

June 13, 2022

U.S. Department of Interior
1849 C Street NW
Washington, DC 20240

Re: Draft “Guidance on the Bipartisan Infrastructure
Law Abandoned Mine Land Grant Implementation”

To Whom It May Concern:

The Pennsylvania Department of Environmental Protection (PADEP) appreciates the opportunity to provide feedback on the Department of Interior’s (Interior) draft Guidance on the Bipartisan Infrastructure Law Abandoned Mine Land Grant Implementation (Guidance) and submits the following comments on the Interior’s Guidance for implementing this critical program.

The Bipartisan Infrastructure Law (BIL) is a significant and unprecedented commitment of funds by Congress and the Biden Administration to address legacy abandoned mine land (AML) and abandoned mine drainage (AMD) problems that have blighted and disadvantaged Pennsylvania’s coalfield communities since before 1977 when the AML program was initially established through the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended.

The PADEP finds the draft guidance is unnecessarily burdensome with duplicative processes and believes that reporting that may impede Pennsylvania’s ability to quickly and efficiently apply for the funds.

The duplicative processes and reporting outlined in the draft Guidance and the delay in grant distribution will significantly slow the implementation of critical reclamation projects to eliminate health and safety concerns and improve the quality of life for and the environment in Pennsylvania’s coalfield communities.

General Comment on the Draft Guidance

Throughout the draft Guidance the terms “should prioritize”, “are encouraged to” and, “may provide” are used frequently to recommend practices. Pennsylvania notes and supports comments indicating that the BIL appears to grant states flexibility in how to best operate their AML programs. The PADEP’s intent is to implement as many, if not all, of the recommended best practices outlined in this document, but believes that the discretion to do so is explicit in the BIL and should be retained and accurately reflected in the Guidance. This comment should be considered repeated wherever the issue of requirements versus recommended practices is found.

Pennsylvania, like most AML program states, has many projects with Authorization to Proceed (ATP), from the Interior’s Office of Surface Mining Reclamation and Enforcement (OSMRE),

and these projects are very advanced in the planning, design, and permitting phases and will be ready for construction as soon as the BIL grants are awarded. The requirements and recommendations, as outlined in the Guidance, for applying for BIL AML grants, including the possibility of additional public engagement, new ATP documentation, and yet to be developed BIL performance measures will cause significant re-work and could cast significant uncertainty on when the PADEP will have the ability to move to the construction phase for these projects.

Eligible Projects & Prioritization

Water supply replacement projects under Section 403(b) of SMCRA are designated as Priority B Water Supplies (AML problem type WS) and to be consistent with Directive AML-1 the Guidance should include that individual or defined groups of water supplies that qualify as health and safety problems because of Polluted Water: Human Consumption (PWHC) should be recorded as a Priority 1 or Priority 2 project.

Coal AML Emergency Projects are a sudden occurrence that pose a high probability of harm to the health and safety of the citizens of the Commonwealth and must be addressed expeditiously. The PADEP cannot control when or where an AML emergency will occur and therefore, AML Emergency Projects should be exempt from the recommendations of public engagement and prioritization of projects that provide employment opportunities to current and former employees of the coal industry.

Regarding the OSMRE consulting with states to identify which updates may be necessary for their Reclamation Plan, the Interior is reminded this process is covered by OSMRE Directive 992 and requires Part 884 notification to the state under 30 CFR 884.

Pennsylvania submitted an AML Reclamation Plan update to OSMRE in 2016 and numerous Regulatory Program Amendments prior to that, all of which have not been reviewed or approved. Based on OSMRE's current history for plan updates and amendment approvals the PADEP believes OSMRE would not be prepared to process the additional surge of Reclamation Plan updates, which appear unnecessary.

It is unclear how Pennsylvania will be able to demonstrate compliance with prioritization of projects under Section 40701(f) when there are other groups, including Minority Business Enterprises, Women Business Enterprises, Veteran Business Enterprises, Service-Disabled Veteran Business Enterprises, Disability-Owned Business Enterprises, and LGBT Business Enterprises, that are required by state law and Executive Order to prioritize. Further guidance from the Interior would be helpful in addressing whether or not this section functions as a preemption on current preference requirements that may be required by state law or, if not, how states can demonstrate compliance with this requirement in light of existing state preference requirements.

The PADEP requests the Interior's definition and/or interpretation of "incentivize" found the statement, "Utilize procurement processes that incentivize AML contractors to hire miners...". Preferential hiring of veterans and preferential hiring of local labor are included in the PADEP General Conditions. Additionally, and to be consistent with BIL language, the term "miners" should be changed to "current and former employees of the coal industry."

BIL AML Grants

The Guidance states, “the administrative costs for annual BIL AML grant awards will be available for the entire grant performance period (i.e., 5 years, with the possibility of a one-year extension).” This conflicts with the OSMRE’s Federal Assistance Manual (FAM) Chapter 4-200-10 and it is unclear if a five-year administrative performance period is required or optional. The PADEP is requesting an explanation as to why OSMRE is making the change to keep the administrative costs available for the entire grant performance period. Pennsylvania’s AML tracking of administrative and personnel costs is based on the long-standing FAM requirement that, “All administrative cost subaccounts last for one year.” Changing from a one-year performance period to a five-year performance period will require significant restructuring of administrative and personnel expenditure tracking.

Footnote 6 of the Guidance states, “Although both the BIL AML Funds and the traditional AML fee-based grants will be disbursed under the same CFDA No. 15.252, separate grant applications via grants.gov will be necessary.” The OSMRE has repeatedly stated, contrary to this footnote, that a determination for a single or separate grant application process has not been made. PADEP and many other states have strongly advocated for a streamlined single or a preferred combined grant application for both the BIL AML funds and the traditional AML fee-based funds. OSMRE must recognize the state’s primacy and honor the PADEP determination for the most effective and efficient approach to managing AML budgets.

The proposed subaccount for “Coal Projects Engineering & Design Costs” was developed originally in response to the Office of Inspector General’s report on Certified states. It was intended to be required for use by Certified states, but it was optional for use by uncertified states. Uncertified states such as Pennsylvania (PA) were assured by OSMRE at numerous Interstate Mining Compact Commission (IMCC) and National Association of Abandoned Mine Land Programs (NAAML) meetings that it would remain optional for uncertified states. PA is a member state of both IMCC and NAAML. The PADEP is requesting OSMRE to adhere to their commitment.

The description in Appendix I for “Coal Projects Engineering & Design Costs” is not limited to the practice of engineering or work done by engineers. The PADEP requests changing the title to “Coal Projects Pre-construction & Design Costs” and because of OSMRE’s commitment, add language that this subaccount is optional for use by uncertified states.

Is the Subaccount 04 - Water Supply Project Costs intended for costs related to water supply replacements under Section 403(b) only? Section 403(b) covers Priority B Water Supplies designated as AML problem type WS. To be consistent with Directive AML-1 the Guidance should include that individual or defined groups of water supplies that qualify as health and safety problems because of Polluted Water: Human Consumption (PWHC) should be recorded as a Priority 1 or Priority 2 project under Subaccount 03 – Coal Project Costs. To eliminate confusion, add the text "SMCRA Section 403 (b)" before the text "Water Supply Project Costs."

The PADEP does not understand the rationale for requiring a list of projects and detailed information to be included in BIL AML grant applications. This is a new and time-consuming process for states with large AML programs and raises these and other questions: Will a BIL

AML grant application be denied by OSMRE if a state does not submit the Table for BIL AML Eligible Projects? How will the information be used post award? What are the expectations and planned procedures for keeping the list updated through the life of the grant? For example, when it is determined that a listed project will not be funded during the grant period; when a project not listed is identified for funding, such as emergency projects; and competitive subawards that will not be issued until after a BIL AML grant is in place. The PADEP believes it is important to note that for the first round of BIL AML grants the AML programs are starting from scratch for collecting this information and this will delay the states' ability to prepare a BIL grant application. OSMRE must consider the delays collecting this information will cause and explain how states are expected to fund these data collection activities prior to the application and award of the BIL grant. The PADEP requests the deletion of the paragraph, bullets, and Appendix II related to the project information that should be submitted with BIL AML Grant applications.

For the bullet item, "Any linkages to economic redevelopment opportunities created by carrying out the proposed projects", BIL funding is only permitted to reclaim eligible AML features that are AML Emergencies, within SMCRA 403 (a) as P1, P2, P3, and Priority B Water Supplies (WS) as defined under 403 (b). Using BIL funds for economic redevelopment opportunities is not permitted. The linkages to economic redevelopment opportunities created by carrying out the proposed projects would be speculative and an indirect result of reclamation. Elimination of project vetting for the use of AMLER funds would give states greater flexibility to incorporate AMLER funds into BIL funded projects and have a direct impact on creating economic redevelopment opportunities in a broader number of projects. The PADEP recommends deleting this item.

Davis-Bacon Act

Is it possible that a state law, that is comparable to Davis-Bacon (i.e. PA's Prevailing Wage Law), could be used in lieu of Davis-Bacon? If so, language should be added to the Guidance indicating a comparable state law can be used in lieu of Davis-Bacon. If not, the Interior or OSMRE should provide contract clauses for the states to incorporate into construction bid documents so the contracts accurately comply with the Davis-Bacon Act.

Public Engagement

The Guidance refers to "existing best practices for public engagement." Additional information on the best practices being referred to, whether federal or state, must be provided. It would be most helpful for OSMRE to provide a link or reference to those best practices.

Enhanced Abandoned Mine Land Inventory System (e-AMLIS)

The OSMRE needs to update e-AMLIS immediately to accommodate the BIL program and provide instruction to the states and tribes for entering coal AML problems and identify them as BIL AML funded.

Compliance with The National Environmental Policy Act

The significant increase of funds to AML Programs means larger scale projects requiring a much higher demand for NEPA analyses. OSMRE should consider expanding the existing 100-acre applicability of Categorical Exclusion (CE) to facilitate NEPA analysis to larger and aggregated

projects. The AML Program has a long history of environmental improvements that will serve as justification for expanded use of CEs.

Project Authorization

Approved ATPs achieved for AML features and projects prior to the final BIL Guidance should be sufficient without any resubmission of NEPA, eAMLIS, or ATP information in order to use BIL funding on these projects. As noted earlier, this reauthorization will delay construction of critical reclamation projects to eliminate health and safety concerns and improve the quality of life for and the environment in Pennsylvania's coalfield communities.

It is unclear if it is legal to place an incentive on an AML reclamation contractor to hire a current or former employee of the coal industry over a person who is not a current or former employee of the coal industry, as this could be considered worker discrimination. Concerning the "certification," even if this was justified and legal, how long would a current or former employee of the coal industry have to be employed and what proof or evidence would be needed to prove the employee is a current or former employee of the coal industry? The PADEP firmly believes that stating a reclamation contractor will employ current or former employees of the coal industry is irrelevant to the ATP process for reclamation of an AML site.

The Interior should clarify the legal basis for the \$1 million threshold for this certification and that it aligns with other federal assistance programs that have this certification requirement and the \$1 million threshold. The PADEP recommends deleting this item.

The ATP process occurs well in advance of hiring the construction contractor for reclamation and Pennsylvania has strict procurement requirements to hire the lowest responsible bidder. Guidance on how a state should demonstrate compliance with this requirement at the time of the ATP request should be provided and should include what a state is to provide to show they were justified in making these certifications, if audited. Guidance should also be given as to what a state will need to demonstrate to OSMRE on this issue in order to receive an ATP for the project.

At the time of the ATP request PADEP will be unable to certify that a project either uses a unionized project workforce or includes a project labor agreement because the reclamation contractor has not been selected. Additionally, Pennsylvania has very few unionized reclamation contractors, so this will be challenging.

Pennsylvania's AML program does not have staff with the experience or training needed to fulfill the recommendations for developing a project workforce continuity plan. Training and hiring staff to perform this function will significantly delay the implementation of BIL funded reclamation projects and the PADEP does not believe OSMRE has sufficient staff with sufficient experience to review the validity of workforce continuity plans and issue ATPs. The ATP for BIL funded projects should not be withheld or delayed if a workforce continuity plan is not submitted or is incomplete.

The Guidance should clarify that the costs PADEP will incur to engage with labor and worker organizations, to identify current or former employees of the coal industry as candidates to be

employed by AML reclamation contractors, will be eligible to be paid under the BIL AML Grant.

The Guidance must clarify that efforts to engage with labor and worker organizations, or efforts to minimize risks of labor disputes and disruptions (under a project workforce continuity plan), cannot be construed to be in conflict with, “BIL AML funds may not be used, directly or indirectly, to support or oppose union organizing.”

BIL AML Performance Measures & Reporting

The PADEP presumes the sentence “Given that AML projects are located in coalfield communities that may also be defined as disadvantaged communities, communities of color, low-income communities, or Tribal or Indigenous communities, State and Tribal AML Programs are encouraged to track and report on the types of benefits and the percentage of benefits that accrue to these communities.” acknowledges that OSMRE considers coalfield communities with AML problems as disadvantaged communities for purposes of Justice40.

Many of the proposed performance measures are subjective or cannot be accurately quantified and OSMRE should consult with the states and tribes to develop performance measures and define how the proposed performance measures will be quantified.

There are very few AMD treatment systems (usually only modern active treatment plants) that constantly measure gallons of AMD treated and continuously monitor effluent pH. Quantities of iron, aluminum, manganese, sulfate, etc. removed are not measured constantly and would only be estimated on an annual basis based on a small number of water samples and flow measurements collected each year.

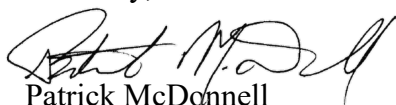
Many of the proposed socio-economic benefit measures within the Guidance cover activities that cannot be paid for with BIL AML grant funds such as: renewable energy facilities installed on reclaimed AML, businesses constructed on reclaimed AML, and new recreational facilities constructed on reclaimed AML. The Guidance should not include measures that cannot be funded under a BIL AML grant.

Conclusion

Again, the PADEP appreciates the opportunity to supply these comments, recommendations, and questions on the draft Guidance. Should you have questions or need additional information regarding the PADEP’s response, please contact Brian J. Bradley, Director of PADEP’s Bureau of Abandoned Mine Reclamation, by email at brbradley@pa.gov or by phone at 717.783.0378.

Thank you for the Interior’s consideration of our comments and recommendations and anticipated response to our questions regarding the draft Guidance.

Sincerely,



Patrick McDonnell
Secretary