May 21, 2007

Brent Wahlquist
Acting Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Mr. Wahlquist:

This letter represents the comments of the National Association of Abandoned Mine Land Programs (NAAMLP) and the Interstate Mining Compact Commission (IMCC) regarding draft rules (proposed and interim final) developed by the Office of Surface Mining (OSM) to implement the provisions of the Surface Mining Control and Reclamation Act (SMCRA) Amendments of 2006 (P.L. 109-432). OSM provided both the NAAMLP and IMCC with copies of the draft rules in April and also attended a meeting of both organizations on May 2 and 3 in Indianapolis to discuss the rules. We appreciate the opportunity to submit comments on the draft rules as OSM prepares to move forward with their promulgation later this year.

There are several key sections of the draft rules that we will address in these comments, as noted below. However there are a few over-arching issues related to the interpretation of the new law that we will discuss first, as they set the stage for some of our recommended changes to the rules. All of these issues grow out of OSM's "Major Policy Issues" paper that was also shared with the states in April.

## I. GENERAL OVERVIEW COMMENTS

### Use of Grant Mechanism to Distribute Payments from the U.S. Treasury

Pursuant to the 2006 Amendments to SMCRA, two new types of payments from the U.S. Treasury are established: 1) distribution of the prior unappropriated state/tribal share balances over a seven year period (Section

411(h)(1)) and 2) payments in lieu of future state/tribal shares formerly paid out of the AML Trust Fund pursuant to section 401(g)(1) (Section 411(h)(2)). Section 402(i)(2) requires the Secretary of the Treasury to transfer to the Secretary of the Interior "such sums as are necessary to pay the amount" described above, but no specific payment mechanism is prescribed. OSM prefers to distribute these payments via grants to states and tribes, based on its reading of the law and on past practice, rather than via direct distribution of cash from the Treasury. The states and tribes posit that the new law does not directly address this matter and therefore the Secretary has the discretion to design a payment mechanism that meets the needs of the states and tribes. In line with this discretionary authority, the states and tribes prefer an approach that will provide them with immediate access to those moneys that are due and owing from the Treasury. This can be accomplished through a traditional grant process for those who desire the "protection" and guidance that such a process affords these monetary distributions. However, there is also flexibility to design either a grant or a direct payment mechanism that provides more unrestricted and immediate access to these moneys for states who desire maximum discretion with regard to the use of these moneys in line with the language in Section 411(h)(1)(D)(i) and (ii). In the latter circumstance, the state legislatures will exercise their fiduciary responsibility to insure that the funds are spent legally and appropriately in accordance with the dictates of the 2006 Amendments and state contracting law. Federal audits will also provide a measure of scrutiny and review of project selection and expenditures. There are also other mechanisms available for tracking and facilitating these payments, one example being the management of mineral royalties paid to states under the Mineral Leasing Act and another being a general statement of work detailing how the money will be spent. The states and tribes therefore urge OSM to incorporate significant flexibility and discretion with regard to the types of mechanisms that are available for distributing and expending Treasury payments for both the prior unappropriated state/tribal balances and payments in lieu of future state/tribal share to certified states and tribes.

**Funding for Minimum Program States**

The 2006 Amendments include several provisions that govern the award of grant funds by OSM to states. Section 402(g) has three paragraphs that bear on that topic. Section 402(g)(1) directs that "50 percent of the reclamation fees collected annually in any State" be distributed to that state.

Under section 402(g)(5)(A), "[t]he Secretary shall allocate 60 percent of the amount in the fund after making the allocation referred to in paragraph (1)" for additional grants to states. And section 402(g)(8) states that "In making funds available under this title, the Secretary shall ensure that the grant awards total *not less than* $3,000,000 annually to each State and each Indian tribe. . ." (emphasis added). This latter provision provides OSM the justification for insuring annual minimum program grant funding in excess of the base $3 million level as long as OSM does not contribute more than $3 million from its own discretionary funds.

Section 401 of the bill also has relevant provisions. Sections 401(f)(1) and (2) direct OSM to distribute grant funds to states annually, including the amount needed for the adjustment under section 402(g)(8) (i.e., the "minimum program" adjustment up to $3.0 million). Section 401(f)(3) has a similar provision:

> "IN GENERAL.—… for each fiscal year, of the amount to be distributed to States and Indian tribes pursuant to paragraph (2), the Secretary shall distribute—
>
> (i) the amounts allocated under paragraph (1) of section 402(g), the amounts allocated under paragraph (5) of section 402(g), and any amount reallocated under section 411(h)(3) in accordance with section 411(h)(2), for grants to States and Indian tribes under section 402(g)(5); and
>
> (ii) the amounts allocated under section 402(g) (8)."

This again makes it clear that the legislation requires OSM to provide minimum program states at least $3.0 million annually, under section 402(g)(8), commencing October 1, 2007.

In its restrictive reading of the bill, OSM depends upon a single provision in section 401(f)(5)(B) to reduce the amounts of annual grants to minimum program states from the minimum $3.0 million annual required grant amount. That provision reads (with emphasis added):

> "(B) EXCEPTIONS.—*Notwithstanding paragraph (3)*, the amount distributed under this subsection for the first 4 fiscal years beginning on and after October 1, 2007, shall be equal to the following percentage of the amount otherwise required to be distributed:

(i) 50 percent in fiscal year 2008.

(ii) 50 percent in fiscal year 2009.

(iii) 75 percent in fiscal year 2010.

(iv) 75 percent in fiscal year 2011."

OSM's reliance on this provision ignores the fact that by its own terms (i.e. the "notwithstanding" phrase), it only overrides the requirements of section 401(f)(3). Yet other provisions of the bill independently require the distribution of the minimum amount of $3.0 million. *See* sections 401(f)(1) and (2) and section 402(g)(8). The provision cited by OSM does not override the clear requirements of those other parts of the bill.

The phase-in schedule of section 401(f)(5) only applies to such *additional funds* as might otherwise be provided by OSM to the minimum program states above the guaranteed distributions required elsewhere in the statute. This means that OSM cannot contribute more than $1.5 million *in additional funding* to each minimum program state in fiscal years 2008 and 2009, and not over $2.3 million *in additional funding* in each of fiscal years 2010 and 2011, and not over $3.0 million *in additional funding* in each subsequent year through fiscal year 2024.

This debate goes much deeper than the interpretations of the two sections mentioned above. Congressional intent and history in the passage of P.L. 95-87, the original "Surface Mining Control and Reclamation Act of 1977," deserves merit in the interpretation debate. In the 95th Congress, the late Morris K. Udall (considered by many as the "father" of P.L. 95-87) worked tirelessly with government agencies, industry, and other organizations to make sure this law became a reality. With regard to the reclamation of abandoned mine lands, Title IV of P.L. 95-87 has been the guiding light for both OSMRE and the States/Tribes for almost 30 years. During this time, AML funding issues have overshadowed Congressman Udall's intent as outlined in Section 403 of P.L. 95-87 "Objectives of the Fund." Section 403 set specific priorities as to the expenditure of moneys from the AML fund. The number one priority is "the protection of public health, safety, and property from extreme danger of adverse effects of coal mining practices." It is significant that the Surface Mining Control and

Reclamation Act Amendments of 2006 removed the words "general welfare" from the original wording of Section 403(1). In their infinite wisdom, the 109th Congress wanted to further strengthen Section 403(1) by placing a special emphasis on public health, safety, and property.

There are no specific provisions in P.L. 95-87 or the 2006 Amendments that discuss in detail the specific State/Tribe AML funding formulas that embrace historic coal production, state share (present coal production), and federal discretionary expenses. However, in the 2006 Amendments Congress did single out states and tribes specifically in Section 402(g)(8)(A) stating, "In making funds available under this title, the Secretary shall ensure that the grant awards total not less than $3,000,000 annually to each State and each Indian Tribe having an approved abandoned mine reclamation program pursuant to section 405 and eligible land and water pursuant to Section 404, so long as an allocation of funds to the State or tribe is necessary to achieve the priorities stated in paragraphs (1) and (2) of section 403(a)." The fact that Congress has always (and in the 2006 Amendments continues to) dedicate a section of the law to states and tribes traditionally known as those with "Minimum Programs" solidifies the Congressional intent that these states and tribes annually receive not less than $3,000,000.

In the late 1980s the Mid-Continent Coal Coalition was formed because the Minimum Program States and Tribes had several hundreds of millions of dollars worth of Priority 1 and Priority 2 AML hazards that posed, and continue to pose, a very high public health and safety risk. AML funding had fallen to an annual $1 million level that would not allow the efficient operation of a State/Tribal AML Program. This Coalition gathered Congressional support through letters, resolutions, testimony at Congressional committee hearings, etc. As a result, the budget reconciliation bill passed by the 101st Congress in the fall of 1990 required that the Secretary allocate annually not less than $2,000,000 to Minimum Program States and Tribes. The passage of this bill in1990 was definitive proof that Congress supported an increase in funding for the Minimum Program States and Tribes.

For three years (FY1992, FY 1993, and FY 1994) the Minimum Program States received $2 million annually. Since that time the Minimum Program States have been limited to an annual allocation of only $1.5 million. The primary reason given for not allocating the statutorily

mandated annual $2 million was “budget deficits.” Then under the Clinton administration, there was a “budget surplus,” but the annual allocation remained at $1.5 million. For the last 13 years, Minimum Program States have been critically underfunded in respect to the number of Priority 1 and Priority 2 AML hazards that need to be reclaimed. Respective Administration budgets and Congressional budgets continued to hold the AML Fund “hostage,” while unappropriated balances continued to rise.

In early December 2006, much to the surprise of both OSMRE and States/Tribes, the 2006 Amendments took AML funding off budget. No longer would Congress appropriate AML funds on an annual basis. The pressure was now on OSMRE to develop a method(s) to distribute the AML funds to States and Tribes. OSMRE began to develop future funding projections under the new law. Since December 2006, OSMRE has distributed four different funding charts. With each successive chart, the funding numbers for the States and Tribes would change. But in all four of these OSMRE charts, there was one constant – the Minimum Program States (Alaska, Arkansas, Iowa, Kansas, Maryland, Missouri, and Oklahoma) would receive no funding increases for FY 2008 and FY 2009. Not until FY 2012 would Minimum Program States receive an annual $3 million.

In the last OSMRE Funding distribution chart (Chart 4), the following funding increases are reflected when comparing FY 2007 AML funding to FY 2008 AML funding, as well as the amount of Priority 1 and Priority 2 coal hazards in the AML Inventory for each state:

| | Funding Increases | Amount of Hazards |
|---|---|---|
| Alabama | 96 % | $49.1 million |
| Colorado | 175 % | $24.9 million |
| Illinois | 45 % | $55 million |
| Indiana | 138 % | $12.3 million |
| Kentucky | 124 % | $338.5 million |
| New Mexico | 187 % | $3.2 million |
| North Dakota | 93 % | $41.6 million |
| Ohio | 65 % | $100 million |
| Pennsylvania | 29 % | $1,016.9 billion |
| Utah | 147 % | $4.9 million |
| Virginia | 115 % | $104.1 million |
| West Virginia | 103 % | $790.6 million |

| | | |
|---|---|---|
| Louisiana | 200 % | $0.00 |
| Montana | 229 % | $8.5 million |
| Texas | 238 % | $800,000 |
| Wyoming | 269 % | $25.8 million |
| Crow Tribe | 260 % | $500,000 |
| Hopi Tribe | 250 % | $0.00 |
| Navajo Nation | 215 % | $0.00 |

It should be noted that the term "minimum program" does not refer to lack of AML hazards that a state or tribe has to address, but rather with the lack of funding being generated by active coal mines within the state or tribe for purposes of remediating hazards associated with past coal mining. For example, Oklahoma has an AML inventory of priority 1 and 2 sites that will cost between $125 and 130 million to reclaim using today's cost figures. Kansas has an AML inventory of priority 1 and 2 sites that will cost over $200 million to remediate. However, funds generated by current coal mining activities in these two states generate around $25,000 annually for Kansas and around $100,000 annually for Oklahoma. For perspective, states like Kentucky and West Virginia receive between $6,800,000 and $8,300,000 annually to perform remediation of hazardous AML sites. Interestingly (and in some respects, unfortunately), Oklahoma has an AML inventory of priority 1 and 2 hazards that will cost more to remediate than 14 of the states and tribes listed above and Kansas has an AML inventory of priority 1 and 2 hazards that will cost more to remediate than 16 of the above-listed states and tribes. Therefore, even though the "minimum program" states may get minimum funding, they certainly have their fair share of AML priority 1 and 2 hazards.

From December 2006 through February 2007, OSMRE continued to change their funding distribution charts, using factors such as historic coal production, state share fund balances, and present coal production. During this three month process, each time a new chart was developed OSMRE failed to put emphasis on the real problem; <u>How much is the public affected by Priority 1 and Priority 2 AML hazards?</u> Ignoring AML project sites that are an eminent danger to the health and safety of the public is not what Congress intended.

OSMRE can find the funds in their FY 2008 budget to fund AML Minimum Programs. OSMRE is phasing out the Clean Streams Initiative Program and the Watershed Cooperative Agreements Program. This money

could be used to help fund the Minimum Programs at the annual $3 million level. Furthermore, in its News Release of February 5, 2007, OSM noted that it has off-budget funds in its FY 2008 budget that could fully fund AML minimum programs at not less that the $3 million level. This money was provided to OSM for the purpose of, and should be used for, fully funding the minimum programs at the $3 million level. The bottom line is the Minimum Programs have been ignored for too many years. With the passage of P.L. 109-432, Congress has sent a message to OSMRE that Minimum Programs should be funded at an annual rate of $3 million, starting with the FY 2008 budget. The sad part of this impasse is the fact that those living near or visiting these Priority 1 and Priority 2 AML sites are exposed on a daily basis to the possibility of death and/or injury.

Congress gave OSMRE the authority to develop the AML funding distribution numbers for the states and tribes. The NAAMLP and IMCC urge that during the development of proposed rules and regulations for the 2006 Surface Mining Control and Reclamation Act Amendments, OSMRE "look outside the box" and consider the real reason that Title IV was enacted almost 30 years ago.

**Use of Unappropriated State Share Balances for Noncoal Reclamation and AMD Set-Aside**

Since the inception of SMCRA in 1977 and the approval of state/tribal AML programs in the early 1980's, the states and tribes have been allowed to use their state share distributions under section 402(g)(1) of the AML Trust Fund for high priority noncoal reclamation projects pursuant to section 409 of SMCRA and to calculate the set-aside for acid mine drainage (AMD) projects. Under the new amendments, states and tribes will receive their unappropriated balances in seven equal payments beginning in FY 2008. In its most recent interpretation of the 2006 Amendments, OSM has stated that these moneys cannot be used for noncoal reclamation or for the 30% AMD set-aside. OSM also initially stated that the historic coal distribution to non-certified states and tribes would also not be available for noncoal reclamation, but the agency appears to have relented on this issue and will allow these moneys to be used for both noncoal reclamation and the 30% AMD set-aside. With regard to the unappropriated state and tribal share balances that will be distributed pursuant to Section 411(h)(1) of the 2006 Amendments, the states and tribes assert that these moneys should also be available for noncoal reclamation under section 409 and for the 30% AMD

set-aside. There is nothing in the new law that would preclude this interpretation. Policy and practice over the past 30 years confirm it. The unappropriated state and tribal share balances consist of past moneys collected from coal producers in these states and tribes that were never distributed due to restricted and under-funded appropriations. This money has always been "colored" as state/tribal share money, available for expenditure in accordance with the provisions of SMCRA and now 30 years of experience. The fact that the money is being paid out of Treasury funds does not change the "color" or operation of that money – it has been and will always be state/tribal share money allocated pursuant to section 402(g)(1) of SMCRA.

OSM's new interpretation of SMCRA based on the 2006 Amendments is without support in the law when read as a whole. In interpreting the meaning of section 411, the entire statute must be read in context. Section 403 (which OSM points to) is modified by Section 409, which provides for the expenditure of AML funds at any priority 1 or 2 site, regardless of the commodity that was mined. Section 409(b) indicates that the 50% state share (from 402(g)(1)) and the historic production distribution (402(g)(5)) can be used for noncoal reclamation. If Congress had intended to limit the use of the unappropriated state/tribal share balances (or historic production distributions) that are now finally being returned pursuant to section 411(h)(1), it could have easily done so. However, no changes were made in section 411 to accomplish this. Nor was Section 409 amended in any way.

OSM's new interpretation is also a dangerous policy choice. OSM claims that once a state has completed all of its coal projects, it can then use all of its grant funds for noncoal projects. This will require that states spend years working on high-cost, low-priority coal projects that present little threat to public health and safety, while numerous highly hazardous abandoned noncoal mines remain unattended. In many western states, the AML programs have employed their AML grants to protect people and property threatened by noncoal abandoned mines. In New Mexico, for instance, the state estimates that over 10,000 mine openings remain. The overwhelming majority of these openings are at abandoned noncoal mines. All of the fatalities at abandoned mines in New Mexico over the past few decades have occurred at noncoal mines. With urban growth pushing into undeveloped areas and recreational uses increasing, the danger to public

health and safety from abandoned noncoal mines throughout the country is increasing

Much of the above reasoning also holds true for the availability of the unappropriated balances for purposes of calculating the 30% set-aside for AMD abatement. Again, this work falls within the clear purposes of section 403 of SMCRA and thus any type of restriction on the use of these funds for AMD remediation is inappropriate. Section 403(g)(6)(B)(ii)(I) establishes and defines the use of AMD set-aside funds. That section states that a qualified hydrologic unit destined for AML abatement must have land and water that " . . . include any of the priorities described in Section 403." Obviously, this passage provides a clear nexus to section 403 of the Act. The 2006 Amendments at section 411(h)(1)(D)(ii) state that non-certified states must use amounts provided from Treasury funds in place of the unappropriated balances for " . . . purposes described in Section 403." Again, a clear nexus to section 403 is stated. Actually, the references in sections 402 and 411 to section 403 are identical. Therefore AMD abatement is a purpose under section 403 and Treasury funds should not be artificially excluded for use in the set-aside for AMD. Finally, we should note that each appropriation bill over the past several years has included language that supports the use of funds made available under Title IV of SMCRA for the purpose of environmental restoration related to treatment or abatement of AMD without restriction. Based on the above, the NAAMLP and IMCC request that OSM reconsider its interpretation on the use of unappropriated state and tribal share balances for noncoal reclamation and the AMD set-aside. Adjustments to the draft rules based on these arguments appear below.

**Reduction of the Treasury 1/7th payments for the unappropriated balance by the amount of the export tax lawsuit loss**

**The relevant citations:**

411(h)(1)(A)(i) of P.L. 109-432
In General – Notwithstanding section 401(f)(3)(B), from funds referred to in section 402(i)(2), the secretary shall make payments to States or Indian tribes for the amount due for the aggregate unappropriated amount to the State or Indian tribe under subparagraph (A) or (B) of section 402(g)(1)

411(h)(1)(B) of P.L. 109 432 (emphasis added)
Amount Due – In this paragraph, the term "amount due" means the unappropriated amount allocated to a State or Indian Tribe ***before October 1, 2007*** under subparagraph (A) or (B) of section 402(g)(1).

As a part of our discussion on the unappropriated balance, OSM has stated that should the export tax lawsuit ultimately be lost on appeal, the loss shall be paid out of the trust fund and the 1/7$^{th}$ payments out of the Treasury to each State or Tribe shall be reduced by the like amounts each State or Tribe owed for the lawsuit.

Section 411(h)(1)(B) of P.L. 109-432 states that the amount due each State or Tribe is the amount allocated to each State or Tribe (State Share) before October 1, 2007. Unless the export tax lawsuit is resolved prior to October 1, 2007, then the amount paid out of the Treasury in 1/7$^{th}$ installments to each State or Tribe for the unappropriated balance should not be reduced due to the lawsuit. Although the trust fund would ultimately be reduced by the amount of the export tax lawsuit loss, the payments out of the Treasury should remain unchanged since the amount the payments will be based upon will be established as of October 1, 2007. Further, we do find any language in P.L. 109-432 that can be interpreted to give OSM the authority to reduce payments from the Treasury for the unappropriated balance.

## Effective Date of In-lieu Payments

There has been some confusion about when in-lieu payments from the U.S. Treasury begin under the 2006 Amendments. OSM has stated that they begin in FY 2009, and that payments to certified states and tribes of their 50% share in FY 2008 are made from the AML Trust Fund. Our reading of the 2006 Amendments is that the in-lieu payments from the Treasury begin immediately in FY 2008. The relevant citations are:

Section 401 (f)(3)(B) of P.L. 109-432:

(B) EXCLUSION. —Beginning on October 1, 2007, certified States shall be ineligible to receive amounts under section 402(g)(1).

Section 411 (h)(1)(B & C) of P.L. 109-432:

(B) AMOUNT DUE.– In this paragraph, the term "amount due" means the unappropriated amount allocated to a State or Indian tribe before October 1, 2007 under subparagraph (A) or (B) of section 402(g)(1).

(C) SHEDULE.—Payments under subparagraph (A) shall be made in 7 equal annual installments, beginning with fiscal year 2008.

Section 411 (h)(2)(A) of P.L. 109-432:

(A) IN GENERAL. – Notwithstanding section 401(f)(3)(B), from funds referred to in section 402(i)(2), the Secretary shall pay to each certified state or Indian tribe an amount equal to the sum of the aggregate unappropriated amount allocated on or after October 12, 2007, to the certified State or Indian tribe under subparagraph (A) or (B) of section 402(g)(1).

OSM has advanced the following explanation to support its current declared intention to pay state share funds to the certified states under section 402 (g)(1) in FY 2008 (emphasis added):

"Certified states and tribes will receive distributions under section 401(f) only in FY 2008 because the bill adds a new section 401(f)(3)(B), which provides that certified states and tribes are ineligible to receive their state-share or tribal-share allocations with respect to fees collected after FY 2007. *However, FY 2008 distributions consist of FY 2007 fee collections, so certified states and tribes are eligible to receive 50% of their state or tribal share allocation of fees collected for that year.*

Beginning with FY 2009, certified states and tribes will receive annual payments from the Treasury in lieu of the amount of fee collections during the previous year that would otherwise have been allocated to their state or

tribal share accounts in the AML fund in the absence of new section 401(f)(3)(B) of SMCRA. *Section 411(h)(2) of SMCRA."* [1]

Section 401(f)(3)(B) of P.L. 109-432 states that beginning October 1, 2007, certified states shall not be paid under 402(g)(1). This provision is a complete exclusion. It prohibits certified States or Indian tribes from receiving grants funded by the reclamation fee effective October 1, 2007. There is no language in this section to support an interpretation that a certified State or Indian Tribe can receive after October 1, 2007 grants funded by reclamation fees collected prior to October 1, 2007.

In order to support the position that the exclusion established by Section 401(f)(3)(B) does not apply to grants issued in fiscal year 2008 if funded by reclamation fees collected during fiscal year 2007, OSM staff have explained that the term "received" as used in Section 401(f)(3)(B) means "allocated". This interpretation is contrary to the normal and ordinary usage of the term "received" and is contrary to standard principles of statutory construction. Unless the context clearly indicates otherwise, or the word has been given a specific definition, words in a statute are to be given their normal meaning.

Relying on this interpretation, OSM has developed a distribution chart dated February 22, 2007, showing that $41.6 million will be paid to the certified States or Indian tribes under 402(g)(1) in FY 2008. This distribution represents FY 2007 fee collections. This approach is correct for distributions to non-certified states as required by 401(f)(2) and (3). However, Section 401(f)(3)(B) prohibits certified States or Indian tribes from receiving payments of funds under 401(f) beginning on October 1, 2007. The fees collected and allocated in FY 2007 are to be included in the amounts due to the states that are allocated but not appropriated under Section 411(h)(1)(B). These funds are then paid over seven years, beginning in FY 2008 under 411(h)(1)(C).

The effect of this misinterpretation of Section 401(f)(3)(B) and 411(h)(1)(B) is that $41.6 million would be paid to certified States or Indian tribes with fee collections instead of Treasury funds as required by Section 411(h)(1)(A)(i). The funds so paid will then not be available to be

[1] ***Major Provisions of P.L. 109-432: SMCRA Amendments Act of 2006***, page 3. Distributed to NAAMLP members at its business meeting February 28 – March 1, 2007.

reallocated as historic share funds available for grants under Section 411(h)(4)(A). Furthermore, the interest that should be earned annually on this $41.6 million and paid to the Combined Benefit fund would not be earned and available to be paid.

The draft language in the Proposed and the Interim-final regulations on this subject is consistent with the statutory language in P.L. 109-432 and so does not need to be changed. However OSM's interpretation of P.L. 109-432 is flawed. Based on the above arguments, the NAAMLP and IMCC urge OSM to revise the proposed AML funding distribution chart to show that:

(a) no state share funds are distributed to the certified States or Indian tribes in FY 2008; but,
(b) The $41.6 million should then be included in the calculation of the amount due to certified States and Indian tribes under Section 411 (h)(1)(B).

**Adjustments to the Grants Process**

There is a fair amount of concern by the states and tribes about how the grants process will work under the 2006 Amendments. With the increased amount of money that will be flowing to the states, it will be incumbent on both OSM and the states and tribes to be particularly sensitive to the impacts on the grants process – especially with regard to the length of grants, rollovers, tracking of grant amount (especially by account), recapture, and paperwork reduction. We assert that the timing is ripe for revisiting the existing simplified grants process to consider additional streamlining and simplification. There is some concern that the 2006 Amendments could unnecessarily complicate the paperwork demands associated with annual grants, especially if we are required to track various kinds of moneys that are received. It will be particularly important to clarify that moneys are "expended" once they are obligated, encumbered or otherwise committed for projects. Even with this, deobligation could become a problem if we are unable to roll grants over from year to year. We understand that OSM will be considering various adjustments to the Federal Assistance Manual and to its AML directives and we request an opportunity to review those revisions once they are available. This may present an ideal opportunity for further clarifications to address the above concerns.

## Annual Distribution Charts

It will be critical for the states and tribes to receive the annual distribution charts for AML grants as soon as practicable after the beginning of each fiscal year (i.e. by no later than November 15) . This will be particularly true in the first few years as the states and tribes attempt to forecast how the distribution will impact their respective programs. In this regard, we have attached a chart that, in simplified terms, demonstrates our understanding of the gross distribution formula as presented by OSM to date. It should be noted that the states and tribes do not agree with this distribution formula, as indicated by our comments on the proposed and interim rules. In fact, we have argued in these comments for various adjustments to the formula and to the use of the distributed funds based on our reading of the new 2006 AML amendments. Nonetheless, we would appreciate OSM's comments on our attempt to capture OSM's distribution formula under their interpretation of the 2006 Amendments and any additional explanations (flowcharts) that OSM can share with us regarding their interpretation of the distribution formula under the new law.

## Training

It will be very important for the states and tribes to receive the necessary training to implement the provisions of the new rules, once they are in place – especially as they impact the grants process. We urge OSM to keep this in mind as they consider implementation plans for the future.

## Preamble Language

We recognize that one mechanism OSM has available to clarify certain aspects of the proposed and interim final rules is through the use of preamble language. We would encourage OSM to do so. One example is the need to adjust the priority matrix contained in the Federal Assistance Manual (FAM) to reflect regional differences in land use patterns. Given that much of SMCRA's history was predicated on land use patterns and experience with hazards in the Eastern United States, there are unintentional gaps that fail to recognize the uniqueness of circumstances in other regions of the country. Whereas residents of Eastern states, for instance, may have residences or other structures that were built adjacent to known hazards, residents of Western states (and non-resident recreational users of Western lands) are exposed to AML features that consist of largely unknown hazards

that are equally, if not more, dangerous than "known" features. Thus, as we consider what would be defined as an "extreme danger", we need to be cognizant of the fact that unknown hazards in remote or rural areas can be even more dangerous than known dangers as the unsuspecting public encroaches on these areas through occasional use or through urban sprawl. Recognizing the exposure of the populace to the hazards associated with abandoned mine sites will assist the states, tribes and the federal government in fully implementing the objectives of the AML program under SMCRA.

## II. PROPOSED REVISIONS TO OSM'S DRAFT PROPOSED AND INTERIM RULES

The NAAMLP and IMCC recommend the following changes to OSM's draft proposed and interim final rules based on the above commentary.

### Section 870.5 – Definitions

"Adjacent" – change to read as follows:

"*Adjacent* means adjoining, in proximity to or contiguous with eligible lands and waters."

Justification: OSM's draft rule implies that a Priority 1 or 2 project must be undertaken in order for a Priority 3 project to be considered "adjacent to" the Priority 1 or 2 problem. This is not what the law requires. It is not a matter of priority; it is a matter of proximity. As long as the Priority 3 project is geographically connected to the Priority 1 or 2 site, the test is satisfied. Furthermore, OSM's proposed language conflicts with statutory provisions in sections 403(a)(1)(B)(ii) and (2)(B)(ii) that eligible lands include those that "are adjacent to a site *that has been or will be remediated."* (emphasis added). In its proposed language, OSM is implying that for a priority 3 feature to be eligible, it has to be reclaimed in order to access or remediate the priority 1 or 2 feature. This simply cannot be the case if the priority 1 or 2 feature has already been reclaimed or may be so in the future, as anticipated by the 2006 amendments. We recommend use of the common dictionary definition of "adjacent". We also oppose the concept of tying the definition to a monetary determination. There is nothing in the law to

support this criterion and we believe it would be difficult to determine and apply. The use of a proximity criterion will also allow us to take into consideration public rights of way, roads, etc, that may be present at or near the site. Finally, to define the term otherwise would be to severely limit the number and types of Priority 3 projects that could be addressed, which is contrary to the intent of the law.

"In conjunction with" – change to read as follows:

"*In conjunction with* means reclamation of priority 3 features in phases or through a combination of contracting and construction with priority 1 and/or 2 features."

Justification: It is important to recognize that Priority 3 work cannot only be done in conjunction with a Priority 1 or 2 feature through a combined contracting or construction effort, but in phases of construction with a Priority 1 or 2 project, especially where the project is particularly large or the AML program is small (as with the minimum program states). We recommend deletion of the phrase "would have provided significant savings to the AML fund" for the same reason we recommend deletion of the last sentence in the definition: these terms are elusive and difficult to define and quantify. The law does not specify this type of monetary criterion and it would be challenging to implement. We assert that it is best to focus on the administrative aspects of project work, which are easier to define. Finally, to define the term otherwise would be to severely limit the number and types of Priority 3 projects that could be addressed, which is contrary to the intent of the law.

"Qualified Hydrologic Unit" – change to read as follow:

Change the word "and" to "or" between subparagraphs (b)(1) and (2), as in the existing regulations.

Justification:

We realize that OSM's new definition is consistent with the statutory language, but actual practice over the past 25 years has been that hydrologic units are defined as containing lands and waters that are either eligible OR the subject of bond forfeitures, but not both. To define the term otherwise would be to severely limit the scope of this important provision of the law.

With the new emphasis on allowing states to set aside upwards of 30% of their AML funds for the abatement of acid mine drainage projects, to limit the definition in this way would emasculate the purposes and intent of the program.

**Section 872.11(b)(1) – Abandoned Mine Reclamation Fund**

Delete section 872.11(b)(4)(ii)(E).

Justification: Based on the arguments articulated above with respect to the use of the states' and tribes' unappropriated share balances, this section should be deleted. There is no basis to restrict the use of these moneys for noncoal reclamation.

**Section 872.13 – Other Treasury Funds for Abandoned Mine Reclamation Programs**

Change the reference in the introductory phrase of subparagraphs (a) and (b) to read: "872.11(b)(1)(vi) and (b)(2)(vi)" – NOT "(vii)".

Change Subparagraph (a) and (b) to read as follows: "Notwithstanding Sec. 872.11(b)(1)(vi) and (b)(2)(vi), from funds in the Treasury not otherwise appropriated and transferred to the Secretary of the Interior pursuant to section 402(i)(2) of the Act, effective October 1, 2007, OSM **shall make payments** to States and Indian tribes . . . ." Also, in subparagraph (a), change the reference to "prior balance funds" to "prior balance payments".

Change section 872.13(a)(3) to read as follows: "States and Indian tribes **may** apply for and receive these annual installments in grants, following the provision of Section 886. Unless a certified State or Indian tribe specifically requests that OSM disburse funds due the State or Tribe in whole or in part through a grant or grants, payments referred to in Section 411(h)(1)(A) (prior balance payments) shall be made in one lump sum payment to the State or Tribe no later than 90 days after the start of the federal fiscal year in which the payment is due."

Change section 872.13(b)(3) as follows: delete the current language and insert the following: "Unless a certified State or Indian tribe specifically requests that funds be disbursed through a grant or grants following the provisions of section 886, payments referred to in Section 411(h)(2)(A) (in

lieu of payments) shall be made annually in one lump sum payment to the State or Tribe no later than 90 days after the end of the federal fiscal year in which the collections are made."

Change section 872.11(b)(4) by striking the word "shall" and inserting "may".

Justification: All of these changes are intended to reflect the discretionary authority vested in the Secretary to make payments to states and tribes through either grants or direct payments, depending on the preference and needs of the respective state or tribe. Section 411(h) uses the term "payments" which appears to embrace a wider degree of flexibility regarding distribution of funds other than just grants. See also the discussion on this topic above.

Change subparagraph 872.13(a)(5) to read as follows:

"(5) States and Indian tribes that are not certified under section 411(a) of the Act shall use any amounts available under this paragraph to achieve the priorities described in sections 403(a)(1),(2) and (3) of the Act, for water supply restoration under sections 403(b)(1) and (2) of the Act, for AMD abatement under section 402(g)(6) and for noncoal reclamation under section 409 of the Act."

Justification: The 2006 Amendments at Section 411(h)(1)(D)(ii) state that the unappropriated prior state and tribal share funds must be used as described at section 403. In interpreting the meaning of sections 411 and 403, the entire statute must be read in context. When doing so, it is clear that section 403 is modified by section 409. Section 409 provides for expenditure of funds at any priority 1 or 2 site, regardless of commodity mined. Furthermore, section 409(b) states that the 50% state and tribal share can be used for noncoal reclamation (referencing section 402(g)). The unappropriated state and tribal shares are in fact the balance of the 50% shares referenced in section 402(g) that have been held in abeyance over the years. There should be little ambiguity that this money is available for noncoal reclamation (as well as for the 30% AMD set-aside). If Congress had intended to somehow qualify or restrict the use of the unappropriated balances, it could easily have done so in section 411. However, it failed to do so and thus we can only assume that the traditional funding mechanism that has prevailed over the past 30 years remains intact. Such an

interpretation is also consistent with the purposes and objectives of Title IV of SMCRA, which are to protect citizens from the adverse impacts of past mining practices – both coal and noncoal.

Add a new subparagraph 872.13(b)(5) as follows: "Payments referred to in section 872.13(b)(3) to certified States and Tribes shall be used with priority given to abandoned coal mine reclamation needs until the State or Tribe and OSM determine that abandoned coal mine reclamation is substantially complete. Thereafter, current in lieu payments will be used for purposes established by the state legislature or tribal council."

Justification: The law and draft rules are unclear as to how certified states and tribes may use current in lieu funds when the state or tribe has completed abandoned coal mine reclamation. Current in lieu funds in excess of those required for completion of abandoned coal mine reclamation should be used for purposes established by the state legislature or tribal council with priority given to addressing the impacts of mineral development.

**Section 873.12 -- Future set-aside program criteria**

In subparagraph (a), change the last phrase to read as follows: " . . . are expended by the State or Indian tribe solely to achieve the priorities stated in Sections 403(a) ***and 409*** of the Act, 30 U.S.C. 1233 ***and 1239***, after September 30, 1995".

Justification: This adjustment is needed to clarify that funds set-aside by the states prior to December 12, 2006 are available for both coal and noncoal work.

**Section 875.15 – Reclamation priorities for noncoal program.**

Delete Subparagraphs (c) – (f).

Justification: These subparagraphs must be deleted in order to be consistent with the new provisions in the 2006 Amendments at section 411(h)(1)(D)(i) regarding use of AML funds by certified states and tribes. Pursuant to this section of the 2006 Amendments, certified states and tribes are allowed to use their AML funds "for the purposes established by the State legislature or tribal council of the Indian tribe, with priority given for addressing the impacts of mineral development". Thus those provisions in OSM's existing

regulations that provide for a concurrence role by the OSM Director are no longer applicable and should be removed. Furthermore, as we argue above, the payment mechanism that will attend the distribution of these funds will likely be different than what has occurred in the past, and therefore the provisions in subparagraphs (c), (e) and (f) will likely no longer be applicable.

**Section 876 -- Acid Mine Drainage Treatment and Abatement Program**

Section 876.12 Eligibility -- add the following: "or up to 30% of the funds received pursuant to Section 4121(h)(1) of the Act."

Justification: this language clarifies that up to 30% of the prior unappropriated state and tribal share balances distributed form Treasury funds may be deposited into state and tribal AMD set-aside funds.

**Section 886.12(b) – Coverage and amount of grants**.

Change subparagraph (b) to read: "Grants shall be approved for reclamation of eligible lands and water in accordance with sections 404 and 411 of the Act and 30 CFR 874.12, 875.12 and 875.14, and in accordance with the priorities stated in sections 403, 409 and 411 of the Act . . . ."

Justification: We have added section 409 as part of the priority reference to be consistent with the above changes regarding noncoal reclamation and to specifically reference noncoal lands.

**Section 886.13 (b) – Grant period**

Change subparagraph (b) to read as follows: "The Director shall approve a grant period on the basis of the information contained in the grant application. The grant period should normally be for 3 years, and may be extended. Grants of funds distributed in Fiscal Years 2008, 2009 and 2010 shall be awarded for 5 years."

Justification: We understand that OSM will not require specific projects to be listed in the grant application, so this phrase has been removed. We also

understand that OSM will allow extensions of the normal 3 year grant period and that those extensions may be for more than one year, which we believe is appropriate. Finally, we assert that the 2006 Amendments specifically call for a 5 year grant period for Fiscal Years 2008 – 2010 and that this is a mandatory requirement.

One further note: it does not appear that the section 411(h)(1) Treasury funds are subject to any of the grant period timelines established by section 402(g)(1)(D). Nor does there appear to be any authority in the Act to establish timelines for the use of 411 funds. Thus, an annual distribution payment in the full amount due under section 411 should be available as an option for grants to each state/tribe, which in turn could be deposited into a separate state account and considered state funds and used without restriction for any section 403 priority (including AMD abatement).

**Section 886.16(a) – Grant agreements**.

Change subparagraph (a) to read as follows: "OSM shall prepare a grant agreement that includes a general statement of the types of work to be covered by the grant."

Justification: We assert that the grant agreement need only contain a general statement of the types of work to be covered by the grant, not a listing of specific projects. This change is intended to clarify that intent.

**Section 886.26 – Unused Funds**

Delete subsections 886.26 (a)(iii) and (iv). Also, delete subparagraph 886.26(b) and add the following: "Deobligation requirements do not apply to certified States and Tribes."

Justification: No treasury payments should be subject to deobligation requirements. OSM should work with the states and tribes to insure that funds do not revert back to the Treasury. With maximum flexibility in designing payment protocols and with appropriate grant periods and applicable requirements, there should be no need for reversion of these payments, especially if OSM and the states/tribes are working together to closely monitor the situation.

We appreciate the opportunity to submit these comments and trust that OSM will give them serious consideration as the agency moves forward with the development of the proposed and interim final rules. We would welcome the opportunity to meet with OSM to further discuss the draft rules, should you so desire. Should you have any questions or require additional information, please do not hesitate to contact us.

Sincerely,

John Husted
President, NAAMLP

Gregory E. Conrad
Executive Director, IMCC

Attachment

cc. NAAMLP Member States and Tribes
IMCC Commissioners

## OSM OVERVIEW OF AML FUNDING PER 2006 AMENDMENTS

| | State Share (Non-Certified) | Historic Share (Non-certified)<br>1. Traditional<br>2. In-lieu transfer | Unapprop. Balance (Everyone) (Treasury (T) Funds) | In-Lieu (Certified) (Begins in 2009) | Min. Program (Non-Certified) |
|---|---|---|---|---|---|
| Amounts | 50% | 30% + 50% From In-Lieu | 1/7 of Bal. Per Year (T) | 50% (T) | At Least $3 Million |
| How Can It Be Spent? | P1's & 2's P3's in conjunction with<br><br>Non-Coal | P1's & 2's P3's in conjunction with<br><br>Non-Coal | P1's & P2's P3's (coal only unless certified) No Non-Coal | As authorized by State Legislature regarding mineral development | P1's & Ps'2 P3's Non-Coal (But no Federal Make-up Money) |
| 30% AMD Set Aside | Y | Y | N | N/A | Y (Limited to State Share and Historical Coal) |