A REPORT
TO THE
MONTANA
LEGISLATURE

Improving Montana's Opencut Mine Permitting Process

Department of Environmental Quality

JUNE 2008

LEGISLATIVE AUDIT
DIVISION

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June 2008

The Legislative Audit Committee
of the Montana State Legislature:

This is our performance audit of the permitting function of the Opencut Mining Program within the Department of Environmental Quality. Findings and recommendations address a wide range of issues related to how the department permits opencut mines including the timeliness of issuing permits, improving management information, and operating more efficiently.

We wish to express our appreciation to department personnel, as well as stakeholders, for their cooperation and assistance during this audit.

Respectfully submitted,

/s/ Scott A. Seacat

Scott A. Seacat
Legislative Auditor

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FIGURES AND TABLES

Appointed and Administrative Officials

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REPORT SUMMARY

Improving Montana's Opencut Mine Permitting Process

The Department of Environmental Quality can strengthen permitting operations and improve resource management by clarifying responsibilities and improving management information capabilities.

Audit Findings

The Opencut Mining Program (program) within the Department of Environmental Quality (department) is responsible for permitting and oversight of opencut mining in Montana. This performance audit focused on the opencut mine permitting process.

To examine the program's permitting activities, we analyzed available data, reviewed program records, and interviewed opencut mining stakeholders. One of our objectives was to determine what controls are needed to assure the department issues opencut mining permits within the time frames established in state law and administrative rule. However, program records did not track information necessary to accurately determine whether the department complied with the statutory 30-day time frame for processing permit applications. While the lack of management information affected our analysis, available data indicated the department can make improvements to better manage the permitting process and program compliance with state laws. The following bullets highlight audit findings.

- ◆ **Improving file documentation**. The department's official files were missing documentation necessary to issue an opencut mining permit.

- ◆ **Formalizing the permitting process**. The department had an informal application process for permit applicants and department personnel, which can result in confusion among the regulated community and program staff.

- ◆ **Clarifying the department's role in processing applications**. Although the department has a backlog of pending permit applications, program staff perform tasks beyond their statutory responsibilities, such as drafting application documents for mine operators.

- ◆ **Facilitating collection of the Resource Indemnity and Groundwater Assessment Tax (RIGWAT)**. Not all opencut mine operators pay RIGWAT, a primary source of program funding. While the Department of Revenue (DOR) is responsible for collecting the tax, the Department of Environmental Quality can facilitate collection efforts by providing DOR with information about opencut mining activities.

- ◆ **Improving the management information system**. The department does not collect complete management information to effectively manage the Opencut Mining Program. Additionally, the department has not identified performance measures essential to a results-oriented management system.

- **<u>Setting priorities for processing applications</u>**. Some applicants may have received preference when program personnel processed applications because there are no formal priorities for processing applications.

- **<u>Clarifying public notification</u>**. Proposed opencut mines commonly generate public interest. However, state law does not require operators or the department to notify the public of proposed operations.

<u>Audit Recommendations</u>

Audit recommendations address improving internal controls, clarifying department responsibilities, and improving efficiencies of the permitting process.

Chapter I –Introduction

Introduction

The Legislative Audit Committee requested a performance audit of opencut mine permitting activities. The Opencut Mining Act (Act) applies to a number of minerals and materials, but sand and gravel mines account for most opencut mines.

The Department of Environmental Quality (department) is responsible for permitting mines and enforcing the Act. The department delegates these responsibilities to the Opencut Mining Program (program) within the department's Permitting and Compliance Division (division).

Audit Objectives

Our overall objective was to evaluate Opencut Mining Program permitting activities. To accomplish our objective, we answered the following three questions:

1. What controls are needed to assure the department issues opencut mining permits within the time frames established in state law and administrative rule?

2. Does the department comply with other statutory requirements for issuing opencut mining permits?

3. Can the department strengthen data-sharing with the Department of Revenue to increase opencut mine operators compliance with paying the Resource Indemnity and Groundwater Assessment Tax?

Audit Scope and Methodologies

Audit scope was limited to analyzing department activities for issuing opencut mining permits. We did not examine department responsibilities for monitoring and enforcing the Act and administrative rules.

To answer our three audit questions, we:

- Reviewed opencut mining laws and rules.
- Reviewed program budget information.
- Reviewed other state's information regarding opencut mine permitting.
- Reviewed a statistical sample of opencut mining permits issued during fiscal years 2003 through 2007.
- Reviewed pending opencut mining permit application information.
- Analyzed permit information in the program's database.
- Interviewed program personnel about opencut mining permitting activities.
- Interviewed representatives of the opencut mining industry.
- Accompanied program staff on opencut mine inspections.

Data Limitation

Government auditing standards require disclosure of any constraints imposed on the audit because of data limitations. To accomplish our audit objective, we analyzed how long it takes the department to process an opencut mining permit application. However, our analysis was limited for several reasons, including:

- The department does not consistently date-stamp when application materials are received and placed in the official file.

- The department does not require permit applicants to submit "complete" application packets before beginning to process applications. Since application materials are commonly submitted "piecemeal," we were unable to determine when applicants had submitted all information necessary for a complete application.

Due to these factors, we were unable to determine how long it takes the department to process applications. This also impacted audit work on program staffing needs, which is discussed further in Chapter III.

Potential Areas for Future Performance Audit Work

While opencut mine monitoring and enforcement activities were outside of audit scope, we identified potential issues in these areas we believe warrant future performance audit work:

- Monitoring. The department conducts limited monitoring of permitted opencut mines. Department personnel stated limited resources affect their ability to conduct routine inspections, and opencut mines may go for years without an inspection. Consequently, sureties/bonds for covering reclamation costs may become inadequate and some operators may not fully comply with permit requirements.

- Enforcement. The Act is primarily a reclamation act to ensure opencut mines are reclaimed upon closure. We documented instances of opencut mine operators mining without permits and reclamation bonds. While the department was aware of these instances, there was minimal or no enforcement action taken. In some instances, operators continued to operate for extended periods without coming into compliance with the Act. In one instance, the department failed to initiate enforcement action before the statute of limitations expired.

Future performance audit work in these areas could include evaluating compliance and monitoring activities such as completion of inspections, enforcement of state laws and administrative rules governing opencut mining activities, review of reclamation and release of bonds, and environmental reviews as required by the Montana Environmental Policy Act.

Report Contents

This report is organized into five chapters. Chapter II provides background information about the program. Chapter III presents conclusions about the department's permitting of opencut mines. Chapter IV presents recommendations for improving internal controls for permitting. Chapter V presents recommendations for improving the efficiency of the agency's permitting process.

The department cooperated and responded favorably to our preliminary audit findings and recommendations. In a number of instances, the department initiated intradepartmental efforts to begin addressing proposed recommendations, including finding resources to help with implementation. The department's response to the audit is located at the end of this report.

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Chapter II – Background

Introduction

This chapter provides information about the Department of Environmental Quality's (department) Opencut Mining Program (program). Most opencut mining is for sand and gravel resources, but also includes a number of other minerals and materials.

Opencut Mining Act Governs Opencut Mining Operations

Laws governing opencut mining date back to 1973 with the passage of the Opencut Mining Act (Act). The following sections provide an overview of Title 82, Chapter 4, Part 4, MCA, which governs opencut mining.

Types of Materials Extracted from Opencut Mines

The Act requires persons wanting to mine the following materials obtain an opencut mining permit:

- Gravel
- Sand
- Bentonite
- Clay
- Scoria
- Peat
- Soil
- Mixtures of the above substances

Gravel and sand mines account for more than 92 percent of all opencut mining permits. Section 82-4-431, MCA, exempts opencut mines from permitting if the mine will remove less than 10,000 cubic yards of materials. In addition to extracting minerals, opencut mines may process mined materials on-site. Sand and gravel processing activities commonly include rock crushers, concrete mixing plants, wash plants, and asphalt batch plants.

Operators Must Submit an Application Packet

To obtain an opencut mining permit, the Act and related administrative rules require operators to submit an application packet. The application packet contains information necessary for the department to determine whether to permit an operation. Required information in the application packet includes:

- A plan of operation that provides information about the nature of a proposed mine and how the operator will reclaim the mined area.
- A map of the area to be mined.

- ◆ Verification the operator has checked with appropriate local government weed control and zoning officials.

- ◆ Verification the operator has consulted the property owner of the proposed operation.

- ◆ A bond for estimated reclamation costs.

If, prior to applying for a permit, an operator notifies the department of the intention to submit an application and requests the department examine the area to be mined, the department must examine the area and make recommendations to the operator regarding the proposed opencut operation (82-4-432, MCA). This statute also states the operator may request a meeting with the department about a proposed operation, and the department is required by law to hold a meeting when requested.

2007 Legislature Rescinded Application Fees

The department requested and the 2007 Legislature passed legislation rescinding a $50 permit application fee, eliminating any fees collected by the program for mining permits. Department management stated the costs for collecting and processing the $50 application fees were greater than revenues collected. Additionally, the fees were deposited in the state's Environmental Rehabilitation and Response Account, which is not available for use to offset program costs. House Bill 201 introduced to the 2007 Legislature would have assessed annual operating fees based on acreage mined for all opencut mines; however, the bill was tabled in committee.

Department Reviews Application Information

Upon receiving a permit application packet, program personnel review application materials to determine whether an application complies with standards set in state law and administrative rules. The department's review includes:

- ◆ Inspecting the site.

- ◆ Ensuring maps of the proposed operation clearly and accurately describe the location of the mine and proposed mine boundaries.

- ◆ Verifying the mining plan of operation meets standards and the disturbed area can be reclaimed to accepted standards.

- ◆ Sending application information to the State Historical Preservation Office to identify potential historical or archaeological impacts.

State Law Sets Time Frames for Issuing Opencut Mining Permits

Section 82-4-432, MCA, requires the program to determine whether an application is acceptable within 30 days of receiving a complete application. If the department is unable to make a determination within 30 days, it may obtain one 30-day extension by notifying the applicant. If the application is not acceptable, the program must notify the

operator of any deficiencies in the application. When the applicant returns the revised application, the program has 30 days to determine whether the revisions are acceptable. If the application is still unacceptable, the process is repeated. The following diagram illustrates the application process as outlined in section 82-4-432, MCA.

Figure 1
Opencut Mine Permit Application Process

Source: Compiled by the Legislative Audit Division.
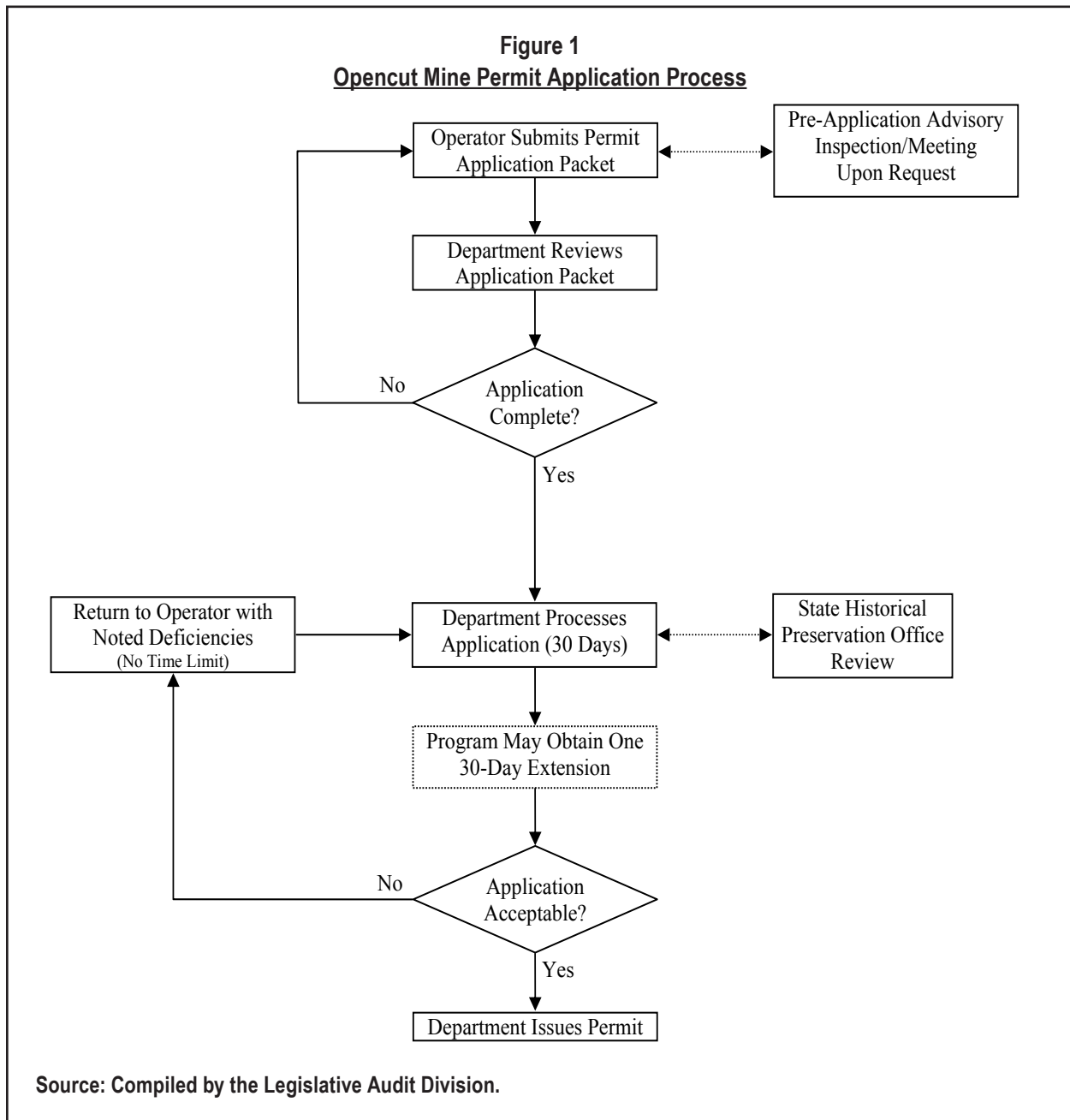
Other Related Permitting Activities

In addition to issuing "standard" operating permits, the department also conducts similar activities for the following types of permits:

- ◆ <u>Amendment</u>. Operators may at any time submit a request to amend an existing permit, often for expanding an existing mine.

- ◆ <u>Assignment</u>. Permit assignments are issued when a permit is transferred from one operator to another operator.

Other Governmental Entities Can Affect Opencut Permits

While the department is responsible for issuing opencut mining permits, other local and state entities can affect opencut mining operations. Examples of other entities include:

- ◆ <u>Air Resources Management Bureau (department)</u>. Some mining equipment or operations may require operators to obtain air quality permits.

- ◆ <u>Water Protection Bureau (department)</u>. If an operation discharges wastewater to surface or groundwater, a discharge permit may be required to protect water quality.

- ◆ <u>Montana Department of Transportation</u>. Impacts to traffic and safety on state highways, as well as ingress and egress to a proposed operation, may result in delays and/or changes to a plan of operation.

- ◆ <u>Department of Natural Resources and Conservation</u>. Depending on use and source of water, operators may need to apply for and obtain a water right.

- ◆ <u>County Governments</u>. County governments have zoning authority, which can ban or condition opencut mining. In addition, concerns about traffic safety on county roads, as well as whether county roads were designed to withstand the impacts of heavy truck traffic, may result in regulating access to and use of county roads.

<u>The Montana Environmental Policy Act</u>
<u>Applies to Opencut Mines</u>

Title 75, Chapter 1, Parts 1 through 3, MCA, the Montana Environmental Policy Act (MEPA), outlines Montana's policy to encourage productive and enjoyable harmony between man and the environment, to prevent or eliminate damage to the environment, and to improve the understanding of ecological systems and natural resources important to Montana. MEPA laws are separate from the Opencut Mining Act, and require government agencies to complete an environmental review so an informed decision can be made. After program personnel complete the environmental review, the department issues an environmental assessment (EA). EAs are formal documents describing a proposed action and its effects on the environment. However, MEPA sets no environmental standards, even though it requires analysis of a proposed action. Additionally, MEPA provides no authority to any state agency, including the department, to require conditions or impose mitigations on a proposed permitting action beyond those specifically in the program's respective state law. While the department has historically completed all EAs, the

department has established policy allowing an operator to reimburse the department for costs incurred for having an EA completed by a private contractor.

Environmental reviews and EAs address a wide array of environmental concerns such as:

- Air quality
- Water quality
- Wildlife
- Archaeology
- Geology and soil quality
- Aesthetics

Interviews indicate EAs rarely result in the program denying proposed opencut mining permits. However, EAs may result in special conditions to mitigate potential or actual environmental effects. Examples of mitigation practices include:

- Restricting operating hours to eliminate noise during the night.
- Requiring downward facing lights to reduce ambient light at night.
- Creating berms for visual and sound barriers.
- Installing specialized equipment to reduce noise levels.
- Conducting groundwater monitoring.

Opencut Mining Activity

As of November 2007, the department reported 1,787 active opencut mines in the state. The number of opencut mining permits issued has increased in recent years. Table 1 provides information on the number of opencut mining permits issued from calendar years 2000 through 2006.

Table 1 Opencut Mining Permits Issued Calendar Years 2000-2006	
Year	Permits Issued
2000	59
2001	59
2002	80
2003	79
2004	119
2005	108
2006	111

Source: Compiled by the Legislative Audit Division from department records.

Majority of Opencut Mines are Government Owned

Of the 1,787 active mines, 955 (53 percent) are owned by federal, state, or local government agencies, with counties owning the most. While state law requires government agencies to obtain permits for opencut mines, state law excludes government entities from bonding requirements, as well as any fees that might be assessed (82-4-405, MCA). The remaining 832 (47 percent) active mines are operated by private sector businesses.

Active Life of Opencut Mines Vary

The active life of opencut mines vary depending on the general purpose. Some opencut mines are "borrow pits" used for small construction projects and are reclaimed upon completion of the project, often within several years. Other opencut mines are major operations with excavations projected to last for 30 years or more. Additionally, in some instances, operators obtain a permit to mine a specified area for a number of years, with plans to expand the area in future years. For example, a mine operator may obtain a permit to operate an opencut mine for ten years, but plans to obtain a future permit amendment to expand the mine for an additional ten years.

Program Funding

The program receives approximately 92 percent of its funding from Resource Indemnity Trust fund (RIT) interest earnings and revenues from the Resource Indemnity and Ground Water Assessment Tax (RIGWAT). The remaining 8 percent is funded with state General Fund. Table 2 provides information about program funding for fiscal years 2005 through 2007.

Table 2
Opencut Mining Program Funding
Fiscal Years 2005-2007

	Fiscal Year 2005	Fiscal Year 2006	Fiscal Year 2007
RIT/RIGWAT	$406,732	$456,907	$456,611
General Fund	$39,064	$37,845	$40,051
Total	$445,796	$494,752	$496,662

Source: Compiled by the Legislative Audit Division from SABHRS data.

Program FTE

The program is appropriated funding for approximately six FTE. In fiscal year 2008, the department reprioritized one vacant position from the Coal and Uranium Mining section, which is within the same bureau as the Opencut Mining Program. As of February 2008, program staffing included four reclamation specialists. One reclamation specialist is located in Helena and three reclamation specialists are located in the Billings and Kalispell field offices. The program supervisor is located in Helena. Remaining FTE includes part-time administrative personnel located in Helena and the field offices and bureau and division administration.

Chapter III – Audit Conclusions

Introduction

This performance audit was requested primarily due to concerns over the Department of Environmental Quality (department) not issuing opencut mining permits within the time specified by law. During preliminary audit work, the department concurred with this concern. This chapter presents our conclusions about the timeliness of issuing permits. Additionally, we present information about external factors that may affect the department's ability to issue opencut mining permits in a timely manner.

The Department Does Not Typically Meet Time Frames for Issuing Opencut Permits

At the beginning of the audit, the department acknowledged a backlog of opencut mining permit applications exceeding the time frames established in statute. Section 82-4-432, MCA, requires the department to issue an opencut mining permit within 30 days of receiving a complete application, with one 30-day extension for cause.

To verify the department's acknowledged backlog, we analyzed department information about pending applications and confirmed the department was exceeding statutory time frames. Available department data indicates approximately 90 percent of pending applications exceed the maximum of 60 days to process an application.

CONCLUSION

The department is not issuing opencut mining permits within the time frames established in state law.

External Factors Can Impact Opencut Mining

Audit work indicates external factors beyond the department's control can affect the opencut mine permitting process, including its ability to issue opencut mining permits within the time frames prescribed by law. The following sections provide information about external factors impacting opencut mining.

Opencut Mining Act Does Not Address Coordination of Permitting Activities

Section 82-4-432(4)(d), MCA, states "If the [opencut] application is acceptable, the department shall issue a permit to the operator that entitles the operator to engage in

the opencut operation on the land described in the application." In practice, however, operators may be required to obtain, from other governmental entities, additional permits or approvals before mining such as:

- ◆ Air quality permit
- ◆ Water discharge permit
- ◆ County/State roadway approach permit(s)
- ◆ Zoning related approvals

During our audit, we noted operators may apply for the opencut mining permit first, and address other necessary permits and approvals later. These other permits or approvals can result in delaying operations, adding operating conditions, and possibly stopping operations. The Opencut Mining Act does not provide regulatory authority over other required permits and approvals associated with opencut mining activities. As a result, the program cannot require operators to obtain other necessary permits and approvals as part of the opencut mine permitting process. If the department issues an opencut mining permit, the department is giving an operator the right to mine; however, other permits or approvals may prevent this.

The Department Must Comply with the Montana Environmental Policy Act

The Montana Environmental Policy Act (MEPA) applies to all agencies, including the department. MEPA is a process to identify and assess impacts to the environment before a state agency makes a decision that could impact the environment. Since opencut mining results in disturbances to the environment, the department must complete an environmental review to comply with MEPA. Additionally, other required permits and approvals may also call for environmental reviews. For example, the department's Air Resources Management Bureau and Water Protection Bureau each conduct separate environmental assessments if corresponding permits are needed.

Department personnel and our observations indicate it is not always reasonable for the department to complete an environmental review and finalize an environmental assessment (EA) within the time frames for issuing an opencut mining permit. According to department personnel, the time required to conduct an environmental review varies due to public interest and/or the complexity and nature of potential impacts. While MEPA and the Act provide time frames for issuing permits and approvals, there is no statutory connection between opencut mine permitting, environmental review, and other related statutory program time frames. A recent First Judicial District Court decision stated the Act takes precedence over MEPA. Consequently, the department must comply with time frames in the Act, whether or not it has completed an environmental review.

Conflicts Exist Between Opencut Mining and Other Land Uses

One external factor impacting the complexity of EAs and time frames to complete EAs is conflict resulting from competing land uses, specifically opencut mining versus residential use. Commonly, particularly in high-growth urban-rural interface areas, residential land uses conflict with opencut mining activities. Currently, section 76-2-209(2), MCA, allows counties to reasonably condition or prohibit sand and gravel mines in areas zoned residential. However, subdivisions and other residential land uses are expanding into areas not zoned by local governments.

Figure 2 illustrates the proximity of opencut mines to populated areas. Geographic data for opencut mines were only available for western Montana, and we selected three of the more populated counties in the region for illustration.

Figure 2
Opencut Mining Sites Proximity to Population Density
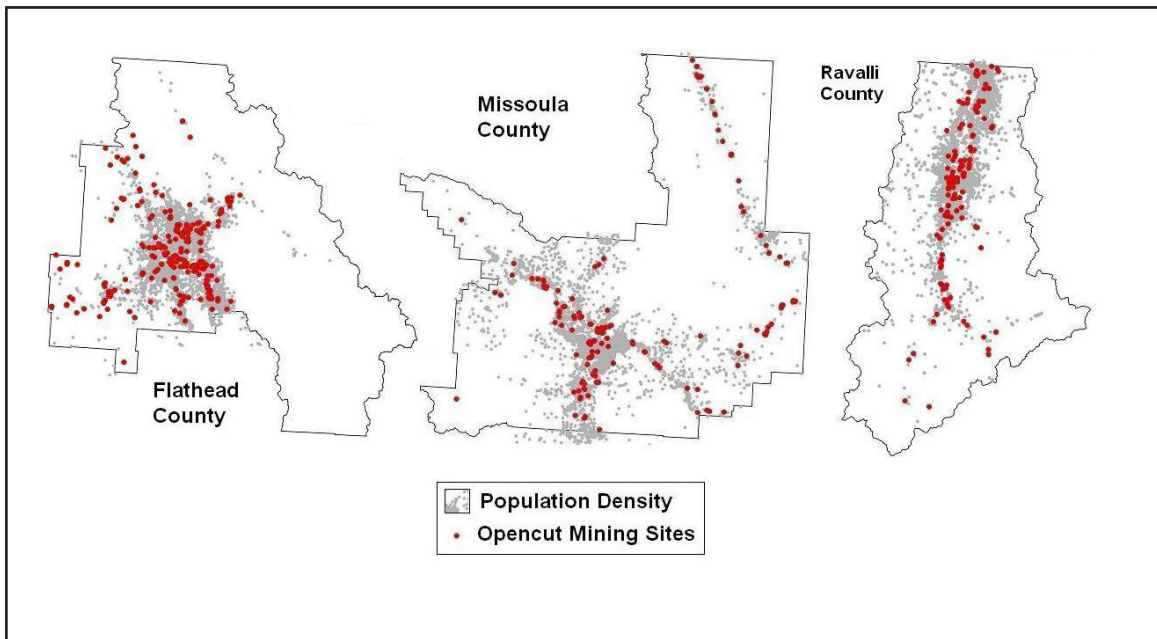
Source: Compiled by the Legislative Audit Division from department and US Census Bureau records.

Audit work indicates common issues homeowners raise about proposed or existing opencut mines include:

- ◆ Public safety
- ◆ Decreased property values
- ◆ Potential contamination of water resources
- ◆ Impacts to water availability
- ◆ Decreased aesthetics
- ◆ Increased dust, noise, and light pollution
- ◆ Increased heavy truck traffic

Industry representatives we interviewed indicate they understand the potential conflicts between opencut mining and homeowners. However, industry representatives said several factors affect decisions on where to locate opencut mines, particularly gravel mines. They must mine where the gravel reserves are located. Commonly, gravel resources are in alluvial valleys, which are also areas providing attractive amenities for residential development. Industry representatives also said they prefer gravel mines to be located near major construction and development to minimize product transportation costs.

Some members of the regulated community recognize the problems with competing land uses and are taking action to mitigate actual and potential impacts. The Montana Contractors Association, an organization representing opencut mining interests, is drafting "good neighbor" practices for its members to follow. These are practices designed to mitigate actual or potential impacts to residential areas adjacent to or near opencut mines. Additionally, when the department considers impacts during the application review and EA process, it can require operators to mitigate actual or potential impacts within the department's statutory authority.

Department Has Limited Ability to Deny Opencut Mining Permits

While the department considers concerns relating to competing land uses, section 82-4-432, MCA, requires the department issue an opencut mining permit if the applicant has submitted an "acceptable" application that meets the requirements established in law. Interviews indicate the department rarely denies an opencut mining permit as long as an operator complies with the law.

Local Governments Have Some Authority to Regulate Opencut Mining Operations

While the department has sole authority to issue opencut mining permits, local governments, mainly counties, have some authority to regulate opencut mining operations through zoning. Counties can establish residential zones where opencut mining would be prohibited, as well as other zoning regulations placing conditions or limitations on opencut mining activities.

CONCLUSION

Conflicts between opencut mining and other land uses occur, especially in high-growth urban-rural interface areas. While the department is responsible for permitting opencut mines, it has no authority to deny a permit if applicants submit complete and acceptable applications. However, local governments have some authority to regulate opencut mining through zoning, which can specify types of land uses and conditions on opencut mining operations.

Department Believes Additional Staff are Necessary for Effective Program Operations

Department management stated the program needs additional staff resources to meet statutory and program obligations, including reviewing permit applications, monitoring operator compliance, and enforcing the Act. Department management stated the Opencut Mining Program has operated with essentially the same FTE for more than 20 years. At

the same time, the number of permits has increased and opencut mining permit applications have become more controversial and time-consuming due to competing land uses. The department requested, but did not receive additional funding for FTE in 2005 and 2007. The department then reprioritized one FTE from the Coal and Uranium Mining section to the Opencut Mining Program.

To help address our objectives, we attempted to examine staff workload; however, a lack of program data impacted our ability to measure workload. We surveyed and interviewed program personnel about the extent and nature of their position responsibilities. Audit work indicates work activities vary significantly among staff, and department management stated it may be necessary to re-examine staff work assignments. Consequently we could not assess the department's reported need for additional FTE.

CONCLUSION

The department believes additional staff are needed to meet its statutory obligations, including the timeliness of issuing opencut mining permits due to increasing number of applications and increasing complexity of permit applications. However, we were unable to assess the need for additional staff during this audit.

The Department Can Improve Efficiency of Program Operations

While external factors can affect the timeliness of issuing opencut mining permits, we identified factors within the department's control where improvements to the permitting process can be made. The remaining chapters present our findings. Chapter IV provides recommendations for improving the department's internal control processes. Chapter V provides recommendations for improving efficiency of permitting activities.

Chapter IV – Improving Internal Controls

Introduction

Internal controls are processes developed and implemented by management to:

- Provide reasonable assurances program objectives will be met.
- Ensure compliance with applicable laws and regulations.
- Ensure efficiency and effectiveness of operations.

Department of Environment Quality (department) management stated the Opencut Mining Program (program) historically has operated on an informal basis with an emphasis on customer service for the industry. The result of these informal practices is weak internal controls, which affects the program's accountability to the regulated community and the public. This chapter provides information and recommendations to improve internal controls to help ensure the program complies with state laws and administrative rules.

Improving File Documentation

To accomplish our audit objectives, we reviewed a statistical sample of hardcopy files for 42 permits issued during fiscal years 2003 through 2007. We noted numerous instances of incomplete file documentation for permitted opencut operations. Examples of incomplete documentation include:

- 7 of 42 files (17%) did not have documentation of an inspection. (82-4-432, MCA)

- 16 of 42 files (38%) did not have documentation of a State Historical Preservation Office letter. (82-4-434, MCA)

- 3 of 42 files (7%) did not have documentation of the program's form indicating compliance with local weed district requirements. (17.24.219, ARM)

- 41 of 42 files (98%) did not have documentation of a weed control plan. (17.24.219, ARM)

- 2 of 42 files (5%) did not have documentation that the landowner of the area to be mined had been consulted about the proposed plan of operations and reclamation. (82-4-432, MCA)

- 2 of 42 files (5%) did not have documentation of an environmental assessment (EA). (Montana Environmental Policy Act)

- 2 of 42 files (5%) did not have documentation of a surety. (82-4-432, MCA)

- 40 of 40 files (100%) with delays beyond the 30-day statutory time frame for reviewing and approving application permits did not have letters notifying applicants of the need to extend the department's review period. (82-4-432, MCA)

Program management stated in some instances, required documentation might be located in the program's management information system. However, program management also stated hardcopy files are the "official" files for opencut permits.

The Department Cannot Demonstrate Compliance with Laws Governing Issuance of Opencut Permits

Without file documentation supporting permitting decisions, the department cannot demonstrate compliance with state laws for issuing opencut permits or assurance operations should be permitted. Additionally, incomplete file documentation may affect potential enforcement action if an operator is in violation of the Opencut Mining Act.

The Department Does Not Have Internal Controls for Ensuring File Documentation is Complete

In accordance with best management practices, organizations should have internal controls for ensuring file documentation is complete; however, the department relies on an informal process. Program staff review application materials for completeness, but do not have a formal method for verifying this. Program staff rely on management to review recommendations for issuing permits, but management does not have a formal process for ensuring complete official hardcopy file documentation.

A checklist could resolve this file documentation control issue. Staff would complete this checklist at various stages of processing and management would review it for use and completeness. While we noted checklists in several files, the program does not have documented procedures for using a universal checklist to ensure file documentation is complete.

RECOMMENDATION #1

We recommend the department establish formal controls including check-lists and formal management file reviews to ensure Opencut Mining Program files contain documentation necessary to support issuance of opencut mining permits.

Establishing a Formal Application Process

The department does not have a defined application process for program personnel or operators to follow. Audit work indicates Helena, Billings, and Kalispell offices have different procedures for processing applications. The following sections illustrate variations and weaknesses in the application process and resulting inefficiencies.

No Formal Reception Point for Receiving Applications

Some program personnel instruct operators to submit application packets directly to the Helena office and some program personnel instruct operators to submit applications to a field office. This can create confusion among the regulated community, as well as among program personnel, about the process and where original application materials are located. This also increases the risk of required documentation not being placed in official hardcopy files. In addition, it makes it more difficult for operators and department personnel to determine when the 30-day time frame for processing applications starts.

Staff Continue to Process Pending Applications

Operators often submit application materials "piecemeal," and program staff commonly begin processing these incomplete applications. Examples of documentation missing from application packets include plans of operation, landowner consultation forms, maps, and forms signed by local zoning officials. However, administrative personnel create official files and mail duplicates of files between the field and Helena offices. Reclamation specialists also begin processing incomplete applications, such as reviewing plans of operation or inspecting proposed mine sites.

Processing incomplete applications increases the risk program staff will spend time on applications that may never be completed, which increases staff workloads. For example, 62 percent of nearly 270 incomplete applications were more than a year old, and 33 percent were more than three years old. As incomplete applications age, applicants are less likely to complete the application process. If this occurs, time spent processing incomplete applications becomes unproductive and ineffectual. In other instances, changes to proposed operations or the age of application materials may necessitate reclamation specialists revisit, and possibly redo, completed work, such as an inspection or EA. Furthermore, these practices delay processing applications for operators who have submitted complete application packets.

Limited Use of Letters of Deficiency

Section 82-4-432, MCA, requires the department to notify applicants of any deficiencies in applications. However, we noted only one reclamation specialist using deficiency letters. Program staff commonly help operators draft plans of operation or prepare other application materials rather than noting deficiencies in letters to operators. However, applicants should be responsible for resolving noted deficiencies. This issue is discussed further in this chapter.

The Department Has Not Established Work Priorities

The department has not established work priorities based on what statute requires for permitting opencut mines. Program management has allowed program staff to develop their own application processes. Audit work indicates some program personnel believe processing partially complete applications can expedite the process. Additionally, the program's practices result in opencut operators becoming accustomed to having program personnel help them through the application process, which is not required by state law. These practices increase workload and reduce staff ability to process applications in a timely manner.

Criteria for Processing Applications

Section 82-4-432, MCA, requires the department to begin its application review process after receiving all application items listed in state law. Additionally, best management practices for regulatory agencies recommend a clear process outlining expectations for both the regulated community and the regulating agency.

State Law Does Not Set Time Frames for Application Expiration

The large number and age of pending applications occurs, in part, because there are no time frames for incomplete applications to expire. As previously mentioned, a substantial number of incomplete applications have been pending for more than three years. Commonly, program staff begin processing these incomplete applications. Additionally, aged application documents may no longer reflect current conditions. Department personnel stated incomplete applications are retained in case operators decide to proceed with a permit application sometime in the future. Although statute does not address whether the department can discard incomplete applications after a period of inactivity, it does not prohibit it.

The Department's Process Varies from Regulations

The department's informal application process also varies from the application process outlined in state law and administrative rules. For example, we noted the following:

- A bond or security must accompany all applications. Currently, the program allows operators to submit a bond just before approval of a permit. Program management said this is a common practice so operators do not have to pay for bonds while waiting for an application to be approved. (82-4-432, MCA)

- Permit applications must be denied if field conditions, such as snow, prevent staff from inspecting the site. In practice, permit applications are placed on hold until staff can inspect a proposed site. (17.24.212, ARM)

- A weed control plan must be submitted to the appropriate weed control district and accompany the plan of operation. We noted only one weed control plan in files we reviewed, but the plan was not signed. (17.24.219, ARM)

While these practices may be reasonable, they do not comply with state law and administrative rules.

The Program is Examining its Application Process

During the audit, the program was reviewing operations, including its application process. However, it is imperative the department take timely and formal action to ensure a defined process is established to ensure the program uses available resources efficiently to obtain desired program outcomes. Programmatic changes should include:

- ◆ Establishing formal procedures and administrative rules for processing applications.
- ◆ Setting timelines in administrative rules for rejecting incomplete applications.

Additionally, since a new application process will likely impact the regulated community, which has not had to follow formal application procedures, the department will need to develop strategies for educating the regulated community about changes to the application process.

RECOMMENDATION #2

We recommend the department take timely and formal action to clarify the application process and propose administrative rules to improve consistency.

Clarifying Staff Responsibilities

While the department reports an extensive backlog of opencut mining permit applications, department personnel have continued to perform tasks that are not required by law. For example, audit work indicates reclamation specialists draft and edit proposed plans of operation and create maps for applicants. Also, program guidelines instruct operators to contact program personnel to obtain maps necessary for applying for an opencut permit.

State Law Specifies Department and Operator Responsibilities

The Opencut Mining Act (Act) specifies department and operator responsibilities for preparing and issuing opencut mining permits. According to the Act, applicants are responsible for preparing the application packet for submittal to the department.

Department staff responsibilities are to review the application to determine whether the application is acceptable.

Department Practices Can Impair Staff Independence

Assisting operators through the application process to the extent of drafting and editing application forms impairs staff ability to independently assess proposed opencut mining operations. Best management practices require a clear delineation of responsibilities between the regulated community and regulators to assure independence of regulatory activities. Regulatory activities may include informational and educational efforts to help the regulated community understand what is required to obtain a permit. However, the level of service program personnel currently provide creates at least the appearance of a lack of independence.

The Department Should Establish Policy and Procedures Clarifying Staff Roles in the Application Process

Audit work indicates program personnel historically have provided the current level of assistance. Program personnel state assisting applicants with preparation of applications expedites the process. While it is unclear whether this level of service achieves the benefits stated by program staff, it does not follow state law.

Section 82-4-432, MCA, provides an operator planning to submit an application an opportunity for a site visit and meeting with the department to discuss the proposed operation. If the operator requests a meeting, state law specifies the department may provide the operator with recommendations about the proposed mining operation. This provides both department personnel and opencut operators a reasonable opportunity to discuss proposed operations, including potential impacts and strategies for mitigating impacts, before operators submit a complete application packet.

Statute indicates the regulated community is responsible for compiling and submitting complete applications for program review and approval. The department needs to establish clear policy and procedures governing the scope and nature of assistance provided to the regulated community.

RECOMMENDATION #3

We recommend the department establish formal policy and procedures, and propose administrative rules clarifying the role of program personnel and operators in the opencut mining permitting process.

Facilitating Collection Of The Resource Indemnity And Groundwater Assessment Tax

Our third objective was to determine whether controls are in place to assure opencut mining operators are paying the Resource Indemnity and Groundwater Assessment Tax (RIGWAT). Opencut mining operators are required to pay RIGWAT, which is a major revenue source for funding the Opencut Program. Section 15-38-102, MCA, states the legislature's policy for the Resource Indemnity Trust is to indemnify the state for the loss of long-term value resulting from the depletion of its mineral resource base and for environmental damage caused by mineral development. Operators are required to pay an annual tax of $25, plus a 0.5 percent tax on the gross value of product mined in excess of $5,000. The Department of Revenue (DOR) is responsible for collecting the tax. Revenues from RIGWAT account for 92 percent of the funding for the Opencut Mining Program.

Not All Permitted Opencut Mining Operators Pay RIGWAT

To accomplish our objective, we compared DOR information on companies paying RIGWAT with Department of Environmental Quality information on the number of operators with excavations for calendar year 2006. From our statistical sample of 42 files, we documented 19 private sector companies with active opencut mining permits. Of these, 16 operators reported excavating materials during 2006. However, when we compared this information with companies DOR reports paying RIGWAT, we noted differences. Our analysis indicates approximately 94 percent of sampled opencut operators are not paying RIGWAT. DOR reported collecting almost $368,000 from opencut operators in 2006, but RIGWAT distributions to the program were approximately $457,000. The difference is supplemented by RIGWAT collections from coal and other mining operations. Improving RIGWAT collections would result in a revenue increase to help fund agency operations and environmental cleanup activities. Increased revenues would help offset General Fund money appropriated for the program.

The Department Can Assist DOR With Identifying Opencut Mining Operators

While the Department of Environmental Quality is not responsible for collecting RIGWAT, it can assist with collections by providing DOR information about opencut mining operators who might be required to pay RIGWAT. The department requires operators to submit an annual report, which includes information about the number of opencut mines an operator has, as well as self-reported information about the volume of materials excavated during a calendar year. Providing annual report information to DOR would increase DOR's ability to identify opencut mining operators with producing mines. Additionally, section 15-38-105, MCA, requires operators to submit to DOR a

report of gross yield from a mine. The department should coordinate data-sharing with DOR to help identify opencut mining operators.

Coordination between agencies helps programs accomplish goals and objectives. Coordination between the department and DOR will enhance DOR's ability to collect RIGWAT. In turn, increased RIGWAT collections will increase deposits into the Reclamation and Development Account, which is the primary funding source for the Opencut Mining Program.

RECOMMENDATION #4

We recommend the Department of Environmental Quality coordinate data-sharing needs with the Department of Revenue to help ensure identification of all opencut mining operators required to pay the Resource Indemnity and Groundwater Assessment Tax.

Improving the Management Information System

Good management information is critical for an effective internal control system. The department collects and maintains some management information in a database; however, we identified several deficiencies. First, the department does not appear to collect complete management information to effectively manage the program. We documented a number of examples of management information not collected that could be useful for management purposes. Although section 82-4-432, MCA, requires complete permit applications be processed within 30 days, the program does not collect information on when applicants submit all information needed to determine whether a permit should be issued. Another example is the department does not track and monitor inspection information, although this is critical to assess compliance with state law.

An Improved Database Would Enhance Management Capabilities

Comprehensive management information systems are essential to understanding program strengths and areas for improvement. For example, the department reports a backlog of approximately 260 pending applications, although our analysis indicates there were 68 applications actually pending program action as of November 2007. From a management perspective, the difference between reported and actual pending permit applications could require significantly different resolution strategies. Resolving a backlog of 260 pending applications might require increasing FTE. However, resolving a backlog of 68 pending applications might only require adjusting how existing resources

are directed until the backlog is reduced. Good management information is essential for understanding conditions and determining appropriate actions or strategies necessary to resolve conditions.

The Program Should Identify Performance Measures

The department should identify management information needs, including performance measures, for improving program oversight and management. Performance measures and management information are tools that enable an agency to evaluate whether it is meeting established goals and objectives. For example, performance measures might include time frames for issuing permits, evaluating bond release requests, and frequency of compliance inspections.

RECOMMENDATION #5

We recommend the department identify information needs and develop a system capable of addressing Opencut Mining Program operational needs.

Chapter V – Improving Efficiency of Program Operations

Introduction

In addition to examining program internal controls, we identified several operational efficiencies that could be achieved. By addressing the areas discussed below, we believe better decisions can be made related to program resource needs, opportunities for public comment on proposed operations, and better intradepartmental coordination. As required by section 5-13-308, MCA, we present these potential efficiencies in this chapter.

Setting Priorities for Processing Opencut Permit Applications

The Department of Environmental Quality (department) does not have a formal system for prioritizing applications submitted by opencut operators. Generally, Opencut Mining Program (program) personnel said they process applications in chronological order. However, program personnel also said operators who aggressively pursue a permit can receive preference over other applicants. For example, an applicant requesting an expedited permit because of an impending contract deadline may receive preference over another applicant who has not made the same request. Additionally, as noted in a previous chapter, program personnel begin processing incomplete applications, which delays processing of pending completed applications.

According to the National State Auditors Association, best management practices for regulatory programs require clear guidelines and procedures for processing applications, including how to prioritize applications. Since regulatory decisions affect individual operators, regulatory agencies must ensure application processing is fair to all applicants. Even the perception of unfairness can damage the integrity of the regulatory program.

Interviews indicate the program does not have formal policy or procedures for prioritizing how applications are processed. Program personnel stated they have historically set their own priorities for processing applications since the program has not established policy. For example, file review documentation indicates the median days from receipt of an application to issuance of a permit is 106 days. However, in two instances the program issued a permit in under 30 days, including one permit within 14 days of receiving an application. Such outliers suggest some applications may not be processed in chronological order, and some applications may unfairly receive a higher priority than others, whether intended or unintended.

While chronological order is one method for setting priorities, other factors might also be considered, such as contract deadlines for major construction projects. The point is, to ensure opencut mining permit applications are processed fairly and equitably for all applicants, the department should establish formal procedures and administrative rules for prioritizing applications.

RECOMMENDATION #6

We recommend the department establish formal policy, procedures, and propose administrative rules for prioritizing opencut mining permit application processing to ensure all applications are handled fairly and equitably.

Ensuring the Public is Notified about the Opencut Permitting Process

In Chapter III we noted competing land uses between opencut mines and residential areas occurs. In turn, this often increases public interest in proposed opencut mining operations. However, state law does not require any public notification about the opencut permitting process.

Other Programs Set Notification Requirements

Recognizing the potential public interest in the location of mines, other department programs have formal standards for public notification. For example, the Coal Program, within the same bureau as the program, requires coal mine operators to provide an informational notice about proposed mines in an area newspaper for four weeks. Similarly, the Air Quality Program, within the same division as the program, requires permit applicants to notify the public either ten days before or ten days after submitting an application for an air quality permit. Since opencut mining operations can generate significant public interest, it seems consistent to set standards for public notification.

The Public May Not Be Notified of Proposals for Opencut Mines

Without clear notification requirements, the public, particularly those living near proposed opencut mines, may not be informed of proposals. The department's application packet recommends opencut mine applicants notify any residents within 1,000 feet of a proposed opencut mine, and includes public notification forms. However, the program cannot enforce this recommendation because state law does not give the department authority to set notification requirements. Consequently, the public may

not be informed of proposed land use changes. This could impact the public's ability to comment on proposed operations, including environmental assessments. Obtaining legislative clarification would provide clear guidance on what constitutes appropriate public notification of proposed opencut mining operations.

RECOMMENDATION #7

We recommend the department seek legislation clarifying whether public notification of opencut mine applicants should be required.

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

DEPARTMENT RESPONSE

Montana Department of
ENVIRONMENTAL QUALITY

Brian Schweitzer, Governor

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June 6, 2008

Scott A. Seacat, Legislative Auditor
Legislative Audit Division
State Capitol
Helena, Montana 59620-1705

RECEIVED

JUN 0 6 2008

Re: Improving Montana's Opencut Mine Permitting Process
Legislative Audit Division Report No. 08P-04 Dated June 2008

LEGISLATIVE AUDIT DIV.

Dear Mr. Seacat:

By this letter, I am transmitting the department's formal response to recommendations presented in the Legislative Audit Division Report No. 08P-04 "Improving Montana's Opencut Mine Permitting Process." The department agrees with all seven recommendations and plans to contract with an outside consultant specializing in business process improvement to assist our efforts in implementing the recommendations. The enclosed responses present the department's position, contemplated corrective action, and anticipated timeframe for implementing each recommendation.

Proposed timeframes reflect the pressing need for existing program staff to continue processing permit applications and perform related site inspections and environmental assessments while efforts to improve permitting procedures are underway. Timeframes also reflect the ongoing expenditure of staff time in relation to litigation on several opencut permit applications and involvement in preparations for the upcoming legislative session.

I will be available for the June 20 meeting of the Legislative Audit Committee, as will appropriate staff from my office and the Permitting and Compliance Division.

I would like to personally thank your office and the audit staff assigned to this project for their dedication and professionalism throughout the course of this audit. Their findings and recommendations have provided a valuable insight into the department's management regarding permitting activities performed by the Opencut Mining Program. Their findings will help us improve the program's operations.

Sincerely,

Tom Livers

Tom Livers
Deputy Director

c: Richard H. Opper, DEQ Director
Judy Hanson, PCD Administrator
Neil Harrington, IEMB Chief
Chris Cronin, IEMB

Recommendation #1 – We recommend the department establish formal controls including checklists and formal management file reviews to ensure Opencut Mining Program files contain documentation necessary to support issuance of opencut mining permits.

The department concurs with this recommendation and will develop a comprehensive checklist identifying the components of a permit or amendment application, the content of each component, and supporting documentation that must be in the file prior to a permitting decision. The checklist and a standard operating procedure (SOP) regarding its use will be developed by September 30, 2008. All opencut program staff will be trained in the use of the checklist and begin to use it by October 30, 2008.

The department will also develop an SOP for formal management file reviews by November 30, 2008. Implementation of this procedure will begin January 1, 2009.

Recommendation #2 – We recommend the department take timely and formal action to clarify the application process and propose administrative rules to improve consistency.

The department concurs with this recommendation. The department will contract with a business process consultant to work with program staff to revise, clarify, and improve the application process. The department anticipates the first group meeting for this effort will take place in September or October 2008. Specific goals of this work will be to develop internal policies and procedures to:

> ➢ establish a consistent office location or locations for permit application submittal;

> ➢ establish consistent procedures for determining when applications are complete and for limiting review of applications that are incomplete;

> ➢ document permit deficiencies in writing for placement in application files;

> ➢ establish priorities for application review. This is anticipated to generally consist of using the chronological order in which applications are submitted as the basis for priorities. Judicious exceptions to this may be included on a case-by-case basis for significant projects with specific timelines such as highway construction; and

> ➢ terminate applications that have been incomplete for an extended period, e.g., two years.

Due to the heated public controversy and legal conflicts associated with a number of permit applications the department processed recently, we understand operators and the public are, or will be, pursuing legislative initiatives to amend the Opencut Mining Act. As a result, requirements of this law are expected to change during the 2009 session. Therefore, the department does not anticipate fully implementing the new opencut policies and procedures until after the session concludes. At that point, the department intends to finalize the revised permitting process and conduct an extensive outreach effort to inform operators and the public of the new program requirements. The department will also consider any necessary rule changes after the 2009 legislative session.

Recommendation #3 – We recommend the department establish formal policy and procedures, and propose administrative rules clarifying the role of program personnel and operators in the opencut mining permitting process.

The department concurs with this recommendation. The department agrees with the concept of establishing general policy for staff regarding the nature of and limits to assisting applicants with their mining permit applications. The policy is anticipated to take the general form of providing applicants with guidance on which application forms and materials are needed, answering applicants' questions, and recommending resources for applicants to use to prepare permit applications. The department will establish this policy and begin educating operators about it by July 1, 2009. Full implementation may require an extended transition period of working with operators.

The department does not anticipate the need for rules on this matter, at least initially, but will consider that option in the future if that appears to be warranted.

Recommendation #4 – We recommend the Department of Environmental Quality coordinate data-sharing needs with the Department of Revenue to help ensure identification of all opencut mining operators required to pay the Resource Indemnity and Groundwater Assessment Tax.

The department concurs with this recommendation. The department will consult with the Department of Revenue (DOR) in early FY09 and provide that agency with a list of permitted operators and any other readily available information that the department has in its possession and that is requested by DOR.

Recommendation #5 – We recommend the department identify information needs and develop a system capable of addressing Opencut Mining Program operational needs.

The department concurs with this recommendation. In the past year, the department's Industrial and Energy Minerals Bureau (IEMB) has been in the process of revising and upgrading its existing Access databases through contracted services. This task is designed to provide IEMB, including the Opencut Mining Program, with databases that are more powerful and responsive to information queries. After this database work is completed, which is expected to occur within the first quarter of FY09, the department will consider the need for other database improvements in the context of the recommendations of the audit. If it appears that further improvements are warranted, the department will pursue further contract work on the Opencut Mining Program's database.

Recommendation #6 – We recommend the department establish formal policy and procedures, and propose administrative rules for prioritizing opencut mining permit applications to ensure all applications are handled fairly and equitably.

For the most part, the department concurs with this recommendation. The department agrees with the principle of prioritizing the processing of permit applications in a fair and equitable manner. As indicated in the response to Recommendation #2, the department will develop and disseminate to the regulated community an internal policy to do just that. The department believes that proposing rules on this subject would be premature until after a trial period of implementing internal policy on the matter.

Recommendation #7 – We recommend the department seek legislation clarifying whether public notification of opencut mine applicants should be required.

The department concurs with the need for legislation. The department has had discussions with one legislator who has expressed interest in pursuing legislation on this issue in the next legislative session. The department will seek to discuss it further with this legislator and any others that are identified as having an interest.