

REPORT TO THE
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**A Performance Audit
of
Utah's Coal Regulatory Program**

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Audit Performed By:

Audit Manager	Rick Coleman
Audit Supervisor	Kade Minchey
Audit Staff	David Gibson
	Rachel Lyon
	August Lehman

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Digest of A Performance Audit of Utah's Coal Regulatory Program

Chapter I: Introduction

The coal regulatory program (program) is one of the programs within the Division of Oil, Gas and Mining (DOGM or division). The program has regulatory responsibility over the surface impacts of coal mining but does not regulate mine safety.

Chapter II: Management Needs Improvement in Key Governing Areas

Comprehensive Policies and Procedures Needed Throughout Coal Program. Coal program staff are suffering from a lack of clear direction from division management, sometimes leading to inconsistent regulatory practices. In addition, we found that it was difficult for some members of management and some staff to rethink and recreate processes; instead, it appears management and staff are entrenched into their current, inefficient management system and practices. We recommend that the division devise adequate policies and procedures that will guide the coal program and that the division director ensure positive change occurs in the coal program.

Management Should Require Performance Information. Division management is not receiving adequate performance information to control and direct the coal program. The coal program has devised a Coal Tracking System (CTS), but management has not fully used the information to monitor the program. We recommend that division management utilize the CTS, or comparable system, as a management information tool.

Chapter III: DOGM Should Change Permitting Practices for Underground Mining

DOGM Should Seek Permit Area Definition Consistent with Underground Mining. We believe the coal program practices do not properly distinguish between surface and underground mining. The coal program has enforced a large permit area, intended for surface mining, in areas where underground mining occurs. The permit area should be limited to the potentially disturbed area where land reclamation will occur. However, program staff can and should continue to monitor and regulate surface impacts in the areas adjacent to the permit area. We recommend the division change their permit area definition to the disturbed area, or seek a change in state law and administrative rules.

**Chapter IV:
DOGM's Inconsistent
Enforcement of
Rules Has Led to
Inefficiency**

Management Entrenched with Current Permit Area Definition. We could not obtain a satisfactory explanation as to why the division is currently permitting an area of land beyond the purpose of the rules. In our opinion, the program must follow existing law and rules. If management feels that concerns exist with some aspects of the law and/or rules, they must seek the appropriate action to change the law and rules.

DOGM Should Consistently and Clearly Enforce *Utah Administrative Rules*. The division's permitting practice, described in Chapter III, has created confusion and inconsistencies in the enforcement of rules dealing with the permit area. Both coal program staff and coal operators have been confused when trying to enforce and adhere to rules designed for the disturbed area in an adjacent area far away from any surface disturbance. This confusion has led to inconsistent enforcement of rules dealing with the permit area. We recommend that the division enforce the law and rules as written.

Inconsistent Enforcement Negatively Impacts Coal Industry. The coal industry representatives we spoke with said that the division's permit-area boundary and enforcement practices affect the efficiency of coal mining operations. Reportedly, the coal industry has unnecessary delays and bears additional costs to obtain and comply with a permit from DOGM.

**Chapter V:
Funding Options for
Coal Program Should
Be Addressed**

Program Improvements Can Translate into Cost Savings. Making the needed improvements to the program can result in greater program efficiency and cost savings. Although the program is currently funded with 20 FTEs, we believe 18 FTEs should be adequate. The coal program currently has vacancies in funded positions, so a reduction in FTEs would not require reducing the current workforce. As the program achieves greater efficiency in the future, we believe program FTEs could likely be further reduced.

Additional Options Exist for Funding Coal Program. The current method the division uses to obtain federal grant dollars is based on the number of federal acres permitted. We do not believe changing to the smaller permit as we recommended in Chapter III will affect federal funding, but we provide funding estimates if the federal funding was to change. In addition, we recommend that the Legislature consider implementing program fees. These fees could be used to fund all or part of the state's portion of funding. If fees are not desired by the Legislature, general fund dollars can continue to fund the program.

Chapter I

Introduction

This reports focuses on the coal regulatory program (program) within the Division of Oil, Gas and Mining (DOGM).

Division management can improve in a few key governing areas. Discussed in Chapters II, III and IV.

The Division of Oil, Gas and Mining (DOGM or division) is a regulatory agency that has authority over some aspects of oil, gas, and mining operations in the state. This report focuses specifically on the coal-mining regulatory operation of the division, which controls and monitors surface impacts of coal mining. Due to the recent tragedy at Crandall Canyon mine, it is important to point out that DOGM only regulates surface impacts caused by mining. The division is not engaged in underground mine safety.

We found that management over the coal program is lacking good management practice in a few key governing areas. Specifically, there are three ways that division management should improve their governance over the coal program:

- Division management should develop clear policies and procedures for regulating, monitoring, and enforcing the established rules, and then consistently adhere to the policies. Division management should also utilize a management information system to effectively monitor the performance of the coal program (Chapter II).
- Division management should more accurately interpret the governing regulatory definitions (Chapter III).
- Division management should consistently enforce their regulatory authority (Chapter IV).

These regulatory and operating improvements will help the program:

- Increase efficiency and improve its regulatory authority over the coal industry without impacting the mission of the program (Chapter V).

Utah's Coal Program Regulates Surface Impacts Caused by Coal Mining

The coal program regulates environmental impacts to the surface caused by coal mining.

Utah's coal regulatory program is charged with regulating the surface impacts caused by coal mining. The coal program is one of four programs within DOGM. The regulations governing surface mines are based on the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA). A separate federal agency, the Mine Safety and Health Administration (MSHA) regulates underground mine safety.

DOGM Regulates Oil, Gas, and Mining. DOGM regulates several different industries in the state. The mission of DOGM is to regulate and ensure "industry compliance and site restoration while facilitating oil, gas and mining activities." The following is a list of areas that are regulated by the division:

- Oil and gas industry
- Coal industry
- Mining (non-coal) industry
- Abandoned mines

The Coal Program Regulates Surface Impacts Caused by Coal Mining. The coal program is charged with permitting, monitoring, and inspecting coal mines for negative environmental effects to the surface. To accomplish the task of regulating coal mines, the program employs engineers, hydrologists, biologists, and other professionals who review permit applications in accordance with established regulations.

The division employs engineers, hydrologists, biologists, and other professionals to accomplish its mission.

The program has historically operated with about 22 FTEs. Recently, the program has reduced FTEs to as low as 15 FTEs due to federal shortfalls in funding. We believe the program can operate fully at 18 FTEs; in the future, as greater efficiency is achieved it can continue to reduce FTEs. This is discussed in more detail throughout the report, but primarily in Chapter V. The following figure shows coal program funding over the last five years.

Much of the land where coal mining occurs is owned by the federal government.

The rules used to regulate the coal industry are based on a 1977 federal law.

Figure 1.1 Coal Program Funding. State appropriations to the coal program have increased in recent years.

	FY 2004	FY 2005	FY 2006	FY 2007 ²	FY2008 ³
State Funds	\$ 193,100	\$ 264,900	\$ 385,900	\$ 661,300	\$ 674,600
Federal Grant ¹	1,709,100	1,730,400	1,743,700	1,698,200	1,698,200
Total	1,902,200	1,995,300	2,129,600	2,359,500	2,372,800

1. Federal funding shown here is the total amount of the federal award. The federal grant allows for a percentage to fund overhead costs, which the division uses for accounting and administration. Consequently, numbers may vary depending on amount shown..
2. Legislature provided a \$400,000 supplemental to avoid losing coal program staff.
3. Legislature provided \$400,000 in ongoing appropriations to avoid losing coal program staff. This number also represents the appropriated budget.

Coal program staff also interact with private and federal mineral and land owners. Much of Utah's land is federally owned and operated; therefore, most of the coal program's interactions are with federal landowners. However, there are some state-owned lands and private owners that the coal program also coordinates with. The following is a list of entities that the program works with in permitting coal mines:

- **Bureau of Land Management (BLM)** – The leasing agent for all federal coal and the surface manager for BLM-owned lands
- **US Forest Service** – Surface manager for forest service lands
- **State Institutional Trust Lands (SITLA)** – Leasing agent and surface owner for SITLA lands
- **Private Owners** – Leasing agent and surface owners for private land

Coal rules can be found in *Utah Administrative Rules*, Section 645. Additionally, state law dealing with coal regulation is found in Title 40, Section 10 of *Utah Code*.

Coal Program's Rules Are Based on Federal SMCRA Law. SMCRA is the law after which Utah's law and regulations are patterned. SMCRA created two programs, one for regulating active coal mines, and a second for reclaiming abandoned mine lands. SMCRA also created the

The federal government's Office of Surface Mining (OSM) provides oversight to the coal program.

Currently, all coal produced in Utah comes from Carbon, Emery, and Sevier counties.

Office of Surface Mining (OSM), an agency within the Department of the Interior, to promulgate regulations, fund state regulatory and reclamation efforts, and ensure consistency among state regulatory programs. The following is a list of the primary components found in federal and state regulations.

- Contains standards to protect environment
- Requires permitting and bonding of mined land
- Protects public safety with inspections and enforcement

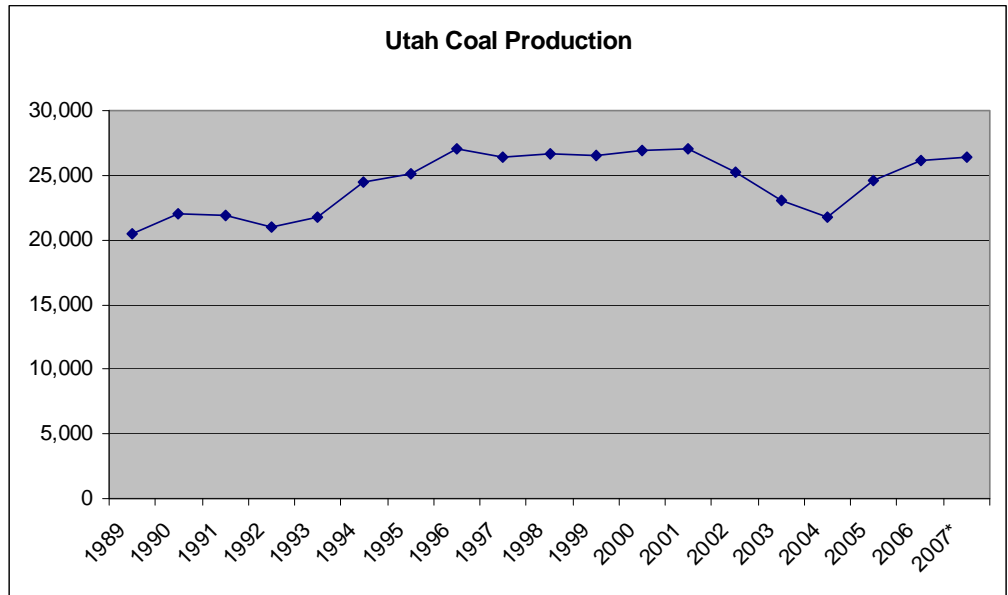
Federal Government Oversees Coal Program. OSM has been overseeing surface mining operations since 1977. The state received approval for the coal regulatory program in 1981. The cooperative agreement for the division to run the program on federal lands was approved in 1987. These approvals allow the division to regulate coal mining activities in Utah. The federal OSM office provides oversight to the division. OSM annually reviews the division and also performs oversight action throughout the year. DOGM and OSM are not involved in underground mine safety. MSHA governs underground mine safety in Utah.

Coal Production Has Been Consistent

Utah coal production has been relatively steady for the last 20 years. Currently, all of the 26 million tons of coal produced in 2006 came from three Utah counties: Carbon, Emery, and Sevier. Utah's coal production is similar to that of other coal-producing western states, with the exception of Wyoming. Utah ranks 12th overall in coal production.

Utah Coal Production Has Held Steady. Coal production peaked in the mid 1990s and has stayed fairly constant over the last 20 years. The following figure illustrates this.

Figure 1.2 Utah Coal Production. Utah coal production has stayed relatively consistent.



**2007 is based on a projection.
Source: Utah Geological Survey*

Currently, all of the coal-producing mines in Utah are underground mines.

Utah Coal Production Is Unique In That All Mines Are Underground. Currently, all of the producing mines in Utah are underground. This is somewhat unique among other western states. Colorado is the most similar to Utah with 8 of the 13 mines being underground. Figure 1.3 shows coal produced in other western states the last two years.

Figure 1.3 Utah Production Compared to Other Western States. Utah production is similar to other western states, with the exception of Wyoming.

State	2006 (tons) Production (In Thousands)	Number of Underground Mines ¹	Number of Surface Mines ¹
Wyoming	446,742	1	17
Montana	41,823	1	5
Colorado	36,322	8	5
Utah	26,131	13	0
New Mexico	25,913	1	3
Arizona	8,216	0	2

1. 2005 data
Source: Utah Geological Survey

For western states, Colorado has the second-most underground mines after Utah. Most coal mines in the West are surface mines.

Surface Mines Create Greater Surface Disturbance. The federal SMCRA law that Utah's rules are patterned after deals with surface mining and underground mining. These rules require that the area of surface disturbance be permitted by the coal program. The area above underground mine workings, often called the adjacent area, is protected through a subsidence control plan. As will be discussed in Chapter III, Utah's coal program has been inaccurately permitting the adjacent areas.

Audit Scope and Objectives

We were asked to audit the Division of Oil, Gas and Mining's (DOGM) coal regulatory program to determine if the program is operating effectively and efficiently. The scope of our audit was to review the following objectives:

- Determine if the agency's operation is consistent with statutory objectives and agency policies.

- Evaluate the effectiveness of the organization's operations.
- Review productivity and fiscal efficiency.

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Chapter II

Management Needs Improvement In Key Governing Areas

Management within the Division of Oil, Gas and Mining (DOGM or division) is lacking good management practices in a couple of key governing areas. First, management is not fully guiding the Coal Regulatory Program (program) with sufficient policies and procedures. Second, management is not fully utilizing an information system to help them control and monitor the performance of the coal program.

Some members of management appear entrenched in the current inefficient system. The division director should ensure positive change occurs.

We believe that management must prepare a more-developed vision for the coal program and institute measures to ensure its implementation. We found that it was difficult for some members of management and some staff to rethink and recreate processes; instead, it appears management and staff are entrenched into their current, inefficient management system and practices. We recommend that the division director ensure positive change occurs in the coal program.

Management has not developed adequate policies and procedures.

Coal program staff are suffering from a lack of clear direction from division management. Management has not established a complete set of policies and procedures that guide and direct coal program staff. Some policies and procedures do exist; however, in some instances we found them insufficient to provide the program with adequate instruction and vision. We found this concern to be particularly evident in the permitting and monitoring functions of the program (permitting concerns are discussed more in Chapters III and IV).

Management is not utilizing a management information system.

Management is not fully utilizing a management information system to adequately measure and track the coal program's performance. The division has established a Coal Tracking System (CTS), but it is not being utilized by management to monitor the performance of the program. We also found that the Governor's Balanced Scorecard, used by the division to measure key performance indicators, has been narrowly used.

Inadequate policies and procedures and inaccurate performance tracking have led to an inefficient program that is not fulfilling all its regulatory objectives. To correct these concerns, we recommend that division management establish better-defined policies and procedures and

use CTS as a management information tool. Division management should also develop better performance tracking measures that accurately describe the performance of the program.

Comprehensive Policies and Procedures Needed Throughout Coal Program

Division management has not instituted adequate policies and procedures to effectively guide the coal program. The associate director over mining told us that the *Utah Administrative Rules* are sufficient in most instances to guide the program. We disagree. Well-developed policies and procedures incorporate the provisions from the *Utah Administrative Rules* and provide direction to coal program staff. The *Utah Administrative Rules* do not specify how the program should go about implementing the requirements in the rules.

We found that the effect of underdeveloped policies and procedures has been to create inconsistencies in regulatory enforcement (Chapter IV), and important functions of the program have been left unimplemented or partially implemented. The following list illustrates important functions that have either been partially implemented or not implemented by the division.

- **15-Day Initial Completeness Review (ICR)** – The program has not been doing these reviews and has not established policies and procedures for this requirement. The *Utah Administrative Rules* require the coal program to determine completeness of information 15 days after submittal. We believe that by not following this rule, extra work for staff has been created and some delays for coal operators have been experienced.
- **Water Monitoring** – The division has developed a policy for water monitoring but has only partially implemented this policy. The policy requires the program to review water reports 30 days after receipt from the coal operator. We found some water data unreviewed after two years. Further, the policy does not adequately address communication of results back to the coal operator.

Coal program staff need well-developed policies and procedures to guide and direct their activity.

Required 15-day initial completeness reviews are not being done.

Water reports are not being reviewed by the coal program on time.

Policies and procedures are nonexistent for emergency permit approvals.

A better-defined policy is needed for the required annual reports.

- **Emergency Permit Amendment Approvals** – The program does not have a policy or procedure in place that details the circumstances, conditions, and requirements for emergency approvals. This is concerning because the program is unable to document decision making for these permit amendments.
- **Annual Reports** – The program has a limited policy dealing with the required annual reports. However, the policy does not address important procedures for items such as timetables for reviewing the reports or standards for accepting/denying the annual reports.

To correct performance concerns, we recommend that division management ensure that policies and procedures for all functions of the program are established and adhered to.

Well-Developed Policies and Procedures Are Key to Good Management. Policies and procedures exist to define best practices and acceptable behaviors in organizations. Policies and procedures define and specify how governmental organizations will carry out and implement provisions in law and in *Utah Administrative Rules*. Government organizations cannot properly execute their charge in law without procedures. It is not acceptable, as suggested by the associate director of mining, to govern an organization solely on provisions in the law and rules.

The division needs to have policies in place so all of their employees will use consistent guidelines when administering the coal regulations. By creating and following sound policies and procedures, management will create an established method of monitoring the coal program. As a result, rules and regulations will be applied consistently by coal employees for all disciplines involved in regulating the coal program.

Required 15-Day Initial Completeness Review Is Not Being Followed

The division has not been completing the required 15-day initial completeness review. Further, the division has not established a policy or procedures overseeing the 15-day completeness review. Established procedures will help ensure this task is accomplished and will provide management with an oversight tool. One consequence of not having an established policy is that the coal program has simply not been performing

Well-established policies and procedures are important to ensure consistent practice.

Using the 15-day completeness review would increase program efficiency.

Colorado uses a 10-day initial review process for permit amendments.

the ICR. The *Utah Administrative Rules* require that information submitted for permit amendments must go through a 15-day ICR.

We believe that much of the staff's workload could be reduced and additional efficiency achieved if the program would ensure that information is complete before too much staff time is invested in the review process of faulty or incomplete information. The required ICR should accomplish this purpose.

Figure 2.1 15-Day Initial Completeness Review. The division is required to determine initial completeness within 15 days. The division has no policy or procedures detailing how to accomplish this rule.

Administrative Rule R645-303-221

At any time during the term of a permit, the permittee may submit to the Division, pursuant to R645-303-220, an Application for Permit Change. The Division will review and respond to an initial Application for a Permit Change within 15 days of receipt of the application.

The director of Colorado's coal program indicated that they use a completeness review and find it very useful. Colorado must complete an initial application review within 10 days of receipt to determine if all the required information was submitted. He said this greatly increased the overall process because the division knows right away if the application can continue in the permit change process or if it should be denied and sent back to the coal operator.

The coal program's non-adherence to this rule has created problems for the coal operators. The operators are often on timetables that require them to have amendments in place at specific dates. The 15-day initial completeness review would let the operator know that after 15 days all the information is in place to receive approval or denial in 45 days. Currently, the operators cannot rely on such a timetable.

Further, the Coal Tracking System (CTS) has not been programmed to track the 15-day review. Without this tracking mechanism in place, division management cannot monitor the completion rate of this review and cannot ensure the program is in compliance with this requirement.

Required deadlines have not been met due, in part, to not using the 15-day completeness review.

We believe the practice of extending deadlines could be eliminated if the division used the 15-day review.

Utah Administrative Rules Have Deadlines for Various Permitting Activities. We believe two primary results of not completing the 15-day review have been inefficiencies for staff and missed deadlines by the coal program. The coal program completes three primary tasks that would be used with the 15 day review; these are:

- **Permit Amendments** - A permit change that does not require public notice. The program has 60 days to approve or deny. (96 of these were requested in calendar year 2006.)
- **Legal, Financial, Ownership** - Required information that must be submitted with the permit application. (11 of these were requested in CY 2006.)
- **Incidental Boundary Change** - A permit change that is necessary if any boundary changes are needed to the permit area. (3 of these were requested in CY 2006.)

Division management has informed us that it is necessary to extend the above-stated deadlines because the coal operators frequently submit incomplete and/or insufficient information. We believe this practice would be corrected if the coal program would adhere to the 15-day initial completeness review.

The division's practice has been to assign a "due date" when a permit change is requested by the operator. This is the date by which the division would like to have the task completed. The division sets this date to ensure the task is completed before the mandated deadline. However, coal program staff have told us that the issue due date is occasionally extended to accommodate the coal operator, even though there is no allowance for this in the rules. Sufficient data did not exist in the CTS program to measure the frequency of this occurrence.

Division management has stated that they do not like to deny requests due to a lack of information provided by the coal operator. Management has said they would rather work with the operators to get the correct information without having the operator start the whole process over. By adhering to the 15-day initial completeness review, management would not have to deny requests after the 15-day period due to insufficient information.

The 15-day ICR can help reduce time spent when reviewing permit amendments.

Coal operators submit insufficient information because, at times, they do not know how the division is going to interpret the administrative rules.

Staff Time Is Wasted When Reviewing Incomplete Information.

This completeness review would also help the division. The division can respond to the application sooner and notify the operator as to what information may be deficient. This will free up staff's time to allow them to work on other projects, instead of reviewing incomplete information.

Coal program staff frequently commented to us that they receive incomplete, insufficient, or, in some cases, irrelevant information from the coal industry. Coal staff said that when they receive this information they spend considerable time, up to several days, reviewing the incomplete submissions. Staff then send detailed deficiency notices outlining precisely what is required of the operators. We believe this is an inefficient process because coal staff are becoming free consultants to the industry instead of performing other job-related duties. Management can change this practice, in part, by implementing the 15-day initial completeness review.

Some Deadlines Were Missed Due to Insufficient Information.

Management told us that on a few occasions they have had to extend deadlines because the operator did not provide sufficient information before the deadline. We believe this is a flawed process. Division management should outline a clear procedure for determining completeness in the required 15 days and then monitor performance to ensure the program is approving or denying requests within stated deadlines.

Coal operators have commented to us on the importance of the program meeting deadlines for coal-mine operations. Coal operators indicated that it is essential for the division to meet the deadlines, or severe disruption can occur with scheduled coal-mining activities.

It appears, at times, coal operators submit insufficient information because they are unsure of exactly how coal program staff are going to interpret the rules, and, consequently, are unsure what information the program is looking for. Chapter IV will explain that the division is inconsistent in how they review and interpret the rules. Consequently, management allows program staff to operate as free consultants by identifying and detailing what pertinent information the coal operators should submit.

Further, since policies and procedures are not followed and time frames are extended, the operators often do not receive an answer within

the mandatory deadlines. Consequently, at times, the operators will submit incomplete information simply to get their requests in the queue.

Policy Not Being Followed For Water Monitoring

Management has established an incomplete policy for monitoring hydrology data, and it is not being adhered to. The established policy states that the coal operators are to submit water-monitoring data each quarter of the year. The division is then supposed to review the data within 30 days after receipt of the information. Then, the division is to inform the operators if there are any irregularities or concerns that need to be addressed. However, the incomplete policy does not address how the program should respond to the coal operator.

It appears the coal operators are submitting the information quarterly, but in some instances the program has not been notifying the operator of their review. Some coal operators expressed frustration in not receiving water information feedback from the program.

The coal program's water-reporting policy states, "Implementation of this [water-monitoring] directive will ensure an established process of timely review and written findings." Unfortunately, by not following the policy, the program has not provided the coal industry with timely, important information. We found that in calendar year 2006, 89 percent of the water reports were not reviewed on time. Some reports went a year or more before being reviewed. The following figure illustrates some of our findings related to water monitoring.

Figure 2.2 Water Report Findings. The division is not following their procedure concerning the reviewing of water data that is submitted to them by the operators.

Water Report Findings

- 89% of the time, water reports were not reviewed on time in calendar year 2006.
- Some water reports were reviewed a year or more after the required date.

**Water monitoring
policy is not
being followed
by the coal
program.**

**Water reports
were not
reviewed 89% of
the time in 2006.**

Findings of the water reports are not always being sent to coal operators for correction.

Policy and procedures do not exist for emergency approvals.

Water, of course, is one of the most valuable resources in the state. Coal program management has stated to us that this water-monitoring data is extremely valuable and necessary. However, they have done very little to ensure this information is reviewed.

Some operators have voiced concerns to us about this process. They, rightly so, do not understand why the division is adamant about enforcing a deadline on them to submit the data, when the program does not adhere to its reviewing deadlines. Division management should bolster this policy by clarifying procedures as to how program staff are to communicate with coal operators. Management should also ensure that the water reports are being reviewed within stated deadlines.

Emergency Approvals Are Given Without Clear Policy

Division management has not established a policy or procedures for accepting or denying requests for an emergency permit amendment approval. This is concerning. A formal policy is necessary to ensure that emergency approvals are not given arbitrarily. Division management should devise policies and procedures to guide how the coal program will internally handle these requests. If external guidance is needed for the coal industry, the division should implement guidance found in the *Utah Administrative Rules*.

Division management said that coal operators approach them with situations that mandate immediate approval or the coal mine will shut down. In these instances, division management has allowed the permit change to occur as a conditional permit, if the operator agrees to their terms. The following is an example of a emergency permit approval by the division for a coal mine. The division granted the operator a conditional permit if they submitted to the division the following information:

The operator will submit an updated Probable Hydrologic Consequence (PHC). This PHC update will include but not be limited to updated potentiometric hydraulic surface maps and an analysis of the well data and the effects of previous mining on the ground water and the future effect of full extraction on the aquifer.

Some staff are concerned with the practice of giving emergency approvals because important data is not being analyzed.

This information was supposed to be completed July 2, 2007, but the operator contacted DOGM and told them he/she would not have the information completed in time. Division management gave the operator a 30-day emergency permit so the operator could stay in operation while collecting the information to meet the deadline.

We talked to some employees within the division who are concerned with management giving emergency approvals. Staff feel that important data must be analyzed to ensure that public safety and the environment are protected before approvals are given. We believe, at a minimum, the division should have a clear policy that details exact procedures outlining specific conditions and requirements for issuing emergency approvals.

On October 23, 2007, the division gave a second emergency permit approval to the same mine. This time the division gave the operator 60 days to produce the required information needed to comply with regulations.

We believe, if DOGM management continues the practice of emergency approvals, management must establish a clear policy and consistently follow it. The policy should specify procedures that, at a minimum: detail conditions that qualify for emergency approvals, detailed requirements for the operator, and gives sufficient documentation that can demonstrate the division is not being arbitrary and capricious in their decision making.

Division Lacks an Adequate Policy For Reviewing Annual Reports

The division has a deficient policy for annual reports. The policy does not contain key procedures, such as specific deadlines as to when the coal program should review the reports and when the reports should be returned to the operators. Division management should update the policy with clear time frames that can guide program staff's work.

The coal operators are required to submit the previous year's annual report to the division by the first quarter of the new year. It appears the operators are complying with this requirement. The program is supposed to review the reports after they are received. However, we found that some of the annual reports had not been reviewed for up to two years. Of

The policy for annual reports is deficient. The policy does not define deadlines or contain clear review procedures.

Some annual reports have not been reviewed for up to two years.

Annual reports contain important subsidence, biology, soil, and other information.

The division is not utilizing a management information system; consequently, they are unaware of the coal program's true performance.

A coal tracking system has been established, but is not used as a management information system.

the annual reports that were submitted in 2006 from calendar year 2005, none of them were reviewed.

Coal program management has stated that the information in the annual report is important and must continue to be reviewed. Management indicated that essential subsidence information is contained in the annual reports. It is necessary for the division to review these reports in a timely manner, so any potential concerns can quickly be remedied. The annual reports also contain important biology, soil, and other information.

Management Should Require Performance Information

Division management are not receiving adequate performance information to control and direct the coal program. The coal program has devised a Coal Tracking System (CTS), but management has not fully used the information in the CTS to monitor the program. Division management does not receive performance reports from this program, nor is sufficient data being entered into the program to help facilitate better monitoring. We believe the CTS program, or another management information system, could be better utilized by management to track required tasks and monitor performance.

Performance of the coal program can be more accurately reported. The division uses the Governor's Balanced Scorecard as a primary method to measure the program's performance. However, we found several concerns with the way the division has been calculating the scorecard. First, the program has not been measuring some key performance indicators. Second, data derived from the CTS program was not always accurate, because either bad information was put into the system or because the system lacked complete information.

A Better-Utilized Management Information System Is Needed

Management is not using the CTS as an information tool. We found two primary concerns with the way management is using the CTS program.

- The CTS program is not used by management to track permit changes and other significant tasks.
- The inputting of data has been sporadic, making it difficult to always obtain good output information from the system.

By correcting these two problems, management should be able to derive valuable information from the CTS program that can be used to help better govern the coal program.

Coal Tracking System (CTS) Not Used as a Management Information System. Management should require regular reports from the CTS, so they can track the progress of the program. We found that management has not been provided reports in the CTS that indicate the status of permit changes and other significant tasks. To obtain this information we had to contact a staff lead.

One member of management told us that tracking permit changes and other significant tasks is not used because his/her responsibility is to react to crisis. We believe that management must be proactive in their leadership responsibilities. A proactive approach will help the program respond better to their clients and create a more efficient organization.

Inputs into the CTS Program Have Been Sporadic, Creating Output Concerns. We found that on many occasions the coal program staff member responsible for entering dates has entered wrong dates in the fields or has left the fields blank. This staff member indicated to us that he/she has not had the time to fill in these dates. One result of this action is that the division does not get good output information about the completion of permit changes.

To correct this problem, the CTS program would need to be changed so that when the requested date and the type of permit are entered, the program could easily calculate the “required due date” within the number of days required by the *Utah Administrative Rules*. Once this information is correct in the system, the supervisor can manually set the issue due date so that the task will be completed before the required due date.

We recognize that technical staff are needed to maintain and develop the CTS program. Since a proper management information system is essential to effective governance, we believe division management should

Better use of the CTS program can provide management with valuable information that can be used to increase the program’s efficiency.

Technical changes are needed in the CTS program to help provide more accurate information.

The division must measure more meaningful performance data.

The division is not including all key performance indicators in their performance measures.

carefully evaluate options that ensure technical IT staff make the necessary changes to the CTS program.

More Meaningful Performance Measures Should Be Established and Followed

We believe more meaningful performance measures can be established for the coal program. The program's performance measures have not been adequate for two reasons.

- The coal program has not been measuring some key performance indicators.
- Some calculation errors exist with performance measures.

We recommend division management do more to ensure performance is being measured correctly and completely.

Performance Measurement Has Not Measured Some Key Performance Indicators. The primary method the division has been using to measure its performance is the Governor's Balanced Scorecard. The division is also evaluated by OSM annually. Officials at the Governor's Office indicated that the scorecard is supposed to measure key performance indicators. We found that the division has not been measuring some key indicators of the coal program.

A primary function of the program is to review permit amendments. However, the program has left out some other key performance indicators, such as water monitoring and significant revisions. Water monitoring is perhaps one of the most important functions the program performs. As previously shown, the program had not reviewed 89 percent of these reports in calendar year 2006 and was a year or more delinquent in reviewing these water-monitoring reports. As well, significant revisions are a major part of the program's workload. Failure to include these tasks has provided an inaccurate measurement of performance.

Much of the work performed by the coal program is measurable. We believe that the program should track and measure their performance with all relevant measurable tasks. Figure 2.3 illustrates the tasks included and

not included by the division when calculating their performance measurement.

Figure 2.3 Tasks that Can Be Measured. The program has been measuring their performance with the tasks in the left column; the program has not been measuring the tasks in the right column.

Tasks Included by DOGM	Tasks Not Included by DOGM (Included by Auditor)
Amendments Legal, Financial, Ownership Incidental Boundary Changes	Midterm Reviews Renewals Water-Monitoring Reports Significant Revisions

The division should establish policies and deadlines for some key functions, so they can be measured.

Other tasks, such as the annual report, could also be measured. We did not include them in our calculation because management has not placed a deadline on the review of this information. We believe that management should set a timetable for review of this information and track the program's performance. Before management can improve performance, they must accurately measure all significant functions completed by staff.

By not including all measurable tasks in its performance measurement, the coal program falsely assumed performance was higher than it actually was, as shown at the end of this chapter.

Important information is not being entered into the CTS program. This has created problems with obtaining good output data.

Performance Measures Have Not Been Calculated Correctly. Some performance measures have been calculated incorrectly. These incorrect calculations stem primarily from inadequate record keeping. We found the following inadequacies:

- The coal program is not entering all the information into the CTS program. Many of the fields necessary to measure performance were left blank in the system.
- Miscommunication has occurred about what certain dates represent within the tracking program. We found that program management and staff believed the dates represented different information.
- The coal program is not following *Utah Administrative Rules* when

Some due dates are being miscalculated.

determining deadlines. The program was not including weekends and holidays when the rules stipulate that it should. This incorrectly gave the program additional days to complete tasks.

We calculated the coal program's performance with more key indicators using corrected data; the results are listed in the next section.

The Coal Program Is Not Performing as Well as Its Measurement Had Indicated. We calculated the program's performance based on (1) a better representation of key performance indicators and, (2) correct calculations of deadlines based on updated record keeping. We found the program was not performing as well as it had reported. Figure 2.4 shows the difference in results using the two different methodologies.

Figure 2.4 Governor's Balanced Scorecard for 2007. DOGM was not including all key indicators to calculate its efficiency. We also corrected some calculation errors. The follow measures are an indication of timeliness, or how often the program completed its work on time.

Quarter (CY2007)	DOGM's Calculations	Auditors' Calculations
1	78%	73%
2	88	65
3	87	50

Data derived from the coal-tracking system was not always reliable. Great effort was taken to validate these numbers, but some minor errors may still exist. Management should require that accurate information is submitted into this system and that queries provide correct output information.

By not measuring all pertinent tasks, the coal program has not had an accurate reflection of performance. We believe the program should more accurately measure its performance in order to know more precisely what areas need to be focused on for improvement.

In conclusion, we believe that the coal program does not have sufficient operating methods. We found that it was difficult for some management members and some staff to rethink and recreate processes when we asked them questions. Instead, they would often offer solutions

A more complete measure of key performance indicators shows the coal program is not performing as well as previously reported.

Some members of management appear entrenched in the current inefficient system. The division director should ensure positive change occurs.

that are incorporated into their current, inefficient management system. We recommend that the division director ensure that new policies, procedures, and a tracking system are implemented that will change and improve the coal program. The next two chapters deal with another key governing issue that needs to be addressed by division management; the division's interpretation of the permit area is not consistent with the current defined rules.

Recommendations

1. We recommend that division management follow *Utah Administrative Rule* R645-303-221, and complete a 15-day initial completeness review on all relevant permit changes. Management should track and monitor the 15-day review (ICR) to ensure that it is consistently completed.
2. We recommend that division management adhere to required mandated deadlines and deny permit amendments that are incomplete.
3. We recommend that division management create a complete policy with water monitoring. This policy should contain procedures that will help ensure water-monitoring reports are timely reviewed. The division also needs to communicate with the coal operators on any deficiencies that are generated from the water reports within a specific time frame.
4. We recommend that division management create a policy and procedures for emergency permit approvals. The policy should specify a sufficient documentation level that can demonstrate the division's decision as not being arbitrary and capricious.
5. We recommend that division management create a policy and develop procedures to ensure annual reports are completed in a timely manner.
6. We recommend that division management utilize the CTS program or develop a similar management information system. Division management should carefully evaluate options that ensure technical IT staff make the necessary changes to the coal tracking

system (or a similar system) to ensure that management has the capability to track the status of required tasks and functions. Other items that should be included into the system are:

- Reports detailing workload analysis
 - Priority rankings of projects
 - Automated calculation of due dates and a function that automatically monitors deadlines
7. We recommend that division management include in the Governor's Balanced Scorecard all key performance indicators that can be measured to help the division better evaluate their overall performance.

Chapter III

DOGM Should Change Permitting Practices for Underground Mining

We believe DOGM's permitting practices are not consistent with the intent of state statutes and administrative rules.

Another key area where management can improve their governance over the coal program is with the division's interpretation of the permit area. We believe the permitting practices within the Division of Oil, Gas and Mining (DOGM or division) are not consistent with the intent of state statutes and administrative rules, as clarified by the Board of Oil, Gas and Mining (Board). Specifically, the division requires underground coal operators to obtain permits for a much larger area than is necessary. The large permit area required by DOGM is well suited for surface coal mines, but it is not necessary for Utah's underground coal mines. Utah's coal industry has been concerned with this practice for many years. The industry feels the division's permit practice is unnecessary and stricter than that required by the federal government. We concur.

Further, the division's insistence on a large permit-area definition has caused the coal program to operate inconsistently. At times the coal regulatory program (program) does not enforce its own rules for permit areas because the rules do not always make sense for the area above underground mining. The selective enforcement of rules is confusing both to agency staff and the coal industry. Besides impairing agency efficiency, coal industry officials report that inconsistencies and confusion have led to operational delays, deadlines not being met by the program, and increased permitting costs for the industry (discussed in the previous chapter).

Division management must enforce the administrative rules as stated. Management should seek a change to the rules if they feel the rules are inadequate.

Division management must enforce the administrative rules as stated. If division management feel that permitting the area above underground mining is necessary to protect environmental resources, then they must seek the appropriate approvals from the Legislature and the Board of Oil, Gas and Mining to change the rules.

DOGM Should Seek Permit Area Definition Consistent with Underground Mining

DOGM's permitting practice has created inconsistencies in regulatory enforcement (discussed in Chapter IV).

We believe the coal program has not properly distinguished between surface and underground mining. The coal program has enforced a permit area, intended for surface mining, in areas where underground mining occurs. The permit area should be limited to the potentially disturbed area where land reclamation will occur. The larger area above underground mining, adjacent to the disturbed area, should remain protected by rules tailored for the potential land subsidence that could occur. A clearer and more consistently enforced regulatory scheme will benefit the coal industry, which does not currently know how the program will enforce or react to certain rules (discussed more in Chapter IV).

Rules Differentiate Between Underground and Surface Mining

The administrative rules based on the federal Surface Mining Control and Reclamation Act (SMCRA) distinguish between surface coal mining and underground coal mining. Two key distinctions between underground and surface coal mining are with the degree of surface disturbance and the requirement to reclaim the disturbed area.

Administrative rules distinguish between surface and underground coal mining.

The rules refer to surface mining and underground mining with a few different terms. In this report, the area of surface mining is called the disturbed area. The surface area above underground mining workings is referred to as the adjacent area. Since DOGM has interpreted the permit area to include both the disturbed area and the adjacent area, we also, accordingly, refer to these two areas as the permit area.

Surface Coal Mining Activities Involve Extensive Surface Disturbance. Surface coal mining extracts coal from the earth by removing the land above the coal seam. This process greatly disturbs the earth as many tons of soil are removed and displaced while the coal is being extracted. Provisions in state law and the administrative rules require extensive baseline information on these surface-disturbed areas before a permit is granted by DOGM.

The rules require extensive reclamation for areas disturbed by surface coal mining.

Extensive reclamation is required in areas disturbed by surface mining. The division has a responsibility to ensure that surface-disturbed areas are

fully reclaimed. The program ensures reclamation by requiring the operator to place a bond on all areas where surface mining or surface disturbance occurs. One surface mine has been proposed and is currently going through the initial permitting process.

Underground Coal Mining Activities Involve Less Surface Disturbance than Surface Coal Mining. Underground coal mining operations extract coal through subsurface methods. There is not a requirement that the coal operator bond adjacent areas where underground mining occurs. Instead, protection to the environment is ensured through a subsidence control plan. Currently, all of the active coal-producing mines in Utah are underground mines.

Requirements for underground mines include a subsidence control plan.

Naturally, underground mines typically have much less surface disturbance than surface mines. Surface disturbance for underground mines typically occurs in areas where the mine portal is developed, storing areas, waste rock areas, and areas where ventilation equipment operates. Underground mining does cause subsidence. The administrative rules require a subsidence control plan for underground mining (this plan is discussed in more detail later in the chapter). The federal government has clarified that subsidence is not categorized as surface disturbance.

In our opinion, the division's practice has not been in concert with the distinction of surface and underground mining. The division is requiring the scope of the permit area, intended for surface coal mining, to apply to the adjacent area.

DOGM's Permit Area Is Not In Harmony with Rules

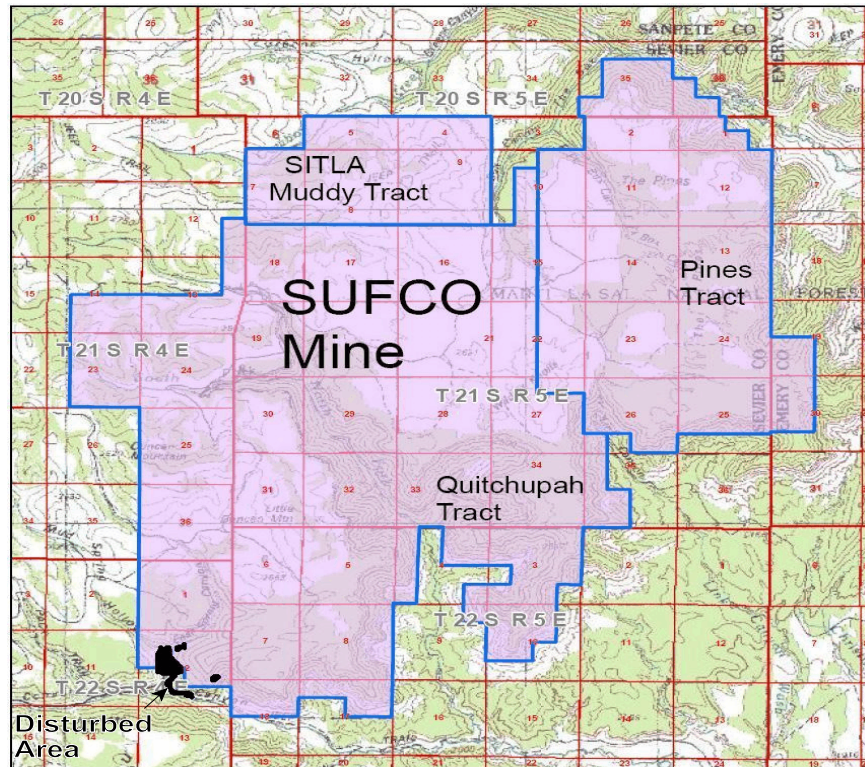
Utah Code and *Utah Administrative Rules* both define the permit area, in part, as the area where the coal operator must issue a bond. The Board of Oil, Gas and Mining has clarified in ruling that the bonded area equals the disturbed area. Therefore, the permit area should also equal the disturbed area, which is not the case in Utah.

The permit area should equal the disturbed area; however, the division has established the permit area as the disturbed and adjacent area.

Currently in Utah, all active coal mines are underground mines. The permit area for underground coal mines should be small because the actual area of surface disturbance is minimal. DOGM's interpretation of the permit area is not consistent with the definition used by the federal Office of Surface Mining (OSM), and 15 other states that regulate coal

mines. The following figure is an example of the division's interpretation of the permit area, which includes the disturbed area and adjacent area. (see also Appendix A).

Figure 3.1 SUFCO Mine Permit Area. DOGM's permit area is pink shaded and outlined in blue. The area in black (bottom left) is the area that has surface disturbance; the rest is the area above the underground mining (adjacent area).



The division requires a permit area that includes the disturbed area and the adjacent area.

As this figure shows, DOGM is permitting an area beyond the scope and intent of the law. Still, division management continue to insist on including the adjacent area within the permit area boundaries. Management's explanations for this are discussed at the end of this chapter.

Utah Law and Administrative Rules Contain a Definition of The Permit Area. *Utah Code* and *Utah Administrative Rules* are silent as to whether an adjacent area should be included within a permit area. However, Utah's Board of Oil, Gas and Mining has clarified the *Utah Administrative Rules* to state that the bonded area is the area of surface disturbance. As well, the federal government has interpreted a similar

Utah Code and Utah Administrative Rules have defined the permit area. These definitions have been clarified by the Board of Oil, Gas and Mining.

definition of the permit area to only cover areas where surface disturbance occurs. The following figure shows the permit area definition found in state law and administrative rules.

Figure 3.2 Definition of Permit Area. State law and administrative rules define, in part, the permit area as the area of surface disturbance that is to be bonded by the operator.

Utah Code 40-10-3 (14)

“Permit area” means the area of land indicated on the approved map submitted by the operator with his application, which area of land shall be covered by the operator’s bond as required by Section 40-10-15 and shall be readily identifiable by appropriate markers on the site.

Utah Administrative Rules 645-100-200

“Permit Area” means the area of land, indicated on the approved map submitted by the operator with his or her application, required to be covered by the operator’s performance bond under R645-301-800, and which will include the area of land upon which the operator proposes to conduct coal mining and reclamation operations under the permit, including all disturbed areas, provided that areas adequately bonded under another valid permit may be excluded from the permit area.

Based on the above definitions, the permit area is defined by several points. These points define the permit area as:

- The area of land covered by the operator’s bond
- The area of land where coal mining and reclamation activities are proposed to occur (considered to be the disturbed area)
- The area established on the operator’s map

The area clearly identified by appropriate markers

The two key points from the law and rules are that: (1) the permit area must be covered by the operator’s bond, and (2) the permit area is where coal mining and reclamation activities occur, or the disturbed area. The other defining points of (3) establishing the area on the operator’s map, and (4) clearly identifying the area by appropriate markers have also not been enforced by the program.

The division has not been adhering to all the defining points in law and rules.

In regards to point three, we observed in a couple of meetings that the coal operators asked the division what the consequence would be for submitting a map where the permit area was limited to surface-mining activities. The associate director for mining responded that DOGM would deny the permit application. Further, with regards to point four, the program is not requiring the operator to mark the permit area. The program is only enforcing this requirement in the disturbed area (see Chapter IV). The next section discusses points one and two in greater detail.

The Region of Land Established as the Permit Area Must Be Covered by the Operator's Bond. As stated in the statute and rules, after the permit area is established, the operator is required to bond that area. It appears that the permit area requires bonding because the rules foresee this area as being surface disturbed. Thus, to ensure that the disturbed surface area is restored, the state holds a bond until reclamation is complete.

The Board of Oil, Gas and Mining has clarified that the bonded area is the disturbed area.

Further, the Board of Oil, Gas and Mining has ruled that the area of surface disturbance is the area requiring bonding. The Board ruled in July, 2000:

The Division shall confirm in writing to [the plaintiff] that [the plaintiff] has satisfied the requirements of the Utah statutes and regulations by posting performance bonds which cover only the “disturbed area” with respect to the Four Coal Mines [the mines in dispute].

As shown above, the law and rules state that the permit area is, defined in part, as the area where a bond is required by the operator. The Board of Oil, Gas and Mining has clarified that the operator only needs to bond the disturbed area. Therefore, it appears clear to us that the permit area should be limited to the area of surface disturbance.

The federal government has also interpreted the permit area to be the disturbed area.

The federal government has also interpreted the permit area to be the area of surface disturbance. The Code of Federal Regulations (CFR), which is used by the OSM, uses a definition of “permit area” similar to the definition in Utah’s law and rules. This definition is shown below (see Appendix B for a map showing the federal permit area).

Figure 3.3 Federal Definition of Permit Area. The federal government has a very similar definition of the permit area to Utah's definition.

30 CFR 701 (definitions)

Permit area means the area of land, indicated on the approved map submitted by the operator with his or her application, required to be covered by the operator's performance bond under sub-chapter J of this chapter and which shall include the area of land upon which the operator proposes to conduct surface coal mining and reclamation operations under the permit, including all disturbed areas; provided that areas adequately bonded under another valid permit may be excluded from the permit area.

According to OSM officials, a permit is not required in adjacent areas. As well, 15 other coal mining states do not permit adjacent areas. Eight other states do permit the adjacent area.

Officials at OSM confirmed that their practice is consistent with the CFR, meaning they only permit the disturbed area. OSM officials pointed us to the 1983 Federal Register where it discussed the rulemaking:

The comments suggesting that the term "permit area" specifically include all areas overlying underground workings have been rejected. The Act requires that the "permit area" include the land covered by the operator's bond.

OSM reasserted their 1983 rulemaking in 1999. OSM again stated that the permit area does not include the adjacent area. OSM states,

In a 1983 rulemaking, we established that the "permit area" for an underground coal mine does not include the area overlying underground mining where subsidence may occur. Areas overlying underground mining are included in the definition of "adjacent area."

The coal industry has provided these statements to division management; however, management has been resistant to changing their interpretation

OSM has clarified its interpretation of the permit area to specifically exclude the adjacent area.

of the permit area definition. We have not been able to identify sufficient reasons for them to resist this change (discussed at the end of this chapter). Instead, we found much confusion and inconsistency that has arisen from the division's interpretation of the permit area. These inconsistencies are discussed further in Chapter IV.

The Permit Area Is Where Surface Disturbance Occurs. OSM has clarified over time what constitutes a coal-mining activity. OSM has declared that coal-mining activities include areas where there is surface disturbance. For underground mining, or areas where the surface is not disturbed, impacts from mining typically occur through subsidence, or the sinking and cracking of the surface. The rules have separate protections for subsidence effects, which are discussed in the next section.

OSM has defined in rulemaking, and the courts have upheld the decision, that subsidence is not considered a surface coal-mining activity. OSM stated in the Federal Register:

[In OSM's] most recent rulemaking defining "permit area" we indicated that we do not consider subsidence to be a "surface coal mining and reclamation operation." Our rules do not require including the "area overlying underground workings" (where subsidence may occur) within the definition of "permit area." In the preamble, we explained that the permit area should only include the "areas upon which surface coal mining and reclamation operations" are conducted, not areas where potential subsidence may occur.

OSM officials told the audit team that the meaning of the above Federal Register means "no permit is required for the areas where there are no surface activities." However, the division continues to permit areas where no surface activities occur.

Law and Rules Have Environmental Protections for Permit Area and Adjacent Area

Utah Code and *Utah Administrative Rules* have environmental protections in place for surface mining (disturbed area) and underground

OSM has also defined in rulemaking that subsidence is not considered a surface coal-mining activity.

The law and rules have environmental protections in place for underground mining.

mining (adjacent area). For example, one primary protection the rules have in place for underground mining is the requirement of a subsidence control plan. Figure 3.4 shows some of the requirements found in the subsidence control plan.

Figure 3.4 Subsidence Control Plan. The administrative rules help protect the environment from underground coal mining through a subsidence control plan.

R645-301-525. Subsidence Control Plan (key points)

- Required for underground mining
- A map of the permit and adjacent areas . . . showing the location and type of structures and renewable resource lands that subsidence may materially damage or for which the value or reasonably foreseeable use may be diminished by subsidence, and showing the location and type of State-appropriated water that could be contaminated, diminished, or interrupted by subsidence.
- A narrative indicating whether subsidence, if it occurred, could cause material damage to or diminish the value or reasonably foreseeable use of such structures or renewable resource lands or could contaminate, diminish, or interrupt State-appropriated water supplies.
- A survey of the condition of all non-commercial buildings or occupied residential dwellings and structures related thereto, that may be materially damaged . . . as well as a survey of the quantity and quality of all State-appropriated water supplies within the permit area and adjacent area that could be contaminated, diminished, or interrupted by subsidence. . . .

The subsidence control plan is designed to protect public safety and the environment from underground mining.

The subsidence control plan is designed to protect the environment and public safety from underground mining. As the above figure shows, subsidence, or settling and cracking of the land above an underground mine, must be controlled and regulated. Consequently, it appears that the areas over underground mining do not need to be included in the permit area to receive protection.

The administrative rules have other protections for wildlife, water, etc, in the adjacent area.

Officials at OSM commented to us that the subsidence control plan does adequately protect the public and the environment. OSM officials stated that if underground mining is anticipated to cause harm to the environment, they can protect it through a subsidence control plan. For example, OSM officials stated that if sensitive hydrology resources are in need of protection, OSM can require that coal operators not undermine these areas through the subsidence control plan.

Along with the subsidence control plan, the rules have other protections for the environment, biology, and renewable resources. The

following are examples of different protections currently in place:

- **R645-301-722.100** and **R645-301-724.100** – Protections for hydrology, including subsurface water
- **R645-301-322** – Protection for fish and wildlife

Not only is the division's practice of including the adjacent area in the permit area both unnecessary and inconsistent with administrative rules, this practice has also created substantial confusion and inconsistencies in the permitting and regulating process. This confusion has led to inefficiency, discussed later in the report.

Management Entrenched With Current Permit Area Definition

We did not obtain a satisfactory explanation as to why division management permits the adjacent area.

We could not obtain a satisfactory explanation as to why the division is currently permitting an area of land beyond the purpose of the rules. Management of the division provided us with several answers. First, management believes that conflicts will arise with regulating hydrology impacts outside the permit area. Second, permitting the disturbed area and the adjacent area has been their practice for over 20 years, and management appears comfortable with the practice. Lastly, the division is fearful that federal funding may be reduced if it redefines the permit area.

Division management must be proactive when seeking solutions to changes involving the permit area.

We believe the division should be proactive and seek solutions to concerns over a change with the permit area. Division management must enforce the law and rules as defined. If management feels that concerns exist with some aspects of the law and/or rules, they must seek the appropriate action to change the law and rules. Further, we do not believe the division should continue an inaccurate interpretation of the rules simply because it has been its longstanding practice. As well, our analysis of funding indicates that the division has options that can keep the federal funding whole.

The division's interpretation of the permit area can be perceived as being unduly strict. The coal industry has been concerned with the division's permitting practices for many years. The industry feels that the division's practice has been unnecessary and is stricter than that required by the federal government.

DOGM Must Follow Established Rules

We believe it is necessary for the division to follow the rules as stated. If division management believes certain rules need to be changed or altered to ensure that sufficient environmental protection is in place, then they must seek out the appropriate level of review from the Legislature and/or the Board of Oil, Gas and Mining to revise the law and/or rules.

Division management has expressed concerns with hydrology impacts if the permit area was changed.

DOGM Should Seek Solutions to Concerns with Altering Permit Area. Division management has expressed some concern with regulating hydrology impacts to mining if the permit area was restricted to the disturbed area. Division management has stated that if only the disturbed area was permitted, then more intensive water information and monitoring requirements would be necessary. As division management points out, one interpretation of permitting the adjacent area is that less hydrology information has been required. The administrative rules allow for hydrologic impact in the disturbed area, but in the adjacent area the coal mining operations must be “designed to prevent material damage to the hydrologic balance.” *Utah Administrative Rule* R645-300-133.400, states:

The division [should make] an assessment . . . that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

One interpretation of the rules suggests changing the permit area would better protect hydrology because more water information would be required.

Again, one interpretation (may vary in practice) of this rule is that the division’s practice of permitting a larger area (the adjacent area), means, at least theoretically, the division has accepted the occurrence of more hydrologic problems.

In discussions with OSM, they stated that they do control for hydrology impacts outside the permit area. OSM stated that they are able to control for hydrology impacts in the adjacent area through the subsidence control plan and by regulating where mining is allowed to occur.

If division management feels they can not properly protect hydrology with a permit area change, they should seek a change to the rules.

Division management are charged to protect hydrology, wildlife, and other resources. If division management feel that the current rules do not properly protect these resources or that restricting the permit area to the disturbed area diminishes their ability to protect environmental resources,

The division must establish written findings and seek a change to the administrative rules if they desire to regulate more strictly than the federal government.

then they should seek approval from the Legislature and the Board of Oil, Gas and Mining to change the rules in the appropriate areas.

DOGM Must Follow Established Rules as Written, Despite Longstanding Practice. It is discouraging that one reason management continues to define an inconsistent, unnecessary permit area is because it has been their practice for over 20 years. Management should enforce the administrative rules as stated. If management believes the rules should be changed, then they should seek the appropriate approval from either the Legislature and/or the Board of Oil, Gas and Mining.

Law Requires Written Findings if Enforcement Is More Strict Than Federal Government. If division management feels that the permit area should include the adjacent area to better protect the public and the environment, then management must seek appropriate action to change state law and/or administrative rules. Utah law requires DOGM to make a written finding and change the rules if they want to regulate more stringently than the Federal Government. *Utah Code* 40-10-6.5 (2) and (3) states:

No rule which the board adopts . . . may be more stringent than the corresponding regulations which address the same circumstances. . . . The board may adopt rules more stringent than corresponding federal regulations for the purpose described in Subsection (2), only if it makes a written finding after public comment and hearing, and based on evidence in the record, that the corresponding federal regulation is not adequate to protect public safety and the environment of the state. Those findings shall be accompanied by an opinion referring to and evaluating the public safety and environmental information and studies contained in the record which form the basis for the board's conclusion.

If management feels hydrology or other resources are not sufficiently protected under the current rules, then the appropriate action is to make a written finding and seek out a change to the rules. Division management must adhere to the rules as stated. Utah law is patterned closely to federal law and regulations. It appears that the federal government believes the regulations contain sufficient environmental protection.

Options Exist that Can Keep Federal Funding Whole

Management has been concerned that adhering to the permit area established in state law would reduce their federal funding. However, management has not completed an analysis to determine the validity of this idea. We believe that management should be more proactive with information gathering, especially when it impacts such a critical enforcement authority issue.

Chapter V discusses funding issues in changing the permitting area.

Chapter V will address funding of the program and contains our analysis of funding options in light of a permit area boundary change. We do not believe that funding will be automatically affected due to a change in the permit area.

DOGM's Permitting Actions Can Be Perceived as Unduly Strict

Coal industry believes that DOGM's permit area is more strict than that required by the federal government.

The coal industry believes that DOGM is being overly strict in their interpretation of the permit area. The industry has pointed to *Utah Code* 40-10-6.5 (2) and (3) (quoted above), arguing that the division has not complied with this statute. The division has not made “a written finding after public comment and hearing . . . that the corresponding federal regulation is not adequate to protect public safety and the environment of the state.” The industry argued to the division,

The Utah Mining Association submits that under present circumstances the Division is required by its statutory authority to interpret and apply the Utah Coal Rules, specifically the definition of the terms “Permit Area” and “Adjacent Area,” in a way that they that they are no more stringent than the corresponding federal regulations.

We agree that, logically, there is an argument that the division’s interpretation of the permit area is more strict. It appears that the rules dealing with the permit area are either equal to or more strict than the rules dealing with the adjacent area. Thus, when division staff enforce permit area rules in the adjacent area, they are enforcing rules that are, at times, more strict than what would have normally been required in the adjacent area.

Recommendations

1. We recommend that DOGM conform its interpretation of the permit area to the definition adopted by the federal Office of Surface Mining and clarified by the Board of Oil, Gas and Mining. If the division believes that the current interpretation of the rules does not adequately protect environmental resources then it should seek clarification from the Legislature and/or the Board of Oil, Gas and Mining.

Chapter IV

DOGM's Inconsistent Enforcement Of Rules Has Led to Inefficiency

The division's larger permit area has created inconsistencies in its regulatory enforcement.

The coal regulatory program (program) within the Division of Oil, Gas and Mining (DOGM or division) has required coal operators to obtain permits for a much larger area than required by law and rule as interpreted by the Board of Oil, Gas and Mining. This larger permit area has created inconsistencies because rules intended for surface mining are being applied to underground coal mining. These inconsistencies have forced the division to ignore, not enforce, or conflict with rules dealing with the permit area.

Inconsistent enforcement has negatively impacted the coal program's efficiency.

We believe these inconsistencies have negatively affected the program's efficiency. These inconsistencies have also caused confusion to coal program staff and the coal industry. The industry is not always sure how the program will enforce or react to certain rules. The coal industry has reported that these inconsistencies have led to operational delays and increased permitting costs.

Division management should ensure rules are being consistently enforced.

We recommend that division management ensure the administrative rules are being consistently enforced as clarified by the Board of Oil, Gas and Mining and adopted by the federal Office of Surface Mining. If division management believe the rules need to be revised to better ensure the protection of environmental resources, then they should seek the appropriate approval from the Legislature and/or the Board of Oil, Gas and Mining.

DOGM Should Consistently and Clearly Enforce *Utah Administrative Rules*

The division's permitting practice, described in Chapter III, has created confusion and inconsistencies in the enforcement of rules dealing with the permit area. Both coal program staff and coal operators have been confused when trying to enforce and adhere to rules in the adjacent area designed for the disturbed area.

We found that in some instances the division has not enforced certain rules because they conflicted with the division's permit area.

This confusion has led to inconsistent enforcement of rules dealing with the permit area. We found that, in some instances, the division has simply not enforced certain rules dealing with the permit area when confusion and implementation problems have arisen. In other instances the enforcement of rules dealing with the permit area has created conflicts with other administrative rules.

We have documented several examples that illustrate this inconsistency in enforcement. We received several complaints of this nature from division staff and the coal industry. Accordingly, we believe many more examples exist but time constraints allowed us to only document a few.

Division Does Not Always Enforce Its Permit Area Definition

The division does not always enforce rules dealing with the permit area. We found that, in some instances, the division's permit area definition is inconsistent with underground mining. In these cases, the program has opted to not enforce their interpretation of the permit area. We found that coal program staff have, at times, been confused with these inconsistencies. Staff have read the administrative rules and have attempted to enforce rules in the permit area, only to have division management tell them not to enforce the rules.

We documented three examples that show the division is not enforcing the permit area as it relates to the following areas:

- The rule requiring studies in areas of prime farmland
- The activities and locations of third parties
- Definition rules relating to boundaries and activities in the permit area

DOGM Has Not Enforced Prime Farmland Rule in Permit Area.

In a recent amendment for a permit change, coal program staff correctly began enforcing a rule dealing with prime farmland reconnaissance by requiring the coal operator to gather information on the prime farmland. The proposed prime farmland existed in the adjacent area. The rule is required in the permit area, but not in the adjacent area. Division management directed this staff member to not enforce this rule after they

In at least one instance, staff were told not to enforce a rule because it conflicted with the permit area.

received complaints from the operator that the division was over-enforcing the rules. The rule dealing with prime farmland reads as follows.

Figure 4.1 Prime Farmland Rule. In the permit area, the division is required to conduct a reconnaissance inspection on prime farmland. The division has not always conducted this inspection.

R645-301-221 and 302-313 Prime Farmland Investigation

All permit applications, whether or not prime farmland is present, will include the results of a reconnaissance inspection of the **proposed permit area** to indicate whether prime farmland exists (emphasis added).

Management has acknowledged that requiring rules in the adjacent area intended for the disturbed area exceeds the division's authority.

It is clear that this prime farmland investigation is to occur in the proposed permit area. The rules anticipate that the permit area will be the area where surface disturbance occurs; therefore, protection is needed for prime farmland. In fact, the associate director for mining told us that staff should have never attempted to require the prime farmland survey because requiring it exceeded the program's authority. However, since the program's permit area includes the disturbed area and the adjacent area, the division has a dilemma of:

- Enforcing its permit definition and wrongly requiring a prime farmland investigation.
- or
- Not enforcing its permit definition and not requiring the prime farmland investigation.

We believe a fundamental dilemma will exist so long as the division permits the adjacent area.

Because the permit area in the rules refers to the disturbed area, but the division's permit area refers to the disturbed and adjacent areas, we believe a fundamental dilemma will continue to exist.

The Division Has Not Consistently Enforced Activities with Third Parties. The division has not enforced the postmining land use rule as it relates to third-party encroachments in the entire permit area. Instead, the division has enforced this rule only in the disturbed area.

The division has not enforced the postmining land use plan in the entire permit area as required by the rules.

Third-party encroachments occur when a party other than the coal operator disturbs the land and changes the proposed postmining land use of the permit area. This can occur in various ways, oil and gas drilling, grazing, timbering, telecommunications, etc. For example, if an oil and gas company sets up a drilling operation and lays concrete foundations at various sites, this activity could change the postmining land agreement between the state and the coal operator from agricultural to industrial. In at least one instance in the past, a coal operator received a citation from the division for the activities of a third party.

Third parties, or companies other than coal operators, have equal access to other mineral rights on federal land. Federal agencies do not exclusively give mineral rights in a section of land to one company. They may give coal rights to one company and oil and gas rights to another company in the same section of land. Both the BLM and Forest Service allow for this.

The coal operator should not be responsible for the intrusion of third parties, especially since the coal operator has little or no control over these activities. The division's permit area for some of the larger mines covers tens of thousands of acres. It would be exceedingly difficult for the coal operator to monitor the activities of all third parties in this vast permit area.

Since the coal operators' mining permits include so much adjacent land, this has led to confusion regarding the coal operators' responsibilities to restore the adjacent area versus the disturbed area. Clearly, the coal operator should not be held responsible for the actions of an oil and gas operator, but we believe the division has confused the issue by permitting the adjacent area. The rule dealing with postmining land use is shown below.

Figure 4.2 Postmining Land-Use Plan. The coal operator must detail what land use will occur in the permit area after reclamation is complete. Third parties can change the expected postmining land use.

Utah Administrative Rule 645-301-412. Postmining Land-Use Plan

Each application will contain a detailed description of the proposed use, following reclamation, of the land within the **proposed permit area**, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, and the relationship of the proposed use to existing land-use policies and plans. The plan will explain . . . How the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use. . . (emphasis added).

The division has recently recognized that third-party activities must be managed, and it is allowing operators to update the postmining land use change in their mine plans. However, the division has not recognized the third-party activity in the entire permit area; instead, the division has only recognized this activity in the disturbed area, not the adjacent area.

The division's interpretation of the permit area continues to cause confusion more than 20 years after implementation. We believe this continued confusion illustrates a fundamental inconsistency with the division's permit area interpretation. An example of this confusion occurred in a recent meeting where DOGM was discussing the third-party issue with the coal operators. All parties became confused about whether this rule would be applied to the disturbed or the adjacent area. To clarify this confusion, the associate director for mining had to pause and ask if the permit area being discussed in the conversation referred to the disturbed area or the adjacent area. It was clarified that enforcement would be limited to the disturbed area.

This confusion is leading to inefficiency within the coal program. By overcoming this inefficiency, we believe the program can operate with fewer FTEs (discussed more in Chapter V).

DOGM Is Not Enforcing Other Definition-Based Rules. Along with the above examples, the coal program is also not enforcing various other definitional rules as they relate to the permit area. We found that the coal program largely ignores many of these rules and does not enforce them. There are several examples of this occurring; the following figure illustrates three of these examples.

Confusion continues to exist with the division's interpretation of the permit area even after 20-plus years of practice.

Confusion with the permit area has led to inefficiency within the coal program.

We found several examples where the division has ignored definition-based rules in favor of its permit area.

Figure 4.3 Rules Inconsistent with DOGM's Permit Boundary.

The division has ignored the following administrative rules in favor of their interpretation of the permit area.

Rule	DOGM's Action
<u>Legal Right of Entrance in Permit</u> – A map showing “The boundaries of land within the proposed permit area upon which the applicant has the legal right to enter and begin coal mining and reclamation operations. . . .”	The operator primarily only enters into the disturbed area to conduct mining and reclamation operations. DOGM requires this only for the surface disturbed area.
<u>Identification Signs For Point of Access</u> – “Identification signs will be displayed at each point of access to the permit area from public roads. . . Show the name, business address, and telephone number of the permittee”	DOGM only requires the operator to post signs in the disturbed area.
<u>Explosive Warning Notification</u> – “At all entrances to the permit area from public roads or highways, place conspicuous signs which state ‘Warning! Explosives in Use,’ which clearly list and describe the meaning of the audible blast. . . all-clear signals that are in use”	DOGM only requires the operator to post signs in the disturbed area.

By not enforcing the rules applicable to the permit area, the division creates confusion and inconsistencies and opens itself up to potential litigation. The division must be precise and consistent in its practice; if not, the coal operators and the public are more likely to have concerns with the process.

Inefficiency Has Occurred When DOGM Enforces the Permit Boundary

In the previous examples, the division did not enforce rules dealing with the permit area. In other instances, we found that the program did enforce the permit area definition to the detriment of efficiency. This is because, at times, great effort has been expended applying the permit area to the adjacent area. The following examples illustrate this conflict:

- Enforcing the division's permit area has required an unnecessary level of federal involvement.

In other instances the division enforced its permit area to the detriment of efficiency.

In some instances, DOGM has inaccurately required federal involvement in the adjacent area.

- Enforcing the division's permit area with boundary changes has caused conflict with wildlife and biology rules, and has required more staff time in the review process.

DOGM Has Incorrectly Required Federal Involvement. When reviewing proposed areas for coal mining, DOGM must involve federal agencies when coal mining will occur on federal lands. DOGM has inaccurately required federal involvement in the adjacent area. This has led to inefficiencies with DOGM, the federal government, and the coal operator in that it has taken extra review and effort.

The rules call for different levels of federal agency involvement in the disturbed and adjacent areas for non-federal leased coal. Coal that is *not* federally leased, but the surface is federally managed, requires less involvement from the federal surface manager in the adjacent area. The following points illustrate what the federal surface manager involvement should be for non-federal leased coal.

- Disturbed Area Consent – The federal agency must agree with mine plan and has veto authority.
- Non-Disturbed Area Consult – The federal agency is involved, but does not have to agree and cannot veto.

It appears that in at least one example the division sought *consent* from a federal agency when the coal was not federally leased in a non-disturbed area. This action brought heightened involvement from a federal agency that was not necessary.

Some division staff have commented to us that obtaining consent from other federal agencies is often difficult and time consuming. The division should be wise in the level of involvement they require from other federal agencies. It is inefficient for both DOGM and the federal agency to engage in unnecessary work and review.

Since Utah received primacy of the coal program from the federal government, it is the division's responsibility to understand the various levels of federal involvement and correctly administer them. The rules dealing with this area are complex. The division should seek clarification on these rules as they proceed with a more restrictive permit area.

The division enforces its permit area when making boundary changes. This has required more intensive reviews than are necessary in the adjacent area.

DOGM's Permit Practice Creates Inefficiencies When Altering Boundaries. The division enforces the permit area boundary when amendments are proposed to the coal mining plan. Thus, the program requires the operator to provide information pertinent to the permit area (disturbed and adjacent areas). Because the permit area is intended as an area where heightened surface disturbance occurs, rules dealing with the permit area require more intensive environmental studies. It takes more time and effort to prepare and review these studies.

It appears that OSM and some other states do not require a full set of permit area studies for boundary changes that occur in non-disturbed areas, especially for incidental boundary changes not affecting the permit area.

Operators have reported to us that this practice by DOGM costs them significant time and resources. One operator commented that a simple incidental boundary change can cost an operator tens of thousands of additional dollars because DOGM enforces rules designed for the disturbed area in the adjacent area. Also, this practice takes more of staff's time to review.

Inconsistent Enforcement Negatively Impacts Coal Industry

As illustrated in this report, DOGM has inconsistently and inefficiently enforced a permit area intended for surface mining in areas where underground mining occurs. The report has shown that this practice is not in harmony with the administrative rules and creates inconsistencies and confusion. This practice also negatively impacts the coal industry.

Division's permit area interpretation has negatively impacted the coal industry.

The coal industry has reported that the division's permit area boundary has had a significant impact on the efficiency of coal-mining operations and has required the coal industry to spend additional dollars to obtain a permit from DOGM.

Some operators have commented that Utah's process is more difficult to work through than other states' processes. Operators attribute this to the division's permit area interpretation.

Coal Operators Believe Enforcement Inconsistencies Create Inefficiency in Mining Operations

Coal operators have reported that the program's treatment of the permit area causes considerable problems and hurdles in making sense of and responding to the rules. Several of the coal operators function in other states. These operators have reported that Utah's process is inconsistent, inefficient, and very difficult to work through compared to other states. Operators feel that the process is difficult, primarily because of the inaccurate permit-area definition.

Coal operators have also reported that the coal program's inconsistent enforcement creates a burden on the operators' time schedules for mining. Operators feel that the inconsistencies and inefficiencies, shown previously in this chapter, make it difficult to meet their timetables for mining. Operators have commented that it takes the coal program more time to sort through requests for permit amendments and revisions because the program must often decide whether it is going to enforce its definition of a permit area.

It can take the division extra time to review permits when inconsistencies occur. We found that the program has been wrongly reporting its completion rate. Because of errors in completion rate, the program has been shown as completing tasks on time, even though this is not always the case. We discussed in Chapter II several ways for the program to do a better job of processing and approving (or denying) permit amendments.

Coal Operators Believe Inconsistent Enforcement Costs Them Additional Dollars

Coal operators also feel that the division's definition of permit area is requiring them to spend more money on the permitting process. Operators report that state rules dealing with the permit area are more intensive because they are geared towards areas of surface disturbance. Since DOGM's permit area also includes areas above underground mining, operators are required to complete studies and surveys intended for surface-disturbed areas in underground mining areas. Operators report that this has significantly increased their costs in obtaining a permit.

Coal operators believe the division's expanded permit area costs them additional dollars with the permitting process.

In addition to finding problems created by the division's permit-area boundaries being imposed on areas above underground mining, we also found that the division is in need of improved policies and procedures, and better use of a management information system. These areas of improvement were discussed in Chapter II.

Recommendations

1. We recommend that division management ensure the *Utah Administrative Rules* are being consistently enforced as clarified by the Board of Oil, Gas and Mining and adopted by the federal Office of Surface Mining. If division management believe the rules need to be revised to better ensure the protection of environmental resources or public safety, then they should seek the appropriate approval from the Legislature and/or the Board of Oil, Gas and Mining.

Chapter V

Funding Options for Coal Program Should Be Addressed

We believe that by adhering to recommendations made in this report the coal program can achieve greater efficiency.

This chapter answers two questions. What level of funding is needed for the coal program? What options exist to fund coal program?

As discussed in the previous chapters, the Division of Oil, Gas and Mining (DOGM or division) can clarify its regulatory enforcement, adhere to a consistent regulatory scheme, improve policies and procedures, and better utilize management information systems. We believe that by improving in these areas, the coal regulatory program (program) can achieve greater efficiency. This chapter answers two questions: First, in light of expected increased efficiency, what funding is needed to operate the coal program? Second, what options does the State have for funding the coal program?

To answer the first question (funding amount) we provide funding estimates based on projections with improved program efficiency. For the second question (funding sources), we recommend the Legislature consider implementing program fees to fund, or assist in funding, the coal program. If fees are not desired by the Legislature, general fund dollars can continue to fund the program.

Program Improvements Can Translate into Cost Savings

Each of the previous chapters has shown a need for program improvements in multiple areas. Making the needed improvements to the program can result in greater program efficiency and cost savings. We believe the program should be funded at 18 FTEs, which is two fewer FTEs than the program requested in the budgets for fiscal years 2008 and 2009. The coal program currently has vacancies in funded positions, so a reduction in FTEs would not require reducing the current workforce. As the program achieves greater efficiency in the future, we believe program FTEs could likely be further reduced.

Greater Efficiency Can Be Achieved Through Program Improvements

Previous chapters in this report have reported concerns with the division's interpretation of the permit-area and with undeveloped process management. We believe the coal program can achieve greater efficiency through a more precise permit area definition, consistent enforcement of authority, and improved policies and procedures.

We believe increased management involvement and information can increase efficiency.

Better Management Control Can Increase Efficiency. Chapter II detailed how the coal program is suffering from weak policies and procedures. The division has not provided sufficient structure to the program in the form of policies and procedures. As well, the division can improve its tracking and monitoring of the coal program. For example, we found an instance where a staff person spent 19 months engaged in a Native American consultation that was beyond the scope of the division's work. This consultation is the requirement of the Bureau of Land Management (BLM). We believe that more precise policies and procedures can better define and direct the coal program's work and reduce instances where the staff spend time in unnecessary tasks. Division management must be more proactive with guiding and directing the program.

We believe that changing the permit area boundary will increase efficiency.

Changing Permit Area Definition to Conform with Underground Mining Will Increase Efficiency. Chapters III and IV discussed the problems and concerns with the division's current interpretation of the permit area. We believe that by altering this practice the coal program will realize efficiency in their process. The former division director of DOGM agrees. We asked the former director, who recently departed the division, if the division's current interpretation of the permit area has led to inefficiency. He stated;

If the permit area in the Coal Program becomes the "disturbed area" as current law suggests, DOGM should modify its permitting requirements accordingly resulting in simplified, less staff intensive permit reviews. I think any reduction in workload should reduce overall staffing needs. . . . If the permit is redefined to be that of the "disturbed area" the amount of material to be reviewed at mid-term and permit renewal time should go down commensurately, and a staff reduction could follow. Nonetheless, a core cadre of hydrologists, soil scientists, geologists, biologists, and engineers

must be maintained to keep the program viable. But given the number of new applications on the books, and the opportunity to streamline permitting offered by reducing the permit area to that of the disturbed area, I think some staff reduction is a logical action to consider, especially given the reduction in federal funding being granted the Coal Regulatory Program.

Some staff in the coal program have also made similar comments. We believe the coal program will realize efficiency after changing the permit area to include only the disturbed area.

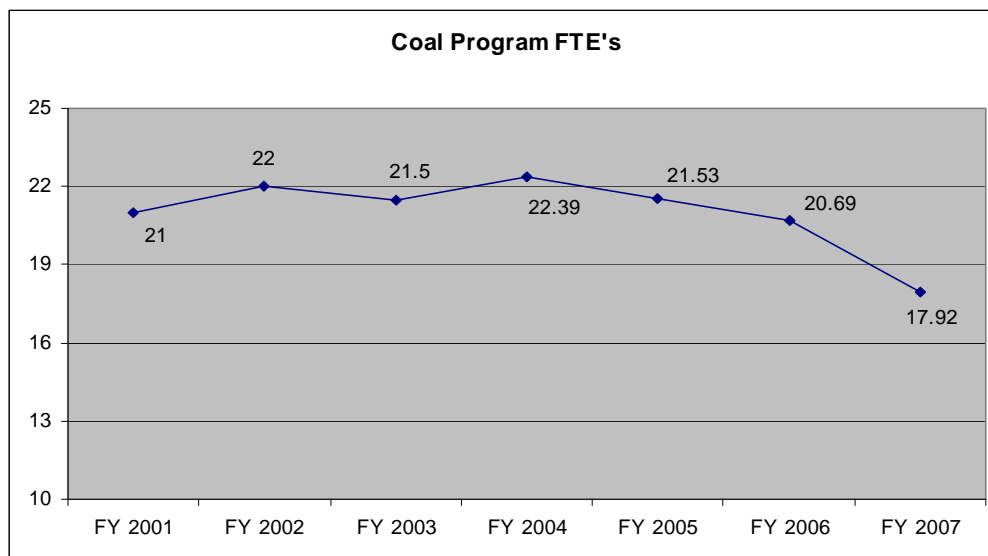
Program Improvements Will Require Fewer FTEs

**Coal program can
operate with fewer
FTEs than requested
in FY 2009 budget.**

We believe this increased efficiency will allow the program to operate with fewer FTEs. The coal program was funded for 20 FTEs in fiscal year 2008; their fiscal year 2009 budget request was also for 20 FTEs. It is our opinion that the coal program can operate with 18 FTEs. We believe that increased efficiency discussed in this report may allow the coal program, in the future, to further reduce FTEs to 16 or fewer.

We Believe the Coal Program Can Operate with 18 FTEs. The division requested additional funding from the Legislature to keep staffing levels at 20 FTEs in fiscal year 2008. The Legislature did appropriate an additional \$400,000 in ongoing funds to the program to help keep staffing levels at 20 FTEs and to cover the indirect costs associated with these FTEs in DOGM's administration program. We believe that the program can operate with 18 FTEs; with increased efficiency, the program may be able to reduce FTEs in the future.

Figure 5.1 Historic FTE Levels. The coal program's FTE level recently dropped in FY 2007 due to budget shortfalls. We believe the program should be funded at 18 FTEs now and possibly fewer in the future.



FTEs remained fairly consistent until federal budget shortfalls required the program to reduce staff in fiscal year 2007. Prior to receiving additional appropriation from the Legislature, the division did reduce staffing levels in fiscal year 2007, and again in fiscal year 2008, to try and meet budget limitations. Several staff members in the coal program were transferred to other programs within the division. The program has not filled all open staff slots due to the ongoing legislative audit.

Reduced FTEs will produce an estimated cost savings of \$235,000.

Funding Projections Based on 18 FTE Level Produce Some Cost Savings. Since we believe the program can operate with 18 FTEs, we project a cost savings of \$235,000. This cost savings is projected based on prior-year federal grant information. Our estimates are based on fiscal year 2008 funding, since it is not known what increases the program may receive for fiscal year 2009. Figure 5.2 illustrates the projected cost savings.

Figure 5.2 Funding Projections Based on 18 FTEs. A reduction in state funding for FY 2008 is projected based on reduced FTE levels.

	FY2008 based on 18 FTEs
Total Program Cost	\$2,140,000
Less Federal Funding ¹	(1,700,000)
<i>Projected State Funding</i>	<u>440,000</u>
Current State Funding	675,000
<i>Projected Savings</i>	\$235,000

1. It is assumed that Federal Funding will remain at historic levels, and no increase will be received.

Based on our funding projections, and using the current state match percentage of 12.5 percent, the state would be required to match about \$270,000 based on a program cost of \$2.14 million. In fiscal year 2008, the state appropriation based on 20 FTEs was \$675,000. By increasing efficiency and reducing FTEs, we project state appropriations can be reduced by \$235,000 if the state match remains at 12.5 percent. The next section deals with changes that may occur to the federal grant in light of the permit-area change discussed in Chapter III.

Additional Options Exist for Funding Coal Program

The current method the division uses to obtain federal grant dollars is based on the number of federal acres permitted. As discussed in Chapter III, we believe the division has been overpermitting. We recommend the division permit fewer acres. We do not believe that this change in permitting will affect federal funding, but we provide funding estimates if the federal funding was to change.

We also recommend that the Legislature consider implementing program fees. These fees could help offset the cost of a federal reduction in funding, or, if as expected, no federal funding reduction occurs, the fees could be used to fund all or part of the state's portion of funding.

We recommend that the Legislature consider implementing program fees.

Federal Funding Largely Based On Historical Funding Levels

Federal funding is based on what states received the last year.

Congress has not given increases to states for coal funding the last several years. Because of this, OSM has not been using the federal formula that calculates the percent of federal participation. Instead, the federal funding is based largely on what the state received the last year.

Federal funding has not increased for several years. This has required the Legislature to fund the shortfalls.

The federal funding formula that would be used by OSM gives the states three different funding options. The option the division has been using considers the number of permitted acres on federal land. As discussed in Chapter III, we recommend that the division change the permit area to only include the disturbed area.

Federal Funding Has Not Increased for Several Years. Congress has not increased federal funding to the coal regulatory programs since fiscal year 2002. Funding to the division has stayed relatively flat at \$1.7 million during this time. However, program costs have increased during this period. In fiscal year 2006, most of the coal program staff received a market comparability adjustment, which increased the cost to fund the program. During the last few years, staff have also received a cost-of-living adjustment. This additional cost for employees has created deep shortfalls in federal funding, as the following table illustrates.

Figure 5.3 Federal Funding Has Not Increased. This chart shows that while federal funding has not increased, the cost to the state to run the program has increased.

	FY04	FY05	FY06	FY07	FY08 ¹
Federal Award	\$1,709,100	\$1,730,419	\$1,743,698	\$1,698,219	\$1,700,000
Actual Percent Feds Funded	88.1%	85.7%	78.0%	71.9%	79.3%
Percent Feds Would Fund if Formula Used	88.5%	88.5%	88.1%	88.4%	87.5%
Federal Shortfall	8,391	55,905	226,370	389,627	176,000
Required State Share	223,177	232,121	266,105	273,971	268,000
Actual Amount of State Funds	\$193,100	\$264,900	\$385,900	\$661,300	\$675,000

1. Fiscal Year 2008 is based on auditors' estimates of 18 FTES; numbers are rounded to show estimate. DOGM requested 20 FTEs for FY 2008.

While the federal award has stayed constant, the actual percent of federal funding has declined due to increased program costs.

These figures are based on funding the program at 23 FTEs through fiscal year 2006; the fiscal year 2007 grant was based on 21 FTEs. Fiscal year 2008 is based on our estimates of funding the program at 18 FTEs. The actual federal award received as a percent of actual expenses for Utah's coal regulatory program has dropped from 88.1 percent in fiscal year 2004 to 71.9 percent in fiscal year 2007. As the figure illustrates, the funding shortfall in fiscal year 2006 reached over \$225,000. In fiscal year 2007, the funding shortfall was nearly \$400,000.

Federal officials have stated that since federal funding is not sufficient to meet the required match, federal funding is no longer calculated through a formula.

Federal Grant Largely Based on Historical Funding. Congress has not increased funding to the coal regulatory program. Consequently, OSM has been unable to increase funding to the states. Thus, OSM officials have told us that the federal funding share is no longer calculated anymore; rather, the states receive roughly what was appropriated to them the year before. Federal officials stated:

We decide to give to Utah regardless of the federal match. The options are there to determine the state match and ensure that states make their share of the match. The ratio is to determine the state match funding based on what they got the year before. Just as long as a state funds their match or more than their match they will not lose funding.

OSM does require that states meet a funding match. There are three formulas states can use to calculate their match.

Thus, federal funding is not expected to increase or decrease due to a reduction of the permit area. The percentage required for state match may change.

Several Options For Calculating State Match Exist. The *Federal Assistance Manual* (FAM) is used by OSM to calculate the state's match. The FAM has three options for states to calculate its state match. These options were used to calculate federal funding levels and will be used in the future if Congress appropriates additional funds. The three options are:

- Acreage option
- Area-weighted average option
- Workload option

The area-weighted average option currently used by DOGM considers the number of federal acres permitted. We do not believe a change in permit area will affect federal funding.

Federal officials involved with evaluating these grants have stated that all states currently use the area-weighted average option. This option is used because it has been the simplest option for states to maximize federal

funds. The area-weighted average option provides all states with at least 50 percent federal funding for the cost to operate their coal-regulation programs.

For states like Utah, the area-weighted average option has worked well because it considers a ratio of federal acres permitted to nonfederal acres permitted. Where the division has been permitting so many acres, Utah has qualified for a high federal-match percentage. Utah has qualified for a 87.5 percent federal match, Utah's federal funding is among the highest when analyzed on a per-employee basis.

Federal Funding Should Stay Constant Despite Permit Area Change

We believe that the federal match will remain constant because federal funding is currently not based on the funding formula.

As previously shown, the federal government has stated, "We decide to give to Utah regardless of the federal match." We do not believe that the federal government will reduce federal funds to the division in light of a permit area change because federal funding is not based on the funding formula. However, state-match dollars are based on the federal formula. To ensure that federal funding is not reduced and required state-match dollars are not increased, we recommend that the division pursue the following two options, ordered by priority. These options are:

- Request OSM change their area-weighted average funding option.
- Request future federal grants based on the workload option.

DOGM should work with OSM to ensure federal funding is not reduced.

It is our opinion that either one of these options will further ensure that state and federal funding remains consistent. However, if these options do not produce the believed results, then some federal funding will be reduced in light of a permit area change, which would require additional state appropriations. In the next section, we recommend that the Legislature consider program fees to help fund the coal program. If federal funding was reduced, these program fees could offset any decreases in federal funding.

We believe it makes sense for OSM to change the funding formula to allow Utah to count work performed in the adjacent areas.

OSM Can Change Funding Formula. We believe DOGM should ask OSM to reconsider the area-weighted average funding formula. In our discussions with OSM officials, they have indicated that if the division were to reduce their permitted acreage to the disturbed area, some subsidence work and other surveys would still occur in the adjacent area. We believe a good representation of work performed on federal acres

includes both the permit and adjacent area. We do believe that the program can achieve greater efficiency by not permitting the adjacent area, but some work is still required in the adjacent area. DOGM should take this argument to OSM and persuade them to change its formula with the area-weighted average option.

Workload Option May Also Be Used. The workload option may be the best option for DOGM if OSM will not reconsider the area-weighted average option. The option would likely keep federal funding consistent. The workload option states the following:

The federal cost sharing percentage is based on workload and cost projections for the grant period. . . . The State must use its own processes and procedures in determining the workload involved in the regulation on federal lands. The State must provide item-specific information in the analysis of its workload, and must include data from its records and other supportable information. . .

The workload option would require strict accounting of work done on federal land. Until 2006, DOGM had been recording work done on federal land. By reinstating this practice, DOGM would have the data necessary to complete the workload option. Since about 65 percent of Utah's coal-mine land is located on federal land, the workload option could keep funding very consistent.

If federal funding was reduced then additional state appropriations would be needed. Program fees could offset this additional cost.

Additional State Appropriation Will Be Needed if Federal Funding Is Reduced. As discussed in Chapter III, we believe the division should restrict its permit area to the disturbed area, which would mean fewer federal acres permitted. We also believe it is not likely federal funding will decrease. However, if federal funding is reduced due to the permit-area change, the state would be required to increase funding to the coal program. In the next section we recommend the Legislature consider implementing program fees. The fees could offset any decreases in federal funding. The following figure provides an estimate of additional state appropriations under this scenario.

If federal funding is reduced, we project an additional \$237,000 in increase state appropriation would be needed.

We recommend the Legislature consider program fees to help pay the cost of the coal program or offset a decrease in federal funding.

Utah's fees are lowest among other coal-producing western states.

Figure 5.4 Estimates If Federal Funding is Reduced. This chart can be updated for FY 2009 once state budgets are known at the end of the Legislative session. We project about \$237,000 more would be needed in state appropriations if federal funding is reduced.

FY2008 - Based on 18 FTEs	
Total Program Cost	\$2,142,000
Projected Federal Award (57.4 Percent)	1,230,000
Projected State Match (42.6 Percent)	912,000
Current State Appropriation	675,000
Increase in State Appropriation	\$237,000

Once fiscal year 2009 funding is known, this projection can be updated for fiscal year 2009. Program fees recommended in the next section could easily pay for the increase in state appropriation.

Program Fees Should Be Considered

The Legislature should consider implementing program fees to help fund the coal program. These fees could pay the full state amount to fund the coal program, supplement state appropriation, or offset a decrease in federal funding. Our review of some other Utah regulatory agencies and other states' coal programs shows that most of them have program fees. We believe that fees in the coal program are consistent with other regulatory agencies.

Some coal operators indicated that fees would be more easily accepted if other recommendations made in this report were implemented by the division. These industry officials indicated that changing the interpretation of the permit area to the disturbed area and having the coal program meet required deadlines are very important issues to the coal industry.

Other States' Coal Programs Charge Permitting Fees. We found that several other states' coal regulatory programs charge fees for permitting actions. Further, a recent rule change by OSM allows the states to keep all funds generated by fees (states used to have to pay a percentage of their funds to OSM). With this rule change, it is expected

that some states may look to increase fees even higher. The following figure lists the fees of coal program regulatory agencies.

Figure 5.4 Fees by Other States and Federal Government. Utah charges fewer fees than surrounding states.

State	Initial Permit		Permit Alterations	Annual Fees
	Flat Fee	Acreage Fee		
OSM ¹	\$ 3,600	\$13.50 to \$3.00	0	0
New Mexico	2,500	25 per acre <\$15,000	4,000 ²	2,500 ² + acre fee
Wyoming ³	100	10 per acre <\$2,000	200 ³ + acre fee	0
Colorado	25	10 per acre <\$2,500	0	0
Utah	5	0	0	0

1. OSM breaks the permit process fees into three areas: \$250 to determine administratively complete, \$1,350 for technical review plus acreage fee, and \$2,000 to prepare decision document.
2. The \$4,000 charge is for significant revisions, they do not charge for minor permit changes. All mines are charged the annual fee, whether actively producing or not.
3. The initial permit fee cannot exceed \$2,000 (including flat and acreage fees). The permit alteration is \$200 flat fee, plus \$10.00 an acre not to exceed \$2,000.

Other Utah regulatory agencies charge program fees.

Other Utah Regulatory Agencies Charge Fees. A survey of other programs within DOGM and the Department of Environmental Quality (DEQ) agencies shows that some other Utah regulatory agencies charge fees. These fees help fund the agencies and provide an incentive for the users to submit complete applications. The following is a list of fees charged by the minerals program in DOGM.

- Minerals Program – \$ 150 Exploration Activities
\$ 150 Small Mining Operation
\$ 500 Mining Operation
\$ 1,000 Large Mining Operation

The following is a list of fees charged by the Division of Air Quality and Division of Water Quality, within DEQ:

- Air Quality – \$500 Filing Fee
\$1,400 Processing Fee

\$70 an hour for work beyond 20 hours

- Water Quality – \$1,800 General Permit
\$3,600 Minor Permit
\$5,400 Major Permit

We recommend that the division devise a fee structure and present it to the Legislature for consideration. Figure 5.5 provides a general framework to help guide the discussion with coal program fees. The division may decide that a different fee structure is more appropriate.

Figure 5.5 Options for Coal Program Fees. The division should consider various options for collecting fees. This figure provides one possible option. The total amount listed would pay the state cost of the program at 18 FTEs.

Type of Fee	Annual Amount
New Application ¹	\$ 1,100
Amendments, Revisions, etc, Minor ²	184,800
Amendments, Revisions, etc, Major ³	148,800
Annual Fee Producing Mines	60,000
Annual Fee Nonproducing Mines ⁵	48,000
Total Collected From Fees	\$442,700

1. Based on .20 new permits a year (1 every 5 years) at \$5,500 per new permit

2. Based on 84 minor amendments at \$2,200 per amendment

3. Based on 31 major amendments at \$4,800 per amendment

4. Based on 10 producing mines at \$6,000 a year

5. Based on 12 nonproducing mines at \$4,000 a year

Some coal operators indicated they would accept fees more easily if program changes suggested in this report are implemented.

These fee options should be considered as a means for collecting fees directly from the entity which benefits from the coal program's services. In discussion with some coal operators, they indicated that fees would be more easily accepted if the division changed their interpretation of the permit area to the disturbed area and began meeting deadlines with permit amendments and revisions. We believe that the recommendations in this chapter will help the division further improve their regulatory obligations to the coal industry.

Recommendations

1. We recommend that DOGM utilize the following two approaches when requesting federal funding in the future.
 - Request the Office of Surface Mining (OSM) change the area-weighted average formula to include disturbed and adjacent areas.
 - Request federal funding based on the workload option.
2. We recommend that DOGM devise a fee structure and present it to the Legislature for their consideration.

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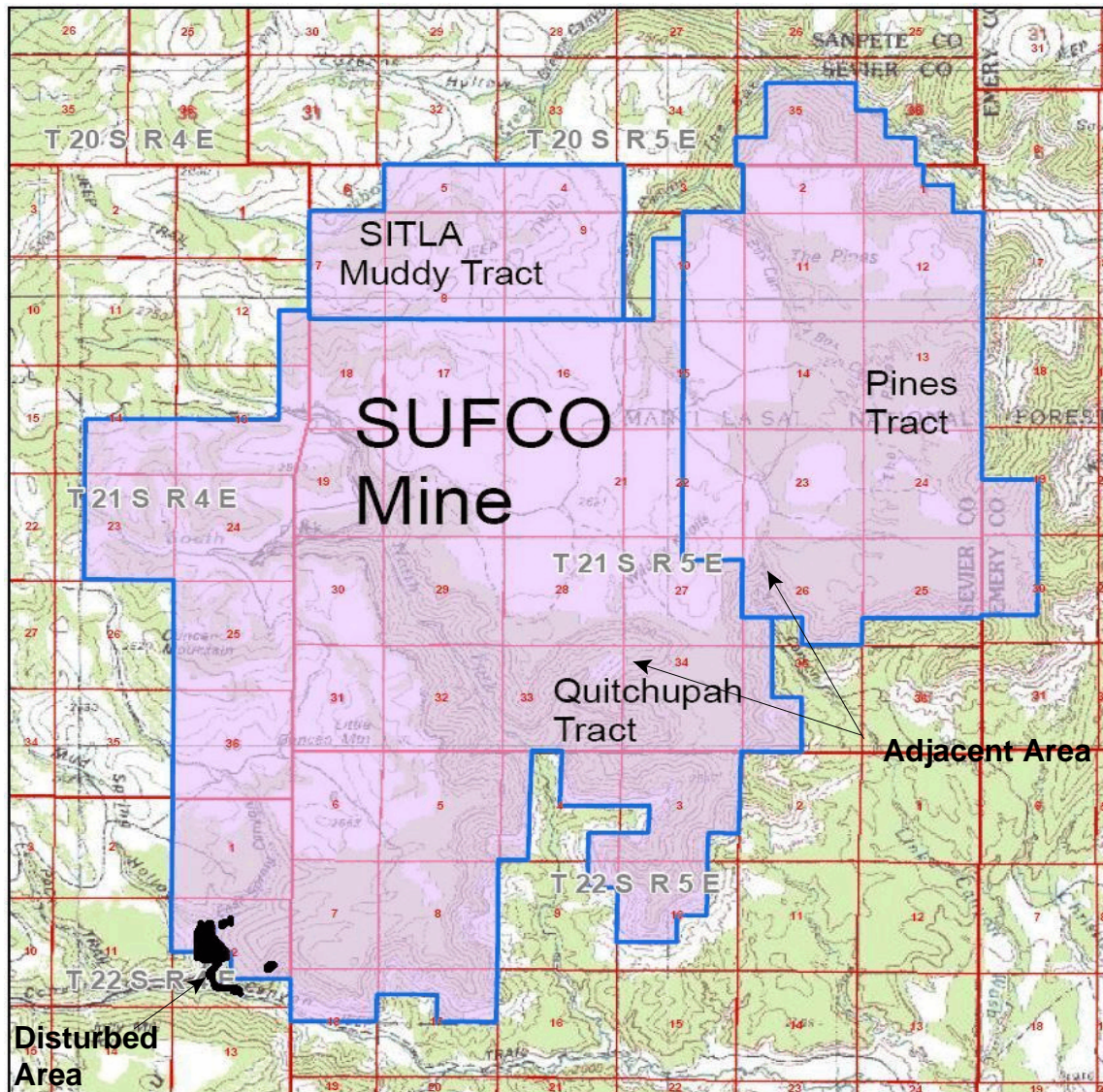
Appendices

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Appendix A

Utah SUFCO Mine Map. DOGM permits the disturbed and adjacent areas.

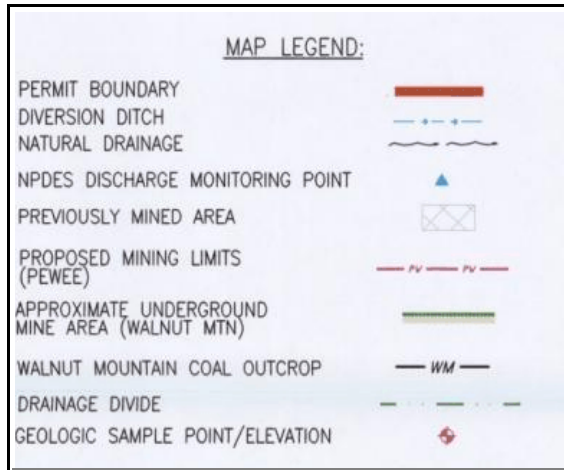
Area	Description	Size
Permit Area	Blue outlined and pink shaded	25,290 acres
Disturbed Area	Marked in Black	28 acres



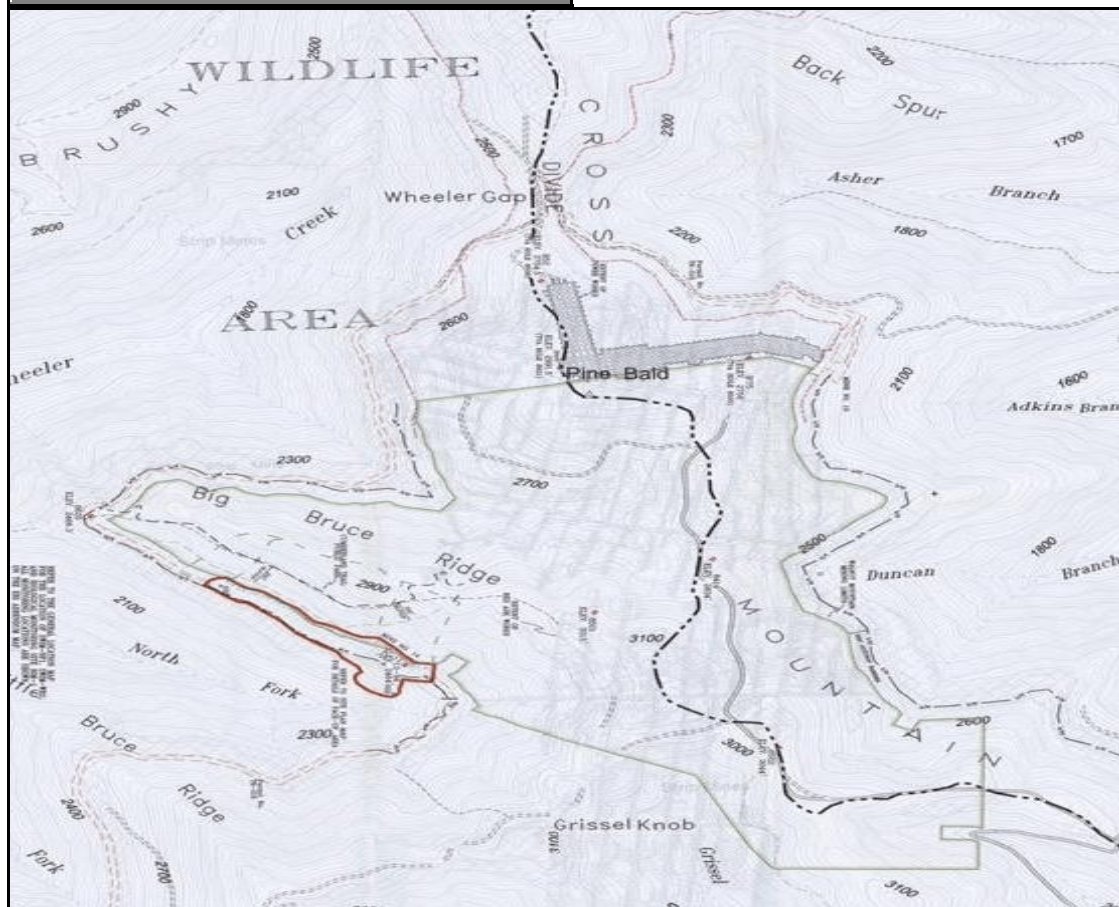
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Appendix B

OSM Mine Number. 19 (located in Tennessee). The Federal Government's Office of Surface Mining (OSM) does not permit the adjacent area.

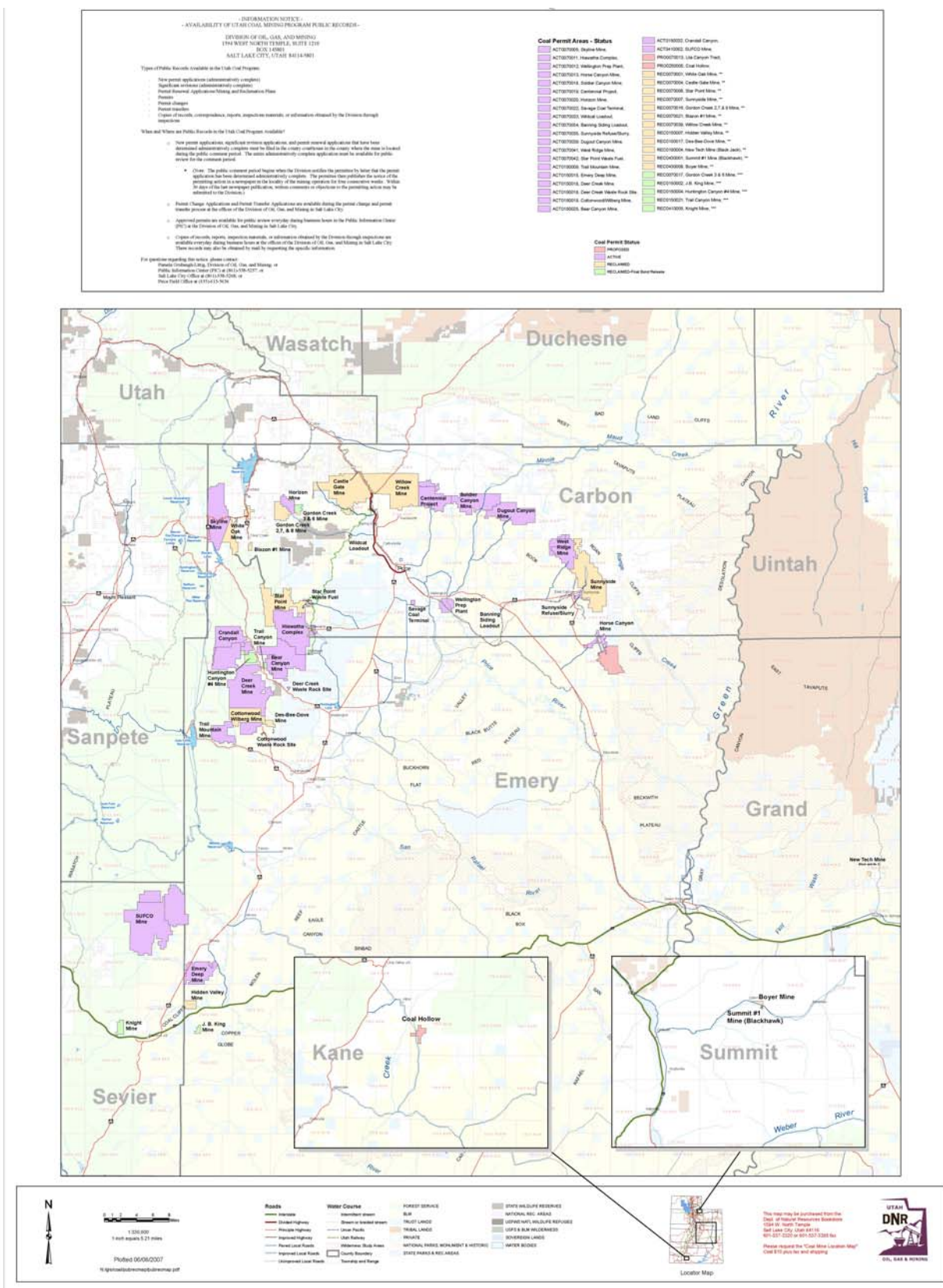


Area	Description	Size
Permit Area (disturbed area)	Marked in red	22 acres
Adjacent Area	Marked in light green	788 acres



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Public Record Coal Maps. Shows active and reclaimed coal mines.



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Agency Response



JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA
Division Director

December 4, 2007

Mr. John M. Schaff, CIA
Auditor General
Utah Office of the Legislative Auditor General
W315 State Capitol Complex
P.O. Box 145315
Salt Lake City, UT 84114-5315

Dear Mr. Schaff:

On behalf of the Utah Division of Oil, Gas and Mining within the Department of Natural Resources, I wish to respond to "A Performance Audit of Utah's Coal Regulatory Program" and express my appreciation for the analysis included in the report. Your staff interacted well with agency personnel as the audit progressed. The audit properly identifies process improvements for the Division's Coal Program, and I accept the recommendations made in the audit.

The audit report is frank and pointed, and neither I nor Division management will treat lightly the items identified. When this process of this legislative audit began (by your letter dated June 1, 2007), I hoped that whatever resulted would be a catalyst for positive change within the Division. I feel that it is now the Division's responsibility to answer this audit with actions and I want to constructively use this audit to produce improvements in the Division's processes and procedures. In fact, as the audit team has brought items to our attention, we have already implemented certain process changes, and these improvements should be evident at future follow-up reviews regarding this audit.

I would also like to point out that although the audit report indicates that improvement is needed in the Division's Coal Program, the program has produced an excellent history of environmental and public health and safety protection as there have been no major environmental incidents by the coal industry in Utah in the over 25 years of the program's existence. Nevertheless, we are committed to re-think and re-create our processes and procedures to achieve greater efficiency and effectiveness.

Again, I appreciate the opportunity to improve the Division's regulatory performance in the Coal Program. It is my objective to utilize the audit report to allow Division management and staff to be more proactive in addressing our responsibilities. We will



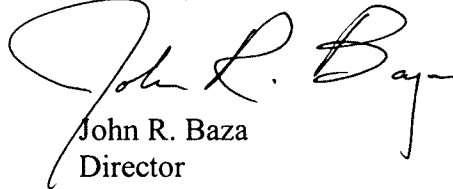
Page 2

Mr. John M. Schaff, CIA

December 4, 2007

now press forward to evaluate each of the recommendations and begin incorporating them into the Coal Program's processes and procedures.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Baza". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke extending to the right.

John R. Baza
Director

cc: Michael R. Styler, Executive Director, Utah Department of Natural Resources
Robyn Pearson, Deputy Director, Utah Department of Natural Resources
Darin Bird, Deputy Director, Utah Department of Natural Resources
Dennis Carver, Financial Manager, Utah Department of Natural Resources
Mary Ann Wright, Associate Director of Mining, Division of Oil, Gas and Mining