

the compact

Update on Federal Budget Legislation

Before the new federal fiscal year began on October 1, 2018, two "mini-buses" were adopted which provide funding for portions of the federal government for the full fiscal year (2019). Versions of a third mini-bus that would have funded the Interior Department, EPA and other specified agencies for the full fiscal year passed both the House and Senate but conferees were unable to resolve differences between the two bills before the end of the fiscal year. We understand agreement could not be reached on some policy riders included in the House version. Agencies that did not receive funding for the entirety of fiscal year 2019 are funded through December 7, 2018 by a continuing resolution. This includes the Interior Department and EPA. The Department of Labor, including the Mine Safety and Health Administration, is covered by one of the mini-buses that was adopted. It is funded for the entirety of fiscal year 2019.

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**A Newsletter
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Upcoming Meetings:

IMCC 2018 Mid-Year Meeting
October 22-24
IP Hotel
Biloxi, Mississippi

Contact Information:

Interstate Mining Compact Commission
445 Carlisle Drive, Suite A
Herndon, VA 20170
Ph: 703.709.8654/Fax: 703.709.8655
Email: bmills@imcc.isa.us

New IMCC Website is Live; Ideas for Further Improvements Welcomed

The new, re-designed IMCC website is up and running. One goal of the updated website is to highlight and promote the job the states are doing as effective regulators of mining impacts. Toward that end, we have increased the focus on reclamation awards and accomplishments. We are also looking for some time lapse photography that will help the public visualize and appreciate mine reclamation as it progresses. If you have content of this type, please send it to us. Any other ideas as to how this goal might be better achieved are welcome. Please send your ideas to Brittany Mills at bmills@imcc.isa.us.

The updated website also contains a "Members Page" which is password protected in an effort to create a space for members-only information. Here, there are email lists for IMCC's standing committees that can be used to generate/facilitate discussion amongst members of the IMCC committees on topics that may relate to each committee's areas of focus. For example, if a topic or question arises in the Abandoned Mine Lands area, the email list for IMCC's AML Committee can be used to solicit thoughts from people in this group. The same is true of the other standing committees. The password for the Members Page was previously distributed by email. Contact Brittany Mills for any assistance.

Discussion of the website is on the agenda for discussion at the upcoming Midyear Meeting in Biloxi, MS. Some very good suggestions for improvements to the site have already been submitted. Your suggestions may be made at the meeting, or at any time. They are always welcome.

Visit the IMCC website at: <http://imcc.isa.us/>

Hardrock Good Samaritan Developments: Government Accountability Office, Environmental Protection Agency, and Congress

Consideration of the need to facilitate the efforts of Good Samaritan groups seeking to clean up hardrock abandoned mine land (AML) sites continues on several fronts.

The Government Accountability Office (GAO) recently began a new study on the nationwide status of hardrock AML efforts, including an emphasis on Good Samaritan efforts. The study was reportedly requested by Senator Tom Udall (D-NM). GAO reached out to the Interstate Mining Compact Commission (IMCC) for initial consultation and IMCC provided a briefing regarding the overall state of affairs for hardrock AML. IMCC also provided contact information for GAO to follow up with state hardrock AML programs, following which several conversations between states and GAO staff were held. Reports indicate that these conversations have so far been viewed as successful. IMCC and the state AML programs expect to continue working with GAO for the foreseeable future as needed to aid in preparation of an eventual report, but the timeline for publication of that report remains unclear.

The Environmental Protection Agency (EPA) has been in conversations with IMCC since the start of 2018 regarding how to facilitate hardrock AML work, especially concerning the participation of Good Samaritans. EPA has been internally studying how to improve the participation of these groups since the beginning of the Trump administration and has now begun to outline specific plans. EPA is discussing two categories of projects to hopefully make progress with 1) direct water treatment projects, and 2) source control projects through the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), aka source control or "dirt" projects. EPA has come to recognize that facilitating the participation of 3rd party groups at direct water treatment projects will be extremely difficult without the aid of legislation that reduces/eliminates liability concerns under the Clean Water Act (CWA), as has been debated by Congress for many years. In light of the ongoing difficulty with direct water treatment projects, EPA plans to focus its efforts on the 2nd category of projects: source control/dirt projects. These projects provide opportunity to achieve water quality improvements by removing materials that generate pollutants from the path of water flow, but without actually impacting a point source discharge directly and therefore avoiding the need for a CWA National Pollutant Discharge Elimination System (NPDES) permit. IMCC continues to consult with EPA on how to facilitate these types of projects, and has solicited input and potential project ideas from the hardrock AML programs to that end. EPA hopes to have a series of these projects underway in the Spring of 2019.

Congressional efforts to facilitate Good Samaritan participation in hardrock AML clean ups has not seen very much development in the last few months, but some work does continue on legislation to provide liability protection to Good Samaritans. IMCC continues to consult with Congressional staff as requested as these issues are examined and potential solutions are debated.

IMCC participates in National Association of Abandoned Mine Land Programs Annual Conference in Williamsburg, VA

The National Association of Abandoned Mine Lands Programs (NAAML) held its 40th annual conference in Williamsburg, VA from October 10-13. IMCC continues its contract with NAAML for legislative and regulatory affairs counsel, pursuant to which IMCC participated in NAAML committee meetings as well as the business meeting by guiding discussions and providing reports on recent developments on AML-related topics. IMCC also coordinated a briefing by the AML programs for Department of the Interior Assistant Secretary for Land and Minerals Management Joseph Balash on topics related to the Surface Mining Control and reclamation Act (SMCRA) Title IV AML program and the approaching FY 2021 expiration of the AML fee which funds the program.

IMCC worked with the AML programs to plan and prepare the briefing and participated in the briefing itself, which was reportedly very helpful for the Assistant Secretary.

US Forest Service is Considering Revision of its Locatable Minerals Rules

On September 13, 2018, The United States Forest Service published an advance notice of proposed rulemaking. This is an initial step toward clarifying and updating the Forest Service's regulations governing prospecting, exploration, development, mining, and processing operations for "locatable" minerals conducted on National Forest System lands authorized by the Mining Law of 1872. These Forest Service's regulations are in 36 CFR Part 228, Subpart A. The stated goals of this effort are to expedite review of proposed and approval of mineral operations, to increase consistency with Bureau of Land Management (BLM) regulations to assist those who conduct these operations on lands managed by each agency, and to increase nationwide consistency in regulating mineral operations. The Forest Service also intends to address recommendations for changes to 36 CFR, Part 228, Subpart A made by two reports: the 1999 National Research Council (NRC) publication "Hard Rock Mining on Federal Lands" and the 2016 United States Government Accountability Office (GAO) report "Hardrock Mining: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More".

Comments the Forest Service receives will inform a future proposal for changes to 36 CFR Part 228, Subpart A. This September 13, 2018 notice also served as the notification of the Forest Service's intent to prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act. A link to this notice can be found below:

<https://www.gpo.gov/fdsys/pkg/FR-2018-09-13/pdf/2018-19961.pdf>

Interior Department Seeks Nominees from States for its Royalty Policy Committee

The US Department of the Interior is seeking nominations for primary and alternate members for its Royalty Policy Committee. This is an advisory committee that provides advice on the fair market value and collection of revenues derived from the development of energy and mineral resources on Federal and Indian lands. The Committee also will advise on the potential impacts of proposed policies and regulations related to revenue collection from such development, including whether a need exists for regulatory reform. Non-federal members of this Committee include:

- Members representing the Governors of States that receive more than \$10,000,000 annually in royalty revenues from onshore and offshore Federal leases.
- Members representing the Indian Tribes.
- Members representing various mineral and/or energy stakeholders in Federal and Indian royalty policy.
- Members representing academia and public interest groups.

Nominations are due by November 2, 2018. For more information, go to:

<https://www.gpo.gov/fdsys/pkg/FR-2018-10-03/pdf/2018-21549.pdf>

Latest Developments in Defining "Waters of the United States"

Following, is a timeline of significant developments in the effort to define "waters of the United States" (WOTUS). Developments since the last IMCC newsletter are shown in bold.

2015-06-09 - 2015 Rule Finalized by EPA
2015-08-27 - US District Court North Dakota stayed 2015 rule in 13 states that challenged it in that court – AK, AZ, AR, CO, ID, MO, MT, ND, NE, NM, NV, SD, WY
2015-10-09 - 6th Circuit Court of Appeals stayed 2015 Rule nationwide
2017-02-28 - Executive Order required consideration of rescission/replacement of 2015 Rule
2017-07-27 - Step 1, EPA proposed rescission of 2015 Rule
2017-09-27 - Comment period on Step 1 closed
2017-08-28 - Comment period for public outreach on Step 2 (a replacement rule) opened
2017-11-28 - Comment period for public outreach on Step 2 closed
2018-01-22 - US Supreme Court holds the 6th Circuit of Appeals did not have jurisdiction
2018-02-06 - EPA promulgated an effective date of 2020-02-06 for the 2015 Rule, leaving pre-2015 rules in effect until then
2018-06-08 US Dist Ct in Georgia enjoined the 2015 Rule in 11 states which challenged it in that court – AL, FL, GA, IN, KS, KY, NC, SC, UT, WV and WI
2018-07-12 – EPA reopened comment on repeal of the 2015 Waters of the United States (WOTUS) rule and reinstatement of the previous rules. The comment period closed on August 13, 2018
2018-08-16 – The US District Court for the District of South Carolina issued a nationwide injunction against the rule EPA promulgated on 2018-02-06 which established an effective date of 2020-02-06 for the 2015 Rule. This put the 2015 Rule into effect in the 26 states for which no injunction of the 2015 Rule has been entered.
2018-09-12 – The US District Court for the Southern District of Texas enjoined 2015 rule in 3 states - TX, LA & MS, making the old rules effective in 27 states, and the 2015 Rule effective in 23 states.

Decisions on Clean Water Act Jurisdiction over Discharges to Groundwater

In the July, 2018 issue of the Compact, there was a report on two recent cases decided by the federal Circuit Courts of Appeal, one in February, 2018 by the 9th Circuit and one in April, 2018 by the 4th Circuit, in which the courts held entities responsible for violations of the Clean Water Act (CWA) for unpermitted discharges into groundwater that ultimately reached surface waters that were unquestionably jurisdictional waters under the CWA. In at least one of these cases, the court expressly adopted a CWA interpretation EPA had supported, but may be reconsidering. As a general matter, discharges to groundwater are not covered by the CWA. However, under the present EPA interpretation, which the 4th Circuit adopted in its April, 2018 decision, an unpermitted discharge to groundwater which reaches jurisdictional surface waters through a direct hydrologic violates the CWA.

Last month, in September, the Circuit Courts decided three more cases dealing with discharges to groundwater that were alleged to reach jurisdictional surface waters via hydrologic connections. All three of them involved unlined coal ash storage and disposal facilities from which water was alleged to be seeping into the ground and flowing as groundwater to nearby surface waters. In all three of these cases, the courts concluded there was no CWA violation. On September 12, a different panel of 4th Circuit judges from the one that decided the case earlier this year briefly acknowledged the earlier decision but went on to examine the question of whether the discharge was from a “point source”. The court deemed this inquiry to be necessary because CWA jurisdiction extends to discharges from “point sources” to navigable waters. Applying the CWA definition of “point source”, the court concluded that neither the ash facilities themselves nor the groundwater through which seepage from them flowed were point sources. Without discharge from a point source, the court decided there was no violation of the CWA. On September 24, the 6th Circuit issued two decisions rejecting the hydrologic connection interpretation of CWA jurisdiction and specifically disagreeing with the February 9th Circuit decision and the April 4th Circuit decision.

Petitions in the earlier 9th and 4th Circuit decisions are pending before the US Supreme Court. A disagreement between Circuit Courts of Appeal on this issue may make Supreme Court acceptance of these petitions more likely.

IMCC Executive Director Speaks to Chinese Delegation

On September 6, 2018, IMCC Executive Director, Tom Clarke, addressed a delegation of about 30 people from the State Administration of Coal Mine Safety of the People's Republic of China, led by Deputy Director General Sun Hongling. The presentation covered the pervasive nature of regulation of the mining industry in the United States, cooperative federalism in America in which sovereignty is exercised by both federal and state governments, the roles of the states and IMCC in the regulatory structure and an overview of elements of the overall approach to mine safety in America from both federal and state law that might be considered as parts of a comprehensive mine safety program. The initial presentation lasted nearly an hour. The presentation generated questions from the Chinese for another 45 minutes.

Developments Re: SMCRA §506(c) – Failure to Initiate Operations Within 3 Years

The market for steam coal has declined in recent years. This may result in a number of SMCRA permits that were sought when demand was higher that have not been activated. Therefore, it may be more important than ever to understand the nuances of SMCRA section 506(c), which deems SMCRA permits on which operations have not begun within three years to be terminated, unless the permit is extended.

In the 2011 – 2012 time frame, this issue was raised through citizens' complaints to OSMRE in Alaska and West Virginia which challenged state-issued permits on which operations had not been started within the three years allowed by section 506(c). OSMRE first addressed the West Virginia complaint. It concluded that that permit termination under section 506(c) was not self-executing after the expiration of three years, but instead required some kind of affirmative act by the regulatory authority to give effect to the permit termination. OSMRE applied the same reasoning in response to the Alaska complaint. The Alaska case made its way to federal court, where the court:

- Ruled that, contrary to OSMRE's interpretation, permit termination under section 506(c) is automatic and does not require action by the regulatory authority;
- Rejected Alaska's argument that its permit renewal had implicitly extended the permit because the permittee had neither requested permit extension at renewal nor had it or Alaska addressed the reasons the statute provides as a basis for extending a permit; and
- Observed that section 506(c) does not prohibit extensions from being granted after the expiration of three years where one of the statutorily allowed reasons for extending a permit exists.

After the Alaska ruling, the federal court where a challenge of OSMRE's West Virginia ruling was pending remanded the case to OSMRE for it to reconsider in light of the Alaska court's ruling. On July 26, 2018, OSMRE concluded its reconsideration and issued a decision. In the decision:

- Picking up on the Alaska court's observation that after the fact permit extensions are not prohibited, OSMRE agreed that the extension West Virginia granted after more than three years of inactivity was allowable under section 506(c);
- OSMRE agreed with West Virginia that a 1993 state policy on permit termination under the state counterpart to section 506(c) was a reasonable interpretation of the state program that was entitled to deference. Under this policy, the state regulatory authority was required to give a permittee advance notice of potential permit termination in order that the

permittee might have notice of the opportunity to seek a permit extension and in cases where the regulatory authority has failed to provide this notice, the policy called for the notice to be given and a request for consideration to be considered, after-the-fact.

- OSMRE agreed that West Virginia had appropriately extended the permit, after-the-fact, based upon this policy.
- OSMRE agreed that the justification permittee had offered for extension of its permit was an appropriate reason for granting an extension under the state counterpart to section 506(c).

OSMRE's decision did not stop at this point. OSMRE went on to note that West Virginia extended the permit through its next renewal in 2013 and that more than three years passed after that renewal before operations on the permit began. OSMRE questions whether permit extensions after 2013 were properly granted and has issued a new ten-day notice to West Virginia to require it to respond on these issues. The outcome of this process is yet to be determined.

In addition to the points from the Alaska court decision and the OSMRE decision on the remand of the West Virginia case, there are a few takeaways to be noted: (1) Permit extension is a separate consideration from permit renewal. A permittee must request extension in addition to seeking renewal. An extension must be justified by at least one of the statutory. (2) After a permit is renewed for a new five year term, it may still be subject to termination (or the need for an extension) if it continues to be inactive for another three years. (3) OSMRE has recognized that a state's reasonable interpretation of its own program is entitled to deference. This may be a useful principle to cite when a state regulatory authority and OSMRE disagree on the proper interpretation of state program provisions.

Other News:

- On August 23, 2018, IMCC staff toured Arch Coal's Leer Mine near Grafton, West Virginia. The management of the Leer Mine was very gracious. IMCC staff heard a complete, comprehensive explanation of all aspects of the operation, from business and profitability, to coal production, health and safety and environmental concerns. The tour included the longwall while in operation, the preparation plant from top to bottom, the loadout, and the refuse area. We came away with a new appreciation for and perspective on the work of our member states and this segment of the industry they regulate. The Leer Mine is an underground longwall mine whose principal product is a mid-vol A coking coal. A small amount of its coal is also sold on the steam coal market. The met coal from the Leer Mine is shipped through Baltimore, MD and Newport News, VA. Its primary customer is a steel maker in Italy which provides steel for use in automobiles manufactured in England, Germany and Korea.
- Johnathan Hall will be leaving the Alabama Surface Mine Commission at the end of October, 2018. Johnathan will be accepting a job in the mining industry with Twin Pines Minerals, LLC, which currently has mining operations in Florida and Georgia and more being planned in other locations. Please join us in wishing Johnathan all the best in his future endeavors.
- Richard Wahrer from Kentucky will be retiring as of October 31. We wish him well on this next chapter.
- Matthew R. Korn of the Columbia, South Carolina law firm of Fisher & Phillips LLP has been appointed by South Carolina Governor Henry McMaster as South Carolina's official delegate to IMCC. Matthew has a background in mine safety and health issues. He previously defended enforcement actions taken and penalties assessed by MSHA as a member of the Office of the Solicitor of the US Department of Labor. He also served as a judicial intern for the Federal Mine Safety and Health Review Commission, the body that hears appeals from MSHA enforcement actions and penalties assessments. His current law practice includes

occupational safety and health and other employment law issues. Please join us in welcoming Matthew to IMCC.

- In retirement, Greg Conrad is transitioning away from the use of his IMCC email address. While IMCC will keep that email address active as long as needed, please note that Greg's new email address is geconrad01@gmail.com.

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