



PERFORMANCE AUDIT REPORT

Performance of the Mined-Land Conservation and Reclamation Board

**A Report to the Legislative Post Audit Committee
By the Legislative Division of Post Audit
State of Kansas**

1983

Legislative Post Audit Committee

Legislative Division of Post Audit

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**PERFORMANCE OF THE MINED-LAND CONSERVATION
AND RECLAMATION BOARD
SUMMARY OF LEGISLATIVE POST AUDIT'S FINDINGS**

1. **How thorough is review of permit applications?** The Board and its staff are reviewing applications thoroughly enough to satisfy federal officials. Findings to the contrary were reported to the Governor, but federal officials changed their minds after reviewing files more fully.

2. **Are written findings being made on important information in applications?** After further review, federal officials have decided they are generally satisfied that the proper information is included in the permit review process. They had reported the opposite to the Governor.

3. **Is the staff large enough and technically adequate?** Only eight of the 15 positions called for in the federally approved plan have ever been proposed in agency budgets and approved by the Legislature. Staffing at the 15-position level does not appear to be necessary. The program does need more engineering expertise, however, either by adding a position or by contracting work out. Some additional legal help may also be needed.

4. **Are serious violations overlooked in State inspections?** State inspectors do not generally miss serious violations. Some problems may crop up between State inspections and are found by federal inspectors. More frequent inspections of permit sites approved before 1981 may help.

5. **Why are inspections not adequately documented?** State inspectors do not use checklists that would help ensure that all aspects of an inspection were carried out. On at least one occasion, an incomplete inspection caused damage to a pond to be overlooked. Improvements can be made in this area.

6. **Why is the staff failing to enforce actions when violations are found?** State inspectors seek to correct the problems they find, but they sometimes give a company time to correct the problem and write it up as a violation only if the problem is not corrected in time. Under State law, inspectors do not appear to have this much flexibility. Uncorrected problems are, however, eventually referred to the Board for action.

7. **Why are civil penalties not assessed?** The Board's policy is apparently not to fine companies, even when violations are severe enough to require fines under a rating system. (In such cases, the Board waives the system.) The Board has this discretion under the law, but it should do more to document the reasons for not assessing fines.

8. **Are complaints handled properly?** Yes. The Board appears to be handling complaints promptly and adequately.

9. **Why are performance bonds being prematurely released?** Most of the problems in this area occurred because permit applications were inadequately reviewed before 1981. (That year, the State assumed primary responsibility for the program.) In particular, ponds were not reviewed to determine whether

they were adequately designed. Now, permit review is more thorough and performance standards are clearer. However, some problems persist for sites approved before 1981. Engineering reviews and better documentation may help alleviate concerns.

10. **Do records allow proper tracking of regulatory activities?** Documentation can be improved in several areas, as noted above. Also, information on permit reviews needs to be more centrally organized.

PERFORMANCE OF THE MINED-LAND CONSERVATION AND RECLAMATION BOARD

At its March 28, 1983 meeting, the Legislative Post Audit Committee directed the Legislative Division of Post Audit to conduct a limited-scope audit of the Mined-Land Conservation and Reclamation Board. The purpose of the audit was to answer a number of specific questions asked by the Chairman of the House Energy and Natural Resources Committee. These questions were prompted by a letter in early March 1983 from the federal Office of Surface Mining to the Governor. The letter was highly critical of the Board's regulatory program. Each of the questions is answered below.

How Thoroughly Is the Board's Staff Reviewing Applications Prior to Issuance of Permits?

In its letter to the Governor, the federal Office of Surface Mining (OSM) stated that permit reviews were inadequate and had major technical deficiencies. During their review at Board offices, the auditors discussed this matter with federal officials from the OSM Technical Center in Denver, who are responsible for the review of the permit-issuing process of the Board's staff. After reviewing the permit-issuing process on April 13, 1983, these officials told the auditors that permit review was adequate and that there were no major technical deficiencies. According to the Denver officials, the criticisms made in the letter to the Governor were based on analysis of incomplete information which was maintained in the Kansas City OSM Field Office. The Denver officials stated to the auditors that although they may have minor suggestions for improving the permit review process, their major concerns were alleviated after they reviewed the complete files in Pittsburgh.

The auditors asked why the Kansas City Office did not receive all permit information. The Board's staff stated that the Kansas City office had told them during 1981 to discontinue their procedure of sending all permit information to Kansas City, since OSM was undergoing a major reorganization. The Kansas City office confirmed that it did request the Board's staff to discontinue remitting permit information. However, in 1982 OSM once again requested all permits and other information which the staff is required to submit under the terms of the oversight agreement. Thus, the problem appears to be a breakdown in communication between the Kansas City Office and the Board's staff, not an inadequate job of reviewing applications prior to the issuance of permits.

Is the Board's Staff Making Written Findings on the Critical Categories of Information Required in the Permit Application?

Critical categories of information required in the permit application include such areas as handling of prime farm land, hydrology, and analysis of impact on fish and wildlife. The Board has cooperative agreements to receive the assistance of various public agencies such as the Fish and Game Commission, the Department of Health and Environment, and the State Geological Survey in reviewing permit applications. The Board's staff requests input from

each of these agencies prior to approval of a permit application. Board members receive comments of these agencies prior to their decision on a permit. Thus, written findings are being made and reviewed on the critical categories of information required in the permit application.

OSM's criticisms in this area appear to be based on its preliminary analysis of only the information at the Kansas City office. After reviewing the staff's complete files in Pittsburg, officials from the OSM office in Denver told the auditors that the proper information was included in the permit review process.

Why Are Only Half of the Positions Filled, and Is the Training of the Staff Technically Adequate to Ensure a Comprehensive Review and Inspection Program?

When the Kansas program was conditionally approved in January 1981, the State plan approved by OSM required fifteen positions. Before the plan was conditionally approved, the Executive Director of the Board wrote to the Board's Chairman requesting a total of fourteen positions for fiscal year 1981. The Director stated that he and OSM believed that this was the minimum requirement to meet the responsibilities of the program. The Director requested that these positions be approved and filled as quickly as possible.

The Director's request was apparently never presented to the Legislature. When the request was made, the staff consisted of only four positions, and the fiscal year 1981 budget request by the Corporation Commission was for only two additional positions. Those two positions, an inspector and an administrative officer, were approved and filled. Since that time, a hydrologist and a secretary have also been added to the staff. No other staff requests have been made by the Corporation Commission on behalf of the Mined Land Division, and all authorized positions are currently filled. Thus, it appears that the Executive Director of the Board did attempt to meet the staffing requirements of the State plan, but the request was never presented to the Legislature for consideration.

In the letter to the Governor, OSM officials cited such staffing needs as an agronomist, geologist, hydrologist, and engineer. However, given the relatively small size of the Kansas program, and the expertise of other agencies utilized by the Board under the cooperative agreements, it is not clear that all these positions are needed. The auditors discussed additional staffing needs with the Board's staff. From these conversations it appears that more engineering expertise is necessary. Many of OSM's criticisms of the Board's actions could have been avoided had an engineer reviewed actions taken prior to bond releases and ensured that permits contained adequately designed ponds. Problems with bond releases and inadequate pond designs may continue in the future unless additional reviews by an engineer are included. This engineering expertise could be obtained either by adding a position or by contracting the work out.

The Board's staff also expressed a need for more legal assistance. Certain staff members said they had requested legal assistance in the past, but had not

received it. Given the infrequent meetings of the Board, the complexity of regulations, and the continuing need for legal assistance, it appears that, while there may not be a need for a full-time attorney, there is a need for increased legal assistance.

Are the Board's Inspectors Missing Serious Violations Which the Federal Inspectors Have Discovered?

The federal Office of Surface Mining periodically conducts inspections of Kansas coal mines and it has authority to issue notices of violations. It recently began issuing ten-day notices if problems were found during inspections. Upon receipt of such a notice, the Board's staff has ten days to take action and notify OSM of the action taken.

Between April 1982 and March 1983, OSM conducted 73 complete inspections and 21 partial inspections in Kansas. Ten-day notices were issued on seven inspections (7.5 percent of all inspections conducted). The auditors examined the seven ten-day notices to determine whether they showed that serious violations had been missed by the Board's inspectors.

In four of the seven cases, the Board's staff was aware of the problem prior to the inspection and ten-day notice by OSM. In each of these cases, the Board's staff had already requested the coal company to correct problems, and the company was either in the process of doing this or had finished doing so by the time the Board's staff received the ten-day notice. In three other cases, the Board was not aware of the problem at the time of the ten-day notice. The Board was unaware of these problems primarily because they developed between regular inspections. Attachment A briefly summarizes a typical case in which the Board was aware of the problem prior to the ten-day notice and a typical case in which the Board was not aware of the problem prior to the notice.

Most of the problems noted by OSM concerned inadequate pond designs on permits issued before the State plan was conditionally approved in January 1981. Under regulations, these permits need to be inspected only once a month. The auditors found that although the Board's staff is completing the required inspections, in some cases problems can develop between inspections because of variables such as weather. It appears that some of the problems that turn into violations could be prevented through more frequent inspections of permits approved under the pre-1981 program.

All but two of the seven ten-day notices involve permits issued under the pre-1981 program. During that time, OSM was jointly responsible with the State Board for inspecting permits and enforcing regulations. Although the Board did approve these permits with inadequately designed ponds, OSM also received copies of these permit applications and did not bring these deficiencies to the Board's attention. Thus, it appears that inaction on the part of both OSM and the Board led to the existence of these problems.

The Board's inspectors contend that it would not be advisable to now build new ponds on many of these sites covered by old permits. In many cases, they

believe building a new pond would result in more damage to the land than maintaining the existing pond and correcting problems as they occur. OSM appears to disagree with this view, and believes that all ponds approved under the pre-1981 program should be reviewed by an engineer and re-designed if they are found to be inadequate.

Why Are the Board Inspections Not Adequately Documented?

In their letter to the Governor, federal officials voiced concern that inspections were done too quickly to be adequate. The Board's inspectors use an inspection form which requires basic information about the permit being inspected as well as narrative information concerning the inspection itself. According to the staff, inspections are thorough even though little documentation is provided on the inspection report about everything that was checked during an inspection. However, the auditors did find that in at least one case an incomplete inspection allowed the Board's staff to overlook damage to a pond.

Federally developed checklists have been used in the past by the Board's staff. However, these checklists apparently included numerous items that inspectors did not think were relevant to Kansas mining operations and therefore are no longer used. Additionally, only one checklist was used for all types of inspections so that use of the checklist on partial inspections was cumbersome. In order to avoid this problem, checklists for different types of inspections could be developed, each covering a specific area of a mining operation such as sediment ponds, reclamation, and the like. A new federal checklist is currently being developed by OSM. The Board's staff could use this as a starting point in developing a checklist that will be of most use for their own inspections.

Why Is the Board's Staff Failing to Enforce Actions as Required by Law When Violations Are Observed?

Until approximately eight months ago, the Board's inspectors conducted "on-site compliance reviews" of areas with permits in addition to their regular inspections. The purpose of these reviews was to identify problem areas within a site. Coal mine operators received copies of these reviews at the time of the review, and according to the inspectors, compliance was prompt. If a problem cited in the review was a violation, no notice of violation was issued. A notice of violation would be issued only if the company did not correct the problem within the prescribed period. However, not issuing such a notice when the violation was first found was contrary to State law. On-site compliance reviews were not authorized by the regulations, and the practice has been discontinued.

The auditors analyzed notices of violation written in fiscal year 1983 and checked to see whether these violations existed in earlier inspections and a notice was not issued. This analysis showed that in some cases, a condition had been noted in an earlier inspection, yet no notice was written. The Board's staff would just note the condition and request the company to correct it. It thus appears that standards for issuing notices are still not consistently applied.

In many cases, it may be a matter of judgment whether a violation exists, or only a condition which might lead to a future violation. Weather conditions and other factors may change the perception of whether a violation exists. Federal officials are also apparently concerned with the difficulty of determining whether a violation exists. OSM officials stated to the auditors that they are considering changes in the regulations which would permit "warning" letters to be issued to companies when conditions exist which might lead to a violation. This regulation would appear to allow the procedures which are already being utilized by the Board's staff. Until that regulation is adopted, however, it appears that the Board's staff should ensure that consistent criteria are applied when determining whether a violation condition exists on a permit. Current regulations require that a notice of violation be written in all cases when a violation condition is noted during an inspection.

The auditors found that in cases where a notice of violation was issued, inspectors utilized a required point system to indicate the severity of the violation for possible Board action. According to the regulations, when a notice of violation is issued, the inspector is to assign points to the violation on the basis of four factors, including history of previous violations, seriousness of violation, negligence, and good faith efforts in achieving compliance.

Why Are Civil Penalty Assessment Procedures Not Followed?

Under the regulations, if a violation receives 31 or more points, the Board must either assess a fine or waive using the point system. (Fines for violations with fewer than 31 points are discretionary.) If the Board chooses to waive the point system, it still must use the four factors described above in making its determination of the appropriate penalty. It also must adequately document the basis for its decision.

In all cases where a notice of violation has come before the Board, it has chosen not to levy a fine. When the violation received more than 31 points, the Board voted to waive the use of the point system. It appears to be Board policy not to assess fines, in the belief that no purpose would be served after compliance has been achieved. Statements made by various Board members at their February 10, 1983 meeting, such as "I see nothing gained by fining a coal company," reflect this policy. Although this discretion is available under the regulations, the Board must thoroughly document its reasons for using this discretion. The auditors found that the Board has failed to adequately document the basis for its decisions to not levy fines or to waive use of the point system.

In cases where a cessation order has been issued, a civil penalty is mandatory under the regulations. Five cessation orders were issued to one company during fiscal year 1983. The Board did assess a penalty to this company as required by law, in the amount of \$6,000.

Is the Board Properly Handling Citizen Complaints?

To answer this question, the auditors examined all of the citizen complaints and inquiries from July 1982 to the present. All but six were related to

a controversial new permit application which is still undergoing review by the Board's staff and has not yet been approved. Since this permit was not yet complete, the auditors evaluated the handling of the remaining six complaints and inquiries for information.

It appears that all of the remaining six complaints were handled promptly and adequately. Inspections were promptly conducted for all complaints requiring further investigation, and persons who complained were informed of the outcome. Of the six complaints, the Board's staff found no instances where the coal companies involved were violating the law.

Why is the Board Releasing Performance Bonds Before Required Performance Standards Are Achieved?

The auditors reviewed ten instances in which federal officials contend that bonds were released before all performance standards were achieved. All ten permits were originally issued before the State assumed primary responsibility for the program in 1981, and most of the problems stem from inadequate review given to these permits under the pre-1981 program. OSM's two major areas of criticism of the pre-1981 permits were 1) that bonds were released without first ensuring that a pond was adequately designed and approved by a registered engineer, and 2) that bonds were released with inadequate vegetative cover on the permit area.

The auditors found that all ten bonds were released without first ensuring that a pond design had been approved by a registered engineer, even though regulations required such a review. At the time most of these permits were issued, there were only four employees on the Board's staff, including an executive director, a secretary, an administrative officer, and an inspector. OSM also had inspection and enforcement responsibilities at this time and had a staff of 94 persons covering an eight-state area. Copies of all permits had been forwarded to OSM prior to issuance by the Board, and the Board's current staff said it was under the impression that OSM should have made technical and completeness reviews of the permits. Although OSM did receive copies of these permits, it appears under pre-1981 regulations that it was still the Board's responsibility to review the permits and require additional information if all requirements were not met.

The auditors also found that some bonds had been released with inadequate documentation of what performance standards were used to measure vegetation, and whether these standards were achieved. For pre-1981 permits, regulations require that vegetative cover must be "equal to the ground cover of living plants of the approved reference area for a minimum of two growing seasons. The ground cover shall not be considered equal if it is less than 90 percent of the ground cover of the reference area for any significant portion of the mined area."

The auditors found that the Board's staff attempts to use performance standards of the permanent program regulations rather than the concept of a "reference area" required in the interim regulations. Although the permanent program standards are more stringent, the staff's documentation of how the

standards were applied and whether they were met is unclear. Under either set of standards, it is in many cases a matter of judgment on the part of the inspector as to whether a cover is 90 percent or less. In cases where the Board's staff documented with inspection reports that re-vegetation was adequate for at least two growing seasons, it appears that vegetation standards were met. However, better documentation by the Board's staff of compliance with re-vegetation standards should be maintained in order to meet the requirements of the regulations, and to reduce the likelihood of a contradictory evaluation by OSM.

Finally, the auditors found that in one case, a bond had been released even though inspection reports showed that erosion problems were still present. In this case, erosion problems were present because there was no topsoil on which to establish vegetation. Although the Board's staff had worked with this company to correct this problem, erosion continued. OSM stated that the Board's staff should have requested assistance from OSM in solving this problem, utilizing alternative techniques. The Board chose not to attempt further solutions to this problem and allowed the bond to be released without meeting the regulation requirements. The Board has no authority to release bonds when the performance standards have not been met.

In summary, there are instances in which the Board has released bonds before all conditions had been met. Most of the cause has to do with problems in the transition to the State-run program in 1981. A lack of sufficient staff and failure on OSM's part to point out problems in permit applications allowed a number of permits to be granted without adequate review. The Board and OSM disagree on the severity of some of the problems that persist from this inadequate review, especially as far as building new ponds is concerned. Some of the disagreement would be lessened if the Board obtains engineering reviews of pond designs and does more to document compliance with re-vegetation standards. Future bond releases of permits approved before 1981 will continue to be in violation of State law unless engineering reviews are obtained.

It is unlikely that the same kinds of problems will occur with permits approved after 1981. The review process for approving these permits is now stricter, and the performance standards are also clearer.

**Are Procedures and Administrative Records Sufficient to Allow
Proper Tracking of Permits, Citizen Complaints, Enforcement Actions
and Civil Penalty Assessments and Bonding?**

The auditors reviewed the procedures used by the Board's staff in all of the above areas. Much of the information on specific areas is provided in previous questions in this report. The following are the auditors' overall conclusions.

The auditors found several areas in which documentation should be more complete and substantial. These areas include Board decisions to issue permits, waive use of the point system, waive civil penalties, and release bonds. Also, inspections should be more adequately documented through the use of checklists and the monitoring of performance standards on re-vegetation should be better documented. The auditors also found that the Board should be presented with

more complete information from the staff before voting on such items as civil penalties and bond releases. While it appears that the staff does review permit files prior to their presentation to the Board, this information could be better communicated to the Board before their decisions are made. Additionally, all permit review information should be better organized and documented in a centralized file to allow better tracking of all relevant permit information.

ATTACHMENT A

OFFICE OF SURFACE MINING TEN-DAY NOTICE EXAMPLES

Example 1: Board's Staff Aware of the Problem Prior to the OSM Notice

This case involves a permit issued before the State's regulatory plan was conditionally approved and the State received primary control for the program. The sediment pond for this operation appears to have been inadequately designed at the time of the permit application. At that time, OSM was also responsible for inspecting this permit and noting problems. Not until 1983 did OSM cite an improper pond design and issue a ten-day notice to the Board's staff. The ten-day notice was issued because the pond overflowed on the day of the OSM inspection, April 5, 1983.

On February 18, 1983, the Board's staff had conducted an inspection of the permit and stated that the sedimentation pond required some maintenance work, but no violations were noted. (The company had previously submitted a written plan for pond improvements in December 1982, and was in the process of implementing these changes.) On March 24, 1983, another inspection was conducted and the Board's staff cited additional maintenance work that was required. It appears that the company was attempting to comply with these requirements at the time the pond overflowed. However, heavy rainfall had been recorded over the previous 11 days, and it was not possible to complete all the maintenance work prior to the storm on April 5.

In this case, it appears that the Board's staff was aware of the inadequacies prior to the OSM inspection and was taking steps to correct the problem. The auditors found that OSM was unaware of the plan submitted by the company in 1982 to correct these problems and therefore believed the staff's actions were incomplete. There appears to be a disagreement between OSM and the Board's staff on the extent of the seriousness of this violation. On April 5, OSM stated that sediment and debris had flowed onto a public road and posed a potential threat to the public's safety. On April 6, the Board's staff stated there was no sign that any material had been in the road.

Example 2: Board's Staff Not Aware of the Problem Prior to the OSM Notice

This case also involves a site approved under the interim program, and again the problem is an inadequate pond design. On March 15, 1983, OSM conducted an inspection of the permit and found that a pond had overflowed. The inspection continued on March 16, and it happened that the Board's staff also conducted an inspection of this permit that day. The Board's staff had also conducted an inspection of this permit on February 21, 1983, and the pond was found to be functioning adequately at that time. Thus, it appears that this problem occurred between inspections, and the Board would have had no way of knowing of this problem unless they had monitored the pond daily.

During the March 16 inspection, the Board's staff requested the company to repair the problems and did not issue a notice of violation because it believed the problem was one of maintenance. The company has since taken action to correct these problems.