

State of New Mexico
Energy, Minerals and Natural Resources Department

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June 13, 2022

Glenda Owens
Acting Director
Office of Surface Mining Reclamation and Enforcement
United States Department of the Interior
1849 C Street, NW
Washington, DC

Re: New Mexico Comments on Bipartisan Infrastructure Law Draft Implementation Guidance (Draft Guidance)

Dear Ms. Owens:

New Mexico is excited about the opportunity to receive additional federal funding under the Bipartisan Infrastructure Law (BIL) to address threats from legacy coal mines throughout the United States and particularly in New Mexico. As a member of the Interstate Mining Compact Commission, New Mexico (NM) has participated in several discussions on implementation of the BIL and appreciates the Office of Surface Mining Reclamation and Enforcement's (OSMRE's) and the Department of the Interior's (DOI's) briefings.

The State of New Mexico, Energy Minerals and Natural Resources Department, Mining and Minerals Division (MMD) appreciates the opportunity to provide comments on the Draft Guidance, which outlines implementation of this new funding source. The goal of these comments is to identify opportunities to streamline grant application submittals, simplify management of funds, and most importantly to expeditiously complete reclamation construction projects using these funds. For the reasons outlined below, the Draft Guidance would be difficult to implement, especially as it relates to miner preference, union worker preference, bid aggregation, ATP process, grant application, and socio-economic reporting requirements. MMD's comments on the Draft Guidance are listed below, in the order they appear.

Section III. ELIGIBLE PROJECTS & PRIORITIZATION

1. *"Under Section 40701(f) of the BIL, States and Tribes should prioritize projects that provide employment opportunities to current and former employees of the coal industry, and OSMRE will work with States and Tribes to incorporate such prioritization into their reclamation plans."*

Given that active mining in New Mexico has significantly decreased over the last 10 years, a contractor pool that employs out of work coal miners may not exist as the workforce we had in the state may have left to seek other opportunities. For the same reason, our previous contractors are also unlikely to have out of work miners on staff making it nearly impossible that we can meet this goal. Instead, New Mexico recommends the guidance provide the ability to satisfy this goal in individual state procurement processes by awarding additional points to responsive proposals that employ current or former employees of the coal industry when evaluating responses to Request for Proposals (RFP) for abandoned mine lands (AML) work, which is how MMD currently contracts for this important work.

Also, to enable awarding any bonus points for responses to an RFP, NM requests that the OSMRE provide a definition of "former miner".

2. *"To further implement the Section 40701(f) priority, States and Tribes should engage with labor or worker organizations that represent coal industry workers to identify current or former employees of the coal industry who are candidates to be employed by AML reclamation contractors and provide OSMRE with certifications of this engagement."*

NM is unaware of any labor or worker organizations representing the coal industry in the state. NM recommends the guidance allow for identification and outreach to mining groups that represent the coal industry to verify potential candidates to be employed by AML reclamation contractors and provide OSMRE with certification of this engagement to satisfy this goal.

3. *"The Department will commence notice and comment rulemaking, as necessary, to further implement Section 40701(f) and to provide additional guidance as to its scope."*

NM recommends that rulemaking not be initiated until BIL funds are managed under final BIL guidance for 2-3 years to better establish what goals should and should not become regulations/requirements.

4. *"States and Tribes should prioritize projects that are beneficial to disadvantaged communities and support the revitalization of such communities to meet the overall objectives of Justice40 Initiative."*

NM recommends that the Justice 40 tool be revised to address Justice 40 beta version issues identified by states already and allow other existing tools to be used to identify disadvantaged communities such as the Environmental Protection Agency's EJ Tool.

5. *"Aggregate projects into larger statewide or regional contracts as part of their procurement processes, in order to improve efficiencies in their BIL AML grant funding;"*

Aggregating bids is not a viable option for NM's AML Program as the program only completes a few projects per year. By not aggregating bids, NM is more likely to hire smaller contracting companies that are local to NM and employ NM workers. NM recommends the guidance provide an exemption from this goal for Minimum Program states that wish to prioritize the selection of smaller, local contractors.

6. *"Incorporate input from disadvantaged communities of color, low-income communities, and Tribal and Indigenous communities into the selection of projects to be funded."*

This goal appears to indicate that disadvantaged communities, and Tribal and Indigenous communities shall be part of the decision-making process for the selection of what reclamation projects are completed. MMD has long recognized that stakeholder input is an essential part of developing an AML project for construction. While we can enhance our current level of public engagement and we always ensure that input is reflected in any decision, the guidance should be clear that what projects are selected for construction should remain with the state's AML program officials.

IV. BIL AML GRANTS

7. *"The period of performance for BIL grants will be 5-years, with an option for a one-time no-cost extension of up to one year, subject to OSMRE's review and approval."*

The 5-year grant period is supported. However, roll over of remaining funds to the subsequent grant award is preferred over a one-year extension.

8. *"When applying for BIL AML grants, State and Tribal AML Programs should include:*
 - *"A description of each proposed project to be funded during the grant period of performance;"*

Listing all projects a state anticipates completing during a 5-year grant period can be provided. However, over that time period many things can change that effect the ability to get to construction on any given project. Therefore, NM recommends the guidance include language that allows the states

to update their lists in response to such circumstances, subject to prompt OSMRE review and approval.

IX. PROJECT AUTHORIZATION

9. *"States and Tribes should engage with labor and worker organizations that represent coal industry workers to identify current or former employees of the coal industry who are candidates to be employed by AML reclamation contractors consistent with the Section 40701(f) priority and provide OSMRE with certifications of this engagement."*

Same response to #2 above.

10. *"For projects or aggregated projects in excess of \$1 million, States or Tribes may provide a certification that a Project either uses a unionized project workforce or includes a project labor agreement."*

This goal suggest that a unionized project workforce or project labor agreement are only required for projects in excess of \$1 million. However, during OSMRE/DOI's briefing, it was stated unionized workforce/project labor agreement are required for any AML work completed under BIL funding. NM requests clarification of this provision.

More importantly, many states, like NM do not have a unionized workforce available to do this work such that satisfying this goal might be difficult with local labor. If this goal remains in the guidance, it will result in work being awarded to out-of-state unionized entities, which are limited and in conflict with the last bullet in this section ("Whether the Project prioritizes local hires."). As suggested above, MMD can incorporate union preferences into its bid documents to support work on these projects but does not want to have requirements that are so strict that smaller, local companies cannot bid.

11. *"OSMRE will provide an ATP letter once the agency has determined that the request satisfies the guidelines for ATP issuance."*

The grant application includes many new items from the current fee-based grant application, which are workable, so long as there is a limited opportunity to request an exemption from certain items based on a showing why those items cannot practically be completed.

X. BIL AML PERFORMANCE MEASURES & REPORTING

12. *"Socio-economic Benefits of BIL AML Projects"*

This section of the guidance lists several items that are not easily measurable or beyond the expertise of state's AML programs and would require states to hire other expertise, such as economists. MMD recommends the list track with the existing list tracked under fee-based grants. This would make tracking between fee-base and treasury-based grant consistent and not require eAMLIS to be reconfigured.

On behalf of New Mexico's AML Program, I respectfully request that DOI and OSMRE consider the comments on the Draft Guidance as they work to finalize it in order to streamline grant awards to ensure the timely completion of AML reclamation at legacy coal mines.

Sincerely,



Jerry Schoeppner, PG
Director, Mining and Minerals Division
New Mexico Energy, Minerals, and Natural Resources Department