



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

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## Memorandum

To: Director, Office of Surface Mining Reclamation and Enforcement

From: Solicitor

Subject: Funding to States and Indian Tribes Under the Surface Mining Control and Reclamation Act of 1977, as Amended by the Tax Relief and Health Care Act of 2006

## INTRODUCTION

On August 3, 1977, the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) was signed into law. One of the purposes of SMCRA is to “promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public.” 30 U.S.C. § 1202(h). These areas are known as abandoned mine lands (AML). In order to fund the reclamation of AML sites, SMCRA mandates that a reclamation fee be assessed on current coal production. The revenues generated by this reclamation fee, and from certain other sources, are transferred into the Abandoned Mine Reclamation Fund (Fund), which is a trust fund “created on the books of Treasury,” but administered by the Secretary of the Interior.<sup>1</sup> 30 U.S.C. § 1231(a). On December 20, 2006, the Tax Relief and Health Care Act of 2006 (2006 Amendments) reauthorized the AML program and made significant amendments to SMCRA. Pub. L. No. 109-432, 120 Stat. 2922 (2006). The Office of Surface Mining Reclamation and Enforcement (OSM) is currently developing policies and regulations to implement the 2006 Amendments. In that regard, you have asked for our opinion on three issues.

Issue 1: May OSM use grants to make the payments to States and Indian tribes required by section 411(h) of SMCRA, as amended, 30 U.S.C. § 1240a(h)?

Yes; in fact, OSM is required to use grant agreements to make the section 411(h) payments.

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<sup>1</sup> Even though the Fund is a special fund on Treasury books, when this memorandum refers to Treasury funds, it is referring to moneys from the general Treasury that are not otherwise appropriated.

## A. Background

SMCRA “establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.” *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981). OSM is required to make certain annual payments to States and Indian tribes from the Fund so that they can administer their AML programs. 30 U.S.C. §§ 1231 and 1232. SMCRA specifies that these payments are to be made in the form of grants. 30 U.S.C. §§ 1231(f) and 1232(g). These grants are made both to “certified” States and Indian tribes and “uncertified” States and Indian tribes.<sup>2</sup> The amount of the grant from the Fund given to each eligible State and Indian tribe is determined by using a formula.

A brief description of SMCRA’s funding formula is necessary as background to the question you have posed. First, all States and Indian tribes with eligible lands and waters are allocated “50 percent of the reclamation fees collected annually in any State or on Indian lands. . . .” 30 U.S.C. §§ 1232(g)(1) (States) and (g)(2) (Indian tribes). These moneys are referred to as “State or Tribal share” funds. Second, uncertified States and Indian tribes are authorized to receive sixty percent of the moneys remaining in the Fund after the State and Tribal share allocations are made. These moneys include “historic coal share” funds that are allocated using “a formula based on the amount of coal historically produced in the State or from the Indian lands concerned prior to August 3, 1977.” 30 U.S.C. § 1232(g)(5). After all of the State or Tribal share and historic coal share allocations are calculated, the Secretary of the Interior may use the remaining moneys in the Fund directly or through grants for other designated AML purposes. 30 U.S.C. § 1232(g)(3). These moneys make up the “Secretary’s share” of the Fund. A portion of the Secretary’s share must be used as “minimum program make up” funds to ensure an annual grant of “not less than” a specified amount to each eligible State. 30 U.S.C. §§ 1231(d)(1), 1232(g)(3) and 1232(g)(8)(A).

Prior to the 2006 Amendments, SMCRA allocated the fees collected, albeit in varying percentages, into these four shares—State or Tribal share, historic coal share, minimum program make up share, and the Secretary’s share.<sup>3</sup> 30 U.S.C. § 1232(g) (2005). However, the Secretary was only authorized to pay the amount of the allocations that were appropriated annually by Congress. 30 U.S.C. § 1231(d) (2005). Typically, the amounts actually appropriated by Congress were less than the amounts allocated. As a result, the Fund began to accrue an allocated but unappropriated balance. As of 2006, the unappropriated State and Tribal share balance in the Fund totaled about \$1.2 billion.

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<sup>2</sup> States and Indian tribes become certified once they reclaim all eligible lands and waters adversely affected by coal mining practices in their State or Indian lands as described in section 403(a). 30 U.S.C. § 1240a(a). Even though SMCRA is primarily designed to reclaim AML problems caused by coal mining, in particular circumstances SMCRA allows some Fund moneys to be expended for noncoal reclamation even before a State or Indian tribe becomes certified. *See* 30 U.S.C. § 409.

<sup>3</sup> In addition to these allocations, another allocation of 20 percent of amount in the Fund not allocated to the State and Tribal shares was designated to go to the Secretary of Agriculture for the Rural Abandoned Mine Program. 30 U.S.C. § 1232(g)(2) (2005). The Amendments eliminated this allocation.

These allocated, but unappropriated, State and Tribal share moneys in the Fund are commonly referred to as the “prior unappropriated State or Tribal share balance.”

In 2006, Congress decided to provide for the distribution of an amount equal to the “prior unappropriated balance.” Accordingly, the 2006 Amendments direct the Secretary<sup>4</sup> to pay uncertified and certified States and Indian tribes an amount equal to the State or Indian tribe’s prior unappropriated State or Tribal share balance in seven annual installments. 30 U.S.C. § 1240a(h)(1). Significantly, the moneys are to be paid from the general Treasury and not from the moneys in the Fund itself. These payments from the general Treasury are referred to as “prior balance replacement funds.” The moneys that constitute the prior unappropriated State and Tribal share balances will remain in the Fund and be reallocated to the historic coal share to be distributed to uncertified States and Indian tribes in fiscal year 2023 and thereafter. 30 U.S.C. §§ 1231(f)(2)(B), 1231(f)(3)(A)(i), and 1240a(h)(4).

In addition to specifying a source other than the Fund from which to pay States and Indian tribes an amount equal to their prior unappropriated State and Tribal share balances, the 2006 Amendments separate most future Fund payments from the annual appropriations process.<sup>5</sup> This change prevents the accrual of another unappropriated balance of State and Tribal shares in the future. The 2006 Amendments also prohibit certified States and Indian tribes from receiving their annual State or Tribal share portion of the Fund in the future, and instead provide them with a new permanent appropriation from the general Treasury in an amount equivalent to what they would have been able to receive as their State or Tribal share.<sup>6</sup> 30 U.S.C. §§ 1231(f)(3)(B) and 1240a(h)(2). These funds are known as “certified in lieu” funds. For uncertified States and Indian tribes, the 2006 Amendments provide a permanent appropriation of the moneys in the Fund to pay the full amount of the annual State or Tribal share.<sup>7</sup>

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<sup>4</sup> Although SMCRA refers to the Secretary, SMCRA gives the Director of OSM the responsibility to “administer the program for the purchase and reclamation of abandoned and unreclaimed mined areas pursuant to title IV . . . .” 30 U.S.C. § 1211(c)(4). The Secretary has further delegated all authority “with respect to [SMCRA] and amendments thereto” to the Director of OSM. 216 Departmental Manual (DM) 1.1.

<sup>5</sup> Moneys distributed from the Secretary’s share of the Fund are still subject to annual appropriations, *except* for those funds used for the minimum program make up under section 402(g)(8)(A). 30 U.S.C. § 1231(d)(1).

<sup>6</sup> The first year certified in lieu funds are allocated is fiscal year 2008. 30 U.S.C. § 1240a(h)(2)(A). Because collections based on coal production during the last quarter of fiscal year 2008 are not received by OSM until fiscal year 2009, certified States and Indian tribes will not receive distributions of these funds until that time. 30 U.S.C. § 1240a(h)(3)(A). Moreover, section 401(f)(3)(B) prohibits certified States and Indian tribes from receiving State or Tribal share funds. 30 U.S.C. § 1231(f)(3)(B). Thus, for Fiscal Year 2008, certified States and Tribes will receive neither State or Tribal share funds allocated in Fiscal Year 2007 nor certified in lieu payments.

<sup>7</sup> The 2006 Amendments also provide for increased amounts to be distributed from the historic coal share and minimum program make up funds. 30 U.S.C. §§ 1231 and 1232(g).

## B. Analysis

As noted above, prior to the enactment of the 2006 Amendments, SMCRA required OSM to make payments from the Fund in the form of grants. By contrast, section 411(h) simply directs OSM to make “payments” to or “pay” States and Indian tribes out of general Treasury moneys when distributing prior balance replacement funds and certified in lieu funds.<sup>8</sup> 30 U.S.C. §§ 1240a(h)(1) and (h)(2). Because OSM is not specifically directed to make these payments in the form of grants, you have asked whether OSM may nonetheless do so. For the three reasons described below, I conclude that OSM must do so. While SMCRA itself does not mandate (or prohibit) a particular method for distributing section 411(h) payments, federal law makes clear that these funds must be distributed in grants via grant agreements.

“Payment” is not a defined term in SMCRA; where it is used in SMCRA other than in section 411(h), it often means or refers to grants. For example, a comparison of sections 411(h)(3)(A) and 401(d) indicates that the word “payments” includes grants. Section 411(h)(3)(A) states that “payments to States or Indian tribes under this subsection shall be made without regard to any limitation in section 401(d) *and concurrently with payments to States under that section.*” 30 U.S.C. § 1240a(h)(3)(A) (emphasis added). All payments from the Fund under section 401(d) are, and historically have been, made in grants. Thus, SMCRA explicitly uses “payment” as a generic term that includes the outlay of money through grants.<sup>9</sup> Moreover, there is nothing in the legislative history of the 2006 Amendments to indicate that by using the word “payments,” Congress intended to change the way that OSM has been distributing funds under SMCRA for the last 30 years.

“Payment” is not a term of art that has a specific meaning. “Payment” is a broad term that simply means the “[p]erformance of an obligation, [usually] by the delivery of money” or the “money or other valuable thing so delivered in satisfaction of an obligation.” BLACK’S LAW DICTIONARY 1150 (7th ed. 1999). Thus, the use of the term “payment” does not mandate a particular means of disbursing funds. In fact, a survey of relevant law indicates that it can and has been used to denote the distribution of funds as

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<sup>8</sup> In addition, section 402(i)(2) requires the Secretary of the Treasury to transfer funds to the Secretary of the Interior to “pay” amounts under section 411(h). 30 U.S.C. § 1232(i)(2).

<sup>9</sup> I note that the IMCC and the NAAML, organizations made up of representatives from States and Indian tribes with SMCRA programs, have generally accepted this analysis. See Letter from John Husted, President, NAAML, and Gregory E. Conrad, Executive Director, IMCC, to Brent Wahlquist, Acting Director, OSM (May 21, 2007). Although the NAAML and the IMCC would prefer that OSM choose a different method of distribution, they have conceded that SMCRA does not specify a payment mechanism to be used to distribute section 411(h) funds. *Id.* (“[T]he 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.” They have also recognized that section 411(h) payments could be “accomplished through a traditional grant process . . .”).

grants.<sup>10</sup> As “payment” does not have a specific meaning, OSM would have discretion to interpret it to mean “grant.”

Federal law mandates that payments of the type required by section 411(h) be made in grants using a grant agreement. The Federal Grant and Cooperative Agreement Act (FGCAA) characterizes the relationship between executive agencies and recipients of government contracts or assistance and prescribes criteria by which agencies are required to select the appropriate legal instrument to reflect that relationship. 31 U.S.C. § 6301. The FGCAA states:

An executive agency *shall* use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient *when—*

(1) *the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and*

(2) *substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.*

31 U.S.C. § 6304 (emphasis added). The FGCAA does not define “grant” *per se*, but rather defines “grant agreement” as an agreement under which all types of financial assistance are provided by the federal government, except direct payments to individuals, subsidies, loans, loan guarantees, or insurance. 31 U.S.C. § 6302(2). Such other types of assistance must be authorized specifically by statute.

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<sup>10</sup> Under the Coastal Impact Assistance Program (CIAP), the Minerals Management Service (MMS) uses grants to make “[p]ayments to producing States and coastal political subdivisions.” 43 U.S.C. § 1356a(b); Coastal Impact Assistance Program Guidelines, 71 Fed. Reg. 57564 (Sept. 29, 2006) (“All funds shall be disbursed through a grant process.”). Similarly, the Department of Labor uses grants “for payment to the New York State Workers Compensation Review Board, for the processing of claims related to the [September 11, 2001] terrorist attacks . . . .” Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the U.S. Act, 2002, Pub. L. No. 107-117, Division B, Chapter 8, 115 Stat. 2230, 2312 (2002); B-303927, 2005 U.S. Comp. Gen. LEXIS 98 (June 7, 2005) (“The Department determined that it should distribute the funds to the Board by means of a grant.”). While there are a limited number of statutes under which the Secretary of the Interior makes payments using direct disbursements rather than grants, such programs are rare and typically involve “revenue sharing” where Congress has not provided the federal government an oversight role regarding the State’s use of the funds. *See, e.g.*, Payment in Lieu of Taxes Act (PILT), 31 U.S.C. § 6902(a); Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287; Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (specifically 43 U.S.C. § 1337(g)).

Section 411(h) payments clearly meet the grant criteria set forth in the FGCAA. Undoubtedly, the money paid to the States and Indian tribes constitutes a “transfer” of a “thing of value” to a State. As prescribed by SMCRA, “a law of the United States,” the payments are to be used “to carry out a public purpose of support or stimulation,” either coal reclamation under section 403 or “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.” 30 U.S.C. § 1240a(h)(1)(D). Furthermore, OSM does not have “substantial involvement” with the State or Indian tribe’s performance of the reclamation or other activities for which the funds are to be used.

Grant agreements are not required in situations where assistance is provided through direct payments to individuals, subsidies, loans, loan guarantees, or insurance. 31 U.S.C. § 6302(2). The section 411(h) payments to States and Indian tribes clearly do not fall within any of those categories. In addition, the Office of Management and Budget (OMB) may “exempt a transaction or program of an executive agency” from the requirements of the FGCAA. 31 U.S.C. § 6307(2). OMB has not exempted these section 411(h) payments from the grant agreement requirement of the FGCAA. As the payments required by section 411(h) fit into the two criteria set forth at 31 U.S.C. § 6304 and do not fit within any of the exceptions, the FGCAA requires that a grant agreement must be used to reflect the relationship between the Secretary and the States or Indian tribes who are receiving the payments.

Moreover, section 411(h) payments fall within the definition of a “grant” in the Intergovernmental Cooperation Act (ICA), which governs the flow of funds in the administration of grants to States. The ICA requires, among other things, that executive agencies, such as Interior, minimize the time between when grant proceeds are transferred from the U.S. Treasury and the time the State expends those funds. 31 U.S.C. § 6503(j). The ICA defines “grant” in such a manner that it would apply to section 411(h) payments. 31 U.S.C. § 6501(4). According to the ICA, a grant:

(A) . . . means money, or property provided instead of money, *that is paid or provided by the United States Government under a fixed annual or total authorization, to a State, to a local government, or to a beneficiary under a plan or program administered by a State or a local government that is subject to approval by an executive agency, if the authorization—*

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(ii) *specifies directly, or establishes by means of a formula, the amount that may be provided to the State or local government, or the amount to be allotted for use in each State by the State, local government, and beneficiaries.*

31 U.S.C. § 6501(4) (emphasis added).

While the ICA is not determinative of the appropriate mechanism for transferring funds under a legislatively authorized program such as SMCRA, I note that it both

applies by its terms to section 411(h) payments and that Interior routinely complies with the ICA in the administration of SMCRA funds.<sup>11</sup>

Interior has implemented the FGCAA and the ICA by means of the Grant Common Rules located at 43 C.F.R. Part 12. They require OSM to treat any “award of financial assistance . . . in the form of money . . . by the Federal Government” to another government “which is accountable for the use of the funds” as a grant. 43 C.F.R. § 12.43 (definition of “grant” and “grantee”). In developing a grant program to distribute the section 411(h) funds, OSM has the discretion allowed by these regulations and such other guidance that is issued by the OMB and the Department to administer the grant program. If you have further legal questions regarding the scope of the Grant Common Rules or related guidance documents, please do not hesitate to contact this Office.

Issue 2: May uncertified States and Indian tribes use the payments they receive under section 411(h)(1) of SMCRA, 30 U.S.C. § 1240a(h)(1), for noncoal reclamation activities and for the acid mine drainage (AMD) set aside authorized by section 402(g)(6) of SMCRA, 30 U.S.C. § 1232(g)(6)?

No.

A. Background

Under the 2006 Amendments, OSM distributes moneys to uncertified States and Indian tribes from two separate Treasury accounts—the Fund and Treasury funds not otherwise appropriated. SMCRA clearly authorizes the use of some Fund moneys to finance noncoal reclamation and the AMD set aside. Section 409 of SMCRA authorizes uncertified States and Indian tribes to use State or Tribal share and historic coal share moneys from the Fund for high priority noncoal reclamation projects. 30 U.S.C. § 1239. Because of historic mining activity, States such as New Mexico, Colorado, and Utah typically have a larger number of high priority noncoal problems than coal problems, and section 409 has allowed them to reclaim many of these hazardous sites. Similarly, section 402(g)(6) of SMCRA allows uncertified States and Indian tribes to place a portion of their State share and historic share moneys from the Fund into interest bearing accounts, the money from which can then be used to fund the treatment and abatement of AMD. 30 U.S.C. § 1232(g)(6). The 2006 Amendments increased the amount of funds that may be placed in these AMD set-aside accounts from 10% to 30%. *Compare* 30 U.S.C. § 1232(g)(6) (2005) *with* 30 U.S.C. § 1232(g)(6) (2007).

Section 411(h)(1) of SMCRA authorizes the distribution of prior balance replacement funds from the general Treasury to uncertified States and Indian tribes instead of the prior unappropriated State or Tribal share moneys that remain in the Fund.

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<sup>11</sup> The ICA expressly exempts from the definition of “grant” the kinds of revenue sharing disbursements discussed in footnote 10, *infra*. 31 U.S.C. § 6501(4)(C). Section 411(h) payments do not constitute revenue sharing, in light of the extensive regulation of State and Tribal reclamation programs under SMCRA.

You have asked whether, in addition to the State share and historic coal share moneys from the Fund, these prior balance replacement funds may be used for noncoal reclamation and the AMD set aside.

## B. Analysis

SMCRA specifies that two allocations within the Fund will serve as the source of funds for both noncoal reclamation and the AMD set aside—State and Tribal share moneys under section 402(g)(1) and historic coal share funds under section 402(g)(5). 30 U.S.C. §§ 1232(g)(1) and (g)(5). Indeed, section 409 expressly states that uncertified States and Indian tribes can *only* fund noncoal reclamation under SMCRA with those two sources of funds. 30 U.S.C. § 1239(b). In particular section 409(b) limits the “[f]unds available for use in carrying out the purpose of this section . . . to those funds which must be allocated to the respective States or Indian tribes under the provisions of paragraphs (1) and (5) of subsection 402(g).” *Id.* Likewise, section 402(g)(6) specifies that only those same two sources of money may be used by uncertified States to fund a State AMD set aside account. 30 U.S.C. § 1232(g)(6) (“Any State . . . may receive and retain . . . up to 30 percent of the total of the grants made annually to the State under paragraphs (1) and (5) if those amounts are deposited into an acid mine drainage abatement and treatment fund established under State law . . .”). The 2006 Amendments made no changes to section 409 and, although they made some changes to section 402(g)(6),<sup>12</sup> they did not change the sources of funding specified.

Moreover, section 411(h)(1) itself has no provision that allows uncertified States and Indian tribes to use prior balance replacement funds for either noncoal reclamation or the AMD set aside. Instead, it specifies that uncertified States and Indian tribes must use prior balance replacement funds “for the purposes described in section 403.” 30 U.S.C. § 1240a(h)(1)(D)(ii). Section 403 sets the objectives for the use of moneys from the Fund, which, other than the expenditure of funds to create and maintain an inventory, authorizes expenditures from the Fund only for the purpose of addressing the reclamation of sites adversely affected by *coal* mining practices. 30 U.S.C. § 1233. No mention is made of noncoal reclamation or the AMD set aside in section 403.

While prior balance replacement funds from the Treasury may not be used for noncoal reclamation or for the AMD set aside, it should be noted that sections 402(g)(6) and 409(b) of SMCRA were not changed in relevant part, other than with respect to the amount that can be included in the AMD set aside. 30 U.S.C. §§ 1232(g)(6) and 1239. Therefore, uncertified States and Indian tribes may still use State or Tribal share and historic coal share funds from the Fund for noncoal reclamation, subject to section 409 of SMCRA, and for deposit into the State or Tribal AMD set aside accounts, subject to section 402(g)(6).

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<sup>12</sup> As just mentioned, the 2006 Amendments increased from 10% to 30% the portion of funds that may be placed in these set aside accounts.



Issue 3: Are the minimum program grants that uncertified States and Indian tribes are entitled to receive under section 402(g)(8)(A) of SMCRA, 30 U.S.C. § 1232(g)(8)(A), subject to the four year phase-in provision of section 401(f)(5)(B) of SMCRA, 30 U.S.C. § 1231(f)(5)(B)?

Yes.

A. Background

Under the SMCRA distribution formula, the amount each uncertified State or Indian tribe is paid annually from the Fund is largely dependent on the amount of coal currently produced, and the reclamation fees paid, in that State or on Indian lands for the preceding fiscal year. Some States, however, have such a small amount of current or historical coal production that the amount of money they would receive solely from their State and historic coal share allocations would be inadequate to support a viable reclamation program. To address this problem, SMCRA requires the Secretary to “ensure that the grant awards” of Title IV money to uncertified States and Indian tribes “total not less than” a specified amount.<sup>13</sup> 30 U.S.C. § 1232(g)(8)(A). The difference between the amount of funds that an uncertified State or Indian tribe is allocated under Title IV and the amount needed, if any, to satisfy the minimum grant amount is known as the “minimum program make up.”

Prior to the 2006 Amendments, the minimum Title IV grant amount was set at \$2 million. However, like other allocations of Fund moneys, the amount that could actually be paid under Title IV was subject to the annual appropriations process. Congress typically appropriated—or allowed to be paid—a maximum of \$1.5 million to minimum program States.

The 2006 Amendments made two changes to this scheme. First, they increased the minimum amount for Title IV grant awards to \$3,000,000.<sup>14</sup> Second, they made the minimum program make up funds, like other Fund allocations, payable from a permanent appropriation of Fund moneys. 30 U.S.C. § 1232(d)(3). Thus, the amount that can be paid to a minimum program State is no longer limited to the annual appropriation made by Congress.

In light of the changes made by 2006 Amendments, you have asked whether OSM must now “ensure” that minimum program States receive grants that “total not less than” \$3 million, or whether the amount of such grants is affected by the four-year phase-in provision established by section 401(f)(5)(B) for grant awards of Fund moneys.

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<sup>13</sup> For fiscal year 2008, the States that are expected to receive allocations under section 402(g)(8) include Alaska, Arkansas, Iowa, Kansas, Maryland, Missouri, Oklahoma, and Tennessee.

<sup>14</sup> Minimum program make up funds of “not less than \$3,000,000” are distributed to eligible States only if additional funds are needed for high priority coal reclamation. 30 U.S.C. § 1232(g)(8)(A).

## B. Analysis

Section 401(f)(3) requires the Secretary “each fiscal year” to distribute the full amount of the allocated State share and historic coal share funds, and the minimum program make up funds. 30 U.S.C. § 1231(f)(3)(B). Thus, at first glance, section 401(f)(3) would appear to require that the Secretary make grants each year to eligible States and Indian tribes of “not less than \$3,000,000 annually” from the permanently appropriated Fund moneys. However, there is an exception to section 401(f)(3) found in section 401(f)(5)(B) that reduces the grant amount that can be paid in each of the next four years. Section 401(f)(5)(B) states:

Notwithstanding [section 401(f)(3)], the amount distributed under this subsection for the first four 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.

For minimum program States, the amount “otherwise required to be distributed” under section 401(f) includes the State share and historic coal share funds and the minimum program make up funds necessary to bring the total grant award under Title IV to “not less than \$3,000,000.” Thus, it is plain that the total amount of grants to minimum program States over the next four years is limited by the phase-in provision in section 401(f)(5)(B).

I recognize that minimum program States have many AML hazards that need to be addressed and that additional funds would facilitate and hasten the remediation of high priority coal sites. However, while the 2006 Amendments raised the minimum funding level for States and Indian tribes to “not less than” \$3 million, they also require a four-year phase-in of the State share, historic coal share, and minimum program make up funds that constitute part of that \$3 million total. Although Congress’ reason for imposing this phase-in is not readily apparent,<sup>15</sup> the language of the statute that makes the State share, historic coal share, and minimum program make up funds subject to the phase-in is clear.

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<sup>15</sup> It is worth noting that Congress also imposed a phase-in provision on the certified in lieu funds to be paid to certified States and Indian tribes. 30 U.S.C. § 1240a(h)(3)(B).

## CONCLUSION

I trust that this memorandum and its conclusions will be helpful to you in implementing the changes to SMCRA by the 2006 Amendments. My office stands ready to assist you as you develop policy and regulations consistent with this memorandum.

This opinion was prepared with the substantial assistance and contribution of Deputy Solicitor Lawrence J. Jensen and the Division of Mineral Resources of the Office of the Solicitor, Associate Solicitor James D. Harris, Deputy Associate Solicitor Matthew J. McKeown, Assistant Solicitor for Surface Mining Thomas A. Bovard, and Emily D. Morris of the Branch of Surface Mining.



David Longly Bernhardt