

AML Campaign Comments for Proposed SMCRA Rulemaking

In 2006, Congress passed significant new amendments to SMCRA. In addition to renewing its commitment for reclaiming legacy coal mining problems, it also recognized the importance of water resources by giving new flexibility to states and tribes to fund abatement and treatment projects related to acid mine drainage (AMD). Provisions in the amended legislation exhibiting the clear intent of this flexibility are embodied in 402(g)(6) "the 30% AMD Set-aside", and in 403(a) - the ability to promote an adjacent Acid Mine Drainage (AMD) problem (associated with an existing Priority 1 or 2 feature) to Priority 1 or 2. Further intent is demonstrated with 403(b) - a change that would now allow up to 100% of a state or tribe's annual grant to address water supply issues caused by legacy mining.

Each state and tribe has its own unique mix, circumstances, and needs with regard to its Priority 1, 2 and AMD problems. Rulemaking should generally recognize this uniqueness as well as the rights of states and tribes by avoiding prescriptive and restrictive "one-size-fits-all" rules so that each state or tribe may tailor solutions it deems to be most appropriate for its own circumstances. We believe the increased statutory flexibility given to states and tribes by Congress to select the mix of reclamation projects to be addressed should also extend to the implementation level defined through rulemaking.

AMD Set-aside: "Hydrologic Unit" and "Comprehensive Manner"

We note that OSM has not proposed to define two terms important in the administration of Section 402(g)(6), the AMD Set-aside. Those terms are "*hydrologic unit*" and "*comprehensive manner*." In electing not to promulgate uniform national definitions, OSM has effectively, if tacitly, left their interpretation to the discretion of each state or tribe with an approved AML program. We believe this deference is appropriate, but we urge OSM to eliminate any doubt on the subject by stating explicitly that its regulations leave definition of "*hydrologic unit*" and "*comprehensive manner*" to the discretion of each State or tribe authorized to administer an approved AML program.

Definition of Adjacent in promoting AMD to Priority 1 or 2

With regard to proposed 30 C.F.R. § 874.13(a), we urge OSM to amend the proposed rule in order to promulgate a uniform, national policy that enables states and tribes with approved AML programs to upgrade Priority 3 sites to Priority 1 or 2 whenever the Priority 3 site is either "geographically contiguous" or "hydrologically connected" to a Priority 1 or 2 problem. To accomplish this, we urge OSM to promulgate as final 30 C.F.R. § 874.13(a)(3) the following amended version of the proposed rule (amendments shown in bold type):

(3) *Priority 3*: The restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices, including measures for the conservation and development of soil, water (excluding channelization), woodland, fish and wildlife, recreation resources, and agricultural productivity. Priority 3 land and water resources that are **either** geographically contiguous with, **or hydrologically connected to**, existing or remediated Priority 1 or 2 problems will be considered adjacent under paragraphs (a)(1)(ii) or (a)(2)(ii) of this section. **Priority 3 water resources that discharge or receive AMD associated with a Priority 1 or 2 problem will be considered hydrologically connected to that problem if the problem is the source of at least 50% of the acid mine drainage that the Priority 3 water resource discharges or receives.**

The reason for amending the proposed rule is straightforward. Mining, by its nature, does not limit its effects to surface expressions. This is particularly true with the formation and conveyance of AMD. Subsurface hydrology may have been altered and connected by mining activities in complex ways having little to do with surface boundaries. An entirely surface based definition of *adjacent* is inadequate and likely not the intent of the statute. Further, subsurface hydrology can play a fundamental role in the surface expression (outfall) of AMD which may not fall within the proposed meaning of *adjacent*.

To assure that the hydrologic connectivity test that we recommend does not sweep in Priority 3 sites that are not truly “adjacent” to a Priority 1 or 2 source of AMD, we ask that OSM include the requirement that the Priority 1 or 2 problem at issue be the source of at least 50% of the AMD that the Priority 3 site discharges or receives. Such a limit would preclude upgrade of Priority 3 sites whose hydrologic connection to a Priority 1 or 2 site is so attenuated other AMD contributors are the predominant source of pollution at the Priority 3 site. Where that is the case, we do not believe that any attenuated hydrologic connection which may exist can reasonably make the two sites truly “adjacent.”

On using certified in lieu funds for any purpose

We oppose the promulgation of proposed 30 C.F.R. § 872.34 and disagree with OSM’s rationale for proposing it. Sections 411(b) through (g) of the statute provide context and guidance for how **all** certified funds must be used, regardless of the origin of the funds at issue. Moreover, Title IV of SMCRA establishes the overall context and methodology for dealing with the effects of coal or minerals development. The absence of explicit provision in SMCRA addressing how **certified in lieu** funds may be used does not authorize organizations that receive such funds to use them *for any purpose*. Sections 411(b) through (g) set the rules for expenditure of all funds involved in the AML program, other than those which other sections explicitly control. For that reason, and contrary to OSM’s rationale, an explicit provision in the statute would be required in order to use certified in lieu funds *for any purpose*.

IMCC/NAAML P in comments

The following are topics are addressed by the IMCC/NAAML P in comments made May 21, 2008 to Brent Whalquist of OSM for which we wish to assert our agreement:

Funding for Minimum Program States

The AML Campaign joins the IMCC/NAAML P in their opinion that minimum program states are both deserving and due a minimum of \$3 million annually for their AML programs.

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

The AML Campaign joins the IMCC/NAAML P in their opinion asserting the use of unappropriated state share balances for noncoal reclamation and AMD Set-aside.