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U.S. Environmental Protection Agency  
Mine Waste Policy Dialogue Committee

Meeting Summaries and Supporting Material

March 1994



U.S. Environmental Protection Agency  
Office of Solid Waste  
Special Waste Branch  
401 M Street, SW  
Washington, DC 20460

U.S. ENVIRONMENTAL PROTECTION AGENCY  
MINE WASTE POLICY DIALOGUE COMMITTEE

MEETING SUMMARIES AND SUPPORTING MATERIAL

**Contents:**

- I. Transmittal Memo and Charter establishing the Environmental Protection Agency's Mine Waste Policy Dialogue Committee
- II. Participant List
- III. Meeting Summaries
- IV. EPA Memorandum Concerning Procedural Approaches to Develop a Template and Conduct State Reviews
- V. White Paper

MEMORANDUM

**SUBJECT:** Possible Establishment of a Policy Dialogue Committee for the Mining Program -- ACTION MEMORANDUM

**FROM:** J. Clarence Davies  
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and Evaluation

**THROUGH:** Mary Ann Beatty  
EPA Committee Management Officer

**TO:** F. Henry Habicht II  
Deputy Administrator

PURPOSE

The purpose of this memorandum is to request your signatures on the attached Federal Advisory Committee Charter and transmittal letter to GSA requesting their review of the Charter. Your signatures will allow us to establish a Policy Dialogue Committee for the mining program being considered under the Resource Conservation and Recovery Act.

We have given OMB a copy of the draft charter and invited them to attend the organizational meeting. We also notified GSA to expect our charter submission.

BACKGROUND

EPA is required, under Section 8002 of RCRA, to perform studies and reports to Congress regarding, among other things, management methods and potential hazards of mining wastes and to make a regulatory determination regarding whether Subtitle C or D (hazardous vs. non-hazardous) controls are warranted. A report to Congress, entitled Wastes from the Extraction and Beneficiation of Metallic Ores, Phosphate Rock, Asbestos, Overburden from Uranium Mining, and Oil Shale was submitted to Congress in December 1985.

On July 3, 1986 (51 FR 24496), EPA published a regulatory determination based on the findings of the report to Congress. These findings concluded that mining wastes should be regulated

as solid wastes under RCRA Subtitle D rather than as hazardous wastes under RCRA Subtitle C even though some mining wastes exhibit hazardous characteristics. In addition, the report also indicated that: EPA is concerned about actual and potential mining waste problems; maximum flexibility is necessary to develop an appropriate program for mining wastes; the program needs to take into account the variability of risk in order to control individual facilities on a site-specific basis; existing Subtitle C regulations do not provide enough flexibility to address mining wastes, while existing Subtitle D regulations do not provide enough Federal authority or

Federal enforcement; and EPA would develop a flexible, site-specific, risk-based program.

In May 1988, the Office of Solid Waste (OSW) released a document that outlined an approach to manage noncoal mining wastes and materials. This document, called Strawman I, was a staff-level approach designed to facilitate the participation of interested parties in program development and to enhance EPA's understanding of mining waste issues.

EPA has been working closely with the States, public interest groups, and industry to solicit input on waste management approaches and to gather information. The involvement of the States in the Strawman process has been coordinated by the Mine Waste Task Force of the Western Governors' Association (WGA) and the Interstate Mining Compact Commission. Involvement of public interest groups has been coordinated through Colorado Trout Unlimited, and the participation of industry has been managed principally by the American Mining Congress.

Based on comments submitted to EPA on Strawman I and on information given to the Agency by interested parties since 1988, EPA released Strawman II in May 1990. Strawman II is again a staff-level approach for protection of human health and the environment from wastes and other materials associated with noncoal mining. Meetings were held with public interest groups and the mining industry in September 1990 to discuss their comments on Strawman II.

As a result of the December 1990 briefing with you on mining waste, EPA will develop a strategic plan for mining waste program development that addresses multi-media integration, relationships with other Federal programs, on-going implementation, and capability building, including determining what role additional authorities should play. We believe that the formation of a Policy Dialogue Committee will provide a forum to refine and further develop issues raised by Strawman II, and to facilitate the exchange of new ideas and information among the interested parties. It is hoped that consensus may be possible on some issues but, at a minimum, we would like to ensure that issues are thoroughly defined and that differing positions, as well as the reasons for those differences are identified. The output of the Policy Dialogue Committee would be made available to various decision-makers in the mining waste program development process.

## DESCRIPTION OF SIGNATURE DOCUMENTS

### Federal Advisory Committee Charter

To establish a Policy Dialogue Committee that will be utilized to provide consensus advice or recommendations, we must first charter a Federal Advisory Committee. The charter is a document for your signature that explains what the committee will do. After GSA and OMB consultation, we will file the Charter with the appropriate Congressional Committees.

### Letter to GSA

Obtaining a charter requires that you send a proposed charter and a letter to GSA justifying the need to establish the committee. GSA generally forwards the request to OMB. We have already been in touch with GSA and OMB and anticipate no major difficulties.

## RECOMMENDATION

I request that you sign the attached FACA charter and request for consultation letter.

Attachments (2)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ADVISORY COMMITTEE CHARTER

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ORGANIZATION AND FUNCTIONS COMMITTEES, BOARDS, PANELS AND COUNCILS

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POLICY DIALOGUE COMMITTEE FOR EPA'S MINING PROGRAM

1. PURPOSE. This charter establishes the Policy Dialogue Committee for EPA's mining program in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. (App.I) 9(c).

2. AUTHORITY. It is determined that establishment of this Committee is in the public interest and supports EPA in performing its duties and responsibilities under Sections 8002 of the Resource Conservation and Recovery Act (RCRA).

3. OBJECTIVE AND SCOPE OF ACTIVITY. The Policy Dialogue Committee will provide a forum to refine and further develop issues related to managing mining waste and to facilitate the exchange of ideas and information among the interested parties. It is hoped that consensus may be possible on some issues but, at a minimum, EPA would like to ensure that issues are thoroughly defined and that differing positions, as well as the reasons for those differences, are identified. The output of the Policy Dialogue Committee would be made available to various decision-makers in the mining program development process.

4. FUNCTIONS. As indicated above, the Committee's function is to assist directly in the development of EPA's mining program. With the participation of knowledgeable, affected parties, EPA expects to develop a more practical, protective approach at less cost.

5. COMPOSITION. The Committee will consist of not more than twenty-five members, appointed by the EPA Deputy Administrator, plus a facilitator who will serve as Chair. Members will represent the following segments of the population in appropriate mix and balance:

Categories of Members:

- public interest groups
- mineral industries
- States
- Federal agencies

Appropriate members shall be selected and appointed for the

duration of the Policy Dialogue Committee. Most members will be appointed as representatives of non-federal interests. A full-time salaried official or regular employee of the Agency will serve as the Designated Federal Official and will be present at all meetings. The Designated Federal Official is authorized to adjourn any meeting whenever it is determined to be in the public interest to do so. The Committee is authorized to form workgroups for any purpose consistent with this Charter. Such workgroups shall report back to the full Committee. Workgroups have no authority to make decisions on behalf of the full Committee nor can they report directly to the Agency.

Under the Federal Advisory Committee Act, EPA may pay travel and per diem expenses when necessary and appropriate. The Committee's estimated annual operating cost is approximately \$100,000, which includes 1 work-year of staff support. EPA's Office of Policy, Planning and Evaluation will provide administrative and process support to the Committee.

6. MEETINGS. Meetings shall be held as necessary, at the call of the Chair, with an agenda for each meeting approved in advance by the Designated Federal Official. Committee meetings will be called, announced, and held in accordance with the EPA Committee Management Manual. This manual contains the Agency's policies and procedures for implementing FACA. Among other things, FACA requires open meetings, and an opportunity for interested persons to file comments before or after meetings, or to make statements to the extent that time permits.

7. DURATION. The Committee will terminate by March 30, 1992, unless the Deputy Administrator determines that the Committee will finish its work within 30 days of the original termination date. If the Deputy Administrator makes such a determination, he can extend the termination date by 30 days without further consultation with GSA. In the event more time is needed, EPA may seek an extension under Section 14 of FACA.

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Approval date

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Deputy Administrator

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GSA Review Date

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Date filed with Congress

U.S. ENVIRONMENTAL PROTECTION AGENCY MINE WASTE  
POLICY DIALOGUE COMMITTEE MEETING

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U.S. ENVIRONMENTAL PROTECTION AGENCY  
MINE WASTE POLICY DIALOGUE COMMITTEE  
MEETING SUMMARY

Washington, D.C.  
May 15-16, 1991

WEDNESDAY - May 15, 1991

The meeting began with the committee members and facilitators introducing themselves. Jeffrey Denit, Deputy Director of EPA's Office of Solid Waste, provided background information on the Policy Dialogue Committee (PDC). Mr. Denit began by acknowledging that many of those at the table have been working on mining issues during the past three years. He noted that he is uncertain about what to expect from the Policy Dialogue Committee but clearly there is keen interest in working on the issue. Denit hopes that the PDC will try to reach consensus on mine waste issues, but minimally he hopes that the members will at least come out of the meetings with a clearer understanding of each others positions. He went on to note that the RCRA reauthorization process is underway and the discussions and recommendations of the PDC will be input into that process. He also observed that PDC's deliberations will be open to public review and available as a part of the public record.

Mr. Denit then introduced C. Bowdoin Train, the recently appointed Deputy Assistant Administrator for Solid Waste. Mr. Train stated that the PDC process will be a useful next step to build upon the Agency's "strawman" mine waste regulatory development process. Train noted that as the EPA enters the Policy Dialogue Committee process the agency will not forget what was learned through that process, but he emphasized that the Agency is not constrained by the positions posed in Strawman.

Train then noted that the Agency views the PDC as the principal mechanism for input to EPA on mine waste policy. In establishing this Committee, the Agency has identified the following goals:

- o Facilitate the exchange of ideas;
- o Develop innovative approaches;
- o Create the principal mechanism for input to EPA on mine waste regulatory policy;
- o Develop consensus to the greatest extent possible; and
- o Sharpen understanding of disagreements.

Although the Committee has designated members, the public will be involved as the effort is designed to provide adequate opportunity for their involvement. As a part of that, EPA chose The Keystone Center to serve as the facilitator for the Committee. In addition to providing facilitation services, The Center will distribute materials, keep records, and handle logistics.

With the conclusion of Mr. Train's comments, John Ehrmann, one of The Keystone Center facilitators, reviewed the agenda for the two day meeting. He noted that the first day will begin by focusing on procedural issues and then move onto consider the list of substantive issues submitted by the members. On the second day, the focus of the Committee's efforts will be to explore in greater depth the substantive issues of concern. Before concluding the meeting, dates for future meetings will be determined. Additionally, he suggested that the Committee evaluate its efforts on an ongoing basis.

Ehrmann went on to explain that the PDC process will be different than a regulatory negotiation. The goal of this effort is to develop national policy regarding mine waste regulation rather than a single regulation. There are no specific deadlines for this effort.

Since many members had not yet received their formal letters of invitations signed by Deputy Administrator Henry Habicht (see attached copy), the Federal Advisory Committee Act (FACA) Charter for the Policy Dialogue Committee was distributed. Participants were directed to note that the Charter states the purpose of the Policy Dialogue Committee. Deborah Dalton, the Designated Federal Representative for the Committee explained that once the Charter was approved by the Deputy Administrator, it also reviewed by OMB and GAO and then filed with the U.S. Congress.

Ms. Dalton noted that the Committee is convened under FACA which requires that meetings be 1) open to the public, 2) noticed in the Federal Register at least fifteen days in advance, and 3) that meeting summaries must be made available to the public. The Charter establishes the Committee to run through March 30, 1992. However, the tenure of the Committee can be extended or terminated in advance of this date.

#### Review of Suggested Groundrules

The next topic of discussion was the proposed groundrules (see copy attached). Tim Mealey, facilitator from The Keystone Center, reviewed them and then asked questions and comments. Some members raised questions about the first groundrule which outlined the objectives for the Policy Dialogue Committee. After some discussion, it was decided to substitute the language used in the FACA Charter for describing the PDC's objective. This language is as follows:

"The Policy Dialogue Committee will provide a forum to refine and further develop issues related to managing mining waste and to facilitate the exchange of ideas and information among the interested parties. It is hoped that consensus may be possible on some issues but, at a minimum, EPA would like to ensure that issues are thoroughly defined and that-differing

positions, as well as the reasons for those differences, are identified. The output of the Policy Dialogue Committee would be made available to various decision makers in the mining program development process".

Some members stated their objection to the fact that the Charter had been developed solely by EPA and the stated purpose of the Committee was "to assist directly in the development of EPA's mining program." They suggested that the Committee should have a broader focus, one that left open questions related to where a mine waste regulatory program might be placed. It was explained that the Federal Advisory Committee Act requires that the Charter be established by the Federal agency that is creating the Committee and that such committees are to be created for the expressed purpose of providing advice to that Agency.

Regarding Committee membership, a question was raised about whether additional alternates could be appointed and if individual Committee members could be replaced if required. The response to both questions was yes. Additionally, it was noted that the alternates were to be viewed as a pool from each of the main interest groups, rather than a one-to-one correlation with PDC members. Thus, alternates were encouraged to attend all meetings if possible so that they be cognizant of issues which had been discussed previously.

There will be approximately one half hour for public comment at the end of each meeting day. The amount of time per person will depend on the number of individuals desiring to speak. It was also noted that the public can submit written comments at any time. These written comments will become a part of the administrative record and will be attached to the meeting summaries.

It was clarified that there will be meeting summaries prepared for each meeting. They will not be transcripts, but they will be thorough. A draft of the meeting summaries will be distributed to PDC Members for their comments before they are finalized. The comments will be sought through the mail or at the beginning of the next meeting depending upon the time between meetings. The Keystone Center will be responsible for distribution of meeting summaries and other materials to PDC members and alternates while EPA will be responsible for other public distribution.

It was noted that the PDC does not necessarily have to produce a final report and that as the Committee desires they may issue documents discussing any agreements that are reached prior to the conclusion of the PDC. If there is a final report, it was explained that the group as a whole will draft and approve the report and it will be completed within the current eighteen month timeframe for the Committee. It was clarified that the term consensus, as used in the groundrules, was meant to imply no dissent by a member of the PDC.

The PDC then adopted by consensus the proposed groundrules as revised by the group's discussion.

The facilitator suggested that the PDC should not break into subcommittees immediately. He indicated that this approach would mean that the PDC would address issues sequentially rather than simultaneously. However, in order to ensure adequate progress is made between meetings, it was suggested that as tasks required it, the PDC might want to consider the use of small work groups.

In terms of agenda setting, rather than using a steering committee, the PDC as a whole would discuss the agenda for the next meeting at the close of the current meeting.

#### Review of Substantive Issues List

The Committee discussion then turned to the issues list compiled from lists submitted by Committee members. Mr. Ehrmann observed that there have been numerous discussions of these issues over the past few years. As a result, there is a long record of publicly stated positions on these issues. Mr. Ehrmann stated that the consensus objective of the PDC will require that the facilitator find ways to help Committee members move beyond stating their publicly held positions to discussion aimed at identifying the underlying reasons why those positions are held. In so doing, it may be possible to find consensus solutions to certain problems. However, Mr. Ehrmann noted that achieving an overall consensus on mine waste policy issues will not be an easy task and that it will be dependent upon, among other things, people's perceptions about what may or may not be achievable in other forums such as Congress.

Martha Tableman, facilitator from The Keystone Center, then presented the combined issues list which was compiled from issues lists submitted by each of the interest group sectors (see attached list).

Russell Wyer, Director of EPA's Division of Waste Management, said that he wanted other members to understand that EPA saw the agency as an "equal party" with the others in the PDC. He then described the scope of the issues that should be addressed by the PDC from EPA's perspective. First, he noted that EPA staff saw the Dialogue Committee's focus as being non-coal hardrock and phosphate mining not stone, sand and gravel. Second, EPA still envisions a Subtitle D type program for mine waste but he noted that EPA believes that it would need additional statutory authorities beyond Subtitle D as it exists in its current form. Third, EPA enters this effort with the following limitations due to on-going internal processes and the staff's preferences:

- Abandoned Mines (those with no known owner) - EPA would prefer that these be addressed through Superfund and non-point source pollution and stormwater rules. The latter positions, as well as the reasons for those differences, cannot be discussed with EPA involvement because EPA is currently engaged in litigation regarding those issues.

o Mineral Processing - This issue is currently being addressed in through a Regulatory Determination that EPA is scheduled to release in the very near future. Discussion of this should be deferred until after the release of the Determination.

o Enforcement in the Context of State and Federal Relationships - The Agency is currently in the process of working out its internal position on this issue and therefore requested that the discussion of this issue be delayed until this process was completed.

o Legislative Proposals - The Agency will not be able to endorse specific legislative proposals unless the administration has a publicly stated position.

Wyer noted that following the Strawman II meetings early last fall, the EPA staff met with state representatives in November. On the Federal/State relations issues, those present agreed that a national program should be designed to address the diversity of environmental conditions that exist as well as the fact that there are many comprehensive state mine waste programs already in place. As a result, the Agency's current position is that they would not pursue federal minimum standards. The ability to tailor the program reflects the states' concern that there be flexibility. Under EPA's current thinking, states would be required to submit state plans that would specify, among other things: 1) performance standards for all media; 2) public participation procedures; 3) the management and organizational dimensions of program, 4) permit procedures; and 5) enforcement procedures.

In concluding his remarks, Wyer observed that using the issues list that was being considered by the group, EPA's key issues are:

- Federal/State Relations, including issues related to plan approval/partial plan approval;
- **Public Participation;**
- Regulated Materials; and
- Scope of the Rule.

Numerous initial response~ were made to the suggestions of EPA as to the scope of issues to be addressed by the PDC. Industry and state participants indicated their support for most of EPA's current thinking. However, state participants indicated some reservations regarding the state plan development procedures and the nature of EPA enforcement oversight. Industry representatives stated their position that the PDC's discussions should be firmly rooted in the legislative and judicial history of mine waste regulatory policy under RCRA. Industry and state participants were

particularly concerned that the PDC's discussions be predicated on a Subtitle D approach to regulation. Environmental participants indicated their concern that EPA's current thinking is to not have federal minimum standards

The facilitator suggested that as a starting point the group consider the scope of issues to be those that pertain to non-coal, hardrock and phosphate mining. This was agreed to by the group.

The Committee discussed the linkage of its effort to efforts to reform the Mining Law of 1872. Some participants suggested that the ability to look at linkages will allow for development of efficient and creative solutions. Thus, they argued it is important to keep linked issues on the table. Others suggested that the PDC's discussion should focus only on the RCRA aspects of a mine waste program.

Environmental participants suggested that pollution prevention and waste minimization should be a part of the scope of the PDC's deliberations. A state participant noted that the availability of resources needs to be considered.

Given that the environmental participants have included an expert in worker safety issues as one of their representatives, several PDC members questioned whether worker safety issues should be part of the PDC's focus. These members indicated that since such issues were not addressed in RCRA they were not relevant to the PDC's efforts. Others noted that mine waste has environmental and health impacts which include impacts on workers. Although this was generally acknowledged as true, and EPA representatives indicated that they viewed worker safety issues as important, they did not see them as part of the scope of the PDC's deliberations. Specifically, since these issues are addressed by other statutes such as those that govern the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) they were considered outside the scope of the PDC except for those instances where there is a clear overlap with public health and safety issues.

EPA representatives clarified that the Agency does not believe that the scope of the PDC's discussions should be limited to existing RCRA statutory authority. They suggested that the PDC work to develop a mine waste policy first, then later determine what legislative changes may or may not be necessary to implement that policy.

After some discussion, it was decided that abandoned mines would be discussed within the context of RCRA. EPA noted that they were particularly interested in re-mining issues. Industry representatives as well as others noted that as the group discusses the issue, they should not get bogged down or distracted by the question of who pays for the clean-up.

It was clarified, however, that it will be important to discuss financial and human resources questions with respect to all of the issues to be addressed by the PDC.

### Public Comments

In concluding the first day's discussions, the facilitator provided an opportunity for public comment. John Davis from the Bureau of Mines spoke first. He stated that the PDC should take a broader view than just the U.S. environmental context. Specifically, he urged the Committee to consider the impact that mine waste regulation will have on the U.S. mining industry in an international comparative strength sense. He also noted that abandoned mine sites would not be a problem if RCRA had been passed in 1872.

Rich Andrews, emphasizing that he was speaking as a taxpayer and private citizen and not as a consultant to Western Governor's Association Mine Waste Task Force, urged the PDC members to deal diligently with the objective stated in the Charter to develop a practical approach at less cost. He also encouraged the PDC to take into account the existence of "good" state programs.

THURSDAY - May 16, 1991

### Additional Procedural Matters

In initiating the second day's discussions, several PDC members suggested that it would be appropriate to hold a number of the PDC meetings in the western U.S. since 17 out of 33 members and alternates live in the West. Additionally, it was suggested that mine site visits be considered in conjunction with PDC meetings. It was decided to hold the next meeting in Denver on June 17-18 and the subsequent session in San Francisco on July 24-25.

It was also reiterated that those in attendance who are not members or alternates who want to receive minutes and notice of meetings, should contact Steve Hoffman, Division of Waste Management, EPA, to get on the mailing list.

It was clarified that each interest group is limited to seven PDC members and that the groundrules will be revised to reflect this. It is hoped that changes in membership will be kept to a minimum, although it was acknowledged that due to changes in the responsibilities or job transitions of PDC members, some changes may be necessary over time. As noted previously, alternates will be treated as a pool for each interest group, not as a one-to-one substitution for PDC members. Mailings will go to alternates as well as members.

Discussions by the PDC of the Scope of  
Issues to be Addressed (continued)

Based on the discussion on the first day, the facilitator suggested and the group agreed that the following parameters should be used to guide the PDC's deliberations:

- o Focus on RCRA issues but recognize that the options to be considered can go beyond existing RCRA statutory authorities;
- o Focus on non-coal, hard rock and phosphate mining wastes, excluding sand and gravel, crushed stone and quarry rock;
- o Include "front end" mining activities, such as those that take place in the gray area between exploration and mining, all the way through and including mineral beneficiation and processing wastes not covered under Subtitle C of RCRA.
- o Address abandoned mines but within the context of RCRA.

The facilitator then introduced the following revised issues list:

1. Scope of Program

- a. regulated materials
- b. inactive units at active sites/re-mining
- c. inactive units at inactive sites/abandoned mines
- d. processing wastes not covered by Subtitle C
- e. split ownership

2. Technical Standards

- a. waste characterization
- b. green field sites versus existing operations
- c. all media standards
- d. link with state/federal relations and Public participation

3. State/Federal Relationship

- a. primacy
- b. non-primacy/partially approved states
- c. EPA/State relationship on federal lands
- d. resources

4. Public Participation

5. Timing and Implementation

6. Prediction, Prevention and Mitigation (Accident and Release)

7. Financial Responsibility and Assurance
8. Waste Minimization and Pollution Prevention
9. CERCLA Liability
10. Closure and Post-closure

In discussing this list it became clear that PDC members differed as to how to approach the discussion of federal/state relations and technical standards and which should be discussed first. From some participants' perspective, federal/state relationships are a fundamental question and thus should be discussed first. From others perspective, the issues associated with technical standards should be discussed first since their ability to know what they could agree to regarding state/federal relations is directly related to how the technical discussion evolves.

PDC members from all interest groups acknowledged that no matter what type of program is established, it is important to recognize and build upon the regulatory successes of existing state programs.

The EPA staff then reiterated their current thinking on a mine waste program. They began by noting that their position is open for discussion. Currently, they are thinking of developing a program under Subtitle D of RCRA. Such a program would be a state run program, with some level of federal oversight, along with the federal a program designed to fill in the gaps in existing state programs. An EPA representative went on to note that the elements of a mine waste program, as conceived of by EPA, would attempt to meet the following criteria:

protective of human health and environment efficient  
flexible, not too complex include pollution prevention use a technology  
and risk based approaches dependent on existing state efforts

He indicated that the exact nature of the state/federal relationship, the amount of flexibility, relationship to legislative authority, how gaps are defined and whether it would be a multimedia program are all areas that the Agency is interested in discussing further.

The discussion then shifted to the question of the need for federal minimum requirements. The EPA staff suggested that the establishment of such a minimum would be difficult if flexibility is to be maintained. Environmental representatives suggested that without such a minimum, it would be difficult to review and evaluate programs. Specifically, they stated that without minimum standards one could not determine what is "adequate."

As the discussion continued, one of the participants suggested that the group will be more effective if it can move beyond the RCRA labels (such as Subtitle C and Subtitle D) since this group's focus is not just on regulations, but on a national mine waste program. He suggested that such a shift in focus would allow people to get away from preconceived notions.

In response, industry participants expressed strong concerns that such a direction would ignore the regulatory history that has occurred on this issue. As the discussion continued on this point, the group agreed to that the purpose of the Committee was not to rewrite history, specifically including the Bevill amendment and EPA's 1986 regulatory determination. However, EPA representatives reiterated their previously stated position that even though they still viewed mine waste as being appropriately regulated under a Subtitle D type program, they do not believe there currently is sufficient statutory authority within RCRA to adequately address all mine waste environmental problems.

In support of this perspective, an environmental participant noted that the 1986 Regulatory Determination specifically acknowledged the need for additional statutory authority.

Several participants from the different sectors agreed that states should play the primary role in mine waste policy implementation. There was also agreement that the goal was to achieve a program which is protective of the environment and human health.

### Regulated Materials

The discussion of regulated materials began with the Western Governors' Association (WGA) representatives explaining their definition for regulated materials. They noted that the WGA Task Force had spent considerable time discussing this issue. They stated that they did not believe that the definition of waste under RCRA was sufficiently broad to address all of the environmental problems that result from mining activities. Therefore, they developed the concept of regulated materials which includes any material with the potential to pollute, including, for example, heap leach units. Materials and units that fell outside of this definition would include, for example-, exploration waste, mud and leach tanks.

Upon the completion of WGA's presentation, industry representatives questioned what the perceived gap is that this concept is trying to address? In response, a state participant indicated that the regulated materials concept is based on the potential to release and cause harm to the environment. It provides an ability to regulate non-waste materials.

As a part of the discussion of regulated materials, the participants tried to identify what gaps the approach was meant to

cover. As the discussion continued, it was observed that it is very difficult to define gaps when looking at all fifty state programs as a whole. The state regulators have identified that there are some gaps and that no state program is complete. To complicate matters further, it was observed that the identification of gaps is a moving target since states are continually modifying their programs. It was suggested that an assessment of the gaps needs to be presented to the group as a whole. It was also noted that one cannot assume that state programs will continue to cover the areas currently covered. State regulatory processes are dynamic. Some of the participants feel it is necessary to have a federal program to provide certainty, to ensure protection, to fill gaps and to make a level playing field for mine operations. WGA representatives indicated that they had completed some studies on gaps in existing state programs and that they would make these available to the Committee.

The facilitator noted that there is no question that the concept of regulated materials raises issues for some about whether the nature and scope of the proposed program are outside of the current bounds of RCRA. Thus, participants that advocate for the use of such an approach need to be cognizant that such proposals raise broader concerns to some of those around the table. In attempting to narrow the scope of this issue, the facilitator asked industry participants whether they had any particular concerns about the regulation of materials and units that clearly can be addressed under the current definition of waste in RCRA. Industry representatives responded that, as a general matter, they did not have concerns about this issue. The facilitator suggested that the most critical issue appears to be whether and, if so how to regulate materials and units that would not normally be regulated under the definition of waste under RCRA, i.e., "non-waste" materials. As a means of addressing this issue he suggested the following:

1. Identify major non-waste disposal mining activities and units generally.
2. Identify those that could potentially pose environmental problems without "adequate" regulations.
3. Identify those that do not pose significant environmental problems.

It was observed that these questions are hard to address without consideration of the site-specific conditions.

The group then considered a list of activities which fall under the non-waste disposal activities. Some of the items listed included: heap leach units, dump leach units, surface impoundments, stockpile of ores and subgrade ore, road network, vat leach, exploratory and

other drilling activities, placer operations, and the mine itself (open pit, underground, in situ solution mining).

In reviewing this list, the group generally acknowledged that all of these activities have the potential to cause environmental harm. The facilitator noted that states from their efforts on regulated materials, clearly believe that these activities merit regulatory attention. An industry representative stated that authority already exists for air and surface water at the state and/or federal level. The one gap which exists for these activities at the federal level is groundwater protection, i.e., there is not any federal authority and some states lack authority. He would favor allowing the states to address that problem first rather than utilizing the regulated materials approach. He would favor the EPA working with a state to develop an appropriate groundwater program. If the state did not want to, the EPA would then develop a program.

The discussion then briefly addressed the question of whether performance standards should define the desired result or whether specific design criteria should be used to reach the desired level of environmental protection. Some suggested that standards should be defined based on the impact on the resource. Others felt there are instances where siting and design issues will have to be specified to achieve the desired goal of protecting the resource.

It was then observed by an environmental participant that two competing models are being proposed here. One would have a nationwide program only where a gap exists in authority. The federal government would have authority only to fill gaps. The second model would be to establish a nationwide program which would define a model approach to addressing mine waste. It would establish standards and a process by which EPA would review state programs. It was observed that an effective program must not only include adequate authority but adequate enforcement. If a state program is deemed "adequate" but is not being enforced how would that gap be addressed under the first model? From this persons perspective, the ability to have effective federal enforcement will be a critical part of a national program.

In summary, the facilitator noted that both EPA in Strawman II and the states in their previous proposals have indicated that something more is needed to protect the environment than is currently available under RCRA. Because the "right" hooks were not available under RCRA to accomplish the desired objective, they had suggested the concept of regulated materials as one answer. The industry is concerned that this approach has other negative implications. The facilitator suggested that group attempt to identify other approaches to address this problem.

## Next Steps

The facilitator asked PDC members to consider the agenda for the next meeting. It was decided that the meeting will begin with a discussion of the current status of state programs. Next, there will be a brief presentation and discussion of the WGA's inactive mine sites and abandoned mine study. It was suggested that the remainder of the meeting will be divided between the discussion of other options to address non-waste environmental problems and an initial discussion of technical standards.

As the meeting adjourned, members were reminded that the dates and locations for the next four meetings are as follows:

June 17-18 Denver, CO July 25-26 San Francisco, CA Sept. 4-5 Location to be determined Oct.. 22-23 Location to be determined

## Public Comments

John Cranyon from the Bureau of Land Management spoke. He noted that the BLM has a statutory mandate under the Federal Land Planning and Management Act to prevent unnecessary degradation of the environment. He felt it was important for the PDC to acknowledge this mandate in its deliberations.

Stuart Miles from EPA spoke next. He provided an analogy of someone leaving a cup of coffee on the roof of their car as they drive off and it spills. They did not intend to for the coffee to become a waste, however it clearly did become a waste. From his perspective, non-waste disposal mining activities are similar. He observed that they present a problem which must be addressed.

Michael Gregory from Arizona Toxics Information Project spoke next. He began by suggesting that one might see a need for a national program if one examines the specifics of a state program and identifies the exemptions allowed. Since he is familiar with Arizona, he used it as his example and provided a list of exemptions found under Arizona law.

Additionally, he noted that even though tailings run-off is supposed to be covered under the Clean Water Act, in reality it is not. At least that is the case in Arizona where there are over 1,000 miles of streams polluted by mine runoff.

He also provided some comments on the general direction for the PDC. He feels that the general scope of a mine waste program should include treatment, storage and disposal. He also suggested that the focus of the program should be on prevention, but where prevention does not work, the program should use a multi-media approach-to regulation.

U.S ENVIRONMENTAL PROTECTION AGENCY MINE WASTE POLICY DIALOGUE  
COMMITTEE MEETING SUMMARY

June 17-18, 1991  
Denver, Colorado

MONDAY, June 17, 1991

Introductions and General Discussion

The facilitator opened the meeting by welcoming the Committee members and by explaining that there would be time at the end of each day's session for public comment.

Materials for discussion were sent in advance of the meeting to all Committee members including a draft agenda, charter, revised ground rules, an EPA discussion document (see attachment A), and three documents that had been developed by the Western Governors Association (WGA) and the Interstate Mining Compact Commission (IMCC).

The location and dates of the next meeting were announced. The meeting will be at the Sir Francis Drake Hotel in San Francisco, California on July 25-26, 1991.

The facilitator noted that the Committee had covered a number of complex issues at the last meeting and that the agenda for this meeting, beyond the scheduled briefings on the WGA and IMCC materials, was still open for discussion. He explained that the agenda and structure of each meeting will be discussed and agreed upon by the PDC. He also suggested that since Committee members had not received a copy of the draft meeting summary from the first meeting until recently, that a procedure be established for obtaining comments on the summary subsequent to the meeting rather than obtaining comments verbally at this session.

A state representative indicated that the state participants had talked and, as a group, they believed the PDC process was progressing at a much slower pace than they had anticipated it would. He stated that state representatives felt there was value in participating but they want to make progress before Congress sets a deadline. It was suggested that the Committee should not stay on topics where no agreement could be reached. It was also suggested that a matrix be prepared of the positions of each interest group on specific issues in order to focus the Committee's attention.

The facilitator indicated that there is clearly a difference in the amount of time state representatives have had to discuss these issues with EPA representatives compared to industry and

environmental representatives. He indicated that the purpose of the PDC was to provide an opportunity for all interest groups to share concerns and explore ideas as to how to best regulate mine wastes. This is not to say the work that has previously been done by all parties is wasted effort. Clearly the PDC needs to account for and build upon these previous efforts. He indicated that the danger in launching the PDC's efforts with a matrix of past positions is that it is likely to make it more difficult for the participants to find alternative means by which the concerns that underlie those positions might be satisfactorily addressed.

An EPA representative indicated that, from his perspective, the amount of progress that was made at the last meeting was to be expected since that was the first meeting of the Committee.

After some additional discussion the Committee agreed that it will make a commitment to meet in July, September and October. At that point the Committee will explicitly evaluate the degree of progress that is being made and whether that progress warrants additional meetings.

#### Review of WGA/IMCC Materials

The first-substantive item on the Committee's agenda was to review the WGA and IMCC materials which addressed abandoned mine sites and state mine waste programs. After the briefing was completed, Committee members asked a number of clarifying questions.

Regarding the survey of state programs, the WGA and IMCC representatives indicated that they had conducted the survey one year ago and that some changes had occurred since then. They briefly highlighted some of these changes and noted that the states recognize that there continue to be some gaps in state programs.

An industry participant asked whether states that have heap leaching operations perceive that there is a gap in the regulation of these types of units. A state participant responded that very few states that have such facilities operating within their boundaries do not have any regulatory program to address these operations, however, these programs clearly differ from state to state.

A state participant indicated that in the case of Nevada, virtually all significant mine waste program components have been put in place with the exception of financial assurance. The group then discussed the degree to which adopting financial assurance requirements poses particular problems for states and whether such a program component should be considered critical in the approval of state programs (this theme was addressed in more detail later in the meeting -- see below).

With regard to the inactive and abandoned mine study, the WGA representative indicated the document attempts to estimate the number of sites and the potential cost of remediation. The report discussed three basic policy options including compulsory remediation through Superfund, corrective action authority, etc., the development of incentives for encouraging but not requiring clean-up and government initiated and funded clean-up.

An environmental representative noted that seven states have completed inventories of inactive and abandoned mines (IAM) sites. He asked what the experience was with respect to the accuracy of the original estimates of the number of IAM sites. A state participant indicated that in the case of Colorado there may be as many as 2.5 times as many sites as originally estimated. Several participants noted that there is a wide diversity of environmental problems associated with these sites and that many, if not most, pose very low levels of environmental risk. An industry participant noted that in Nevada there are a lot more sites than expected, but many of these sites do not have particularly difficult environmental problems.

An environmental participant asked what was industry's perception of the extent of the problem. One industry participant responded that it is important to recognize that there is not a lot of consistency in terms of the definitions that are used for active, inactive, abandoned etc.; nor is there a lot of consistency regarding the assessment of the nature of the problems at these sites. Also, industry does not have any special knowledge about whether sites are abandoned or not. He indicated that to the extent that these sites pose environmental problems, they clearly need to be addressed.

#### Agenda Review

The next item on the agenda that had been prepared for the meeting was to continue the discussion of the how to regulate non-waste materials that had begun at the last meeting. EPA representatives had prepared a brief options paper on this topic and the facilitator suggested that the group begin its discussion by referring to this piece. Several industry participants indicated that they did not believe that they had had enough time to review the document. EPA representatives indicated that the ideas that were expressed in the paper were not particularly new. Other industry participants indicated that they were interested in discussing state/federal relations before the committee discussed either the regulation of non-waste materials and/or technical standards. State participants indicated that they shared this desire.

The facilitator noted that the agenda that had been developed for the meeting was intended to allow the Committee to address the interrelationship between technical standards, including the manner

in which non-waste materials might be regulated, in the context of state and federal relations. He reminded the Committee that, as discussed at the first meeting, there is a bit of a "chicken and egg" problem as to which issue to discuss first. He suggested that the Committee review and discuss the second component of the document that EPA had developed for the meeting which sets forth EPA's ideas about how federal guidance on technical standards might be used to help establish a certain type of structure and flexibility in the nature of state/federal relations.

After some additional discussion the group agreed to this procedure approach, i.e., to begin the discussion of state/federal issues by focusing on the EPA document as it pertained to the use of federal guidance.

#### Discussion of the Use of Federal Guidance on Technical Standards in the Context of State/Federal Relations

An EPA representative stated that EPA had put together the discussion piece labeled "An Example of Rule and Guidance Language for the Mining Program" (see Attachment A) to provide an indication as to how state/federal relations might be structured with respect the establishment of technical standards through federal rules and guidance documents.

Using the EPA document, the group discussed the relationship between the use of federal guidance documents and regulations in the approval of state plans and the establishment of enforceable environmental standards. EPA representatives suggested an approach whereby federal rules would set forth environmental standards in a somewhat general manner and, in a guidance document, EPA would set forth their preferred approach to achieving the standard. In this context, the term standards does not necessarily refer to numerical standards but could be technical requirements or an approach to achieving a desired outcome. States would not have to follow the guidance but in their state plan they would have to show how their approach is equivalent to the "standard" set forth in the rule. Thus, EPA in their review of the state plan would have to make a determination regarding the equivalency of the state plan in relation to the federal rule.

An environmental representative, using the example that EPA used in their document regarding a set point of compliance, asked what the corresponding federal rule would be for purposes of determining equivalency. The group discussed various "standards" including protection of human health and the environment or protection of the resource or media. Environmental representatives expressed concerns about how equivalency judgements would be made. They also stated that even in instances where they were comfortable with how such judgements were made, they questioned how often the implementation and adequate enforcement of state standards will be reviewed against the federal standards.

State representatives asked how the federal guidance would be developed. EPA representatives indicated that they envisioned active state involvement in the EPA work group that would develop the guidance.

Related to this, environmental representatives stated that the less precise the federal rule will be that is used to judge the adequacy of state plans, and the more reliance there is on guidance documents to make these judgements, the more important it is for the public to play a meaningful role in the state plan approval process.

This then led into a discussion of whether state plan approval decisions and/or state permit decisions should be appealable. A state representative indicated that in his state all current mine waste permit decisions are appealable and that numerous decisions have been made that were not appealed. An environmental representative responded that the lack of appeals was not necessarily an indication of public satisfaction with these decisions, but perhaps an indication of the difficulties associated with filing appeals.

Industry representatives again expressed their view that there are not many gaps in existing state programs and that the design of federal/state relations needs to account for this. Specifically, they suggested that state programs need to be reviewed as to their adequacy in terms of the protection of human health and the environment, rather than in terms of their consistency with a set of federal standards that are aimed at achieving that end.

The Committee spent some time discussing the possibility of partial approvals and conditional approvals of state programs. During the course of this discussion a distinction was made between mine waste program components that were directly related to the regulation of mine waste and those that were more general, such as water and air regulations. As a result of this discussion, it became apparent that EPA viewed the substantive dimensions of the state plan approval process as including the possibility that states that have not been delegated Clean Air or Clean Water Act authorities could continue to rely upon the federal government in these areas. Likewise, if EPA developed a plan for a state, EPA anticipated that it would continue to rely on already delegated state water and air authorities. Thus, the question of partial or conditional plan approval was largely focused on those components that were directly related to RCRA mine waste regulation, separate from Clean Water Act, Clean Air Act or other relevant statutes.

With regard to partial plan approval, EPA representatives expressed a reluctance to utilize such an approach because they believed the RCRA mine waste component would be much easier to administer if it were approved on an all or nothing basis. Thus, they suggested an approach-whereby EPA might issue a conditional approval of a state

plan with a stipulated schedule for the state to come into full compliance with the state plan approval requirements. This then led the group into a discussion of what program components might be considered "critical" to outright approval or, more importantly, conditional approval (as explained below, the group ultimately decided to create an interim work group to discuss this issue further).

The example of financial assurance came up again as an example of a requirement that many of the states with mine waste programs either do not currently have in place or, if they do, the state's requirements are likely to differ from whatever federal requirements are adopted. The question was asked whether such a situation would be critical to plan approval, disapproval, conditional approval or partial approval. EPA representatives responded that they had not gotten that far in their thinking.

Environmental representatives stated that conditional approvals caused them concerns because in similar situations their experience is that the conditions usually never get met or are met inadequately. The possibility of withdrawing approved programs was discussed and several committee members stated that the experience in Subtitle C indicates that such a step is a remote possibility. The group briefly discussed the situation in a variety of states regarding Subtitle C program approval, interim approval and withdrawal to clarify the current state of affairs in this area.

State representatives argued that they did not believe the administrative difficulties with partial plan approval were as great as EPA suggested. Industry representative indicated that it was very difficult for them to operate in situations where they have to answer to "two masters." Given this, they expressed some support for the notion of an all or nothing approach to program approval. However, they emphasized again their view that states are, by and large, doing an adequate job and that there needs to be some flexibility inherent in the manner by which state plans are approved, disapproved or conditionally approved.

An EPA representative stated that it is useful to keep the "big picture" in mind when one is trying to grapple with any one piece of the puzzle. Specifically, he noted that when EPA was preparing Strawman II they attempted to insert a number of checks and balances into the overall system of state/federal relations that not only were applied to the state plan approval process, but to federal involvement in permitting as well.

#### Preliminary Summary/Public Comment

In concluding the first day of the meeting, the facilitator verbally summarized the group's discussions by identifying some possible foundations for further discussions and some issues that require further discussion. (This list was presented verbally at

the end of the first day and in writing at the beginning of the second day. The written version is attached hereto, as Attachment B, as it was amended by the group's discussion of that document on the morning of the second day.)

The facilitator asked if there were any members of the public that wished to comment. With no members of the public indicating their desire to do so, the first day's session of the meeting was adjourned.

TUESDAY June 18, 1991

AS note~ above, the facilitator introduced a document that attempted to capture the essence of the previous day's discussions. This document was broken down into two sections that included: possible foundations for future discussions; and issues that require further discussion.

The second day's discussions began with some suggested revisions to Section I of the document (see Attachment B which now incorporates the revisions suggested by PDC members). The facilitator emphasized that it was not important for the group to reach consensus on the specific language used in the first section of the document, but rather to use the points raised in that section as launching points for the discussion of the issues outlined in Section-II of the document. Thus, the language contained in the document should not be interpreted as consensus language.

#### Discussion of the State Plan Approval Process

The first two issues raised in Section II of the document introduced by the facilitator were:

- A. Regarding federal approvals of state plans/programs, should this be on an all or nothing basis or should partial approvals be permissible?
- B. If partial federal approvals of state plans/programs are permissible, should partial federal withdrawals of state programs, as an enforcement tool, also be permissible?

In discussing these issues, EPA representatives reiterated that they shared the concerns of the regulated community regarding the difficulty of "serving two masters." They also indicated that they were concerned about duplication of efforts at the state and federal levels. Therefore, they stated that they were not particularly interested in partial approvals or, for that matter, partial withdrawals. Rather, they suggested that the process allow for conditional approvals with specified compliance schedules for obtaining full approvals. Thus, at the time a state submits its plan for approval they saw three possible outcomes: 1) full

approval; 2) conditional approval with a compliance schedule; or 3) non-approval.

EPA representatives also reiterated that in the case of nonapprovals EPA would be relying upon states to continue to implement whatever federal programs had already been delegated to it under the Clean Air and Clean Water Acts. In the case of either full approvals or conditional approvals they explained that states could rely on EPA to continue to implement Clean Air and Clean Water Act authorities if this was the status quo. Therefore, the evaluation of the adequacy of the state plan would be judged primarily on how well the federal RCRA mine waste regulatory requirements are met.

In taking the role of federal land managers into account, EPA representatives indicated that they saw each state plan approval process as comprising a matrix that would specify the roles and responsibilities of the state, EPA and federal land managers for implementing Clean Water Act, Clean Air Act, RCRA and other relevant authorities on both private and public lands.

They elaborated by saying that if a state submits a plan that is 90% complete in terms of the RCRA mine waste regulatory components, and that plan covered all of the "critical" components regarding plan approval, they would opt for conditional approval with a schedule for complying with the remaining 10%. If a state plan is only 40% complete in terms of the RCRA mine waste regulatory component, they would choose non-approval.

The Committee then discussed situations in which a state submits a plan that is only 80% complete. After some discussion the committee agreed that a subgroup should be established to identify the complete list of program components that need to be addressed in the state plan and the subset of those components that should be considered "critical" in terms of state plan approval.

The Committee discussed the difference between states that are establishing new programs and those that are simply reporting on their existing programs. In the case of the former, EPA representatives indicated that EPA may be able to provide technical assistance but, as a general matter, they did not believe that federal funds are likely to be available to assist states in actually running their programs. Furthermore, they indicated that the availability of sufficient resources within states will likely be a consideration in the review of state programs.

#### Federal Oversight. Citizen Suits and Permit Shield Issues

The other issues raised in Section II of the document distributed by the facilitator were as follows:

C. In order to balance flexibility in the nature of - state/federal relations with mechanisms that will ensure

effective program implementation, what additional "checks and balances" would be helpful. For example, should:

-- the federal government be permitted to enforce permit conditions in an "approved" state?

-- citizens be permitted to sue the state for failure to comply with an approved state plan and/or the permittee, in certain circumstances, for failure to comply with permit conditions?

D. If, to afford flexibility in the nature of state/federal relations, a national mine waste program relies on a combination of "standards" set forth in federal rules and (non-exclusive) options for how states can meet these standards at the program approval level set forth in a guidance document (as per EPA's discussion draft):

1) What degree of specificity will be required in the rule in order to have the standards be:

-- subject to an "objective" analysis as to whether or not they are being adhered to at the state plan/program approval level; and

-- enforceable at the permit issuance and compliance level by parties other than the implementing agency (i.e., citizens at state or federal level and EPA in the case of an approved state)?

During the discussion of these issues the group acknowledged that there as a long history of serious disagreements among the interest groups regarding enforcement and permits. In an effort to see more precisely what the issues of concern are, the group identified four scenarios for which the group wished to determine what the appropriate federal oversight role should be or what the appropriate implication of a presumed federal oversight role should be. These included

#### SCENARIOS THAT MAY REQUIRE SOME FORM OF FEDERAL OVERSIGHT, ENFORCEMENT OR OTHER ACTION

1) A state with an approved plan is not adequately enforcing a permit. Presumably, this situation, by definition, will mean that the state is out of compliance with its approved plan.

2) Federal agency comments on a draft permit that is about to be issued by an approved state indicates that the federal agency believes that the state will be out of compliance with its approved plan if the permit is issued as set forth in the draft.

3) A permit has been issued by an approved state, the permit is being adequately enforced, but conditions change or new information is generated which indicate that there is a substantive problem with the permit as issued.

SCENARIO FOR WHICH THE IMPLICATION OF A FEDERAL ACTION NEEDS TO BE CLEARLY UNDERSTOOD

4) Conditional state plan approval does not result in final plan approval or full plan approval is withdrawn -- what should be the effect of these actions on state permits that had previously been issued under conditional or full approval?

The Committee agreed that a second work group should be established to explore options for each of these four scenarios.

Discussion of Industry's Draft Proposal for an Alternative Approach to Non-Waste Materials

Industry representatives distributed a written draft proposal for discussion purposes that addressed an "Alternative Approach to NonWaste Materials." They explained that this draft proposal was an attempt to be responsive to the discussion at the last PDC meeting regarding the concept of regulated materials. The proposal includes three basic elements:

1) As a general requirement for approval, state plans would need to specify how the impact of mine waste on ground water will be addressed;

2) Where the ground water protection component of a state plan cannot be approved or is not submitted, EPA would develop a state-specific federal plan that would:

-- if they exist, use existing state ground water or aquifer quality standards or procedures to develop such standards in the state-specific federal plan; or

-- pursuant to a schedule established by the Regional Administrator, require states to develop the ground water or aquifer quality standards to be used in the state specific federal plans, taking into account current and reasonably foreseeable future uses, scientific validity and background water quality or

-- in the event that a state does not establish such standards, EPA would use the National Primary Drinking Water Standards where the current beneficial use is drinking water.

3) EPA would have the authority to issue permits to waste management units where a state-specific federal plan, or the ground water permitting element thereof, is in place.

As explained by industry representatives, the last element was intended to include EPA review of the design of mining units that at some point in their life will become waste management units. The example that was used in the written proposal and in the verbal description of the proposal to clarify this concept was that of a heap leach unit. Since heap leach piles are almost always disposed of in place, and thereby become waste management units, industry representatives stated that the federal government does have a legitimate role to play in reviewing the design of such units under the traditional bounds of RCRA statutory authority.

The group then discussed whether other mining units should or should not be subject to the same treatment as heap leach units under this proposal. Two examples that were posed by other Committee members included mine pits that are likely to discharge or release waters to ground water or surface water during post closure; and subgrade/lean ore piles that have a potential to pollute (i.e., cause environmental harm) during their existence due to releases and discharges to ground water and surface water. Industry representatives responded that Clean Water Act authorities could be used to address surface water discharges.

The issue of how the draft proposal would address ground water releases from mining units that may at some point in their life become waste management units was raised, but not fully discussed. The issue of how this proposal would address ground water releases from units that may not become waste management units was also raised, but not fully discussed.

The facilitator suggested that a third activity that should take place between this meeting and the next is for each interest group to find time to confer amongst themselves to consider this proposal further. Thus, state government, federal government and environmental representatives were asked to consider the proposal further and identify any concerns that they might have, as well as suggestions for how those concerns might be addressed. Industry representatives were asked to consider the concerns that had already been expressed and to explore ways in which such issues should be addressed within the spirit of the draft proposal.

#### Next Steps

The facilitator summarized the agreed upon next steps which include three interim tasks, the first two of which will require work groups with one representative of each of the four major interest groups -- federal government, state government, industry and environmental groups. The first work group will discuss what components in the state plan approval process should be considered

critical in terms of full plan approval and conditional plan approval. The second work group will discuss how each of the four scenarios outlined above regarding federal oversight should be addressed. The third activity, which will not require a work group, is for each interest group to consider the draft industry proposal for how to address "non-waste materials."

The facilitator indicated that The Keystone Center will take the lead in terms of coordinating the conference calls for the two work groups. In addition, they indicated that they would set a deadline for comments on the first meeting summary and distribute the final version of that summary along with a draft summary of this meeting and an agenda for the next meeting.

#### Public Comment

Mark Levin, a small miner from Colorado commented that he was concerned that the Committee not create a regulatory program that was too complex or costly for small miners to comply with. There are many small miners in Colorado and elsewhere who rely on their mining claims and operations for their livelihood and if this program is not designed appropriately, such people will be put out of business. He cited several examples of other federal regulatory programs that had led to such results.

Following the public comment, the meeting was adjourned.

## **Attachment A**

### **Discussion Paper Distributed by EPA for the July 17-18 PDC Meeting**

#### Introduction

The purpose of this paper is to summarize the two options raised at the last meeting of the Policy Dialogue Committee (PDC) on Mining, and introduce a new option, all of which may be used to control the potential environmental effects caused by non-waste materials. It is hoped that the paper will stimulate additional discussion of how to regulate non-waste materials. Nothing in this paper represents a federal agency position on the issue of how best to control nonwaste materials, and the federal agencies are willing to discuss whether different approaches may be more appropriate.

The first option is to identify those non-waste materials with a potential to pollute and seek to regulate only these activities under the mining program. The second option would involve the development of a program to protect ground water from all sources; the implementation of this option may not be limited to the mining industry. The third option would require mine operators to prepare a facility ground water protection plan for the entire mine site.

Whatever approach is chosen to control non-waste materials, it must be coordinated with existing state and federal programs which may already address the impacts of non-waste materials. Furthermore, the chosen approach must also not interfere with the statutory authority of the federal land managers.

#### Option 1

The Agency, in cooperation with the States, could evaluate the types of non-waste materials commonly found at mine sites and identify those that have caused environmental damages at sites. The statute would require that a state would be required to discuss how such materials would be controlled in its state plan. This risk-based approach could limit the number of regulated materials to only those which have caused environmental damages. Current data exists which indicate that ore piles, rock-piles, heap leach piles, and mine waters have caused environmental damages at mine sites listed on the National Priorities List (NPL).

#### Option 2

New statutory authority to protect ground water could grant jurisdiction over any surface or sub-surface activity which could affect groundwater. There would be no regulatory distinction between wastes and non-wastes. Rules would be promulgated that dictate specific requirements that a facility operator would have

to meet to be in compliance. Such rules could also involve minimum monitoring and corrective action requirements.

At present, the Agency indirectly regulates groundwater either by regulating wastes under RCRA, or controlling groundwater contamination hydraulically linked to surface water discharges under the Clean Water Act. This option is much broader in scope than current statutory authorities.

### Option 3

The state plan would require mine operators to develop a facility ground water protection plan. The state plan would discuss how the state intends to enforce facility ground water protection plans. A facility ground water protection plan would differentiate between wastes and non-wastes regarding how they affect ground water.

The Agency could develop general guidance on what components it believes should be in a facility ground water plan. The facility ground water protection plan would, at a minimum, require ground water monitoring and the initiation of corrective action at a site if standards are violated. Other elements of a facility ground water protection plan may include identifying the principal threats to ground water, and how the plan complies with existing federal and state laws affecting ground water. The mining program would not set minimum federal technical requirements for the facility ground water protection plan.

Specific requirements for a facility ground water plan would be left up to the states. States, therefore, would be able to develop facility ground water plan requirements more stringent than those noted in the Agency guidance document. It would be left up to the mine operator to demonstrate to the state that compliance with the plan would in fact protect ground water. The Agency would not review or approve facility ground water protection plans.

This approach could achieve two goals, protect ground water and be preventable in nature. Since a plan would not differentiate between wastes and non-wastes, both heap and dump leaches could be addressed as well as other non-wastes.

## AN EXAMPLE OF RULE AND GUIDANCE LANGUAGE FOR THE MINING PROGRAM

### Introduction

At the previous Policy Dialogue Committee (PDC) meeting, EPA described its current thinking with regard to the Federal/State relationship and the extent that EPA would develop national minimum technical standards. In particular, it was noted that due to the differences in site geology, climate, hydrogeology, topography, etc. that States need maximum flexibility in developing the appropriate requirements that should be imposed at each mine site. As a result, it was indicated that EPA would not promulgate Federal minimum technical standards, but rather, would develop a rule that would require the State to develop a State plan that would include procedures for establishing (or utilizing existing performance and/or technology standards) and how a State would implement/enforce such standards. To assist the State in preparing the plan, technical guidance would be developed by EPA. This guidance would discuss the various alternatives that could be used by the State to set standards. The guidance issued would also include a procedural framework on how to coordinate with Federal land managers regarding program implementation on Federal lands.

The purpose of this paper is to describe this general concept and show the relationship between the rule language and guidance language when addressing a particular technical topic. The example will address establishing a point of compliance for ground water monitoring. As we indicated at the last PDC meeting, while this is EPA's current thinking, we are willing to discuss whether a different approach may be more appropriate.

### Rule Language Applicable to Setting Point of Compliance for Groundwater Monitoring

For example, the rule may read:

"The State plan shall address releases to ground water using site-specific risk based and/or technology based performance standards including establishing point of compliance for those performance standards."

### Guidance Language Applicable to Setting Point of Compliance for Groundwater Monitoring

A guidance document would provide general information on how to establish a point of compliance for ground water monitoring applicable to all mines. Additionally, based upon sector and geographic specific factors, more detailed examples would be provided.

### General Guidance

For example, general guidance may read:

"Performance goal must be met at a location designated by the regulatory authority. That location must be in the uppermost aquifer and within the property boundary of the facility. The location may be either:

- a. As close as technically practical to the predicted lifetime boundaries of the mining waste management unit; or
- b. An alternative location established by the regulatory authority based on an evaluation ~f
  - i. Hydrogeologic characteristics of the facility and surrounding land;
  - ii. Volume and physical and chemical characteristics of leachate;
  - iii. Quantity, quality and direction of flow of groundwater;
  - iv. Proximity and withdrawal rates of current and potential future users of the groundwater;
  - v. Availability of other sources of drinking water; vi. Public health, safety and welfare effects.

#### Specific Guidance

Specific guidance applicable to a particular type mining operation or specific climate, geology, topography, etc. may be helpful. For example, in the case of setting a point of compliance for ground water from a tailings pond with a very deep aquifer in an arid climate the guidance may read as follows:

"When setting a point of compliance for ground water for a tailings pond in an arid climate, a number of factors should be considered. The depth of the aquifer and its predominate directional flow need to be considered. Also, the permeability and porosity of the tailings embankment, the acid generation potential or other applicable characteristics of the tailings, the predominate directional flow of liquids from the tailings ponds, the net evaporation rate, degree of snow melt runoff and the likelihood of stormwater events resulting in percolation should be considered." (Examples of setting the point of compliance at a certain depth in the vadose zone and distance from tow of tailings ponds would be given, if applicable.)

## Attachment B

### DRAFT DISCUSSION POINTS EPA MINE WASTE POLICY DIALOGUE COMMITTEE

6/18/91

#### I. POSSIBLE FOUNDATIONS FOR FURTHER DISCUSSION

A. A national mine waste program should acknowledge, account for, and build upon existing state mine waste programs.

B. A national mine waste program should acknowledge, account for, and build upon existing state and federal environmental programs, such as Clean Air Act and Clean Water Act (NPDES) Programs and the existing authorities of federal land managers regarding environmental protection. However, it is acknowledged that there is currently no groundwater protection program at the federal level.

C. Given these points, in developing a national mine waste program, it is acknowledged that there is a need for flexibility in the nature of state/federal relations and that this need should be balanced against the need for mechanisms that will ensure effective program implementation to achieve protection of human health and the environment. It is further acknowledged that there is a need for some form of federal oversight that, at a minimum, includes federal approval of state programs through the submission of state plans.

D. For the same reasons (i.e., the need to balance flexibility in the nature of state/federal relations with mechanisms to ensure effective program content and implementation), it is acknowledged that there is a need for meaningful public involvement at the state plan/program development and approval level and the permit issuance level.

E. A national mine waste program must also recognize that state mine waste programs vary and that the purpose of a national mine program is to raise the effectiveness of inadequate state programs rather than decreasing the effectiveness of adequate state programs.

#### II. ISSUES THAT REQUIRE FURTHER DISCUSSION

A. Regarding federal approvals of state plans/programs, should this be on an all or nothing basis or should partial approvals be permissible?

B. If partial federal approvals of state plans/programs are permissible, should partial federal withdrawals of state programs, as an enforcement tool, also be permissible.

C. In order to balance flexibility in the nature of state/federal relations with mechanisms that will ensure effective program implementation, what additional "checks and balances" would be helpful. For example, should:

-- the federal government be permitted to enforce permit conditions in an "approved" state?

-- citizens be permitted to sue the state for failure to comply with an approved state plan and/or the permittee, in certain circumstances, for failure to comply with permit conditions?

D. If, to afford flexibility in the nature of state/federal relations, a national mine waste program relies on a combination of "standards" set forth in federal rules and (non-exclusive) options for how states can meet these standards at the program approval level set forth in a guidance document (as per EPA's discussion draft):

1) What degree of specificity will be required in the rule in order to have the standards be:

-- subject to an "objective" analysis as to whether or not they are being adhered to at the state plan/program approval level; and

-- enforceable at the permit issuance and compliance level by parties other than the implementing agency (i.e., citizens at state or federal level and EPA in the case of an approved state)?

2) By what procedures should the guidance documents be developed?

## Attachment C

DRAFT FOR DISCUSSION PURPOSES ONLY

ALTERNATIVE APPROACH TO  
NON--WASTE MATERIALS

### POSSIBLE GAPS

The concept of "regulated materials" was apparently developed to address possible gaps in federal regulation of potential ground water impacts of certain materials that are not solid waste, such as active heap leach facilities. Even if existing state regulation of these active production processes is wholly adequate to protect ground water quality, there are two circumstances where such a regulatory gap are possible:

- o Where a state ground water program is inadequate, either through deficiencies in its rules or their implementation; or
- o Where a state has no ground water program but may have active leaching operations.

In the first instance, EPA would be unable to require changes in state requirements or its implementation of ground water regulation. In the second instance, EPA would lack the authority to require a state to develop ground water rules, or to impose a federal Mine Waste Management Plan, that would be applicable to active production processes.

When these circumstances are viewed in the context of the statutory changes necessary to craft a federal Mine Waste Program, existing EPA authorities under RCRA, and the recently released EPA Ground Water Strategy, the true potential for regulatory gaps is actually quite limited, and does not require the wholesale expansion of RCRA jurisdiction contemplated by the "regulated materials" approach.

### BASIS OF ALTERNATE APPROACH

- o States with ground water programs can regulate waste and nonwaste activities
- o All states with active heap leaching operations already regulate them under their water quality programs.
- o Heap leach piles are usually disposed in place.
- o When a heap is shut down, it becomes a waste management unit subject to the requirements of a state or federal Mine Waste management Plan.

- o It is EPA policy that leachate that escapes from an (active leach facility) constitutes waste disposal and is within RCRA jurisdiction.
- o "A core premise" of EPA's final report of its Ground-Water Task Force is "recognition of the primary State role in designing and implementing programs to protect the resource consistent with distinctive local needs and conditions."

#### ALTERNATE APPROACH

The following is provided as a general approach to the issue, not as proposed regulatory language. This approach is designed to ensure that existing state ground water programs are adequate to protect human health and the environment, to allow EPA to require the development of such a program where none exists, and to impose such a program where a state fails to do so. It would extend existing RCRA ground water authorities, and can substantially resolve the "regulated materials" issue. These provisions are entirely consistent with EPA Ground Water Strategy, and do not extend RCRA authorities beyond waste management.

1. As a general requirement for EPA approval, a State Mine Waste Management plan would need to reference the statutory authority to regulate the impacts of mine waste on ground water quality, identify the agency or agencies to whom such regulatory authority has been delegated, and describe the pertinent State regulations controlling ground water quality at mine waste management facilities. Regulatory approaches could take the form of ambient numerical or narrative standards, discharge standards, minimum technology requirements, or any other mechanism that is enforceable and that can be used to limit ground water impacts so as to provide for the protection of human health and the environment .
2. Where a State plan, or the ground water protection element thereof, can not be approved, or the State does not submit such a plan or element for approval, EPA would develop (and implement, if necessary) a State-specific Federal Plan.

In States which have numerical or narrative ground water or aquifer quality standards, the federal plan would enforce such standards, provided those standards meet EPA criteria.

In States which have no existing ground water or aquifer quality standards, the Federal plan would enforce such standards, provided those standards meet EPA criteria.

In States which have no existing ground water or aquifer quality standards, but do have laws or regulation prescribing procedures to set such standards, the State would be required to develop

standards applicable to the waste management units in question, pursuant to a schedule approved by the Regional Administrator.

In States which have no existing ground water or aquifer quality standards, nor laws or regulations prescribing procedures to set such standards, the State would be required to determine the current and reasonably foreseeable beneficial use(s) of the aquifer downgradient of the waste management units pursuant to a schedule approved by the Regional Administrator. Based on the determination of beneficial use(s) at the appropriate point of compliance. The standards would have to be scientifically valid, and could be no more stringent than background water quality.

In the event that a state with no ground water or aquifer quality standards does not develop ground water quality standards, EPA would establish the National Primary Drinking Water Standards as the aquifer or part of the aquifer is drinking water, or where the aquifer is designated as an underground source of drinking water as defined under the Safe Drinking Water Act (except designated Class III aquifers).

3. EPA would have authority to issue permits to waste management units where a State-specific Federal plan, or the ground water permitting element thereof, where in Place.

#### CLOSING THE GAPS

All requirements applicable to closed leaching facilities, including ground water quality performance standards as well as any design, operating and closure requirements, would be subject to EPA review as part of their approval process for State Mine waste Management Plans.

These same considerations would be addressed directly by EPA when the Agency needed to develop and implement a State-specific Federal plan. Whatever controls are necessary to maintain ground water quality standards at a closed leach facility must be incorporated into the design of the operational unit, due to the infeasibility of retrofitting. EPA would therefore have input to the initial design of leaching facilities as it relates to their closure. During active operations, EPA's policy that releases constitute waste disposal would appear to provide the Agency with "back-up" enforcement authority where such a release actually presents a significant risk to human health and the environment but where a State takes no action.

#### CONSISTENCY WITH EPA GROUND WATER STRATEGY

Considering the lack of any data indicating inadequate State regulation of existing active leaching operations, the above approach to federal oversight and enforcement presents the appropriate level of EPA involvement, especially in light of the

overall Agency policy articulated in the final report of the EPA Ground-Water Task Force. In fact, the Report, entitled "Protecting the Nation's Ground Water: EPA's Strategy for the 1990's" (Early Release Copy, dated May 8, 1991) appears to be at odds with the intrusive Federal presence contemplated by the expansion of RCRA to address non-waste materials. Several statements made in this report are worth considering in the context of the "regulated materials" issue:

In discussing the overall principles defining the Federal/State relationship, the Report calls the State role "critical," and continues:

"The Agency believes that while EPA will continue its role in controlling major sources of contamination, the States (and Indian Tribes) should retain the primary responsibility for the management and protection of the ground-water resource and in addressing diffuse sources of pollution. Such management may require decisions about ground-water allocation and land use which are appropriately the province of state and local government." (Page 11)

With regard to State and Federal roles in regulating specific sources, the Report concludes:

"In general, State and local governments should play the prominent regulatory role. This is especially appropriate when the activities of concern are...highly localized (e.g., vary in impact and number from State to State and nationally present a low to medium risk potential." (Page 12)

The Report's discussion of EPA review of State ground water programs is consistent with this alternative approach. The Report contains the following statements:

"As States move toward designing and achieving a comprehensive approach to protection of the resource, EPA will review and concur in State ground-water quality protection programs submitted by the States. The review will focus on "adequacy" instead of "consistency" -- the threshold question will not be whether a State's program is consistent with EPA criteria, but whether a program falls within a range deemed "adequate" to protect a State's ground-water resource." (Page 14)

"EPA's review of State programs will be flexible and take into account the unique characteristics of each State, as well as the different stages of development of each State program. The process will be interactive and iterative, with the States and EPA working together. It will focus on assessing programs to identify gaps, and providing EPA technical and financial assistance to States to address the gaps." (Ibid)

Where State ground water programs are deemed "adequate," the Report characterizes the Federal presence as follows:

"To the extent authorized by statute and consistent with Agency program implementation objectives, EPA will defer to State policies, priorities

and standards once a State has developed an "adequate" program. Under this policy of deference, EPA will study and identify ways in which the Agency can defer to State decisions in implementing Agency programs."  
(Page 15)

U.S. ENVIRONMENTAL PROTECTION AGENCY  
MINE WASTE POLICY DIALOGUE COMMITTEE  
MEETING SUMMARY

July 25-26, 1991  
San Francisco, California

Thursday, July 25, 1991

**Introductions and General Discussion**

The facilitator opened the meeting by welcoming the Committee members and noting that there would be time for public comment at the end of the day.

Next, the facilitator reviewed the suggested agenda for the meeting and explained how it differed from the draft agenda originally sent to Committee members. Rather than beginning with the discussion of enforcement and the four scenarios drafted at the June meeting, it was felt that the discussion of enforcement should be delayed until the September meeting when EPA would be able to fully participate in the discussion. It was noted that EPA's participation is currently constrained because they are undergoing an internal decisionmaking process on enforcement.

With agreement on the agenda for meeting, the facilitator then asked and received comments on the draft meeting summary from the June meeting in Denver. He noted that in the future, The Keystone Center will send the draft meeting summary out to Committee members prior to the subsequent meeting for their review. Comments will then be taken at the beginning of the next meeting. Committee members requested that they be given as much time as possible to review the draft meeting summaries.

Next, the facilitator turned to C. Bowdoin Train, EPA's Deputy Assistant Administrator for Solid Waste and Emergency Response, who wanted to make a few opening remarks. Train began by thanking the Committee members for their hard work. He specifically commended the industry members for coming up with a proposal to address nonwaste materials. He reiterated that there is interest in the PDC's efforts at the highest levels of EPA. To illustrate his point, he noted that last week, EPA Administrator Bill Reilly had been briefed on the PDC effort and Deputy Administrator Hank Habicht was scheduled to be briefed the week following the meeting. He also noted that the Agency has received a number of inquiries from Congressional members about the possible structure of a mine waste program.

Train concluded his comments by stating that he was interested hearing PDC members comments on the Program Options Paper prepared by EPA representatives to the PDC. He also identified three areas of particular interest to him:

1. Public participation in state plans and permits;

2. Concern about other sources of pollution from non-waste materials beyond heap and dump leaching; and

3. The "dual master" problem where permittees would be subject to different regulatory interpretations from the state and the EPA.

### Presentation and Discussion On EPA's Program Options Paper

An EPA representative presented the Program Options Paper (see Attachment A). He began by noting that the document is a staff level effort that does not represent EPA's position but is a vehicle to facilitate discussion. The first item presented addressed reactions to and ideas about industry's proposal on how to regulate non-waste materials. The paper supports the industry proposal presented at the Denver meeting which would require states to identify the regulatory programs they utilize to control threats to ground water from mine waste management units. The industry proposal would include giving regulatory authorities the clear authority to review the design and closure of heap leaching facilities. EPA's Program Options Paper identifies concerns about other activities or operations which may also become waste management units. To handle these units, it was suggested that owner/operators be required to develop a facility ground water protection plan that would specify actions to be taken to protect ground water including monitoring and initiation of corrective action if state standards are violated.

The second item addressed was the Enforceability of the Program. This portion of the document addresses the question of how specific the federal program must be to ensure adequate enforcement. The Program Options Paper outlines three or four areas identified by the EPA representatives where a national base for the program, a federal minimum standard, should be established. The areas identified are financial assurance to cover closure and corrective actions, procedures for establishing a specific point of compliance, the establishment of ground water standards and procedures for determining when a unit has to begin closure. It was noted that if this approach was pursued, the Agency would anticipate writing regulations so that these minimum standards would be enforceable by States, Federal Agencies, EPA and citizens.

The third item in the Program Options Paper is EPA Involvement in Permitting. This issue is raised due to industry's concern about the possibility of having a "dual master" and the environment's community's concern about EPA's ability to intervene at the permit issuance level. This proposal would give EPA the authority to sign-off on all permits at high risk mining facilities. What qualifies as a high risk facility would have to be defined.

### **Non-Waste Proposal**

With the completion of the presentation, the facilitator suggested that each proposal should be addressed separately. Thus, he began by asking

for questions of clarification on the options for regulating non waste materials

A variety of clarification questions were raised by the Committee members. As a result of the questions, the following information was provided which increased the understanding of the proposal:

The ground water plan would cover the entire facility and all potential sources.

The state would review the plan where they have the lead: EPA would do it for states without a state lead

EPA would need legislation in order to be able to require such a plan.

The plan would apply to units in addition to heap leach units.

The question of how to achieve groundwater protection standards would be left to the states and the owner/operator to determine.

Plans would address closure and operation.

The plan would be a part of the permit, therefore EPA's concerns could be raised within the permit process.

The proposal focuses on ground water because that is where a gap currently exists.

The facilitator then asked for Committee members' reactions to the Non-Waste Proposal. One industry representative observed that they favored a ground water approach since it provided general protection regardless of the source of pollution. Other industry representatives noted that it is important to them that even when a performance standard could be established that specific techniques for achieving that standard not be specified. An industry representative also raised a concern that states may not be willing to take the lead on ground water plans due to inadequate resources, staff and money. Thus, the EPA would end up with the lead and the dual master problem would result. Overall, the industry representatives felt that they needed more time to consider the proposal before making a judgement.

An environmental representative reiterated their concern about the use of guidance with its lack of specificity. Additionally, concern was expressed about the focus on one media, ground water, as the means to address potential pollution problems. Another environmental representative noted that the approach taken by EPA was creative. Another noted that he liked the idea of a ground water plan and the intent to look holistically at the site, however, he was unsure about what else would be included in this approach.

Several state representatives also raised concerns about the focus on one media. They felt that other media such as surface water and air quality should also be considered which is why the states had developed the regulated materials concept. It was also observed that the original set of issues identified by the PDC are linked and that those

connections should not be lost by focusing on one media. Another state representative raised a concern about the implications of having a federal program that specifically addresses non-waste issues. He noted that many states are already regulating specific non-waste units as no discharge units under existing laws. He felt that the expansion of coverage to the entire site may result in less effective regulation. An EPA representative noted that there was nothing in their proposal which would prevent the states from being more stringent.

This observation raised a related procedural problem which state representatives felt needs to be addressed by the PDC. The procedural problem is that in many states they cannot be more stringent than the federal government according to their respective state law or constitutions. As a result, if EPA establishes a standard, the states may have to relax theirs since they cannot exceed the federal standard. A state representative noted that this problem may be a reason for having the EPA take a broad approach to standard setting, since without specific standards, states that are in these situations could more easily avoid the problem. An environmental community representative suggest that this problem could be addressed directly with language from the federal statute. However, several state representatives noted that such language had been used in other federal environmental statutes and had not prevented the states from having to relax their standards.

The facilitator addressed the question of not overlooking other media and the linkages between issues by noting that the use of a single text proposal will allow the examination of linkages. Additionally, he noted that any decisions made by the Committee are tentative until all issues are addressed. Thus, there is an opportunity for the interactions and linkages to be examined

### **Enforceability of the Program**

The facilitator then asked for clarifying questions on EPA's discussion of the program. In response to questions, the EPA representatives explained that the four areas selected within the proposal for possible minimum federal standards were chosen because they were not linked to geology or design and were areas which they perceived as not needing as much flexibility. They also noted that the areas picked had a technical focus and were presented as examples. In discussion, they agreed that there may be other critical elements with a procedural focus which would benefit from a federal minimum standard. EPA representatives also agreed that a federal minimum standard could be a procedural or substantive standard

The first set of reactions focused on the issue of determining state plan adequacy. An environmental representative suggested that each critical plan element should have a federal minimum standard. Without a substantive or procedural standard, he felt that there would be nothing to judge adequacy against.

On a slightly different tack, another environmental representative

noted that the EPA is pursuing a guidance approach, without minimum standards, because they desire flexibility. He noted that guidance is not the only means to get flexibility. Specifically, he stated that rules can specify standards and/or options for achieving standards while maintaining flexibility. His concern was that with guidance, one is left without the procedural protection that would be afforded by the rulemaking process under the Administrative Procedures Act. He and other environmental representatives also expressed specific concern about the difference in public participation requirements afforded under a rulemaking process in comparison to those required when developing a guidance.

Several state representatives were concerned about their flexibility in interpreting the guidance. This concern focused the discussion on "What is a guidance document? Is it a suggestion or another form of regulation?" and "How does it relate to rulemaking?" In response to the question of "What is a guidance document?", an EPA representative stated that a guidance document establishes an objective and provides technical input to the states about their different options. The states would then be free to choose which option(s) to include in their program or they could choose another method which was equivalent. It was stated that EPA sees guidance as including a range of options from specific numbers to a general statements.

The broad spectrum of what can be considered to be guidance raised a red flag to a diverse set of members on the Committee. They observed that the question of whether a guidance is really just a suggestion or a defacto rulemaking depends upon how it is used. As a simplification, current case law seems to suggest that with a vague rule, the more a guidance becomes the real basis of decision, the closer that one comes to having the "guidance" be interpreted by the courts as a defacto rulemaking. With a less vague and more specific rule, if the guidance document only has technical options and is not used as the basis for decisionmaking, then it is not likely to be interpreted as a rulemaking.

Committee members from industry, the states and the environmental community all agreed that understanding the potential legal implications of relying on guidance documents as well as its implications for the design of the program and the plan approval process was important. They encouraged EPA to go back and think about their intent and goals as they consider which approach to pursue.

### **EPA Involvement in Permitting**

This proposal was not discussed until the second day of the San Francisco meeting when it was discussed in the context of Chart C EPA and State Roles Permit Review and Issuance presented by the state representatives (see below).

### **Discussion of Elements of A State Mining Waste Plan**

The facilitator began by distributing a revised version of a document entitled, "Elements of a State Mining Waste Plan" (see Attachment B). This document had been developed for purposes of the state plan approval subgroup and had been revised in response to the conference call held by this subgroup on July 12th. Those participating in the conference call, one from each interest group, felt the right items were identified although they had questions about the implications, level of detail required, etc.

The discussion began with the identification of critical elements to be added or deleted. The attached version of the "Elements of a State Mining Waste Plan" is the updated version which contains those changes. The additions are redlined and deletions are crossed out (see Attachment B).

At another point in the discussion, the Committee identified which elements they felt were critical and thus had to be a part of any approved plan whether conditional or partial. It was suggested by some PDC members that all of the eleven elements identified were critical except for item ten and some specific aspects of items five, seven, and eleven. In relation to item ten, waste minimization, many of the group felt that it should not be identified as a critical plan element. However, the environmental representatives felt strongly that this element should be considered critical in the plan approval context. After some clarifying discussion, others in the group explained that the reason for not identifying the element as critical was not because the element was perceived as less important but because it was felt that it would take additional time to determine what was meant by waste minimization in the mining context and what could be achieved .

Also, the following areas were identified as additional issues to be considered as the Committee discussed a national mine waste program and the elements of state mining waste plans in particular:

The process for modifying a state plan due to changes in regulations, the situation, etc.

Abandoned mines and inactive sites.

Conflict of interest standard by the states.

With respect to inactive sites and abandoned mines, some in the group disagreed whether it should be addressed in a state mining waste plan.

### **Conditional and Partial State Plan Approval**

The discussion then shifted to clarifying and understanding the difference between conditional and partial approval of state plans. The following reflects the facilitator's understanding of the two concepts:

Conditional approval could occur if the state plan had the elements identified by the EPA as critical and had a timeline for obtaining the other elements. Without the elements defined as critical, a plan would not be approved. Ultimately, all of the elements specified by EPA would become a part of the plan. If the state eventually failed to add those

additional elements within the specified timeframe, the state would lose control of the program. During the interim period, there would be no program.

Partial approval would occur if the state plan had all of the elements required by EPA except "X" element(s) (e.g. financial assurance). In its guidance, EPA would identify specific elements which states could allow EPA to have jurisdiction over. It would suggest that this would not establish a "dual master" situation since only specific elements would be handled in this manner and thus, would be under federal jurisdiction while the rest of the program would be under state jurisdiction. The state plan would have to specifically address how coordination between the state and EPA would be handled .

The facilitator then asked the Committee members for their reactions to these concepts. A variety of concerns were raised during the discussion. Several state representatives were concerned about conditional program approval because a state could have 90 percent of the elements and still lose the program. Environmental and industry representatives were concerned about the discreteness of issues and thus, the ability to carve out discrete elements for federal management under the partial approval approach. For example, an environmental representative noted that while EPA perceives financial assurance as a discrete issue, they felt it is linked with enforcement and corrective action authority.

Concern was also expressed about how permits issued under a conditional plan approval during the interim period would be treated.

A concern was voiced that since both approaches require a significant role for EPA, EPA will not have sufficient resources to run the program under a partial or conditional approach or have the capability to take over a state program under a conditional approval if the state fails to achieve compliance within the time specified.

As a part of the discussion, Committee members identified other elements besides financial assurance which might be considered for partial program approval. These included ground water, closure, post closure, corrective action, and soils.

Much of the discussion of partial versus conditional plan approval used financial assurance as an example. During that discussion, the environmental representatives raised concerns about how the process would work. They asked if the federal government was responsible for financial assurance would they cover inadequate bonds? Another environmental representative raised the question of who would forfeit the bond which he characterized as the ultimate enforcement decision, thereby noting the link between financial assurance and enforcement.

An industry representative raised concerns about whether the financial assurance requirement would be a rigid, arbitrary sum or whether it would reflect the potential for damage.

A state representative noted that to comply with financial assurance requirements as a part of their plan, many states would have to seek major statutory changes. This observation raised a concern which is the scenario where a state has conditional approval and they make a good faith effort to get legislation on financial assurance or some other non-critical element. However, due to the nature of the legislative process, they do not succeed. Do they then lose the entire program? He concluded that this needs to be addressed by the PDC.

Another state representative noted that some states would chose to include financial assurance in their program rather than try to coordinate with EPA.

With a better understanding of conditional and partial approvals It was decided that both approaches should be kept on the table for further discussion.

Before opening the floor to public comment, the facilitator reminded the Committee members that the eleven elements of a state mining waste plan needed further elaboration. To achieve that, he would make assignments the next day.

### **Public Comment**

Bruce Humphries, from the Colorado Department of Natural Resources spoke. He raised some concerns about congressional staff having discussions with EPA about the mine waste program. He feels that the PDC should discuss how EPA would handle these discussions. He a so noted that EPA's high risk facilities proposal had the potential to create gaps where none now exist. It was his feeling that in Colorado, the state might decide not to get involved at all with such sites and let EPA handle them in order to avoid duplications of effort.

With the conclusion of the public comment, the meeting was adjourned.

### **FRIDAY, July 26, 1991**

The second day began with a discussion of logistics for the September 4 and 5 meeting in Charleston, South Carolina. It was decided that the meeting would begin at 8:30 a.m. and end at 5:00 p.m. on September 4 and begin at 8:30 a.m. and end at 5:00 p.m. on September 5. The mine tour will be held on September 6. A bus will take participants from Charleston to Columbia visiting the mine site on the way. The tour will end in time for individuals to catch planes out of Columbia that afternoon.

It was decided to hold the October 22-23 meeting in Tucson, Arizona. A mine tour to a copper mine will be held on October 21.

Additionally, participants were asked to hold September 24, 1991 available for a possible conference call or work group meeting.

Also, it was decided that the meeting after Tucson would be held in Washington, D.C.

## Elements of a State Mining Waste Plan (continued)

Given the previous day's discussion, the facilitator noted that it is important to further describe and refine the eleven elements outlined by EPA. He suggested that the best way to get at the issues inherent in each element and to focus discussion was to have something written on paper for each element. The facilitator proposed the assignment of elements to specific interest groups for a first cut. The facilitator suggested that the ideas to be

developed by the lead interest group for each of the state program elements should be creative and attempt to reflect options which are responsive to the concerns of other interest groups rather than reiterations of previously stated positions. It was also suggested that the problem of linkages between elements could be addressed by listing the assumptions made about those other elements. Although the majority of elements would be assigned, it was anticipated that the next meeting would only address a subset of the elements.

Presented with a list of which elements to consider, the Committee members raised a variety of issues about which elements should be included. After some discussion, the interest groups asked for an opportunity to caucus to consider how to proceed.

After the caucuses, the PDC members were supportive of the concept of assigning a lead interest group to coordinate drafting a first cut at the issues for each element. However, they felt that the review process should be done in subcommittees instead of through conference calls. Thus, it was decided that the first day of the September meeting would be spent in subcommittee meetings. This then precipitated a discussion of whether such meetings would be open to the public. After consulting with Deborah Dalton, the designated Federal Representative for FACA purposes, it was concluded that the subcommittee meetings did not have to be open since they were not making a decision for the whole group. Thus, the PDC had a choice if they wanted the subcommittee meetings to be open or not. The group decided to have the meetings open for observation by the public just as the large PDC meetings are.

It was also suggested by PDC members that after three or four program elements had been discussed by the entire group, a subgroup should be formed to look at the linkages between those elements.

Since it was observed by several PDC members that each element will require a different amount of work, the facilitator concurred that each effort will be at a different stage of development by the September meeting. Some will have a paper drafted while others will just have an outline. The lead interest group for each subcommittee was encouraged to get as far as possible prior to the September meeting.

It was decided to concentrate on drafting issue papers for elements 3, 4, 5, 6, and 7 of Attachment B. Each interest group would be assigned to take the lead on at least one element. They would be responsible for

initiating the development of options for that element. The interest groups were assigned as follows:

Element 3: Implementation procedures: STATES

Element 4: Regulatory mechanisms: STATES

Element 5: Technical program requirements: INDUSTRY

Element 6: Public Participation: ENVIRONMENTAL

Element 7: Enforcement: EPA

The facilitator requested that the Committee members inform The Keystone Center staff of who would be their lead individual on their assigned elements and who would be their representative on the other subcommittees.

### **Discussion of State Prepared Flowcharts on State Programs and Permits**

Next, the Committee reviewed two of the flowcharts prepared by the state representatives. Since Charts A and B addressed enforcement issues, they began with Charts D and C. (See Attachment C.) Chart D is titled State Mine Waste Management Plan Development Process. Chart C is titled EPA and State Roles in Permit Issuance. The charts were explained by a state representative to provide Committee members with a better understanding of their content and thus, a basis for future discussions. It was also suggested that the other interest groups should consider developing their own flow charts. Some of the issues identified for further discussion include the opportunity for public participation and what the federal role will be in the permit process.

The facilitator asked if there were any members of the public that wished to comment. No-one expressed a desire to do so, thus, the meeting was adjourned.

## ATTACHMENT A

Program Options

EPA Representative to the PDC 7/10/91

### Introduction

A number of issues were discussed at that last meeting of the PDC in June, 1991 regarding how a national mining program should operate. The mining industry presented its Alternative Approach to Non-Waste Materials, and there were also discussions about how the program should be enforced and whether a permit issued under this program should be used as a "shield".

The purpose of this paper is to present our initial thoughts to those discussions and to offer some possible alternatives in dealing with those issues. None of the alternatives presented in this paper reflect the final position of the Agency and have not been reviewed by the federal land managers.

### Non-Waste Materials

The mining industry presented an alternative approach to the concept of "regulated materials" at the June, 1991 PDC meeting. This approach would require states to identify the regulatory programs they utilize to control threats to ground water from mine programs they utilize to control threats to ground water from mine waste management units. If a state did not submit a plan, EPA would develop a State-specific Federal plan. The industry approach acknowledged the need to control materials which ultimately become wastes. Furthermore, the approach stated that EPA should have input to the initial design of leaching facilities as it relates to their closure when EPA is implementing its State-specific Federal plan.

We support the industry concept that regulatory authorities should have the authority to review the design of leaching facilities. Standards for the closed unit would be incorporated into the design of the operational unit due to the infeasibility of retrofitting.

However, other activities or operations may also become waste management units at the end of their useful life: our concern would be how to control these operations. One approach to addressing these operations would be to try to identify them as we did for leach piles. Another approach, and one that may be more appropriate, would be to require owner/operators to develop a facility ground water protection plan that would specify actions to be taken to protect ground water including monitoring and initiation of corrective action if State standards are violated. Such a ground water protection plan would, therefore, deal with materials not deemed likely to become wastes, but which could have the potential to contaminate ground water.

## **Enforceability of the Program**

Representatives of environmental groups have noted their concern that it would be extremely difficult for the Agency to enforce requirements of a state plan if those requirements were not quite specific. The environmental community has noted in the past that it supports the creation of federal minimum technical standards.

While we generally believe that the use of guidance will be appropriate in reviewing state mining waste management plans to determine their adequacy, there may be a few areas where the use of federal minimums is appropriate in order to minimize risk to human health and the environment. Some possible areas where we may want to set such minimums are: specific requirements for financial assurance to cover closure and corrective action, procedures on establishing a specific point of compliance, the establishment of ground water standards, and procedures for determining when a unit has to begin closure. Should a national program include minimums, the Agency would write regulations so that these minimums would be fully enforceable by States, Federal Agencies, EPA, and citizens.

## **EPA Involvement in Permitting**

The industry indicated that it needs to know who it must satisfy from a regulatory standpoint when both the state and EPA have roles in permitting. The environmental community has noted concern that the EPA would have no means of addressing a draft permit it finds inappropriate, other than commenting on it.

We are considering an alternative approach which addresses both concerns. EPA would have the authority to approve all permits at high risk mining facilities. We would develop regulations that define a high risk facility. For all other permits, the Agency may review and comment on the permit and the State must address all of the Agency's concerns.

## ATTACHMENT B

### U.S. EPA Mine Waste Policy Dialogue committee

July 25-26, 1991

San Francisco, California

#### ELEMENTS OF A STATE MINING WASTE PLAN

Listed below are the program elements that the PDC work group suggests should be addressed in a State Mining Waste Plan. This is intended to be a complete list, that is, both those necessary for initial plan approval and those other elements that states must add in order to maintain program approval. The examples provided with some of the elements are meant to illustrate types of requirements, not to indicate specific policy choices or directions. As the work group discussed these items, it became clear that people's opinions regarding which items should be deemed the minimum necessary for plan approval (i.e., "critical to plan approval") are directly related to the scope and content of the requirements.

The State Plan Should:

1. Identify all State (including point of contact), Federal, regional, and local agencies that are responsible for implementation of various components of the State Plan and describe the procedures for addressing coordination and integration of the program.

(The WGA Mine Waste Task Force endorsed the concept of a single point of contact. to enhance coordination. The WGA did not advocate that states should centralize authority under this concept. Instead, the single point of contact would act as a "tour guide not a traffic cop." At the same time, states where mine waste permitting was centralized were not prohibited under this concept from maintaining that organization.)

2. Describe each agency's statutory and regulatory authority to implement its responsibilities under the State Plan on Federal, State and private lands within the State's borders.

3. Describe each agency's existing or planned procedures for implementing the authorities (organizational and functional structure and resources).

4. Address the regulatory mechanism(s) (e.g., permits, approvals, project authorizations or other enforceable instruments) that the state intends to use to authorize the operation of new units and to require compliance and/or closure of existing units.

5. Describe the means by which the state will carry out the technical program requirements and develop permit conditions (e.g., performance standards, design standards, closure requirements, characterization, ground water monitoring reporting).

6. Provide for: public participation in State Plan development and program actions (e.g., initial approvals, significant modifications, or where applicable renewals of permits, application, closure, post closure and whistleblower protection) prior to significant modifications to or renewals of State Plans; opportunity for citizen suits; and provision for citizen-access to information and data

7.- Address- the activities each agency will use to achieve compliance with the State Plan.

Imposition of financial or other penalties related to financial assurance requirements.

Reporting

8. Describe how the agencies would carry out corrective action or remediation when violations of trigger levels have occurred.

10. Describe the manner in which waste minimization/pollution prevention are being addressed.

11. Describe the program implementation schedule including any modifications in statutory and regulatory requirements, and incorporation of the non-critical elements. Also, describe what phasing, if any, the State may undertake for low risk type of mining operations.

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ATTACHMENT C

To: Policy Dialogue Committee Workgroup No. 2 Members  
From: Richard D. Andrews, WGA Mine Waste Task Force Consultant  
Date: July 18, 1991  
Subj: Material for PDC Workgroup No. 2

Attached are some suggested draft materials for use in discussion of the PDC Workgroup No. 2.

Illustrative Charts and Table

Attached are several flowcharts which may help to illustrate the various scenarios federal oversight and state/federal enforcement roles.

(NOTE: CHARTS ARE NOT INCLUDED ON ELECTRONIC VERSION)

Chart A: EPA Audits of State Programs

This chart illustrates the process of EPA audits and the response of states in the event that program deficiencies are found in the audits.

Chart B: EPA Enforcement of State Permits (after state issuance)

This chart presents the circumstances in which EPA could take enforcement actions on a state permit. It also indicates EPA enforcement of permits issued by EPA in partial or non-primacy state.

Chart C: EPA and State Roles In Permit Issuance

This chart gives the sequence of events associated with EPA involvement in permit applications and issuance. It should be noted that the WGA Task Force assumes that the normal circumstance will be that EPA is not involved in routine permit application and issuance matters. However, in the defined triggering events, EPA may become involved. The final permit condition and issuance decisions still reside with the states. In finalizing this chart, it might be useful to insert public input blocks.

Chart D: State Mining Waste Management Plan Development Process

This chart provides the decision, development and approval process for a state plan to reach implementation and EPA approval so that it can be federally enforced. It is descriptive of the WGA Task Force recommendations as of April 1990.

Table of EPA and State Roles:

In support of the last question posed by the PDC and formulated by Keystone is a suggested table. This table is included for the use of the PDC workgroup and perhaps the full PDC. This is a table (matrix) with EPA and state roles presented for several different possible situations involving conditional full, conditional partial, unapproved, non primacy seeking, partial withdrawals and full withdrawal of program. Given are the possible effects on state permits and the recommended division of responsibilities of the state and EPA.

U.S. ENVIRONMENTAL PROTECTION AGENCY  
MINE WASTE POLICY DIALOGUE COMMITTEE  
MEETING SUMMARY

September 5, 1991  
Charleston, South Carolina

INTRODUCTIONS AND GENERAL DISCUSSION

The facilitator opened the meeting by welcoming the Committee members and noting that there would be time for public comment at the end of the day.

Next, the facilitator noted that work group meetings had been held the previous day as agreed at the San Francisco meeting. He explained that the work group meetings do not fall under the Federal Advisory Committee Act (FACA) since decisions were not being made. However, the PDC had decided to have them open to the public. The facilitator then explained that the majority of this PDC plenary session would be devoted to summary presentations of the work group discussions. Thus, this meeting summary reflects the summary plenary discussion, not a detailed summary of the previous day's work group discussions.

The facilitator noted that each work group summary and discussion would be approximately 45 minutes long and should focus on key points from the work group discussions. The facilitator asked the PDC members to focus their questions on the issues which were discussed within the small groups and to refrain from addressing issues which had not yet been addressed by the work groups. To assist in developing the agenda for the next meeting, the facilitators noted that they would be tracking critical questions, issues and linkages which arise during the discussions.

Before beginning the presentations, the facilitator addressed the issue of the relationship of the Policy Dialogue Committee (PDC) to Congressional activities. He noted that there were several hearings on related issues scheduled in the next week. At previous PDC meetings, the members had agreed that members and alternates would not be constrained in their activities in other fora. It was acknowledged that PDC member's statements may be of a different character and content on the Hill than have been made in the PDC process. However, the facilitator cautioned that it would be harmful to the trust relationships which have been established within the PDC if people characterized views of other members as they relate to issues in front of the PDC in a public setting. From the resulting discussion, it was determined that it would be appropriate to quote PDC minutes, however, members should avoid characterizing the degree of support by the other PDC members. The facilitator ended the discussion by asking that if PDC members hear a statement about PDC discussions with which they are uncomfortable, they should speak to that individual directly or one of the Keystone facilitators so that the situation it can be clarified.

## WORK GROUP SUMMARIES

### Regulatory Mechanisms

The states were the lead interest group for the regulatory mechanism work group. They prepared a discussion paper which outlined several different regulatory mechanisms which could be used.

As a preface to their discussion, the work group felt it was important to note that the options presented and discussed were not mutually exclusive nor exhaustive. The different options considered were:

A: Multiple permits and agencies;

B: Single permit, one agency;

C: RCRA master referencing permit - one permit lists all RCRA aspects, single coordination point, multiple agencies issuing permits;

D: Integrated Federal and State Permits;

E: RCRA Subtitle Basis for Regulatory Mechanisms; and

F: Umbrella permit - one permit lists all aspects related to mining waste program (includes non-RCRA aspects), multiple agencies, single coordination point.

In their discussions, the work group only considered options A, B, C and F. The focus of their discussion was to identify the positive and negative aspects of each option. To facilitate their discussions, they made the following assumptions:

A state mine waste program exists

The state program addresses the gaps in regulatory authority and has the required elements

To guide their evaluation of the options, the group established a set of factors to use. They are as follows:

- Oversight
- Accountability
- Public Involvement
- Technical Expertise
- Efficiency

- Compatibility with Established Programs
- Cost
- Clarity of Process
- Multi-media/cross media
- Agency Coordination
- Intrastate Communication (consistent policy)

As a mechanism to understand the distinctions between each of the options, the work group created a chart listing each option on one axis and the factors on the other (see chart in Appendix A). Pluses equaled a strength, zero equaled neutral and minuses were weaknesses. The minuses were seen as weaknesses, but did not mean an option was unworkable. If the group had time, which they did not, they had intended to go back and consider means to address those problems. The chart was not a matrix to be used to select the "best" option, but was seen as a means to clarify the differences between the options and to increase understanding of them .

The work group did not select a preferred option. In closing, they reiterated that there were other permutations to consider. They also noted that the work group did not get a chance to discuss the RCRA subtitle basis for addressing mining waste nor were they able to address formats for permits or state federal relationships which they felt was addressed in element 1 of the State Plan Elements (see Appendix B).

In the ensuing discussion among the PDC members, further explanation was desired regarding option F which includes non-RCRA permits. It was clarified that the RCRA aspects related to a national mine waste program were included as were non-RCRA permits which were related to a mine and its operation. Several other questions were raised which had not been addressed yet by the work group. These included, where does site-specific authorization become appropriate, timing of permits and the difference between new and existing program and how the differences would be addressed in the regulatory mechanism.

### **Enforcement**

The lead interest group for the enforcement work group were the federal agencies, specifically EPA. The EPA staff prepared a discussion paper which identified nine issues associated with enforcement. It was noted that the discussion paper prepared was not inclusive and was a vehicle to stimulate discussion. Although the work group's task was enforcement, they did not specifically address the state plan approval process or enforcement on federal lands. They felt that these issues should be addressed by separate work groups or at subsequent sessions.

In the time available, the work group focused their discussion on four issues:

1. For a state mine waste plan to be eligible for Federal approval, which elements must be included?
2. When should the federal government get involved in permit enforcement?
3. Does State law operate in lieu of federal law in States with only a partially approved State Plan?
4. What is the extent to which permits issued by the States can serve as shields to federal enforcement?

### **Elements of a Mine Waste Program**

For the first issue discussed, the issue paper identified the following elements as potential requirements for State Mine Waste Programs:

State authority to obtain access to any site subject to mine waste regulation.

State authority to collect information from owner/operators to determine whether site is regulated or to evaluate compliance.

State administrative order authority to impose penalties?

Civil judicial order and penalty authority

Criminal sanctions

When faced with outstanding violations, the authority to link permit approval and bonding requirements to correct violations.

Public participation

The work group considered these elements as well as other additional factors. Two specific issues were discussed in greater detail: access authority and administrative penalty authority.

The work group noted that access authority is essential to an enforcement program. It was observed that access is not generally a problem. However, it was observed that with an increased enforcement effort, access could potentially become a problem. If access became a problem, the use of a cessation order was suggested as a possible solution. Others in the work group were concerned that such a proposal would result in a stricter approach to access in the mine waste program than is currently in RCRA Subtitle C.

They questioned the need for a stricter approach and were concerned about the implications for RCRA Subtitle C.

State representatives expressed concerns about including administrative penalty authority on the list of required program elements. It was noted that most states do not currently have authority to assess penalties on the administrative level and are not likely to be able to obtain such authority. To assess penalties, they must pursue the judicial route. However, it was noted that as a practical matter, the threat of civil penalties usually provides sufficient incentive to force violators to enter into voluntary settlements. At the federal level, administrative penalties can be assessed under RCRA Subtitle C. It was also noted that Colorado, New Mexico and a few other states do have administrative penalty authority as well as civil penalty authority against officers and directors of companies. Some work group members stated that administrative penalty authority should be required as a part of the mine waste program. Others felt that such a requirement was not needed and went beyond what is currently in RCRA Subtitle c

In a related issue, members of the work group felt that it is important to evaluate a state's performance regarding the use of its enforcement authority. It was noted that having the appropriate authority is not worth much if it is not utilized. The work group identified this issue as an area of linkage with the federal government's role in overseeing a mine waste pro~ram.

#### **Federal Government Involvement in Permit Enforcement**

On the second issue, "When should the federal government become involved in enforcement once a state has an approved plan?," the issue paper identified a set of factors that may be appropriate for evaluating whether federal enforcement action is warranted. They are:

The facility is likely to impact a critical ecosystem or an important natural resource.

The State has requested the federal government to take an enforcement action.

The U.S. is already taking an enforcement action at a **facility under** another statute and it is an efficient use of resources to incorporate the violations of RCRA into the administrative or judicial action.

The facility's impact may extend across state or national boundaries.

Issues of national precedence.

Several members of the work group indicated that this list of factors presumed that there would be some form of federal involvement in permit enforcement in an approved state. An EPA representative clarified that these factors were meant to suggest certain policies that the Agency might adopt with respect to their enforcement discretion and that there has not been any decision made within the Agency regarding the threshold question of whether there should be any federal involvement in permit enforcement prior to program withdrawal.

The work group then discussed the difficulties that would be experienced regarding the definition of some of these items (i.e., what is a critical ecosystem, issues of national precedence).

The work group also discussed the potential triggers for federal enforcement of state issued permits. Work group participants agreed that there needs to be federal authority for situations where there is imminent and substantial endangerment or where the state has requested federal involvement. The unresolved question before the work group is whether and, if so, under what circumstances should there be additional authority for federal action.

An environmental representative indicated that their preference would be mandatory duties for federal action in certain circumstances. However, he indicated that environmental representatives are interested in pursuing the possible use of broad discretionary federal enforcement authorities combined with specific mandatory triggers. Specifically, he presented some thoughts regarding the use of a citizen complaint trigger which could first be made to states and if states acted that would be the end. If states did not act, citizens could petition EPA involvement, at which time EPA would determine if there is a "reason to believe" the allegations and, if so, make a decision about whether to act. Such a trigger would be separate from any citizen suit provisions which would have a higher substantive standard for review. A second possibility presented by the environmental representative in the work group was to allow for EPA to initiate an enforcement action in the context of performing program oversight functions. In discussing this possibility the environmental representative indicated that it would not be acceptable to rely solely on a systemic breakdown and complete program withdrawal before EPA permit level enforcement is possible.

The group discussed the possibility of narrowing either or both of the two enforcement triggers presented above -- citizen complaint initiated and program oversight initiated -- to a specific set of substantive requirements rather than allowing for such triggers to be related to any or all aspects of the program. However, it was clear that other members of the work group were not yet ready to give a definitive response to these ideas.

## **State Plan - In Lieu of Federal Law?**

On the third issue, "Do State Plans operate in lieu of federal law?," the work group noted that this issue arises both where partial program approval is permissible and where it is not permissible, but the problem is especially acute in the former. They suggested that this problem would arise in several different circumstances:

when there is a change in state law after program approval, or  
a change in federal law or regulation after program approval, or  
a permit is issued which is inconsistent with an approved state program.

The latter circumstance is one in which the issue of permit shield arises (see below).

It was suggested that one way to address these concerns is to require codification as a part of the approval process. Some work group members were concerned that codification would result in the federalization of aspects of the state mine waste program which are state controlled such as water rights. Others suggested that a codification could take place only for those components which are clearly mine waste related. Others voiced their concern that codification and the resulting federal involvement would diminish the significance of state primacy.

### **State Permits as a Shield to Federal Enforcement**

The issue paper identified a number of factors which might be considered when determining the extent to which a state permit will act as a shield to federal enforcement. They are:

Degree of EPA input into the permitting process  
Length of term of the permits  
Degree of financial burden placed on the permittees  
Need for flexibility to quickly incorporate new regulatory requirements or modify permits to adjust to changing circumstances .

The work group concluded that this question has an important linkage to the federal oversight function and thus must be considered together. It was also noted that there is an important link between this issue and an idea that was raised at a past meeting where EPA had suggested the possibility of federal involvement in the permitting of "high risk" facilities.

## Areas of Linkage

The work group also identified areas of linkage between enforcement and issues being considered by other work groups. They include:

specificity of technical standards regulatory mechanism for implementing standards (what type of permit)  
program approval process degree of oversight  
public participation and citizen suit authority

As the work group concluded their discussions, they noted that the manner in which each of these aspects interact with enforcement will have to be discussed interactively. The work group did not have time to discuss sanctions and citizen suit provisions.

In the PDC discussion of enforcement, it was suggested by an industry representative that the administrative penalty authority may be a non-issue. He suggested that although states have to go to court to get penalty authority, the threat of judicial action is often used effectively to achieve a settlement without going to court. Additionally, it was suggested that the issue paper assumes that EPA will have the broad authority to be involved in site specific enforcement. He has problems with that assumption. In response, an EPA representative reiterated that the Agency is not presupposing broad authority, but it does assume some authority beyond imminent and substantial endangerment.

Another PDC member raised a question about enforcement discretion. In response, an EPA staff noted that the Agency would probably not be in favor of options that included mandatory enforcement.

After much discussion by the PDC group as to the critical nature of enforcement to the entire mine waste program and questioning about whether an enforcement work group should be continued, it was decided to have the enforcement work group meet in Tucson. In preparation for the meeting, each interest group is to prepare a document outlining their view of the full range of enforcement options available.

## Public Participation

The lead interest group for the public participation work group was the environmental community. They prepared an issue paper which divided public involvement issues into three categories: program approval, program implementation and enforcement and program oversight. The group had time to address the program approval process and several aspects of program implementation and enforcement. They did not begin discussion of program oversight issues.

The work group presented a series of flip charts outlining the proposed processes for program approval and program implementation and enforcement. Transcriptions of the flip charts illustrating these processes are attached (see Appendix C). As indicated, the work group discussed the plan approval process and was able to develop a series of key points in the process where various types of public participation could take place. The implementation and enforcement process discussed also led to the development of key points in the process regarding public participation.

At the conclusion of the work group presentation, it was noted that completeness reviews and complaint procedures were not discussed by the work group. It was also noted that a member of the work group was going to redraft the discussion paper so it would more fully describe areas that need to be addressed, how they would be addressed and when they would be addressed. The work group felt that their session had been productive and that they had increased each others understanding of the issues involved.

In the PDC discussion, an expansion on the options available to EPA upon receipt of a state plan was suggested. Three options were presented:

Option A. Self Certification. A state program submitted to EPA would be considered automatically approved upon submission or shortly thereafter unless and until EPA affirmatively disapproved all (or part if partial program approval is available) of the program.

Option B. Codification. EPA approval of the state program is required, and the approval process is considered a federal rulemaking because it results in the codification of state requirements into federal law.

Option C. Approval without Codification. The standard EPA program approval process, with or without a statutory deadline for reaching a final decision.

The advantages and disadvantages of these options were discussed but a conclusion was not reached.

Additionally, a suboption of approving state programs for limited time period was discussed. It was suggested that this suboption would be available for any of the three options identified above. The work group agreed that such a concept merited further discussion.

### **Technical Program Requirements and Permit Conditions**

The lead interest group for this work group was industry. The work group noted that the issue paper was prepared to focus discussion

not to present various options. The primary focus of the work group's effort was the level of specificity which should be required for technical criteria. The work group noted that some elements were more amenable to specific criteria than others. The discussion paper also presented three examples which cover the range from a non-specific guidance to a detailed rule; As they considered the different examples, concern was expressed that guidance could be considered to be the functional equivalent of a rule, thus eliminating the intended distinction.

The work group also examined an important linkage issue: the relationship between the plan approval process (the front end of the process) and enforcement (the back end of the process). From the different interest group's perspectives, whether the front end is flexible or stringent is linked to whether the back end is flexible or stringent.

As to the specificity of standards, it was felt that performance standards are amenable to more specific numbers. The discussion began by examining surface water and air standards. Many work group members felt that existing standards could be used on a facility specific or statewide basis. The environmental community representatives did not agree and indicated a desire for additional standards regarding design and operating standards as a means to achieve greater environmental control.

For groundwater, the work group also discussed the linkage between quality and quantity, but differed as to whether quantity should be considered .

Regarding compliance monitoring, the work group seemed to feel that there was a need for more flexibility in the criteria due to differences in location, design and remedies. The work group had general agreement as to the importance of monitoring, but did not resolve what appropriate action levels or triggers for action should be.

In summarizing the session, it was felt that the discussions had been productive and mutual understanding had been enhanced. Its members felt that the group should continue to meet and discuss the issues before them.

In the PDC discussion after the presentation, concerns about the ability of monitoring to assess exceedences above the standard and the ability to prevent exceedences from occurring was raised. It was also suggested that the standards need to be as specific and clear as possible.

### **Implementation**

The lead interest group for this work group was the states. They prepared an issue paper focusing primarily on the resources

necessary for state implementation of a mine waste management plan. Thus, most of the group's discussion focused on optional funding mechanisms which could be used. The work group concluded that whatever funding sources a state used, they should be stable. Thus, they recommended that such sources should be outside of the control of the state legislatures. The work group also concluded that the federal government should not require specific funding sources in its plan approval process. The work group discussed all twenty-one sources identified in the issue paper (see Appendix D for a complete list). From their discussion, they identified four which they deemed the most desirable. They are:

federal program grants and contracts  
fixed application fees  
annual license fees  
general fund revenues

The work group found the other sources to be less desirable for a variety of reasons such as reliability and Political implications.

The work group also briefly discussed some of the elements identified for organizational procedures and structures which could be included in a state plan.

During the PDC discussion, one of the environmental community representatives who had been a member of the Implementation work group added that royalties and fees on locatable and leasable minerals should be included as a source of revenues. In response, others in the work group felt that these royalties and fees were not within the RCRA focus of the PDC.

#### NEXT STEPS

The next meeting of the PDC is scheduled for Tucson, Arizona on October 21-23, 1991. The PDC members decided that the following work groups will meet: Enforcement, Public Participation, Technical Standards, Regulatory Mechanisms and Implementation Procedures and Enforcement. The Implementation Procedures Group will now address the issues associated with Partial/Conditional Approval. The work group meetings will begin on the evening of October 21 from 7:00 p.m. to 9:30 p.m. They will continue work from 8:00 a.m. until 3:00 p.m. on Tuesday, October 22. From 3:30 p.m. until 5:30 p.m., the PDC will meet in plenary session. On Wednesday, October 23, the PDC will begin in plenary session at 8:00 a.m. and adjourn at noon.

To facilitate the discussions by the Enforcement Subcommittee, it was decided that each interest group will prepare an options paper that will identify a range of enforcement options, including options that the interest group does not necessarily support, but provides their view of the possible range of options. These option

papers should also attempt to address the interplay between enforcement and th federal role in state permit issuance and program oversight.

The PDC also decided following dates for future sessions. The following dates were identified:

December 9-10

Washington, D.C.

January 22-24

Location to be determined.  
Tour on the 24th if scheduled.

#### PUBLIC COMMENT

The facilitators asked if there were any members of the public who wished to comment. With no one requesting to make a statement, the meeting was adjourned.

**U.S. ENVIRONMENTAL PROTECTION AGENCY  
MINE WASTE POLICY DIALOGUE COMMITTEE  
MEETING SUMMARY  
DRAFT**

**October 21-23, 1991  
Tucson, Arizona**

MONDAY, October 21, 1991

The members of the Policy Dialogue Committee (PDC) met informally to receive an update on recent Congressional activities of the House Subcommittee on Transportation and Hazardous Materials which have involved some PDC members and may influence the agenda of the PDC. Steve Barringer and Don Ostler, who are involved in the Congressional process, briefed the PDC. They noted that the Congressional meetings arose as a result of the hearings held on September 12, 1991 before the Subcommittee. Those who testified were invited to attend a meeting with Congressional staff to provide input on a mine waste provision to be included in a proposed RCRA bill. Subcommittee Chairman Swift hopes to introduce a complete RCRA bill by Thanksgiving, thus, the group has a short time period to provide input. The Congressional staff acknowledged the PDC and said they would welcome input from the PDC. The next Congressional meeting has been scheduled for October 29 and 30.

After the briefing, the facilitator asked the PDC members how they wanted to proceed given the existence of the Congressional process. In the plenary session, members discussed the advantages and disadvantages of linking the two processes. The meeting concluded with the various interest groups stating they needed to caucus among themselves. The decision of how to proceed would be made the following morning.

TUESDAY, October 22, 1991

The facilitator welcomed everyone and thanked Norm Greenwald for making the arrangements for the Magma Copper Mine Tour. He then noted that based on discussions with representatives from each caucus, the PDC would be meeting in three work groups: enforcement (including public participation and state/federal relations), technical standards, and scope of the program. The public was welcomed to attend the work group meetings as observers. The facilitator also noted that an opportunity for the public to comment on the discussions would be provided at the end of the day and at the close of the plenary session on Wednesday.

WEDNESDAY, October 23, 1991

The plenary session began with brief reports from each work group on their efforts. Before the reports were given, the facilitator suggested that Keystone Center staff begin taking draft documents prepared for the PDC meetings and assemble them into a "white paper." The purpose of this draft paper would be to begin the process of building a document which could be issued by the PDC if members so desired. The creation of

such a document would address the concern expressed regarding the fact that various versions of draft documents had been created, and might be misinterpreted as representing PDC agreements. The draft document would clearly state that it is a draft and does not reflect a consensus of the PDC. The PDC agreed that Keystone Center staff should prepare a draft document.

#### Technical Standards

The Technical Standards Work Group reported that they continued to proceed through the document prepared for the Charleston meeting. The work group identified areas of potential agreement as well as areas that needed further discussion. The document will be revised to reflect the work group's input and will be reviewed in greater detail at the next meeting.

#### Scope of Program

The Scope of Program Work Group discussed whether the following areas should be included within a mine waste program: active mines, inactive units at active units, abandoned mines, remining, and federal lands. A summary of the work group's discussions will be incorporated into the white paper.

#### Enforcement

A major focus of the Enforcement Work Group's discussion was on the federal role in enforcement and permitting. Additionally, the group considered what the citizens' role in enforcement and permitting would be. Each interest group identified their worst case scenario. The work group then explored options which would satisfy these concerns. The work group felt that their discussions were productive. Numerous issues had been aired, however, they were not at a stage to begin putting recommendations on paper. They felt that another meeting prior to the December meeting would be productive.

#### Next Steps

The facilitators clarified that they would consult with PDC members as they prepared the white paper as well in the preparation of the agenda for the December meeting. At this point in time, the intent is to continue with the same three work groups: enforcement, technical standards and scope of the program.

In terms of the Congressional process, it was concluded by the PDC members that it would not be appropriate for the PDC to be drafting position papers. It was felt ideas generated through the PDC would inevitably enter the Congressional process through the individuals involved in both processes, but, that it would be inappropriate for the PDC to take any formal positions regarding the Congressional process. ~n keeping with the PDC groundrules, the facilitator cautioned the PDC members involved in both processes to be careful not to characterize other groups' positions

## Public Comment

Jim Crowther from the Bureau of Indian Affairs asked if the PDC's discussion included Indian lands and if so, asked if there should be representatives from the Bureau and Indian tribes at the table?

Next, Moon Hom from the Bureau of Land Management (BLM) noted that he does mine plan reviews for Indian lands. He wanted to know how the PDC efforts would interact with the BLM's process.

In response to these questions, it was noted that Indian lands are considered within the context of the PDC discussions. It was observed that the Department of Interior which has responsibilities for Indian lands has one representative at the table who represents all Department of Interior interests including Indian land concerns.

Last, John Craynon from the Department of Interior Office of Environmental Affairs spoke. He noted that it is his role to feed information to the Forest Service and Bureau of Mines representatives to the PDC to assist them in identifying issues for all DOI lands including Indian lands.

With the conclusion of the public comment period, the meeting was adjourned.

U.S. ENVIRONMENTAL PROTECTION AGENCY  
MINE WASTE POLICY DIALOGUE COMMITTEE  
MEETING SUMMARY  
DRAFT

January 22, 1992  
Orlando, Florida

The facilitator welcomed everyone and noted that the agenda for the meeting would evolve throughout the day dependent upon the needs and desires of the PDC members. He also noted that at the end of the day there would be an opportunity for public comment.

Before turning to Matt Straus from EPA for a few opening remarks, the facilitator explained that the December meeting had been cancelled due to the scheduling demands of the Congressional activities on mine waste, "the Swift Process," which has involved many of the PDC members. He noted that the White Paper which had been mailed to PDC members and alternates prior to the meeting had been prepared at the request of the PDC at the Tucson meeting. The White Paper is a compilation of materials previously prepared by PDC members at and for previous meetings. How the document should proceed was noted as being a topic on the agenda for this meeting.

Matt Strauss, Acting Director Waste Management Division Office of Solid Waste, US EPA, began by thanking Jeremy Craft of Florida's Division of Resource Management and the Florida Phosphate Council for arranging the previous day's tour to the Central Phosphate Mining District. He felt that it had been very informative for those who attended. Strauss then told the PDC that the Agency feels that the Orlando meeting is a turning point for the PDC process. He felt that there were several items which needed to be discussed. They were:

-status of the Swift process, that relationship between the Swift process and the PDC and the renewal of the PDC's charter;

The White Paper: is it still a desired product for the effort?: Who should draft it?;

the federal land paper prepared by the federal land management agencies; and a discussion of scope of a federal mine waste program.

In closing, Straus noted that after this meeting the EPA PDC members felt they need to go to senior management to provide them with a statute report on PDC activities.

As noted in the earlier comments, all those present felt it was important to update PDC members on the current status of the Swift negotiations. Before turning the floor over to the PDC members who had participated in the Swift process, the facilitator provided some background on the Swift process. He began by noting that the relationship of the Swift process to the PDC had been discussed at

Tucson. At that time, the PDC members had agreed to keep the two processes separate. Despite that separation, he observed that there is overlap in membership between the two groups. The Swift group consists of four industry representatives (Steve Barringer and Dave Kimball from the PDC), 2 state representatives (Jim Joy and Don Ostler from the PDC), and four environmental representatives (Dave Lennett, Phil Hocker, Tom Galloway and Paul Robinson).

The Swift group met several times through November and December with Congressional staff present at the session. The group attended to be educated about the issues, thus, they asked primarily clarifying questions. Since the December 10 meeting, the Congressional staff have met on a one-on-one basis with each of the interest groups. At this point, the staff have not yet made their cut on legislative language. From their perspective, the process is still on-going.

From the facilitator's perspective, those in the Swift process had made progress in their discussions, but hit a major hurdle when they approached the discussion of scope of the program. He noted that without agreement on scope, many in the Swift process were not willing to continue to discuss other aspects of mine waste legislative package. It appears that the Congressional staff are considering how to proceed to try to come to some closure on the scope issue.

Members of each interest group, the environmental community, the states and the industry, then presented their assessment of the Swift process. It was agreed to by all that the process has not been "swift", the discussions have been undertaken in good faith and have been quite helpful in increasing everyone's understanding of the issues. They concurred that scope of the program is clearly a major issue that needs more discussion.

#### Federal Lands

Next, the PDC members reviewed the Federal Lands paper which had been prepared by the Forest Service and Department of Interior representatives in the federal delegation. Lynn Sprague of the U.S. Forest Service briefly summarized the paper and distributed an additional handout. (See Attachment A). He emphasized that the federal lands, the public domain lands, are responsible for a significant percentage of total mineral development in the United States. Sprague felt that the overall question to be considered on federal land~s is "What their relationship will be to the states and EPA?"

The paper contained a series of recommendations for the PDC to endorse. They are as follows:

#### Primacy States

Federal land management agencies should participate in the development of State Mining Waste Management Programs.

\* Federal land management agencies should participate with the EPA in the approval process for State Mining Waste Management Plans that

affect their responsibilities, with concurrence authority to assure that the State programs are sufficient to meet statutory mandates.

\* The development of MOUs among the States and related Federal land management agencies in line with existing practice should be provided for in any Federal mine waste program.

#### Non-Primacy States

The EPA assumes oversight of mining waste management programs on Federal lands.

\* The EPA defers the mining waste programs to appropriate Federal land management agency and incorporates the existing mine waste programs on Federal lands into the program for nonprimacy States.

Sprague noted that for primacy states, the overall thrust of the recommendations is to promote cooperation between EPA, the states and the federal land management agencies in the development of state mine waste management plans. It was clarified that this role applies specifically to federal lands. In the ensuing discussion, PDC members from both environmental and industry observed that the concept of cooperation made sense but expressed concern about the possibility of "dual masters." It was also noted by several members that the use of MOU's already occurs. It was then suggested by some that continued use of such a practice would not require legislative or regulatory action, thus, does not need to be addressed by the PDC.

Additionally, concern was expressed about the proposed deferral of EPA authority to federal land management agencies in non-primary states. It was suggested by a PDC member that this had the potential to result in confusion for citizens and industry as to who had the lead responsibility. The discussion concluded without any agreement as to what the PDC would endorse on the issue of mine waste regulation on federal lands.

#### Scope

The next issue of discussion was the scope of the program. As noted earlier, scope issues had not been resolved during the Swift process. The question of scope had also been discussed previously by the PDC. At that time, PDC members thought that it seemed prudent to revisit the issue.

The PDC's initial discussion of the scope of the program began with the states' proposal to have the scope of the mine waste program include what they labelled as "regulated materials" i.e. all materials which have a potential to pollute would be regulated. This approach is not constrained by a traditional definition of waste. The discussion of scope of the program at this meeting revisited the "regulated materials" proposal. The resulting discussion focused on the implications of various scope/regulated materials options. After a thorough discussion of the issues, the PDC members decided to take the State representatives who had contributed much to the discussion to

develop a paper outlining their proposed approach. They agreed to draft such a piece for further use by the PDC.

In addition, the PDC members decided to authorize a representative subgroup to meet, if it seemed appropriate, to further discuss the scope of the program prior to the next PDC meeting. If the subgroup meets, the results of their efforts would be presented to the PDC at the next meeting.

#### Charter Renewal

The last item identified by Matt Straus was the question of renewal of the PDC's charter which expires in April 1992. The PDC members decided that the charter should be renewed since that would provide the PDC with maximum flexibility in terms of future direction.

#### Next Steps

The next PDC meeting was tentatively scheduled for April 7-8, 1992 in Washington, D.C.

The facilitator then asked if there was any public comment. No-one requested to speak, thus, the meeting was adjourned.

## ATTACHMENT A

### INTRODUCTION TO FEDERAL LANDS

- Total U.S. lands  
2.3 billion acres
- Lands dispersed by the U.S. since 1781  
1.1 billion acres
- Lands still owned by the U.S.  
0.7 billion acres
- Metallic mineral production (1988)  
65%

### MAJOR LAWS AFFECTING MINING

- National Environmental Policy Act of 1969 (NEPA)
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)
- Clean Water Act Amendments of 1972 (CWA)
- Resource Conservation and Recovery Act of 1976 (RCRA)
- Federal Land Policy and Management Act of 1976 (FLPMA)
- National Forest Management Act of 1976 (NFMA)

### FLPMA AND NFMA REQUIREMENTS

Manage BLM and NFS lands for sustained yield and multiple use-- e.g., to manage mineral development considering its impacts on other competing uses.

- Manage BLM and NFS lands in coordination with public opinions and other Federal, state and local requirements, as long as those requirements are consistent with goals and objectives mandated by FLPMA or NFMA.

### AGENCY RESPONSIBILITIES

Federal land management agencies within the Departments of Agriculture, the Interior, Defense, and Energy are trustees of the Federal lands. They have the authority and responsibility to manage lands under their respective jurisdiction in compliance with NEPA, RCRA, CERCLA, CWA, etc.

## **PRIMACY STATES**

- Federal land management agencies should participate in the development of State Mining Waste Management Plans.
- Federal land management agencies should participate with the EPA in the approval process for State Mining Waste Management Plans that affect their responsibilities with concurrence authority to assure that the State programs are sufficient to meet statutory mandates.
- The development of MOU's among the States and related Federal land management agencies in line with existing practice should be provided for in any Federal mine waste program.

## **NON-PRIMACY STATES**

- The EPA assumes oversight on mining waste management programs on Federal lands.
- The EPA defers the mining waste programs to appropriate Federal land management agency and incorporates the existing mine waste programs on Federal lands into the program for non-primacy States.

**EPA MINE WASTE POLICY DIALOGUE COMMITTEE**  
**Draft MEETING SUMMARY**

**February 17, 1993**

Introduction

The meeting of the EPA Mine Waste Policy Dialogue Committee (PDC) began with introductions of the PDC members. The agenda for the day was: 1) updates by each interest group on recent and current activities; 2) EPA presentation of their plans for the next 2 years; 3) review of EPA's White Paper on PDC Activities to date; and 4) discussion of the future of the PDC.

Before beginning the updates, the facilitator placed the current meeting in its historical context. He noted that the PDC had not met for over one year. Prior to the cessation of meetings in January 1992, the PDC had met approximately every two months for a year. The focus of those meetings had been on identifying and clarifying aspects of a national regulatory program for mine waste. In late 1991 and early 1992, the focus of the states, environmental/citizen and industry representatives' attention shifted to the legislative arena where Chairman Swift of the House Subcommittee on Transportation and Hazardous Materials asked each interest group to participate in an effort to draft legislative language for inclusion in RCRA. The Subcommittee staff did draft legislation which was passed by the Subcommittee but did not the full committee.

EPA asked that the PDC be reconvened at this time to assess the status of activities associated with mine waste, determine possible future direction for the PDC and review the White Paper written by EPA summarizing PDC activities.

Updates

The environmental/citizen representatives noted that much was accomplished during the Swift discussions. They felt there was a willingness to explore alternatives and much communication occurred. They noted that the resulting legislative language was based primarily on the States' position.

On other fronts, they noted that they continue to be involved in efforts to reform the 1872 mining law. It was noted that they felt that some major policy concerns are not addressed within the context of the 1872 mining law.

They also mentioned that they are working with individual states (New Mexico, Washington, Oregon, Colorado) who are currently revising their mine waste programs. They also noted that several individual mine sites, specifically Summitville in Colorado, have been experiencing problems which from their perspective illustrates the need for federal oversight and enforcement. It was also noted that the Citizen's Mining Information Network held a meeting last summer in Missouri where lead facilities were visited and information about mining was shared.

The states reported that they have only met once as a group since the completion of the Swift process. At that meeting, they reviewed the document prepared by the State representatives to the Swift process. The next Western Governors Association Mining Task Force meeting is scheduled in the March/April timeframe.

In addition, the states are continuing to refine their programs as a result of the PDC and Swift discussions. They are also continuing to implement their programs at new and existing facilities.

The industry representatives concurred with the others that the Swift process had been valuable. They felt that the communication which occurred within the Swift process allowed progress to be made on some issues while the short time frame of the Swift process hindered efforts on other issues. Industry members also noted that both the Swift and PDC efforts had been useful. They noted that on-the-ground efforts are being made to implement some of the concepts addressed by the PDC and the Swift process.

The facilitator noted that the Swift process would not have been possible without discussions which had preceded it. He noted that many participants had expressed concern about the slow pace of PDC discussions and that as one considers possible future roles of the PDC, participants need to remember that the pace of discussions directly reflects the external incentives surrounding the issues before the Committee.

He stated that facilitators have no interest in convening meetings without a clear sense of role and objective. It is up to the PDC members and EPA to decide whether there is a future role for the PDC that merits their time and effort.

#### White Paper

Discussions then shifted to the White Paper prepared by EPA to summarize PDC discussions to date. EPA noted that the White Paper will include the appropriate caveats that the document does not reflect a consensus of the PDC. Once the White Paper is completed, EPA stated that they intend to issue the document as an EPA report which reflects PDC discussions. They then asked the PDC members whether the White Paper is accurate and how it should be changed.

In response to EPA's question, it was suggested by several participants that written comments be submitted directly to EPA. Several participants suggested that it would be difficult to give EPA general comments on tone and content without knowing how the White Paper is linked with future EPA actions and PDC efforts. Rather than continuing to discuss the White Paper, EPA was asked to give their presentation on their future plans regarding mine waste issues and the PDC.

#### EPA Future Efforts on Mine Waste

The EPA staff began by identifying a number of activities which they

intend to pursue given that they do not foresee any RCRA legislative activity occurring in the next year or so. They have identified three primary areas of effort which assume a continued reliance on state mine waste programs:

- 1) Work with federal land managers to better coordinate programs.
- 2) Provide technical information to states and land managers.
- 3) Identify and pursue ways to work more directly with states to improve mining programs.

Beyond these three primary areas, other efforts are underway involving the EPA water program (specifically stormwater, non-point source pollution, headwater mining initiative and federal facility Superfund compliance), technical demonstration projects and joint permitting efforts with states (e.g., Tri State effort - WA, OR, ID).

Increased coordination with land managers (DOI, USDA, EPA), has been occurring at least in part due to the PDC and the agencies want to formalize the process. A memorandum of understanding (MOU) between the agencies is currently being drafted. It is anticipated that it will include a lot of flexibility and will encourage the agencies to coordinate on training, studies, and research, while providing for flexibility in implementation. It is hoped that the MOU will be finalized by the end of FY 1993. From EPA's perspective, they see the coordination effort as assisting in a continuing dialogue to improve the existing program.

The second primary area, technical studies, continues efforts currently underway to fund The Western Governors Association and Interstate Mining Compact to act as a conduit of information to the states and others. Under this category of effort, there are three sub-categories: technical reports, technical assessments and waste minimization/pollution prevention efforts. In the area of technical reports, the EPA has developed a series of profiles on waste generation in a variety of types of mines (e.g., solution mineral, gold, gold placer, lead/zinc, copper and iron) and site reports of efforts to minimize waste currently being undertaken at specific mines. In the area of technical assessments, the EPA has prepared reports on topics such as tailings ponds design, acid mine drainage and cyanide. Under waste minimization and pollution prevention, the EPA is examining the feasibility of such efforts in relation to mining. They are in the process of identifying mining operations where such activities are occurring. They are trying to document these cases to share with others who are considering undertaking such efforts. In this area, they see their role as one of information dissemination.

Within the third primary area of effort, working directly with the states, the EPA is considering the establishment of a voluntary state program review process similar to that which is conducted under the auspices of the Interstate Oil and Gas Compact. The model calls for a diverse team of individuals representing industry, other states,

environmental groups, etc. to visit a state and review its program using a "template" or model state program as a basis for evaluation. The result is a report which identifies areas of strength and weakness and suggests changes. EPA feels that the strength of such a program would be its involvement of diverse interests and its voluntary nature.

In response to EPA's statement of proposed efforts, the environmental/citizen representatives noted that they agreed with a primarily state run program. However, they stressed the importance of having a baseline for comparison and enforceability. They feel that the EPA should be developing regulations as the means of establishing the baseline. They also feel that legislation should be pursued which would enable federal oversight and enforcement.

An industry representative supported the idea of joint training, research and studies but noted that it is important to involve the states in identifying areas of effort.

The state representatives then asked for the opportunity to caucus since they had not had a chance to consider these ideas prior to the meeting. The other interest groups concurred and a break for lunch and caucuses was called. The meeting reconvened at 1:45 p.m.

Following the caucuses, the states spoke first. They identified five main points: state lead program, technical assistance, guidance for states, state program review, and EPA oversight. On the first, state lead program as the focus of future efforts, the states concurred. They feel it is an efficient use of resources. On the second, technical assistance, they welcome such efforts. However, they are concerned about the direction of such efforts and would like to have a role in designing such activities. Specifically, they would like to see such efforts be field and project oriented. On the third, guidelines for state programs, they are supportive. They would be willing to take the concept back to the WGA Task Force and consider drafting such guidelines. The fourth item, state program review concept, is one that they are willing to consider. Since many of them are not familiar with all of the details of the oil and gas process, they would like additional information about the process. It is their contention that the fifth item, EPA oversight, should be minimized if states have the program lead. They noted that EPA has oversight through existing programs related to mining under the Clean Air and Clean Water Act.

The environmental/citizen representatives stated that they believe that the minimum federal standards for state program approval is a reasonable approach. They suggested that the actual development of a minimum federal program is a constructive role for a multi-party group such as the PDC. They would be willing to work on such an effort if it focused on actual rules not concepts.

The industry representatives noted that they are intrigued by the state review process and would like to hear more about it. From their perspective, it is important that all in interests be involved in

developing a template for state programs. The industry concurred with the states that the technical assistance efforts seemed like a positive direction to pursue. On a slightly different tack, they do not want any documents generated by the Swift process attached to the EPA White Paper.

EPA staff responded that they would seek and appreciate input wherever possible on their technical assistance efforts. On the concept of developing a "template" or model state program, they noted that they feel that the difference in the various interests' positions is one of specificity. They believe that everyone would agree to the components of a state program, the disagreements would occur when one tried to define them. They noted that EPA has limited resources and does not want to take another year to discuss the subtleties of these components. They would be willing to establish a short time frame for discussions and input but raised a question about what would provide an incentive for the various interests to participate.

The discussion then shifted to a question of incentives whether they be rulemaking oriented or legislative. The facilitator noted that the EPA could create an incentive by stating that they would issue the "template" for state programs by a certain date. The various interests could attempt to define such a template and provide input to EPA if they so desired.

A PDC member suggested that based on previous PDC discussions and some further elaboration, a template/guidance for state programs could be developed for use by peer review groups to evaluate existing state programs. It was suggested that this could be done in a 6 month frame. As a result of that effort and the resulting reviews, the need for future legislative and rulemaking efforts could be determined.

This suggestion was clarified and elaborated as consisting of three steps:

- 1) Identify the broad characteristics of a template/guidance for state programs.
- 2) Define a peer review process like the IOGC process. Key aspects include its voluntaryness and use of a diverse review group.
- 3) Identify gaps which are not covered by the template/guidance and possibly pursue legislative or regulatory remedies.

The facilitator then asked the PDC members if they were interested in pursuing such an effort whether it was within the context of the PDC or elsewhere (e.g., WGA Task Force). The PDC members responded favorably with a few caveats. The importance of a limited time frame was stressed as well as the need for EPA to provide assurance that they would issue the template/guidance by a certain time. They also noted that it was quite likely that a consensus would not be reached on some of the issues but it was worthwhile to continue discussions for a limited time. The final input to EPA could include minority opinions.

The meeting concluded with the following identified as next steps to be pursued:

- EPA will draft a concept paper outlining the proposal to develop a template and voluntary, peer review process within a week or so. The draft concept paper will then be distributed to PDC members for review and comment.
- While comments are being sought. PDC members will seek out information about the IOGC process and EPA will take the idea back to its management for consideration.
- EPA will put together a proposal for a procedure to develop the template and state program review which will include a clear statement of goal for the process, timeline, and address the issue of resources for the meetings and subsequent peer review process.
- Based on EPA's proposal, PDC members can decide whether they want to participate or not.

On a piece of unfinished business from earlier in the meeting, PDC members were given until March 15 to give EPA comments on the White Paper. EPA stated that prior to determining next steps regarding the White Paper, they would notify PDC members.

The facilitator asked if any of the observers wished to make a statement. No one requested to speak. The meeting was adjourned.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

March 12, 1993

OFFICE OF  
SOLID WASTE AND EMERGENCY RESPONSE

**MEMORANDUM**

SUBJECT: Procedural Approaches to Develop a Template and Conduct  
State Reviews

To: Representatives of the Policy Dialogue Committee on  
Mining

FROM: Matthew A. Straus, Director  
Waste Management Division

**Introduction**

As a result of the last meeting of the Policy Dialogue Committee on Mining (PDC), held on February 17, 1993, the U.S. Environmental Protection Agency is seeking the views of the PDC participants development of a "template", which would identify the critical elements of a state mining waste program. EPA is also seeking PDC input for the development of a program to review existing state mining waste programs by comparing those programs against the template.

The purpose of this paper is to discuss two possible procedural approaches on how the template could be developed, as well as a proposal for the conduct of state program reviews. (It should be noted that while we are requesting your views, we are also seeking input from the new Administration. If we get additional direction, we will let you know. However, in order for us to make a decision quickly, we would request your views by April 2, 1993. )

Template Preparation

The first approach would have a subcommittee of the PDC develop the template. The PDC has held a number of discussions regarding critical state program elements. A list of those elements can be found in the meeting notes from the Tucson meeting. At that meeting the PDC broke up into working groups to further discuss the details of each component. Other approaches have been discussed at PDC meetings and also merit consideration.

Thus, we believe that there is a considerable body of material the PDC could use to develop the template.

The PDC would first need to determine how a template can be developed which acknowledges that there are many alternative means of achieving

environmental goals. Further, the PDC should discuss how the use of the template in conducting state reviews should affect the nature and make-up of the template. The goal of the state program reviews will also need some discussion.

Under this approach, the PDC would create a subcommittee with representatives from each of the interested parties who will be charged with developing the template. EPA acknowledges that the template may include minority opinions, but every effort should be made to reach consensus on the template. The subcommittee should meet two times and then report back to the full PDC. The first meeting is expected to be held in the Spring, with the second meeting being held six weeks later. One month after the last meeting of the subcommittee, a draft of the template would be presented to the PDC for approval. This process should conclude by approximately September, 1993. After this action, the PDC would cease its operations. Under this approach, if the subcommittee or the PDC fail to develop a template, the EPA will complete development of the template based on PDC input to date.

An alternative approach to PDC development of the template is that the document entitled, "WGA Recommendations for a Mine Waste Regulatory Program", be utilized as the template. <sup>1</sup> This document was developed and approved by the Mine Waste Taskforce of the Western Governors Association in December, 1989. The use of the WGA document would allow us to begin the state review process very quickly.

It is also feasible that some variation or combination of the two approaches noted above could be used for template development. It should be emphasized that EPA has not decided on a preferred approach. EPA is committed to assisting in funding of template development activities to assure active participation of all the interested parties.

#### State Program Reviews

The Agency believes the most effective means of implementing the review process is through a grant, which would fund an organization to fine tune the review procedure, coordinate reviews, assure participation of all parties, and prepare final reports. These reports would not be EPA documents; rather they would reflect the positions of the review participants. We believe that a procedural approach similar to one underway with the Interstate Oil and Gas Compact Commission (IOGCC) could be used to review state mining waste programs.

As noted in the last PDC meeting, EPA is currently assisting in the development of state program reviews through a grant with the IOGCC.

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<sup>1</sup>As we discussed at the PDC meeting, the state/EPA relationship would not be included in the template since we would only be defining a state mining waste program template. However, the template should address the state/federal land management agency relationship.

IOGCC first developed a guidance document identifying the critical elements of state oil and gas exploration and development waste regulatory programs. This document, which is currently undergoing the first of a regular series of reviews and revisions, is used as a template against which an existing state program is evaluated. IOGCC works with its member states, and a multi-interest group advisory committee, to choose states for review, select the members of the review committee, consider changes to the review process, and reevaluate the adequacy of the template. The review teams also include representatives of all major interests. In the case of mine waste state reviews, this would also mean participation of the federal land managers.

Prior to a review team visiting a state, the state is requested to fill out a detailed survey about the structure and implementation of its regulatory programs. The response to the survey, information from in-state interviews, and other supportive materials provided by the state, are the factual bases for the review team to use in evaluating the state program. We anticipate that each state review will result in the preparation of a report which will identify the strengths and weaknesses of the state mining waste program, identify any gaps, and provide recommendations for improvements.

Please mail or fax your comments on this approach to:

Stephen Hoffman, Chief (OS-323W)  
Mining Waste Section  
Office of Solid Waste  
U.S. Environmental Protection Agency  
401 M Street, SW  
Washington, D.C. 20460  
Phone 703-308-8424  
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## **State Review Process**

States volunteer to be reviewed.

The IOGCC Council on Regulatory Needs (State Program Review Committee) selects the review panel.

Review Panel is comprised of two to four representatives from environmental/health or oil and gas agencies from other states, one representative of industry and one representative of an environmental organization.

In addition to the Review Panel, there are a limited number of official observers. This group of observers includes one local environmental representative, one local industry representative, one EPA Regional representative, one national DOE representative, one national DOI representative plus or one local DOI representative, if appropriate.

IOGCC staff and EPA HQ staff are also present at state reviews for the principal purpose of guiding the process.

The Review Panel team leader is always one of the state agency representatives.

The state review consists of a questionnaire filled out by the reviewed state followed by interviews of state personnel. Official observers are able to actively participate in the interview process. The on-site interviews take up to five days and may also include a visit to one or more field offices and/or field sites.

An exit interview is completed at the conclusion of the state review. This is expected to provide a two-way exchange of information between the reviewed state and the Review Panel.

The Review Panel writes a report on the state program that has been reviewed, including descriptions of strengths and weaknesses of the program. Recommendations for ways to make improvements are provided for all areas where a state program is found to be deficient. All Review Panel members' views are included in the report.

The draft of the Review Panel report is circulated to the state and the official observers for comment.

The final report of the state review is submitted by the Review Panel through the IOGCC to the reviewed state. Because the final report is a report by and from the Review Panel, it does not need to be approved by the IOGCC.

## Summary of IOGCC Study of State Programs

In January 1989 EPA provided a grant to the IOGCC to assist EPA in working with the states to improve some state regulatory programs where appropriate.

- This task (completed in December 1990) was to study existing state regulatory programs and make recommendations to states for developing an effective state program.

At the request of EPA, the IOGCC Council on Regulatory Needs was established as a panel composed of representatives from the following types of organizations:

- state oil and gas regulatory agencies
- state environmental regulatory agencies
- federal government (EPA, DOE and DOI)
- industry, (API, Appalachian Consortium, and Texas Independent Producers and Royalty Owners Association), and
- environmental interest groups (e.g. Alaska Citizens for the Environment, and Mineral Policy Center (since replaced by National Audubon Society).

The panel was divided into two committees (the Technic Committee and the Administrative Committee) and each committee has been subdivided into several subcommittees:

- Administrative Subcommittees
  - Personnel and Resources
  - Statutory Authority
  - Intrastate Organization and Coordination
  - State and Federal Relationships.
- Technical Subcommittees
  - Commercial and Centralized Disposal Facility
  - Pits
  - Land Disposal

The Council's December 1990 report includes guidelines on the above subcommittee topics for states to use in develop improved regulatory programs.

The guidelines do not cite specific minimum standards, generic in nature to allow for the maximum flexibility by states in developing their programs.

## **IOGCC History and Background**

The Interstate Oil and Gas Compact Commission (IOGCC) organization made up of the governors of 29 member states and six associate member states. Member states produce over 99% of domestic oil production.

The governors of member states are members of the IOGCC, but typically they designate the head of their state oil and gas regulatory agency or some other person as their official representative to the IOGCC.

The IOGCC was originally formed about 1935 to encourage the conservation of petroleum and wise management of the resource. More recently they have begun to take an active role in environmental issues.

# Policy Dialogue Committee White Paper

## Introduction

In May, 1991, the EPA's Office of Solid Waste (OSW) chartered the Policy Dialogue Committee on Mining Waste (PDC), under the Federal Advisory Committee Act (FACA). The PDC has seven representatives each from the States, the Mining Industry, Public Interest Groups and the Federal government. Representatives from the Federal government include EPA, the Department of Agriculture, and the Department of the Interior. The PDC is providing assistance to EPA in the development of a program to control the management of non-coal mine waste. The purpose of this paper is to provide an overview of the PDC discussions to date. As this is only a summary, the notes of the individual meetings can be consulted for further detail.

The PDC has met a total of six times since it was established. The meetings were held in Washington, D.C. on May 15-16, 1991; in Denver, CO on June 17-18, 1991; in San Francisco, CA on July 25-26, 1991; in Charleston, SC on September 4-5, 1991; in Tucson, AZ on October 21-23, 1991; and in Orlando, FL on January 23-24, 1992. Mine tours have been held in conjunction with a number of the PDC meetings to provide participants a first hand opportunity to examine industry mine waste management practices.

The major issues that have been discussed by the PDC are the scope of a mine waste program, technical standards, enforcement, state plan approval and the oversight process, public participation and the role of the Federal land manager (FLM). The PDC formed subcommittees to address these topics. This paper discusses each topic in turn. Although pollution prevention/waste minimization was cited as a priority issue throughout the PDC process, it was discussed in some subcommittee deliberations but not synthesized by the Committee.

The PDC meetings have served to ensure that issues related to non-coal mining wastes have been thoroughly discussed differing positions, as well as the reasons for these differences, have been identified. Consensus was not outcome and the members made considerable progress in understanding the positions presented by each party. Each of the parties made clear that they would not be in a position to reach consensus on components of a mine waste program, until the entire program was described and cross-component implications were discussed and understood.

## Scope of the Program

The PDC has focused on the management of extraction and beneficiation wastes and has not specifically included mineral processing wastes. The members of the PDC reached some general understanding of how a mining program should operate; however, the group has not reached specific agreement on what activities, operations and/or wastes should be included within the program.

Much of the issue on scope focused on the definition of mining waste and the regulation of non-waste units, such as heap leach piles, ore piles, and mine water, that have the "potential to pollute." The concept of "regulated materials", which captured these materials, was initially suggested in the May, 1990 Strawman document (an EPA staff level approach for managing extraction and beneficiation waste and materials).

Industry representatives expressed the view that they were wary of allowing federal authority over these non-waste operations. They maintain that the inclusion of non-waste units goes beyond the scope of RCRA. Industry representatives indicated that if there was a regulatory gap for mine waste, it was in the groundwater control area, and suggested as a possible alternative, the requirement for the preparation of a groundwater plan. They showed some flexibility in their position, since the groundwater plan could include the regulation of heap and leach operations. They believe that this may be appropriate since these piles become wastes upon completion of mining and that control of these operations upfront is appropriate.

Other issues discussed in this area included abandoned/inactive mines, exploration wastes, and closure and reclamation. In terms of abandoned mines, EPA representatives indicated a preference not to include abandoned mine lands (AMLs) in the context of the mining PDC in order to put some bounds on the discussions. Public Interest Group representatives, however, felt that these sites should be addressed because they may pose significant risks. It was agreed that abandoned sites may come up in the course of discussion, though the issue was not specifically on the Committee agenda.

Industry representatives did not appear to object to these non-waste units being regulated by the States under their own authorities.

cooperation with IMCC, which examined inactive and abandoned noncoal mines. This report, which coincided with the PDC meetings, illustrated the impact these mines have had in mining districts across the country.

In September, 1991, the WGA published a final report in cooperation with IMCC, which examined inactive and abandoned noncoal mines. This report which coincided with the PDC meetings, illustrated the impact these mines have had in many mining districts across the country.

Exploration wastes were discussed in the Scope subcommittee meetings. It was suggested that the scope of the mining waste program might include wastes from exploration activities, to the extent that it includes roads, pads, and drillings. However, it was not addressed further in subsequent full PDC discussions.

In terms of closure and reclamation, Industry representatives questioned whether reclamation should be part of the scope of the program. Industry representatives distinguished closure from reclamation by stressing that although they are related, closure ensures a chemically safe, environmentally protected site, whereas

reclamation ensures a physically safe site. Reclamation is surface treatment, such as re-vegetation. The States felt that adequate financial assurance provisions be included in closure plans. Many states currently do not have adequate financial assurance provisions to cover the cost of closure and reclamation.

### **Technical Standards**

The discussions concerning technical standards are tied to enforcement, and initially focused on the issue of whether to adopt Federal minimum technical standards or to adopt performance based standards, supplemented with guidance. EPA representatives suggested tailoring regulatory programs to the unique geologic, geographic, and climatic conditions in each state, and in an attempt not to develop a prescriptive program, it suggested as a possible approach that performance standards should be developed that states would then include in their state-specific mine waste management plans. These standards would be supplemented with guidance.

The State and Industry representatives reacted favorably to such an approach. The Public Interest Group representatives offered an alternative view that in the absence of Federal minimums, it will be difficult to review and evaluate state programs, and to enforce a program on the Federal level when a state is not enforcing its program. Although differences remain as to what approach to take to technical standards, the various interests believe that some degree of flexibility is necessary to account for variations in individual State's regulatory programs.

The Technical Standards subcommittee attempted to list examples on how to achieve a sufficient degree of flexibility, while still including an adequate level of specificity. The subcommittee pointed out the need to balance the level of "front end" (program development) versus "back end" (enforcement) involvement. The subcommittee addressed performance standards for groundwater, surface water, and air quality; design and construction requirements; requirements for unit closure; requirements for site and waste characterization; and requirements for reporting.

The subcommittee discussions achieved some understanding regarding performance standards and design and construction criteria. In terms of setting performance standards for surface water and air, it was generally felt that the State plan could use existing Federal standards or Federally approved state standards; that State standards could be more stringent than the Federal standard; and that new sites should be treated differently from existing active facilities. It was also pointed out that a mining program should address groundwater protection. Regarding design and construction criteria, it was felt that a state plan should have certain minimum design and construction criteria.

Questions still existed regarding waste characterization and closure requirements. Although the group believes that closure activities should be required, there are differing views concerning how RCRA would define closure and how that definition would affect the Federal land

managers definition of reclamation. One standard definition is needed to clarify what activities constitute closure. Additionally, although there was a belief that waste characterization should be required, the group did not come to specific agreement as to the magnitude and frequency of such testing.

### **Oversight and Enforcement**

There are two principal elements of oversight/enforcement. These elements are Federal oversight in permitting and Federal involvement in site-specific enforcement. The level of EPA involvement in site-specific enforcement was subject to considerable debate in the PDC discussions. At the beginning of the discussions, the Public Interest Group representatives supported full Agency site-specific oversight and enforcement while Industry and the States favored (for different reasons), limiting Federal involvement in site-specific enforcement.

With continuing discussion, however, the respective positions have evolved, with differences in opinion narrowing. At a minimum, the parties seem to believe that EPA could have limited enforcement and oversight authority triggered by certain conditions which would serve as limits. These conditions include imminent and substantial endangerment, a "significant" violation would have occurred, and lack of diligent prosecution by the states. The parties also felt that EPA should not take any action until it gave the states 60 days notice to address the problem. Furthermore, it was generally believed that the level of public participation in the permit and enforcement process should be inversely related to the level of federal involvement.

### **State Plan Approval**

The discussions regarding state plan approval have revolved around two issues. The first issue is whether the program should be self-implementing--that is, whether the state would be considered to have an approved program once they submit their application to EPA or whether the Agency had to review and approve the program before it was considered an approved program. The other issue is whether a State should receive partial or conditional approval.

In addition to these issues, there was also discussion on the State plan. In particular, it was suggested that the State plan could address all media: air, water, and soils. Furthermore, the plan would discuss how the State would develop regulations, permit sites, and enforce its program. There was also considerable discussion regarding whether certain elements were critical or non-critical, as they related to having a comprehensive program.

After some discussion, there was a general understanding by the parties that a state plan should include a description of the following: (1) all State, Federal, regional, and local agencies that are responsible for implementation of various components of the State plan; (2) the statutory and regulatory authority each agency has to implement its responsibilities under the State plan; (3) the existing or planned

procedures each agency has for implementing its authorities; 4) the regulatory mechanisms that the State will use to authorize the operation of new units and to require compliance and/or closure of exiting units (enforcement); (5) public participation provisions in State plan development and program compliance with the State plan; (6) how the agencies would carry out corrective action or remediation; (7) the financial assurance program; (8) the waste minimization/pollution prevention program; and (9) the program implementation schedule.

In terms of the approval procedure, it was suggested that if there was an approval process that the one already used in the Clean Air Act and RCRA may be a good model--that is, the program would require EPA approval of the state plan. The Public Interest Group representatives generally agreed with this type of approval.

The States offered an alternative view. In particular, they suggested a self-implementing or self-certified state program that would be considered automatically approved by EPA upon submission, unless EPA affirmatively disapproved all (or part if partial program approval is available) of the program. The States presented a WGA chart entitled, "State Mine Waste Management Plan Development Process" to the PDC for comment.

The State representatives also asked whether a State could seek partial approval of a mine waste program and allow EPA to implement the rest. EPA and the Federal land managers noted that, in such a situation, there would be multiple masters to deal with under that circumstance. The States pointed out that EPA already operates in this fashion in RCRA and the Clean Water Act where the State does not have primacy. To address this situation, the states suggested having EPA assume responsibility for any or all of the critical elements of a plan via a Memorandum of Understanding (MOU), if a State is unable to develop those elements. By doing this, the States indicated that it would limit the possibility of both EPA and the States implementing duplicative programs.

A Public Interest Group representative proposed the SMCRA approach as an alternative to partial program approval. Under this approach, the federal regulatory authority would examine each plan element, submitting each to conditional or partial approval based on its own merit.

### **Public Participation**

Public participation was listed as one of the primary issues for discussion. Although no agreement was reached on the extent for which the public should be involved, there is a mutual recognition that some level of public participation is necessary in the program approval process, program implementation and enforcement, and program oversight. It was also acknowledged that the level of Federal involvement in the program may be inversely related to the degree of public participation -- meaning that decreased Federal involvement could warrant increased public participation.

The debate became focused specifically on how public participation might offset federal involvement. The question of this balance became a point for discussion, as the Public Interest Representatives indicated that they might be able to support less federal involvement if provisions were made for increased citizen involvement throughout the plan approval, permit and enforcement processes.

The public participation debate also focused on citizen suit authority. The Public Interest Groups have continuously stressed the need for a strong public oversight role in permitting and enforcement, including the ability to initiate state actions in court. The States, while they support strong public participation, raised an issue as to whether this would lead to an abundance of frivolous actions that would deplete state resources and seriously delay the routine administration of the program.

### **Federal Lands**

About half of the 1,500 mines in the U.S. are located on Federal lands. These lands are overseen by land management bureaus in the U.S. Department of Interior (USDOI) and the U.S. Department of Agriculture (USDOA). Senior officials from these agencies are participating in the PDC. In particular, the representatives from the Forest Service, the Bureau of Mines, and the Bureau of Land Management.

The Federal Land Managers (FLMs) agreed to draft discussion paper providing a background on the FLM agencies and an outline of their position regarding the role of the FLM within a mine waste program. An FLM representative described the FLM's management of mining waste and noted that the FLMs do not have separate operation plans for different media; rather they have a mining plan of operation that addresses all aspects of managing mining waste. This plan addresses water quality, air quality, groundwater quality, reclamation, socioeconomic, and visual impacts as covered under NEPA. The miner is required to lay out the plan. If the FLM is not qualified to review such a plan, they will contract out to get the expertise.

The FLM representative stated that except where responsibility is statutorily given to the States in the Clean Air and Clean Water Act, the FLMs are essentially held accountable for all activity on their lands. In this respect, it was suggested that the FLMs should take a leadership role in mine waste management on Federal lands. Additionally, it was alluded to the FLM's dependance upon MOUs with various States, in sharing the work and regulatory activities which take place. An Industry representative stated that industry is currently working with the FLMs on a Technical Advisory Committee to identify areas that need improvement and to set up standards. He said it is Industry's hope to avoid encountering conflicting State and Federal standards through the use of MOUs.

It was recognized by the various interests of the full PDC, that FLM statutes would have to be integrated in the R~~C~~RA program to avoid duplication. The EPA representative stated that oversight on federal lands would need to be worked out with the FLMs (i.e., to what degree

is EPA involved in the case of a permit issued on an FLM site.) EPA also clarified that in a primacy State there would be a State-lead and not an EPA-lead.

Industry representatives noted that the relationship of the Federal agencies should be clarified in Non-primacy states. The State representative suggested that perhaps a HSWA/RCRA permit authority may be a likely scenario with State and EPA authority in certain areas. This would entail shared State and Federal responsibility on full program approval. The States believe that it makes sense to use the expertise of the FLMs, especially in facilitating issues of cross-state contamination. Nevertheless, the States expressed the view that in primacy states, they would accept FLM comments, but not FLM approval authority of State programs.