

IMCC's 2014 Annual Meeting Held in Reno, Nevada

The Interstate Mining Compact Commission's (IMCC) 2014 Annual Meeting was held April 27 - 30, 2014 at the Peppermill Hotel in Reno, Nevada.

A welcoming reception took place on the evening of Sunday, April 27. On Monday, April 28, Nevada Governor Brian Sandoval presented a welcoming address and a General Session followed. The Governor spoke on the important role mining plays in the state of Nevada, such as through providing good paying jobs and being an ample source of tax revenue to the state and the local communities. Topics and speakers for the General Session included: "Mining's Contributions to Nevada" by Tim Crowley, President, Nevada Mining Association; and "Greater Sage Grouse: The Bird that Could Change the American West" by Allen Biaggi of The Nevada Mining Association. A joint meeting of the Noncoal Environmental Affairs and Mine Safety and Health Committees followed the speakers and was concluded the next morning. The meeting recessed at Noon. In the afternoon attendees visited the historic mining town of Virginia City before touring the Comstock Mine. The day's events concluded with a dinner at the Gold Hill Hotel featuring an enlightening and interesting talk by Ron James, who had served as the state historian for 30 years, on "Nevada's True Gold Mining History."

On the morning of Tuesday, April 29, the joint meeting of the Noncoal Environmental Affairs and Mine Safety and Health Committees resumed followed by a meeting between the states and representatives from the Federal Office of Surface Mining (OSM). The Coal Section of the Environmental Affairs Committee and the Abandoned Mine Land Committee met jointly immediately following the OSM/states meeting. The Annual Awards Banquet took place in the evening where the IMCC 2014 National Reclamation and Minerals Education Awards were presented with several of the award winners present.

IMCC's Finance and Administrative and Resolutions Committees met jointly on the morning of Wednesday, April 30. The Executive Commission Annual Business Meeting followed immediately and concluded the Annual Meeting.

For more information, contact: Beth A. Botsis at 703.709.8654 or E-mail: bbotsis@imcc.isa.us. Information about the IMCC Annual Meeting is also available on the IMCC website at: <http://www.imcc.isa.us/Conference.htm>.

IMCC 2014 Mid-Year Meeting Scheduled for Washington DC

The Interstate Mining Compact Commission (IMCC) will be holding its 2014 Mid-Year Meeting at the Westin Georgetown Hotel in Washington, DC on October 15 - 17. In conjunction with the meeting, a day of federal agency and state discussion sessions is currently in the planning stages. Officials from the federal Environmental Protection Agency (EPA), Corps of Engineers (Corps), Bureau of Land Management (BLM), and the Fish and Wildlife Service (FWS) will be invited to participate in the day of meetings. Officials from the Mine Safety and Health Administration (MSHA) and the Office of Surface Mining (OSM) will be invited to participate in more federal/state discussions on the following day. Details will be posted on IMCC's website once they become available.

Following the day of federal/state roundtable discussions on October 15, the Mid-Year Meeting will commence with IMCC Standing Committee Meetings. A meeting with MSHA and the states will precede the start of the Joint Meeting of the Mine Safety and Health and Noncoal Environmental Affairs Committees in the morning. Following a luncheon, a joint meeting of OSM and the states is being planned to be followed immediately by the Joint Meeting of the Abandoned Mine Lands and Coal Environmental Affairs Committees.

A Newsletter Published by
Interstate Mining Compact
Commission

Upcoming Meetings:

IMCC 2014 Mid-Year Meeting

October 15 - 17, 2014
The Westin Georgetown Hotel
Washington, DC

For more information on IMCC Meetings as it becomes available, visit our website: www.imcc.isa.us and click on the "Conferences" tab. Some presentations from IMCC Meetings and Workshops can also be viewed on the website at the "Conferences" tab. Copies of IMCC's Compact Newsletter are available on the website by clicking on the "Publications" tab.

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The IMCC Resolutions and Finance and Administrative Committees will meet jointly on the morning of October 17, followed immediately by the Executive Commission Business Meeting which will conclude the Mid-Year Meeting.

More information on the meeting will be posted at www.imcc.isa under the "Conference Info" tab when it becomes available. Room reservation and registration information will also be posted there, along with agendas for the committee meetings once they are finalized closer to the meeting date.

For more information, contact: Beth A. Botsis at 703.709.8654 or E-Mail: bbotsis@imcc.isa.us.

Mississippi Becomes Full Member State of IMCC

The Interstate Mining Compact Commission (IMCC) was recently pleased to welcome the state of Mississippi as a full member state. Mississippi became an associate member state of the Compact in October 2013.

The legislature of the state of Mississippi passed legislation (House Bill 925) on March 21, 2014 to take effect July 1, 2014, to bring the state into the Interstate Mining Compact (IMCC) as a full member. Governor Phil Bryant also signed the bill into law on March 21, 2014.

Upon becoming a full member, Mississippi will now have a formal vote in guiding the direction of the Compact. The state will also have opportunities to chair the various standing committees of the Compact and to help lead the Compact in directions that are favorable to all the member states. According to IMCC Executive Director Gregory Conrad, "Mississippi's participation as a full member will also be recognized and understood by those who work with the Compact on a regular basis, including both the Congress and the federal agencies, and this brings a greater degree of recognition and influence regarding [the state's] participation in our work. IMCC's presence in Washington, DC allows us to monitor federal agency and congressional initiatives that might impact state primacy programs as well as developmental constraints on mineral resources. I believe that Mississippi's participation in the organization opens avenues for the state to be heard in unique and valuable ways not otherwise available to it and to be supported with the clout that comes from 26 states speaking together as one voice. Since IMCC is focused solely on mining and related environmental protection issues with the federal government, we are able to delve deeper into the concerns that matter most to Mississippi in this critical area of resource use and protection."

WildEarth Guardians Files Petition for Rulemaking with OSM Re. Greater Sage Grouse

On February 26, 2014, the WildEarth Guardians (WEG) petitioned the Office of Surface Mining (OSM) in the Department of the Interior (DOI) to promulgate new "specific and enforceable" rules to protect the Greater Sage Grouse. WEG asked OSM to use its authority under the Surface Mining Control and Reclamation Act (SMCRA) to supplement its current rules with additional requirements specifically intended to protect sage grouse, including:

- limiting coal exploration to "helicopter portable drilling methods" in priority habitats and prohibiting exploration in nesting, brood-rearing, and wintering habitats during their seasons of use by sage grouse;
- prohibiting all surface coal mining in priority sage grouse habitat areas, and prohibiting all surface coal mining outside of primary habitat areas that are within 5.3 miles of an existing lek;
- prohibiting all surface coal mining operations associated with underground mines within priority sage grouse habitat and prohibiting roads, overburden piles, and other related surface operations and impacts associated with underground mining outside of priority sage grouse areas if they are within 5.3 miles of existing leks.

The petition specifically points to the states of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming as areas where Greater Sage Grouse Priority Areas for Conservation overlap considerably with coal resources. The petition states that existing mining operations have already destroyed extensive areas of sage grouse habitat and claims that mining in those areas has contributed to the decline of the species.

WEG requested a decision by OSM either granting or denying the petition within 90 days pursuant to SMCRA, however no decision had yet been rendered as of the printing of this newsletter. The Greater Sage Grouse has not been formally listed as a threatened or endangered species under the Endangered Species Act. FWS is bound by a settlement agreement to issue a listing decision for the bird by September 1, 2015.

For more information or a copy of the petition, contact: Beth Botsis at 703.709.8654 or E-mail: bbotsis@imcc.isa.us.

IMCC Testimony on MSHA's FY 2015 Budget Request

On March 28, 2014, the Interstate Mining Compact Commission (IMCC) submitted written testimony to the Subcommittee on Labor, Health and Human Services, Education and Related Agencies of the House Appropriations Committee in opposition to the FY 2015 budget request of the Mine Safety and Health Administration (MSHA). The MSHA budget contains a proposal to completely eliminate funding (\$8.4 million) for state grants under the Mine Safety and Health Act. It proposes to increase MSHA's budget by \$2.8 million and eighteen full time employees (FTEs) to "expand training delivery and oversight." IMCC's testimony urged the subcommittee to reject MSHA's proposed de-funding of the state grant program and to restore funding to the statutorily authorized level of \$10 million.

As justification for eliminating the grants, MSHA offered that responsibility for training will be shifted to mine operators and that the state assistance grant money will be reprogrammed into MSHA's budget to allow for an expanded federal role in training, inspection, and enforcement. IMCC's testimony describes the many concerns held by the states regarding MSHA's proposal. For one, IMCC points out that the "training grants," as MSHA often characterizes them, are in fact "state assistance grants," which Congress intended to be used for support of the state programs including, but not limited to, training. More generally, IMCC argues that the states' mine safety programs, and miner training programs in particular, will suffer greatly without full, stable funding of the state grants program. The "yo-yo" effect as a result of inconsistent funding for state assistance grants is already having a debilitating effect on the states' ability to run programs effectively. Furthermore, with regard to shifting of training responsibilities to mine operators, IMCC expressed concerns that the mining industry, in particular small operators and contractors, will simply not be able to accommodate the costs of training responsibilities, which will result in miners receiving sub-standard training.

IMCC's testimony goes on to describe the good work done by the states every year in ensuring that our Nation's miners receive the best training possible, and includes results of a state survey explaining how the elimination of the grants program would affect each state's program.

For more information, or for a copy of IMCC's testimony, contact: Greg Conrad at 703.709.8654 or E-Mail: gconrad@imcc.isa.us.

MSHA Issues Final Rule re. Respirable Dust

The Mine Safety and Health Administration (MSHA) issued the final rule titled "Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors" on April 23, 2014. The rule becomes effective as of August 1, 2014.

The rule revises MSHA's existing standards on miners' occupational exposure to respirable coal mine dust in order to: lower the existing exposure limits; provide for full-shift sampling; redefine the term "normal production shift"; and add reexamination and decertification requirements for persons certified to sample for dust and maintain and calibrate sampling devices. The rule also provides for single shift compliance sampling by MSHA inspectors; establishes sampling requirements for mine operators' use of the Continuous Personal Dust Monitor (CPDM); requires operator corrective action on a single, full-shift operator sample; changes the averaging method to determine compliance on operator samples; and expands requirements for medical surveillance of coal miners. The intent of the rule is to reduce occupational exposure to respirable coal mine dust and lower the risk that coal miners will suffer material impairment of health or functional capacity over their working lives.

MSHA has posted links to the rule, stakeholder and field seminar briefing PowerPoints, technical handouts, pocket cards for miners, a regulatory economic analysis of the rule, and fact sheets on its website at: www.msha.gov/endblacklung/. A schedule of presentations scheduled by MSHA for stakeholders in several states is also posted at that link.

Sage Grouse Legislation Proposed in the House and Senate

On April 8, 2014 the "Sage-Grouse and Endangered Species Conservation and Protection Act" (H.R. 4419) was introduced in the House by Representative Mark Amodei (R-NV). Impetus for the bill was findings by the U.S. Fish and Wildlife Service (FWS) in 2005 which identified the threats to the greater sage-grouse and their habitat in the West. The FWS review found that wildfires have a relative rank of 84 percent of the threat, and invasive species have a relative rank of 91 percent of the threat. Overgrazing by wild horses and burros was also found to be a substantial threat to sage-grouse habitat, especially in Nevada which has more wild free-roaming horses than all of the other Western states combined.

The legislation would amend the Endangered Species Act of 1973 (ESA) to require periodic review of listings of endangered species. It would also require the Secretary of Agriculture or Secretary of Interior, as appropriate, to conduct management activities, conservation programs, and pilot projects for public and National Forest System lands to address threats to the habitats and viability of listed endangered and threatened species under the ESA, or for other species in order to alleviate the need to list them as threatened and endangered. On other lands, the applicable Secretary is also given authority to support efforts by other federal agencies, states, political subdivisions of states, Indian tribes, or private entities to address threats or protect and conserve a species, thereby alleviating the need for the species to be listed. The bill would require formation of a Federal/State Endangered Species Council by the applicable Secretary in each affected state. The Council would consist of representatives of the Secretary together with the state's Governor and representatives of affected political subdivisions of the state. The Council would be tasked with the prioritization of habitat conservation efforts, determination of habitat land designations, and selection of management activities, conservation programs, and pilot projects.

Finally, the bill would also establish a funding source for habitat management projects related to ESA listings and ensure that the federal government fulfills its ownership obligation for funding such habitat projects when habitat issues on federal lands are the source of a proposed listing. Before listing a species, the federal government would be required to fund its share of conservation work. As a funding mechanism, the bill would require the sale of small parcels of National Forest System and public lands to generate revenues used for species protection and conservation measures authorized by the Act. A special fund would be established in the U.S. Treasury for the collection and distribution of the funds. Distributions would be made annually to those states in which the federal government owns more than thirty-three percent of the land area. Seventy-five percent of the amount collected from a land sale would be distributed to the Federal/State Endangered Species Counsel in the state where the land is located with the remaining twenty-five percent being distributed equally between the remaining eligible states. States would be required to use the funds for authorized management efforts, conservation programs, and pilot programs such as fire suppression, pre-treatment and fuels management, invasive species control, habitat restoration, non-slaughter management of wild horses and burros, and predator control.

On May 22, Senator Mike Enzi (R-WY) and Representatives Cory Gardner (R-CO), Rob Bishop (R-UT), Steve Daines (R-MT), and Scott Tipton (R-CO) also introduced a sage grouse bill in the House and Senate. The "Sage Grouse Protection and Conservation Act" would prevent the sage grouse from being listed under the ESA for ten years while at the same time requiring both the Departments of Agriculture and the Interior to provide assistance and work with the Western states of California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming in the development of state-specific conservation and management plans for the protection and recovery of sage grouse species. The ten-year moratorium on ESA listing of the sage grouse will allow the states to generate their own customized recovery plans that take into account the unique state and regional differences that exist throughout the Western United States.

"The state of Wyoming has worked tirelessly with stakeholders over many years to protect the sage grouse," Representative Enzi noted. "These efforts have already proven that conservation plans created by states, and local groups, work better to protect habitat and increase sage grouse population than top-down federal plans. This bill will help ensure western states continue to manage their own sage grouse populations, letting them take into account the distinct management needs within their own borders."

IMCC Statement on OSM's FY 2015 Budget Request

On April 7, 2014, the Interstate Mining Compact Commission (IMCC) submitted written testimony to the House Interior, Environment and Related Agencies Appropriations Subcommittee regarding the FY 2015 budget request of the Office of Surface Mining Reclamation and Enforcement (OSM). In its proposed budget, OSM requested \$53.2 million to fund state Title V grants, a reduction of \$15.4 million or 22% below the FY 2014 enacted level. IMCC's testimony urged Congress to reject OSM's proposal and to continue providing the funding essential to full and effective operation of the state and tribal regulatory programs under the Surface Mining Control and Reclamation Act (SMCRA). IMCC noted that OSM does not disagree with the states' demonstrated need for the requested amount of Title V regulatory grants. Rather, OSM's solution for the drastic cuts come in the way of an assumption that the states can simply increase user fees. IMCC argues that this assumption is unrealistic, citing a survey of IMCC's member states which confirms that, given the current fiscal and political implications of such an initiative, it will be difficult, if not impossible, for most states to establish user fees at all, let alone in the one year time-frame imagined by OSM.

IMCC also asked that Congress resist OSM's desire for increased oversight. IMCC argues that this initiative is evidenced by the agency's request for additional funding and for 12 new full-time employees, as well as the vague language used to justify those increases (found in OSM's budget request). IMCC noted that the overall performance of the states as detailed in OSM's annual state program evaluation reports demonstrates that the states are implementing their programs effectively and in accordance with the purposes and objective of SMCRA. In IMCC's

view, this suggests that OSM is adequately accomplishing its statutory oversight obligations with current federal program funding. Without more to justify the need for increased oversight and the concomitant increase in funding for related federal operations, IMCC urged Congress to reject OSM's proposal for increased federal funding and to approve not less than \$69 million for state and tribal Title V regulatory grants.

OSM also proposed to reduce mandatory spending for the Abandoned Mine Land (AML) Program by \$64 million pursuant to a legislative proposal to eliminate all AML funding for certified states. IMCC argues that this reduction repudiates the comprehensive restructuring of the AML program passed by Congress in 2006, following ten years of Congressional debate and hard fought compromise among the affected parties. IMCC therefore urged Congress to reject OSM's unjustified proposal and restore the full mandatory funding of \$250 million.

IMCC's testimony goes on to ask the Committee to support funding for OSM's training program, arguing that these programs are central to the effective implementation of state regulatory programs as they provide necessary training and continuing education for state agency personnel. IMCC also urged the Committee to support funding for TIPS, a program that directly benefits the states by providing technical assistance, and for the Watershed Cooperative Agreements.

OSM's budget request also contains a proposal to establish a hardrock AML program. IMCC agrees with OSM that there is a clear need to establish both the funding mechanism and the administrative program to address these legacy sites. IMCC suggests that this might be accomplished through a fee or through a meaningful Good Samaritan program that provides liability protection for groups seeking to do AML work. IMCC offered that OSM is in the best position to administer a hardrock AML program, but IMCC also expressed concern that while OSM is advocating for a hardrock AML program, the agency is simultaneously pushing for the elimination of funding for certified states and tribes meant to accomplish the very same work.

For more information or a copy of IMCC's statement, contact: Greg Conrad at 703.709.8654 or E-mail: gconrad@imcc.isa.us.

Update on EITI

In September, 2011, President Obama announced the United States' intention to implement The Extractive Industries Transparency Initiative (EITI), a global governance standard designed to promote revenue transparency in oil, gas, and mining industries. EITI operates through a multi-stakeholder group (MSG) made up of representatives from government, industry, and civil society. The Interstate Mining Compact Commission (IMCC) was nominated by the Secretary of the Interior to serve as a member of the government sector representing the states, along with the Interstate Oil and Gas Compact Commission (IOGCC), and two state agency representatives.

Over the past year the Interstate Mining Compact Commission (IMCC) has remained closely engaged in the development of the EITI. The United States Candidacy Application was accepted by the international EITI secretariat in March of 2014, meaning that the U.S. is now officially a "candidate country." The U.S. will now be responsible for producing a pilot EITI report by December 2015.

As part of the Candidacy Application, the U.S. requested "adapted implementation" of the EITI requirements pertaining to "sub-national" (i.e. state governments) reporting. The international secretariat granted the adapted implementation request and accepted the proposal to utilize a two-phase approach for state participation in USEITI. During "Phase 1," which spans the first two reporting years, information on state extractives revenues that is already publically available via the internet will be collected, repackaged, and placed in a front-facing data repository through the Department of Interior's website. "Phase 2" will involve an "Opt-in" approach, whereby any state will have the opportunity to voluntarily engage in the full EITI reporting and reconciliation. As a representative of state mining regulators, IMCC has endeavored to ensure that EITI is developed such that it does not place burdensome new reporting requirements on state agencies. IMCC is pleased that the adapted implementation approach has been accepted, finding that it represents the best solution for state participation in USEITI.

In addition to participating as part of the MSG, IMCC has also been engaged in several USEITI subcommittees and work groups over the past year. Currently IMCC is on the Opt-in Subcommittee which has been tasked with designing the opt-in process. IMCC has also sent out several communications regarding EITI to the member states. A letter and questionnaire were distributed to the states in order to keep them informed about developments in EITI, to procure information on the revenue data that is already produced by the states, and to gauge the states' overall interest in participating in the initiative. IMCC also sent a letter to the Department of Interior regarding the states' ongoing concerns regarding expectations of state involvement.

IMCC was pleased with the addition of two new state agency representatives to the Government Sector of the MSG: Marina Voskanian of the California State Lands Commission and Mike Matthews of the Wyoming Department of Audit.

For more information, contact: Ryan Ellis at 703.709.8654 or E-mail: rellis@imcc.isa.us.

EPA/Corps Publish Proposed Rule on WOTUS

On April 21, 2014, the U.S. Environmental Protection Agency (EPA) and the Department of the Army, Corps of Engineers (Corps) published the proposed rule "Definition of 'Waters of the United States' Under the Clean Water Act" (WOTUS) in the *Federal Register* (79 FR 22187). The 88 page proposed rule would define waters of the U.S. as:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable, interstate water, the territorial seas or impoundment;
- All waters including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary;
- "Other Waters" that don't meet the preceding definition would be handled on a case-by-case basis as to whether they have a "significant nexus." Waters in a watershed with no connection to a traditional navigable water, interstate water, or territorial sea would not be considered as waters of the U.S.

The proposed rule would also define for the first time what classifies as a "tributary." The proposed rule requires that a connection from one waterway to another has to be determined on a case-by-case basis regarding what constitutes a significant nexus. It recognizes that "significant nexus" is not a scientific term, but comes from a statement made by Justice Anthony Kennedy in two Supreme Court decisions, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) in 2001, and *Rapanos v. United States* (Rapanos) in 2006, that led EPA and the Corps to develop this rule. The rule states that "Assertion of jurisdiction over tributaries as defined in this proposed rule is appropriate under *Rapanos* both as a legal matter and as a scientific matter based on available science and the agencies' professional judgment and field expertise." The agencies conclude, "based on their scientific and technical expertise, that tributaries, as defined in the proposed rule, in a watershed are similarly situated and have a significant nexus alone or in combination with other tributaries because they significantly affect the chemical, physical or biological integrity of traditional navigable waters, interstate waters, or the territorial seas." In the proposed rule EPA and the Corps propose to define "significant nexus" to be consistent with language in SWANCC and Rapanos. "Justice Kennedy was clear that waters with a significant nexus must significantly affect the chemical, physical, or biological integrity of a downstream navigable water and that the requisite nexus must be more than 'speculative or insubstantial'...and the agencies propose to define significant nexus in precisely those terms," the rule states. In the "Supplementary Information" section of the proposed rule, the agencies specifically ask for comments that would help them define "significant nexus."

The comment period on the WOTUS proposed rule ends on July 21. However, several state organizations, including IMCC, have submitted formal requests for an extension of the comment period. IMCC has put together a work group to formulate IMCC's position on the WOTUS rule. On June 2, IMCC also participated on the first of three co-regulator conference calls that were organized by the Association of Clean Water Administrators (ACWA) between EPA, the Corps, and several state organizations. The calls are intended to help the states gain a better understanding of the proposed rule in order to better inform any comments they may decide to submit on the rule, either independently, through IMCC, or as a coalition of state organizations.

For more information, contact: Beth Botsis at 703.709.8654, or E-Mail: bbotsis@imcc.isa.us.

WEG Files Nitrogen Oxide Emissions (Blasting) Petition for Rulemaking with OSM

On April 14, 2014, the WildEarth Guardians (WEG) petitioned the Office of Surface Mining (OSM) to promulgate a rule prohibiting visible nitrogen oxide (NOx) emissions during surface coal mine blasting operations. On occasion, blasting generates NOx gas which forms an orange cloud. According to a 2010 Bureau of Land Management (BLM) Environmental Impact Statement (EIS) cited in the petition, incomplete combustion during blasting may be caused by wet conditions in the overburden, incompetent or fractured geologic formations, deformation of boreholes, and blasting agent factors, among other factors. This incomplete combustion generates NOx gas which forms orange or red clouds. The clouds are more prevalent at operations that use a technique called cast blasting in which the blast is designed to directly cast the overburden from on top of the coal into the previously mined area. Cast blasting is frequently used in surface coal mining.

The WEG petition calls on OSM to develop “explicit and enforceable standards to ensure that when explosives are used at coal mining operations, emissions of nitrogen oxides are controlled to prevent injury to persons and to protect the general health, welfare, and safety of the public and mine workers.” WEG is asking OSM to accomplish this by supplementing its current rules with specific rules that would require: blasting be conducted so as to prevent visible emissions of nitrogen oxides, including nitrogen dioxide; and the operator to visually monitor all blasting activities (through the use of remote surveillance or other acceptable methods for detecting visible emissions) and within 24 hours to report in writing any instances of visible emissions of nitrogen oxides to the regulatory authority, thereby allowing the appropriate regulatory authority (the state or OSM) to exercise timely and appropriate oversight to ensure future compliance. The petition acknowledges that operators already utilize a variety of practices to prevent the formation of visible nitrogen oxide emissions and claims the proposed rule would ensure these practices are utilized consistently and effectively.

For more information or a copy of the petition, contact: Beth Botsis at 703.709.8654 or E-mail: bbotsis@imcc.isa.us.

WEG Files NEPA Petition for Rulemaking with OSM

On February 7, 2014, the WildEarth Guardians (WEG) petitioned the Office of Surface Mining (OSM) to promulgate “a rule to ensure compliance with the National Environmental Policy Act (“NEPA”) when reviewing and making recommendations on Mining Plans in accordance with 30 C.F.R. § 746.” The petition provides draft rule language which WEG requests OSM consider adopting. Generally, the proposed rules focus on increasing public involvement in various NEPA processes as they relate to leasing coal on federal lands. Also included are provisions to require OSM to revise Environmental Assessments (EAs) and Environmental Impact Statements (EIS’) more frequently. The draft language specifically includes provisions meant to:

- Ensure full compliance with NEPA.
- Ensure that relevant public notice requirements under NEPA are met. This includes providing public notice, responding to public comments, and allowing OSM to extend deadlines for comments.
- Ensure that adequate public notice and opportunity to comment is provided for OSM’s intent to adopt an EIS, and that decisions based on an EIS are documented in a Record of Decision (ROD).
- Ensure adequate public involvement in preparation of an EA and on a proposal to adopt an EA and ensure that a determination to adopt an EA is appropriately documented in a Finding of No Significant Impact (FONSI).
- Ensure that OSM consistently reviews potentially outdated NEPA documents, and ensure that potentially outdated EAs and EIS’ are supplemented and or revised as necessary.

As justification for the provision to ensure that OSM responds to public comment, the petition notes that in 2013, OSM did not respond to WEG comments regarding a modification of the Black Thunder Mine. WEG requests a decision by OSM either granting or denying the petition within 90 days pursuant to SMCRRA.

House Committee Hearing Held on Four Bills to Amend the ESA

The House Committee on Natural Resources held a Legislative Hearing on April 8, 2014 on four bills intended to amend the Endangered Species Act of 1973 (ESA). Among the bills included in the hearing, H.R. 4317 (Rep. Neugebauer (TX - R)), the “State, Tribal, and Local Species Transparency and Recovery Act”, is intended to amend the ESA to require disclosure to states of the basis of determinations under the ESA. It also ensures the use of information provided by state, tribal, and county governments in decision making under the ESA by requiring all such data to be included as “best scientific and commercial data available” (16 U.S.C. 1532 – Section 3) when considering an ESA determination.

The other bills considered in the hearing include:

- H.R. 4315 (Rep. Hastings (WA - R)) – “21st Century Endangered Species Recovery Transparency Act”: The bill would amend the ESA to require publication on the internet of the basis for determinations that species are endangered or threatened species, and for other purposes.
 - H.R. 4316 (Rep. Lummis (WY - R)) – “Endangered Species Recovery Transparency Act”: This bill intends to amend the ESA to improve the disclosure of certain expenditures under the Act, and for other purposes.
 - H.R. 4318 (Rep. Huizenga (MI - R)) – “Endangered Species Litigation Reasonableness Act”: The bill would amend the ESA to conform citizen suits under the Act with other existing law, and for other purposes.
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FWS and NMFS Propose Two New Rules Re. "Critical Habitat"

On May 12, 2014, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) proposed two new rules and a draft policy guidance regarding "critical habitat." The first proposed rule (50 CFR Part 402) would revise the definition of "adverse modification" of critical habitat. The rule is in response to two court decisions (*Sierra Club v. U.S. Fish and Wildlife Service*, 245 F. 3d 434 (5th Cir. 2001), and *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004)) in which the courts invalidated the 1986 definition of "adverse modification" for failure to properly require consideration of the impact of adverse modification on recovery of the species in favor of focusing on survival. Under the proposed regulation, "destruction or adverse modification" is defined as "a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery." The proposed rule requires the Services to consider whether effects are "noticeable" rather than "significant" when determining whether an action will "appreciably diminish" the conservation value of the critical habitat. The focus on the recovery of species would allow the Services to seek protection for habitat features that are not there presently or are of poor quality, and could require private landowners to engage in recovery efforts for species.

Another proposed regulation is described by the Services as "minor changes to the regulations to: better describe the scope and purpose of critical habitat, add and remove some definitions, and clarify the criteria for designating critical habitat." The rule includes definitions of some previously undefined terms, such as "geographical area occupied by the species" which the rule would define as "the geographical area which may generally be delineated around the species' occurrences, as determined by the Secretary (i.e. range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals)." The term "physical or biological features," which is used in the statutory definition of "Critical Habitat" to identify specific areas that can be designated, would be defined to allow inclusion of "habitat characteristics that support ephemeral or dynamic habitat conditions." This would allow the Services to designate land where they believe that there may have been the required features in the past if they believe there is a "reasonable expectation of that habitat occurring again."

FWS and NMFS are also proposing policy guideline changes which are intended to clarify how they consider exclusions from critical habitat designations, which are allowed for under Section 4 of the ESA "if [they] determine that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [they] determine, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." (16 U.S.C. §1533(b)(2)) The proposed policy sets forth several categories of information to be used in balancing or weighing the benefits of excluding a specific area from a designation of critical habitat against the benefits of including that area in the designation. It would require the Services to examine such things as the conservation benefits of habitat conservation plans, candidate conservation agreements and safe harbor agreements; the level of review; and the use of monitoring. The policy also addresses potential exclusion of tribal lands.

Comments on the proposed regulations and the draft policy are due July 11, 2014.
