
COVID-19 Effect on IMCC Operation

Virginia Governor Ralph Northam has issued a state-wide stay at home order through June 10, 2020, affecting all but businesses deemed to be essential. To do its part to flatten the curve of the COVID-19 virus outbreak, IMCC staff has shifted to operation from home for the immediate future. The best way to reach staff during this time will be by email.

As you are all aware, the Annual Meeting of the Interstate Mining Compact Commission that had been scheduled for April 6-8, 2020 in Lexington, Kentucky has been cancelled. Arrangements have been made to refund all registration fees that have already been collected. Please contact Administrative Assistant Brittany Mills if you have any further questions regarding refunds.

Contingency plans have been developed to allow IMCC to accomplish much of what we had hoped to do at the meeting in Lexington. This will take the form of multiple conference calls over the coming weeks. The IMCC values the work of the winners of our Annual Awards and we are also considering alternatives for recognizing those winners.

While we recognize that the situation surrounding COVID-19 is continually evolving, the Interstate Mining Compact Commission currently plans to hold its 2020 Mid-Year Meeting at the Bourbon Orleans Hotel in New Orleans, Louisiana. Planning is currently underway for the meeting, which will begin Monday, October 19, and conclude on Wednesday, October 21. A registration form, hotel booking information, and the schedule for the various IMCC committee meetings to be held in conjunction with the meeting will be posted on the IMCC website once finalized.

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**A Newsletter
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Compact Commission**

Upcoming Meetings:

IMCC 2020 Mid-Year Meeting
October 19-21
Bourbon Orleans Hotel
New Orleans, Louisiana

Contact Information:

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Development of a New Biological Opinion Under SMCRA

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has produced a new draft Biological Assessment (BA) and related documents. IMCC distributed these documents - a new draft BA, OSMRE's response to IMCC comments on its previous draft BA and OSMRE's summary of its reasons for decisions whether to include scientific research papers IMCC had identified - to the states on Friday, April 3, 2020. OSMRE has asked that IMCC provide it with comments on this draft by Friday April 24, 2020. After OSMRE complete the BA, it will submit it to the Fish & Wildlife Service (FWS) for preparation of a new programmatic Biological Opinion (BiOp) for permitting under Title V of the federal Surface Mining Act. Thereafter FWS will complete the BiOp. OSMRE will provide a briefing to states on the draft BA by conference call at 3:00 PM EDT on April 8, 2020. IMCC has signed a Memorandum of Understanding (MOU) with OSMRE that contemplates confidentiality will be maintained, to the extent consistent with otherwise applicable law, with

respect to documents OSMRE and IMCC exchange in the development of a new BA and BiOp. The MOU also contemplates that IMCC will have the opportunity to review a draft of the BiOp the FWS will produce, before it is finalized.

As you may be aware the Center for Biologic Diversity (CBD) has sued OSMRE over its continued reliance on the 1996 BiOp. It is our understanding that these parties have discussed settlement of this case. When the terms of the settlement are proposed to the court, we will provide a further update on this case. We understand that, conceptually, the settlement is likely to give OSMRE and FWS a deadline for completing their work. The new Biologic Opinion is likely to be the first programmatic Biologic Opinion issued since new F&WS regulations under the Endangered Species Act were issued in September, 2019. This means that further litigation that will test the application of these new rules is likely after this new Biological Opinion is completed.

Abandoned Mine Land Reauthorization Bill Advances in the House

A bill (H.R. 4248) reauthorizing collection of fees that support the Abandoned Mine Land (AML) program under Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) has taken a step closer to adoption by the House of Representatives. On January 15, the House Natural Resources Committee passed the bill by voice vote, clearing the way for consideration by the full House. Among other things, the legislation would authorize the collection of fees paid by the coal industry into the AML Trust Fund for an additional 15 years until September of 2036. Those fees support annual grants to states and Indian tribes to undertake a variety of AML projects within their borders including stabilizing dangerous highwalls, filling or closing hazardous mine openings, controlling underground mine fires and cleaning up streams impacted by acid mine drainage.

The bill was originally introduced by Reps. Matt Cartwright (D-PA) and Glen Thompson (R-PA) on September 9 and has bi-partisan support. This was evidenced at a November 14, 2019 legislative hearing on the measure where several members of Congress spoke in support of the valuable work undertaken by the states to address AML sites. Testifying on behalf of IMCC and the National Association of Abandoned Mine Land Programs (NAAML), John Stefanko of the Pennsylvania Department of Environmental Protection noted that "while significant progress has been made since the passage of SMCRA in 1977, it is clear that our work is not done: approximately 998,000 acres of high-priority AML sites remain throughout the country." He urged passage of H.R. 4248, stating that reauthorization "is the top AML legislative priority for IMCC and NAAML" and that "without this source of funding, the AML programs will be unable to continue their vital work." A copy of Mr. Stefanko's testimony can be found here:

<https://naturalresources.house.gov/imo/media/doc/Testimony%20-%20John%20Stefanko%20-%20EMR%20Leg%20Hrg%2011.14.19.pdf>

IMCC Confers with Congressional Staff on Mining Matters

IMCC staff spent the early days of the second session of the 116th Congress in early January conferring with congressional staff in the House and Senate on a myriad of mining issues of interest to the member states. Meetings were held with majority and minority staff of the House Energy and Mineral Resources Subcommittee and the Senate Energy and Natural Resources Committee. Topics included pending legislation regarding the abandoned mine land (AML) program under SMCRA, particularly reauthorization of fee collection; Good Samaritan legislation related to AML cleanups; critical minerals; and the forecast for legislative activity in the second session. Meetings were also held with staff from the offices of Reps. Cartwright (D-PA), Thompson (R-PA)

and Gosar (R-AZ) and Senators Toomey (R-PA), McConnell (R-KY), Barrasso (R-WY) and Enzi (R-WY).

IMCC Meets with the Office of Management and Budget on AML Issues

Several IMCC member states and staff met with officials from the Office of Management and Budget (OMB) on November 14, 2019 to brief them on key policy and legislative concerns associated with the abandoned mine land (AML) program under SMCRA. The state delegation (including representatives from Pennsylvania and Wyoming) provided an overview of the work being accomplished by states and Indian tribes with the funding they receive pursuant to Title IV of SMCRA and the remaining work to be done. The delegation also discussed the position of the states and tribes concerning pending legislation before Congress, in particular H.R. 4248 which would reauthorize fee collection for an additional 15 years and provide enhanced funding for minimum program states and state AML emergency programs. A healthy and productive discussion ensued among the meeting attendees on a variety of issues, including sources of funding for the AML program, the impact of lower coal production on existing funding, the nature of the work being undertaken by the states and tribes, and the current structure of the funding formula and priority system under Title IV of SMCRA.

IMCC and NAAMLPL Submit Statements on the President's Budget for FY 2021

IMCC and the National Association of Abandoned Mine Land Programs (NAAMLPL) submitted statements on behalf of their respective organizations with the House and Senate Interior Appropriation Subcommittees recently concerning the Office of Surface Mining Reclamation and Enforcement's (OSMRE) proposed budget for Fiscal Year 2021. IMCC opposed the administration's proposal to underfund grants for state regulation of active mining operations under Title V of SMCRA. The administration's FY 2021 budget had proposed \$43.1 million for these grants. IMCC supported full funding at \$68.59 million, which is the enacted level in recent fiscal years. IMCC noted that the work of the states in the areas of permitting, inspection and enforcement remains at robust levels and that, with the state of Tennessee likely gaining primacy soon, the states' needs are likely to increase.

In its statement, NAAMLPL supported full, mandatory funding for annual state and tribal abandoned mine land (AML) program grants and recommended increases in funding for minimum program states and for state emergency programs. The statement also supported funding for watershed cooperative agreements and for AML economic development (pilot program) grants. NAAMLPL reminded the Subcommittees about the importance of advancing legislation to reauthorize fee collection authority under SMCRA as set forth in H.R. 4248. Copies of IMCC's and NAAMLPL's statements were previously distributed to IMCC member states.

IMCC also submitted a statement on the Mine Safety and Health Administration's (MSHA) proposed FY 2021 budget to the House Appropriations Subcommittee for Labor, Health and Human Services, and Education and Related Agencies on March 18, 2020. An identical written statement was submitted to the parallel subcommittee in the Senate. IMCC supported the Administration's proposal to fully fund state mine safety and health training grants at \$10.537 million, without any authorization for diversion of a portion of this money for other purposes. A copy of IMCC's statement on the MSHA budget was also previously distributed to IMCC member states.

EPA, Corps of Engineers Announce Final Rule Defining “WOTUS”

On January 23, 2020, the US Environmental Protection Agency (EPA) and Army Corps of Engineers released a pre-publication version of their final rule re-defining “Waters of the United States” or “WOTUS” along with five fact sheets that provide an overview and explanation of the final rule. They call this rule the “Navigable Waterways Protection Rule”. The rule will take effect 60 days from its publication in the Federal Register. Finalization of this rule completes Step 2 of the two-step process mandated by Executive Order 13788 for repeal (Step 1) and replacement (Step 2) of the WOTUS definition promulgated in 2015.

The final rule adopts an approach to defining WOTUS that is consistent conceptually with the opinion of the four-justice group of United States Supreme Court Justices led by former Justice Antonin Scalia in *Rapanos v. United States* (2006) which applied the Clean Water Act to traditional navigable waters and abutting wetlands. In contrast, the 2015 rule it replaces broadly applied the “significant nexus” approach to defining WOTUS that former Justice Anthony Kennedy articulated in his opinion in the *Rapanos* case. Justice Kennedy’s opinion in *Rapanos* was the decision of the Court. On most points, it concurred with the four justices who were led by Scalia, but there were some points on which Justice Kennedy agreed with an opinion written by former Justice Stevens for himself and three other justices. This latter group would have given “WOTUS” a more expansive interpretation. *Rapanos* is the leading Supreme Court case on the scope of Clean Water Act jurisdiction.

There are three components to the rule: 1) jurisdictional waters; 2) excluded waters; and, 3) definitions. EPA and the Corps also included some features that are helpful to understanding their intent as to how the rule is to be applied. Throughout the preamble to the rule, specific examples of features that are considered jurisdictional or non-jurisdictional are named. The explanations of several components of the rule include sections titled “How Will the Agencies Implement the Final Rule?”. In addition, the agencies provided five fact sheets on different aspects of the rule and a photo appendix.

Senate Committee Holds Confirmation Hearing on Erdos Nomination

On Tuesday, December 17, 2019 the Senate Energy and Natural Resources Committee held a hearing on confirmation of Lanny Erdos as OSMRE Director. The hearing lasted just under an hour. The Committee Chair, Senator Murkowski of Alaska, stated at the conclusion of the hearing that she expected him to be confirmed. During the hearing, Erdos responded to questions from Senators on the following topics: SMCRA Title V bonding; progress on addressing the AML inventory; AML interest transfers to the UMWFA funds; AML generally; AML re-authorization; the cancellation of the health impacts study; OSMRE’s role in cooperative federalism under SMCRA; state program amendments under Title V of SMCRA; improved assessments of AML sites; court decisions on climate change analysis in permitting decisions; consultation with the Navajo Nation; the process for obtaining a permit; the time required for the National Environmental Policy Act (NEPA) analysis by the government; and, the proper use of the Ten Day Notice process. Numerous times during the hearing Erdos expressed a desire to work with primacy states through IMCC.

GAO Report on Hardrock Abandoned Mine Cleanups

On March 11, 2020, the Government Accountability Office (GAO) released its report on government efforts to address abandoned mine land (AML) hazards from hardrock mining. The report had been

requested by Senator Tom Udall, Ranking Member of the Senate Appropriations Committee's Subcommittee on Interior Environment and Related Agencies. GAO obtained information for this report from five federal agencies – the U.S. Forest Service within the Department of Agriculture; the Bureau of Land Management (BLM), National Park Service and Office Surface Mining Reclamation and Enforcement (OSMRE) within the Department of the Interior; and the Environmental Protection Agency (EPA). Working with IMCC, GAO also reached out to thirteen states and examined the AML programs of three states (Colorado, Montana and Nevada) in greater detail. The full GAO report can be found here: <https://www.gao.gov/assets/710/705146.pdf>

The report provides a comprehensive look at efforts to address hardrock AML hazards throughout the country. It gives a brief history of how hardrock mines came to be abandoned by mine operators, a description of various types of hazards and the role each of the federal agencies plays. In terms of federal money spent on AML, the report focuses on the ten-year span of federal Fiscal Years from 2008 through 2017. During this time, the federal government spent about \$2.9 billion addressing hardrock AML, for an average of \$287 million per year. In addition to the federal funds directed at correction of AML hazards during this period, the states spent \$117 million addressing hardrock AML issues, an average of \$12 million per year.

With regard to the overall hardrock AML inventory figures, the GAO report is affected by different ways of inventorying hardrock AML hazards by the various agencies. For instance, the Forest Service and EPA track AML hazards by site, not by feature. For its report, GAO attempted to quantify features, assuming one hardrock AML feature for each site listed by these two agencies. The total number of hardrock AML features, using this assumption, for all federal inventories is 140,000. In addition, GAO reports that the federal agencies estimate there are about 393,000 features that are not listed in their inventories, mostly on BLM lands. The total number of features identified in the inventories of the 13 western states agencies contacted by GAO was 246,000. The total number of features based on state estimates is 620,000. There is an unquantified amount of overlap between the totals of the federal and state inventories and estimates. The federal agencies' estimates for the cost of addressing all of these features are incomplete. The total of the partial cost estimates they have is over \$10 billion.

GAO reports two limiting factors on the ability of federal and state agencies to address hazards from hardrock AML: availability of funds and concerns over legal liability under CERCLA and the Clean Water Act. All the state officials and nearly all the NGOs and other stakeholders GAO interviewed identified lack of Good Samaritan protections against this liability as a factor that prevents more resources from being directed at the hardrock AML problem. GAO's report includes a succinct summary of the issues that have been raised in the debates over Good Samaritan legislation.

States and OSMRE Meet to Discuss Key AML Issues

IMCC member states have had the opportunity over the past few months to meet with officials from the Office of Surface Mining Reclamation and Enforcement (OSMRE) to discuss a variety of issues related to the abandoned mine land (AML) program. During the Winter Meeting of the National Association of Abandoned Mine Land Programs (NAAML) from February 25 – 27 in Charleston, WV, a meeting of the OSMRE/States AML Oversight Steering Committee was held which was facilitated by IMCC. Topics of discussion included OSMRE's NEPA handbook; status of the AML pilot program and related funding concerns; the FY 2020 AML grant distribution; a comprehensive report on the AML program; and the status of several OSMRE/state work groups, one of which is focused on AML data and information. A meeting of the latter work group was held on February 26 to discuss several key AML data sets such as fee collections and grant distributions over time; program accomplishments; AML Fund expenditures; and future grant projections. The work group also discussed OSMRE annual reports and e-AMLIS summary reports and how data is

presented in each. The group also discussed the implications of pending AML legislation for future state and federal grants and expenditures.

During the NAAML P Winter Meeting, IMCC staff provided updates and led discussion of the member states and tribes on several key topics including the status of pending legislation; OSMRE's appropriation for FY 2020 and proposed budget for FY 2021; hardrock AML issues; and communications and strategies related to reauthorization legislation.

Title IV Oversight Steering Committee Formed; Title V Oversight Steering Committee Reinvigorated

OSMRE's official oversight policy has long sanctioned the existence of an Oversight Steering Committee as a platform for high-level communications on regulatory policy and developments between OSMRE and state programs under Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Until recently, this Steering Committee has not been active. In the summer of 2017, a group of state Title V program leaders held a summit meeting with OSMRE and Interior Department leadership at which important issues related to the successful implementation of SMCRA were discussed. Out of these discussions, several work groups were formed and much to advance the federal state cooperation under SMCRA has been accomplished, with more to come. Later in 2017, a group of state Title IV program leaders held a similar summit meeting with OSMRE leadership leading to the formation of similar work groups for addressing important Title IV issues. These groups have made great progress, too.

To continue and build upon the momentum as a result of the Title IV and Title V summits, IMCC and OSMRE have reinvigorated the Title V Oversight Steering Committee and newly established a parallel Oversight Steering Committee for Title IV issues. As currently organized, these Committees will meet four times per year. The Title V committee will meet in person at the two IMCC meetings held each year and by a conference call held between meetings. The Title IV committee will meet in person twice each year at NAAML P meetings and by a conference call between meetings. The committees should greatly enhance the working relationship between the states and OSMRE by establishing a platform for regular communication on important issues, leading to more successful implementation of the overall federal-state enterprise under SMCRA. As reported above, the Title IV Oversight Steering Committee met in conjunction with the February, 2020 NAAML P meeting in Charleston, WV. It also met by conference call on December 4, 2019. The Title V Oversight Steering Committee met by conference call on January 22, 2020 and April 6, 2020. At each meeting, the states have been able to bring important issues in program implementation to OSMRE's attention and OSMRE has briefed the states on policy development from the federal level. Through this process, OSMRE and the states are working together to develop solutions to the important issues in implementation of SMCRA.

Information Needed: 1) State Contact Updates for IMCC Committees and 2) Permitting Information for the IMCC Annual Report

Each state needs to provide Brittany Mills with updated membership directory information and IMCC committee assignments. IMCC uses this information to send relevant material and requests to the appropriate committee members. It is also available for use by member states when there is a desire to ask questions of your peers from other states or raise new issues with them. The membership directory is available on the IMCC website for members. Please help us keep the membership directory up to date and useful for all of us.

IMCC also needs statistics from each state for permits issued and land disturbed during 2019 for the IMCC Annual Report. If you have not already done so, please send this information for your

state to Brittany Mills by May 30, 2020. Examples of past reports and how this data is used can be found on the IMCC website at <http://imcc.isa.us/publications>.

New State Mining Program Leaders in Arkansas, Kentucky, Ohio, New Mexico and Texas

Quite a few new people have joined state mining regulatory agencies recently. Please join us in welcoming the following people to the IMCC community when you have the opportunity:

- Kevin White has become Director of Mining for the Arkansas regulatory program.
- Gordon Slone has joined the Kentucky regulatory program as Commissioner of the Department for Natural Resources.
- Jim Ward has joined the Kentucky regulatory program as Director of the Division of Mine Reclamation and Enforcement.
- Gerald "Jerry" Schoeppner has joined the New Mexico regulatory program as Director of the Mining and Minerals Division.
- Dave Crow has moved up in the Ohio regulatory program to serve as Chief of the Division of Mineral Resources Management of the Ohio Department of Natural Resources.
- Brent Elliot has joined the Texas regulatory program as Director of the Surface Mining and Reclamation Division.