Panel Discussion on Reauthorization of AML Fee Collection Under Title IV of the Surface Mining Control and Reclamation Act – Past, Present and Future

"The Present Landscape"

Gregory Conrad
Interstate Mining Compact Commission

As we begin to consider reauthorization of fee collection authority under Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) – which will terminate as of September 30, 2021 – there are more questions than answers. That is to be expected at this stage of the game. However, we have also learned much over the almost 40 year history of the AML program, especially based on the most recent reauthorization effort in 2006 and all that led up to it, which Loretta has expertly covered in her comprehensive overview of the past. My job is to address the present – where we find ourselves today in anticipation of potential reauthorization efforts over the next several years. What I hope to provide is an assessment of some of the key elements that will attend any reauthorization effort and how we are positioned today to respond to them. There is a maxim that "everything old is new again" and we will certainly see that truism play out in the forthcoming AML debate because, in many respects, the issues that will attend any future reauthorization effort are likely to be the same or similar to those we faced in the mid-2000's. Thus, it will be incumbent on the states and tribes, as major players in the debate, to fashion arguments and information that not only accurately inform the debate, but breathe new life into it. How we do that will be answered by our next presenters. I merely want to set the stage for what we will likely be facing as we consider our strategy for action over the coming years.

At the NAAMLP Winter Meeting in Anchorage in February of 2013, I presented a thought piece on reauthorization that raised several issues for consideration including the following:

- Who will the players be this time around? What are their various interests and likely positions? What is the potential for developing a coalition of interested parties to pursue reauthorization?
- How have things changed since the mid-2000's when we last pursued reauthorization?
- What are the key issues surrounding reauthorization this time around?
- Who will our likely "champions" be on Capitol Hill for purposes of pursuing reauthorization?
- What ground work must be laid in advance of a renewed reauthorization effort?

To begin to answer some of these questions, let me begin with the players in the debate and their likely interests or concerns.

First, and most importantly, we have the states and tribes. Knowing that we already face an existing inventory of $4 billion worth of unaddressed AML projects as presented in E-AMLIS, and that this inventory is likely to continue growing, there is clearly a need for fee collection beyond 2021. At present the unappropriated balance in the AML Trust Fund stands at about $2.4 billion. The majority of this balance consists of several accounts or buckets including the federal share (i.e. OSM's discretionary share that must be appropriated each year), much of which

consists of former RAMP money; historic production share reallocated from prior balance replacement payments (for future payouts after 2022); withheld amounts of money from the phase-in process for both certified and uncertified states during 2007 – 2009 (some of which is to be paid out in FY 2018 and 2019 (to certified states) and some of which is to be paid out after 2022 (to uncertified states); sequestered amounts since FY 2013; and any other unappropriated state share funds since 2006 (which are likely minimal given mandatory funding). In many ways, this is setting up the same scenario that plagued the Trust Fund prior to 2006, where a large unappropriated balance became not only questionable from an AML remediation perspective, but also a target for budget-balancing purposes. The latter tactic impeded payouts from the Fund as intended by Congress when SMCRA was enacted.

All of this begs several questions and presents several challenges. The states and tribes may be asked why the inventory remains so large, and why it may increase rather than decrease in size and complexity over time. We will need to be prepared to answer those questions directly and fully. The unappropriated balance will need to be dissected and explained so as to provide a transparent accounting of what these accounts consist of and why the balance is increasing instead of decreasing (given the accounts/buckets described above). Obviously, some balance was anticipated so as to generate interest for the United Mine Workers Combined Benefit Fund (CBF). Given the complexity of the funding formula, it will be incumbent on the states and tribes to provide their own assessment of how the Trust Fund is intended to operate. Hopefully it will align with OSM's and other's interpretations as well.

In addition to addressing why the balance in the Fund as of September 2021 will not be sufficient to address all outstanding AML reclamation concerns, the states and tribes will also want to fashion a position on actual fee collection – at what levels and for how long. We will also want to revisit the priority system in current law, as well as any other program requirements, to determine whether adjustments are needed. This would include funding for noncoal reclamation projects, the acid mine drainage set-aside, and funding for certified states and tribes (especially in light of the MAP-21 limitations on funding). Depending on how sequestration of mandatory funding is addressed over the coming months, we may also need to specifically address the consequences of that action, especially in terms of understanding where the sequestered funds have gone. One additional question will be the extent to which we even need fee extension if sufficient moneys remain (and truly exist) in the Trust Fund to address future AML work after 2021. Of course, that money will be primarily focused on high priority coal projects in remaining uncertified states, therefore leaving the impact on other states and tribes an open question.

The 2006 Amendments saw a unique and effective working relationship among the states and tribes – East and West; certified and uncertified; larger programs and minimum programs. This was critical to presenting a unified front and avoiding the divide and conquer mentality that can often impact the type of negotiations that resulted in the 2006 legislative accord. Much of this was managed through a small working group of states that was formed through the National Governors Association, working in concert with IMCC and NAAMLP. The dynamics that may attend a future legislative effort may be different this time around, but the value of unanimity will remain. It will also be important to reestablish our working relationship with other

interested and affected parties, such as the coal industry, the UMW, and environmental/citizen groups. More on these groups later.

A host of other issues will likely be brought into the debate, many of which we have faced over the recent past, and some of which are perennial concerns associated with the AML program. These include:

- How states and tribes are spending the money they receive. This necessarily involves two separate issues: 1) the "undelivered orders" concern relating to timeliness of expenditures and 2) the nature and extent of our reclamation work. We have already addressed both of these concerns in recent communications with OSM and Congress, including the updated Accomplishments Report published by NAAMLP and our response to the "undelivered orders" concern. As AML grant funding continues to see delays (due to the vagaries of the federal budget process and, in particular, sequestration), it will be incumbent on the states to articulate the programmatic impacts that this is causing, especially with respect to truncated construction seasons.
- If funding under Title IV of SMCRA is reduced or eliminated following fee termination, will some states continue to operate Title V regulatory programs?
- What is the potential interaction between extending fee collection authority under SMCRA for coal and a separate program (and fees) for the hardrock mining industry? Will reauthorization serve as a vehicle for pursuing Good Samaritan protection legislation?
- What is the potential for keeping AML funding as a mandatory, off-budget program under any reauthorization effort, especially in light of deficit reduction?

Some of these require immediate attention and constant vigilance as we anticipate a reauthorization effort in the future because they will define the landscape for the legislative environment. Speaking of which, let me turn now to Congress.

As I have shared with many of you at past conferences and as you have probably noted yourselves in the press, the environment on Capitol Hill for legislative action is fairly toxic, with antagonism and intransigence ruling the day. The 113th Congress will likely go down as the least productive in U.S. history. There are many reasons for this. One is that overwhelming personal or political power is no longer one of the attributes of congressional leadership and for the most part no longer exists on Capitol Hill. Another can be traced to the very laws that Congress has and continues to pass. In an Op-Ed article in the Washington Post this past spring entitled "What Broke Washington", Phillip K. Howard of the nonpartisan group Common Good, stated the following: "Polarization is mainly a symptom, not the cause, of paralysis. Democracy has become powerless. Politicians who are impotent have no way to compete except by pointing fingers. The main culprit, ironically, is law. Generations of lawmakers and regulators have written so much law, in such detail, that officials are barred from acting sensibly. Like sediment in the harbor, law has piled up until it is almost impossible – indeed, illegal – for officials to make choices needed for government to get where it needs to go." He concludes: "the problem with too much law is that it's the law. No one, not even the president, can get around it. [Well – I'm not so sure about that!] Democracy can't work until this dense legal jungle is rewritten to permit officials to take responsibility again."

Can you identify? After working through the 2006 Amendments for the umpteenth time in preparing these remarks, I sure can. The complexity of this law, and especially the funding formula, are enough to cross anyone's eyes after about 30 minutes of attempting to dissect the details. I raise this because any reauthorization effort is likely going to involve a fair degree of helping folks on Capitol Hill capture the essence of this law in order to appropriately amend it. And that in itself will be a Herculean effort based on some of my past efforts to explain it to them. As Patty Beneke, formerly senior counsel with the Senate Energy and Natural Resources Committee once told me after another of our in-depth discussions about some esoteric aspect of the 2006 Amendments "Greg, you can NEVER leave IMCC. No one understands this law like you do." High praise – much appreciated – but she gave me entirely too much credit. I don't think anyone truly understands the complexities of this law – and for us to take it on again will require much diligence and perseverance given the environment I just spoke of on Capitol Hill.

So far we have fared well in terms of congressional support for state programs – both AML and regulatory – on Capitol Hill over the past few years. Thanks primarily to actions by the House Appropriations Committee (and concurrence by the Senate Appropriations Committee), we have turned back attempts to revamp the AML program and eliminate funding for certified states and tribes (other than the midnight action by some yet unknown congressional committee to place a $15 million cap on payments to certified states and tribes as part of the Surface Transportation Act (MAP-21) in 2010). We have also seen strong support for state Title V regulatory programs in terms of both grant funding and limits on OSM's oversight authority. To some extent, I believe we can read congressional support for the AML program through these budget actions as an expression of Congress' intent to maintain the integrity and approach contained in the 2006 amendments.

Several other complexities abound. Most importantly, we have to identify a champion for our cause. Some of the major players the last time around are gone, including Senators Santorum, Byrd and Rockefeller. On the House side, Representatives Cubin from Wyoming is gone, although fortunately replaced by Representative Lummis who is very engaged on the issues. Representative Rahall of West Virginia has moved on to other committee responsibilities and is facing a serious reelection challenge. As a result, we have a whole new slate of players that will need to be educated. Many of our congressional committee staff are gone as well, with Tim Charters and Kathy Benedetto of the House Energy and Mineral Resources Subcommittee being the most aware and engaged on the issue. So new alliances will need to be forged and we will need the help of others to accomplish this.

While some legislative issues rely heavily on who controls each chamber, this isn't necessarily the case with AML issues as they tend to transcend political alliances. That being said, it is helpful where we have strong working relationships with the committees of jurisdiction over SMCRA, which include Senate Energy and Natural Resources and House Natural Resources. For instance, the House Energy and Mineral Resources Subcommittee staff is willing to hold an oversight hearing on AML issues at our request, which would be hugely helpful in building the case for reauthorization. Over the course of the next few years, we will want to take advantage of these alliances to forge the right environment for action in Congress. And as in 2006, we will want to develop a coalition of interests to support legislation once the time is right to move forward with it.

Who are some of these interested parties? One key player will be the coal industry, and more specifically the Bituminous Coal Operators Association or BCOA. We have worked closely with the group over the years and it has paid great dividends. Unfortunately, Dave Young, who served as President, has retired and we have a new group of players with whom we have yet to engage, even though we have made some overtures to do so. You may recall that BCOA was a major player in the 2006 legislative debate because of its working relationship with the United Mine Workers of America (UMW). BCOA's efforts focused on securing funding for pension benefits and health care for widows and orphans under the UMW Combined Benefit Fund (CBF). This issue was one the primary drivers for the 2006 amendments to SMCRA. The final amendments confirmed the continued use of interest from the AML Trust Fund to meet CBF funding shortfalls, but also provided for additional moneys from the general treasury to meet these shortfalls. Interestingly, these moneys were intrinsically tied to the AML funding formula in terms of interest from the Trust Fund and caps on payouts from the general treasury.

My understanding is that these CBF shortfalls continue and as a result efforts continue to free up additional funds from the treasury under Title IV of SMCRA. Senator Rockefeller and Congressman Rahall, both of West Virginia, have introduced legislation, dubbed the CARE Act, to adjust the available amount of payments to the CBF under the 2006 amendments. This legislative adjustment would not impact state or tribal AML payments, so we have had little concern about it. It also has not seen any action in either the House or the Senate. However, in the Senate Report accompanying the Fiscal Year 2015 appropriations bill, the following language was included: "If Congressional action is not taken to address the long-term solvency of these pension and healthcare funds prior to the end of the 113th Congress, the administration is encouraged to consider legislative alternatives to address these concerns as part of the fiscal year 2016 budget request." Obviously, someone is watching out for the CBF.

The significance of this issue cannot be minimized in terms of future legislative engagement. If the CBF continues to see funding shortfalls, and if Congress or the Administration is unable to secure a solution over the next few years, this issue could well serve as the driver once again for reauthorization efforts. And the states and tribes would do well once again to hitch our car to this engine given the success it insured the last time around.

Interestingly, the National Mining Association (NMA), which represents the majority of the coal industry (BCOA only represents a handful of the majors who are tied to UMW labor contracts), has been a minor player in the AML debate. In the past, NMA's position has been that the AML fees paid by its coal companies should be spent in accordance with the dictates of SMCRA, focused on high priority coal problems, and be used in a fiscally responsible manner by OSM and the states. There has been some concern about the use of AML funds for noncoal reclamation projects, but NMA has been careful to not too push the envelope on this issue given the potential for a hardrock AML fee and associated program. The Association realizes that both SMCRA and BLM's hardrock AML program have served as a kind of buffer from a more extensive hardrock AML program under either the 1872 Mining Law or the Administration's budget proposal. What must be kept in mind is that NMA worked diligently to secure a reduction in AML fees over the extended life of the program back in 2006 and will therefore be opposed to any increase in the fees, and probably any extension of fee collection – at least

without some sort of reasonable limit on that extension or some additional concession in other SMCRA program areas. Hence the importance of us making a clear case for why fee increases and/or extensions are necessary.

Another interested party in the debate are environmental and citizen groups, and here we have seen a divergence of opinions and approaches depending on the group we are working with. Some of the national environmental groups, such as Earthworks and the National Wildlife Federation, have been rather circumspect about their support for AML reauthorization. While they see value in the program itself, and believe the coal industry must pay for the legacy of AML problems left in the wake of pre-1977 mining practices, they have articulated concerns about the use of AML money. Some are nervous about expanding the universe of AML projects beyond coal only; others have concerns about set aside funds that have few parameters for how they can be used and managed. And yet many watershed groups are strong supporters of the AML program, especially set aside funds that are focused on acid mine drainage and improvements to water quality. At least one national environmental organization, Trout Unlimited, has been an advocate for state and tribal AML programs and is coordinating with IMCC and NAAMLP to seek an exemption from sequestration for mandatory AML funding.

In general, I think we can expect support from most NGO's on any reauthorization effort. We will likely engage in some lively debate about priorities and use of funds, but I anticipate that these groups will support an extension of fee collection authority. The harder issue may be whether and to what extent SMCRA issues should be intertwined with related AML concerns such as a hardrock AML fee and program and possibly other SMCRA issues under Title V in such areas as stream protection, mine placement of coal ash, federal oversight, etc. Given the interplay between Title IV funding and the implementation of Title V regulatory programs, there may be a great temptation to link the two in a quid pro quo type of arrangement to gain NGO support for fee extension.

And finally, what can we expect from our federal government partners under SMCRA? We know that OSM, as part of its proposed budget for Fiscal Year 2015, has suggested a restoration of AML fees to pre-2006 levels, based on their view that significant amounts of AML work remain on the inventory and the need for adequate funding to complete the job. At the same time, the Administration (through the Office of Management and Budget) was not the strongest advocate for an extension of the program back in 2006. They seemed to "go along" with the idea, but were particularly distressed about the use of general treasury funds to pay for unappropriated state and tribal share balances and for certified state and tribal in lieu payments. In fact, ever since the enactment of the 2006 amendments, the Administration has proposed in its budget to eliminate payments to certified states and tribes due to the impact on deficit spending. They also did not oppose efforts in 2010 to cap payments to certified states and tribes at $15 million as part of amendments to SMCRA under the Surface Transportation Act (MAP-21).

Some might find these positions inconsistent, but in many ways they are not. The Administration, and OSM in particular, has always supported a targeted and effective AML program, as long as it is focused on high priority coal problems. Anything beyond these types of expenditures – including for noncoal AML projects; for mining impacts to communities; for set aside programs – have been viewed as inappropriate expansions of the intent of Congress in

reauthorizing the fee in 2006. We of course do not see it that way, but unfortunately the federal government's position also aligns with industry's view of the world – and even some environmental groups. This may result in us having to consider either other approaches or new justifications when the time comes for reauthorization this time around.

In any event, I believe we can count on the federal government to support some type of extension, as long as it is appropriately focused and limited. I also anticipate that we'll continue to see strong positions advanced by them regarding payments to certified states and tribes, use of AML moneys for noncoal projects and for lower priority projects that are done "in connection with" high priority projects, and maybe even continued use of set aside programs. It will be particularly important for us to reach a common understanding and agreement about how we are spending our AML dollars so that the "undelivered orders" issue does not cause undue complications. And it will be helpful if there is complete confidence in the E-AMLIS inventory, which will play a large role in justifying the need for fee extension. Any issues we have with grant administration and/or oversight should also be resolved so this does not provide a lightning rod for controversy. And finally, we should have a common understanding of what moneys remain in the Fund and how they are allocated among such programs as the Secretary's share, historic coal production, and unappropriated balances.

We also need to be aware of the internal dynamic within the federal government. While OSM is the lead agency that administers and oversees the AML program under Title IV of SMCRA, the agency is also beholden to at least two entities within the Interior Department – the budget shop within the Policy, Management and Budget secretariat and the policy makers within the Land and Minerals Management secretariat. Beyond this, and perhaps most importantly, there is the political and policy arm of the government represented by the Office of Management and Budget. Finally, a significant role is played by the Solicitors Office within Interior regarding all legal, and often times even policy, issues. Taken together, OSM (and by extension, the states and tribes) have a tenuous maze of decision makers to negotiate as we advance any sort of legislative initiative that has both policy, legal and budget ramifications.

A few other thoughts as we contemplate the present state of affairs in advance of any reauthorization effort. There is no time like the present to address issues that may stand in the way of a serious reauthorization effort. I have mentioned some of them earlier, such as undelivered orders, the veracity of the inventory, evolving and new AML problems that are being added to the inventory, and grant administration, especially grant distribution delays due to the federal budget cycle and sequestration and the consequences for construction seasons. A few others to consider include:

- Impacts to annual grant expenditures related to our need to "staff up" in anticipation of increased grant amounts (i.e. fixed administrative costs v. project/construction costs)
- Impacts from sequestration of mandatory AML funding (recent briefing to OMB)
- Current challenges related to grant administration and oversight
- The certification landscape – who is in and who is still out?
- Status of minimum program states funding and projects
- Impacts to AML funding related to declining coal production

- Relative importance of AML projects, especially water replacement and AMD treatment. Is it time to reevaluate priorities? The "in connection with" requirement?
- Overall nature of AML problems, new and old. What is the landscape really looking like for AML work? How are emergencies impacting the nature of our work?

How we address these and other matters raised in my remarks today will set the stage for any next steps in the reauthorization process. We can also learn from our shortcomings and successes in the past as we prepare for the future. From my perspective, we are well positioned to lead the charge for reauthorization, especially if we take a measured, deliberate approach that includes an assessment of where we are today and a structured plan for where we hope to end up in three or four more years. I will leave it up to Murray and Brian to provide you with a picture of our critical next steps.