

**Statement of Gregory E. Conrad, Executive Director, Interstate Mining Compact Commission on Behalf of the Interstate Mining Compact Commission re Oversight Hearing on The Effect of the President's FY 2013 Budget and Legislative Proposals for the Office of Surface Mining on Private Sector Job Creation, Domestic Energy Production, State Programs and Deficit Reduction before the House Energy and Mineral Resources Subcommittee -- March 6, 2012**

My name is Gregory E. Conrad and I serve as Executive Director of the Interstate Mining Compact Commission, on whose behalf I am appearing today. I appreciate the opportunity to present this statement to the Subcommittee regarding the views of the Compact's 24 member states on the Fiscal Year (FY) 2013 Budget Request for the Office of Surface Mining Reclamation and Enforcement (OSM) within the U.S. Department of the Interior. In its proposed budget, OSM is requesting \$57.3 million to fund Title V grants to states and Indian tribes for the implementation of their regulatory programs, a reduction of \$11 million or 15% below the FY 2012 enacted level. OSM also proposes to reduce mandatory spending for abandoned mine lands (AML) program by \$180 million pursuant to a legislative proposal to eliminate all AML funding for certified states and tribes.

The Compact is comprised of 24 states that together produce some 95% of the Nation's coal, as well as important noncoal minerals. The Compact's purposes are to advance the protection and restoration of land, water and other resources affected by mining through the encouragement of programs in each of the party states that will achieve comparable results in protecting, conserving and improving the usefulness of natural resources and to assist in achieving and maintaining an efficient, productive and economically viable mining industry.

OSM has projected an amount of \$57.3 million for Title V grants to states and tribes in FY 2012, an amount which is matched by the states each year. These grants support the implementation of state and tribal regulatory programs under the Surface Mining Control and Reclamation Act (SMCRA) and as such are essential to the full and effective operation of those programs. Pursuant to these primacy programs, the states have the most direct and critical responsibilities for conducting regulatory operations to minimize the impact of coal extraction operations on people and the environment. The states accomplish this through a combination of permitting, inspection and enforcement duties, designating lands as unsuitable for mining operations, and ensuring that timely reclamation occurs after mining.

In Fiscal Year 2012, Congress approved \$68.6 million for state Title V grants. This continued a much-needed trend whereby the amount appropriated for these regulatory grants aligned with the demonstrated needs of the states and tribes. The states are greatly encouraged by the significant increases in Title V funding approved by Congress over the past three fiscal years. Even with mandated rescissions and the allocations for tribal primacy programs, the states saw a \$12 million increase for our regulatory programs over FY 2007 levels. State Title V grants had been stagnant for over 12 years and the gap between the states' requests and what they received was widening. This debilitating trend was compounding the problems caused by inflation and uncontrollable costs, thus undermining our efforts to realize needed program

improvements and enhancements and jeopardizing our efforts to minimize the potential adverse impacts of coal extraction operations on people and the environment.

In its FY 2013 budget, OSM has once again attempted to reverse course and essentially unravel and undermine the progress made by Congress in supporting state programs with adequate funding. As states prepare their future budgets, we trust that the recent increases approved by Congress will remain the new base on which we build our programs. Otherwise, we find ourselves backpedaling and creating a situation where those who were just hired face layoffs and purchases of much needed equipment are canceled or delayed. Furthermore, a clear message from Congress that reliable, consistent funding will continue into the future will do much to stimulate support for these programs by state legislatures and budget officers who each year, in the face of difficult fiscal climates and constraints, are also dealing with the challenge of matching federal grant dollars with state funds. In this regard, it should be kept in mind that a 15% cut in federal funding generally translates to an additional 15% cut for *overall* program funding for many states, especially those without federal lands, since these states can generally only match what they receive in federal money.

OSM's solution to the drastic cuts for state regulatory programs comes in the way of an unrealistic assumption that the states can simply increase user fees in an effort to "eliminate a de facto subsidy of the coal industry." No specifics on how the states are to accomplish this far-reaching proposal are set forth, other than an expectation that they will do so in the course of a single fiscal year. OSM's proposal is completely out of touch with the realities associated with establishing or enhancing user fees, especially given the need for approvals by state legislatures. IMCC's polling of its member states confirmed that, given the current fiscal and political implications of such an initiative, it will be difficult, if not impossible, for most states to accomplish this feat at all, let alone in less than one year. OSM is well aware of this, and yet has every intention of aggressively moving forward with a proposal that was poorly conceived from its inception. We strongly urge the Subcommittee to reject this approach and mandate that OSM work through the complexities associated with any future user fees proposal in close cooperation with the states and tribes before proposing cuts to federal funding for state Title V grants.

At the same time that OSM is proposing significant cuts for state programs, the agency is proposing sizeable increases for its own program operations (\$4 million) for federal oversight of state programs, including an increase of 25 FTEs. In making the case for its funding increase, OSM's budget justification document contains vague references to the need "to improve the implementation of existing laws" and to "strengthen OSM's skills base." More specifically, OSM states in its budget justification document (on page 60) that "with greater technical skills, OSM anticipates improved evaluation of permit-related actions and resolution of issues to prevent unanticipated situations that otherwise may occur as operations progress, thereby improving implementation of existing laws". In our view, this is code language for enhanced and expanded federal oversight of state programs. However, without more to justify the need for more oversight and the concomitant increase in funding for federal operations related thereto, Congress should reject this request. The overall performance of the states as detailed in OSM's

annual state program evaluation reports demonstrates that the states are implementing their programs effectively and in accordance with the purposes and objectives of SMCRA.<sup>1</sup>

In our view, this suggests that OSM is adequately accomplishing its statutory oversight obligations with current federal program funding and that any increased workloads are likely to fall *upon the states*, which have primary responsibility for implementing appropriate adjustments to their programs identified during federal oversight. In this regard, we note that the federal courts have made it abundantly clear that SMCRA's allocation of exclusive jurisdiction was "careful and deliberate" and that Congress provided for "mutually exclusive regulation by either the Secretary or state, but not both." *Bragg v. West Virginia Coal Ass'n*, 248 F. 3d 275, 293-4 (4<sup>th</sup> Cir. 2001), cert. Denied, 534 U.S. 1113 (2002). While the courts have ruled consistently on this matter, the question remains for Congress and the Administration to determine, in light of deficit reduction and spending cuts, how the limited amount of federal funding for the regulation of surface coal mining and reclamation operations under SMCRA will be directed – to OSM or the states. For all the above reasons, we urge Congress to approve not less than \$70 million for state and tribal Title V regulatory grants, as fully documented in the states' and tribes' estimates for actual program operating costs.<sup>2</sup>

With regard to funding for state Title IV Abandoned Mine Land (AML) program grants, Congressional action in 2006 to reauthorize Title IV of SMCRA has significantly changed the method by which state reclamation grants are funded. Beginning with FY 2008, state Title IV grants are funded primarily by mandatory appropriations. As a result, the states should have received a total of \$488 million in FY 2013. Instead, OSM has budgeted an amount of \$307 million based on an ill-conceived proposal to eliminate mandatory AML funding to states and tribes that have been certified as completing their abandoned coal reclamation programs. This \$180 million reduction flies in the face of the comprehensive restructuring of the AML program that was passed by Congress in 2006, following over 10 years of Congressional debate and hard fought compromise among the affected parties. In addition to the elimination of funding for certified states and tribes, OSM is also proposing to reform the distribution process for the remaining reclamation funding to allocate available resources to the highest priority coal AML sites through a competitive grant program, whereby an Advisory Council will review and rank AML sites each year. The proposal, which will require adjustments to SMCRA, will clearly undermine the delicate balance of interests and objectives achieved by the 2006 Amendments. It is also inconsistent with many of the goals and objectives articulated by the Administration

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<sup>1</sup> While not alluded to or fully addressed in OSM's budget justification document, there are myriad statutory, policy and legal issues associated with several aspects of the agency's enhanced oversight initiative, especially three recently adopted directives on annual oversight procedures (REG-8), corrective actions (REG-23) and Ten-Day Notices (INE-35). IMCC submitted extensive comments regarding the issues associated with these directives and related oversight actions (including federal inspections) on January 19, 2010, July 8, 2010 and January 7, 2011.

<sup>2</sup>We are particularly concerned about recent OSM initiatives, primarily by policy directive, to duplicate and/or second-guess state permitting decisions through the reflexive use of "Ten-Day Notices" as part of increased federal oversight or through federal responses to citizen complaints. OSM specifically addresses this matter in its budget justification document (on page 69) where it states that "OSM has an obligation under section 521 of SMCRA to take steps to ensure that all types of violations, including violations of performance standards or permit conditions and violations of permitting requirements, are corrected if the state does not take action to do so. Aside from the impact on limited state and federal resources, these actions undermine the principles of primacy that underscore SMCRA and are likely to have debilitating impacts on the state-federal partnership envisioned by the Act.

concerning both jobs and environmental protection. We urge the Congress to reject this unjustified proposal, delete it from the budget and restore the full mandatory funding amount of \$488 million. A resolution adopted by IMCC last year concerning these matters is attached. We also endorse the testimony of the National Association of Abandoned Mine Land Programs (NAAML) which goes into greater detail regarding the implications of OSM's legislative proposal for the states.

We also urge Congress to approve continued funding for the AML emergency program. In a continuing effort to ignore congressional direction, OSM's budget would completely eliminate funding for state-run emergency programs and also for federal emergency projects (in those states that do not administer their own emergency programs). When combined with the great uncertainty about the availability of remaining carryover funds, it appears that the program has been decimated. Funding the OSM emergency program should be a top priority for OSM's discretionary spending. This funding has allowed the states and OSM to address the unanticipated AML emergencies that inevitably occur each year. In states that have federally-operated emergency programs, the state AML programs are not structured or staffed to move quickly to address these dangers and safeguard the coalfield citizens whose lives and property are threatened by these unforeseen and often debilitating events. And for minimum program states, emergency funding is critical to preserve the limited resources available to them under the current funding formula. We therefore request that Congress restore funding for the AML emergency program in OSM's FY 2013 budget.

On a somewhat related matter, there appears to be increasing concern by some in Washington that the states and tribes are not spending the increased AML grant moneys that they have received under the 2006 Amendments in a more expeditious manner, thus resulting in what the Administration has characterized as unacceptable levels of "undelivered orders". What these figures and statements fail to reflect is the degree to which AML grant moneys are obligated or otherwise committed for AML reclamation work as part of the normal grant process. Most AML grants are either three or five years in length and over that course of time, the states and tribes are in a continual process of planning, bidding and contracting for specific AML projects. Some projects are multi-layered and require extended periods of time to complete this process before a shovel is turned at the AML site. And where federal funding is concerned, additional time is necessary to complete the myriad statutory approvals for AML work to begin, including compliance with the National Environmental Policy Act and the National Historic Preservation Act.

In almost every case, however, based on the extensive planning that the states and tribes undertake, AML grant funds are committed to specific projects even while clearances and bidding are underway. While funds may not technically be "obligated" because they are not yet "drawn down", these funds are committed for specific purposes. Once committed, states and tribes consider this grant money to be obligated to the respective project, even though the "order" had not been "delivered" and the funds actually "drawn down". The latter can only occur once the project is completed, which will often be several years later, depending on the size and complexity of the project. We would be happy to provide the Subcommittee with more detailed information about our grant expenditures and project planning in order to answer any questions

you may have about how we account for and spend our AML grant moneys. Given the confusion that often attends the various terms used to describe the grant expenditure process, we believe it is critical that Congress hear directly from the states and tribes on this matter and not rely solely on the Administration's statements and analyses. We welcome the opportunity to brief your Subcommittee in more detail regarding this issue should you so desire.

One of the more effective mechanisms for accomplishing AML restoration work is through leveraging or matching other grant programs, such as EPA's 319 program. Until FY 2009, language was always included in OSM's appropriation that encouraged the use of these types of matching funds, particularly for the purpose of environmental restoration related to treatment or abatement of AMD from abandoned mines. This is a perennial, and often expensive, problem, especially in Appalachia. IMCC therefore requests the Committee to once again include language in the FY 2013 appropriations bill that would allow the use of AML funds for any required non-Federal share of the cost of projects by the Federal government for AMD treatment or abatement.

We also urge the Committee to support funding for OSM's training program, including moneys for state travel. These programs are central to the effective implementation of state regulatory programs as they provide necessary training and continuing education for state agency personnel. In this regard, it should be noted that the states provide nearly half of the instructors for OSM's training course and, through IMCC, sponsor and staff benchmarking workshops on key regulatory program topics. IMCC also urges the Committee to support funding for TIPS, a program that directly benefits the states by providing critical technical assistance. Finally, we support funding for the Watershed Cooperative Agreements in the amount of \$1.2 million.

Attached to our testimony today is a list of questions concerning OSM's budget that we request be included in the record for the hearing. The questions go into further detail concerning several aspects of the budget that we believe should be answered before Congress approves funding for the agency or considers advancing the legislative proposals contained in the budget.

Thank you for the opportunity to present this statement. I would be happy to answer any questions you may have or provide additional information to the Subcommittee.

# Resolution

## Interstate Mining Compact Commission

***BE IT KNOWN THAT:***

***WHEREAS***, Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) established the Abandoned Mine Land (AML) reclamation program; and

***WHEREAS***, the Interstate Mining Compact Commission (IMCC) is a multi-state organization representing the natural resource and environmental protection interests of its 24 member states, including the elimination of health and safety hazards and the reclamation of land and water resources adversely affected by past mining and left in an abandoned or inadequately restored condition; and

***WHEREAS***, pursuant to the cooperative federalism approach contained in SMCRA, several IMCC member states administer AML programs approved, funded and overseen by the Office of Surface Mining Reclamation and Enforcement (OSM) within the U.S. Department of the Interior; and

***WHEREAS***, SMCRA, Title IV establishes a reclamation fee on each ton of coal mined in the United States to pay for abandoned mine land reclamation; and

***WHEREAS***, SMCRA, Title IV mandates that fifty percent (50%) of the reclamation fees collected annually are designated as state share funds to be returned to the states from which coal was mined to pay for reclamation projects pursuant to programs administered by the states; and

***WHEREAS***, SMCRA, Title IV also mandates that a minimum level of funding should be provided to ensure effective state program implementation; and

***WHEREAS***, Congress enacted amendments to SMCRA in 2006 to address, among other things, continued collection of AML fees and funding for state programs to address existing and future AML reclamation; and

***WHEREAS***, the 2006 Amendments established new, strict criteria that ensure states expend funds on high priority AML sites; and

**WHEREAS**, the proposed 2012 budget for the Office of Surface Mining Reclamation and Enforcement within the U.S. Department of the Interior would disregard the state-federal partnership established under SMCRA and renege on the funding formula under the 2006 Amendments by, among other things, eliminating mandatory funding for states who have certified the completion of their coal reclamation work and adjusting the mechanism by which non-certified states receive their mandatory funding through a competitive bidding process; and

**WHEREAS**, if statutory changes are approved by Congress as suggested by the proposed FY 2012 budget for OSM, reclamation of abandoned mine lands within certified states would halt; reclamation of abandoned mine lands in all states would be jeopardized; employment of contractors, suppliers, technicians and others currently engaged in the reclamation of abandoned mine lands would be endangered; the cleanup of polluted lands and waters across the United States would be threatened by failing to fund reclamation of abandoned mine lands; minimum program state funding would be usurped; the AML water supply replacement program would be terminated, leaving coalfield citizens without potable water; and the intent of Congress as contained in the 2006 Amendments to SMCRA would be undermined

***NOW THEREFORE BE IT RESOLVED:***

That the Interstate Mining Compact Commission opposes the legislative proposal terminating funding for certified states and altering the receipt of mandatory AML funding for non-certified states contained in the FY 2012 budget proposal for the Office of Surface Mining Reclamation and Enforcement and instead supports the AML funding mechanism contained in current law.

Issued this 10<sup>th</sup> day of March, 2011

ATTEST:

*Gregory E. Conrad*  
Executive Director

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## **Questions re OSM's Proposed FY 2013 Budget**

What does OSM plan to do with the additional \$4 million that has been budgeted for “enhanced federal oversight of state regulatory programs”? How does OSM justify an increase in money for federal oversight while decreasing money for state Title V grants? What is the demonstrated need for an additional 25 FTEs to perform federal oversight of state programs? Will this not simply lead to duplication of effort, second-guessing of state decision-making, undermining of state primacy and wasted resources?

If pressed by Congress, how expeditiously does OSM intend to push the states to recover more of their regulatory costs from the coal industry through user fees? Has OSM undertaken a full analysis of the administrative and rulemaking complexities inherent in such an undertaking?

OSM's newest AML legislative proposal (to eliminate payments to certified states and tribes and to utilize a competitive bidding process for the allocation of remaining AML reclamation funds for non-certified states) is the fourth time that the agency has put forth potential legislative adjustments to the 2006 amendments to SMCRA in its proposed budgets. Based on the legislative proposal we have seen to date, there are many more questions than answers about how this process will work. (See attached list) Does OSM intend to seek input from the states and tribes, especially given the role that the states and tribes will play in the bidding/selection process and the significant impact this will have on current program administration? What is the basis for OSM's proposal to essentially upend the carefully crafted legislative resolution related to future AML program funding and AML reclamation work approved by Congress in 2006? Has OSM thought and worked through the implications for AML program management and administration that would result from its legislative proposal?

Why has OSM chosen to advocate for a hardrock AML reclamation fee to be collected by OSM but not distributed by OSM? Why bring another federal agency (BLM) into the mix when OSM has the greater expertise in this area?

### **Specific Questions re Cost Recovery/User Fees**

OSM has requested an amount for state Title V regulatory program grants in FY 2013 that reflects an \$11 million decrease from FY 2012. And while OSM does not dispute that the states are in need of an amount far greater than this, the agency has suggested once again that the states should be able to make up the difference between what OSM has budgeted and what states actually need by increasing cost recovery fees for services to the coal industry. What exactly will it take to accomplish this task?

Assuming the states take on this task, will amendments to their regulatory programs be required?

How long, in general, does it take OSM to approve a state program amendment?



The state of Alabama submitted a program amendment to OSM in May of 2010 to raise current permit fees and authorize new, additional fees. It took OSM a full year to approve this amendment, resulting in lost fees of over \$50,000 to the state. If OSM is unable to approve requested state program amendments for permit fee increases in less than a year, how does the agency expect to handle mandated permit increases for all of the primacy states within a single fiscal year?

If OSM is not expecting to pursue this initiative in fiscal year 2013, why include such a proposal in the budget until OSM has worked out all of the details with the states in the first instance?

Speaking of which, what types of complexities is OSM anticipating with its proposal at the state level? Many of the states have already indicated to OSM that it will be next to impossible to advance a fee increase proposal given the political and fiscal climate they are facing.

OSM's solution seems to be that the agency will propose a rule to require states to increase permit fees nationwide. Won't this still require state program amendments to effectuate the federal rule, as with all of OSM's rules? How does OSM envision accomplishing this if the states are unable to do it on their own?

Even if a federal rulemaking requiring permit fee increase nationwide were to succeed, how does OSM envision assuring that these fees are returned to the states? Will OSM retain a portion of these fees for administrative purposes?

### **Specific Questions re Federal Program Increases**

In OSM's budget justification document, the agency also notes that the states permit and regulate 97 percent of the Nation's coal production and that OSM provides technical assistance, funding, training and technical tools to the states to support their programs. And yet OSM proposes in its budget to cut funding to the states by \$11 million while increasing OSM's own federal operations budget by nearly \$4 million and 25 FTEs. How does OSM reconcile these seemingly contradictory positions?

OSM's budget justification document points out in more detail why it believes additional federal resources will be needed based on its recent federal oversight actions during FY 2011, which included increased federal inspections. Was OSM not in fact able to accomplish this enhanced oversight with its current resources? If not, where were resources found wanting? How much of the strain on the agency's resources was actually due to the stream protection rulemaking and EIS process?

In light of recent annual oversight reports over the past five years which demonstrate high levels of state performance, what is the justification for OSM's enhanced oversight initiatives and hence its federal program increase?

Something has to give here – no doubt. There is only so much money that we can make available for the surface mining program under SMCRA. Both Congress and the courts have made it clear that the states are to exercise exclusive jurisdiction for the regulation of surface coal mining operations pursuant to the primacy regime under the law. It begs the questions of whether OSM has made the case for moving away from supporting the states and instead beefing up the federal program. Unless the agency can come up with a better, more detailed justification for this realignment of resources, how can Congress support its budget proposal?

### **Specific Questions re OSM Oversight Initiative**

OSM has recently finalized a Ten-Day Notice directive (INE-35) that had previously been withdrawn in 2006 based on a decision by then Assistant Secretary of the Interior Rebecca Watson. The basis for terminating the previous directive was several court decisions that clarified the respective roles of state and federal governments pursuant to the primacy regime contained in SMCRA. The Secretary's decision also focused on the inappropriate and unauthorized use of Ten-Day Notices under SMCRA to second-guess state permitting decisions. OSM's new TDN directive flies in the face of both this Secretarial decision and federal court decisions. Does OSM have a new Secretarial decision on this matter? If not, how can its recent action overrule this prior decision? Has the Solicitor's office weighed in on this matter? If so, does OSM have an opinion supporting the agency's new TDN directive? Will OSM provide that to the Committee?

In light of limited funding for the implementation of SMCRA, how does OSM justify the state and federal expenses that will necessarily follow from reviewing and second-guessing state permitting decisions? States have complained that responding to a single OSM TDN, especially with respect to state permitting decisions, can require the investment of 2 – 3 FTE's for upwards of a week. How do you justify this?

## **Questions and Concerns re the AML Legislative Proposal in OSM's FY 2013 Budget**

### **The Proposed Competitive Allocation Process**

- What is the potential for this new review and ranking process to reduce expenditures and increase efficiency without being counter-productive? Will it introduce an additional level of bureaucracy and result in more time being spent formulating proposals and less on actual AML reclamation? The present funding formula, while not perfect, at least provides some direction on which to base long term strategic planning and efficient use of available funds. The closest analogy to what OSM is proposing by way of its competitive allocation process is the way BLM and the Forest Service currently allocate their AML funds through competitive proposals to various state offices and regions. Because of the uncertainties of funding, neither agency has been able to develop significant in-house expertise, but instead often rely on SMCRA-funded states like MT, NM, UT and CO to do a good portion of their AML work. Why would OSM want to duplicate a system that has proven problematic for other agencies?
- Who would be the “other parties” potentially bidding on AML grant funds? Would this include federal agencies such as BLM, FS, NPS, etc? If so, in many cases, those agencies already rely on the states to conduct their reclamation work and also determine priorities based on state input or guidance.
- What do the state project managers and inspectors do if a state does not win a competitive bid for AML funds? How does a state gear up if it receives funding for more projects than it can handle with present staffing? Each state and tribe has different grant cycles. Unless all are brought into one uniform cycle, how will everyone compete for the same dollars? In this regard, how can the competitive allocation process and the use of the Advisory Council be more efficient and simple than what we already have in place?
- How long will OSM fund a state's/tribe's administrative costs if it does not successfully compete for a construction grant, even though the state/tribe has eligible high priority projects on AMLIS? How will OSM calculate administrative grant funding levels, especially since salaries and benefits for AML project managers and inspectors predominantly derive from construction funds? Would funding cover current staffing levels? If not, how will OSM determine the funding criteria for administrative program grants?
- How do the states and tribes handle emergency projects under the legislative proposal? Must these projects undergo review by the Advisory Council? Will there be special, expedited procedures? If a state/tribe has to cut back on staff, how does it manage emergencies when they arise? If emergency programs do compete for AML funds, considerable time and effort could be spent preparing these projects for review by the Advisory Council rather than

abating the immediate hazard. Again, how can we be assured that emergencies will be addressed expeditiously?

- What ranking criteria will be used to determine the priority of submitted AML project grant requests? The number of people potentially affected? The current priority ranking on AMLIS? How would the Council determine whether a burning gob pile near a city presents a greater hazard than a surface mine near a highway or an underground mine beneath a residential area? Would the winning bid be the “most convincing” proposal? The one with the most signatures on a petition? The one with the most influential legislative delegation? Will AMLIS continue to serve as the primary mechanism for identifying sites and their priority status?
- If the current AML funding formula is scrapped, what amount will be paid out to the non-certified AML states and tribes over the remainder of the program? What does OSM mean by the term “remaining funds” in its proposal? Is it only the AML fees yet to be collected? What happens to the historic share balances in the Fund, including those that were supposed to be re-directed to the Fund based on an equivalent amount of funding being paid to certified states and tribes each year? Would the “remaining funds” include the unappropriated/prior balance amounts that have not yet been paid out over the seven-year installment period? What about the amounts due and owing to certified states and tribes that were phased in during FY 2009 – 2011?
- Has anyone alleged or confirmed that the states/tribes are NOT already addressing the highest priority sites for reclamation within the context of the current AML program structure under the 2006 Amendments? Where have the 2006 Amendments faltered in terms of high priority sites being addressed as envisioned by Congress? What would remain unchanged in the 2006 Amendments under OSM’s proposal?

### **The Nature and Purpose of the Advisory Council**

- Who would be on the AML Advisory Council and how could they collectively have better decision-making knowledge about hazardous AML sites than the state and tribal project managers and administrators who work with these sites on a daily basis?
- What will be the criteria to serve on the Advisory Council? Will the Federal Advisory Committee Act (FACA) requirements apply to the formation and deliberations of the Council? How long does OSM envision it will take to establish the Council and when will it become operational?
- Will the Advisory Council be providing recommendations to OSM or will OSM make all final decisions? Will these decisions be appealable? If so, to who? Does OSM envision needing to develop internal guidance for its own review process? If so, how long will it potentially take from Advisory Council review and recommendation to final OSM decision in order to complete the grant process so a state can begin a project?

- What degree of detail will be required in order to review and approve competitive grant applications? Will the Council review each project? What type of time constraints will be placed on their review?
- Will the Advisory Council consider partial grants for projects that may exceed the allocation for a single year? Would minimum program states be authorized to apply for a grant that would exceed \$3 million?
- Will grant applications be based on an individual project or will the grant be based on a project year? How will cost overruns be handled?

### **Planning for AML Work**

- One of the greatest benefits of reauthorization under the 2006 Amendments to SMCRA was the predictability of funding through the end of the AML program. Because state and tribes were provided with hypothetical funding levels from OSM (which to date have proven to be quite accurate), long-term project planning, along with the establishment of appropriate staffing levels and project assignments, could be made more accurately and efficiently. How can states/tribes plan for future projects given the uncertainty associated with having to annually bid for AML funds? NEPA compliance issues alone can take years of planning. One state recently asked its State Historic Preservation Office for initial consultation regarding project sites that may be reclaimed over the next five years. This process will also have significant impacts on those states that utilize multi-year construction contracts that are paid for with annual AML grants.
- State and tribal AML projects are often planned 18 months to two years in advance of actually receiving construction funds, based on anticipated funding under the 2006 Amendments. During that time, states and tribes are performing environmental assessments, conducting archeology reviews, completing real estate work and doing NEPA analyses. There could be considerable effort and money wasted if a project does not get approved during the competitive allocation process.
- At what point does a State or Tribe seek approval from the advisory council? Considerable investigation must take place prior to developing most projects, whether they be acid mine drainage projects or health and safety projects. How much time should be spent in design prior to proceeding to the Council? How accurate must a cost estimate be prior to taking a project before the Council? The greater the accuracy, the greater the design time expended, possibly for a project that will be rejected.
- State and tribes often seek and obtain valuable matching funds from watershed groups, which take considerable lead time to acquire. It will be difficult to commit to partners if we don't know what level of funding, if any, will be made available from OSM.
- Several states have committed significant amounts of money to waterline projects across the coalfields. Local governmental entities have started designs and applied for additional funds from other agencies to match AML funds in order to make these projects a reality. Ending all AML funding for these projects

(assuming they are not considered “high priority”) could have significant consequences for local communities. Our understanding is that these projects were excluded under the 2006 Amendments from the priority scheme contained in section 403(a) of SMCRA.

- Does OSM’s proposal allow acid mine drainage (AMD) projects to be undertaken? Can these be designated as high priority? (Our understanding is that those AMD projects undertaken pursuant to the “AMD set-aside program” are not subject to the priority scheme under Section 403(a) and that those AMD projects done “in conjunction with” a priority 1 or 2 project are considered “high priority”.) How do states handle ongoing engineering, operating and maintenance costs for existing AMD treatment systems? As the Administration works diligently to develop a new rule to protect streams nationwide, why would it advance a proposal to essentially halt the cleanup of streams funded by the AML program?

### **Overarching Concerns**

- Given the original design of SMCRA by its framers that AML funds will only be allocated to those states who agree to implement Title V regulatory programs for active mining operations, to what extent can we expect that states will continue to implement and fund their Title V programs if Title IV funding is drastically cut or eliminated under the proposal? Furthermore, since states and tribes will not know what level of AML program staffing to maintain from year to year under the proposal, who would desire to work for a program that is in a constant state of flux?
- The SMCRA 2006 Amendments were the result of roughly ten years of negotiations, discussions, and debates in Congress. Since the legislative process to enact these new proposed changes could take years, why didn’t OSM begin with the legislation and then follow up with an appropriate budget proposal? Why weren’t the states/tribes or the NAAMLPP included in discussions that led to this legislative proposal?
- As OSM develops the legislative proposal for a competitive bidding process, the agency should consider the impacts on minimum programs and consider maintaining the minimum allocation of \$3 million for minimum program states.
- What type of state AML plan amendments does OSM foresee as a result of this new process?

### **Proposed Elimination of Funding for AML Emergencies**

- While amendments to Title IV of SMCRA in 2006 (P.L. 109-432) adjusted several provisions of the Act, no changes were made to OSM’s emergency powers in Section 410. Quite to the contrary, Section 402(g)(1)(D)(2) states that the Secretary shall ensure “strict compliance” with regard to the states’ and tribes’ use of non-emergency grant funds for the priorities listed in

Section 403(a), none of which include emergencies. The funding for the emergency program comes from the Secretary's discretionary share, pursuant to Section 402(g)(3) of the Act. This share currently stands at \$416 million. OSM's elimination of funding for the emergency program will result in the shift of approximately \$20 million annually that will have to be absorbed by the states. This is money that cannot be spent on high priority AML work (as required by SMCRA) and will require the realignment of state AML program operations in terms of personnel, project design and development, and construction capabilities. In most cases, depending on the nature and extent of an emergency project, it could preclude a state's ability to undertake any other AML work during the grant year (and even following years), especially for minimum program states. How does OSM envision states and tribes being able to meet their statutory responsibility to address high priority AML sites in light of the elimination of federal funding for AML emergencies? How does OSM reconcile this proposal with the intentions of Congress expressed in the 2006 amendments to move more money out of the AML Fund sooner to address the backlog of AML problems that continue to linger?

### **Proposed Elimination of Funding to Certified States and Tribes**

- From what we can ascertain, OSM proposes to eliminate all payments to certified states and tribes – in lieu of funds; prior balance replacement funds; and monies that are due and owing in FY 2018 and 2019 from the phase-in during fiscal years 2008 and 2009. Is this accurate? OSM says nothing of what the impact will be on non-certified states as a result of eliminating these payments to certified states and tribes – especially the equivalent payments that would otherwise be made to the historic production share that directly relate to “in lieu of” payments to certified states and tribes under section 411(h)(4). Previously, OSM has stated that “the amounts that would have been allocated to certified states and tribes under section 402(g)(1) of SMCRA will be transferred to the historical production allocation on an annual basis **to the extent that those states and tribes receive in lieu payments from the Treasury (through the Secretary of the Interior) under section 402(i) and 411(h)(2) of SMCRA.**” By OSM's own admission in its FY 2013 proposed budget, this will amount to \$1.2 billion over ten years. If the in lieu payments are not made (as proposed), how can the transfer to historic production occur? The result, of course, would be a drastic impact on the historic production allocation otherwise available to uncertified states. Will OSM address this matter in its proposed legislation? If so, how?
- Has OSM considered the fiscal and programmatic impacts that could result if the certified states and tribes, who no longer receive AML monies, choose to return their Title V regulatory programs to OSM (especially given the severe reductions being proposed for FY 2013 in Title V grants)?

- Finally, how do the cuts in the Title IV program line up with the Administration's other economic, fiscal and environmental objectives as articulated in the deficit reduction and jobs bills that have been considered by Congress? These objectives include environmental stewardship, cleaning up abandoned mines (coal and noncoal) nationwide, creating green jobs, pumping dollars into local communities, putting money to work on the ground in an expeditious manner, sustainable development, infrastructure improvements, alternative energy projects, protecting public health and safety, and improving the environment. It seems to us that there is a serious disconnect here and we remain mystified as to how these laudable objectives and OSM's budget proposal can be reconciled.