



OSM Releases Long-Awaited Guidance on Implementation of AML Grants in the Bipartisan Infrastructure Law

On July 21, 2022, the U.S. Department of the Interior’s Office of Surface Mining Reclamation and Enforcement (OSM) released its long-awaited “Guidance on the Bipartisan Infrastructure Law Abandoned Mine Land Grant Implementation” for use by participating states in applying for the first \$725 million in funding available for projects involving the reclamation of abandoned mine lands (AML) under the Bipartisan Infrastructure Law (BIL). Overall, the BIL provides a total of \$11.3 billion in AML grant funding over 15 years to eligible states to help communities eliminate dangerous environmental hazards and pollution caused by coal mining that took place prior to the August 3, 1977, effective date of the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201, et seq. (SMCRA).

The AML reclamation program, funded by per-ton fees on coal production, was created under Title IV of SMCRA; the BIL provisions (modifying the “AML Economic Revitalization (AMLER) Program”) greatly increase the funding for the program and provide additional factors to be considered in awarding projects under it. Generally, the AMLER Program has provided annual grants to the six Appalachian States with the highest number of unfunded Priority 1 and Priority 2 AML problems based on OSM’s AML inventory data: Ohio, Pennsylvania, West Virginia, Alabama, Kentucky, and Virginia.

As an example of the magnitude of the increased funding from the BIL, since the program was created in 2016, West Virginia (through its Department of Environmental Protection or “WVDEP”) has received approximately \$25-\$30 million each year to use in awarding contracts for AMLER projects. Under the BIL, the WVDEP anticipates receiving some *\$140 million each year* for the next 15 years to support projects under the program.

However, use of BIL funding does differ from the traditional fee-based AML funding in a few important ways. Some of those differences are:

- Stand-alone projects classified as Priority 3 (lowest priority under SMCRA Title IV, that are typically last to be addressed) are eligible for BIL funding, regardless of whether the project will be completed in conjunction with other projects classified as Priority 1 or Priority 2 projects under SMCRA Title IV;
- AMD treatment projects that are not part of a qualified hydrologic unit are eligible for BIL funding; and
- Eligible states and tribes are not authorized to place BIL AML grant funds into AMD set-aside accounts.

AUGUST 11, 2022

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In spending BIL AML funds, states are directed to prioritize projects that provide employment opportunities to current and former employees of the coal industry. To measure this, states have the option of requiring contractors to affirm that they will give preference to these individuals in any hiring for BIL-funded AML projects, and they may choose to require submission of data substantiating any reported employment of those persons. The guidance also notes that for projects valued in excess of \$1 million, states should require a certification that the project will use a unionized workforce or the project applicant should provide an explanation of how its employment practices satisfy a list of key labor-related requirements.

Additionally, in accordance with President Biden's Executive Order 14008, states are encouraged to prioritize projects that equitably provide funding under the "Justice40 Initiative," a policy that establishes a goal that 40 percent of the overall benefits from a program should flow to disadvantaged communities. OSM has indicated that in the near future it plans to commence rulemaking around a proposed regulation that would place firm requirements on states to prioritize contractors that provide these employment opportunities. These current policies and future rules make it important that project applicants work closely with the state agency staff in completing the required application materials in a manner that is sufficiently detailed and responsive to these concerns, so that an application is not disqualified from consideration or determined to be of lower merit for failing to do so.

To be eligible for an award, project applicants must not be permit-blocked under the federal and state regulations that determine eligibility for mining permits and provisional permits, as implemented by OSM's Applicant/Violator System (or "AVS"). In addition, states are expected to follow best practices in engaging input from local communities and other stakeholders in selecting and developing eligible projects.

Finally, OSM has determined that all BIL AML funded reclamation projects are major federal actions and are therefore subject to review under the National Environmental Policy Act (NEPA). Although NEPA allows for the development and approval of Categorical Exclusions (CE) from the statutory environmental review process (and OSM has a number of CEs in place), OSM anticipates that AMLER projects will typically require completion of at least an Environmental Assessment (EA). In this regard, OSM stresses that projects that will be completed in phases must be evaluated in a single NEPA review document, and all connected actions (regardless of funding source) are considered part of a single project under NEPA.

West Virginia Tax Credits for Reclamation of Bond-Forfeited Sites. On a separate but related note, pursuant to *W. Va. Code* § 22-3-11(g)(2), West Virginia allows current mine operators to enjoy substantial tax credits for performing reclamation work at mine sites that were the subject of bond forfeitures *after* August 3, 1977 (so-called "Special Reclamation Fund" or "SRF" sites, that are not eligible for AML funding). Under that statute and associated regulations at *W. Va. C.S.R.* § 110-29-1, et seq., a mining company may claim dollar-for-dollar credits against its 27.9 cents per-ton SRF fees, calculated based upon the *WVDEP's* estimated costs for reclaiming a site — even if the operator spends less to complete the work.

For questions about the AML funding programs and other reclamation contract opportunities available under SMCRA and delegated state mine regulatory programs, please contact Christopher B. (Kip) Power at (681) 265-1362 or cpower@babstcalland.com, or Marley R. Kimelman at (202) 853-3464 or mkimelman@babstcalland.com.

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