Interstate Mining Compact Commission

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Glenda Owens
Deputy Director
Office of Surface Mining Reclamation and Enforcement
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

Re: IMCC and NAAMLP Comments on
Draft OSMRE Implementation Guidance for
Section 40701 of the Infrastructure Investment and Jobs Act

Dear Deputy Director Owens:

The Interstate Mining Compact Commission (IMCC) is an interstate organization representing the mineral and natural resource interests of its 26 members states. IMCC also serves as a policy liaison with Congress and the federal government for the National Association of Abandoned Mine Lands Programs (NAAMLP). NAAMLP represents 32 states and tribes, of which 29 implement federally approved abandoned mine land reclamation (AML) programs under Title IV of the Surface Mining Control and Reclamation Act (SMCRA). IMCC and NAAMLP members are responsible for nearly all (in excess of 99%) of on-the-ground implementation of the coal AML program under Title IV of SMCRA. The states and tribes (collectively hereinafter, "AML programs") look forward to working with our federal partners at the office of Surface Mining Reclamation and Enforcement (OSMRE) to ensure that the coal AML program, as recently re-invigorated by the Infrastructure Investment and Jobs Act (Public Law 117-58) (IIJA), is optimally implemented. On behalf of the AML programs of IMCC and NAAMLP, we submit these comments on OSMRE's draft guidance for implementation of the AML program under Section 40701 of the IIJA.

"If it ain't broke, don't fix it."

Bert Lance, Director, Office of Management and Budget. *Nation's Business*, May 1977.

As the Department of the Interior embarks on implementation of the most significant new funding of the coal Abandoned Mine Lands (AML) program since the program began with President Carter signing the federal Surface Mining Control and Reclamation Act (SMCRA) on August 3, 1977, it would do well to heed the advice of President Carter's OMB Director.

State and tribal AML programs have a forty-five-year track record of delivering good results for the citizens and environment of the nation's coalfields. These years of experience have enabled state and tribal programs to hone their exceptional reclamation expertise and maximize their effectiveness. States and tribes efficiently and effectively achieve the fundamental goals of protecting safety and health and restoring the environment. As a result, the AML program is one of the Interior Department's most successful. The benefits to citizens of America's historic coalfields have been immense.

Last year, when Congress was considering the best ways to create jobs through investments in infrastructure, the demonstrated success of the AML program made it an obvious choice. Congress rewarded state and tribal AML programs for their fine work with greatly increased new funding. It provided nearly $11 billion from the US Treasury for state and tribal AML programs to continue these efforts over the next 15 years in Section 40701 of the Infrastructure Investment and Jobs Act (IIJA)[1]. In addition, Congress also extended the AML fee on coal production for another 13 years. With the treasury funding, came a few relatively minor tweaks to the forty-five-year-old AML success story. Other than the rate of the fee, which was reduced by 20%, Congress left the fee-based AML program nearly unchanged.

A single section of the IIJA, Section 40701, lays out the entirety of the new treasury-funded AML program. The instructions Congress provided to OSMRE on dividing the new funds among states and tribes and the types of "covered activities" upon which Section 40701 funds may be expended both borrow from the existing AML program and, accordingly, no guidance is required for implementation of these aspects of Section 40701. Section 40701 adds three new wrinkles to the AML program: 1) discretion to give preference to projects that provide employment to current or former employees of the coal industry, a "miners preference"; 2) discretion to aggregate projects to be bid into larger regional or state-wide packages; and, 3) a requirement that wage rates dictated by the Davis-Bacon Act be paid for reclamation projects performed under the IIJA.

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[1] For context consider that during the first 45 years of the AML program, states and tribes received about $5.5 billion. In comparison, Section 40701 of the IIJA gives them nearly $11 billion over the next 15 years, nearly a sixfold increase. In addition, Sections 40702 and 40703 of the IIJA continue AML funding through the fees collected from industry at 80% of current rates for the next 13 years.

Far from implying that a significant overhaul of the AML program was in order, the minor nature of these tweaks suggests that Congress was well-satisfied with the AML program and simply desired to make slight adjustments to the program as it was incorporated into this historic investment in infrastructure and job creation. If Congress perceived the AML program was truly broken and in need of a substantial "fix", AML would not be the significant part of the IIJA that it is. We believe that Congress, instead, saw that the AML program was doing quite well at achieving exactly the same goals as it had for the IIJA and even more could be accomplished with increased funding.

To avoid providing a fix for something that is not broken, OSMRE's guidance must be carefully tailored to the core issues that must be addressed for efficient implementation of Section 40701. Guidance is legitimately needed from OSMRE on two of the three tweaks the IIJA made – the miners preference and bid aggregation. Definitive guidance on Davis-Bacon Act requirements will probably need to come from the Department of Labor. Beyond those issues, guidance on implementation of Section 40701 may also need to address the necessary details of program operation that Congress typically does not address, such as how OSMRE will operate the grants program within the framework of 2 C.F.R. Part 200 and what accounting codes and procedures are necessary to accurately track program expenses. The draft guidance goes well beyond these essential components. The host of substantial changes the draft guidance includes will add a tremendous amount of additional administrative work and establish a tangle of new priorities that will undermine the ability of the program to achieve its fundamental goals, all to the detriment of the coalfield citizens that rely on it. The AML programs want to avoid this result.

We urge OSMRE to consider these comments carefully. As the front line implementors of the AML program, the AML programs have indispensable insight into how the program works, what can be beneficially changed, and what must be maintained to preserve its effectiveness. The states, tribes, OSMRE, and the Department of the Interior share the fundamental goal of enhancing the benefits of AML reclamation, and our cooperation in implementing Section 40701 is critical to that end.

General Comments

The guidance includes a variety of new "soft" mandates that have no basis in either the pre-existing AML program or Section 40701. These items appear as things the AML programs either are "encouraged" to do or things they "should" do, without any explanation of the source of OSMRE's legal authority to make these suggestions. There are several problems with this.

- First, Section 40701 only allows the AML programs to use the funds it provides for the "covered activities" described in in sections 403(a), 403(b) and 410 of SMCRA. Spending Section 40701 funds on other priorities is just not legal.
- Second, AML programs are constrained by state and tribal law and do not have freedom to make up new requirements or procedures governing their AML work that do not have a legal basis.
- Third, implementation of many of these changes to the pre-existing AML program is likely to require changes in state or tribal law or regulations. This is certainly the case with the three adjustments to the pre-existing AML program that are actually specified in the IIJA. So will implementation of the "soft" mandates that have no discernable basis in the IIJA, but nevertheless are part of the Section 40701 guidance. Legislatures may be required to act. Even a rule change that does not require legislative approval is likely to draw the scrutiny of state or tribal legislatures. A question every AML program manager is going to face is, "where does it say we have to make this change?" For the miners preference, bid aggregation and Davis-Bacon requirements, there are clear answers to this question. For the things the guidance says AML programs are "encouraged" to or "should" do, there are no answers. Absent a clear federal legal mandate requiring states and tribes to implement these policy approaches, AML program managers are likely to be caught in the middle between the choices the Interior Department has identified in the guidance and legislators whose approaches to these same policy issues are likely to be quite different.
- Fourth, many of the entirely new set of priorities and approaches that the guidance establishes for AML programs conflict with one another and historic priorities of the program that are well established in the law. Even where there is no conflict, because the new priorities seek to fundamentally change the way the AML program is operated, they will at a minimum, create dysfunction, confusion and inefficiency. Adding too many additional considerations risks diluting the AML program's attention to its fundamental health, safety, and environmental goals. Beginning to choose projects based on secondary benefits risks confusion of the basic purpose of the program and will introduce difficulties that undermine the program as a whole instead of accomplishing those secondary benefits. These difficulties could take years to sort out. During this time the program will be unworkable. The existing priorities of the AML program must be maintained as <u>the</u> focus in choosing projects. The AML program has already been achieving the secondary benefits the guidance seeks. These benefits are more likely to continue to be achieved by maintaining this focus. The strength of the existing program is the reason Congress provided so much additional new funding in the IIJA. The AML program needs no fix.
- Last, both the pre-existing AML program and the AML program as augmented by the IIJA are an exercise in cooperative federalism. The states and tribes across the country face very diverse circumstances. Wisely, Congress declined to take a one-size-fits-all

style approach in SMCRA. It is important that Section 40701 implementation follow the fundamental precept of SMCRA that states need the flexibility to match their individual implementation efforts to their unique circumstances. In the absence of a clear federal legal mandate from Congress requiring a certain policy approach, any policy void that is left in a particular area should be the state's or tribe's prerogative to fill.

The AML programs strongly recommend that OSMRE delete the following provisions from any final guidance it issues:

- *Utilize AML funding to promote the revitalization of coal communities.* Page 3. While all AML projects benefit coalfield communities by eliminating safety or environmental hazards in the community, revitalization of coalfield communities is the goal of the Abandoned Mine Land Economic Revitalization (AMLER) program. Congress did not choose to expand AMLER. Instead, in Section 40701, it chose to increase funding to the AML program. AMLER and AML are distinct programs and should not be conflated.
- *Support pre-apprenticeship, registered apprenticeship, and youth training programs.* Page 4. While such programs may have laudable goals, Section 40701 limits the funding it provides to the "covered activities" specified in Section 40701(c). AML programs cannot spend Section 40701 money on these other programs. During the initial years of implementation of Section 40701, AML programs will face more than enough challenges in putting greatly increased funding to work without diluting their focus with new priorities that have no basis in the law. The IIJA goal of job creation will be more effectively achieved if AML programs are allowed to concentrate on their core mission.
- *Engage with potential partners to support recruiting and training efforts, including community colleges, workforce partners, community-based groups, and unions*. Page 5. Again, while the goals may be laudable, Section 40701 funds cannot be spent on these programs. The IIJA goal of job creation will be more effectively achieved if AML programs are allowed to concentrate on their core mission.
- *Provide linkages to economic redevelopment opportunities created by carrying out the proposed projects*. Page 5. Again, this confuses AMLER goals with AML program goals. Congress did not choose to expand AMLER. Instead, Congress chose to expand the AML program. AMLER and AML are distinct programs that should not be confused.
- *Expand or enhance a project's scope or outcome. States and Tribes are encouraged to identify and leverage additional funding sources, e.g.:*
    - *Clean Energy Demonstration Program under Title III, Section 40341 of the BIL;*
    - *DOI's Ecosystem Restoration Program under Title VIII, Section 40804 of the BIL; and*
    - *EPA Brownfield Job Training Grants) and*
    - *In-kind contributions to be used in conjunction with BIL AML monies.*

Page 6. Again, OSMRE must recognize that the authority of AML programs under Section 40701 is limited to AML work. The IIJA's goals will be more effectively achieved if AML programs are allowed to concentrate on their core mission.

- *Require contractors to support safe, equitable, and fair labor practices by:*
    - *adopting collective bargaining agreements,*
    - *local hiring provisions (as applicable),*
    - *project labor agreements, and*
    - *community benefits agreements.*

Pages 4, 9. There is no basis in the law for these requirements. They also conflict with state or tribal law in many jurisdictions as well as the guidance's policy encouraging use of local labor. In Addition, Community benefit agreements are not "covered activities" on which Section 40701 funds may be spent.

Below, we provide more detailed comments on various aspects of the guidance:

Miners Preference

While, on the surface, the premise of giving preference to projects that provide employment to current or former mining industry employees (referred to hereafter as "miners") is simple, giving effect to this goal presents a number of practical problems. Importantly, the miners preference provision in Section 40701 is not characterized as a mandate. The use of "may" suggests that Congress intended to encourage AML programs to give some level of priority to employing former and current miners through their AML projects, but only to the extent practicable. It is important for the guidance to embody flexibility and deference to state and tribal circumstances when setting expectations with respect to the goal of employment of miners through AML work.

As written, the miners preference cannot be readily applied to the existing contracting procedure the states and tribes use. Typically, AML *projects* are not competing for funding, as the language presumes. Instead, AML programs design projects and put them out for bid by interested contractors. The competition is among *contractors*, not among *projects*. Thus, some construction of the statutory language is necessary to give effect to the intent of Congress. We believe Congress meant to encourage AML programs to consider employment of former or current miners by reclamation contractors when awarding contracts.

Existing state and tribal procurement laws and rules will not mesh well with the miners preference. Some of these laws require that low bids be accepted without regard to any other criteria. Others already incorporate other types of vendor preferences (e.g., a preference for "in-state" vendors, which is often limited to either a specified percentage of the amount of the low bid or in a specific dollar amount). These laws will be difficult to reconcile with the miners preference. Changes to those laws and rules may be necessary to require specific hiring preferences. Another

significant problem in implementing the miners preference is that many states do not have a significant population of current or former miners who are seeking employment. For this reason, it is not practicable to expect every AML program to provide direct preference for current and former miners in their procurement process in the way that the Section 40701 language and the guidance anticipates.[2] Many AML programs simply lack the means of doing so.

Based on these issues, giving priority to *contractors* based on their employment of miners seems to be a more practical way of applying the intent of Section 40701 in this respect. We expressed these thoughts in an April 25, 2022 letter to Acting OSMRE Director Glenda Owens and made some recommendations on how to implement the miners preference. The draft guidance basically adopts our recommendations that AML contractors be encouraged to report data on the number of miners employed in any reclamation project and that AML programs could, in turn, report this data to OSMRE. Another recommendation we made was to allow contractors who bid on AML projects to affirm that they will give preference to miners in any hiring they do to perform this work. In this recommendation the word, "allow," is key. By expressing this affirmation with permissive rather than mandatory language, we hoped to avoid the change to state purchasing laws that mandatory language would require.

The permissive language of our recommendation also gives effect to two of the key words Congress used in establishing the miners preference. Congress chose to establish a "*priority"* for employment of miners in AML work. Importantly, a giving a *priority* or a *preference* to those who employ miners does not mean that those contractors who do not employ miners are disqualified from seeking AML work. Instead, those who do employ miners are preferred over those who do not. The other key word Congress chose in crafting the miners preference is "may". Section 40701(f) does not establish an absolute preference for those who employ miners. By the language stating that "priority *may* also be given" to projects that employ miners, Section 40701(f) is clear that the preference Congress established is neither absolute nor mandatory. Instead, "may" connotes an intent to allow an AML program to decline to give preference to contractors that employ miners in certain circumstances. For example, an *absolute* preference might require an AML program to award a contract to a bidder who employs miners whose bid amount is twice or more than that of a low bidder on the project who does not. Congress wisely chose not to require this. A *mandatory* preference might disqualify any contractor who declines to preferentially hire miners from bidding on any AML work. Basically, this would likely disqualify AML contractors who have been doing this work for many years in the several states and tribes that have no population of former miners who are looking for work. Through its use of permissive instead of mandatory language, Congress avoided this absurd result also. We support an interpretation of the

[2] Because of the expressed preference for use of local labor in the guidance, we conclude that OSMRE does not interpret the miners preference to require those states and tribes that do not have a significant population of coal industry employees seeking work to use out-of-state labor for AML projects. We concur with this interpretation.

miners preference that gives AML programs flexibility to avoid absurd results. The language of Section 40701 supports this approach.

The OSMRE guidance fails to appreciate the nuances of the miners preference. Instead of using IMCC's recommended permissive language that is true to the intent of Congress, the guidance *requires* "contractors to affirm they will give preference to miners in any hiring for BIL-funded AML projects." Because there are no miners looking for work in many states with AML programs, this new pre-condition to bidding on AML work may disqualify the existing contractors who have bid on such work in the past from doing so in the future. As a new *mandate* for bidders, it is also certain to require a change in purchasing laws in every state.

Another aspect of the OSMRE guidance on the miners preference that is unworkable is the new requirement that AML programs "engage with labor or worker organizations that represent coal industry workers to identify current or former employees of the coal industry who are candidates to be employed by AML reclamation contractors" and certify to OSMRE that they have done so. This requirement fails to appreciate the reality that AML programs do not hire the workers who perform AML work. Therefore, nothing can be gained by requiring the AML programs to make this certification. Instead, any potential for miners to be hired for AML work depends entirely on the needs of the contractors who bid on this work. Another issue with this requirement is that very little of the workforce in the mining industry is represented by a union. According to the most recent data (2020) collected by the federal Energy Information Administration (EIA), there are at least ten states with AML programs where *none* of the mining industry workforce is represented by a labor organization. Annual Coal Report 2020 (eia.gov), see Table 7, page 13. This data also shows that employees in surface mining are generally less likely to have union representation than employees in underground mining. This is important because the skill set of people who work in surface mining more closely aligns with the skills that are needed by AML contractors. There is no point in requiring these states and tribes to *certify* that they engaged with a labor organization that represents so few of the class of people entitled to the preference.

For these reasons, IMCC/NAAMLP proposes an approach that 1) allows each AML program to pursue the goal of employing miners through AML work to the extent practicable under their circumstances and 2) focuses on collecting and reporting information rather than setting specific national standards. To avoid the necessity of revising state purchasing laws, any affirmation by a contractor during the bidding process should be voluntary, instead of an absolute precondition for eligibility to bid. The requirement that AML programs certify engagement with organized labor is unnecessary and unworkable and should be dropped.

Bid Aggregation

Section 40701(b)(3) allows AML programs to aggregate bids on several projects bid on a state-wide or regional basis. The guidance provides little additional illumination beyond the text of the law on bid aggregation. Because the seasonal cycle for effective management of an AML programs demands that the available construction season be used to the greatest possible advantage, we anticipate that many AML projects will need to be ready for bidding around the same time in the year. This may create some opportunities to aggregate bids as the law contemplates, especially for larger AML programs.

Like with the language of the miners preference, the Congress used permissive language in Section 40701(b)(3). Therefore, where bid aggregation is not practical for an AML program, the IIJA does not compel it. This benefits those small AML programs that are likely to have difficulty with bid aggregation by giving them flexibility. OSMRE must respect this need for flexibility in administering Section 40701.

There is likely to be tension between the goal of bid aggregation and the guidance's goal of using local labor. We understand that aggregating bids into larger bid packages is intended to attract interest from larger contractors whose workforce is represented by a labor organization.[3] Historically, though, AML projects have mostly been too small to attract interest from most unionized contractors. AML projects are typically performed by smaller local contractors who use local labor in the rural areas where most AML work is needed. Attracting larger contractors for this work is likely to result in displacement of the smaller local contractors and the local labor who have years of experience in AML work. Thus, the goals of bid aggregation and use of local labor are in tension with one another.

Grant Application - Requiring Submission of a Project List

Project information in grant application

The new requirement that AML programs provide a list of projects they intend to fund with a grant application will needlessly add to the administrative burden of grant management at a time when states face the challenge of effectively putting greatly increased new funding to work. The existing system for project planning and execution works well. Under the current system, most AML programs maintain their own inventories of AML-eligible sites and features. All AML programs enter information into the federal E-AMLIS inventory. Through these

[3] Whether bid aggregation will be successful in achieving this purpose is questionable. Contractors with a represented workforce are believed to be more attracted to large scale projects. Aggregation of AML projects for bidding may result in a larger package of work, but the reality is that such a package will often consist of several projects that may be too small, on an individual basis, to be of interest to these contractors.

inventories, AML programs already have a project list. AML programs select potential projects from the inventory for development of a design for the needed reclamation. When an AML program is ready to proceed with work on the project, it submits a request to OSMRE for approval as part of the authorization to proceed (ATP) process, wherein OSMRE verifies that the proposed projects are in E-AMLIS and otherwise meet project eligibility criteria under the law. The guidance, in contrast, anticipates a system in which an AML program must submit information on its projects as part of its grant application, well before a "project" is actually developed. The new information OSMRE will gain from this new project list will not be reliable enough for OSMRE to gain any appreciable value from it. This new approach would be problematic for multiple reasons.

Any project list provided at the grant application stage will include nothing more than what the states and tribes *hope* to do with that year's funding. At this early stage, there are too many pre-project tasks that must be completed for each project for the AML program to have a concrete idea of what projects will be performed with the funding for that particular year. Developing each AML project requires a substantial amount of coordination with stakeholders, landowners, and contractors. This coordination must take place before a project is ready for the design and engineering work necessary to develop a bid package. The necessary NEPA analysis is another pre-project task that must be done. It often takes years to develop a project from initial identification to the point where the AML program is ready to request an ATP for the project. Another factor affecting project timing is the need to have all the necessary pre-project work done so a project can proceed during construction season. A number of external factors, such as environmental conditions and weather events, the willingness of landowners to consent to the project, and proposals made by stakeholders and project design contractors can change a project's priority. AML programs know the complications from these pre-project tasks all too well. Many details as to how work a project must proceed and the benefits the project may yield simply cannot be known before the project is fully developed. That is true of the relatively basic information indicated in the appendix II document in the guidance. It is especially true of the extensive list at the bottom of page5/top of page 6 of other project details on which information would be required. For these reasons, any project list provided at the grant application stage will contain only a very preliminary projection of what will actually be done with that year's grant funding. Because of the preliminary nature of the list, it will not be helpful in advancing OSMRE's understanding of what projects will eventually be completed under that grant.[4]

[4] These circumstances also raise the question of what kind of verification an AML program must provide as to the accuracy of its grant application, when it knows at the time it submits the application that the project list is so fluid that it provides no real value. Is it good policy to require information in an application for millions of dollars in federal funds that may be outdated and inaccurate by the time OSMRE can act on the application? This list may provide more misinformation than reliable, accurate data. What part can such unreliable information play in an OSMRE decision as to whether funding should be awarded?

Collecting specific project information as part of the grant application will require a significant amount of new administrative work. AML programs will not only have to compile the initial projections of what projects might clear all pre-project hurdles in time to be funded under each grant application, but as some plans for some projects move forward while others are stymied for one reason or another, AML programs will continually need to update their grant applications. Another layer of complexity will be the need to continually move projects back and forth between the grant list for one year and the grant lists for several others. Given the number of projects conducted by larger AML programs and the fluctuation in plans over the course of project development, this system could require hundreds of grant amendments by a single AML program over the course of a year. All these foreseeable changes in a project list necessarily make the quality of any list provided at the time of a grant application extremely low. Given the low value of the information that can be provided at this time and the immense administrative burden the project list and grant amendments would entail for the AML programs and OSMRE, it is clear this approach is not worth the effort.

The current system of planning and funding AML projects works well. The federal E-AMLIS inventory already serves as a "project list" for each AML program. Each state has processes for updating the E-AMLIS inventory and for developing inventoried sites into projects that are ready to be funded. The current process, in which OSMRE gets information on project plans after actual project plans have been developed but before money is drawn down against a grant, is much more sensible. It generates accurate information, utilizes existing processes and tools and avoids creating a senseless administrative challenge in which grant applications are never accurate and grants management is a never-ending bureaucratic nightmare.

OSMRE Vetting of AML Projects

A second aspect of the project list requirement of great concern to AML programs is the potential that OSMRE would use it as another way of pre-approving or "vetting" projects. OSMRE already exercises a type of project pre-approval through the gatekeeping function it performs when a project is entered into E-AMLIS. More formal project approval is already occurring at the ATP stage. Now, OSMRE appears to be adding another interim project pre-approval step to the process at the grant application stage. Presumably, this pre-approval would be based in part on the extent to which a project complies with the new non-reclamation-related considerations listed at the bottom of page 5 and top of page 6 of the guidance. There are several fatal problems with such an approach.

Preapproval or vetting of all Section 40701 AML projects by OSMRE would result in paralyzing confusion and inefficiency. The vetting system used in the AMLER program provides an example of how this would likely play out. There have been many successful

AMLER projects, but this has been *in spite of AMLER's largely dysfunctional vetting process*, which is plagued by inefficiency and lack of clarity regarding the specific criteria OSMRE uses to approve or deny an AMLER project. The result is that many AMLER proposals are caught in multiple rounds of requests for additional information and are stalled indefinitely in the pre-approval process. Complicating this difficulty, OSMRE was never designed to be an economic and community development agency, nor has it ever been equipped with the specific types of expertise and state, tribe, region, or locale-specific knowledge necessary for vetting economic and community development projects in a logical, consistent, efficient manner.

All these difficulties will be present and be even more pronounced if OSMRE undertakes vetting of all Section 40701 projects. Section 40701 continues an already existing and successful federal program with minor adjustments and a new source of funding. However, the Section 40701 implementation guidance goes much further than either the existing program, or even AMLER, by expanding the non-reclamation criteria on which AML projects will be judged and, like AMLER, does not resolve how those criteria should be weighted in a way that provides clarity of purpose for the program. Unlike AMLER, there is no legal basis for the new criteria. Adding new non-reclamation-related criteria that lack any sound legal basis will only add to the opaque, arbitrary nature of the project approval process we have experienced in the AMLER program. The AMLER experience causes us to believe that vetting projects under these newly imposed criteria at the same time the AML programs and OSMRE will be faced with the much larger volume of projects generated by Section 40701 will cause progress on AML projects to grind to a halt.

Cooperative federalism lies at the core of state primacy under the AML program. Adding yet another form of federal project approval through the vetting of Section 40701 AML projects will disrupt this basic element of the AML program. AML project selection must be driven by the AML programs, themselves. The AML programs face widely varying circumstances and need to be able to exercise their specific expertise to ensure the best outcomes for reclamation projects. Allowing OSMRE to vet Section 40701 AML projects would empower OSMRE to substitute its less informed judgement for the expertise of the AML programs. We believe Congress intended to emulate the AML program's 40 plus year history of successful state- and tribe-led projects as outlined in SMCRA when it adopted Section 40701. Nothing in Section 40701 even suggests that a greater role was envisioned for OSMRE.

We understand that OSMRE does not currently plan to use the new project list for vetting, but the guidance certainly creates the appearance that this is contemplated, especially when we see the new project list requirement paired with the new AMLER-like socio-economic reporting criteria. That the guidance is constructed to enable vetting is of great concern to the AML programs. As OSMRE considers this guidance or any other efforts to implement Section

40701, the lessons of AMLER have taught us that the AMLER-style central vetting by OSMRE should be strictly avoided. This is essential to efficient and effective use of Section 40701 funds.

Grants Processes

The AML programs are concerned that the grants processes emerging for the new IIJA treasury-based funding will prevent AML funding from being used efficiently. The grant administration system should maximize efficiency by allowing AML programs to maximize the program resources that can be devoted to actual reclamation work. This is especially important considering the strain AML program staff will face with the large funding increase provided by the IIJA. Well-developed, reasonably efficient grants processes developed over the last 40 plus years of the AML program are already in place. We recommend maintaining existing processes as much as possible.

Separate vs Combined Grant Application

Separating fee-based and Section 40701 funding into two separate grant applications seems unnecessary and overly bureaucratic. Our understanding is that OSMRE's reason for requiring a separate grant process for Section 40701 is the need to separately account for AML funds sourced from the treasury. The AML programs believe strongly that accounting for funds from the two sources, the treasury and fees paid by industry, in no way requires doubling the number of grant applications. Instead, the necessary accounting can be accomplished in same way the AML programs already track money attributed to various sources. All that is needed is to establish the necessary accounting codes and procedures.

When this topic was discussed during the recent briefing OSMRE conducted for AML programs, the AML programs were asked to identify examples of other federal grant programs that combine funding from distinct sources in a single grant application. So far, we have identified the Department of Agriculture's Forest Service grants under the Cooperative Forest Assistance Act, which provides multiple grant options for state grants.[5] From this one example, it is clear that a single grant application is a viable option. With more time to research, we may find other examples that should be emulated.

Separate grant applications would effectively double the administrative burden of grants management both for the AML programs and for OSMRE. Whatever benefit might be gained by that separation is certainly outweighed by the huge cost this approach entails in time and effort spent on grant administration.

[5] Direction on how states may receive their Forest service grants can be found here: https://usfs-public.app.box.com/v/2022FinancialAdvice/file/955303045824

Grant Extensions

The IIJA guidance provides that OSMRE will use a 5-year grant period with the availability of a 1 year, no cost extension for Section 40701 funds. The AML programs appreciate the added flexibility the 5-year term will provide. This will be helpful in effectively putting the IIJA's greatly increased funding to work. Nonetheless, extensions will be necessary in some cases. The guidance's 1 year limit on extensions is not practical given the amount of increased funding and likelihood of unforeseen project delays. The AML programs recommend that OSMRE preserve the practice of "rolling over" funds when necessary. To be clear, the flexibility to de-obligate grant funds from expiring grant periods and re-obligate them to new ones, as has been done in the past, absolutely must be retained. This practice avoids a number of problems that emerge when roll-overs are not allowed. Without grant roll over, AML programs are likely to have left-over funds in expiring grants that are insufficient to fund a project. Inability to roll these funds over may also lead to an excessive number of open grants at a given time. This will be confusing and unnecessarily burdensome. AML programs understand the desire to minimize the amount that is rolled over into new grants but believe that the ability to roll grants forward beyond 1 year, where necessary, absolutely must be preserved.

New Subaccounts

The guidance includes several new subaccounts for Section 40701 funds. It is unclear how non-reclamation activities discussed in the guidance such as workforce training and community benefit agreements would be accounted for in the subaccounts since they are not "covered activities" under Section 40701. It is also unclear how the subaccount for water supply project costs should be populated. Specifically, it is not clear whether SMCRA 403(b) project costs are the only type of costs that belong in this subaccount or whether it also includes water supply project costs associated with Priority 1 and 2 problems under 403(a). Clarity on this point is needed.

Additionally, neither administrative costs nor amounts spent on design and engineering costs should be tracked at the project level. The AML programs understand OSMRE's desire to separately track fee-sourced funds and Section 40701 funds. With adjustments, AML programs can separate overall design and engineering costs for the fee-sourced funds and the Section 40701 funds. However, doing this at the project level will be problematic. Administrative costs support multiple projects at once and are not traceable to one source of funding or the other. The AML programs strongly believe that they should have flexibility to charge all administrative activities to either the fee-sourced or the Section 40701 treasury-funded grants.

Grants - Reporting and Performance Measures

The AML programs are concerned about the number and utility of the performance measures listed in the guidance. The long list of measures will add significantly to the AML programs' administrative burden. Many of these items, especially those detailing with socio-economic impacts, are just not measurable by the AML programs. The AML programs' expertise is in reclamation, not in socio-economic measurement. Again, we must point out that Congress knows how to establish socio-economic programs. It did so with AMLER. Section 40701 merely made minor adjustments to the existing AML program. There is no evidence that Congress intended to create a vastly expanded version of AMLER when it adopted Section 40701. Turning the new Section 40701 AML program into AMLER would be a huge mistake. The socio-economic measures attempt to do just that. They cover factors that are well beyond the control of the AML programs and would require inordinate effort to measure. One example is the requirement for tracking new business formation. It would require AML programs to track developments *totally unrelated to reclamation <u>in perpetuity</u> for all AML projects*. This is untenable.

Any information the AML programs could provide in this area would be rough estimates at best. This undermines the reliability of the information and, thus, any value from collecting it. For the most part, the data metrics already being reported for the pre-existing AML program are adequate to characterize the successes of the Section 40701 AML program.[6] The AML programs recommend that OSMRE rely on the existing E-AMLIS data fields and platform. This ensures that new reporting requirements do not become so onerous that the cost in time and money of collecting data eclipses the value of the data. If OSMRE truly requires socio-economic information, it should consider hiring a contractor that specializes in conducting this kind of policy research instead of placed the burden of doing so on the AML programs.

We will be providing more detailed comments on the reporting and performance measures in the draft guidance by Monday, June 20, 2022.

State and Tribal Plan Amendments

OSMRE intends to require AML programs to embark on a program-wide effort to update all reclamation plans. The IIJA, itself, does not require a program-wide reclamation plan update. Neither would such an effort serve any useful purpose: full compliance with all federal

[6] The principal exception is the potential need to measure the impact of the miner preference, which is discussed above.

requirements is independently assured by OSMRE's oversight of every AML project through the ATP process. Furthermore, just as the state and tribal AML programs are facing personnel and resource challenges of efficiently and effectively putting a much larger amount of AML money to work is an especially poor time to divert program managers' attention to plan updates that are largely a formality.

The AML programs oppose any effort to require incorporation of elements of the draft guidance the have no basis in the law into state and tribal reclamation plans.

Preference for Union Labor and Labor Practices Requirements

The mandate in the guidance that AML contractors have collective bargaining agreements, project labor agreements or, in lieu of union labor, a "project workforce continuity plan" will be very disruptive to most AML programs for both legal and practical reasons. All states and tribes have existing laws governing labor standards with which the AML programs must comply. In most states, right-to-work or other state laws prevent AML programs from encouraging union representation of workers. If the goal of these provisions is to force changes in state law to accommodate these federal labor policy choices, strong opposition is likely in many states. The AML programs have little stake in the debate over labor law and policy that the guidance is likely to provoke. Instead, the AML programs exist to effectively and efficiently accomplish the reclamation goals of Section 40701 and SMCRA Title IV. Foreseeably, however, this debate will be very disruptive to our goals of accomplishing reclamation. Very few Section 40701 funds are likely to be put to use until these issues are resolved.

From a practical standpoint, very few AML contractors with union-represented workforces have historically bid on AML projects. Some union contractors who bid on AML projects seek only highly specialized work. Many states currently have no union AML contractors. Even, in states that do have some union AML contractors, there are very few. Currently, contractors with and without represented workforces are all welcome to bid on AML work. However, the effort to force union representation on the existing community of AML contractors and their employees will be greatly disruptive to the work of AML programs. The existing community of AML contractors cannot be replaced with a new group of contractors who, as a general matter, have never had interest on AML work in the past, and lack the experience and expertise in this work that the current community of AML contractors have, without severe disruption in the number and quality of AML projects. Also as noted above, the goal of the guidance to promote an all-union AML workforce is in tension with its goal of using local labor.

Greenhouse Gas Emissions

The principal greenhouse gas associated with coal mining is methane from underground mines. To be eligible for the AML program, a mine had to have been abandoned by 1977. Thus, any mine openings that are eligible for closure under the AML program have been left open to freely vent methane into the atmosphere for at least the last 45 years. In the distant past before 1977, when these mines were being operated, they were being actively ventilated to prevent explosive accumulations of methane. Mine ventilation has always been intended to force methane out of the mine and into the atmosphere where it is diluted to safe levels. After many years of active methane ventilation efforts, followed by at least 45 years during which any methane remaining underground was being freely vented to the surface, a practical question that should be asked is whether any significant quantity of methane remains. Before requiring all AML programs to undertake the cost and effort to measure greenhouse gas consequences of plugging old, abandoned underground mine openings, we recommend that a pilot project for measurement of methane reduction be undertaken at a few locations to determine whether AML mine closure projects provide any significant methane reductions. After several pilot projects are complete, wider implementation of a requirement to measure greenhouse gas emission reductions can be considered, if the data gathered supports doing so.

Another issue with actions to eliminate methane emissions from underground mines is that many of these openings are used for roosting and hibernating by endangered species of bats. Where this is the case, the goals of the Endangered Species Act are in tension with the air quality goal of closing the opening to eliminate greenhouse gas emissions. In the past, AML programs have commonly installed bat gates at mine openings that prevent public access to the safety hazard that abandoned mine openings pose. These bat gates have left underground mine entries open to the atmosphere to preserve their function as habitat for bats. Obviously, this method of AML remediation does not address potential methane emissions. A desire to give greater importance to AML mine projects that plug abandoned mine openings to address methane emissions is evident from the guidance. The guidance does not provide the needed clarity as how these very real competing environmental policy conflicts with the Endangered Species Act are to be resolved.

Stakeholder Input

More detail is needed on what changes OSMRE envisions in existing stakeholder engagement practices. While Section 40701 does not alter the existing AML program in this regard, this is an area of significant focus in the guidance. States value public input and already have well-developed, long standing stakeholder engagement practices for receiving it. It would

be helpful to have answers to questions such as what counts as a "community", who counts as a representative of a community, and what counts as engagement.

Justice 40 and Disadvantaged Communities

Success in Justice 40's application to the AML program depends on the specifics of its implementation. Much of this is not in OSMRE's hands because Justice 40 implementation relies on the guidance and screening tool developed by the Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ). We appreciate that OSMRE is striving for an approach to Justice 40 implementation that corresponds with the realities of the AML program and sets the AML programs up for success. Nevertheless, the AML programs do have concerns with current plans for Justice 40's application to AML. Below are some recommendations for how to address them. In addition, several aspects of Justice 40 implementation require more clarity before the AML programs can adequately comment. We urge OSMRE to further develop plans to provide needed clarity, make the necessary accommodations to the AML programs concerns, and to relay these concerns to CEQ. It should not be difficult to comply with Justice 40 through AML work if the initiative's stipulations can be adjusted to properly accommodate the realities of how and where AML impacts exist.

CEQ Justice 40 Interim Guidance and Screening Tool

Current plans for Justice 40 implementation do not mesh well with the realities of AML work. The Justice 40 Interim Guidance issued by OMB and CEQ recognizes AML as a prime example of the kind of unfair burden of energy development that is a focus of the initiative. The Interim Guidance anticipates "reclamation of abandoned mine lands" will fall under the "reduction and remediation of legacy pollution" disadvantaged community criterion and identifies communities that have suffered "[j]obs lost through the energy transition" as categorically "disadvantaged" for Justice 40 purposes. The Interim Guidance also recognizes the relevance of "critical clean water and waste infrastructure," which is another important role of the AML programs. Based on this recognition of the relevance of AML-impacted communities to discussions of environmental justice through Justice 40, it seems that all, or nearly all, coal AML-impacted areas should qualify as disadvantaged communities under Justice 40. However, the data sets used in the beta screening tool on which eligibility for "disadvantaged" status is based give no consideration at all to coal or AML impacts. In addition, the tool establishes a restrictively high threshold for the types of impacts that are considered by the data sets that were included in the tool. The result is that the screening tool exhibits a low degree of overlap between communities that are impacted by AML and those that are considered disadvantaged.

This is very problematic for AML programs because, of course, AML work is not a benefit that can be directed to the places or communities selected by the beta screening tool. Work can only be done in those areas that have been impacted by legacy coal mining. Some states, for example Maryland and North Dakota, have zero overlap between their AML area and their Justice 40-eligible area designated by the beta screening tool, making it literally impossible for them to comply with Justice 40. Many other states have an untenably small amount of overlap, including Pennsylvania, the state with the greatest need for AML work and largest amount of AML funding. Only 8% of Pennsylvania's total AML sites and a mere 3% of its unfunded AML sites occur in Justice 40 eligible area. With $300 million in combined AML funding per year, compliance with Justice 40 would require Pennsylvania to concentrate 40% of that amount in only 3% of its AML impacted area. West Virginia will face a similar situation with $190 million in combined annual AML funding and only 7% of its unfunded AML area within Justice 40-eligible area.

Under these circumstances, AML programs will either be unable to comply with Justice 40, or will have to make significant, detrimental changes to AML processes for project selection to even approach the 40% threshold. Rather than prioritizing safety, health, and environmental impacts, AML programs would have to choose projects with relatively low safety and health or environmental priority because they are the only potential projects available in Justice 40-eligible areas. Preventing the AML programs from fully prioritizing health, safety, and environmental impacts in this way would undermine rather than further the goals of Justice 40 as well as frustrate the AML programs' ability to comply with their fundamental statutory mandate under Section 40701 and Title IV of SMCRA.

This problem can be alleviated by expanding datasets used to identify disadvantaged communities. Geospatial information for AML eligible areas should be incorporated in the geospatial screening tool, creating a workable amount of overlap between AML-impacted and Justice 40-eligible areas. In the Section 40701 guidance, OSMRE appears to contemplate more expansive Justice 40 definitions, such as for low-income communities, which should encompass more coalfield communities. It is helpful and appropriate to expand the non-AML related criteria in this way, because much of the coalfield area in these states qualifies as "disadvantaged" under any objective criterion. If CEQ and OMB fail to make the necessary adjustments to their screening tool, we hope OSMRE will establish program-specific criteria to presumptively establish all AML-eligible areas are disadvantaged communities because they were negatively impacted by past coal mining.

Other Justice 40 Methodology Issues

The AML programs seek clarity on how the Justice 40 calculation work for the AML program. The AML programs recommend that the Justice 40 benefits percentage calculation be

made on the national level for the entire AML program. As discussed above, the states will vary greatly in their ability to meet a 40% threshold, based on the beta version of the Justice 40 screening tool. Some AML programs may be able to devote a higher percentage of funding to areas the tool identifies, while for some it will be lower. Some will not be able to devote any at all to eligible communities. Calculation of the Justice 40 percentage at the national level will help compensate for the inadequacies of the screening tool in capturing coal-impacted areas.

Conclusion

The amount of money Congress provided for coal AML in Section 40701 corresponds almost exactly to the cost of completing the remaining inventory of Priority 1 and Priority 2 AML work according to the E-AMLIS inventory as of the enactment of Section 40701. This suggests that Congress believed most of the work of the AML programs could be completed by enacting Section 40701. While the cost of this work is probably undervalued in the inventory, we do not want to disappoint Congress by falling short of its expectations. The AML programs desire to make as much progress toward this goal as possible.

Instead of guiding the AML programs toward achievement of this goal, OSMRE's draft guidance poses many obstacles. The guidance's many new non-reclamation priorities will cause mission confusion. This and the greatly increased administrative burden will make the program dysfunctional. None of these changes are mandated by the IIJA. They all translate to much less efficiency and higher costs that will impede the AML programs from achieving the goals of Congress. The inefficiency and increased costs are also contrary to the President's goals for the IIJA. First among the IIJA implementation priorities he listed in Executive Order 14,501 (November 15, 2021) is: "investing dollars efficiently, working to avoid waste, and focusing on measurable outcomes for the American people". We need to invest Section 40701 dollars wisely and avoid waste. We need to justify the confidence Congress placed in us. To do this the AML programs must be free to concentrate on our core priorities - eliminating the safety, health, and environmental legacy hazards of coal mining. The OSMRE guidance must allow us to do this. All the new mandates that have no basis in the IIJA must be eliminated from the guidance. The new, unjustified bureaucratic requirements must also be eliminated.

The AML programs' 45 year reclamation success story must be allowed to continue. During this time the AML program has been a vehicle for job creation and greater economic prosperity in America's coalfields. These benefits of AML work will continue to flow, if the AML programs are simply allowed to do their jobs. The draft Section 40701 guidance must be revised to allow us to do so. As written, they contain many fixes for a program that is not broken.

Thank you for the opportunity to provide these comments. We value our partnership with OSMRE and are available to discuss our comments further. Please do not hesitate to contact us.

Sincerely,

Thomas L. Clarke
Executive Director