

AML Fee Reauthorization Legislation Introduced in the Senate

Senator Manchin (D-WV) has introduced legislation to reauthorize the AML fee under the Surface Mining Control and Reclamation Act (SMCRA) Title IV for 15 years (to 2036) at the current rate. Mr. Manchin is joined by Senators Jones (D-AL), Warner (D-VA), Kaine (D-VA), and Duckworth (D-IL) as co-sponsors for the bill, which is titled, "the Abandoned Mine Land Reclamation Fee Extension Act". Senator Manchin's leadership on this issue is especially significant given his senior position as ranking member of the Senate Energy and Natural Resources Committee.

Senator Manchin's reauthorization bill represents a significant milestone for the AML program. It has been characterized as a "clean" reauthorization, meaning that it extends the fee but makes no other changes to the program. Congressional consideration of reauthorization is still in the early stages. As it progresses, there is likely to be discussion of other potential changes to the Title IV AML program. The introduction of this bill may add significant momentum to Congress' consideration of the future of the AML program.

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Upcoming Meetings:

IMCC 2019 Annual Meeting
May 5-8
Ventana Canyon
Tucson, Arizona

Contact Information:

Interstate Mining Compact Commission
445 Carlisle Drive, Suite A
Herndon, VA 20170
Ph: 703.709.8654
Email: bmills@imcc.isa.us

IMCC meets with Congress and other Stakeholders re: AML Reauthorization

On March 26-28, IMCC again travelled to Capitol Hill for a series of meetings with twelve respective Congressional members. The primary purpose was to establish general contact with congressional offices that have mining and abandoned mine land (AML) interests, especially those IMCC was not able to visit in its initial round of Hill visits in January. The pending need for reauthorization of the coal AML program under SMCRA Title IV was a primary topic of discussions. Other topics included: the RECLAIM Act, 1872 mining law reform, hardrock AML, and Good Samaritan protections. IMCC has now met with staff of 10 Senators and 10 Representatives who serve in the 116th Congress, plus both majority and minority staff for the committees of jurisdiction over the Interior Department in both the House and Senate.

IMCC has also held calls and meetings with other stakeholders with interest in AML reauthorization to discuss the operation of the AML program and to clarify the allocation of AML funding. These have included non-governmental organizations (NGO) and the National Mining Association (NMA). To prepare for the possibility that state governors may become involved in a resolution of issues in AML



reauthorization legislation under the auspices of the National Governor's Association (NGA), as happened with the last reauthorization in 2006, IMCC conducted a briefing for NGA staff and remains in contact with them.

IMCC's 2019 Annual Meeting to be held in Tucson, Arizona

The Interstate Mining Compact Commission's (IMCC) 2019 Annual Meeting will take place in Tucson, Arizona at the Ventana Canyon Hotel from Sunday, May 5 to Wednesday, May 8.

The meeting will begin with a welcome reception on Sunday, May 5. On Monday, May 6, IMCC member states will be joined by officials from the Interior Department and the Office of Surface Mining Reclamation and Enforcement (OSMRE) to discuss issues of mutual concern. A joint meeting of the IMCC Finance and Administrative and Resolutions Committees will follow.

On Tuesday, May 7, the IMCC Standing Committees will meet, starting with the joint meeting of the Hardrock/Noncoal Section of the Environmental Affairs Committee and the Mine Safety and Health Committees in the morning. Immediately following lunch, the Coal Environmental Affairs and Abandoned Mine Land Committees will meet. The Annual Awards Banquet will take place in the evening where the IMCC 2019 National Reclamation, Minerals Education, and Mine Safety and Health Training Awards will be presented.

IMCC's Finance and Administrative and Resolutions Committees will meet again on the morning of Wednesday, May 8 to continue any unfinished business from the previous committee meeting. The Executive Commission Business Meeting will follow immediately and will conclude the Annual Meeting.

For more information, contact IMCC at 703-709-8654 or visit <http://imcc.isa.us>.

Administration Budget Again Proposes Cuts in SMCR Title V Funds for States

The Administration's budget for the federal government for FY20 was released on March 11, 2019. The appendix, containing the details of the budget, was not released until March 18, 2019. The biggest news for state mining programs in the budget is that, as the administration proposed last year, it contains large cuts to the Office of Surface Mining Reclamation and Enforcement's (OSMRE) budget for Title V regulatory grants under SMRCA. This year, OSMRE's proposed budget includes only \$43.9 Million for Title V state grants. (Last year, the amount proposed for Title V state grants was \$52.4 Million.) We understand that this is based on the amount of money left unspent by the states in recent years. Their figures indicate that, since 2008, the amount of money actually used by the states has averaged a total of \$62 Million per year and that carryover funding from state grants now amounts to about \$28 Million.

IMCC filed statements with both the Senate and House Appropriations subcommittees for the Interior Department urging that Congress continue funding for state Title V grants at the \$68.59 Million level it has adopted in each of the last several years. This is the level the states have identified as sufficient for their needs in their projections. IMCC's statement points out that states have faced particular challenges in obtaining state funds that has hampered states' ability to match available federal funds and that Congress needs to provide reliable, consistent funding. We also call to Congress' attention, that, if anything, the need for state Title V funding will increase with the FY21 budget, when an additional state program will also need funds. IMCC's Statement also endorses the Statement of the National Association of Abandoned Mine Land Programs (NAAML) President, Autumn Coleman, on AML budget issues.

Administration's Budget Proposes Elimination of the AML Pilot Program

The Administration's budget proposed elimination of the AML pilot program that Congress has funded in six Appalachian states in recent years. IMCC filed a statement on behalf of the NAAMLPL with both the Senate and House Appropriations subcommittees for the Interior Department urging that Congress continue funding for the AML Pilot Program.

Good News and Not So Good News in the Administration's Budget for MSHA

The good news in the Administration's budget for the Mine Safety and Health Administration (MSHA) is that, as IMCC has recently advocated, state training grants are funded in the full amount of not less than \$10,537,000. The not so good news is that the administration included a proviso in the budget which makes this state grants funding available for purchase of equipment necessary for compliance with MSHA's 2014 respirable dust rule by mine operators whose financial need is demonstrated to the Secretary of Labor. There is no limit on the amount of state training grant money that could be diverted under this proviso, so, conceivably, the entirety of the state training grant money could be diverted. IMCC filed statements with the Senate and House Appropriations subcommittees for the Labor Department objecting to this proviso and urging that state training grants be fully funded.

IMCC Participates in NAAMLPL Winter Meeting in St. George, Utah

IMCC staff participated in the National Association of Abandoned Mine Land Program's (NAAMLPL) Winter Business Meeting in St. George, Utah from Feb 5-7. NAAMLPL continues to contract with IMCC for legislative and regulatory affairs counsel. As part of this contract, IMCC provided a series of briefings and assisted in leading discussions during the meeting. These included the outlook for both coal and hardrock AML legislation in the incoming 116th Congress. IMCC led discussions of IMCC/NAAMLPL's coordination with Congress, the Office of Surface Mining Reclamation and Enforcement (OSMRE), and other major stakeholders on AML issues, with a focus on reauthorization of the AML fee.

EMR Subcommittee Hearing - SMCRA Abandoned Mine Lands Program

On March 28, the House Subcommittee on Energy and Mineral Resources (within the Natural Resources Committee) held a legislative hearing on SMCRA Title IV AML issues titled, "Abandoned Mine Land Reclamation: Innovative Approaches and Economic Development Opportunities." The hearing focused on three legislative measures related to the Title IV AML program, including: the Community Reclamation Partnerships Act (CRPA) (H.R. 315), the RECLAIM Act (H.R. 2156), and Reauthorization of the AML fee.

The RECLAIM Act was the primary focus of the hearing, but it also included a broad discussion of the AML program and its future. Subcommittee Chairman Lowenthal (D-CA) stated the Committee's desire to make the AML Program a priority in the 116th Congress and noted the great bi-partisan support for AML work in years past. He discussed in particular the program's importance for helping regions impacted by the loss of coal jobs, citing the RECLAIM Act as an example. He said that while the fee expiration would not occur until 2021, it was time to start discussion of reauthorization. Ranking Member Gosar's opening statement focused on the need to facilitate assistance by third-party groups at AML sites, mentioning the CRPA as a potential

solution. The CRPA's sponsor, Representative LaHood (R-IL), provided witness testimony in support of the bill and discussed the need for AML water treatment work.



IMCC prepared comments for the hearing and Eric Cavazza provided witness testimony on behalf of IMCC and NAAML. Mr. Cavazza's statement focused on the importance of AML work and discussed examples of its positive impacts, noting that addressing AML emergencies is particularly important. He also addressed the large remaining inventory of AML hazards and the very significant funding shortfall that will occur without reauthorization of the AML fee. Other hearing witnesses on the panel included Robert Hughes, Eastern Pennsylvania Coalition for Abandoned Mine Reclamation (EPCAMR); Eric Dixon, Appalachian Citizen's Law Center; Dan Fisher, City

of Gillespie, Illinois; and Chris Wood, Trout Unlimited – all of whom discussed the need for reauthorization of the AML fee in the course of their remarks.

Two Recent Developments: Clean Water Act Jurisdiction over Discharges to Groundwater

Background: The issue of whether the Clean Water Act (CWA) applies to discharges into groundwater that then flow until they reach waters that are clear jurisdictional under the CWA has been a hot topic in the federal courts of appeals, with different results coming from decisions in at least three circuits in the last year or so. There are developments on this subject in two areas since the last issue of the Compact:

US Supreme Court: The Supreme Court granted certiorari in a 9th Circuit case in which this issue is presented on February 19, 2019 and established a briefing schedule. Arguments in the case will not be set before the Court's fall term, at the earliest. A petition for certiorari in a 4th Circuit is also pending before the Supreme Court.

EPA: On April 15, 2019, the Environmental Protection Agency (EPA) announced its issuance of an Interpretative Statement on this issue. EPA has concluded, based on the structure, legislative history and context of the CWA that the "best, if not the only, reading of the statute is that all releases to groundwater are excluded from the scope of the National Pollutant Discharge Elimination System (NPDES) program, even where pollutants are conveyed to jurisdictional surface water via groundwater." Thus, EPA is establishing a "bright line" rule that excludes any water that has flowed as groundwater from jurisdiction under the NPDES provisions of the CWA, regardless of how directly connected the point source where the discharge occurs and the jurisdictional water to which it flows may be. EPA chose to not make this interpretive statement applicable in either the 9th or 4th Circuit, pending action by the Supreme Court on the cases from those courts that are pending there. EPA will take comments on how it might further clarify its position on this issue for forty five (45) days following publication of notice in the Federal Register.

Community Reclamation Partnerships Act Introduced in the House

Representative LaHood (R-IL) re-introduced the Community Reclamation Partnerships Act (CRPA) or "Community Reclaimers" (H.R. 315) in January, 2019.

The goal of the bill is to facilitate water treatment projects at coal AML sites, which have been

impeded for many years due to concerns over the potential liability attending this type of work. The CRPA seeks to establish a distinct process for state Title IV programs to conduct AML water treatment work free from those impediments, while also allowing states to partner with third-party charitable organizations by extending them a degree of liability protection.

The way forward for the CRPA in the current Congress is unclear. The bill has enjoyed significant bi-partisan support in the past. During the previous Congress, the House Natural Resources Committee passed an identical version (then H.R. 2937) on a voice-vote. The bill was then passed unanimously by the full House of Representatives, but efforts to introduce the bill in the Senate before the end of the 115th Congress were ultimately unsuccessful.

RECLAIM Act of 2019 Introduced in the House

Representative Matt Cartwright (D-PA) has re-introduced the RECLAIM Act (or, "Revitalizing the Economy of Coal Communities by Leveraging Local Activities and Investing More"), this time as H.R. 2156. Mr. Cartwright is joined by Representatives Beyer (D-VA), Thompson (R-PA), and Rogers (R-KY) as co-sponsors.

The RECLAIM Act is intended to aid economic circumstances in AML-impacted regions, particularly the coalfields in Appalachia, through AML projects that are intended to spur economic development. The bill would accelerate \$1 billion in grants to the AML programs from funds currently residing in the AML Trust Fund, with additional requirements for how and where the funding will be spent. The newly introduced version of the RECLAIM Act is substantially the same as the version passed by the House Natural Resources Committee in the previous Congress.

There were significant efforts over the course of 2018 to pass the RECLAIM Act in the House. While the measure has historically received bi-partisan support, it did not come to a vote before the end of the 115th Congress. Proponents of the RECLAIM Act, particularly non-governmental organizations (NGO) in the central Appalachian region, have made it their primary focus in the new Congress. Introduction of a bill containing a version of RECLAIM is also expected to come soon in the Senate.

NEPA Decision by Montana Federal Court re: Federal Coal Leasing Program

In a decision the US District Court for the District of Montana issued on Friday, April 19, 2019 in *Citizens for Clean Energy v U.S. Department of the Interior*, the court held that the government failed to comply with the National Environmental Policy Act (NEPA) when it terminated the moratorium on new coal leases on federal lands that the previous administration had imposed. Former Secretary of the Interior Jewell issued Secretarial Order 3338 on January 15, 2016. This Order required the Bureau of Land Management (BLM) to prepare a programmatic environmental impact statement (PEIS) that addressed: climate change; social and environmental externalities of federal coal production; the return to the public on leased coal; when, where and how to lease coal; consideration of leasing federal coal for export; and the role of federal coal in meeting the country's energy needs. Pending completion of the PEIS, the Order imposed a moratorium on federal coal leasing. The current administration issued an executive order on March 28, 2017 requiring the withdrawal of Secretary Jewell's order. One day later, on March 29, 2017, Interior Secretary Zinke issued Secretarial Order 3348. It lifted the moratorium, determined that a PEIS was not necessary for consideration of improvements to the federal coal leasing system and directed BLM to expeditiously process coal leasing applications in accordance with the law.

Citizens for Clean Energy and six other environmental organizations, a tribe and three states (California, Washington and New Mexico) sued the Interior Department and BLM in federal court in

Montana contending, among other things, that the government had failed to comply with NEPA in its actions terminating the moratorium on federal coal leasing. The states of Wyoming and Montana joined as defendants in the case. The federal court's April 19, 2019 decision held that Secretary Zinke's order was a major federal action that triggers the obligation under NEPA to conduct an analysis and NEPA was violated by the failure to conduct this analysis. The court stopped short of entering an injunction, pending further briefing on the remedies that should be imposed for failure to comply with NEPA.

Those who follow federal coal leasing issues may wish to contrast this decision with the one the US Court of Appeals for the DC Circuit issued on June 19, 2018 in the *Western Organization of Resource Councils v Zinke* case. There, the DC Circuit rejected a contention that the Interior Department was obligated to update the programmatic environmental impact statement (PEIS) that had been developed for the federal coal leasing program to address the impacts of climate change. Even though there was little or no disagreement that the PEIS had not considered climate change on any significant level, the DC Circuit held that the federal action at issue was adoption of the coal leasing program which was, for practical purposes, complete in 1979. Without a new federal action subsequent to 1979, the court indicated there was no basis to require an update to the PEIS that the Interior Department had conducted for the leasing program in 1979. In *Citizens for Clean Energy*, the Montana federal court determined that Secretary Zinke's Order ending the moratorium on federal coal leasing was a new federal action that triggered NEPA.

IMCC Participates in EPA Roundtable re: Good Samaritan Projects

IMCC participated in the Environmental Protection Agency's (EPA) "Abandoned Mine Lands Good Samaritan Demonstration Projects Roundtable" on April 17 at EPA Region 8 headquarters in Denver, Colorado. Participants included a mix of stakeholders including a large contingent of federal personnel from EPA as well as the Bureau of Land Management (BLM), United States Forest Service (USFS), and National Parks Service (NPS); state government personnel from Colorado, Montana, and others; mining industry representatives from the National Mining Association (NMA), American Exploration and Mining Association (AEMA), and several individual mining companies; and representatives of non-governmental organizations, most notably Trout Unlimited. There were presentations on a number of topics, including one by Ryan Ellis of IMCC on advancing AML clean ups from the perspective of the state Title IV AML programs and one by Jeff Graves of Colorado on his state's experience with obstacles to AML work.

The focus of the meeting was facilitation of cleanup of water resources at AML sites, which has been a renewed priority for EPA in the current administration. EPA is working to identify the obstacles to "Good Samaritan" work at AML sites by both state agencies and third-party charitable organizations. To that end, EPA has developed a white paper explaining new and existing administrative "tools" for facilitating these projects, especially through a new Administrative Orders on Consent (AOC) process. EPA hopes to refine the available tools based on input it received, and be able to proceed with several projects during 2019.

Latest Developments in Defining "Waters of the United States"

Below is a timeline of significant developments in the effort to redefine "waters of the United States" (WOTUS). Developments not noted in the last IMCC newsletter are shown in bold.

2015-06-09 - 2015 Rule finalized by EPA

2015-08-27 - US District Court in North Dakota stayed 2015 rule in 13 states that challenged it in that court – AK, AZ, AR, CO, ID, MO, MT, ND, NE, NM, NV, SD, WY

2015-10-09 - 6th Circuit Court of Appeals stayed 2015 Rule nationwide

2017-02-28 - Executive Order required consideration of rescission/replacement of 2015 Rule

2017-07-27 - Step 1, EPA proposed rescission of 2015 Rule
2017-09-27 - Comment period on Step 1 closed
2017-08-28 - Comment period for public outreach on Step 2 (a replacement rule) opened
2017-11-28 - Comment period for public outreach on Step 2 closed
2018-01-22 - US Supreme Court holds the 6th Circuit of Appeals did not have jurisdiction, eliminating that court's stay of the 2015 Rule
2018-02-06 - EPA promulgated an effective date of 2020-02-06 for the 2015 Rule, leaving pre-2015 rules in effect until then
2018-06-08 US District Court in Georgia enjoined the 2015 Rule in 11 states which challenged it in that court – AL, FL, GA, IN, KS, KY, NC, SC, UT, WV and WI
2018-07-12 – EPA reopened comment on repeal of the 2015 Waters of the United States (WOTUS) rule and reinstatement of the previous rules. The comment period closed on August 13, 2018
2018-08-16 – US District Court in South Carolina issued a nationwide injunction against the rule EPA promulgated on 2018-02-06 which established an effective date of 2020-02-06 for the 2015 Rule. This put the 2015 Rule into effect in the 26 states for which no injunction of the 2015 Rule has been entered.
2018-09-12 – US District Court in Texas enjoined 2015 rule in 3 states - TX, LA & MS
2018-09-18 – US District Court in North Dakota stays the 2015 rule in Iowa, making the old rules effective in 28 states, and the 2015 Rule effective in 22 states.
2018-12-12 – EPA and the Corps announce their proposed Step 2 Rule for replacement of the 2015 Rule.
2019-02-14 – EPA and the Corps publish a proposed Step 2 Rule for replacement of the 2015 Rule with a new definition based generally on the plurality opinion authored by Justice Scalia in the *Rapanos* case. The comment period for this proposed rule extended through April 15, 2019.

Other News:

- IMCC is deeply saddened by the loss of Jim Stephens, who has represented Arkansas so capably before the IMCC for many years. Jim always brought common sense to the IMCC debates, was ready with kind words of advice when anyone wanted them, and was well respected by his peers. He will be missed by all who knew him.
- Although there is nothing concrete to report at this time, IMCC expects to see bills introduced as soon as early May in both the House and Senate for reform of the Mining Law of 1872. Legislation for this purpose is expected to receive significant attention in the House Natural Resources Committee.

Note: Any other news regarding current delegates to IMCC or its "alumni" is welcome and will be published in future editions of the Compact. Please pass any updates on to Brittany Mills.