

**Ohio AML Program Comments to Office of Surface Mining Reclamation and Enforcement on the draft  
“GUIDANCE ON THE BIPARTISAN INFRASTRUCTURE LAW ABANDONED MINE LAND GRANT  
IMPLEMENTATION”**

Released by OSMRE and DOI May 2022

General Comments

The BIL provides an exciting opportunity to finally substantively reclaim many of the priority AML features in Ohio left from over 150 years of historic mining. In general, our opinion is that to be the most effective guidance for BIL grants should mirror existing grant, inventory, and reporting procedures and policies established by the Office of Surface Mining Reclamation and Enforcement (OSMRE) in the Federal Assistance Manual (FAM). The current practices for the fee-based program have resulted in a successful program where funds are spent in an expeditious manner on eligible projects that have reclaimed thousands of acres of abandoned mine lands and improved water quality in Ohio. In addition to restoring AML lands, these activities have created jobs and stimulated the economy in these affected areas.

The draft guidance requires many additional grant and reporting requirements that will delay grant approvals, slowing project development and completion. These delays will lead to fewer jobs being created and increase time to realize desired economic stimulus in coal affected communities. Finally, there are many components that are not required according to the infrastructure law and these should be spelled out clearly as encouraged but not required. These are outside the mission of AML programs nor do AML programs have the experience or expertise to implement effectively.

Below are comments related to needed clarification or suggestions for improving/modifying specific aspects of the draft guidance to be the useful in accomplishing the BIL and AML Program goals in Ohio.

Specific Comments

1. Page 3, paragraph 3: This paragraph outlines several provisions about current and former employees of the coal industry. This section does not define what is considered the coal industry nor does it identify what a “former” employee is. Further definition of what the coal industry is for this purpose will be needed to implement. Furthermore, the section describes engaging with labor or worker organizations that represent coal industry workers. In Ohio, none of the coal industry workers are represented by a labor or worker organization so this provision is impossible to implement. Additionally, the guidance has taken a “may” and expanded that to a “should”. The measures outlined are items that cannot be legally considered in selection of a competitively bid reclamation project in Ohio currently. Ohio has the authority in state law to award contracts without bidding to coal operators to perform AML reclamation on sites adjacent to an active permit. The use of this provision of Ohio Revised Code is how Ohio intends to fulfill this provision and BIL guidance should allow maximum flexibility for states to utilize a variety of approaches.
2. Page 4, bullet 1: Adds requirements to bidding processes that cannot be required upon contractors in Ohio under current state law.

3. Page 4, bullet 4: The AML program competitively bids projects under state law and is required to award to the lowest and competent bidder. Forcing this on contractors would not be possible as part of their bid. Apprenticeship and other job-related programs would likely need to be run through a different state agency with this expertise and mission as opposed to the AML Program. OSMRE should consider providing funds directly to those agencies for job training or apprenticeship programs instead of asking AML agencies to create these programs. Is this an eligible expense under the BIL?
4. Page 4, bullet 5: Adds requirements to bidding processes that cannot be required upon contractors in Ohio under current state law and would likely be very difficult to implement effectively in rural coalfield regions of Ohio.
5. Page 4, bulleted item 6: Methane emissions from Ohio Abandoned Mine Lands is not an issue that needs to be addressed and reporting should not be required.
6. Page 4, bulleted item 7: No federally recognized tribal and indigenous reservations exist in Ohio. The areas of AML's in Ohio are all located within counties served by the Appalachian Regional Commission. Of these counties all except for one (Holmes) are classified as distressed, at-risk, or transitional. Holmes County is the only county within this area is classified as competitive. Holmes County has some AML features but very few as coal mining only occurred in a small portion of the county. In general, all of Ohio's AML work will occur in areas of the state that have the lowest income and most distressed communities. The J40 screening tool does not appear to capture the status of these counties accurately.
7. Page 5, paragraph 1: The paragraph states the grants are 5 years with an option for a one-time no-cost extension of up to one year. If OSM is stating that grants cannot go beyond 6 years then procedures for how unexpended funds will be handled at the end of the grant period should be developed and published with the guidance document. A suggested change to this language is make it clear that grants are 5-year grants with no extension but include allowances, following current practice, that allows states to deobligate and reobligate grant funds to another currently open grant.
8. Page 5, paragraph 3: The new subaccount 19 Coal Projects Engineering & Design Costs is unnecessary. These costs are directly associated with a project and should be captured in the subaccount 03 Non-Water Supply (Coal Project) Costs as is currently done with the fee-based grants and outlined in the current FAM.
9. Page 5, paragraph 3: The guidance does not describe how and/if adjustments to these categories are allowed/implemented. Assume current grant policies in the FAM are followed for anything not specified in the draft guidance?
10. Page 5, paragraph 4, bullet 1: Based on the amount of annual BIL funding this is impossible for Ohio to do accurately at the time of grant submission, and if information is not accurate then what is the purpose and usefulness to OSMRE? Also, all project planning is done at the state/tribe level so what is the benefit to OSMRE for requiring all this additional work by the state/tribe since they have no role in the project planning and selection process? All AML problems that the BIL funds can be used to reclaim must be in e-AMLIS before seeking an Authorization to Proceed. The decision to work on any of these projects is determined by a multitude of different factors and vary over time. Additionally, as project work starts, issues arise that cause either a delay or shelving of a project. The listing of projects and follow-up reporting on this list will become a non-productive exercise in reporting. The FAM Chapter 4-

170-10-C states that the ATP is the point of federal action and approval for AML construction activities because information is not required on individual projects in the annual grant application. The grant application should not require the listing of projects as utilize the existing procedure outlined in the FAM. If OSMRE does require projects to be listed in the grant application, then the ATP process should be eliminated because it would be duplicative.

11. Page 5, paragraph 4, bullet 2: This is currently addressed in the state reclamation plan. To outline this in the grant application is a redundant effort.
12. Page 5, paragraph 4, bullet 3: The benefits of the project will be the units of the problem type to be reclaimed. Again, this information is listed in e-AMLIS and will be identified in the request for authorization to proceed.
13. Page 5, paragraph 4, bullets 5 and 6: These two requirements are completely out of scope of the program. Additionally, none of these requirements can be forced upon contractors. Any economic redevelopment will likely occur well after the project is completed and grant is closed.
14. Page 5, paragraph 4, all bullets: These bulleted items do not appear in Appendix II: Table for BIL AML Eligible Projects.
15. Page 6, bullet 1: As part of NEPA, all projects will have a public engagement process. Local communities will have the same opportunity to provide input as any other stakeholder.
16. Page 6, bullet 2: Any reclamation completed will improve environmental conditions. Beyond that, any other improvements will be a best guess. The improvements can be measured by using the units of measure addressed in AML-1 and reported in e-AMLIS.
17. Page 6, bullet 3: There are no federally recognized tribal or indigenous reservations in Ohio, there is very limited communities of color located in Ohio's AML areas, so the only aspect of this bullet we could use is low-income communities. While only a few census blocks meet the standard as low-income communities.
18. Page 6, bullet 4: Methane and greenhouse gases are not an issue related to Ohio's AML features. Ohio will be strongly encouraging the planting of trees on AML sites.
19. Page 6, bullet 6: This should not be required to be listed in the application related to bullet 1 comment above. The current process for grant application should be utilized...SF424 forms, basic program narrative, and budget narrative.
20. Page 7, paragraph 1 and 2: Public engagement is required as part of the NEPA process. This section of the guidance is not needed.
21. Page 8 Section VIII, last paragraph: Cannot find references to project phases in NEPA guidance, only reasonably known proposed actions. Does using this terminology imply that OSMRE is going to change how they review and implement the NEPA review on AML projects for BIL projects instead of using current practices outline in the Handbook?
22. Page 9, paragraph 1: The process to receive an ATP should be the same as currently used in the fee-based program.
23. Page 9, paragraph 3: The additional items outlined in paragraph 3 and bullets are items that we cannot require our contractors to do. The last bullet is not allowable by Ohio law. The requirement of using Davis-Bacon wages and following the Fair Labor Standards Act addresses most of these items.
24. Page 10 Reporting Measures- General Comment: Congress provided funding equal to the cost of the known AML problem features entered into the e-AMLIS system. The intent of this program is to reclaim the known features this should be the focus of the reporting measures.

AML-1 provides very clear direction on what reporting is required to measure success of the AML program. While the BIL provides a new source of funding to accomplish important reclamation, the problems to reclaim have not changed. They are captured in the inventory. Success or failure of the BIL AML program will be determined by how many of these features get reclaimed. Many of the proposed performance measures are difficult to measure and/or are unmeasurable. They also do not directly tie back to whether successful implementation of AML reclamation was achieved. The performance measures that should be used to determine the success of the BIL funding is the existing performance measures outlined in AML-1. The use of the existing e-AMLIS system as the official reporting system of accomplishments should also continue.

25. Page 11, AML Reclamation Environmental Benefits: Bullet points 1, 2 and 3 can be accurately measured. Bullet points 1 and 2 are two ways of measuring the same thing and only one should be used. There is not a preference on which is used. Bullet points 4, 5 and 6 are unmeasurable. Bullet 4 is vague and the establishment of habitat for one endangered species may negatively impact habitat of another endangered species. These considerations are addressed in the NEPA process and without extensive post reclamation monitoring cannot be measured. Bullets 5 and 6 assume that these elements exist in the AML areas, are problems, and/or are being extracted for reuse. Situations where this occurs will be rare. Additionally, measurement of these, specifically bullet 6, methane emissions reduced, is very challenging and methods to do this are unknown and likely very costly.
26. Page 11, AMD Remediation Project Benefits: Bullets 3, 4, 5, and 9 all can be accurately measured. While bullets 3, 4, and 5 would be new items to measure, Ohio supports the tracking of these features. Ability to capture the system should be added to e-AMLIS. Bullet 9 is the standard currently used to capture water problems and is currently tracked in e-AMLIS as gallons of water per minute. Bullet 1 would be an estimate based upon modeling software. This software is used to model the effectiveness of an AMD treatment system. These quantities reported would not be measured but instead model data. Bullet 2 is something that currently we have no way to measure or effectively model. Bullet 6, AMD discharges abated would need much more clarification to measure. Discharges are never abated, the water coming from these is treated. Once treatment ends, either due to failure of system or lack of maintenance of system, the water from the discharge is no longer treated and water quality diminishes back to pre-treatment conditions. To state a discharge is abated is a false statement. Bullet 7 is vague and unmeasurable. What is the definition of polluted water supplies address? Bullet 8 is a measure that takes years of monitoring to determine and is not a performance measure that can be reported within a grant period. Bullet 10, outflow remediated has the same issues as Bullet 6.
27. Page 11, Socio-economic benefits: Outside of the last bullet, all of these measures require expertise that AML programs do not have to measure and/or model. Additionally, many of these items are vague in what the item being measured is. Socio-economic benefits should be something that OSMRE contracts to have a study conducted by experts in these elements to determine the benefits of AML reclamation. Finally, some of the items listed may occur (new businesses, renewable energy, and recreational facilities constructed on reclaimed sites) well after the reclamation project has been completed and the state agency no longer is involved in the project. People impacted by BIL AML projects is something that e-AMLIS can already

capture by using the census data associated with the Problem Area. This does not need to be changed into a new type of measure.

28. Page 14, Subaccount 19: This subaccount is unnecessary. The activities listed in the description should use funds from subaccount 03 Coal Project Cost. This is how costs are accounted for according to the FAM. According to the FAM, "Project costs include actual construction, and also other activities such as project development and design, realty work, construction contracting, construction inspection, post-construction costs and other costs which you can allocate to a specific project." The creation of this subaccount accomplishes nothing beyond additional bookkeeping issues.

# **GUIDANCE ON THE BIPARTISAN INFRASTRUCTURE LAW** **ABANDONED MINE LAND GRANT IMPLEMENTATION**

## **I. OVERVIEW**

The Bipartisan Infrastructure Law (BIL) (Pub. L. No. 117-58), also known as the Infrastructure Investment and Jobs Act, was enacted on November 15, 2021. The BIL authorized and appropriated \$11.293 billion for deposit into the Abandoned Mine Reclamation Fund administered by the Office of Surface Mining Reclamation and Enforcement (OSMRE). Of the \$11.293 billion appropriated OSMRE will distribute approximately \$10.873 billion<sup>1</sup> in BIL Abandoned Mine Land (AML) grants to eligible States and Tribes on an equal annual basis—approximately \$725 million a year—over a 15-year period.<sup>2</sup> In accordance with Executive Order 14008 States and Tribes are encouraged to prioritize projects that equitably provide funding under the Justice40 Initiative towards meeting the goal that 40 percent of the overall benefits flow to disadvantaged communities.<sup>3</sup> BIL funds will expand the AML Reclamation Program to meet the priorities described in the BIL and the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended. States and Tribes may use BIL AML grants to address coal AML problems, including:

- Hazards resulting from legacy coal mining that pose a threat to public health, safety, and the environment within their jurisdictions (including, but not limited to, dangerous highwalls, waste piles, subsidence, open portals, features that may be routes for the release of harmful gases, acid mine drainage, etc.);
- Water supply restoration (infrastructure); and
- Coal AML emergencies.

The purpose of this guidance document is to provide State/Tribal AML Programs with overarching information concerning the interpretation, project eligibility, and priorities for the use of BIL AML grant funds. It also clarifies how BIL AML grant funding differs from the traditional fee-based AML grant distributions authorized by SMCRA. OSMRE will consider initiating rulemaking to establish

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<sup>1</sup> Section 40701 of the BIL authorizes \$11.293 billion for deposit into the AML Fund, and Division J, Title VI appropriates and apportions the funds in the following ways: up to 3% for OSMRE Operations, 0.5% for Office of Inspector General (OIG) Operations, and \$25 Million for OSMRE to provide States and Tribes financial and technical assistance in making amendments to the inventory system for documenting eligible lands and waters. The remaining funds, approximately \$10.873 billion, will be distributed to eligible States and Tribes as BIL AML grants.

<sup>2</sup> Section 40701(c) of the BIL limits the use of BIL AML grants to the activities described in subsections (a) and (b) of section 403 and 410 of SMCRA. OSMRE will ensure that the annual grants provided to a State or Tribe do not exceed its estimated cost to reclaim its remaining coal AML problems and water supply restoration, as documented in the Abandoned Mine Land Inventory System (e-AMLIS).

<sup>3</sup> “Disadvantaged Community” – a community may be considered disadvantaged based on a combination of: low income, high and/or persistent poverty; high unemployment and underemployment; racial and ethnic residential segregation, particularly where the segregation stems from discrimination by government entities; linguistic isolation; high housing cost burden and substandard housing; distressed neighborhoods; high transportation cost burden and/or low transportation access; disproportionate environmental stressor burden and high cumulative impacts; limited water and sanitation access and affordability; disproportionate impacts from climate change; high energy cost burden and low energy access; jobs lost through the energy transition; access to healthcare; and geographic areas within Tribal jurisdictions; or based on the community’s inclusion in the Climate and Economic Justice Screening Tool. Definition adapted from OMB and CEQ Interim Implementation Guidance for the Justice40 Initiative (M-21-28) dated July 20, 2021. See Climate and Economic Justice Screening Tool at: [Explore the tool - Climate & Economic Justice Screening Tool \(geoplatform.gov\)](https://www.geoplatform.gov).

requirements and obligations related to application procedures, allowable uses of funds, and reporting program activities and outcomes.

## **II. ELIGIBLE STATES AND TRIBES**

Pursuant to section 40701(b)(2) of the BIL, eligible grant recipients include both certified and uncertified States and Tribes carrying out approved AML Programs. A certified State or Tribe is a State or Tribe that has certified that all coal reclamation projects that are considered a priority under section 403(a) of SMCRA have been completed. An uncertified State or Tribe is a State or Tribe that has not yet made the certification that reclamation of all priority coal reclamation projects in the State or on applicable Indian lands have been completed.

## **III. ELIGIBLE PROJECTS & PRIORITIZATION**

BIL AML funding may only be spent on coal reclamation projects. According to section 40701(c) of the BIL, BIL AML grants may only be used on one or more of the following:

- Priority 1 Projects – These projects protect public health and safety from extreme effects of coal mining practices, including the restoration of adjacent land and water resources and the environment (Section 403(a)(1) of SMCRA).
- Priority 2 Projects – These projects protect public health and safety from adverse effects of coal mining practices, including the restoration of adjacent land and water resources and the environment (Section 403(a)(2) of SMCRA).
- Priority 3 Projects – These projects restore land and water resources and the environment previously degraded by adverse effects of coal mining practices (Section 403(a)(3) of SMCRA). These projects may include the design, construction, operation, maintenance, and rehabilitation of acid mine drainage (AMD) treatment facilities regardless of whether they are part of a qualified hydrologic unit.
- Water Supply Restoration Projects - protection, repair, replacement, construction, or enhancement of facilities relating to water supply, including water distribution facilities and treatment plants, to replace water supplies adversely affected by coal mining practices (Section 403(b) of SMCRA).
- AML Emergency Projects - Emergency projects that restore, reclaim, abate, control, or prevent adverse effects of coal mining practices, on eligible lands when an emergency exists constituting a danger to the public health, safety, or general welfare and no other person or agency will act expeditiously to restore, reclaim, abate, control, or prevent adverse effects of coal mining practices (Section 410 of SMCRA).

Use of BIL funding differs from the traditional fee-based AML funding in a few important ways:

- Stand-alone projects classified as Priority 3 under SMCRA Title IV are eligible for BIL funding, whether or not the project is in conjunction with other projects classified as Priority 1 and Priority 2 projects under SMCRA Title IV;
- AMD treatment projects that are not part of a qualified hydrologic unit are eligible for BIL funding;
- Eligible states and tribes are not authorized under the BIL to place BIL AML grant funds into AMD set-aside accounts.<sup>4</sup>

Under Section 405(e) of SMCRA, State and Tribal AML Reclamation Plans must identify the specific criteria for ranking and identifying projects to be funded. The *overall* State or Tribal AML Program must reflect the priorities listed in section 403(a), and, accordingly, the BIL does not require strict adherence to those priorities when grantees and OSMRE work to evaluate, apply for, and approve particular projects.

OSMRE will consult with each State and Tribe receiving funds under the BIL to identify which updates to the grantee's Reclamation Plan, if any, are necessary to ensure to Plan's compliance with the BIL.

- 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. Measures to implement these priorities include: (1) requiring contractors to affirm they will give preference to miners in any hiring for BIL-funded AML projects; (2) requiring contractors to report on the extent to which miners have been employed in any AML work the contractors perform; (3) requiring contractors to retain data that can substantiate the reported information; and (4) providing to OSMRE the information reported by the contractors as part of the State or Tribe's regular AML reporting processes. 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.

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. Such a proposed rule would, based on Section 40701(f), require that States and Tribes provide employment opportunities to current and former employees of the coal industry, prioritize projects that provide such employment opportunities, and utilize AML funding to promote the revitalization of coal communities.

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.

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<sup>4</sup> Section 402(g)(6) of SMCRA authorized the creation and use of AMD set aside accounts, which allow uncertified States to apply for up to 30% of certain fee-based funds received as part of their traditional annual AML grant to be transferred to an interest-bearing account established by the State/Tribe to be used for the abatement of the causes and the treatment of the effects of AMD in a comprehensive manner within qualified hydrologic units affected by coal mining practices.



In carrying out their programs with BIL AML funding, OSMRE encourages States and Tribes to:

- 2** • Utilize procurement processes that incentivize AML contractors to hire miners when bidding on BIL-funded AML projects and require the collection of information from AML contractors on the number of former and current miners they employ;
- 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;<sup>5</sup>
- Prioritize aggregated or larger projects in selecting projects to be funded;
- 3** • Support pre-apprenticeship, registered apprenticeship, and youth training programs that open pathways to employment; and
- 4** • Require contractors to support safe, equitable, and fair labor practices by adopting collective bargaining agreements, local hiring provisions (as applicable), project labor agreements, and community benefits agreements.
- 5** • Consider project designs that reduce methane emissions from abandoned coal mine sites.
- 6** • Incorporate input from disadvantaged communities of color, low-income communities, and Tribal and Indigenous communities into the selection of projects to be funded.

OSMRE and the Department of the Interior (DOI) will engage with the Department of Labor (DOL) to determine what information and tools DOL can provide to States and Tribes to support the above efforts.

BIL AML funds may not be used, directly or indirectly, to support or oppose union organizing.

#### **IV. BIL AML GRANTS**

The first BIL AML grant distribution will occur by the end of the 3<sup>rd</sup> Quarter of FY 2022. Annual BIL AML grant amounts are calculated using a congressionally mandated formula based on the number of tons of coal historically produced in the States or from applicable Indian lands before August 3, 1977. Adjustments will be made to ensure the total amount of the distributions to any individual State or Tribe is not less than \$20 million over the life of the program to the extent that amount is needed for eligible projects described above and to reconcile the amount of the BIL AML funding with the total unfunded cost of coal problems at the end of the preceding fiscal year, as reflected in the enhanced Abandoned Mine Land Inventory System (e-AMLIS).

BIL AML grants will be awarded to eligible State and Tribal AML Programs on an annual basis and adjustments will be made to these distributions as required and needed to achieve the objectives of the

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<sup>5</sup> Section 40701(b)(3) allows states to aggregate bids in this manner.

7 program. For example, adjustments will be made as changes to the number of eligible States and Tribes increase or decrease. 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. BIL AML grants will be disbursed and tracked under the Catalog of Federal Domestic Assistance (CFDA) No. 15.252. In order to receive BIL AML funding, each eligible State and Tribe will need to submit a grant application through [GrantSolutions](#).<sup>6</sup>

BIL AML grant recipients will be required to comply with all applicable Federal grant award requirements, including but not limited to, the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards ([2 C.F.R. part 200](#)). OSMRE anticipates that State and Tribal AML Programs will incur higher staffing and operational costs as they stand up programs to effectively implement their BIL AML programs. In addition, the administrative costs for annual BIL AML grant awards will be available for the entire grant performance period (i.e., 5 years, with the possibility of a one-year extension).

8 Appendix I, which is entitled, "Subaccounts for BIL AML Financial Assistance," provides guidance on the available subaccount categories that State/Tribal AML Programs can use in the development of their BIL AML grant application. Outlined below are the main subaccounts:

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- BIL – Non-Emergency Administrative Costs
  - BIL – Non-Water Supply (Coal Project) Costs
  - BIL – Water Supply Project Costs
  - BIL – Coal Projects Engineering & Design Costs
  - BIL – AMD Operational and Maintenance Costs
  - BIL – Emergency Project Costs

A sample template for States and Tribes to use when submitting an application for BIL AML grant funding has been attached (see *Appendix II: Table for BIL AML Eligible Projects*). When applying for BIL AML grants, State and Tribal AML Programs should include:

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- A description of each proposed project to be funded during the grant period of performance;
  - A description of the state and Tribe's prioritization process or ranking system for the selection of each proposed project;
  - A statement of the estimated benefits that will result from each project;
  - A statement of how the State or Tribe will prioritize projects employing current or former employees of the coal industry;
  - Plans for promoting workforce training and development, including how activities encouraged under Section III will be implemented, if applicable, along with the names of potential partners to support recruiting and training efforts, including community colleges, workforce partners, community-based groups, and unions;
  - Any linkages to economic redevelopment opportunities created by carrying out the proposed projects;

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<sup>6</sup> The CFDA number is a five-digit number assigned in an awarding document for any financial assistance (e.g., grants) funded by the Federal government. Although both the BIL AML Funds and the traditional AML fee-based grants will be disbursed under the same CFDA No. 15.252, separate grant applications via grants.gov will be necessary.

- 15 • A description of how local communities provided input into the selection of projects to be funded;
- 16 • A description of how the grantee will address environmental justice issues within coalfield communities;
- 17 • Details of how the grantee will identify and address any disproportionate burden of adverse human health or environmental effects of coal AML problems on disadvantaged communities, communities of color, low-income communities, and Tribal and Indigenous communities;<sup>7</sup>
- 18 • A description of whether and to what extent the proposed projects will reduce greenhouse gas emissions, particularly methane emissions;
- 19 • Estimated costs for each project to be completed using the BIL AML grant funding. If BIL AML funds will be leveraged with other funding sources, such as AML-fee based grants, include this information; and,
  - Proposed performance measurement (see section X).

When possible, a project's scope or outcome may be expanded or enhanced. States and Tribes are encouraged to identify and leverage additional funding sources (e.g., Clean Energy Demonstration Program under Title III, Section 40341 of the BIL; DOI's Ecosystem Restoration Program under Title VIII, Section 40804 of the BIL; and EPA Brownfield Job Training Grants) and in-kind contributions to be used in conjunction with BIL AML monies.

## V. DAVIS-BACON ACT

The BIL requires that all laborers and mechanics employed by contractors or subcontractors in the performance of construction, alteration, or repair work on a project assisted in whole or in part by funding made available under the BIL must be paid wages at rates not less than those prevailing on similar projects in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C. §§ 3141-3148). The Davis-Bacon labor standards are applicable to the reclamation projects completed using BIL AML funding and Davis-Bacon clauses must be included in BIL AML work contracts. The Department of Labor [Fact Sheet #66A: Bipartisan Infrastructure Law](#) provides additional information on the responsibilities of BIL funding recipients.

## VI. PUBLIC ENGAGEMENT

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<sup>7</sup> "Low-income communities" are those communities that in the last 12 months had a median household income less than twice the poverty level. This definition is similar to USEPA's EJSCREEN definition at <https://www.epa.gov/ejscreen/ejscreen-map-descriptions#category-demographics>

"Communities of color" are those communities with a higher than national average percent of individuals in a block group who list their racial status as a race other than white alone and/or list their ethnicity as Hispanic or Latino. That is, all people other than non-Hispanic white-alone individuals. The word "alone" in this case indicates that the person is of a single race, not multiracial. A block group is an area defined by the Census Bureau that usually has in the range of 600-3,000 people living in it. This definition is adopted from USEPA's EJSCREEN definitions at: <https://www.epa.gov/ejscreen/overview-demographic-indicators-ejscreen#demoindex>

"Tribal and Indigenous communities" are communities whose members make up a Federally recognized Indian Tribe, a State-recognized Indian Tribe, an Alaska Native community or organization, a Native Hawaiian organization, or any other community of indigenous people located in a State, including indigenous persons residing in urban communities.

**20** When developing eligible projects for the BIL AML Program, State and Tribal AML Programs should ensure public engagement at the local level through engagement with the community. The term, "public" includes all stakeholders (e.g., citizens at large, industry, other Federal, State, Tribal, or local agencies, Tribal Nations, unions and worker organizations, non-governmental organizations, community colleges, workforce boards, community-based groups, and environmental groups). Engaging with the public to identify potential projects will ensure that projects completed through this program best address the needs of the relevant communities.

States and Tribes are encouraged to use existing best practices for public engagement or develop a process for public outreach and communication with local citizens, agencies, and organizations that best fits their unique circumstances. For example, States and Tribes could notify local citizens of the intent/purpose of a project via meetings, print media, websites, and social media and/or partner with organizations that facilitate public outreach and communication.

## **VII. ENHANCED ABANDONED MINE LAND INVENTORY SYSTEM (e-AMLIS)**

Pursuant to section 403(c) of SMCRA, OSMRE maintains e-AMLIS, the central electronic database for housing the national inventory of unreclaimed AML problems affecting public health, safety, and the environment and reclaimed sites, along with their associated reclamation costs. Data maintained in e-AMLIS is provided by States and Tribes using standardized procedures approved by OSMRE.

States and Tribes are required to enter all coal AML projects into e-AMLIS and identify them as BIL AML projects when funds are expended. To ensure that States and Tribes are able to update their respective AML inventories in e-AMLIS, the BIL makes \$25 million available to the Secretary of the Interior to provide financial and technical assistance to States and Tribes to amend e-AMLIS. If needed, OSMRE will provide further guidance on its implementation of this specific requirement of the BIL at a later date.

## **VIII. COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT**

OSMRE has determined that all BIL-funded reclamation projects are major Federal actions<sup>8</sup> subject to review under the NEPA because, in accordance with NEPA regulations,<sup>9</sup> BIL AML projects are federally assisted activities performed using Federal funds.

OSMRE REG-1, Handbook on Procedures for Implementing the National Environmental Policy Act ([NEPA Handbook](#)) (Revised 2019), provides additional information on NEPA compliance.

Depending on the significance of the actual and potential impacts of the proposed action, there are three potential analytical approaches under NEPA, which include:

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<sup>8</sup> According to 40 C.F.R. § 1508.1, major Federal actions may include, among other things, new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies.

<sup>9</sup> NEPA regulations issued by the White House Council on Environmental Quality (CEQ) are found at Title 40, Parts 1500-1508 of the Code of Federal Regulations (40 C.F.R. § 1500-1508, 42 U.S.C. §§ 4371 *et seq.*).

- 1) Categorical Exclusion (CE);
- 2) Environmental Assessment (EA), which may result in a Finding of No Significant Impact (FONSI) or a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS);
- 3) Environmental Impact Statement (EIS) and Record of Decision (ROD).

The Department's NEPA regulations make clear that in the absence of an applicable CE, an EA, and, in some cases, an EIS, must be prepared for the proposed Federal action. Section 46.205(a) of Title 43 of the Code of Federal Regulations (CFR) states:

If a proposed action does not meet the criteria for any of the listed Departmental categorical exclusions or any of the individual bureau categorical exclusions, then the proposed action must be analyzed in an environmental assessment or environmental impact statement.

The three potential analytical approaches under NEPA are defined below.

### **Categorical Exclusion**

A CE is a class of actions that a Federal agency has determined, after review by CEQ, does not individually or cumulatively have a significant effect on the human environment; therefore, neither an EA nor an EIS is normally required unless an extraordinary circumstance is identified.<sup>10</sup> A CE is the threshold NEPA analysis for a proposed Federal action. OSMRE has created and received approval from CEQ for a CE. This CE is contained in the DOI Departmental Manual (DM), Chapter 13 [516 DM 13.5 (33)].

### **Environmental Assessment**

If a determination is made that the proposed Federal action cannot be categorically excluded from further NEPA analysis, then an EA is prepared. The EA determines whether a Federal action has the potential to cause significant environmental effects. If no significant environmental effects are found, the decision document will result in a FONSI, and the project may continue without further NEPA analysis. However, if it is determined that an action will have significant effects, then the project must go through the EIS process.

### **Environmental Impact Statement**

For actions with significant impacts, NEPA requires federal agencies to prepare an EIS that must assess, among other things, the potential environmental impacts of the proposal and alternatives to the proposed action. *See* 42 U.S.C. § 4332; 40 C.F.R. part 1502. Once an agency reaches a final decision on the action it wishes to take (i.e., the proposed action or an alternative), it creates a ROD, which is the conclusion of the EIS process. 40 C.F.R. § 1505.2.

**21** In accordance with section 8.5.2.1 of OSMRE's NEPA Handbook, State and Tribal AML Programs must ensure that all connected actions, regardless of the funding source or who proposes them, are analyzed in a single NEPA document. Additionally, a project that includes multiple phases must be reviewed in a single NEPA document. State and Tribal AML Programs are strongly encouraged to look closely at the NEPA analyses outlined above and refer to OSMRE's [NEPA Handbook](#) to better understand the NEPA process early and align their proposed projects accordingly.

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<sup>10</sup> Extraordinary circumstances are described in the Departmental NEPA regulations at 43 C.F.R. § 46.215.

## IX. PROJECT AUTHORIZATION

- 22** The Federal regulations require that, before the start of construction on any non-emergency reclamation project, States and Tribes submit a request for an Authorization to Proceed (ATP) once the NEPA analysis has been completed. 30 C.F.R. §§ 885.15, 886.16. An ATP request for a reclamation project should include: confirmation that the problem area to be reclaimed has been entered into e-AMLIS; all completed environmental documents, including NEPA documents and other documents demonstrating compliance with relevant environmental laws, such as the Endangered Species Act; an AML eligibility statement; and any additional documentation requested by OSMRE for that particular project.

As discussed above, 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.

- 23** 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, meaning a pre-hire collective bargaining agreement consistent with section 8(f) of the National Labor Relations Act (29 U.S.C. 158(f)). In lieu of such certification, the Recipient may develop a project workforce continuity plan, detailing:

- How the State or Tribe will ensure the Project has ready access to a sufficient supply of appropriately skilled and unskilled labor to ensure high-quality construction throughout the life of the Project, including a description of any required professional certifications and/or in-house training, registered apprenticeships or labor-management partnership training programs, and partnerships like unions, community colleges, or community-based groups;
- How the State or Tribe will minimize risks of labor disputes and disruptions that would jeopardize timeliness and cost-effectiveness of the Project;
- How the State or Tribe will provide a safe and healthy workplace that avoids delays and costs associated with workplace illnesses, injuries, and fatalities, including descriptions of safety training, certification, and/or licensure requirements for all relevant workers (e.g., OSHA 10, OSHA 30);
- Whether workers on the Project will receive wages and benefits that will secure an appropriately skilled workforce in the context of the local or regional labor market;
- Whether the Project has a Community Benefit Agreement, with a description of any such agreement; and
- Whether the Project prioritizes local hires.

These plans should maintain sufficient records to substantiate this information upon request.

OSMRE will provide an ATP letter once the agency has determined that the request satisfies the guidelines for ATP issuance. The ATP letter from OSMRE provides the required approval to use BIL



AML grant funding to reclaim the specific project being addressed and allows project construction to begin. Although NEPA documentation is part of the criteria required for an ATP request, the NEPA process and ATP process are two separate processes. An ATP request cannot be completed until OSMRE has completed the NEPA review process and issued a ROD, FONSI, or CE in compliance with the NEPA requirements.

According to chapter 4-120 of the Federal Assistance Manual (FAM), States and Tribes are required to submit a request for emergency declaration to OSMRE for emergency reclamation projects. The FAM requirements track the “emergency” definition at 30 C.F.R. § 700.5, identifying the proper amount of emergency reclamation as the amount necessary to stabilize the emergency aspects of the problem—eliminating the immediate danger to public health, safety, and general welfare. Any remaining reclamation should then be accomplished as part of a regular, non-emergency AML project, as necessary.

Upon receipt of a request for emergency declaration, OSMRE will review the information and ensure that the project meets all requirements of the AML emergency program. If all information contained within the request for emergency declaration is complete, OSMRE will declare an emergency by signing a Finding of Fact/ATP. The Finding of Fact certifies that the problem meets the emergency criteria and serves as the point of Federal action, authorizing the State/Tribe to proceed with reclamation work on the site. After the emergency is abated, the States and Tribes are required to comply with all applicable Federal laws and regulations, including NEPA.

## **X. BIL AML PERFORMANCE MEASURES & REPORTING**

**24** OSMRE is required to submit a report to Congress within six years of the first BIL AML grant allocation to State and Tribal AML Programs. This report will detail the progress made under the BIL AML provisions in addressing outstanding reclamation needs under subsections (a) and (b) of section 403 and section 410 of SMCRA. In preparing this report, OSMRE will solicit input from State and Tribal AML Programs on the progress made in addressing outstanding coal AML problems and use the information provided in the annual evaluation reports each State and Tribe submits pursuant to section 405(j) of SMCRA.<sup>11</sup> OSMRE intends to provide future guidance on how to prepare the information required in the report to Congress.

OSMRE is evaluating and developing the performance measures and reporting elements to be tracked to ensure accomplishments made by State and Tribal AML Programs under the BIL are captured in these annual reports. Given that AML projects are located in coalfield communities that may also be defined as disadvantaged communities, communities of color, low-income communities, or Tribal or Indigenous communities, State and Tribal AML Programs are encouraged to track and report on the types of benefits and the percentage of benefits that accrue to these communities. State and Tribal AML Programs are also encouraged to engage with stakeholders to help identify metrics that accurately reflect the benefits of BIL AML projects in their reclamation programs. In order to enable robust reporting, States and Tribes are expected to track the following types of benefits that can be measured and reported:

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<sup>11</sup> Pursuant to section 405(j) of SMCRA, State and Tribal AML programs will be required to submit annual reports to track their progress and accomplishments in addressing outstanding reclamation needs using BIL AML grant funds.

**25 AML Reclamation Environmental Benefits**

- Number of acres reforested
- Number of trees planted on AML sites
- Number of bat gates installed
- Number of acres of endangered species habitat re-established
- Number of tons of rare earth elements, metals, or sediment recovered for reuse
- Amount of methane emissions reduced

**26 AMD Remediation Project Benefits**

- Quantity of iron, aluminum, manganese, sulfate, etc. removed and/or recovered on annual basis by AMD water reclamation projects
- Quantity of Rare Earth Elements (REE) recovered by AMD water reclamation projects
- Number of AMD passive treatment systems built
- Number of AMD passive treatment systems operated and maintained
- Number of AMD active treatment systems built
- Number of AMD discharges abated
- Number of polluted water supplies addressed
- Miles of waterways improved
- Volume of water treated
- Number of outflows remediated

**27 Socio-economic Benefits of BIL AML Projects**

- Percent of overall benefits and types of benefits that accrue to disadvantaged community, community of color, low-income community, or Tribal or Indigenous community;
- Number of former/current employees of the coal industry employed in AML reclamation;
- Demographics/number of workers from under-represented groups;
- Percent of workers from the local community;
- If there is a community benefit agreement as part of the project;
- Number of project partners involved in AML reclamation projects;
- Electric generating capacity of renewable energy facilities installed on reclaimed AML sites;
- Number of businesses constructed on reclaimed AML sites, and number of people employed at those sites;
- Acres of new recreational facilities constructed;
- Number of job hours involved in BIL AML remediation;
- Number of people receiving potable water after completion of water supply restoration projects;
- Number of residents positively impacted by the restoration of previously polluted waterways; and,
- Number of residents within [X] miles of BIL-funded projects.

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**If you have any questions or need additional assistance, please contact your servicing OSMRE Field or Regional Office.**



## **\*\*Appendices**

Appendix I: Subaccounts for BIL AML Financial Assistance

Appendix II: Table for BIL AML Eligible Projects

Appendix III: BIL AML Project Flowchart

\*\* - Appendices to be developed as needed.

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## **Appendix I: Subaccounts for BIL AML Financial Assistance**

### **I. Authorities**

- The Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, as amended
- Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, also known as the Bipartisan Infrastructure Law (BIL)
- Office of Surface Mining Reclamation and Enforcement (OSMRE) Directive GMT-10, The Federal Assistance Manual (FAM)
- The Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224
- Title 2 C.F.R. Part 200, Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards

### **II. Purpose**

The purpose of this document is to provide guidance and to clarify the available subaccounts (i.e. cost categories) for allocating monies when submitting a BIL AML grant applications and expending monies when invoices are submitted for processing through the Department of the Interior's/OSMRE's financial system. This guidance document outlines the available subaccounts for BIL funds that were created in 2022. The Federal Assistance Manual (FAM) will be updated to reflect these changes.

### **III. How to Use this Document**

This document contains the following information:

- BIL Subaccounts Table. (Table 1) This table provides a listing of all available subaccounts under the BIL AML Program, which is funded by moneys sourced from the U.S. Treasury.
- Fund Type Descriptions. This section describes the different types of funds listed in Table 1, which are used in the BIL AML Program.

### BIL AML Grant Subaccount Table

The table below contains a listing of standard subaccounts currently available for BIL AML Grants:

**Table 1: BIL Fund Subaccounts**

Subaccount	Bipartisan Infrastructure Law
01	IL
03	IL
04	IL
19	IL
21	IL
23	IL

Listed below is the fund type description.

**IL** Funds authorized by section 40701 of the BIL that are available to eligible States and Tribes.

*Source: U.S. Treasury Funds*

Listed below are the subaccount number definitions:

**01. Non-Emergency Administrative**

These are costs that cannot be tracked to individual reclamation projects and include items such as travel, rental of vehicles, and any other administrative expenses. Project Design and Engineering costs should not be incorporated into subaccount 01.

**03. Coal Project Costs (Non-Water Supply)**

Used for actual construction, realty work, construction contracting, construction inspection, and other items allocable to a specific project in accordance with the BIL. Please note that project design and engineering coal-related costs and operation and maintenance costs related to AMD projects should not be included under subaccount 03. An engineering and design subaccount 19, as described below, have been created to track these coal-related costs. An operational and maintenance subaccount 21, as described below, has been created to track these AMD related costs.

**04. Water Supply Project Costs**

Authorized by the Bipartisan Infrastructure Law, eligible States and Tribes may expend funds to protect, repair, replace, construct, or enhance facilities related to water supplies adversely affected by coal mining practices. Please note that project design and engineering coal-related costs should no longer be included under subaccount 04. A new engineering and design subaccount 19, as described below, has been created to track these coal-related costs

**19. Coal Projects Engineering & Design Costs**

Coal-related engineering and design costs associated with site investigation, including identification and mapping of hazards; environmental sample collection and data validation; costs associated with surveying design and engineering of reclamation activities, including development of construction bid packages; costs associated with owner operator searches, eligibility determination, historic and archeological surveys, threatened and endangered species reports and consultation, document preparation related to NEPA, public meetings, and landowner agreements; and any other costs associated with project preparation before the award or initiation of a construction project.

Pursuant to section 403(c) of SMCRA, OSMRE maintains e-AMLIS, the central electronic database for housing the national inventory of unreclaimed AML problems affecting public health, safety, and the environment and reclaimed sites, along with their associated reclamation costs. BIL funding may be used by State or Tribal AML Programs to amend their inventory of coal problems. Costs associated with the activities necessary to update a State or Tribe's inventory in e-AMLIS should be included under this subaccount.

Please note that this definition does not include construction oversight or long-term monitoring or maintenance. Any cost related to construction oversight or long-term monitoring or maintenance should be included under direct project subaccounts such as 03 and 04. Any BIL costs related to long term acid mine drainage (AMD) operational and maintenance costs should be included under subaccount 21.

**21. Acid Mine Drainage (AMD) Operational and Maintenance Costs**

These are costs associated with the long-term operation and maintenance of AMD treatment facilities. This category was created as a result of the determination that States and Tribes receiving BIL AML funding may use the grant funds to operate and maintain AMD treatment facilities. Costs related to the construction of AMD treatment facilities should be included under direct project subaccounts such as 03 and 04. Costs related to the design of AMD treatment facilities should be included under subaccount 19.

**23. BIL Emergency Projects Only**

Authorized by the BIL. As defined at 30 C.F.R. § 700.5, an emergency is: a sudden danger or impairment that presents a high probability of substantial physical harm to the health, safety, or general welfare of people before the danger can be abated under normal program operation procedures. Emergency project costs cover the emergency restoration, reclamation, abatement, control, or prevention of adverse effects of coal mining practices, on eligible lands. Emergency projects must be pre-authorized by OSMRE, directly related to emergency hazard abatement, and are subject to availability of funds

**Appendix II: Table for BIL AML Eligible Projects**

<b>Project or Activity</b>	<b>Type of Hazard</b>	<b>Estimated FY 2022 BIL AML Funding for Project</b>	<b>Schedule</b>	<b>Proposed Project Accomplishments</b>
<i>Project 1 – Name of Project</i>	<i>E.g., Dangerous Highwall, Clogged Stream Lands, etc.</i>	<i>\$XXXX</i>	<i>Anticipated Start Date – Anticipated End Date</i>	<i>E.g., dangerous highwall reclaimed</i>

**Appendix III: BIL AML Project Flowchart**

