

Comment on Draft Guidance on Bipartisan Infrastructure Law Abandoned Mine Land Grant Implementation

By: Robert Uram¹

ruram@sheppardmullin.com

(415) 774-3285

June 13, 2022

Introduction

I am responding to the Office of Surface Mining Reclamation and Enforcement's (OSMRE) request for comments on Draft Guidance on the Bipartisan Infrastructure Law (BIL) Abandoned Mine Land Grant Implementation (May 20, 2022). Section 40701 of BIL provides \$11 billion to States and Tribes to reclaim lands and waters degraded by abandoned coal mines.

The Draft Guidance confirms that BIL funds can be used for projects that seek to restore lands and waters affected by acid mine drainage (AMD) from abandoned coal mines. Page 2. It notes that eligibility for:

Priority 3 Projects – These projects restore land and water resources and the environment previously degraded by adverse effects of coal mining practices (Section 403(a)(3) of SMCRA). These projects may include the design, construction, operation, maintenance, and rehabilitation of acid mine drainage (AMD) treatment facilities regardless of whether they are part of a qualified hydrologic unit.

The Draft Guidance requires grantees to account separately for acid mine drainage construction costs and operations and maintenance costs. It says, "An engineering and design subaccount 19, as described below, have been created to track these coal-related [planning and construction] costs. An operational and

¹ The views expressed in this comment are my own views and do not reflect the views of Sheppard Mullin Richter and Hampton, LLP or its clients.

maintenance subaccount 21, as described below, has been created to track these AMD related costs. Page 14

The Draft Guidance expressly says that “Eligible states and tribes are not authorized under the BIL to place BIL AML grant funds into AMD set-aside accounts” noting in footnote 4 that:

Section 402(g)(6) of SMCRA authorized the creation and use of AMD set aside accounts, which allow uncertified States to apply for up to 30% of certain fee-based funds received as part of their traditional annual AML grant to be transferred to an interest-bearing account established by the State/Tribe to be used for the abatement of the causes and the treatment of the effects of AMD in a comprehensive manner within qualified hydrologic units affected by coal mining practices.

The Draft Guidance precludes the use of the Section 402(g)(6) set-aside funds, it does not identify what mechanisms can be used to fund long-term operation and maintenance costs.

Recommendation

I recommend that the OSMRE revise the Draft Guidance to provide examples of how grantees can use BIL AMD grants to fund multi-year or perpetual operations and management of existing and newly-constructed AMD treatment sites. Examples are needed because the Draft Guidance says that BIL AML grants may not be placed in Section 402(g)(6) set-aside funds. The Section 402(g)(6) set asides have been the traditional way of funding these long-term costs. The Draft Guidance should answer the question of what methods of funding long-term operations and maintenance *will* be acceptable. Providing a clear answer to that question is critical for the expeditious implementation of BIL AML grants for AMD treatment.

Specifically, I request that the OSMRE add a new paragraph following

Paragraph 21 in Appendix 1 of the Draft Guidance:

States and Tribes receiving BIL AML funding may use the grant funds to operate and maintain AMD treatment facilities by one or more of the following mechanisms:

1. Annual or multi-year funding for operations and maintenance carried out by the recipient State or Tribe or by a third party operating a specific AMD treatment facility.
2. One-time funding of an endowment or a trust account for operations and maintenance carried out by the recipient State or Tribe or by a third party operating an AMD treatment facility in the amount needed to assure multi year or perpetual funding for specified actions in accordance with a site-specific long-term operations and management plan.
3. Purchase of a long-term service contract to undertake operations and maintenance carried out by the recipient State or Tribe or by a third party operating a specific AMD treatment facility in accordance with a site-specific long-term operations and management plan.

Discussion

Under the Draft Guidance, AMD treatment has a design and construction component (Sub-Account 19) and an operations and maintenance component (Sub-Account 21). For most AMD treatment sites, operations and maintenance activities will be ongoing. These activities will require funding for many years, if not in perpetuity. The suggested examples require that Subaccount 21 expenditures be used for a specific, identified AMD treatment facility and for specified operations and maintenance activities. These are not generic authorizations for unspecified purposes at unspecified sites. Under the examples, funds are not being set-aside for future use; they are being committed to a specified use. For these reasons, the examples are distinguishable from the more general set asides under Section 402(g)(6).

Using grants in this manner does not run afoul of the “claw back” provision in Section 40701(d)(4)(B), which requires States and Tribe to “return unused” grant funds to the Abandoned Mine Land Reclamation Fund after a specified passage of time. The common meaning of “use” is: “[employed in accomplishing something.](#)” Funds allocated for operations and maintenance of a specified acid mine drainage treatment site specified in accordance with a site-specific long-term operations and management plan are clearly being used and will not have to be returned.

Similarly, use of the BIL AMD funds described in the examples does not raise Cash Management Act issues. 31 U.S.C. § 6501 et seq. The Cash Management Act requires that federal grants to States be timely used. Under certain circumstances, funds granted to a State and not used promptly, generate an obligation for a State to pay interest to the federal government.

Specifically, the Cash Management Act requires the federal government to enter into agreements with States receiving federal funds to “minimize the time elapsing between transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payments by other means for program purposes.” 31 U.S.C. § 6503(a)(2). The Cash Management Act requires, “The Secretary shall issue regulations that shall require a State, when not inconsistent with program purposes, to pay interest to the United States on funds from the time funds are deposited by the United States to the State’s account until the time that funds are paid out by the State in order to redeem checks or warrants or make payments by other means for program purposes.” 31 U.S.C. § 6503(c)(1).

The payment by a State for annual or multi year operation and maintenance or for an endowment or to establish a trust or to purchase a long-term operation and maintenance contract constitute “funds paid out by a State . . . for program purposes” under the Cash Management Act. Consequently use of BIL AMD funds is fully consistent with and does not raise issues or leave funds disbursed in that manner subject to payment of interest to the Federal government.

Conclusion

Thank you for providing the opportunity to comment on the Draft Guidance. I encourage you to include the examples I have provided in the final guidance document. The clarification will be very helpful in ensuring the best possible use of the BIL AMD funds.