal Office of Surface Mining ("OSM") for approval. OSM approved the program, including the ABS component, in 1981. The sole condition on OSM's approval concerned the solvency of the ABS and required the state to submit an actuarial analysis to demonstrate the funds solvency. The review was completed in 1982 and OSM removed the condition from the program in 1983.

In 1985, the Department of Energy (created the same year to assume regulatory program administration from DNR) voluntarily executed a settlement agreement (under the purview of the federal Clean Water Act, not SMCRA) to take over water treatment at a bond forfeiture site. DLM Coal Co. (Alton) conveyed to DNR certain assets to fund ongoing water treatment. According to DNR, with the concurrence of OSM, this was a special situation and treatment was undertaken to protect an outstanding water resource and did not represent a change in policy as it regards water treatment liability at forfeiture sites.

This discretionary use of the SRF collections to treat water continued through the 1980s, with the State completing its first forfeiture acid mine drainage (AMD) inventory in 1988. Based on that inventory, voluntary water treatment occurred at a handful of post-permanent program forfeiture sites.

In 1990 West Virginia undertook a massive revision of its surface mining regulatory and mine safety programs as the Department of Energy was abolished and replaced with the current WVDEP. During this restructure, changes were made to the ABS to satisfy OSM program oversight issues, including increasing the maximum per-acre bond amount from \$1,000 to \$5,000 an acre and raising the per-ton tax from 1.5 cents to 3 cents. Additionally, OSM had concerns that voluntary water treatment at certain sites by WVDEP could lead to insolvency of the SRF for its primary purpose- land reclamation. To address this issue, expenditures for water

treatment were statutorily restricted and could not exceed 25 percent of the annual assets of the fund. OSM approved the amendments, noting that SMCRA does not require regulatory authorities, under either a site-specific or ABS bonding program, to conduct water treatment activities.

In 1991, OSM radically changed its position relative to water treatment and ABS programs. Under 30 CFR 732, the federal agency notified West Virginia, Pennsylvania, Ohio and Maryland that their ABS programs failed to satisfy the minimum requirements of SMCRA since they were not financially solvent to undertake water treatment at bond forfeiture sites. According to OSM, "completion of reclamation" under SMCRA included ongoing water treatment to "prevent material damage to hydrologic balance." Under OSM's "new" interpretation of SMCRA, long-term AMD treatment must be addressed in both conventional (full-cost) bonds and ABS programs. A year later, OSM rescinded those letters, but then resent them the next year in 1993.

Relying on OSM's 1991 and 1993 ABS deficiency notifications, in 1994, several environmental groups sued WVDEP seeking a declaration that water treatment at bond forfeiture was a mandatory duty of SRF to "complete reclamation" under SMCRA. Drawing heavily on the language and citations of the 732 letter, the West Virginia Supreme Court sided with the plaintiffs, holding that water treatment at bond forfeiture sites was a non-discretionary duty of WV DEP under the state surface mining regulatory program. However, the Court did not strike or mandate the removal of statutory provisions that restricted water expenditures from the SRF to 25 percent of the assets of the fund.

Several environmental groups sued OSM in federal court in 2001, alleging the agency was failing to perform non-discretionary functions under SMCRA by continuing to allow West Virginia to maintain an insolvent ABS. Included in the case were issues related to water treatment at forfeiture sites. OSM issued 30 CFR 733 "takeover" letters to WVDEP, warning the state to correct the insolvency of the SRF, including funding for water treatment, or a federal bonding program would be implemented by OSM.

To address the lawsuit and the takeover notifications from OSM, the West Virginia Legislature convened a special session later in 2001 and enacted several changes to the ABS program. The 25 percent restriction on expenditures from the SRF for water treatment was removed and the funding for the ABS was increased from 3 cents per ton to 14 cents per ton. Half of the 14 cents was intended to be temporary and would be imposed only until a backlog of unfinished land reclamation and basic water treatment facility construction was completed. The remaining seven cents would be permanent and provide the continual funding for the ABS. Based on the changes made by the Legislature, OSM rescinded its 733 notifications.

In 2009-10, a federal court required the agency to obtain NPDES permit coverage for its treatment activities and discharges from SRF sites. In response, in August 2010, WVDEP executed a consent decree that obligated the agency to obtain individual NPDES permits for all SRF sites where water treatment was ongoing or required to meet state water quality standards. The consent decree established a schedule for WVDEP to obtain NPDES permits for 191 sites over the course of five years.

Based on the estimated costs of building and maintaining treatment systems to comply with NPDES permit effluent limits, the SRF faced a potential funding shortfall of approximately \$133,000,000.00. In order to address the deficit and provide funding for continual water

treatment, the West Virginia Legislature passed a bill to increase the SRF tax from 14.4 cents a ton to 27.9 cents per ton, where it stands currently.

Turning to the Post Audit Division's report and recommendations, the WVDEP makes two broad arguments. First, the WVDEP does not have the authority to consider the adequacy of the bonding rates currently in effect. Those rates are firmly within the province of the State Legislature. The WVDEP cannot unilaterally change the per acre formula or the per-ton tax on coal production or statutorily limited bond amount .

Second, the Post Audit Division's report focuses only on *part* of the reclamation equation in the State. The Report does not touch on the combined value of the State's bonding program *and* its SRFs. When the amount of bonding currently held by sureties is added, and the continuing revenue to the SRF are considered, the program appears more robust. The State currently holds approximately \$838,000,000.00 in surety bonds, \$36,000,000.00 in the land reclamation SRF, and \$145,000,000.00 in the water treatment SRF. Combined, the State controls over \$1 billion dollars in funds and annual SRF revenues devoted, or potentially devoted, to complete approved reclamation plans at bond forfeiture coal mining sites.

Audit Issue and Recommendation Two: A lack of limitations on amounts permitted to be underwritten by single insurers for mining reclamation surety bonds increases the risk of insolvency of the Special Reclamation Funds. The Legislative Auditor recommends a legislative change to impose maximum thresholds on the value of bonds underwritten by a single surety.

DEP Response: Issue Two is directed to the West Virginia Legislature and does not require a response from the agency.

Audit Issue and Recommendation Three: The DEP does not require coal companies to maintain bonds equal to the estimated reclamation cost as required for inactive extensions and does not ensure that applications for inactive status extension are complete and accurate. The Legislative Auditor recommends that the DEP comply with West Virginia Code of State Rules § 38-2-14.11.

DEP Response: During the course of providing a response to the request from the Post-Audit Division, DMR self-identified 26 instances where inactive status regulations were incorrectly implemented. DMR immediately took action through our inspection and enforcement section to address these issues.

The list of permits with inactive status, as referenced in Issue 3, would have an approval date of June 30, 2018 to December 31, 2020. During this time period, DMR approved 240, terminated/ withdrawn 30, and denied 5 inactive status applications. A total of 275 applications were processed. According to our research, we made the appropriate final decision 90.6% of the time.

Without further documentation from the Post Audit Division, DMR cannot verify the allegations raised in Issue 3.

Audit Issue and Recommendation Four: Reclamation awards that result in decreased bond amounts may increase the state's liability for mining reclamation and potentially contribute to the insolvency of the SRF. DEP does not maintain a complete record of companies that have received reclamation awards resulting in bond reductions or the reduction amounts received. The

Legislative Auditor recommends that DEP comply with Code and develop a system to track and maintain a record of all such awards. The Legislative Auditor recommends that the agency report that analysis to the Post Audits Subcommittee by November 30, 2021.

DEP Response: The agency disagrees with the Post Audit Division's allegation that the DEP fails to maintain a complete record of companies that have received reclamation awards resulting in bond reductions or the reduction amounts received. Attached to this Response as Appendix A, please find the agency's most recent inventory and analysis of the reclamation awards program.

Audit Issue and Recommendation Five: According to the State Tax Department, as of May 21, 2021, 70 mining companies that filed coal reclamation tax returns had delinquent coal reclamation tax accounts totaling \$5,300,000.00. The Legislative Auditor recommends the DEP not approve applications for permit renewals and revisions or grant inactive statuses for companies found delinquent in paying SRF taxes. The Legislative Auditor further recommends the agency revoke mining permits in the event a company fails to file tax returns, its unpaid delinquencies reach a certain threshold, or a company's delinquency exceeds a specified time limit.

DEP Response: Issue Five is, largely, directed to the West Virginia Legislature and does not require a response from the agency. To the extent a response is required, however, the WVDEP submits the following:

Recommendation 5.1 begins by noting that whether the agency considers tax delinquencies in making determinations on the issuance, renewal, or revision of permits is a discretionary duty, as made clear in West Virginia Code §22-3-11. Whether the agency exercises that discretion - given to it by the Legislature - is up to the Governor and the WVDEP. In light of that discretion, the agency reviews the delinquent tax list at the time the agency makes permitting decisions for application types of: notice of intent to prospect, operator assignment, permit transfer, significant revisions, significant incidental boundary revisions, permit renewals, and surface mine applications/ permit amendments. During the time period stated in the audit report, DMR processed 6,186 of these application types. Assuming we incorrectly applied our policy in 131 instances, as alleged, DMR appropriately issued these application types 97.9% of the time. Without permit numbers and application types, DMR cannot verify the allegations.

Further, the report overlooks the fact that companies may become tax delinquent *after* permitting decisions are rendered. The draft Report, on page 33, does not distinguish between companies that were delinquent at the time a permitting action was taken and companies that were in compliance.

Recommendations 5.2 and 5.3 require actions by the Legislature before the agency may commit to them.

Audit Issue and Recommendation Six: The DEP does not adequately verify that coal companies are remitting the proper taxes to the SRF. The Legislative Auditor recommends the DEP develop a method to track coal production and reconcile production with SRF tax collection.

DEP Response: The agency does not currently have statutory authority to take the actions recommended by the Legislative Auditor.

Audit Issue and Recommendation Seven: The DEP and Tax Department granted several million dollars in reclamation tax credits prior to the tax credit program receiving the required approval from the OSMRE in violation of federal law. The Legislative Auditor recommends that DEP not implement amendments to the program until approved by OSMRE.

DEP Response: The agency notes that it granted one such reclamation tax credit. Further, the agency contends that state tax policies do not require OSM review and approval and, to the extent the Legislature approves them and companies take reclamation tax credits on state tax payments only. Regardless, OSM reviewed the credit and approved it.

Audit Issue and Recommendation Eight: The DEP is not commencing reclamation proceedings for forfeited coal mining sites within 180 days as required by West Virginia Code of State Rules § 38-2-12.4.c. The Legislative Auditor recommends that DEP commence reclamation of forfeited sites within 180 days as currently required.

DEP Response: The agency does commence reclamation proceedings within 180 days. Site assessments, remedial work to protect public safety or against offsite impacts, liability estimates, water sampling and design activities begin at the time of forfeiture. The timing and progression of reclamation activities associated with individual sites varies from site to site. For example, water sampling takes place for a minimum of twelve months prior to advancing with design and permitting aspects of reclamation.

Audit Issue and Recommendation Nine: The DEP is not in compliance with state and federal laws that require the use of funds collected for forfeited bonds be used to reclaim those properties for which the bond was posted. The Legislative Auditor recommends that the DEP properly encumber forfeited bond funds to ensure the funds are used for reclamation costs for which the bonds are posted.

DEP Response: The WVDEP complies with state and federal law regarding the use of funds collected by forfeiting bonds by placing such funds in an account devoted entirely to the reclamation of bond forfeiture coal mining sites. The agency does not deposit forfeited bond funds into separate accounts based upon which permitted facility they arise from because the funds used for such work are fungible. Maintaining scores or hundreds of separate forfeiture accounts does not bring the benefits of scaled economy, especially here, where keeping forfeited funds in a single account will generate greater investment return while the funds are held in the account.

Audit Issue and Recommendation 10: The DEP records regarding mining permit statuses are inadequate. The Legislative Auditor recommends that the agency comply with West Virginia Code § 5A-8-9 and maintain and make public a full historical record of permit changes to allow for proper oversight and analysis.

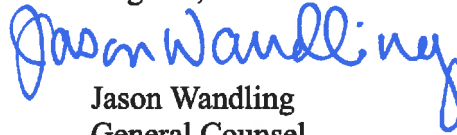
DEP Response: The WVDEP's records management system is designed to help our inspection and enforcement teams perform their jobs. The purpose of DMR's mine status codes is to ensure agency compliance with the inspection frequency requirements at 38 CSR 2-20.1. Whereby, inspection frequency is dictated by the level of activity occurring a permit. There is currently no statutory requirement to report or record the type of specific activity that is occurring on permit through a mine status code. The agency stands ready to collect and collate any and all data required by the Legislature and will do so as directed by the Legislature.

Audit Issue and Recommendation 11: The SRF Advisory Council has experienced extended vacancies and expired terms for council members due to a lack of timely appointments. The Legislative Auditor recommends that the Governor's office file SRFAC vacancies in a timely manner.

DEP Response: Issue and Recommendation 11 is not directed to the WVDEP and, accordingly, no response is required.

In conclusion, I'd like to thank you for your well-prepared and thorough report. Your report contains many insights that the agency will consider over the course of the next year. We will appear at the hearing on your report and will be prepared to answer any questions the Committee may have. In the meantime, as always, please do not hesitate to call, text, or email me.

Regards,



Jason Wandling
General Counsel

APPENDIX A

YEAR	COMPANY	PERMIT NUMBER	INSPECTOR	DESCRIPTION	TYPE of AWARD	MINE NAME
2011	Pinnacle Mining Co.	U-0220-83	Lily Kay		Water Treatment	
2011	Litwar Processing Co.	R-0006-43	Eugene Lacy		Litwar Refuse Area	
2011	Mid-Vol Coal Sales	S-4007-00	Arnold Fortner		Surface South	
2011	CNP Properties LLC	S-4008-07	Earl Holt		Surface South	
2011	Kingston Resources Inc.	O-3011-98	Ray Horrocks		Refuse/Prep Plant - South	
2011	Mingo Logan Coal Co.	O-5014-06	John Flesher		Refuse Facility South	
2011	Coal-Mac	S-5015-98	Jonathan Rorrer		Greenlands Award	
2011	Coal River Energy	S-5016-09	John Dannon		Good Neighbor	
2011	Coyote Coal Co.	S-5027-99	John Dannon		Valley Fills - South	
2011	Atlantic Leaseco	S-3063-86	Cam Ford		Valley Fills - North	
2011	Pocahontas Coal Co.	U-3036-92	Jerry Quesenberry		Deep Mine - South	
2011	Apogee Coal Co.	S-5007-01	Ron Sheets		NWTF	
2011	Bluestone Coal Corp.	S-4008-99	Jerry Quesenberry		Valley Fills - South	
2011	Hobet Mining Co.	S-5003-96	Dexter Starcher		Ducks Unlimited	
2011	Apogee Coal Co.	S-5006-05	Ron Sheets		Surface South	
2011	Pocahontas Coal Co.	S-3020-09	Steve Sizemore		Re-Mining	
2011	Kingwood Mining	U-1007-98	Cindy Cross		Underground - North	
2012	Alex Energy, Inc.	S-0005-80	Allan Kuhn	For exemplary performance in reclamation on a surface mine. From preparations of the soils to the permanent vegetative cover with and extraordinary diversity in tree species including over 60% native hardwoods and a 2 acre apple orchard on top of valley fill #2. The 22 different species of trees have consistently had significant growth rate and a survival rate of 85-90%.	Surface Rec. South	Whitman Surface Mine
2012	Pocahontas Coal Co.	U-0162-83	Jerry Quesenberry	For exemplary performance in reclamations of a refuse facility. For achieving environmental compliance, and incorporating community involvement in the expansion of a prelaw refuse area into an aesthetically appealing facility with their "Green Project" challenge to all of its operations.	Coal Refuse Rec. South	East Gulf Complex
2012	Consolidation Coal Co.	U-0017-84	Earl Holt	For their exemplary performance in reclamation of a deep min facility. From the timely reclamation and establishing vegetation at the portal areas prior to the removal of two large ponds, reconstructing the stream channel and initiating a riparian/wildlife management plan.	Refuse Reclamation South	Turkey Gap Refuse Impoundment
2012	Consolidation Coal Co.	U-0011-84	Earl Holt	For the exemplary performance in the reclamation of a refuse area, preparation plant and deep mine complex. After reclamation of the mining complex was completed, coal fines were reprocessed at the Turkey Gap impoundment over a five year period. Consol initiated reclamation of the impoundment in 2011 and finished in 2012. Extra effort was used in the establishment of the drainage channels, leaving an aesthetically pleasing and highly functional end result.	Refuse Reclamation North	Reed Hollow Refuse
2012	Wolf Run Mining Co	O-0039-83	Thomas Fultz	For exemplary performance in reclamation of a refuse facility and the innovative approach to the use of Short Paper Fiber as an amendment to the refuse in order to reduce the generation of acid mine drainage and help stabilize the slopes and provide resistance to erosion.	Surface Mine Rec. North	Koon Surface Mine
2012	Ten-A Coal Co.	S-1032-87	Kaitlyn Kiehart	For exemplary performance in reclamation of a prelaw deep mine that had created subsidence damage to the stream running through the hollow. Ten-A Coal contour mined the area and eliminated the prelaw highwall, restored the stream channel and reclaimed the site. A post mining land use of hayland and pasture blends in with the natural terrain and provided the land owner with a pond to provide water for the livestock that now graze the hillsides.	Haulroad Construction South	McComas Haulroad
2012	Met Resources, LLC	O-4001-09	Justin White	For exemplary performance in haulroad construction in that an existing county road that was previously deemed unusable to the public is not constructed of extremely durable material with reconstructed drainage control and now provides use to the members of the community.	Drainage and Sediment Control South	McComas Surface Mine #1
2012	Met Resources, LLC	S-4018-08	Justin White	For exemplary performance in reclamation of a surface mine and the engineering and construction of the drainage structures to ensure that each exit channel mirrors one another. Met Resources mined the area and returned the site to blend in with the surrounding topography in environmentally responsible manner achieving an environmental compliance with no violations during the life of the permit	Refuse Reclamation North	Jackson Hollow Refuse
2012	Kanawha Energy Co.	R-649	Cindy Cross	For exemplary reclamation of a prelaw refuse facility. Kanawha Energy acquired the facility that it had remained on inactive status since 1985 with little maintenance and poor water quality. During the next four months, the site was re-graded with an alkaline amendment and seeded. Sediment control was re-established to keep surface water contamination and erosion to a minimum and making the site more aesthetically appealing.		

2012	Mingo Logan Coal Co.	O-51-85	Doug Boone	For exemplary techniques and innovative design of a specific treatment system in order to eliminate total suspended solids in the impoundment. Water from the impoundment is pumped to two large holding ponds where an automated treatment process utilized turbidity probes and pumps to control the amount of chemical necessary to provide environmental compliance.	Pool Dewatering Project	Mountain Laurel Complex
2012	Apogee Coal Co.	S-5007-01	Allen Kuhn	For exemplary construction techniques protecting the environment on drainage structures. Over 9 miles of sediment structures are each over designed individually for the drainage area they are required to handle and builds in additional safety factors to protect the environment and provides structures to promote wildlife growth.	Drainage and Sediment Control	Guyan Surface Mine
2012	Coal-M Inc.	S-0097-80	Jonathan Rorrer	For the National Wild Turkey Federation award. This permit combines the bst of mountain top removal with returning the area to a post mining land use of hayland and pasture while integrating the development of wildlife habitat for wild turkeys. In 2012, Coal-Mac and its employees sponsored a guided hunt for the Logan area chapter of the NWTJ. Jakes program, the area kids and their parents.	NWTF	New Ridge East Surface Mine
2013	Brooks Run Mining Co., LLC		Jim Bennett & Kelley Eads		WVSAP Reforestation Award	Seven Pines Surface Mine Complex
2013	Green Valley Coal Co.	O-0010-83	Manuel Seijo	Exemplary Construction Techniques Protecting the Environment on Drainage Structures		Blue Branch Refuse Area
2013	Pocahontas, LLC	O-0073-82	Larry Dunn	Exemplary Performance Protecting the Environment in the Renovation of a Refuse Facility		Affinity Refuse Area
2013	White Flame Energy, Inc.	S-5020-97	Jonathan Rorrer	Exemplary Performance Protecting the Environment and Enhancing the Posts-Mining Land Use		White Flame Surface Mine #9
2013	Caldwell Trailblazer, LLC	S-3009-08	Larry Dunn	Exemplary Construction Techniques Protecting the Environment on Roads		Laurel Creek #1 Surface
2013	Coal-Mac Coal Co.	S-5006-07	Jonathan Rorrer	Exemplary Construction Techniques Protecting the Environment during the Construction of a Valley Fill		Pine Creek #1 Surface
2013	Mingo Logan Coal Co.	U-5063-92	Doug Boone	Exemplary Construction Techniques Protecting the Environment Through Innovative Material Placement and Drainage		Mountain Laurel Deep Mine
2013	Green Valley Coal Co.	R-0006-90	Tony Barnett	Exemplary Performance in the Reclamation of a Refuse Facility		Adkins Lick Refuse
2013	Pocahontas Coal Co.	S-3007-11	Steve Sizemore	Exemplary Performance in the Reclamation of a Surface Mine		Tommy Creek Highway Mine #1
2013	Wolf Run Mining Co	O-0113-83	Cindy Cross	Exemplary Performance in the Reclamation of a Refuse Facility		Sentinel Complex
2013	Vindex Energy Corp.	O-2005-12	David Rockwood	Exemplary Construction Techniques Protecting the Environment through Innovative Material Placement and Drainage		A-34 Refuse Pit
2013	Apogee Coal Co.	S-5006-05	Allen Kuhn		National Wild Turkey Federation Award	North Rum Surface Mine
2013	Hobet Mining, LLC	S-0032-85	Donald Crace		Ducks Unlimited	Big Horse Creek Surface Mine
2013	Coal-Mac Coal Co.		Chris Hobl	Exemplary Performance in Community Outreach and Being a Good Neighbor	Good Neighbor	Coal Mac
2013	Alpha Natural Resources		Bianne Barringer	Exemplary Performance in Community Outreach and Being a Good Neighbor	Community	Elk Run Coal Co
2013	ICG Tygart Valley, LLC	U-2004-06	Cindy Cross		Greenlands Award	Leer Mining Complex
2014	Catenary Coal Company	S-30008-00	Bart Cavendish	For exemplary construction techniques of a valley fill while protecting the environment. Construction of valley fill #3 began in 2004 by installing the first bench in order to aid in sediment control and to insure a critical foundation was established. The durable rock blanket underdrain was constructed by dumping material over the face of the fill. Reclamation started in February of 2012 with the operator's building benches behind them which controlled the water and allowed for continued reclamation in the winter months. The groin ditches were completed in May of 2014 by tying the riprap into the benches on the face to guarantee positive drainage and stop any erosion. Samples employees take pride in building valley fills to a standard that guarantees that they will perform and sustain through any foreseeable event.	Valley Fill Construction/ Southern Region	Samples Surface Mine
2014	Alpha Natural Resources	S-3005-99	Rueben Gillispie	Alpha Natural Resources acquired the Kayford Mountain permit in 2007 out of the Horizon bankruptcy. Empire's employees and management took on the hazardous task of converting the end dump fill with poor material and stability into a haul down, bottom-up construction with far superior stone quality. Since the acquisition, Empire has taken a potentially hazardous situation and added durable material for stability, proper compaction and trees for vegetation and wildlife habitat. Dyne to the excellent efforts of the employees at the Empire Surface Mine, a multi-million dollar potential reclamation liability for the state of West Virginia has been removed.	Valley Fill Construction/ Southern Region	Republic Energy's Empire Surface Mine

2014	Arch Coal, Incorporated	David Smith	Since June 2011, Arch Coal Inc. has invested over 2.5 million dollars to the pre-law refuse facility in order to update environmental compliance measures and employs over 290 workers during full production. Upgrades in technology include cameras which allow visual monitoring of the slurry lines from a control room and flow meters that will allow the system to shut completely down in the event of a line rupture. Arch Coal has also provided donations to local schools, 4-H programs, Adopt-A-Highway programs and local church programs as well as other community interaction and involvement. The facility illustrates the positive benefits that can be derived when dedicated employees consider both the environment and the community around them.	Refuse Construction and Reclamation/ Northern Region	Sentinel Complex
2014	Greenbrier Smokeless Coal Co. S-3008-05	Mark Foley	In 2004, Greenbrier Smokeless Coal Co. signed a lease agreement with MeadWestvaco to permit and mine a portion of the old Leckie Smokeless property and entered into an agreement with the Office of Special Reclamation to assist in reclamation of the forfeited Buck Lilly permit. Through the process of mining and special handling of material and providing encapsulation of the toxic material from the forfeited site, the area was returned to a useable condition for the land owner and Acid Mine Drainage at the site has been nearly eliminated. This project also reduced a significant amount of cost to the state.	Refuse Construction and Reclamation/ Southern Region	Buck Lilly Mining Complex
2014	Met Resources, LLC	Justin White	Met Resources began mining on the McComas 155 acre permit in June of 2010 as a contour job with augering allowed. During the mining process, reclamation is continuously monitored and was kept current with seeding being completed promptly in order to assure good success. The area has been returned to its original contour with trees being planted in order to meet the forestland post mining land use. Met Resources was able to mine this permit in a timely manner with only one violation during the life of the permit, therefore providing excellent protection of the environment.	Surface Mine Reclamation/ Southern Region	McComas No. 1 Surface Mine
2014	Alpha Natural Resources	Ray Horrocks	The Republic #2 permit consists of 952 acres and has 3 valley fills that have been built with bottom-up construction and has a post mining land use of forestland. The fills are promptly seeded as each lift is completed with tree planting slated for this year. In 2013, Republic introduced The American Chestnut Foundation to the mine site. Students from Duke University have visited the site to study and measure the growth of the once plentiful but since lost American Chestnut tree. Test plots and American tree lings have been planted throughout the reclaimed ridges. Republic also participates in community involvement and sponsors an Earth Day event with local elementary kids from the local schools.	Surface Mine Reclamation/ Southern Region	Republic Energy's Republic No. 2 Surface Mine
2014	Coal-Mac, Inc.	Jonathan Rorrer	The Phoenix #4 surface mine was approved for mining 851 acres in August of 2003 as a mountaintop mine using the AOC Plus method for determining backfill configurations. Prior to mining, a large unstable impoundment left by previous loggers had to be removed in order to protect local residents from possible failure. The mining and reclamation of this permit was completed in a timely manner that not only maximized coal recovery but also minimized the adverse impacts to the environment.	Surface Mine Reclamation/ Southern Region	Phoenix No. 4 Surface Mine
2014	Alpha Natural Resources	Jerry Quesenberry	Permit #O-0047-82 was transferred to Road Fork Development in 2012 in order to provide a coal refuse disposal area for the recently constructed Preparation Plant at Mannana. Treatment for high levels of iron and manganese has been ongoing at the refuse area for many years. Road Fork improved the ponds and treatment facilities in order to better treat the water and in increase overall compliance at the facility and to ensure that the company maintains their exceptional environmental standards.	Water Treatment Facility/Southern Region	Road Fork Developments' Turkey Creek Refuse Area
2014	Alpha Natural Resources	Jerry Quesenberry	In 2012, Kepler Processing began the major construction effort of a down-stream expansion of the refuse disposal area. Reinforcement of the downstream toe and slope has resulted in an increased Static Safety Factor, minimizing any future public and/or environmental concerns. Throughout the project, Kepler Processing has maintained Best Management Practices for protecting the environment, while earning the reputation of being a Good Neighbor.	Impoundment Construction/Southern Region	Kepler Processing's Wallace Cabin Branch Impoundment
2014	Alpha Natural Resources	Cam Ford	The Sugarcamp Refuse Impoundment was permitted as a combined refuse facility in 2003. In 2014, Power Mountain installed several lateral drains to convey internal drainage from within the embankment increasing stability and integrity of the refuse embankment. A 800 foot beltline extension was also completed which ultimately led to increased efficiency in material placement, excellent compaction percentages and minimized erosion, all of which improved the overall protection of the hydrologic balance of the downstream hydrology.	Impoundment Construction/Southern Region	Power Mountain Coal Company's Sugarcamp Refuse Impoundment
2014	Consol of Kentucky, Inc	Phillip Williamson	Prior to commencing operations, Consol re-worked the previously used, dilapidated gravel haulroad making it wider, straightening out the curves, rip-rapped the ditches, reducing the grade and paving the 30 foot road with 8 inches of asphalt for one mile. The Twin Branch Surface Mine has taken numerous precautions to limit the potential impacts of coal haulage to the environment and to be good stewards to the communities in which they operate. Once operations are complete, the road will be turned over to the state and will serve as access to the future Twin Branch Motorsports Complex.	Haulroad Construction South	Twin Branch Surface Mine

2014	Coal-Mac, Inc.	S-5006-07	Jonathan Rorrer	Coal-Mac strives to be a good neighbor and support their local communities working with them to improve the lives of those around us. Coal-Mac partners with schools, assist with the local crime watch program, donates coal to local residents, support industry organizations and provide educational opportunities for industry awareness in the southern West Virginia region. Every year, Coal-Mac celebrates Earth Day with both Burch Elementary and Omar Elementary schools, inviting students, teachers and parents to tour the mine complex and discuss the mining and reclamation process. Mingo Logan Coal Company has put forth an excellent effort towards aiding the National Wild Turkey Federation in furthering its core objectives such as creating and enhancing wildlife habitat as well as furthering outdoor education. The company has worked to adjust their seed mix to further promote tree growth and provide an abundant food source for all varieties of wildlife. Mingo Logan also hosted the events to promote sportsman education while affording opportunities to enjoy the outdoors to those who would otherwise not have the chance to do so.	Good Neighbor and Community Outreach Award	Pine Creek #1 Surface
2014	Mingo Logan Coal Co.	S-5081-87	Tom Adkins		National Wild Turkey Federation Award	Left Fork Surface Mine
2014	Xinergy Ltd.	O-3013-11	Mark Foley	Construction of the Clearco preparation plant and double batchweigh loadout started in December of 2012 and South Fork loaded the first train in August of 2013. Throughout the initial earth work, construction activities of the plant and all associated facilities and continuing now into the day to day operation, attention to detail has been made in order to maintain a high standard and record of environmental compliance. South Fork Coal Co. has not received any violations to date and was able to exhibit exemplary performance in the construction and operation of this facility while protecting the environment resulting in and continuing to be an excellent example of responsible coal mining and operation.	Greenlands Award	South Fork Coal Company's Clearco Preparation Plant
2015	Catenary Coal Company Alpha Natural Resources Republic Energy Arch Coal, Incorporated Greenbrier Smokeless Coal Co. S-3008-05 Met Resources, LLC Alpha Natural Resources Coal-Mac, Inc. Alpha Natural Resources Alpha Natural Resources Alpha Natural Resources Alpha Natural Resources Consol of Kentucky, Inc Coal-Mac Incorporated Mingo Logan Coal Co. Xinergy Ltd.				Valley Fill Construction Valley Fill Construction Community Commitment Refuse Construction and Reclamation Refuse Construction and Reclamation Surface Mine Reclamation Surface Mine Reclamation Surface Mine Reclamation Water Treatment Facility Refuse Impoundment Construction Refuse Impoundment Construction Haulroad Construction and Reclamation Good Neighbor and Community Outreach Award National Wild Turkey Federation Award Greenlands Award	Samples Surface Mine Republic Energy's Empire Surface Mine Empire Surface Mine Wolf Run Mining company's Sentinel Complex Buck Lilly Mining Complex McComas No. 1 Surface Mine Republic Energy's Republic No. 2 Surface Mine Phoenix No. 4 Surface Mine Road Fork Developments' Turkey Creek Refuse Area Kepler Processing's Wallace Cabin Branch Impoundment Power Mountain Coal Company's Sugarcamp Refuse Impoundment Twin Branch Surface Mine Pine Creek #1 Surface Mine Left Fork No. 2 Surface Mine South Fork Coal Company's Clearco Preparation Plant and Loadout Facility
2015	Xinergy Ltd.				Greenlands Award	Canyon Refuse and Dump AML Project

2018	Coal Mac	S-5027-01	Jeremiah Carter	<p>This mine is a great example of the planning and effort taken to return the site to the permitting conditions as much as possible. The backfill acres have been terraced to assimilate the premining topography and loosely graded to provide a suitable medium for better establishing grasses and trees on the site. The reclamation of this site has provided a suitable environment for the variety of wildlife that inhabit the area. Many turkeys have been seen on this site and the fact that it hosts the annual Jakes Hunt is a testament to the successful turkey habitat that has been established.</p>	National Wild Turkey Federation Award	Imperial Mine
2018		U-2002-01	Thomas W. Fultz		Underground Reclamation	
2019	Vindex Energy, LLC			A 100-acre bond forfeiture site in Tucker County that included a large, open-pit, exposed highwall and a substantial water treatment obligation. At the time of its forfeiture, the site represented the single largest liability to the state's Special Reclamation Fund. In agreement with the West Virginia Department of Environmental Protection, Vindex used the A-34 permit for the placement of mine refuse from an adjacent, active mining complex, eliminating the need to permit a new facility and allowing for the reclamation of the forfeited area.	Greenlands Award	A-34 Refuse Area
2019	Cheyenne Coal Sales	U-0011-83 & U-2009-96		Included the demolition of coal handling equipment and preparation plant, the reclamation of a coal refuse area and the elimination of multiple sources of acid mine drainage. After land reclamation was completed and new drainage control structures were installed, water quality from the site improved dramatically, with several outlets now in compliance with effluent limitations.	Special Reclamation Award	Mountaineer Infrastructure
2019	Stanley Industries			5,300 feet of highwall and the elimination of unstable spoil material on a pre-law mine site close to several homes. The project also required the installation of bat boxes to protect endangered species habitat and the installation of appropriate drainage control.	AML North Reclamation Award	Morgan Highwall #46
2019	J.F. Allen Co.			A 200 foot long and 75 feet wide sudden landslide that developed along a pre-law mining area where excavated spoil was placed in uncontrolled manner. The landslide was threatening three residences and had already damaged the foundations and driveways of several homes. The reclamation involved the excavation of 45,000 cubic yards of material and the stabilization of the area and installation of sediment and drainage control.	AML Emergency Award	Satls Run
2019	Coal Mac			Construction and operations of drainage control structures on a large surface mine, including an excellent regulatory compliance history through effective runoff management and the use of innovative preventive measures.	Drainage Control Construction Award	Pine Creek No. 1 Surface Mine
2019	Mid-Vol			Reclamation of large sediment control structure and the reconstruction of a stream channel that on the newly reclaimed area that promoted rapid colonization of macroinvertebrates and fish.	Drainage Control Construction Award	Cactus Ridge Surface Mine
2019	Southeastern Land			Construction of valley fills associated with a surface mine. By being innovative within the available resources, environmental impacts were kept to a minimum. This included over-stacking two existing fills to avoid impacts to jurisdictional waters and constructing an incised pond to reduce the impacts to jurisdictional waters.	Valley Fill Construction Award	Twin Branch East
2019	Republic Energy			Construction of a 55-acre coal handling facility through effective sediment control and concurrent reclamation of disturbed areas, including the elimination of 2,800 of pre-law highwall adjacent to the site.	Mine Construction Award; Loadout Facility	Workman Creek Coal Handling Facility
2019	Mid-Vol Coal Sales			Over two miles of pre-law highwall as part of its active mining operation and the successful implementation of a highly effective contemporaneous reclamation plan that minimized disturbed acreage on the active mining site.	Surface Mine Reclamation Award	Dan's Branch Surface Mine
2019	Pocahontas Coal Company			Working with multiple state and federal agencies, the company completed the multiphase conversion process from a coarse coal refuse facility to a slurry impoundment with particular attention paid to environmental protection and compliance.	Surface Mine Reclamation Award	Coal Refuse Facility
2019	Mingo-Logan Coal LLC			Construction of a primary access, 9000 feet long haul road for a large surface mining operation. The road was constructed in difficult topography with special attention to runoff control and avoiding impacts to jurisdictional waters.	Mine Construction Award; Loadout Facility	Spruce No. 1

2019	JMAC Leasing				Operations and reclamation of a surface mine after encountering a substantial mine fire in the coal reserves associated with the active mine area.	Surface Mine Reclamation Award	Briar Mountain Surface Mine
2019	Highland Mining Co.				Operation and reclamation of a large surface mine, including the reclamation of pre-law mining disturbance and the construction of a training area for the West Virginia Army National Guard.	Surface Mine Reclamation Award	Reylas Surface Mine
2019	Greenbrier Smokeless Coal Mining LLC.				575-acre surface mine in Greenbrier County that include the elimination of over three miles of pre-law highway, with a special emphasis on returning both the active and pre-law disturbance to approximate original contour and a post-mining land use of forestry.	Surface Mine Reclamation Award	Pollock Knob Surface Mine
2019	Lexington Coal Company				Included the installation of drainage control to address an unforeseen groundwater seep that, without innovative design and installation of control structures, could have compromised the long-term stability and reclamation of the mine.	Underground Mine Reclamation Award	Laurel Creek No. 8 Mine
2019	Blue Creek Mining Company				Operation of a surface mining permit that was later converted for the placement of coarse coal refuse, eliminating the need for new disturbance. Blue Creek Mining, in conjunction with the West Virginia Department of Environmental Protection, the West Virginia Division of Natural Resources and the federal Office of Surface Mining, hosted an Arbor Day event for local students to learn about forestry practices by planting trees on the reclaimed areas of the permit.	Good Neighbor Award	Western Refuse Areas
2020	Vindex Energy LLC	U-2001-07		Amy Tracey	The hybrid FRA contouring method of planting used on this site, it has been found to be very inventive and effective. This method allowed them to meet requirements for Phase 2 release while remaining compliant in all enforcement areas during every inspection.	Reforestation Award	Bismarck Deep Mine
2021	Vindex Energy LLC	O-0096-83		Amy Tracey		Exemplary Reclamation of Surface Mine Operations Award	Dobbin Ridge Prep Plant
2020	Republic Energy	S-3012-99				Exemplary Reclamation of Surface Mine Operations-South Award	Edwight Surface Mine
2020	Harrison County Coal Resources, Inc.	U-0104-83				Exemplary Reclamation of Underground Mining Operations-North Award	7 North Portal
2020	Marshall County Coal Resources, Inc.	O-1023-92				Exemplary Reclamation of Refuse Facilities-North	Connor Run Refuse Area
2020	Wolf Run	O-0113-83		Dave Smith	Outstanding work in development, performance, reclamation, and continuing compliant operation of this mining facility.	Exemplary Construction Techniques for Drainage Structures - North	Leer South Mine
2020	Wolf Run	U-0015-83		Dave Smith	Outstanding work in development, performance, reclamation, and continuing compliant operation of this mining facility.	Exemplary Construction Techniques for Drainage Structures-North	Leer South Mine
2020	Mid-Vol Coal Sales	U-4025-89		Larry Kade	They constructed additional sediment control in some difficult working conditions. They constructed 2 additional ponds in some very steep areas and ran a discharge line to the upper pond to be able to aerate the water to assist in dropping the iron out. They also constructed flumes on steep hillsides to help control erosion.	Exemplary Construction of Drainage Control	39 Mine Outlet 11 Pond
2020	Republic Energy	S-3017-12		Matthew Dillon		Exemplary Construction Techniques for Drainage Structures-South	Workman Creek Surface Mine
2020	Mid-Vol Coal Sales	S-4007-09			Exemplary Construction on it's structures in the sediment control system.	Exemplary Construction Techniques for Valley Fills-South	Dry Branch Surface Mine
2020	Hawthorne Coal Company, LLC	D-184		Roland Ring	Upon receipt of the PMLU approval, reclamation activities began according to the approved plan. The residual refuse material removed from the raw coal and clean coal stock pile areas was consolidated and disposed of accordingly. The facility and adjacent buildings were dismantled, the siding and steel removed were salvaged and recycled by the contractor eliminating the need of landfill disposal.	Exemplary Construction Techniques for Loadout or Preparation Plant Facility-North	Sawmill Run Preparation Plant
2020	Mid-Vol Coal Sales	O-4027-92		Larry Kade		Exemplary Construction Techniques for Loadout or Preparation Plant Facility-outh	Berwind Loadout Facility



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