

A NEWSLETTER PUBLISHED BY THE INTERSTATE MINING COMPACT COMMISSION

IMCC 2023 Meeting October 16-18 in Bozeman, Montana

The IMCC's 2023 Mid-Year Meeting will be held at the Kimpton Armory Hotel in Bozeman, MT, which boasts unique art deco architecture, incredible mountain views, and proximity to all that Bozeman has to offer! Registration info was sent to all attendees via email. Please contact the IMCC with any questions!

IMCC 2024 Meeting June 10-12 in Anchorage, Alaska

The IMCC's Annual Meeting for 2024 will be held at the Sheraton Anchorage Hotel and Spa. A June meeting will allow for longer days and nicer weather for a possible excursion Monday afternoon! More details to follow as we work with our friends in Alaska to provide another great Annual Meeting experience for you all.

Upcoming Meetings:

IMCC 2023 Mid-Year Meeting
October 16-18, 2023
The Kimpton Armory Hotel
Bozeman, Montana

IMCC 2024 Annual Meeting
June 10-12, 2024
The Sheraton Anchorage Hotel & Spa
Anchorage, Alaska

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Montana Becomes IMCC's 25th Full Member State

On May 1, 2023, Montana Governor Greg Gianforte signed Senate Bill 55 into law. This bill adopts the Interstate Mining Compact and makes Montana a full member state of the Interstate Mining Compact Commission. The bill takes effect immediately and brings the number of IMCC full member states to 25, the most ever.

Please welcome representatives of the State of Montana, our newest member, to IMCC.

MSHA Publishes Proposed Silica Dust Rule

On Thursday, July 13, 2023, the Mine Safety and Health Administration (MSHA) published a proposed rule titled, "Lowering Miners' Exposure to Respirable Crystalline Silica and Improved Respiratory Protection". The rule would establish the permissible exposure limit for airborne respirable silica in all mines, including both coal and metal/non-metal, at 50 micrograms/cubic meter for full shift exposure, based on an 8-hour weighted average. The rule also addresses exposure sampling, corrective action to be taken when exposure exceeds the limit, and medical surveillance for metal/non-metal miners. The rule will incorporate by reference ASTM F3387-19 Standard Practice for Respiratory Protection in place of existing standards.

MSHA is accepting comments on this proposal through August 28, 2023, and has scheduled public hearings in Arlington, Virginia and Denver, Colorado.

IMCC and MSHA Meet at MSHA Headquarters and Sign New Memorandum of Understanding

Members of IMCC's Mine Safety and Health Committee met with MSHA leadership at its headquarters in Crystal City, VA on June 14th, 2023. This meeting was the first in-person IMCC-MSHA meeting following the COVID pandemic. This was also the first opportunity for IMCC to meet in person with the Biden Administration's choice to lead MSHA, Assistant Secretary Christopher Williamson, and hear about his priorities for the agency.



Issues discussed in the meeting included opportunities for cooperation between MSHA and state mine safety and health agencies, trends in mining fatalities and how to address them, upcoming agency rules, utilization of state training grant funding, support for mine rescue contests, and other current and potential mine safety and health challenges.

At the conclusion of the meeting, Assistant Secretary of Labor for Mine Safety and Health, Christopher Williamson and IMCC Executive Director, Tom Clarke, signed a new memorandum of understanding (MOU) between IMCC and MSHA.

IMCC and States Comment on OSMRE Ten Day Notice Rule

OSMRE published proposed revisions to its rules dealing with ten-day notices and oversight of state coal regulatory programs in the Federal Register on April 25, 2023. This rule effectively eliminates the "exclusive" jurisdiction SMCRA expressly confers on state regulatory programs by giving OSMRE authority to guide every move state regulators make. It also takes two distinct provisions of the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) and effectively blends them into one. Any distinction between what OSM can address as a "violation" in a primacy state under the ten-day notice provisions in section 521(a)(1) of SMCRA and what it must instead address through the oversight tools available to it under section 521(b) will be eliminated.

IMCC and several states submitted comments on the proposed rule, opposing it, before the June 26, 2023, deadline for commenting on the rule. OSMRE finally added IMCC's and most States' comments to its online docket for this rule on June 27, 2023. As of the same date, the individual state comments filed by Alabama, Indiana, and Pennsylvania were yet to be posted to the docket. About 5,300 comments were submitted on the rule. Out of this number, about 5,100 have now been posted to the docket. IMCC will continue to monitor the docket until all comments submitted have been posted.

House of Representatives Holds Hearings Related to FY24 Budget

The House of Representatives held a series of budget hearings in preparation for the release of its FY24 budget bill. Department of Interior (DOI) Secretary Deb Haaland testified before the House Natural Resources Committee on April 19. OSMRE Deputy Director Glenda Owens and BLM Director Tracy Stone-Manning testified before the House Energy and Mineral Resources Subcommittee on May 16. The hearings were informative regarding the mining-related concerns and priorities that underly the FY24 budget bill.

Committee and Subcommittee members expressed concern that Administration policies will curtail domestic production of minerals, particularly critical and rare earth minerals (CREMs). There was extensive discussion of the de-prioritization of mining represented by multiple land withdrawals in areas with CREM mineral deposits. BLM Director Stone Manning was questioned extensively regarding BLM's Landscape Conservation and Health proposed rule. The Committee encouraged the Administration to consider the need for permitting reform to bolster domestic CREM production.

A number of concerns were also expressed on coal mining and AML issues. The Subcommittee questioned OSMRE's processes for coal mine plan approvals on federal land and the prudence of the moratorium on coal mining on federal lands. They also criticized OSMRE's proposed TDN rule and implementation of the IJA coal AML program, noting that oversight would be necessary regarding the inefficiencies and impingement on state-delegated authority resulting from OSMRE's actions.

House of Representatives Releases FY24 Budget Bill

The House Appropriations Committee released its FY2024 Interior, Environment and Related Agencies funding bill and accompanying report on July 12, 2023. The Committee characterized the bill as seeking to rein in discretionary spending and limit certain Biden Administration actions. Much of what is contained in the House bill is likely to change as the House and Senate negotiate a final appropriations bill, but the House bill is an important indication of the House's funding and policy priorities.

The bill includes the following IMCC-relevant appropriations:

- *SMCRA Title V Coal Regulatory Program* – \$108,923,000, of which \$65,000,000 is to be made available for regulatory grants to states and tribes. This is the same amount appropriated for Title V state/tribal regulatory grants in FY 2023, but roughly \$12,000,000 less than OSMRE's Title V budget last year, a 21% cut.
- *Abandoned Mine Lands Economic Revitalization (AMLER) Program* – A total of \$136,000,000 would be provided for AMLER, a small increase from last year.
- *Coal Abandoned Mine Lands (AML) Program* – OSMRE's budget for overseeing the SMCRA Title IV state and tribal programs is slightly increased to \$34,000,000.
- *40704 Hardrock AML Grants Program* – The bill includes \$5 million for the "Energy Communities Revitalization Program (ECRP)", the hardrock AML grants program authorized by Sec. 40704 of the IJA that includes grants to states and tribes. This is the same total amount that was appropriated for FY23.
- *BLM Hardrock AML Funding* – Roughly \$16,500,000 is provided for BLM's hardrock AML remediation program. This is the same amount as appropriated for FY23.

The bill includes the following IMCC-relevant policy directives:

- *AMLER program* – OSMRE is required to make AMLER payments directly to the designated states and tribes within 90 days of the bill’s passage.
- *Soil Sorting* — OSMRE is encouraged to “consider the use of on-site soil sorting in plugging and reclamation projects”. This language was also included in FY23 appropriations.
- *40704 Hardrock AML Grants Program* – The Department of Interior must provide an update to Congress within 30 days of the bill’s passage on their progress setting up the 40704 program.
- *Endangered Species Act* – Funding for rules related to sage-grouse protection would be blocked.
- *Mineral Withdrawals* – The hardrock mineral leases in the Superior National Forest in Minnesota that were blocked by withdrawal of the surrounding lands from mineral development would be reinstated within 30 days. In addition, funding to implement the land withdrawal in Nye County, Nevada for NASA’s purposes, which would affect a large lithium extraction operation planned within that area, would be blocked.
- *Rosemont Decision re. Hardrock Mining Waste Disposal* – The text of the Mining Regulatory Clarity Act of 2023 is included in the bill in its entirety. This language would counteract the court decision in *Rosemont* that disallowed placement of mine waste on unvalidated hardrock mining claims on federal lands.
- *WOTUS Rule* – The Biden Administration’s rule relating to the definition of Waters of the United States submitted in January of 2023 would be blocked.
- *Conservation and Landscape Health Rule (aka Conservation Lease Rule)* – The Biden Administration’s FLPMA rule related to prioritization of conservation in public land management and establishment of conservation leases would be blocked.

On the same date, the Subcommittee with jurisdiction over the Department of Labor released its FY 2024 funding bill for Department of Labor agencies, including the Mine Safety and Health Administration. This bill includes a full appropriation of not less than \$10,537,000 for state assistance grants by MSHA.

Permitting Reform Measures Included in Debt Ceiling Package

The Fiscal Responsibility Act of 2023, also known as the “Debt Ceiling Package”, was signed into law on June 3. Several significant permitting reform measures were included in the package, which have long been sought by members of Congress on both sides of the aisle as a way to bolster domestic supply of critical and rare earth minerals.

Most notable for IMCC purposes is the inclusion of much of the text of the BUILDER Act (Building U.S. Infrastructure through Limited Delays and Efficient Reviews), a NEPA reform bill led by House Transportation & Infrastructure (T&I) Committee Chair Sam Graves (R-LA). The BUILDER Act is summarized as follows by the House Natural Resources Committee:

- Implementing the One Federal Decision framework for all projects that must undergo NEPA review, facilitating the designation of a lead agency to set a permitting schedule and utilization of a single document for environmental reviews involving multiple agencies.
- Setting 150-page limits for environmental impact statements (300 pages if the project is of extraordinary complexity) and 75-page limits for environmental assessments.

- Setting time limits of one year for environmental assessments and two years for environmental impact statements and providing a right of action to project applicants if the agency does not adhere to these deadlines.
 - Permitting project sponsors to assist agencies in conducting environmental reviews to help speed up the process.
 - Allowing agencies to adopt categorical exclusions utilized by other agencies through a streamlined process.
 - Clarifying the definition of a "major federal action" under NEPA, including a list of actions that do not qualify as a "major federal action."
 - Directing the Council on Environmental Quality to conduct a study on modernizing the NEPA process by utilizing digital technologies to create an online portal to streamline communications and data sharing between agencies and project applicants.
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***Rosemont* Decision Jeopardizes Waste Rock Disposal Authority for Hardrock Mines on Federal Land; Congress Responds with Legislation**

A recent 9th Circuit Court decision in the *Rosemont* is having a major impact on hardrock mining operations on federal land. In a major departure from historic practice, the Court held that mining plans cannot be approved if they propose to dispose of waste rock on lands without valid mining claims, i.e., miners cannot place waste rock on claims where valuable minerals have not been found.

The Biden Administration published a new Bureau of Land Management (BLM) Solicitor's Opinion on waste rock disposal to comport BLM policy to the *Rosemont* decision. The Opinion affirms the Court's finding and states that BLM will no longer approve mining plans without evidence that valuable minerals have been discovered on any mining claim where waste rock is proposed to be placed.

Rosemont has sparked serious concern from the Mining Industry and members of Congress, especially regarding critical minerals production. They worry that the decision confuses the regulatory framework for hardrock mining and will result in restricted access to minerals. Legislation has been introduced in both houses of Congress to counteract the *Rosemont* decision. Led by Senators Cortez Masto (D-NV) and Risch (R-ID), the Mining Regulatory Clarity Act would allow miners to resume the practice of disposing of waste rock and conducting other ancillary activities on land adjacent to mining claims regardless of whether the adjacent land has a mining claim. This legislation was included in the House's FY24 budget.

Hardrock Mining Reform Bills Reintroduced in House and Senate

On May 19th, 2023, Representative Grijalva (D-AZ) and Senator Heinrich (D-NM) reintroduced their respective versions of the Clean Energy Minerals Reform Act. There are differences in the two bills, but they are largely similar. Both would fundamentally rework the 1872 Mining Law. They would establish a hardrock mining regulatory program, establish new royalties and fees, devote newly raised funding to hardrock AML, expand land withdrawal capability, and provide tools to incentivize production of critical minerals. Under Grijalva's bill, States with existing regulatory programs would be required to enter into a cooperative agreement with the federal government to continue to enforce State law and establish "a common regulatory framework." Heinrich's bill does not appear to contemplate State involvement; instead, the regulatory program would be run entirely by the federal government.

***Sackett v. EPA* - Supreme Court Decision on Scope of “Waters of the United States”; EPA & Corps Response**

More than fifty years have passed since the Clean Water Act was enacted and it has been a great benefit in eliminating pollution of the nation’s waterways. Notwithstanding that overall success story, the question of what exactly the Act applies to continues to be debated.

On May 25, 2023, there was a major development on this front. The United States Supreme Court issued a decision in *Sackett v. EPA* that instantly became the leading precedent on the scope of the Clean Water Act. At issue was whether the Sacketts were obligated to obtain a CWA section 404 permit before filling wetlands on their property near Priest Lake in Idaho. This is the second time this dispute between Sacketts and EPA has reached the Supreme Court. In the first *Sackett* decision in 2012, the Court held that EPA enforcement orders could be challenged in court, rejecting EPA arguments to the contrary. In the Sacketts’ return to the Court in this case, the Court unanimously held that the Clean Water Act did not apply to the wetlands on the Sackett property, but split 5 – 4 as to the scope of the Clean Water Act. The majority held that CWA jurisdiction extends only to wetlands that have a continuous surface connection with a clearly jurisdictional stream or water body such that it is impossible to discern where the stream (or other water body) ends and the wetland begins.

The *Sackett* case represents the most significant development affecting Clean Water Act jurisdiction since the Court decided *Rapanos v US* in 2006. The Court split 4 --1 – 4 in *Rapanos* as to the proper framework for analysis of whether a wetland is jurisdictional, with Justice Scalia leading a four-member faction of the Court and Justice Kennedy joining *mostly* with this faction as to the result. Justice Scalia’s analysis of the issue was similar to that of the majority in the new *Sackett* decision, while Justice Kennedy’s opinion found Clean Water Act jurisdiction exists where a wetland has a “significant nexus” to a clearly jurisdictional stream or water body. After the *Rapanos* decision, much of the analysis as to whether the Clean Water Act applies to a wetland has centered on the question of whether a wetland has a “significant nexus” with a jurisdictional stream. The *Sackett* decision turns this whole post-*Rapanos* CWA analytical framework on its head. None of the Justices in *Sackett* followed Justice Kennedy’s “significant nexus” formulation from *Rapanos*. This is important because each of the redefinitions of WOTUS in recent years (in 2015, 2020, and 2023) have been based largely on interpretation of Justice Kennedy’s significant nexus opinion in *Rapanos*. Now, post-*Sackett*, this previously cornerstone Clean Water Act premise no longer has a place in determining jurisdiction under the CWA.

EPA and the Corps of Engineers have announced plans to revise the rule defining WOTUS they finalized in January 2023 in light of the *Sackett* decision. They intend to issue a new WOTUS rule by September 1, 2023. Because this self-imposed deadline does not allow time for notice and comment under the federal Administrative Procedure Act, the agencies seemingly intend to proceed directly to issuance of a final rule. We will report further on developments in this area, as they occur.

IMCC Welcomes New Administrative Assistant

Madeline Hoggarth has joined the IMCC as Administrative Assistant, taking over for Brittany Mills. Madeline brings to the IMCC eight years of management experience, and an enthusiasm for event-planning. She is excited to learn about the unique needs and challenges faced by states in this industry and meet you -- the people supporting your communities through collaboration and self-advocacy. She hopes to see you all in Bozeman this Fall for our 2023 Mid-Year Meeting!

