

Missouri AML Program's Comments on Draft Guidance for IHA AML Grant Implementation

June 13, 2022

The Missouri AML program is grateful for the opportunity to comment on the "Draft Guidance for Bipartisan Infrastructure Law, Abandoned Mine Land Grant Implementation."

Overall, this guidance document is a step backwards in the cooperative federalism that has made the AML program a success and is an overreach of the federal administration's policies and executive orders that had no intentions of being a part of the law, otherwise such language and requirements would have been included in the law itself. In reading section 40701 of the Bipartisan Infrastructure Law (BIL), it is apparent that the purpose of the law is to provide the needed funding to specifically address the historic coal mine problems identified across the nation through a comprehensive program. Other than providing a mechanism to fund reclamation of the country's legacy coal mines, there are three caveats to the law: 1) Contract Aggregation.—In applying for grants, States and Indian Tribes may aggregate bids into larger statewide or regional contracts; 2) subsection (f) may provide priority to AML projects that provide employment to current and former employees of the coal industry; 3) subsection (g) reserves \$25,000,000 for the Secretary of Interior to maintain the federal inventory. 4) 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 this division or an amendment made by this division shall 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 subchapter IV of chapter 31 of title 40, United States Code (commonly referred to as the "Davis-Bacon Act"). Other than those four caveats, this funding is to be expended on coal mine reclamation. In fact, subsection (c) "Covered Activities" specifically states that grants under subsection (b)(1) shall only be used for activities described in subsections (a) and (b) of section 403 and section 410 of the Surface Mining Control and Reclamation Act of 1977.

However, through OSM's guidance document there are many unrelated activities that are proposed to be funded through the BIL which will be exhaustive of staff time and funding:

- 1.) Eligible Projects & Prioritization; Page 3, last paragraph states "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." **There is nothing in section 40701 of the law that provides the states funding for this activity.**
- 2.) BIL Grant Amendments; Page 5, last para with bullets states "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:"
 - a.) "A description of each proposed project to be funded during the grant period of performance;" **This will be problematic to adhere to a list of proposed projects since much of these projects will be developed by consultants and it will be near impossible to determine which grant they will be funded from. Grants selected for funding will greatly depend on estimated cost of project and time period of grant as to when the project is bid.**
 - b.) "A description of the state and Tribe's prioritization process or ranking system for the selection of each proposed project;" **Not sure this is necessary since this information is already captured in e-AMLIS.**

- c.) "A statement of the estimated benefits that will result from each project;" **It is important for the national program to remain focused on reporting benefits identified in the SMCRA. The other proposed initiatives by the administration, including labor/ collective bargaining agreements, work force training/ development, disadvantaged communities shall not be included in the list of benefits. This will not only be an inappropriate use of the BIL funds but it will also be a significant workload on the State programs.**
- d.) "A statement of how the State or Tribe will prioritize projects employing current or former employees of the coal industry;" **Because the majority of Missouri's coal miners have been unemployed for more than 30 years, prioritization seems unnecessary for our state. There is a small company that is actively mining in the state, but it seems that OSMRE needs to work closely with the state programs to develop mutually acceptable protocol for complying with this part of the law. Furthermore, the definition of a "former employee of the coal industry" needs to be defined. Does it mean anyone historically or currently employed by a coal mining company? How about those that mine for personal use? What about employees who worked for a mine company that produced less than 16 2/3 percent of the total cumulative production (see 30 CFR 702.14)? Are contractors who have been historically involved in coal reclamation activities part of the mining industry? It would seem reasonable since SMCRA regulates coal mining from approval of the permit application through reclamation. This definition needs to be clearly defined. Additionally, what credentials will miners need to provide to meet this qualification?**
- e.) "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;" **This proposal should not be in the guidance document. There is no requirement in SMCRA for this submittal.**
- f.) "Any linkages to economic redevelopment opportunities created by carrying out the proposed projects; A description of how local communities provided input into the selection of projects to be funded;" **This proposal should not be in the guidance document. There is no requirement in SMCRA for this submittal.**
- g.) "A description of how the grantee will address environmental justice issues within coalfield communities;" **This proposal should not be in the guidance document. There is no requirement in SMCRA for this submittal.**
- h.) "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;" **This proposal should not be in the guidance document. There is no requirement in SMCRA for this submittal.**
- i.) "A description of whether and to what extent the proposed projects will reduce greenhouse gas emissions, particularly methane emissions;" **This proposal should not be in the guidance document. There is no requirement in SMCRA for this submittal.**
- j.) "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,"
- k.) "Proposed performance measurement (see section X) **Performance measures need to be those that are associated with SMCRA only.**

- 4.) IX. Project Authorization; Page 9, para 3 along with associated bullets and verbiage related to projects or aggregated projects in excess of \$1 million dollars should be eliminated from the OSM's guidance document. There is no requirements in SMCRA that requires State program to use unionized workforce or to engage in labor agreements of any kind. This kind of engagement with union labor organizations would be an extreme burden on small programs that are not in heavily unionized communities. This requirement completely contradicts incentivizing State programs to complete aggregated, regional contracts for reclamation.
- 5.) X. BIL AML Performance Measures and Reporting; Because Section 40701 is limited to funding activities described in subsections (a) and (b) of section 403 and section 410 of SMCRA, only those activities need to be reported to assure States are conducting their work in accordance with the law. Reporting the socio-economic benefits does not provide any kind of quantitative data that assures State programs are making progress on reclamation activities and does not provide a sort of assurance that the monies are being effectively and efficiently utilized for the approved activities. Furthermore such reporting would cause an undue burden on the State programs unless OSMRE were to develop a tracking database similar to "people no longer at risk" that automatically populates through data entries into e-AMLIS.

Additionally OSM's guidance document provides extremely vague guidance often utilizing the terms "encourage" and "Should" to describe the actions the State programs are to follow when implementing their State program activities. For example, page 4, para 1 with bullets states the OSMRE encourages States and Tribes to: Utilize procurement processes that incentivize AML contractors to hire miners; aggregate projects into larger statewide projects; support apprenticeships and youth training programs; require contractors to adopt collective bargaining agreements and community benefit agreements; consider Projects that reduce methane production; incorporate input from disadvantaged communities into the selection of projects to be funded. While actions to support the hiring miners and the development of aggregate project areas into larger projects is a direct reference to the law, the remaining actions are outside the scope of the law and are not funded as per Section 40701, subsection (c) "Covered Activities."

During a conference call with OSMRE, IMCC, and participating state AML programs on June 1, 2022, OSMRE stated that much of the guidance is just that "guidance" and in no way will the suggestive language, including the last seven bullet points in Section III. ELIGIBLE PROJECTS & PRIORITIZATION (page 4), be requirements for project selection and approval for Authorization to Proceed. Although we appreciate OSMRE's flexibility, we have concerns that the "soft requirements" in this draft guidance document, which are not part of the law, will be expected to be part of our State regulations and State Plans.

Furthermore, implementation of many of these soft requirements will likely have major impacts to the States and Tribes and will set back the cooperative federalism that has made this program such a success. For the miner's preference, bid aggregation, and Davis-Bacon requirements, there are clear answers to this question. For the items the guidance says are "encouraged" or "should" be done, there are no answers. The soft mandates mostly appear to involve the Interior Department's policy preferences for BIL implementation. Absent a clear federal legal mandate requiring States and Tribes to implement these policy approaches, AML program managers are likely to be caught in the middle between the choices the Interior Department has identified in the guidance and legislators at the state level whose approaches to these same policy issues are likely to be in conflict. Importantly, both the pre-existing AML program and the AML program as augmented by the BIL should remain an exercise in cooperative federalism. A reason for this is that one-size-fits-all style approaches tend not to work well for this program. It is important that Section 40701 implementation follow the fundamental precept of SMCRA because states

need the flexibility to match their individual implementation to their circumstances. In the absence of a clear federal legal mandate from Congress requiring a certain policy approach, any policy void left in a particular area should be the state's prerogative to fill.

We must remember State and Tribal AML programs have a forty-five-year track record of delivering good results for the citizens and environment of this nation's coalfield communities. These years of experience have enabled state and Tribal programs to develop and implement their reclamation expertise and maximize the effectiveness in achieving the AML program's fundamental goals of protecting safety and health and restoring the environment. States and Tribes working in cooperation with OSMRE is the most effective and efficient means for implementing the new Bipartisan Infrastructure Law.