

**Comments on Draft Guidance on Bipartisan Infrastructure Law Abandoned Mine Land Grant Implementation Options for State Funding of Long-term Management of Acid Mine Drainage Treatment Systems; Efficient Implementation of Bipartisan Infrastructure Law; Certified States' Diversion of AML Funds to non-AML Reclamation; Hiring of United Mine Workers of America; Compliance with Davis-Bacon Prevailing Wage Requirements; Reforestation of Abandoned Mine Lands; and, Disadvantaged Communities**

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## **Introduction**

I am responding to the Office of Surface Mining Reclamation and Enforcement's (OSMRE) request for comments on Draft Guidance on the Bipartisan Infrastructure Law (BIL) Abandoned Mine Land Grant Implementation (May 20, 2022).

## **Issue**

First and foremost, Section 40701 of BIL provides \$10.873 billion to States and Tribes to reclaim lands and waters degraded by abandoned coal mines. The Draft Guidance, page 2, confirms that BIL funds can be used for projects that seek to restore lands and waters affected by acid mine drainage (AMD) from abandoned coal mines. It notes that eligibility for:

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.

This is a valid interpretation of BIL and should be retained. This interpretation will have the maximum positive impacts on communities which have been unduly burdened by polluted waters for the past 50 to 150 years and which have been waiting for more than 44 years for the environmental and economic burdens of AMD and AML to be lifted pursuant to the promises

Congress and the federal government made in 1977. This interpretation addresses part of the inequities imposed on abandoned communities by provisions included in SMCRA that appear to be designed to limit the restoration of thousands of miles of polluted waterways. The Guidance on the Bipartisan Infrastructure Law (BIL) Abandoned Mine Land Grant Implementation must go further in order to provide for effective and prudent restoration of America's AMD polluted waterways.

The Draft Guidance expressly says that "Eligible states and tribes are not authorized under the BIL to place BIL AML grant funds into AMD set-aside accounts" noting in footnote 4 that: 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. The Draft Guidance precludes the use of the Section 402(g)(6) set-aside funds, it does not identify what mechanisms can be used to fund long-term operation and maintenance costs.

We know that funding construction of AMD treatment systems and the operation of existing and new AMD treatment systems is not a short-term necessity. Abandoned coal mines will discharge AMD for hundreds or thousands of years. OSMRE needs to allow states to fund the operation, maintenance and rehabilitation (OM&R) of AMD treatment systems for years to come. If OSMRE and the Department of the Interior (DOI) fail to address what mechanisms can be used to fund long-term operation and maintenance costs, states will devise their own mechanisms.

This could result in a hodge-podge of mechanisms that are not consistent and could increase OSMRE's oversight costs.

## **Recommendation**

OSMRE should revise the Draft Guidance to provide examples of how grantees can use BIL AMD grants to fund multi-year or perpetual operation, maintenance and rehabilitation of existing and newly-constructed AMD treatment systems. Examples are needed because the Draft Guidance says that BIL AML grants may not be placed in Section 402(g)(6) set-aside accounts. The Section 402(g)(6) set asides have been the traditional way of funding these long-term costs. The Draft Guidance should answer the question of what methods of funding long-term operation, maintenance, and rehabilitation will be acceptable. Providing a clear answer to that question is critical for the expeditious implementation of BIL AML grants for AMD treatment. OSMRE should add a new paragraph following Paragraph 21 in Appendix 1 of the Draft Guidance which provides:

States receiving BIL AML funding may use the grant funds to operate, maintain, and rehabilitate AMD treatment systems by one or more of the following mechanisms:

1. Annual or multi-year funding for operation, maintenance, and rehabilitation carried out by the recipient State or by a third party operating a specific AMD treatment facility or facilities.
2. One-time funding of an endowment or a trust fund for operation, maintenance, and rehabilitation carried out by the recipient State or by a third party operating an AMD treatment system or systems in the amount needed to assure multi-year or perpetual funding for specified actions in accordance with a specific long-term operation, maintenance and rehabilitation plan.

3. Purchase of a long-term service contract to undertake operation, maintenance, and rehabilitation carried out by the recipient State or by a third party operating a specific AMD treatment system or systems in accordance with a specific long-term operation, maintenance, and rehabilitation plan.

### **Issue**

The Draft Guidance appears to create a new grant application and approval process that disregards the existing AML fee grant application and approval process. This new proposed process is bureaucratic and ignores the efficiencies of the existing process.

### **Recommendation**

OSMRE should revise the Draft Guidance BIL AML grant application and approval process to more closely track the existing AML fee grant process that has been successfully used the past 40 plus years. Replicating a process that has been effective and efficient will enable OSMRE, states, and tribes to more timely and efficiently complete AML/AMD reclamation.

### **Issue**

Section II of the Draft Guidance indicates certified states are eligible to receive BIL AML grants. Sections III and IV of the Draft Guidance describes eligible projects and use of the BIL AML grant funds. These provisions reflect the BIL. However, they do not address the fact that SMCRA allows certified states to use AML fee grant funds for purposes other than coal AML Priority 1, Priority 2, and Priority 3 projects. Some certified states have a documented history of

using AML fee grant funds for these other purposes instead of focusing on completion of the known coal abandoned mine lands that exist in the state despite their past “certification” that the state has completed reclamation of all coal AML. The Draft Guidance, as written, allows certified states to divert their SMCRA AML fee grants to these other purposes and use the BIL AML grant funds to address existing coal AML that have not been addressed, despite the state’s past certification it had addressed all coal AML. Certified states should not be allowed to exploit the system in a manner that deprives uncertified states of BIL funds needed to address their AML/AMD that continue to threaten the health and safety of the people and continue to poison their water and environment; and, that continue to economically and environmentally disadvantage communities in uncertified states.

### **Recommendation**

OSMRE and DOI should revise the Draft Guidance to specify that certified states must use 100% of their SMCRA AML fee grant to address coal AML before the certified state can receive any BIL AML grant funds. This clarification should be made to prevent BIL AML grant funds and SMCRA AML fee grant funds from being diverted for other purposes which effectively perpetuates the adverse economic and environmental burdens on communities that are still burdened by coal AML/AMD due to the inadequate AML fees paid by the coal industry the past 44 years. Setting standards that prioritize the reclamation of coal AML will hasten the date when the existing coal industry no longer needs to pay AML fees because the sins of their past have been addressed. Certified Tribes should not be subject to this clarification as they need the funds to address the many inequities imposed on them by the United States of America.

**Issue**

Section V provides the Davis-Bacon Act prevailing wage provisions apply to BIL funded projects. This is correct. It should be maintained in the final Guidance document. In fact, I urge DOI to establish that all state SMCRA AML fee grant projects also comply with the Davis-Bacon Act.

**Issue**

Section III of the Draft Guidance notes Section 40701(f) of BIL provides states and tribes should prioritize projects that provide employment to current and former employees of the coal industry. The Draft Guidance document fails to note that some current coal companies used the Bankruptcy process to abandon their United Mine Workers of America contractual obligations to provide health care and retirement benefits to current and former coal miners. These contract obligations have been shifted from the coal company to the American tax payers (some of them paid no taxes due to the 2017 tax cut law passed by the majority in Congress and signed by Trump). These coal companies, their owners and controllers, their corporate officers, and their shareholders should not be allowed to profit from the BIL. None of these entities should be allowed to bid on or in any way profit off the BIL funded AML/AMD reclamation. They have proven they put profits over people. This behavior should not be rewarded.

**Recommendation**

The Draft Guidance should be modified to provide that no coal company, their owners and controllers, their corporate officers, and their shareholders, that used the Bankruptcy process to abandon their United Mine Workers of America contractual obligations to provide health care

and retirement benefits to current and former coal miners, will be allowed to profit from the BIL AML/AMD reclamation work. They cannot bid on or be awarded any contract or subcontract or perform any work funded by the BIL.

### **Issue**

The Draft Guidance references “Disadvantaged Community.” It includes a broad definition of the term. However, that definition does not adequately address or properly include communities that have been adversely economically and environmentally burdened by: unproductive and dangerous AML; surface and ground waters polluted by toxic AMD; whose air is polluted by methane from AML; whose air is polluted by toxins and smoke from mine fires and burning waste coal; and, whose air is polluted with sulfur dioxide emissions from AMD discharges.

### **Recommendation**

The Final Guidance should be modified to make it clear the definition of “Disadvantaged Community” specifically includes former coal communities that have suffered for many decades due to unproductive and dangerous AML; surface and ground waters polluted by toxic AMD; air polluted by methane from AML; air polluted by toxins and smoke from mine fires and burning waste coal; and, air polluted with sulfur dioxide emissions from AMD discharges.

### **Issue**

The Draft Guidance addresses many worthy issues. However, it does not provide guidance to states and tribes on how to address some of the harms inflicted by coal mining. There are thousands of acres of former forests that were destroyed by coal mining and not replaced as

required by SMCRA. The Guidance should encourage as much reforestation of AML as possible. Reforestation has many benefits. It will create future jobs in forestry products and lumber industry. It will sequester some of the carbon emitted by people during the industrial age. It will provide wildlife habitat. Reforestation will reduce erosion of soils into America's streams and rivers. Reforestation provides clean water. And, reforestation of lands from which AMD flows will reduce the quantity of AMD that is discharged from AML which reduce the amount of toxic AMD that flows into America's streams and rivers. It will also reduce the cost of AMD treatment because there will be less AMD to treat.

### **Recommendation**

OSMRE should modify the Guidance Document to encourage as much reforestation of the AML as possible in order to achieve the above benefits.

### **Conclusion**

Thank you for the opportunity to comment on the Draft Guidance. I encourage OSMRE and DOI to modify the Draft Guidance to address all of the issues and recommendations set forth above. The clarifications will be very helpful in ensuring the best possible use of the BIL AMD funds.

Sincerely,

Joe Pizarchik



