

IMCC 2016 Mid-Year Meeting Scheduled for Park City, Utah

The Interstate Mining Compact Commission (IMCC) will hold its 2016 Mid-Year Meeting in Park City, Utah at the Park City Marriott on October 17 - 19.

A meeting between the Office of Surface Mining (OSM) and the states will be held at 1:00 p.m. on Monday, October 17 preceding the Mid-Year Meeting. OSM Director Joseph Pizarchik, OSM Regional Directors, and other OSM headquarters officials will participate in the meeting. A meeting of the states will follow to discuss development of reports for submission by IMCC to the transition team of the new Administration resulting from the November presidential election. A reception is planned for the evening.

IMCC's Abandoned Mine Land (AML) and Coal Environmental Affairs Committees will meet jointly on Tuesday morning, October 18. At Noon during a roundtable luncheon, attendees will engage in informal discussions on several topics of interest, including AML issues, bonding, the OSM Stream Protection Rule, public outreach issues in noncoal states, noncoal program funding sources, and mine safety and health issues. A joint meeting of the Mine Safety and Health and Noncoal Section of the Environmental Affairs Committees will take place in the afternoon.

On Wednesday, October 19, the Finance and Administration Committee and the Resolutions Committee will meet jointly in the morning, followed by the IMCC Executive Commission Business Meeting, which will conclude the Mid-Year Meeting.

IMCC 2017 Annual Meeting Plans Underway for Williamsburg, Virginia

The Interstate Mining Compact Commission (IMCC) 2017 Annual Meeting in Williamsburg, Virginia has been scheduled for April 2 - 5. The meeting will take place at the Kingsmill, located on the historic James River. An opening reception will kick off the meeting the evening of Sunday, April 2. All IMCC standing committees will meet on Monday and Tuesday, April 3 - 4. A social event is being planned for Monday night, and the Annual Awards Banquet will be held on Tuesday night. The morning of Wednesday, April 5 will begin with final committee meetings, and the Executive Commission's Annual Business Meeting will follow immediately and conclude the meeting.

Call for Nominations for IMCC 2017 National Awards Programs

The Interstate Mining Compact Commission (IMCC) is beginning the process of soliciting nominations for the 2017 Kenes C. Bowling National Reclamation Awards, the 2017 National Minerals Education Awards, and the 2017 Mine Safety and Health Training Awards. The criteria, deadlines, and nomination forms for all three award programs can be found on IMCC's website at the following link: <http://www.imcc.isa.us/Awards.htm>. The announcements and forms have also recently been distributed to the IMCC member states. The awards will be presented at the Annual Awards Banquet in conjunction with IMCC's Annual Meeting in Williamsburg, Virginia on April 4, 2017. More information about IMCC's 2017 Annual Meeting will be included in the next issue of the "Compact."

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

A Newsletter Published by
Interstate Mining Compact
Commission

Upcoming Meetings:

IMCC 2016 Mid-Year Meeting

October 17 - 19, 2016
Park City Marriott
Park City, Utah

IMCC 2017 Annual Meeting

April 2 - 5, 2017
The Kingsmill
Williamsburg, Virginia

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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OSMRE Grants WEG Petition for Rulemaking on Self-Bonding

On Wednesday, September 7, 2016, a Federal Register notice was published announcing that the Office of Surface Mining Reclamation and Enforcement (OSMRE) would grant the WildEarth Guardians (WEG) petition for rulemaking on self-bonding. A copy of the notice can be accessed online at: <https://www.gpo.gov/fdsys/pkg/FR-2016-09-07/pdf/2016-21440.pdf>.

The notice states that, though the OSMRE Director has decided to grant WEG's petition, specific rule changes requested in the petition will not be processed. OSMRE will examine broader regulatory changes to 30 CFR Part 800 to update its bonding regulations to ensure the completion of the reclamation plan in the event of a forfeiture. As a result of evaluating the petition and the comments received, OSMRE concluded that current regulations do not require use of the most appropriate financial tests, both before a self-bond is approved and during the life of a self-bond.

OSMRE is considering a number of changes to the regulations in light of their findings, including: reviewing the definitions in 30 CFR 800.23(a); reviewing the existing financial tests and documentation required under 30 CFR 800.23 (b) to ensure that the self-bond is financially stable; considering the development of a systematic review process for ascertaining whether self-bonded entities remain financially healthy, and for spotting any adverse trends that might necessitate replacing a self-bond with a different type of financial assurance; consideration of whether an independent third-part review of a self-bonding entity's annual financial reports and certification of the current and future financial ability of the self-bonding entity is needed; and consideration of whether to propose additional procedures for replacing self-bonds in the event that a company no longer meets the financial tests, and to clarify the penalties for an entity's failure to disclose a change in financial status.

OSMRE is also considering proposing revisions to other bonding requirements, including: creation of new financial assurance instruments to provide industry more options; potential of requiring diversified financial assurance; exploring ways to ensure there is sufficient collateral to cover all reclamation obligations, rather than allowing the same set of assets to be used as collateral for multiple liabilities as allowed for in current regulations; establishing criteria to create a greater incentive for self-bonded companies to timely complete reclamation and apply for final bond release; and examining concerns raised over certain sureties' reliance on a cash-flow basis to cover the cost of reclamation when their bonds are forfeited.

The rulemaking was discussed in a meeting between the Interstate Mining Compact Commission's (IMCC) Bonding Work Group and OSMRE Director Joseph Pizarchik and several OSMRE staff on September 14 in Herndon, Virginia.

IMCC Submits Federalism Comments Re. EPA CERCLA 108(b) Rulemaking

On August 16, the Interstate Mining Compact Commission (IMCC) filed pre-proposal comments on the Environmental Protection Agency's (EPA) rulemaking effort regarding CERCLA 108(b) Financial Assurance for Hardrock Mining. The comments were submitted to EPA as part of a "Federalism" outreach related to the rulemaking, pursuant to Executive Order 13132.

Under CERCLA 108(b), EPA's draft rule is intended to address financial assurance requirements for hardrock mining operations and processing facilities in the event of a hazardous release, should a company declare bankruptcy or be otherwise unable to conduct necessary response activities. EPA intends to take into account the "degree and duration of risks" associated with the use and management of hazardous substances at these sites. In response to state concerns about the rule potentially duplicating and preempting state programs, EPA has argued that the CERCLA 108(b) rule would address hazardous releases, and that state programs, which EPA views as preventative in nature, purportedly address only reclamation and mine closure requirements.

IMCC's comments include summaries of several comprehensive state programs demonstrating how these and other state programs are designed to substantially reduce, if not eliminate, the chance of such releases from ever occurring. An important component of these programs is the requirement that companies provide financial assurances that are sufficient to fund required reclamation, post-closure monitoring and water treatment, and the handling and disposal of hazardous and acid-forming substances resulting from mining processes, should the company for some reason fail to do so in accordance with the state program requirements, and for the remediation of hazardous releases in the unlikely event it becomes necessary. In the West, hardrock mining operations on public lands are also subject to comprehensive regulations and financial assurance requirements under the authority of the federal Bureau of Land Management and United State Forest Service, in many cases in cooperation with the states through memoranda of understanding. These programs have been effective in eliminating or substantially reducing the risk that a mine will

end up on a National Priorities List (NPL) requiring remediation under CERCLA.

IMCC maintains that the state and federal programs already in place are sufficient for purposes of CERCLA 108(b), and suggested EPA work from within state programs to enhance those existing programs, where necessary, to address any gaps it perceives may be present. IMCC also asked EPA to meet with the states to conduct case studies of actual mine scenarios and compare what states currently are doing under their programs with what EPA envisions under a CERCLA 108(b) rule. This would require EPA to seek an extension from the court regarding the December 1 deadline for publishing a proposed rule. IMCC asserted that such coordination was critical to the rule's effectiveness. However, IMCC learned the draft rule was submitted to the Office of Information and Regulatory Affairs within the Office of Management and Budget for their review on October 7, and EPA remains poised to meet the December 1 deadline.

For more information or a copy of IMCC's comments, contact: Beth Botsis at 703.709.8654 or E-mail: bbotsis@imcc.isa.us.

IMCC Bonding Work Group Focuses on Coal and Noncoal Financial Assurance Issues

In April of 2016, the Interstate Mining Compact Commission's (IMCC) Bonding Work Group formed four subgroups, each focused on a specific subject area related to financial assurance for coal and noncoal mining. The subgroups include: Calculating Correct Liabilities; Reviewing Bonding Instruments; Matching Bonding Instruments (Liquidity) to Risk of Liability; and Chapter 11 Filings – How to Best Position Your Liability Requirements. The subgroups met several times over the past six months via conference call and have been developing draft work products related to their assigned topic areas. On September 13, a meeting was held in Herndon, Virginia, at which several of the subgroups' draft work products were presented to the full work group for discussion. On September 14, the work group also met with the Office of Surface Mining Reclamation and Enforcement's (OSMRE) Financial Assurance Coordination Team (FACT), during which FACT and the work group presented overviews of their recent activities and discussed possible areas for future coordination of efforts.

Three of the subgroup work products that are close to being completed were discussed with FACT at the meeting, including a "Bonding Instruments Information Spreadsheet" that identifies, characterizes, and describes the various types of bonding instruments available for coal and noncoal mining. Information for each type of bond was collected from several states regarding: pros and cons to the regulatory authorities; pros and cons to the regulated community; associated ease of liquidation and risks; states' experiences and lessons learned; which types have been or are being used in each state and reasons why a particular instrument may no longer be allowed in a given state; best management practices developed by individual states; and whether a statutory or regulatory change would be required to allow a particular type of bond to be used that was not previously authorized in the state. Also distributed and discussed were: a "Warning Signs" document identifying signs that could indicate a permittee may be facing financial difficulties and be at risk of filing for bankruptcy; and a "Bankruptcy Scorecard" to assist the regulatory authority in gathering and providing essential information to the state's attorney early on in the case of a company filing for bankruptcy, to help the state best position itself to secure funding for reclamation liabilities, should the company become unable to complete the required reclamation.

In addition to the work products, information sharing through robust discussions occurred during the multiple subgroup conference calls held since April. At the request of the Chapter 11 Subgroup, IMCC arranged a conference call with representatives from the surety industry that was open to all IMCC member states and OSMRE personnel. The call, which took place on August 26, explored such questions as: what surety companies' reactions are to recent bankruptcies within the coal industry and what impact that has had on the surety industry; whether various sureties continue to be active and engaged in providing surety bonds for mining; the sureties' perspective on what the impact would be regarding the availability of bonds and bonding capacity should large mining companies who were previously self-bonded (to the tune of \$3.9 billion, according to OSMRE) attempt to replace the self-bonds with more traditional instruments, such as surety bonds or letters of credit; what would be the impact of large companies replacing self-bonds for other mid-size mining companies, and will there be implications for the noncoal industry as well; have sureties implemented stricter requirements, particularly with regard to qualifications and collateral required for surety bonds in light of the downturn in the coal industry; how are surety companies assessing risk, and has underwriting changed in light of current circumstances in the coal industry; and what are the expectations of sureties from the state regulatory authorities, especially in regard to inspection and enforcement.

The Bonding Work Group will continue with its discussions and efforts to complete additional work products that are currently under development, and will be discussing the group's next steps during IMCC's Mid-Year Meeting in Park City in October.

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

FWS Develops National Listing Workplan

The U.S. Fish and Wildlife Service (FWS) developed a National Listing Workplan for addressing a backlog of Endangered Species Act (ESA) listing and critical habitat decisions over the next seven years. The Workplan is intended to enable FWS to prioritize their workload based on the needs of candidate and petitioned species, while providing greater clarity and predictability about the timing of listing determinations to state wildlife agencies, non-profit organizations and other stakeholders and partners, with the goal of encouraging proactive conservation so that federal protections are not needed.

The decision to list a species as threatened or endangered under the ESA will be made following a rigorous scientific assessment of the species' status to determine whether it meets the criteria. If a species warrants listing, the appropriate rulemaking processes must be undertaken before a species receives the protections of the ESA, including required public comment and scientific peer review before any action is finalized. If ESA protections are deemed warranted, the FWS will seek to issue a listing proposal simultaneously with making the finding, rather than adding the species to the candidate list. FWS will also strive to propose critical habitat designations simultaneously. Following issuance of listing proposals, the FWS will issue final rules with statutory deadlines.

The 7 year Workplan can be viewed at:

https://www.fws.gov/endangered/improving_esa/pdf/Listing%207-Year%20Workplan%20Sept%202016.pdf and will be updated periodically on the FWS Ecological Services website. FWS intends to provide the public with a projection of their workload for a minimum of five years into the future. Species with new "substantial" 90-day findings will be assigned a bin number in coordination with states and others with relevant information, according to the FWS methodology. This will assist in prioritizing 12-month findings. The bin categories identified from highest to lowest priority by number include: bin 1 – critically imperiled (highest priority); bin 2 - strong data already available on status; bin 3 - new science underway to inform key uncertainties; bin 4 - conservation opportunities in development or underway; and bin 5 - limited data currently available. Critically imperiled species (Bin 1) will be incorporated into the Workplan as soon as possible, with remaining species being incorporated according to their bin number, if feasible, or added to the back end of the Workplan.

OSMRE Policy Memo Re. CWA/SMCRA Enforcement

On July 27, 2016, the Office of Surface Mining Reclamation and Enforcement (OSMRE) released a memorandum to the OSMRE regional directors and state Title V program division chiefs titled, "A More Complete Enforcement of SMCRA and Its Implementing Regulations." The memo is purportedly in response to several instances of legal action brought against OSMRE over the last decade alleging Surface Mining Control and Reclamation Act (SMCRA) and Clean Water Act (CWA) violations in Appalachian states, including compliance with National Pollutant Discharge Elimination System (NPDES) effluent limits; violation of Water Quality Standards; renewal of SMCRA permits with unabated CWA violations; and discharges from SMCRA operations without a valid NPDES permit.

The memo outlines the relationship between SMCRA and CWA authority, noting that Federal SMCRA regulations contain specific requirements regarding water protection, for example, requiring that each Hydrologic Reclamation Plan include, among other things, steps taken to meet applicable Federal and state water quality laws and regulations. Essentially, the memo contends that these requirements are not being fully implemented in some cases. It concludes with eight "SMCRA enforcement directives", meant to act as "instructions to implement the existing law." The eight directives are mainly focused on promoting additional or enhanced oversight of state Title V programs by OSMRE regional directors with respect to certain instances of CWA and SMCRA violations, both potential and actual.

The states have expressed concerns related to the balance of statutory authority between the CWA and SMCRA, as well as practical concerns related to the interplay between CWA and SMCRA requirements and permitting authorities. IMCC will continue to monitor developments in the relationship between CWA and SMCRA enforcement, which has also been in question during the state program reviews of OSMRE's proposed stream protection rule.

WEG Contends Unauthorized BLM Employees Approved Coal Leases

In a September 6 letter sent to Secretary of Interior Sally Jewell, Assistant Secretary for Land and Minerals Management Janice Schneider, Bureau of Land Management (BLM) Director Neil Kornze, and Office of Surface Mining Reclamation and Enforcement (OSMRE) Director Joseph Pizarchik, WildEarth Guardians (WEG) demanded that BLM withdraw any coal leasing decisions that were made by "unauthorized BLM employees". Citing 30 U.S.C., Section 201(a), WEG wrote the Secretary alone is authorized to lease federal coal, and therefore any leasing decisions made by unauthorized BLM employees, namely field office managers and district managers, are invalid. The letter cites

recent rulings from the Interior Board of Land Appeals (IBLA), in which three leases were set aside on the basis that unauthorized BLM employees approved the coal leases. IBLA ruled the decisions “are not properly considered of the BLM and have no legal effect” (187 IBLA 349, 353 (May 6, 2016)).

WEG asserts that unauthorized BLM employees have regularly approved and signed off on coal leases, many of which have been approved for development. In the letter, WEG identifies 18 leases approved since 2006 in Colorado, Montana, Utah, and Wyoming that were signed off on by a BLM field office manager or district manager, and claims the decisions are invalid and have no legal effect. Under the Secretary of Interior’s authority to cancel any illegally issued leases, WEG is demanding the Interior Department cancel, withdraw, or otherwise undo any actions undertaken pursuant to these coal leases. The 18 leases identified contain 24,000 acres and 2.5 billion tons of coal. The letter also suggests many more leases have likely been approved by “unauthorized BLM employees” since 2006 that should be invalidated.

In any instance where a leasing decision was made by an “unauthorized BLM employee”, WEG demanded that Interior:

- Declare null and void any and all coal leases and lease modifications which have been sold and issued; refund all payments made by the lessee; and direct the lessee to cease all development of the lease, and to restore all disturbed lands;
- Rescind approval of mining plans and plan modifications by the Assistant Secretary;
- Immediately rescind the approval of any such coal leases that have not yet been sold;
- Immediately halt any OSMRE reviews currently being undertaken to recommend approval of a mining plan or mining plan modification on such coal leases.

A copy of the WEG letter can be found here: http://www.eenews.net/assets/2016/09/27/document_gw_07.pdf.

CEQ Issues Guidance on Greenhouse Gases and Climate Change

On August 1, 2016, the White House Council on Environmental Quality (CEQ) released a final version of its “Guidance on Greenhouse Gases and Climate Change.” Draft versions of this Guidance have been evolving since 1997, when CEQ initially recommended to federal agencies that they consider Greenhouse Gas (GHG) emissions and their effects in the course of assessing their proposed actions under the National Environmental Policy Act (NEPA).

During the 2000's, many federal agencies began to modify their NEPA procedures to account for GHG impacts in the course of preparing Environmental Assessments (EA) and Environmental Impact Statements (EIS), which generally involve quantifying direct GHG emissions from a proposed action and its alternatives. The recently released final Guidance seeks to further inculcate these practices and bring some additional measure of consistency to how federal agencies consider the impact of GHGs. It recommends that federal agencies use existing tools to quantify GHG emissions, coordinate with CEQ to identify actions that warrant assessment of GHG emissions, and that they consider the impact of GHGs during the scoping, alternatives analysis, impact analysis, and identification of mitigation measures portions of NEPA reviews.

The Guidance is not legally binding and does not directly effect existing NEPA regulations. Federal agencies have discretion in how and the extent to which they tailor their NEPA review to accommodate the Guidance. While modifications to agency-specific NEPA regulations are not required, the agencies are encouraged to make updates as necessary.

IMCC will continue to monitor developments in assessing GHG and other climate change impacts as part of federal agency reviews, including as part of the Department of the Interior’s efforts to amend federal coal leasing practices. For now, the full impact that the final CEQ Guidance will have on how federal agencies assess GHG emissions, and potential climate change impacts more generally, remains unclear.

The guidance document is available on the White House website here: <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance>.

USFWS and NMFS Publish Final Rule Re. ESA Listing Petition Process

On September 27, 2016, the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (the “Services” collectively) published a final rule revising the Endangered Species Act (ESA) listing petition regulations. Originally proposed in May, 2015, the revisions are intended to improve the process by which species are petitioned for listing, delisting, or reclassification as threatened or endangered under the ESA.

The process by which a petitioner may request revisions to critical habitat designations under the ESA are also described in the rule.

“These revised ESA petition regulations will help ensure more complete and robust petitions that will lead to more effective conservation, greater involvement by state wildlife agencies, and provide greater transparency to the public,” according to the Services.

The final listing petition regulation revisions include:

- Improved engagement with state wildlife agencies: Petitioners will be required to notify each state wildlife agency in which the species occurs at least 30 days before submitting the petition to the Services. This change will provide states an opportunity to submit pertinent information on petitioned species in time to inform the Services’ review.
- Limitation on number of species per petition: Petitions will be limited to only one species per petition. A petition may still address any members of a single species as defined by the ESA, including the full species and one or more subspecies or varieties. For vertebrate species, this includes one or more distinct population segment.

The the final revisions reflect extensive input received from the public and stakeholders, according to the Services. The rule will go into effect on October 27, 2016. The Federal Register notice can be viewed here:

<https://www.federalregister.gov/documents/2016/09/27/2016-23003/endangered-and-threatened-wildlife-and-plants-revisions-to-the-regulations-for-petitions>.

ACWA Comments on EPA NPDES Application and Program Updates

The Association of Clean Water Administrator (ACWA), an independent, nonpartisan, national organization of state, interstate, and territorial water program managers who implement the water quality programs under the Clean Water Act (CWA) within their states, submitted comments to the Environmental Protection Agency (EPA) on August 2, 2016, regarding EPA’s recent proposed National Pollutant Discharge Elimination System (NPDES) Updates Rule. Forty-six states have been authorized to directly implement the NPDES program within their borders, and two additional states are currently exploring the authorization process. ACWA expressed support for EPA periodically updating and modernizing the federal NPDES regulations to reflect current implementation practices, and supported efforts to provide NPDES permit writers with improved tools. The Association also supports the provision of opportunities for public participation in permitting actions. While some of EPA’s proposed provisions will accomplish these goals, ACWA and the states are concerned that other provisions will undermine historical flexibilities and create new challenges for the states, including an increased administrative burden. ACWA also expressed disappointment that EPA did not take full advantage of opportunities to consult in-depth with the states prior to proposing the rule, and suggested EPA seriously consider several recommendations included in the comments that came directly from the states.

– End –