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## **IMCC's 2018 Annual Meeting Held in Charlotte, North Carolina**

The Interstate Mining Compact Commission (IMCC) held its 2018 Annual Meeting April 8-11 at the Omni Hotel in Charlotte, North Carolina. A casual welcome reception took place on the evening of Sunday, April 8, kicking off the Annual Meeting.

On Monday, April 9, the Honorable Joe Balash, Assistant Secretary of Land and Minerals Management in the U.S. Department of Interior (DOI) provided opening remarks. Immediately following, officials from the Office of Surface Mining met with the IMCC member states to discuss issues of mutual concern. Next, the standing committees met beginning with a joint meeting of the IMCC Finance and Administrative Committee and the Resolutions Committee. The meetings concluded for the day with an IMCC Member State Orientation and Primer Session for any new attendees as well as those who hoped to learn more about IMCC membership. The evening was spent in celebration of the retirement of Executive Director, Greg Conrad, featuring many heartfelt speeches in appreciation of Greg's hard work and dedication to the Compact.

On Tuesday, April 10 the meeting continued, starting with a joint meeting of the Noncoal Environmental Affairs Committee and the Mine Safety and Health Committee. The Coal Environmental Affairs and Abandoned Mine Lands Committee Joint Meeting followed in the afternoon. The Annual Awards Banquet took place in the evening, during which the IMCC 2018 National Reclamation, Minerals Education, and Mine Safety and Health Training Awards were presented. All of the award winners were present.

IMCC's Annual Executive Commission Business Meeting took place on the morning of Wednesday, April 11, concluding the Annual Meeting.

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## **IMCC 2018 Mid-Year Meeting Scheduled for Biloxi, Mississippi**

The Interstate Mining Compact Commission will be holding its 2018 Mid-Year Meeting at the IP Hotel in Biloxi, Mississippi. Planning is currently underway for the meeting, which will begin Monday, October 22, and conclude on Wednesday, October 24. A schedule for the various IMCC committee meetings to be held in conjunction with the meeting will be posted on the IMCC website once the itinerary is finalized.

For more information, contact: IMCC at 703.709.8654

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### **Upcoming Meetings:**

#### **IMCC 2018 Mid-Year Meeting**

October 22-24  
IP Hotel  
Biloxi, Mississippi

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## **FY 2019 Federal Appropriations Legislation**

Appropriations bills for the Interior Department, Environmental Protection Agency (EPA) and related agencies have cleared both the House and Senate Appropriations Committees. State grants under Title V of the Surface Mining Control and Reclamation Act (SMCRA) continue to be funded at \$68.5 million in each bill. The House version also provides \$2.3 million in seed money for states seeking to attain primacy (i.e., Tennessee). The Tennessee money is not supposed to come from the \$68.5 million in state grant funds, but this needs to be clarified in the committee report. The House and Senate bills would also continue the Abandoned Mine Land (AML) Pilot Program. The Senate version would provide \$75 million for the three Appalachian states with the largest inventories of priority 1 and 2 sites, \$30 million for the next three Appalachian states and \$10 million for federally recognized Indian tribes. The House version provides \$90 million for the three Appalachian states with the largest inventories and \$10 million for tribes, with the latter amount being directed to the tribes through the Bureau of Indian Affairs instead of the Office of Surface Mining Reclamation and Enforcement (OSMRE). Floor action on the Senate bill could come as early as the first week of July.

Appropriations bills for the Labor Department have cleared the House and Senate Appropriations Committees. Both direct the Mine Safety and Health Administration (MSHA) to provide training grants of not less than \$10,537,000 million to the states.

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### **Tennessee to Seek SMCRA Primacy**

On April 25, 2018, Tennessee Governor Bill Haslam signed Senate Bill 686 into law. The bill contains provisions which parallel those in the Surface Mining Control and Reclamation Act (SMCRA), identifies the Tennessee Department of Environment and Conservation (TDEC) as the agency which will operate the state program, and directs the Tennessee Board of Energy and Natural Resources to promulgate emergency rules that conform to SMCRA. It contemplates a federal grant to start the program and makes certain parts of the law effective upon deposit of federal funds into the state account that is established to operate the surface mining program. Notably, in a separate development, the Interior Department appropriations bill that has cleared the House of Representatives Appropriations Committee and is awaiting action by the full House directs the Office of Surface Mining Reclamation and Enforcement (OSMRE) to provide \$2.3 million in grant payments to states that are preparing to seek SMCRA primacy.

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### **Coalition of 14 States Seeks to Intervene in CERCLA 108(b) Case**

On February 21, 2018 the Environmental Protection Agency (EPA) published notice of its final action declining to exercise the discretion it has under section 108(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to impose financial assurance requirements on the hard rock mining industry. As expected, environmental groups led by the Idaho Conservation League, Earthworks, and Sierra Club filed a petition for review of EPA's decision in the United States Court of Appeals for the District of Columbia Circuit. On June 15, 2018, a coalition of 14 states or state agencies led by New Mexico, Arizona, and Nevada filed a motion to intervene in this case in support of EPA's decision. The EPA consents to the states' intervention, while the petitioning environmental groups do not oppose it. Other Interstate Mining Compact Commission (IMCC) member states in this coalition include Alaska, Arkansas, Colorado, Louisiana, South Carolina, Utah, and Wyoming. Michigan, Montana, Nevada, South Dakota, and Wisconsin are also in the coalition

EPA's decision relied heavily on existing state regulatory programs in many states that serve to minimize the risk of a CERCLA release to the environment and mitigate the severity of any such

release as well as existing state bonding requirements that serve the same purpose as the proposed financial assurances under section 108(b). Under section 114 of CERCLA, a federal section 108(b) rule would have superseded and negated existing state bonding requirements. Comments of many states and IMCC on EPA's proposed rule highlighted the effectiveness of the existing state requirements. After EPA's decision was made, IMCC led five conference calls to help organize state legal support for the EPA decision in the court challenge that was to come.

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## **DC Circuit Rejects NEPA Challenge to Federal Coal Leasing Program**

On June 19, 2018, a three judge panel of the United States Court of Appeals for the District of Columbia Circuit rendered a significant decision for the federal coal leasing program in *Western Organization of Resource Councils, et al., v. Zinke*, rejecting environmental groups' contention that the National Environmental Policy Act (NEPA) regulations require the Bureau of Land Management (BLM) to update its programmatic environmental impact statement (PEIS) for this program to address climate change. BLM published the PEIS for the federal coal program in 1979. In this PEIS, BLM acknowledged that burning coal could lead to increased CO<sub>2</sub> levels and a serious problem called the "greenhouse effect". The environmental groups contended that NEPA regulations require the PEIS to be supplemented to address the body of science developed on CO<sub>2</sub> levels and climate change since 1979. One of these regulations, 40 CFR 1508.7, requires the consideration of the cumulative impacts of a proposed federal action "when added to other past, present, and reasonably foreseeable future actions." The other regulation, 40 CFR 1502.9(c)(1)(ii), requires an EIS to be updated in response to "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

The way the federal action at issue was defined was critical to the way the court decided the case. Even though individual leasing decisions continue to be made pursuant to the Federal Coal Management Program, the court determined the Program, itself, was completed in 1979 and, accordingly, the BLM's NEPA obligation with respect to the Program terminated in 1979. The court held that the NEPA regulations' requirement to update an EIS applies only when a proposed federal action is not yet complete.

It is important to note that this decision does not affect the NEPA analysis required for individual coal leasing decisions. The court expressly stated that BLM's NEPA obligation to consider the cumulative environmental impacts of coal leasing, i.e., climate change impacts, applies to individual leasing decisions. In fact, the court pointed the environmental groups in this direction by suggesting they could "challenge any attempt by BLM to rely on (or tier to) the 1979 PEIS on the ground that it is too outdated to support new federal action."

Wyoming and North Dakota led a group of intervenors in support of the Interior Department.

The court's decision can be found at:

[https://www.cadc.uscourts.gov/internet/opinions.nsf/FCE27F0BA64C40A1852582B100518555/\\$file/15-5294-1736645.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FCE27F0BA64C40A1852582B100518555/$file/15-5294-1736645.pdf)

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## **CEQ is Considering NEPA Reform; Seeks Comments**

On June 20, 2018, the Council on Environmental Quality (CEQ) published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal Register in which it announced it is seeking comment on many ideas for changes to its regulations implementing the National Environmental Policy Act (NEPA). There are twenty specific items, with subparts, for comment in the following areas: NEPA Process, Scope of NEPA Review and General. The deadline for comments is July 20, 2018.

The complete ANPR can be founded at: <https://www.gpo.gov/fdsys/pkg/FR-2018-06-20/pdf/2018-13246.pdf>

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## **Definition of Waters of the United States (WOTUS) Timeline/Status**

The following timeline provides an update on the status of EPA's efforts to define "Waters of the United States".

2015-06-09 - 2015 Rule Finalized

2015-08-27 - US District Court North Dakota stays 2015 rule in 13 states that challenged it in that court

2015-10-09 - 6<sup>th</sup> Circuit Court of Appeals stays 2015 Rule nationwide

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

2017-07-27 - Step 1, EPA proposes 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 6<sup>th</sup> Circuit of Appeals did not have jurisdiction

2018-02-06 - EPA promulgates an effective date of 2020-02-06 for the 2015 Rule, leaving pre-2015 rules in effect until then. This prevents one rule, the 2015 rule, from being in effect in the 37 states that are not subject to the North Dakota court's stay while another, the pre-2015 rule, is in effect in the 13 states that are subject to this stay. Of course, EPA appears to be proceeding toward fully rescinding the 2015 rule before it can take effect.

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## **Other Developments Regarding Clean Water Act Jurisdiction**

In addition to the Environmental Protection Agency's (EPA) ongoing effort to define which *waters* are subject to Clean Water Act (CWA) jurisdiction, there are recent developments regarding the separate issue of the *types of discharges* that are subject to CWA jurisdiction. While EPA has acknowledged in the past that nothing in the CWA purports to give it jurisdiction over pollution of groundwater, the agency has nonetheless claimed jurisdiction over discharges from a point source to groundwater which has a "direct hydrologic connection" to surface waters. The federal Circuit Courts of Appeal have decided at least two citizen suit cases this year involving CWA jurisdiction over these types of discharges. Some other federal circuit courts have held that the CWA does not extend to discharges to groundwater, regardless of whether there is a direct hydrologic connection to surface water.

In February, in *Hawai'i Wildlife Fund v. County of Maui*, the 9<sup>th</sup> Circuit held the County had violated the CWA by its unpermitted discharge of municipal wastewater into four wells, from which it migrated through groundwater to the Pacific Ocean. The court held that because the discharge was "fairly traceable" from the point source to a jurisdictional water it was the functional equivalent of a discharge from a point source to jurisdictional waters.

In April, the 4<sup>th</sup> Circuit reached a similar result in *Upstate Forever v. Kinder Morgan Energy Partners*, a case in which an underground pipeline ruptured resulting in the spillage, underground, of over 300,000 gallons of gasoline at a location that was 400 feet from one creek and 1000 feet from another. Adopting EPA's "direct hydrological connection" approach, the 4<sup>th</sup> Circuit held the pipeline owner was liable under the CWA for the unpermitted discharge that reached these creeks via subsurface flow.

The hydrologic interaction between surface water and groundwater systems can be very dynamic. In certain hydrologic settings, unlined ponds used for settlement of sediment or water treatment, unlined refuse and tailings impoundments and underground mine works could potentially face

similar CWA claims. Perhaps as a response to concerns raised by the 9<sup>th</sup> Circuit case and similar cases, EPA decided to take public comment from February 20, 2018 to May 21, 2018 on the issues of whether EPA should revise its previous statements concerning the applicability of the CWA National Pollutant Discharge Elimination System (NPDES) permit program to discharges from point sources that reach jurisdictional surface waters via groundwater flow and whether its “direct hydrologic connection” justification for claiming jurisdiction over such discharges is appropriate in the context of the CWA. The Interstate Mining Compact Commission will continue to monitor developments in this area.

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### **IMCC Executive Director Speaks in Arizona; Tours Wyoming Mining Operations**

At the invitation of the Arizona Mining Association, the Interstate Mining Compact Commission’s (IMCC) Executive Director, Tom Clarke, spoke at its annual meeting in Tucson, Arizona on May 31, 2018. This event was a good opportunity for Tom to get to meet mining industry leaders in Arizona, learn more about its mining industry and the issues that are important there. He spoke about IMCC’s organization, history, recent activities with Congress and federal agencies on behalf of the states, and other topics of focus. While at the meeting, Tom was also able to speak with the leadership of the Arizona Department of Environmental Quality.

From June 4 through June 6, 2018, Tom participated in a tour of various types of mining operations being conducted in Wyoming, including a longwall unit in a trona mine, a bentonite mining operation, a large surface coal mine, and an in situ recovery uranium operation. After the tour of mining operations was completed, Tom was able to attend the Wyoming Mining Association’s annual convention on June 7, 2018. While there, he met with the Association’s Board of Directors and heard presentations on issues in Wyoming. Other participants in the mine tour and meeting included Joe Balash, Assistant Secretary of the Interior, others from the Office of Surface Mining Reclamation and Enforcement (OSMRE), and state government leadership in Wyoming.

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### **Interstate Mining Compact Commission and Mine Safety and Health Administration Meeting July 26, 2018**

The Interstate Mining Compact Commission (IMCC) met with the Mine Safety and Health Administration (MSHA) on Tuesday, June 26, 2018 at MSHA headquarters. IMCC staff were joined by mine safety and health agency representatives from several states. The primary purpose of the meeting was to allow IMCC and MSHA to discuss topics of mutual interest relating to mine safety. It was the first opportunity for IMCC members to meet with new Assistant Secretary of Labor, David Zatazelo, and his staff. Much of the meeting involved discussions of the new administration’s goals and plans for the next few years, which include: MSHA’s plan to begin to blur the line between its coal and metal/non-metal sides and to cross-train inspectors from each side to be proficient in the work of the other; standardized certification of mine safety personnel; and, two of Assistant Secretary Zatezalo’s priority areas for reduction of injuries – the use of safety belts and proximity detection. Other topics of discussion included: the status of State Training Grants; MSHA participation in mine rescue contests; the status of resolution of technical issues on proximity detection systems, the use of 103J/103K orders, and coordination of technical reviews for coal and gas. During the Meeting, MSHA announced that the National Academy of Sciences report, “Monitoring and Sampling Approaches to Assess Underground Coal Mine Dust Exposure” would be released on June 28, 2018. A copy of this report, labeled as a “pre-publication copy”, can be found at: <https://www.nap.edu/read/25111/chapter/1>

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## Department of the Interior Reorganization Plan for Hardrock Abandoned Mine Lands

The Department of Interior (DOI) recently announced plans to reorganize the way that federal non-coal abandoned mine land clean ups are managed. This plan follows on the push for executive branch reorganization made in a March, 2017 Executive Order, the stated goal of which is to “improve efficiency, effectiveness, and accountability.” Notably, the recently announced Interior Department plan would “consolidate” the non-coal abandoned mine land programs currently within DOI and the department of agriculture (USDA) into one program within the Environmental Protection Agency (EPA). The proposal summary explains that the overlap in these agencies responsibilities for abandoned mine cleanups causes inefficiencies and inconsistencies, which it suggests could be eliminated through the consolidation into the agency “with the most significant expertise” i.e. EPA. The proposal goes on to note that some portion of both funding and full-time employees (FTE’s) for non-coal AML would shift from DOI and USDA to EPA, and that states would have a single federal point of contact for discussing issues related to these sites in the future.

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### Other Matters:

- A decision of the US Court of Appeals for the 4<sup>th</sup> Circuit on June 20, 2018 rejected environmental groups’ contention that West Virginia had made a constructive submission of no total maximum daily loads (TMDLs) to the Environmental Protection Agency (EPA) under the Clean Water Act for streams with biologic impairment, triggering EPA’s duty to approve or disapprove the constructively submitted TMDLs. This is the most recent in a series of court cases arising from narrative water quality standards for protection of the aquatic ecosystem. In this case, West Virginia and EPA had agreed on a schedule for completion of the TMDLs at issue.
  - The Interstate Mining Compact Commission (IMCC) and its members continue to discuss different aspects of the Surface Mining Control and Reclamation Act (SMCRA) Title IV and Title V programs with their counterparts at the Office of Surface Mining Reclamation and Enforcement (OSMRE). As developments arise from these discussions, further updates will be provided.
  - The updated and revised IMCC website is expected to go live very soon. Watch your email for announcements.
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*Have a safe and happy 4<sup>th</sup> of July!*

