

December 4, 2008

Mark Van Putten
Coordinator of Stakeholder Input
U.S. Department of the Interior
Obama/Biden Transition Office
Washington, DC

Dear Mr. Van Putten:

As state government agencies with responsibility for the regulation of mining and attendant environmental impacts within our respective states, we hereby transmit the attached report that addresses several critical environmental and natural resources issues facing the Obama/Biden Administration. The Interstate Mining Compact Commission (IMCC), the Western Interstate Energy Board (WIEB) and the National Association of Abandoned Mine Land Programs (NAAML) are multi-state governmental organizations that together represent some 30 mineral-producing states and Indian tribes, each of which implements programs that regulate the environmental impacts of both coal and hardrock mining. Many of these programs involve delegations of authority from the federal government pursuant to national environmental laws such as the Surface Mining Control and Reclamation Act and the Clean Water Act. Under these statutes, the states exercise primary responsibility for the permitting and inspection of the affected mining operations, for the enforcement of applicable environmental performance standards, and for the protection of public health and safety. See attached resolution.

In this report, we address the relationship between the states (and in many cases the Indian nations/tribes) and the Office of Surface Mining Reclamation and Enforcement within the U.S. Department of the Interior. Over the course of the past 40 years with the passage of sweeping national environmental laws, the states and tribes have taken the lead in fashioning and then implementing effective programs for the regulation of mining and its impacts on the environment. Significant progress has also been achieved in terms of the working partnerships between the states/tribes and the federal government that are critical to the effective implementation of these laws. And yet there are several issues that require additional attention. These include the following:

- Federal funding for state and tribal regulatory programs must keep pace with inflation and meet identified state needs and priorities
- Federal support for state and tribal abandoned mine lands (AML) programs must continue unabated as we strive to clean up old mines and address emergencies
- The federal government should continue to support the states through technical assistance and comprehensive training opportunities
- Federal oversight of state regulatory programs should continue to focus on meaningful accomplishments on-the-ground where mining and reclamation is occurring
- Federal rulemakings or initiatives that directly impact state program implementation should fully consider and address state input and

recommendations; should avoid adverse fiscal impacts on the states; and should provide for meaningful public involvement.

As the Administration considers a revamped energy policy for the country, it is important to consider the unique position, role and contribution of state governments. This is particularly true in protecting the environment and the public during the extraction of coal and other minerals that support the infrastructure behind energy production. In most instances, the states are the front-line regulatory authorities when it comes to the extraction of mineral resources within their respective borders and are tasked with achieving a balance between the production of those resources and the protection of the environment, as well as assuring that the health and safety of the public and the Nation's miners are accounted for.

It is our intention in this report to address the various issues that are ripe for resolution in this Administration and that will set us on the course to continued improvements and successes in the environmental arena. In the final analysis, we believe that the key to progress on many of the issues is open and effective communication, coordination and cooperation between the states and the federal government. We consistently seek to operate our regulatory programs in a responsible, efficient and productive manner whereby environmental goals are achieved, problems are identified and addressed, and a balance is struck between mining, environmental protection and preservation of citizens' rights. We trust that we can work together in accomplishing these shared objectives.

In this regard, we would welcome an opportunity to meet with appropriate members of the new Administration's transition team to discuss matters of mutual interest and concern and to further elaborate on the issues addressed in our report. In the meantime, we would be happy to provide you with any additional materials that would be helpful as you move forward in this important area of state/federal relations. A listing of state contact persons is also enclosed. Please do not hesitate to contact us for any information you may need or to answer any questions you may have.

Sincerely,

Gregory E. Conrad
Executive Director
Interstate Mining Compact Commission
gonrad@imcc.isa.us

Douglas C. Larson
Executive Director
Western Interstate Energy Board
dlarson@westgov.org

Steve Herbert
President
National Association of Abandoned Mine Land Programs
sherbert@dnr.IN.gov

Transition Team Report

A. Introduction

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) is one of several laws passed in the environmental decade of the 1970s that provided for a cooperative and somewhat unique blend of federal and state authority for implementation of its provisions. One of the law's key underpinnings was that the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to the Act should rest with the states, due to the diversity of terrain, climate, biologic, chemical and other physical conditions related to mining operations.

From our perspective, the implementation of SMCRA by the states has been a remarkable success. The stated purposes of the Act have been or are being accomplished and the overall goal of establishing a nationwide program to protect society and the environment from the adverse effects of past and present surface coal mining operations has been achieved. Drainage and runoff controls are in place to ensure that downstream waters are not filled with sediment or otherwise polluted by mining activity. Blasting operations are controlled to prevent damage to nearby buildings and other property. Final grading and reshaping of mined lands are undertaken to ensure that they are stable and approximate their original contour. Topsoil is preserved and then replaced on mined lands to accomplish high levels of productivity. Mined lands are reclaimed to a variety of beneficial uses contemporaneously with the completion of mining. Once reclaimed lands are fully bond released, they are returned to local landowners in equal or better condition than before mining began. All of these statutory requirements are being accomplished while maintaining a viable coal mining industry that is essential for meeting our Nation's energy needs.

As we reflect back on the past 30 years since the enactment of SMCRA, much has changed and yet some things remain the same. In the early years, we were focused on the development of a comprehensive federal regulatory program that would serve as the baseline for SMCRA's implementation. Many of these initial rules faced legal challenges as being arbitrary, capricious or inconsistent with law and took many years to resolve. At this point, the majority of the federal rules are in place and working effectively. However, this is not to say that we are completely out of the woods with respect to significant future rulemakings. Examples of rules currently before the Office of Surface Mining Reclamation and Enforcement (OSMRE) are a proposed rule regarding mine placement of coal combustion by-products and a final rule concerning stream buffer zones. However, in general, the regulatory program is more stable and certain than it was even 10 years ago, which benefits both coal operators and citizens.

B. The State-Federal Partnership and Federal Oversight of State Programs

One of the key components of SMCRA when first enacted was its reliance on a unique and challenging arrangement of state and federal authority to accomplish its intended purposes and objectives. Pursuant to the state primacy approach embodied in SCMRA, the states serve as the front-line authorities for implementation of the public protection and environmental conservation provisions of the Act, with a supporting oversight role accorded to OSMRE. It has taken a good portion of the past thirty years to sort out the components of these often competing roles, but the result has been a balance of authority that generally works.

During the past ten or so years, the working relationship between the states and OSMRE has been particularly productive and non-contentious. We have moved beyond the second-guessing of state decisions that predominated the early years of state program implementation and instead are engaged in more cooperative initiatives where OSMRE strives to support the states through technical advice and training and where the states and OSMRE work together to solve difficult policy and legal questions. OSMRE's oversight program is more focused on results, looking at on-the-ground reclamation success and off-site impacts, which better reflect the true measure of whether the purposes of SMCRA are being met. In fact, over the years, both OSMRE's oversight program and several state performance-based regulatory programs have received national recognition for their effectiveness and efficiency.

The first attempt at designing a meaningful oversight program in the mid-1980's was merely an exercise in data gathering or output measurement. We were concerned then with numbers of inspections, numbers of permit reviews and numbers of enforcement actions. OSMRE also tended to look behind state permitting decisions to determine whether OSMRE would have handled them the same way the states did. This type of paternal "second guessing" generated significant conflict and even resentment between the states and OSMRE. In addition, the numbers that were collected into oversight reports told us little or nothing about whether the objectives of SMCRA were being met. Rather than a bean counting approach, we needed to focus on the following: what was happening on the ground?; how effectively were state programs actually protecting the environment?; how well was the public being protected and how effectively were citizens being served?; how well were we working together as state and federal governments in implementing the purposes of SMCRA?

Following an effort by OSMRE and the states in the late 1980's to fashion a more effective state program evaluation process based on a goal-oriented or results-oriented oversight policy and another review of the process in the mid-1990's, a performance measurement approach was adopted, based in large part on the requirements of the Government Performance and Results Act (GPRA). The new outcome indicators focus on the percentage of coal mining sites free of off-site impacts; the percentage of mined acreage that is reclaimed (i.e. that meets the bond release requirements for the various phases of reclamation); and the number of federal, private and tribal land and surface

water acres reclaimed or mitigated from the effects of natural resource degradation from past coal mining, including stream restoration, water quality improvement, and correction of conditions threatening public health or safety. These new measurements are intended to provide Congress and others with a better picture of how well SMCRA is working and how well the states are doing in protecting the public and the environment pursuant to their federally-approved programs.

There is some thought that, following ten years of experience with these measures, it might be appropriate to consider appropriate adjustments that reflect new realities. We would be amenable to a fresh look at these three measures to the extent they do not fully capture what is happening on the ground. In the meantime, however, we assert that effective program implementation by the states and compliance by the coal industry are resulting in the reclamation and restoration of both active and abandoned sites that meet the objectives of SMCRA and benefit both people and the environment.

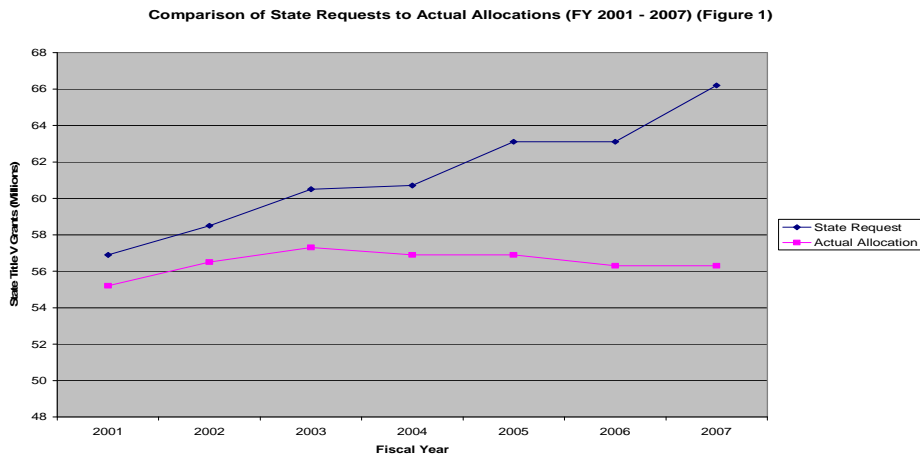
Over the past thirty years, state regulatory programs have improved to the point that implementation is highly successful. Due to this success, the overall programmatic emphasis under SMCRA has shifted from structural and administrative issues to specific technical issues that are encountered as reclamation technology and science are advanced. These issues tend to manifest themselves as environmental challenges unique to particular regions or states, many of which must be resolved during the permitting process. They may also arise as a result of state inspections at mining sites. In any event, due to constraints on existing state resources, states may be unable to undertake the type of technical analyses that attend these issues. This is where OSMRE serves a valuable support mechanism for the states (as anticipated by Section 705 of SMCRA) by providing technical assistance. In doing so, however, OSMRE must avoid what has been a tendency in the past to use the technical assistance process to second-guess state actions (be they permitting, inspection or enforcement), simply because an OSMRE staff person disagrees with the state on a matter that the state initially turned to the agency for assistance. In addition to meaningful and properly focused assistance, the states also depend on OSMRE's Technical Innovation and Professional Services (TIPS) program. This has been one of OSMRE's most valuable and effective initiatives and serves as the cornerstone of the states' computer capability, particularly now that many states are utilizing or moving toward electronic permitting. We trust that this Administration will continue their support for TIPS and for the hardware and software upgrades that are required to assure the system's integrity and usefulness. TIPS training is also critical.

One of the other key successes of SMCRA over the years has been its training program. Through a combination of both state and federal agency instructors, OSMRE's National Technical Training Program (NTTP) assures that newly hired state and federal employees, especially inspectors and permit writers, receive adequate and credible training both on basic elements of program implementation and on cutting-edge technical and policy subjects. The NTTP may be one of the finest examples of state and federal cooperation and partnership that exists within the Interior Department. The NTTP has also allowed more seasoned employees to fine tune their skills and update their knowledge on important topics. A career series program has been developed to help

guide managers with both NTTP and TIPS training opportunities for their staff, while meeting program goals and needs. OSMRE’s training program is especially important for smaller states that do not otherwise have access to such resources. In addition to NTTP classes, IMCC (working in cooperation with NTTP) has developed and facilitated a series of benchmarking workshops for both state and federal agency personnel that has allowed them to improve and enhance their respective regulatory programs and skills in such areas as blasting, subsidence, bonding, underground mine mapping, and permitting related to hydrologic balance. OSMRE has also sponsored several interactive forums on a variety of subjects of mutual interest to the states and we urge the agency to continue this practice, again with state input. All of these training components will become increasingly more critical as OSMRE and the states face a retiring workforce and attendant succession planning.

C. Funding for State Title V Programs

Perhaps the most critical, on-going challenge that we face is adequate funding for state regulatory programs. Pursuant to section 705 of SMCRA, OSMRE is authorized to make annual grants to the states of up to 50 percent of the total costs incurred by the states for the purposes of administering and enforcing their programs. These grants are essential to the full and effective operation of state regulatory programs. For the past several fiscal years, the amount for state Title V grants had been flat-lined. (See figure 1) What this graph does not show is that these grants have been stagnant for over 12 years. The appropriation for state Title V grants in FY 1995 was \$50.5 million. Essentially, we attempted to operate effective, high performance programs with a meager \$6 million increase spread over 12 years. By most standards, this is remarkable, and clearly a bargain for the federal government. Over this same period of time, coal production has risen substantially and OSMRE’s own budget for federal program costs has increased by over \$25 million. Given the fact that it is the states that operate the programs that address the environmental impacts of coal mining operations, a similar increase would have been expected. But instead, state regulatory grants remained flat-lined.



For Fiscal Year 2008, Congress approved an additional \$5 million over the President's budget request of \$60.5 million for state regulatory programs in OSMRE's budget, for a total of \$65.5 million. The states are greatly encouraged by and are most appreciative of the meaningful increase in Title V funding approved by Congress in the FY 2008 Omnibus Appropriations bill. Even with the 1.5% rescission and the allocation for tribal primacy programs, the states saw a \$6 million increase for our regulatory programs over FY 2007 levels. This increase was critical in addressing the ever widening gap between the states' requests and what they received. The debilitating trend was compounding the problems caused by inflation and uncontrollable costs, thus undermining our efforts to realize needed program improvements and enhancements and jeopardizing our efforts to control the impact of coal extraction operations on people and the environment.

In its FY 2009 budget, OSMRE is reversing the positive trend established by Congress last year. While OSMRE attempts to paint a picture of increased funding for Title V grants, it does so by referring to FY 2007 numbers in making its case. The fact is, OSMRE's proposed amount of \$62.6 million for state Title V grants is \$1 million less than what was allocated in FY 2008 (after the rescission and tribal allocation). Our estimate of actual need for FY 2009 is \$68 million, leaving a difference of almost \$6 million. This difference would be reduced by \$2 million if Congress' approved amount for FY 2008 was used as the base.

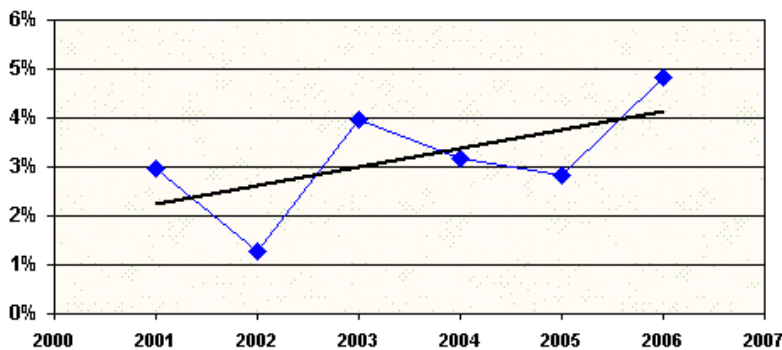
This is not the time to reverse course and upset the effort to restore the efficacy of state regulatory programs. The states are finally in a position to see some meaningful recognition of their program expenses through the upward adjustments approved by Congress last year. The states are just now beginning to put last year's improved funding to work in their programs through the filling of vacant positions and the purchase of much needed equipment and supplies (including computers and vehicles). As states prepare their budgets for the next few years, there is an expectation that the amount approved by Congress will become the new base on which we will build into the future – otherwise we create a situation where layoffs would occur for those who were just hired. In fact, in these difficult economic times, it may be incumbent on OSMRE to provide additional federal funding to states to insure that regulatory programs are kept whole in the face of declining state revenues. The states continue to face significant cost increases in their programs due to inflation. Health insurance premiums and cost of living adjustments are also significant factors in the annual operation of state programs, especially with personnel expenses representing some 80 percent of total program costs. A new challenge has come in the form of retirements, where states are faced with buy-outs, paying for unused annual leave, and replacing an aging work force. These are substantial, often unavoidable, costs that are wreaking havoc on state budgets.

It is essential that we maintain consistent funding from year to year in order to efficiently deploy resources for our programs. This is especially true with regard to hiring new staff to fill vacancies or to supplement under-staffed areas of the programs. We cannot afford to invest money in these positions and then face potential layoffs the next year because funding is not maintained. Sending these types of mixed signals to

state legislatures and budget officers will undermine their ability to support their respective regulatory programs through matching state funds and may cause them to reexamine their commitment to these programs. A clear message from this Administration and Congress that reliable, consistent funding will continue will do much to ensure that states can continue to implement these vital programs.

Just as with the federal government, state regulatory programs are personnel intensive, with salaries and benefits constituting upwards of 80 percent of total program costs. And, just like the federal government, state personnel costs are increasing. See the chart below, which indicates an upward trend (black line) in the percentage increases realized by the states over the period 2001 – 2007 (blue line) related to personnel costs. States must have sufficient staff to timely complete permitting, inspection and enforcement actions needed to protect citizens of the coalfields. When funding falls below program needs, states may struggle to keep active sites free of offsite impacts, promote reclamation of mined areas, and prevent injuries.

Coal Regulatory Program Personnel Cost Increases



State coal regulatory program permitting and inspection workloads are in large part related to coal mine production. In general, as coal production increases, the need for additional permitting and operational inspections also increases. State programs must be adequately funded and staffed to insure that permitting and inspection duties are both thorough and timely in order to protect the public health and safety and the environment, especially where states experience the reality of accelerating coal mine expansion and production activities. Under-funding stresses existing programs, resulting in the delay or elimination of vital program functions that protect the environment and the public.

There continues to be no disagreement about the need demonstrated by the states. In fact, in OSMRE’s budget justification document, the agency states that: “the states have the unique capabilities and knowledge to regulate the lands within their borders. Providing a 50 percent match of Federal funds to primacy States in the form of grants results in the highest benefit and the lowest cost to the Federal government. If a state were to relinquish primacy, OSMRE would have to hire sufficient numbers and types of Federal employees to implement the program. The cost to the Federal government would be significantly higher.” (Page 76 of OSMRE’s Budget Justification)

For all the above reasons, we urge this Administration and Congress to increase funding for state Title V regulatory grants in OSMRE's FY 2009 budget to \$68 million, as fully documented in the states' estimates for actual program operating costs. This represents a \$1 million increase over our request for FY 2008 and a \$2.5 million increase over the amount approved by Congress last year. Continued adequate funding for state regulatory programs in FY 2009 and beyond will allow the states to efficiently and effectively implement the quality programs for which they have been recognized over the years. In doing so, the purposes and objectives of SMCRA will be realized, including protection of public health and safety and the environment while meeting the Nation's need for coal as an essential source of energy.

In order to deliver services at the level our citizens expect and deserve, it is essential that the states' funding needs be met. The consequences of reductions like those we have seen in the past will be immediate and far-reaching and will result in the classic "SMCRA Catch-22" situation: where there is inadequate funding to support state programs, some states will be faced with turning all or portions of their programs back to OSMRE. Of course, where a state does, in fact, turn all or part of its Title V program back to OSMRE (or if OSMRE forces this issue based on an OSMRE determination of ineffective state program implementation), the state would be ineligible for Title IV funds to reclaim abandoned mine lands. This would be the height of irony given the recent reauthorization and revitalization of the Title IV AML program. In addition, loss of Title IV funding would eliminate good paying construction jobs in a time of declining job opportunities in rural America where coal mines are typically found.

D. Abandoned Mine Land Reclamation – State/Tribal Title IV Programs

The states and tribes were greatly encouraged by the passage of the 2006 Amendments to SMCRA, which culminated over 12 years of work by the states, tribes and others to reauthorize this vital program. The AML program has been one of the hallmarks of SMCRA and has accomplished much over the years. With the infusion of new life and funding, the program holds out great promise for the future. The states and tribes have been working closely with OSMRE to design rules that will appropriately implement the provisions of the 2006 amendments and allow the states and tribes to put money into projects that meet the purposes and objectives of the new law. Among the key issues we have addressed in our discussions with OSMRE are the following:

- Use of the grant mechanism to distribute payments from the U.S. Treasury, as opposed to direct payments
- Funding for minimum program states
- Use of unappropriated state share balances for noncoal reclamation and the acid mine drainage set aside. Western states, in particular, are adamant that OSMRE must not arbitrarily define funding origins in order to control and prevent states from reclaiming of some of the Nation's most extreme physical mine hazards.
- The effective date of certain payments under the new law
- Adjustments to the current grants process and reporting databases

We have submitted extensive comments to OSMRE concerning a proposed rule published by the agency in June of this year that would implement the provisions of the 2006 Amendments. A copy of those comments is available from IMCC and NAAML. Over our strong objections, OSMRE published a final rule on November 14 at 73 Fed. Reg. 67576, with an effective date of January 13, 2009. We are very disappointed with the final rule and the agency's disposition of our comments. This rule addresses several critical issues that impact implementation of State and Tribal AML reclamation programs and it is therefore essential that OSMRE properly interpret and apply the provisions of the 2006 Amendments. This the agency has not done, and we therefore urge the new Administration to revisit this important matter of federal/state/tribal interaction. In revisiting this matter, we encourage the new Administration to be open to needed revisions to the rule, and potentially to SMCRA itself, as well as potential changes to OSMRE's directives and Federal Assistance Manual for the AML program.

With regard to funding for state and tribal Title IV Abandoned Mine Land (AML) program grants, recent Congressional action to reauthorize Title IV of SMCRA has significantly changed the method by which state and tribal reclamation grants are funded. Beginning with FY 2008, state/tribal Title IV grants are to be funded primarily by permanent appropriations. The only programs that continue to be funded through discretionary appropriations are high-priority federal reclamation programs, state and federal emergency programs, additional AML grant funding that OSMRE may provide to the states/tribes, and OSMRE operations. As a result, the states and tribes will receive mandatory funding in FY 2009 of \$298.4 million for AML reclamation work. OSMRE also proposes to continue its support of the Watershed Cooperative Agreement program in the amount of \$1.5 million, a program we strongly endorse.

As permanent appropriations for state/tribal AML grants become a reality, there are three remaining discretionary funding priorities for the states and tribes: minimum program funding; federal emergency programs; and Clean Streams funding. With respect to minimum program states, under the new funding formula provided by OSMRE, all of the states and tribes will receive immediate funding increases except for minimum program states. Under OSMRE's interpretation of the 2006 Amendments, those programs remain stagnant for the next two fiscal years at \$1.5 million, a level of funding that greatly inhibits the ability of these states to accomplish much in the way of substantive AML work. Many of these states have pending high priority AML projects "on the shelf" that cost several million dollars. The challenge for these states is putting together enough moneys to address these larger projects given minimum funding. It is both unfair and inappropriate for these states to have to wait another two years to receive any funding increases when they are the states most in need of AML moneys. We have therefore urged Congress to directly fund (or mandate OSMRE to use discretionary moneys to fully fund) these states at the statutorily mandated level of \$ 3million in FY 2009 so as to level the playing field and allow these states to get on with the critical AML projects that await funding.

We also urged Congress to approve continued funding for the AML emergency program. The emergency program, in its present form, has proven to be very effective and efficient in protecting citizens from sudden hazards resulting from historic coal mining operations. OSMRE's FY 2009 budget would eliminate funding for state-run emergency programs and also for federal emergency projects (in those states that do not administer their own emergency programs). Continued funding of the OSMRE emergency program should be a top priority for OSMRE's discretionary spending. This funding has allowed the states and OSMRE to address the unanticipated AML emergencies that inevitably occur each year. In states that have federally-operated emergency programs, the normal state AML programs are not structured or staffed to move quickly to address these dangers and safeguard the coalfield citizens whose lives and property are threatened by these unforeseen and often debilitating events without access to this funding source. Also, many minimum program states would be only "one bad day" away from bankruptcy if a large emergency event occurred and they were forced to fund the emergency project from their normal AML grant.

Section 410 of SMCRA establishes an emergency reclamation procedure for AML sites that pose a "sudden danger with a high probability of substantial physical harm to the health, safety or general welfare of people before it can be abated under normal program operation procedures". (OSMRE Directive AML-4). In a Federal Register notice dated March 6, 1980 (45 Fed. Reg. 14810), OSMRE noted that "the Secretary of the Interior working through OSMRE has the responsibility for projects administered under these authorities." Therefore, the authority for the implementation of the emergency program is placed solely on the Secretary and was not meant to be defaulted to the states. The same Federal Register notice states that emergencies are differentiated from priority one problems in section 403 of SMCRA.

Additionally, the funding for the emergency program is separate from the state and tribal non-emergency AML grant funding since it comes from the Secretary's "discretionary share". Funding for emergencies is provided for in Section 402(g)(3) of SMCRA and is used for the purposes described therein and with monies remaining after the distributions required under Sections 402(g)(1), (g)(2) and (g)(5). Section 402(g)(1)(C) specifically requires that the non-emergency state share be used only for annual reclamation project construction and administration costs. The non-emergency federal share allocated to the states in Section 402(g)(5) is used to supplement the state share received under 402(g)(1) until the priorities set forth in Section 403(a)(1) and (2) are met. Emergencies do not fall under Section 403, but are provided for only in Section 410. This matter was spoken to very directly in a 1992 report to the Interior Subcommittee of the House Appropriations Committee entitled "Cleaning Up the Damage: An Analysis of the Operation of the AML Program". Rep. Carl C. Perkins (D-KY) stated in the report: "The AML emergency program has existed separately and been run differently from normal AML programs for very good reason: it deals with separate types of problems. Indeed, the Congress recognized this distinction when it devoted a special section (410) of SMCRA to the Secretary of the Interior with special powers to cope with AML emergencies. Reversing this division of responsibility cannot be accomplished simply by reallocating funds. There are a number of other hurdles which

have to be negotiated.”

While there were several significant changes to the AML program as a result of the 2006 Amendments recently passed by Congress, there were absolutely no changes to the emergency program under Section 410 of the Act. In fact, significant funding increases were approved by Congress that would allow the states to address long overdue reclamation problems including landslides, contaminated drinking water, refuse piles, dangerous highwalls, mine fires, and exposed mine portals. Diverting these state monies to the emergency program, as suggested by OSMRE’s budget, would impede the progress the states are now making to address AML problems that have been awaiting funding for years. In this regard, new section 402(g)(1)(D)(2) requires that the Secretary ensure “strict compliance” by the states in their use of non-emergency grant funds for the priorities listed in section 403(a). For the states to do otherwise would require at the least a rulemaking by OSMRE, if not legislative adjustment. It would also reverse 30 years of official guidance and practice by OSMRE. We therefore request that this Administration and Congress direct OSMRE to restore \$21 million for the AML emergency program in OSMRE’s FY 2009 budget.

A final thought on OSMRE’s AML emergency program moneys: as OSMRE attempts to zero out its AML emergency program budget, the agency will continue to receive revenues from AML fee collections to operate the program. These fees are statutorily mandated to be spent on AML reclamation, including the emergency program. If OSMRE wants out of this part of the program, these moneys should be transferred to the states so that they can address this important area of public health and safety.

Future challenges for the AML program include the perpetual operation and maintenance costs associated with acid mine drainage treatment; assuring that maximum flexibility is provided to the states to determine their respective AML project priorities; maintaining a well-structured and functioning inventory database for tracking accomplishments and remaining problems; and enhancing opportunities for economic development (including recreation and tourism) in depressed areas of the coalfields.

E. Recent Successes and Future Challenges

There have been other notable successes in SMCRA’s implementation, in both the regulatory and policy areas. The states have worked cooperatively with OSMRE and others to address acid mine drainage issues through the Acid Drainage Technology Initiative, which focuses on prediction, prevention, avoidance, remediation and treatment. Again working cooperatively with OSMRE, the states have made significant strides in advancing reforestation efforts on reclaimed lands, particularly through the Appalachian Regional Reforestation Initiative. Through a partnership among the states, OSMRE and the Environmental Protection Agency (EPA), we have also seen major strides in the remining arena, where thousands of acres of abandoned mine lands have been restored as part of active mining operations, thereby saving valuable AML Trust Fund dollars and returning the land to productive use.

In its 1990 monograph on “Environmental Regulation of Coal Mining: SMCRA’s Second Decade”, the Environmental Policy Institute identified and commented on several challenges facing the states and OSMRE, as follows:

The issues facing regulators today are more difficult than they were in 1977. Many of the easier and more blatant problems have been addressed [such as the two acre exemption] The regulatory issues today include the prevention of hydrologic damage, the control of subsidence and subsidence damage, the establishment of adequate reclamation bond amounts, the use of permit-based enforcement, and the improvement of federal oversight. Also of concern is the massive shortfall in the federal fund meant to reclaim areas abandoned prior to 1977 without reclamation. [Page 3].

Throughout SMCRA’s third decade, many of these issues have been addressed and resolved. Congress has addressed the shortfall of moneys in the AML Trust Fund with the 2006 Amendments to SMCRA and OSMRE and the states are focused on implementing those adjustments and putting more money on the ground to restore AML sites. Federal oversight (and the attendant state/federal relationship under SMCRA) has advanced by significant degrees and is no longer the flashpoint that it once was. Through advances in electronic permitting and the use of tools available through OSMRE’s TIPS program, state permitting actions are timely, comprehensive and accurate, thereby insuring more effective compliance with the law.

That being said, there are still several regulatory challenges that we face, as follow:

- Coal Combustion By-Products – In light of a 2006 Report by the National Academy of Sciences entitled “Managing Coal Combustion Residues at Mines”, OSMRE plans to move forward with a proposed rule addressing the mine placement of coal combustion by-products (CCBs) at coal mines. This is not a new area of regulatory control for the states; our various programs under both SMCRA and the Resource Conservation and Recovery Act (RCRA) have addressed this matter. While there are differences among the states in the way we regulate mine placement of CCBs, there has been limited evidence of any major gaps that require filling through new national rules. However, to the extent that adjustments to existing state programs are necessary, particularly in light of the NAS recommendations, we assert that SMCRA should serve as the platform for these rules. SMCRA’s provisions provide adequate authority for the adoption of regulations governing the placement of CCBs with respect to both permitted mines and abandoned mine reclamation projects in order to protect against adverse impacts on public health and safety and the environment, including impacts to surface water and groundwater. We also believe that the permit application requirements and performance standards in OSMRE’s existing regulations at 30 CFR Chapter VII can be relied upon to structure specific rules

that would apply to the use of CCBs at coal mines. With regard to CCB placement at abandoned mines, while we agree that 30 CFR Part 874 could be revised to include minimum requirements that would apply to AML reclamation projects funded or otherwise conducted under an AML reclamation plan approved under section 405 of SMCRA, we caution OSMRE to structure any proposed rule in such a way that does it not unduly or inappropriately discourage the use of CCBs at coal AML sites. There are several uses of CCBs at both coal and noncoal mines, whether active or abandoned, that result in beneficial results for purposes of reclamation, especially where acid mine drainage is abated (alkaline addition), highwalls are backfilled (structural fill), topsoil is replaced (soil substitution) or enhanced (soil additives), dangerous pits are filled, and subsidence-prone areas are stabilized. It is critical that any rules or policy guidance that may be developed by OSMRE do not discourage these uses.

- Bonding – one of the larger challenges concerning the bonding provisions of SMCRA is with regard to post closure issues. While SMCRA originally envisioned the bond as a guarantee of performance during mining, it did not anticipate the challenges associated with postmining concerns such as long-term treatment related to acid mine drainage or long-term impacts from subsidence. For instance, OSMRE’s current rules on bonding require that the bond amount be adjusted for potential subsidence damage repairs. However, nothing is said about how the bond release procedure will apply in these situations. The result is that surety companies are reluctant to write bonds for reclamation because of the long term nature and unknown extent of the liability. The states have been working with OSMRE to address this matter through the use of other financial assurance mechanisms, such as trust funds.
- Prime farmland – the requirements related to proof of productivity (five year minimum) prior to termination of jurisdiction and before the land can be returned to the owner are cumbersome. The mid-continent states are currently undertaking research through a major Midwestern agronomy/soil science university to determine proper testing techniques to ensure soil capabilities are present, in the hope that an alternative method for demonstrating productivity can be attained, thus returning land much sooner back to the owner of record.
- AVS – over the past twenty years, the states have worked diligently with OSMRE to develop the Applicant/Violator System (AVS), which assists us in implementing section 510(c) of SMCRA, particularly the issuance of permits. Early in the development of AVS, the states focused on helping to design a system that would enable them to identify and block violators and other scofflaws without bogging down the database with useless or unproductive information. While we have made progress in this regard, we continue to examine ways to improve and enhance overall system effectiveness. For example, a critical aspect of AVS is the rules that define ownership and control; permit and application information requirements; and the transfer, assignment or sale of permit rights. These rules have been under a constant state of flux since their original

promulgation in 1988 and a recent OSMRE rulemaking attempts to bring closure to several key issues that remain unresolved or problematic.

- Underground mine mapping – another continuing challenge that we face concerns accurate and readily available underground mine maps, which are essential for protecting the public, the environment and infrastructure from the threats posed by unknown underground mines. Events such as the Queecreek incident in Pennsylvania and the Martin County Coal Company impoundment failure in Kentucky were high profile demonstrations of the kinds of incidents that can occur when mine maps are inaccurate or unavailable. IMCC has sponsored a series of national and regional benchmarking workshops that have focused on the collection, handling, scanning, geo-referencing and validation of mine maps. While the expertise and technology is available to tackle this issue and accomplish these tasks, our biggest challenge is the lack of funding for personnel, hardware, software upgrades and database development to move the initiative forward.
- Remining Incentives –A readily available, cost effective approach that provides for realistic remining incentives will provide valuable relief for both state and federal regulators who are searching for innovative and reliable ways to safeguard against tomorrow's AML problems. In many of today's mountainous areas of eastern Appalachia, it makes operational and economic sense to go back into areas once deep mined or surface mined in an effort to recover remaining coal reserves. Remining opportunities abound in other areas of the country as well. In the majority of such circumstances, the coal operation and the reclamation work associated therewith result in a significantly improved remined area where highwalls are substantially, if not completely, eliminated; stream beds are reconstructed; pits are drained and backfilled; coal refuse piles are removed; underground mines are daylighted; rills and gullies are corrected; and new vegetation is established. The results are often remarkable. And considering that valuable AML monies are conserved in the process, the end product is commendable. We urge OSMRE to continue working with the states to explore incentives for remining.
- Mountaintop Mining and Valley Fills – Controversy continues over the use of mountain mining practices in Appalachia and the attendant use of valley fills. While a portion of the debate is focused on the mining practice itself, particularly blasting, dust, aesthetics and viewsheds, the primary focus most recently has been on stream impacts associated with valley fills in waters of the United States. This necessarily brings the U.S. Army Corps of Engineers into the picture, since it has responsibility for the issuance of Clean Water Act Section 404 (dredge and fill) permits related to valley fills. There has been considerable frustration and, as a result, legal challenges associated with both Section 404 permitting requirements and the interaction between the Clean Water Act and SMCRA on this matter. The courts have struggled to untangle the competing rules, regulations and policies that attend the interplay between the statutes and the agencies of jurisdiction.

From our perspective, the regulation of mining-related fills and activities in waters of the U.S. will continue to require cooperative efforts of state and federal regulatory authorities.

- Federal consistency and jurisdictional disputes -- we urge OSMRE to assert itself in the debate among its fellow federal agencies regarding the question of who has the lead on mining and reclamation issues in the environmental arena, including such issues as mountaintop mining; fish and wildlife values; historic preservation; and mine placement of coal combustion by-products. OSMRE and its state partners have considerable expertise in this area and that experience should not be discounted simply because of disputes over jurisdiction.

F. Conclusion

Much progress has been made over the past 30 years to accomplish the purposes and objectives of SMCRA. From our perspective, the basic organization of OSMRE is working well. At this point of SMCRA's implementation, neither the states nor OSMRE are dealing with the same types of issues or problems that attended the early years of program formation and administration. We have moved away from questions of adequate state program components and state implementation techniques to more substantive issues associated with technical, on-the-ground problems or with thorny legal and policy questions associated with interpretation of our programs. We therefore believe that it is most relevant for OSMRE to focus its energies and resources on assisting and supporting the states through adequate funding for state grants, sound technical and legal assistance, and opportunities for the states to actively participate in the agency's excellent training program. The overall result will be a continued reduction of federal intrusion in the states' administration of their programs, a concomitant enhancement of the federal/state partnership, and better on-the-ground performance by the regulated industry.

A couple of final thoughts with regard to any potential adjustments by the new Administration to OSMRE operations: Although there has been vast improvement over the past several years in the way that OSMRE operates in relation to the states, one issue that remains is OSMRE's tendency to broaden issues that should be state or regionally focused. We therefore urge OSMRE to continue working cooperatively with individual states or regions to resolve issues that are specific to that state or region and to contain its tendency to proscribe a national solution to every problem. It is also critical that OSMRE respect the states' and tribes' technical expertise and 30 year history of successful program management. We believe that Congress' intent is for OSMRE to work as a partner with the states and tribes in the implementation of SMCRA and related environmental laws. This was particularly evidenced by the framers of the Act, who envisioned that issues would be resolved at the state or regional level.

In the end, we trust that an atmosphere of open and effective communication between the states and OSMRE will be nurtured and promoted by the new Administration so that effective implementation of SMCRA will continue to be achieved. Without constructive communication, cooperation and consensus building between governments, the continued vitality of the partnership mandated by SMCRA will be substantially at risk. The key to the success of this partnership is that both parties treat one another with equal amounts of respect and integrity. Another key is appointing a Director of OSMRE who understands the relative roles of the states and federal government and who will work to instill this understanding among others in the agency. Effective “top-down” management is critical to assuring that the message and philosophy embraced by the agency’s leadership is communicated to the field. We look forward to fostering an environment of meaningful cooperative federalism with the new Administration at the Interior Department and OSMRE.

RESOLUTION

INTERSTATE MINING COMPACT COMMISSION

BE IT KNOWN THAT:

WHEREAS, the Surface Mining Control and Reclamation Act of 1977 (SMCRA) provides for the vesting of exclusive jurisdiction with the states for the regulation of surface coal mining and reclamation operations within their borders following approval of a state program by the Secretary of the Interior; and

WHEREAS, over the past 30 years, the states have established and been recognized for their commitment to implementing the goals and objectives of SMCRA; and

WHEREAS, under the primacy regime envisioned by Congress under SMCRA, a stable, consistent and effective state/federal partnership was anticipated based on principles of comity and federalism; and

WHEREAS, a disregard for these principles will undermine the effective implementation of SMCRA;

NOW THEREFORE BE IT RESOLVED:

That the Interstate Mining Compact Commission reasserts its commitment to the principles of primacy and federalism that underlie implementation of the Surface Mining Control and Reclamation Act of 1977; and

That the IMCC looks for the same commitment from the Interior Department and the Office of Surface Mining and anticipates the continuation of an effective state/federal partnership under SMCRA.

Issued this 19th day of November, 2008

ATTEST:

Gregory E. Conrad

Executive Director