

## Report to the Legislature of the State of Washington



## Recommendations Regarding the Administration of the Surface Mine Reclamation Act, Chapter 78.44 RCW

**September 1, 2006**

Submitted on behalf of the  
Surface Mine Reclamation Advisory Committee  
by the  
Washington State Department of Natural Resources



WASHINGTON STATE DEPARTMENT OF  
**Natural Resources**  
Doug Sutherland - Commissioner of Public Lands

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Ron Teissere - State Geologist



September 6, 2006

The Honorable Ken Jacobsen, Chair  
Senate Natural Resources, Ocean and Recreation Committee  
P. O. Box 40466  
Olympia, WA 98504-0466

The Honorable Brian Sullivan, Chair  
House Natural Resources, Ecology, and Parks  
P. O. Box 40600  
Olympia, WA 98504-0600

Dear Senator Jacobsen and Representative Sullivan:

In accordance with Section 8 of Engrossed Second Substitute Senate Bill 6175, Chapter 341, Laws of 2006, this report is respectfully submitted to your respective committees.

The members of the Surface Mine Reclamation Program Advisory Committee wishes to express its appreciation for this opportunity to inform the legislature regarding policy issues that affect the public safety, environmental protection, and economic development of Washington.

Sincerely,

A handwritten signature in cursive script that reads "Ron Teissere".

Ron Teissere  
State Geologist



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## **I. Introduction**

Engrossed Second Substitute Bill 6175 required the Department of Natural Resources (DNR) to convene a surface mine reclamation advisory committee (Committee) and to prepare a report to the legislature by September 1, 2006 containing the Committee's recommendations regarding the administration of the Surface Mine Reclamation Act (Chapter 78.44 RCW). The language of Section 8 of the bill reads:

The department of natural resources shall establish a surface mining advisory committee that will recommend effective methods of accomplishing reclamation and address other issues deemed appropriate by the committee for the effective administration of chapter 78.44 RCW. The committee is comprised of but not limited to representatives of mining interests, state and local government, environmental groups, and private landowners. The state geologist will select the members of the committee. The department of natural resources must submit a report to the appropriate committees of the legislature containing the committee's findings by September 1, 2006.

## **II. Methodology**

A balanced committee of informed and committed stakeholders and decision-makers from a variety of organizations was assembled during May and June 2006. The Committee included large and small mine operators, environmental groups, large and small landowners, local government, and state agencies. Appendix A is a roster of the Committee members. Meetings were held weekly to adequately cover the major issues identified by the Committee. The use of a professional facilitator enabled the group to keep the meetings on schedule and productive. The facilitator ran the meetings, ensured the participation of all of the Committee members, kept the discussions focused, and called for consensus votes on issues when the discussion seemed mature. This process materially contributed to the success of the Committee.

The Committee initially went through a process of identifying issues of concern and/or interest to the members, and then, as a group, prioritized the issues. The Committee then set time frames for the discussion of each issue so that all of the highest priority issues would be discussed for inclusion in this report. The overall goal of the Committee was to provide conclusions and recommendations supported by a majority of the Committee members.

The issues discussed by the Committee included:

- Illegal mining,
- Enforcement provisions of Chapter 78.44 RCW,
- Definitions used in Chapter 78.44 RCW,
- Land-use planning affecting mining and reclamation,
- Delegation of enforcement authority for reclamation by DNR to local government,
- Landowner accountability for reclamation,
- Permitting process, including State Environmental Policy Act (SEPA) decisions and compliance with the provisions of SEPA documents, and
- Management/accountability of DNR for use of program funds, including staffing, resource mapping, and support for the industry at the local jurisdiction level.

Each of these topics was discussed in a predetermined time frame. In some cases, the Committee determined that the discussion was not productive, would not lead to a consensus recommendation, or was not being done at the policy level necessary for this report. These items were either dropped or tabled for discussion at some future date.

### **III. Discussion Summary**

The most detailed review and discussion was focused on the closely linked issues of illegal mining and the enforcement tools available to DNR under the existing Act. The Committee identified illegal mining as the most significant problem, and concluded that the existing enforcement tools are inadequate. The other issues selected for the most detailed review were the delegation of enforcement to local government and land use planning.

Lesser issues included:

- DNR's strategy to use the additional program funding from the recent fee changes,
- the definition of abandonment and how DNR has addressed this issue,
- the line between the reclamation of mining properties and the implementation of local development plans for industrial, commercial, and/or residential uses,
- cancellation of reclamation permits,
- the concepts of interim and segmental reclamation, and
- landowner accountability.

Table 1 summarizes the discussion of the major issues. Columns 1 through 5 break down the discussions as follows:

Column 1: A brief description of the issue

Column 2: The concerns raised by this issue for the Committee members

Column 3: Some possible actions that might be taken to address the issue. These suggestions came from DNR, the Office of the Attorney General, and Committee members

Column 4: A brief summary of the consensus of the Committee

Column 5: Concerns raised by a minority of the Committee that they believed were unresolved by the consensus opinion.

**Table 1.** Summary of discussion by the Surface Mine Reclamation Advisory Committee, by topic.

ISSUE	CONCERNS	ACTIONS	GENERAL CONSENSUS OF COMMITTEE	COMPLICATING FACTORS OR CONTINUING CONCERNS
1. Illegal mining, including violations of the Act, rules, or permit	DNR should have authority to immediately stop any of the following four violations without first seeking judicial enforcement: a. Mining outside of any authorized permit boundary (whether mining without a permit, or permitted but mining outside of a permit boundary); b. Violations causing immediate danger to environment or to public's health, safety, or welfare; c. Unauthorized removal of topsoil from the permitted site; or d. Violation of a final DNR order.	Cease and Desist <u>OR</u> Stop Work Order  By: DNR To: Person violating Act, rules, permit Scope: Only stops the four violations identified Timing: Effective immediately Longevity: Until approval obtained in an appropriate form Due Process: Expedited post-order hearing	<ul style="list-style-type: none"> <li>DNR's Geology Division should have statutory authority to stop illegal mining. (Abbreviated restatement of Committee's prior adoption)</li> <li>Committee accepts concerns and actions identified to the left.</li> </ul>	1(a) Some in the industry want to use the term "illegal mining" only in the context of miners operating without any permit whatsoever. This group would like those miners operating outside the boundaries of an existing permit treated separately. 1(b). One Committee member expressed reservation with subsection 1b, but agreed to it so long as the concern relates to the public and not miner safety. 1(c). Some Committee members expressed concerns about the vague nature of the term "topsoil." Further statutory prescriptions for the meaning of topsoil and topsoil management are recommended.
2. Current enforcement structure (responsibility for violations, noncompliant sites)	The current Act does not sufficiently authorize compliance actions against individuals other than the permit holder. The Act should clearly identify against whom an enforcement action may be taken. All persons violating the Act should be responsible for their actions.	For each compliance provision, clearly identify to whom an order may be issued and under what circumstances. <ul style="list-style-type: none"> <li>Compliance actions should be taken against violators and permit holders whose sites are out of compliance.</li> <li>Actions taken to address site conditions regardless of a violation should be to the miner and/or permit holder.</li> </ul>	DNR Geology shall have statutory authority to take compliance action against: <ol style="list-style-type: none"> <li>Any person in violation of the Act, Rules, or permit; and</li> <li>A permit holder whose site is out of compliance.</li> </ol> Statutes shall be appropriately amended to clearly identify who may receive notices and enforcement orders for certain circumstances.	
3. Current enforcement structure (swift compliance, reduce bureaucracy)	Violators do not appear to be compelled to comply with the law or to take reasonably swift corrective action.	Streamline enforcement steps where appropriate to reduce use of process by violators as a means of delaying or avoiding compliance. <ol style="list-style-type: none"> <li>Allow DNR to issue cease and desist (stop work) orders under certain circumstances.</li> <li>DNR may issue Notices of Correction simultaneously or independently of Orders to Rectify.</li> <li>Allow DNR to issue civil penalty as soon as notice of correction is issued or exceptions under RCW 43.05 apply.</li> <li>Cancel permits where:               <ol style="list-style-type: none"> <li>a site is abandoned;</li> <li>permit fees are not paid for more than 60 days;</li> <li>a permit holder continues to violate a final order; or</li> <li>a permit holder is without lawful access for more than six months and the landowner declares that she or he will not grant access for further mining.</li> </ol> </li> </ol>	DNR Geology shall have statutory authority to: <ol style="list-style-type: none"> <li>Issue cease and desist orders as agreed under concern #1.</li> <li>Issue Notices of Correction either simultaneously or independently of Orders to Rectify.</li> <li>Issue civil penalties in accordance with RCW 43.05. <i>See civil penalty Legislation.</i></li> <li>DNR may cancel permits where a permit holder:               <ol style="list-style-type: none"> <li>Does not pay fees for more than 120 days;</li> <li>Violates a final order; or</li> <li>Is without lawful access for more than 90 days and the landowner declares that she or he will not grant access for further mining.</li> </ol> </li> </ol>	Consensus #2: One committee member requested that the identification of circumstances where DNR may issue Notices of Correction simultaneously with Orders to Rectify.  4a. A 120-day grace period for permit cancellation does not coincide with typical fiscal reporting periods. 4b. Cancellation should probably await resolution of judicial appeals to avoid having to reinstate. Concern about the reasonableness of time lines specified in final orders and/or ensuring a reasonable process for determining when a final order is being violated.

**Table 1. (cont'd)**

ISSUE	CONCERNS	ACTIONS	GENERAL CONSENSUS OF COMMITTEE	COMPLICATING FACTORS OR CONTINUING CONCERNS
4. Current enforcement structure (DNR's right of entry)	DNR and its agents should be permitted to enter land at reasonable times or under court order to inspect the land or to conduct authorized reclamation.	<ul style="list-style-type: none"> <li>• Provide right of entry authority for the purpose of reclaiming the land when authorized to conduct reclamation under the Act, rules, or permit.</li> <li>• Allow DNR to inspect sites during business hours or to obtain a search warrant.</li> <li>• Language in the permit application section could also be revised to require that landowners and permit holders bind themselves and their assigns to permit entry and inspection.</li> </ul>	<ol style="list-style-type: none"> <li>1. DNR Geology shall have statutory right of entry authority for:               <ol style="list-style-type: none"> <li>a. Reclamation when authorized under the Act, Rules, or Permit; and</li> <li>b. Compliance inspections.</li> </ol> </li> <li>2. Landowners and permit holders shall be statutorily bound to allow DNR to enter for reclamation and inspections as a condition to receiving a reclamation permit.</li> <li>3. Judicial warrant authority should be granted where access is denied or probable cause for a violation exists.</li> </ol>	Any proposed legislation should be consistent with constitutional sideboards regarding the timing and scope of inspections.
5. Enforcement structure (danger to environment or public)	DNR should have authority to ensure that mining practices are not posing a significant danger to the environment or the public's health, safety, or welfare.	<ol style="list-style-type: none"> <li>1. Allow DNR to issue emergency and non-emergency orders to rectify where mining is creating a danger to the environment or public.</li> <li>2. Allow DNR to issue a cease and desist or stop work order where a violation is creating the danger.</li> <li>3. Allow DNR to conduct interim reclamation if necessary to remove an immediate danger or danger created by a violation. <i>Not approved by group, but currently contained within EORD and C&amp;D.</i></li> </ol>	DNR Geology shall have statutory authority to: <ol style="list-style-type: none"> <li>1. Issue an order to rectify deficiencies (including emergency order) where mining is creating a situation involving an <u>immediate</u> danger to the public health, safety, welfare, or environment, without need for a violation.</li> <li>2. Issue cease and desist orders as recommended under concern #1.</li> </ol>	The discussion on DNR's interim reclamation authority was tabled.
6. Enforcement structure (fair and predictable enforcement)	Permit holders attempt to comply and should be given more leniency than non-permitted miners. It is important for permit holders to understand how compliance will progress. Thus, compliance provisions should be clearly stated and should progress from less significant to more significant measures.	This concern may be recognized in many ways, such as: <ol style="list-style-type: none"> <li>a. Issuance of compliance actions should be discretionary not mandatory. <i>See all enforcement Legislation.</i></li> <li>b. Issue a permit suspension only if a final order has been violated. <i>See Suspension Legislation.</i></li> <li>c. Civil penalties may only be issued in accordance with RCW 43.05. <i>See Civil Penalty Legislation.</i></li> <li>d. Limit cease and desist orders as being recommended by the committee under concern number 1. <i>See Cease and Desist Legislation.</i></li> </ol>	The committee agreed with the "actions" as amended and stated to the left.	One member suggested that enforcement actions for certain violations should be mandatory to avoid the "politicization" of the enforcement process.

**Table 1. (cont'd)**

ISSUE	CONCERNS	ACTIONS	GENERAL CONSENSUS OF COMMITTEE	COMPLICATING FACTORS OR CONTINUING CONCERNS
<p>7. Delegation of enforcement to local government</p>	<p>What criteria, process, and public input would be necessary for the agency, the local jurisdiction, the industry, and the public to agree with a decision to delegate?</p> <ol style="list-style-type: none"> <li>1. King County’s primary concern regarding delegation relates to segmental reclamation issues. Permit holders allege that the county is not authorized to regulate certain issues because they fall under DNR’s exclusive reclamation authority rather than under the county’s operation authority. Dust management is one example. Other examples include interim slopes, retention ponds, and vegetation.</li> <li>2. Industry identified many concerns regarding DNR’s delegation of authority to local government:               <ol style="list-style-type: none"> <li>a. redundant layers of regulation;</li> <li>b. inconsistency of regulation;</li> <li>c. DNR has more reclamation expertise;</li> <li>d. local government is too “politicized”;</li> <li>e. not good to have just one inspector;</li> <li>f. DNR better values importance of statewide resources; and</li> <li>g. additional cost to industry.</li> </ol> </li> <li>3. Unclear which jurisdiction has authority to enforce State Environmental Policy Act (SEPA) mitigation measures.</li> <li>4. Delegation may impede expedited resolution of issues.</li> <li>5. Unintended tax consequences are currently occurring.</li> <li>6. Delegation doesn’t work.</li> </ol>	<p>All or some sites? Based on area or operator? Are there size of operation considerations What specific tasks should be delegated?</p> <ul style="list-style-type: none"> <li>• Inspections, technical assistance, notices of correction, orders to rectify deficiencies, cease and desist, civil penalties, suspension of permit?</li> <li>• What consultation between DNR and the local jurisdiction take place?, When?</li> </ul> <p>Appeals of enforcement actions:</p> <ol style="list-style-type: none"> <li>1. Jurisdiction?</li> <li>2. Procedures?</li> <li>3. Consultation?</li> <li>4. Costs?</li> <li>5. Resolution or settlement?</li> <li>6. Consistency</li> </ol> <p>Fairness:</p> <ol style="list-style-type: none"> <li>1. Local government fees?</li> <li>2. % of permit fee</li> <li>3. economic and programmatic impact</li> </ol> <p>Qualification of local government staff:</p> <ol style="list-style-type: none"> <li>1. Licensing?</li> <li>2. Experience?</li> <li>3. Public processes?</li> </ol> <p>Revoking of delegation:</p> <ol style="list-style-type: none"> <li>1. Performance measures</li> <li>2. Industry complaints</li> </ol> <p>Form of agreement</p> <ol style="list-style-type: none"> <li>1. Explore interagency agreements regarding local government v. DNR responsibilities.</li> <li>2. Consider DNR policy statement clarifying jurisdiction between locals and DNR.</li> <li>3. Might be better to change the two year segmental reclamation time period to make it fit better with operational issues.</li> </ol>	<ol style="list-style-type: none"> <li>1. DNR should not delegate enforcement authority to local governments at this time. (The committee is not recommending that the legislature remove delegation authority from the Act.)</li> <li>2. Clarification of the roles and responsibilities of local government v. DNR should be discussed and pursued.</li> </ol>	<ol style="list-style-type: none"> <li>1. Delegation of compliance should generally not be given to locals due to the many concerns listed to the left.</li> <li>2. Some mineral deposits do not lend themselves to segmental reclamation, which makes it more difficult for local or state government to determine the correct level of interim reclamation.</li> </ol>



**Table 1. (cont'd)**

ISSUE	CONCERNS	ACTIONS	GENERAL CONSENSUS OF COMMITTEE	COMPLICATING FACTORS OR CONTINUING CONCERNS
8. Land use	<p>When should a surface mine be solely regulated under the Act?            Where is the boundary between mining and development?            How do we document the transfer of jurisdiction?            County use of Mineral Resource Overlay?</p> <ol style="list-style-type: none"> <li>1. Industry is concerned about miners who extract and sell large amounts of materials, mine for extended durations, and make large profits without first obtaining a reclamation permit. This concern exists where miners extract materials under the guise of “development” and never engage in development and where miners have appropriate construction permits. Either way, these miners are viewed as avoiding costs of business that must be experienced by mines that are regulated by the Surface Mining Act.</li> <li>2. The duration of the mining under the guise of construction/development, without a reclamation permit is also a concern. Where a mine is being operated for a long time before construction is completed, it seems as though miner should be regulated as a mine.</li> <li>3. All are concerned about miners who avoid state and local regulation by arguing to local government that they are conducting reclamation and claiming with DNR that they are developing a site.</li> <li>4. Inconsistencies between the Reclamation Act’s minimum reclamation standards and local government construction standards creates uncertainties about how to appropriately terminate a surface mine reclamation permit.</li> </ol>	<p>Status quo.</p> <p>Subsequent use, development permits, long term liability, original contours.</p> <p>Issue County permit of some type?</p> <p>Encroaching uses, resource information</p> <ol style="list-style-type: none"> <li>1. DNR should require a reclamation permit where certain thresholds are reached regarding quantities of materials extracted, the duration of mining, or the profits being made.</li> <li>2. See the consensus of the group for the three recommended actions.</li> </ol>	<p>The Legislature should amend the Act to reflect the following:</p> <ol style="list-style-type: none"> <li>1. On-site construction is exempt from the Reclamation Act where there is a local government construction permit.</li> <li>2. DNR may terminate a reclamation permit when local government assumes oversight of the site’s final condition through issuance of a construction permit.</li> <li>3. If somebody’s construction permit expires or is cancelled without completing construction, DNR may require a reclamation permit.</li> </ol>	<ol style="list-style-type: none"> <li>1. DNR currently regulates reclamation, not operations.</li> </ol>

#### **IV. Future Committee Process**

The Department and the Committee members are interested in the continuation of this collaborative effort to improve the Surface Mine Reclamation Program. DNR intends to continue the Committee meetings on a less intense basis and without the professional facilitator. The discussion of the issues identified by the Committee, but put on hold in order to complete the discussions of the highest priority issues for this report, will be the first items on the continuing agenda. From the perspective of the Surface Mine Reclamation program, the most significant remaining issues are:

- the definition of abandonment and how DNR has addressed this issue,
- the line between the reclamation of mining properties and the implementation of local development plans for industrial, commercial, and/or residential uses,
- cancellation of reclamation permits,
- the concepts of interim and segmental reclamation, and landowner accountability.

Additionally, there are some high priority issues where the Committee did not reach a consensus recommendation. Of these unfinished issues, the delegation of enforcement to local government is of the most current importance to the Program. All of these unfinished and lower priority issues will benefit from more in-depth discussion and the development of some alternative solutions to the concerns that may not require legislative action. The intent of the Department is to meet with the Committee monthly or bimonthly through the end of the calendar year depending on the near-term priorities of the Program. The meeting schedule after that will be based on the level of interest, issues of importance to the Committee, and the needs of the program.

The Department is evaluating the early results of this advisory committee effort. Some of the invited participants did not make this a priority, while other stakeholders have expressed an interest in active participation. Over the next few months, the Department will be evaluating possible revisions to the makeup of the Committee that would enhance its value to the surface mine reclamation program. The program's focus in the near-term is on the full implementation of the changes made to Chapter 78.44 RCW by the 2006 Legislature. The completion of this implementation and the possible revisions to the Committee will result in a less intense committee process until after the 2007 Legislative session.

#### **V. Conclusions and Recommendations**

The consensus of the Committee on its highest priority issues is contained in Column 4 of Table 1. The Committee was not prepared to recommend specific changes to Chapter 78.44 RCW at this time. The Department plans to continue to work with the Committee on legislative recommendations addressing illegal mining and the enforcement provisions of Chapter 78.44 RCW, along with other high priority concerns, with a goal of having agreed-upon language by May 31, 2007 for consideration by the Department as possible agency request legislation for the 2008 Legislative session.

The Committee is also strongly in favor of continuing to serve as an advisor to DNR regarding the Surface Mine Reclamation Program. The Committee members believe that the meetings and discussions serve as a forum for all of the stakeholders to communicate their concerns, develop solutions to statewide and local problems, enhance cooperation among operators and the various agencies with jurisdiction, and to evaluate issues for future recommendations to DNR and the Legislature.

## Appendix A. Surface Mine Reclamation Advisory Committee roster.

\*, participating committee members; \*\*, nonmembers present at Committee meetings; other individuals were not in regular attendance.

ORGANIZATION	NAME	E-MAIL	PHONE	ADDRESS
Audubon Washington	*Heath Packard Dana Kiehl Lisa Remlinger	<a href="mailto:hpackard@audubon.org">hpackard@audubon.org</a>	360-786-8020 ext. 205	PO Box 462 Olympia, WA 98507-046
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Washington State Attorney General	*Steve Reneaud	<a href="mailto:STEVE.ATG.UNIX@atg.wa.gov">STEVE.ATG.UNIX@atg.wa.gov</a>	360-664-3451	PO Box 40100 Olympia, WA 98504-0100

<b>ORGANIZATION</b>	<b>NAME</b>	<b>E-MAIL</b>	<b>PHONE</b>	<b>ADDRESS</b>
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Washington State House of Representatives	**Jeff Olsen	<a href="mailto:Olsen.jeff@leg.wa.gov">Olsen.jeff@leg.wa.gov</a>	360-786-7157	PO Box 40600 Olympia, WA 98504-0600
Washington State Office of Financial Management	*Keith Philips	<a href="mailto:keith.philips@ofm.wa.gov">keith.philips@ofm.wa.gov</a>	360-902-0630	PO Box 43113 Olympia, WA 98504-3113
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