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DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Part 870
Surface Coal Mining Reclamation Operations; Initial and Permanent Regulatory Programs;
Excess Moisture Content Allowance; Reclamation Fees

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) is amending its regulations governing how the weight of each ton of coal produced is determined for reclamation fee purposes. This action is being taken to permit a deduction for excess moisture that is the calculated difference between the estimated inherent moisture in the coal at the time of production and the amount of total moisture estimated to be contained in the coal at the point of fee assessment.

EFFECTIVE DATE: July 1, 1988.

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March 16, 1988.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Title IV of the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1231*-1243 (the Act), provides for the collection of a fee from coal mining operators subject to the Act on each ton of "coal produced." The funds are to be used for the reclamation of lands mined and abandoned or left in an inadequate reclamation status before the enactment date of the Act, August 3, 1977. Neither the Act nor the legislative history explicitly defines the term "coal produced" or indicates the Congressional intent as to how the term should be implemented. See *Drummond Coal Company v. Hodel, 796 F.2d 503 (D.C. Cir. 1986),* cert. denied, *107 S. Ct. 1593 (1987)* (hereafter Drummond). As Congress did not determine the point in time at which the reclamation fee should be assessed or what the weight of the coal should include, the Secretary of the Interior (Secretary) has wide discretion to consider a number of alternatives for determining fee liability.

OSMRE first promulgated regulations governing reclamation fee collections on December 13, 1977, at 30 CFR Part 837 *(42 FR 62713).* Those regulations provided that the fee be paid on each ton of coal produced for sale, transfer, or use and that the fee be determined at the time of initial bona fide sale, transfer of ownership, or use by the operator. The 1977 regulations were later renumbered as Part 870 without any editorial changes *(43 FR 49940).* On June 30, 1982, OSMRE promulgated regulatory language "to clarify the point in time of fee determination, as well as the value and weight parameters for calculating reclamation fees" *(47 FR 28577).* The 1982 regulation identifies "the first transaction or use of the coal by the operator immediately after it is severed, or removed from a reclaimed coal refuse deposit" as the point in time of fee assessment (30 CFR 870.12(b)(1)).

The weight of the coal taxed included "impurities, including water, that have not been removed prior to the initial bona fide sale, transfer of ownership or use by the operator" (30 CFR 870.12(b)(3)(i) (1982)). Therefore, pursuant to that rule, the fee was collected on the gross weight of all materials, including moisture, extracted with the coal by the process of mining, other than materials removed prior to the first disposition of the coal. In addition, any moisture added to the coal after severance, and not removed prior to the first disposition, was also included in the weight.

The U.S. Court of Appeals for the District of Columbia Circuit held in Drummond that the Secretary did not act in an arbitrary or capricious manner in promulgating the prior rule, and that the rule was not inconsistent with the Act or its legislative history. The Supreme Court declined, without explanation, to review this decision.

The proposed rule in this rulemaking was published on May 18, 1987 *(52 FR 18680)*. As explained in the preamble to the proposal, an inconsistency in the taxation of coal weight under various Federal statutes now exists. Although operators are required to include the coal's excess moisture weight in their abandoned mine land (AML) fee liability, under a 1986 Internal Revenue Service (IRS) Revenue Ruling (86-96), operators can reduce their Black Lung tax liability by taking a deduction based upon the weight of the coal's excess moisture content. As this situation is different from the one that existed at the time OSMRE's rule was adopted in 1977 and clarified in 1982, OSMRE decided to reconsider the issue of including the weight of excess moisture in its assessment of the AML fees.

On July 21, 1987, the comment period was reopened and extended until August 7, 1987 *(52 FR 27419)*. OSMRE conducted one public hearing on July 31, 1987, in Birmingham, Alabama. In response to this proposal, OSMRE received numerous comments from State and national coal associations, coal mining operators, public utilities, coal certification laboratories, and an environmental organization.

II. DISCUSSION OF PUBLIC COMMENTS AND DESCRIPTION OF THE FINAL RULE

SECTION 870.5 -- DEFINITIONS.

OSMRE proposed to add a definition for excess moisture to identify the basis on which an operator could estimate a reduction in coal weight for reclamation fee calculation purposes. The proposed rule would have defined "excess moisture" as noninherent water which accumulates in coal after extraction. Inherent water would have been defined in the proposed rule as natural bed moisture contained in the coal.

The final rule defines the term "excess moisture" as being the difference between "total moisture" and "inherent moisture." "Inherent moisture" is defined as moisture that exists as an integral part of the coal seam in its natural state, including water in pores but not that present in macroscopically visible fractures. "Total moisture" is defined as the moisture that is the loss in weight in an air atmosphere under rigidly controlled conditions of temperature, time and air flow.

Several commenters asserted that the proposed definition of excess moisture was misleading, since it allowed for moisture in coal which could be interpreted to include moisture trapped within the fracture planes and surface pores from outside the natural coalification process (e.g. rain, coal processing moisture, ground water, drilling fluids, etc.) that should not be considered inherent to the coal. One commenter objected to the use of the term "inherent water" and other undefined terms, such as "noninherent water," in the definition, as these terms are not well defined or understood in the industry. This commenter added that these terms are complementary only in an operational sense when it is understood that extraction includes disturbance of the bed (e.g. blasting) that may allow additional water to penetrate the bed from aquifers, and that water released from the aquifer would not be inherent water even though it penetrated the bed.

Another commenter criticized the use of the words "after extraction," stating that the true geological definition of excess moisture must not be limited to moisture accumulated after coal is extracted and that excess or "free" water can be found along the cracks in the in-place coal bed, as well as on the chunks of extracted coal, and can come from water flowing through rock strata, from the surface or ground water systems, into and onto the in-place coal. Another commenter recommended that OSMRE use an independent definition of "inherent moisture" to identify it as the water present at the time of the coal formation, which is intrinsically part of the coal structure, to preclude any surface waters from being interpreted as inherent in the coal.

A majority of the commenters agreed that excess moisture, also known as "surface moisture" and "free moisture," is the difference between total moisture and inherent moisture as those terms are defined by the American Society for Testing and Materials (ASTM). Twenty-two commenters recommended that OSMRE adopt ASTM definitions for inherent moisture and total moisture, as defined in ASTM "Standard Definition of Terms Relating to Coal and Coke," D 121-85, since these terms are well recognized and accepted throughout the coal community. Several commenters noted

that ASTM standard definitions and test methods are used by laboratories owned and operated by commercial coal operations as well as by independent laboratories which conduct tests and analyses for coal companies and consumers of coal. One commenter cited the industry-wide recognition of the ASTM for its procedural work and the large amount of time it has devoted to development of precise definitions of inherent and total moisture.

OSMRE has analyzed these comments and agrees that the proposed definition of excess moisture was deficient and could have caused confusion among members of the coal industry. In response to the comments, OSMRE is adopting the recommendation of many commenters by defining the term "excess moisture" as being the difference between "total moisture" and "inherent moisture." Therefore, OSMRE has found it necessary to define the terms "inherent moisture" and "total moisture" as well. The definitions OSMRE has selected are the ASTM definitions which were recommended by almost all of the commenters commenting on the issue. "Inherent moisture" is defined as moisture that exists as an integral part of the coal seam in its natural state, including water in pores but not that present in macroscopically visible fractures. "Total moisture" is defined as the moisture that is the loss in weight in an air atmosphere under rigidly controlled conditions of temperature, time and air flow.

SECTION 870.12 -- RECLAMATION FEE.

Section 870.12 in 30 CFR is the regulatory provision requiring operators to pay reclamation fees. Paragraph (b) of that section specifies how the fee is determined. Section 870.12(b)(3)(i) disallows deductions for impurities that are not removed prior to the time of initial bona fide sale, transfer of ownership or use by the operator. The rule adopted today creates an exception in Section 870.12(b)(3)(i) and allows a weight reduction for determining AML fee liability for excess moisture present at the time of initial bona fide sale, transfer of ownership or use by the operator.

The proposed rule would have amended 30 CFR 870.12(b)(3)(i) by deleting the phrase "including water" and adding the phrase "including excess moisture for which a reduction is not taken pursuant to paragraph B of this section" and would have redesignated the section as 30 CFR 870.12(b)(3)(i)(A). This provision provided that excess moisture would be included in the weight of coal for determining AML fee liability unless the operator made the reduction pursuant to the proposed 30 CFR 870.12(b)(3)(i)(B). Paragraph (b)(3)(i)(B) would have specified the terms of the allowable reduction.

The final rule is reorganized from the proposal for editorial convenience. In the final rule, OSMRE has decided not to redesignate 30 CFR 870.12(b)(3)(i). Instead of specifying the parameters for implementing the excess moisture content allowance in 30 CFR 870.12(b)(3)(i)(B) as proposed, OSMRE has added a new Section, 30 CFR 870.18, as an administrative convenience. The provisions of Section 870.18 are explained below.

In the final rule, the clause "excluding excess moisture for which a reduction has been taken pursuant to section 870.18" is substituted for the proposed statement "including excess moisture for which a reduction is not taken pursuant to paragraph (B) of this section."

The phrase "excess moisture" is included, rather than the term "water," because the latter could be construed within the context of the rule to include two other types of coal moisture: total moisture and inherent moisture. The new language specifically employs the term "excess moisture," which is defined in 30 CFR 870.5, to avoid confusion and to ensure consistency in the implementation of the excess moisture content allowance. Thus, under the rule, a reduction may be taken only for excess moisture.

One commenter suggested that the first phrase of proposed 30 CFR 870.12(b)(3)(i)(A) be changed to clarify the intent and relationship between proposed subparagraphs (A) and (B) by "excluding excess moisture for which a reduction has been taken pursuant to subparagraph (B) of this section." OSMRE has incorporated this clarification in 30 CFR 870.12(b)(3)(i), and cites new 30 CFR 870.18, which replaces proposed 30 CFR 870.12(b)(3)(i)(B).

This final rule does not otherwise alter the general rule which requires all impurities not removed from coal to be included in its gross weight for AML fee assessment purposes. It remains the operator's responsibility to seek a calculated weight reduction under 30 CFR 870.18 if an excess moisture content allowance is desired.

SECTION 870.18 -- EXCESS MOISTURE CONTENT ALLOWANCE.

The proposed rule, in Section 870.12(b)(3)(i)(B), required an operator seeking the allowance to establish the percentage of excess moisture by standardized laboratory analyses (but did not specify which standard test was to be employed), to retain the results of this testing for a period of six years from the date of the analysis, and to verify the reduction taken by annually updating the documentation of the laboratory analysis. The analysis was to be performed by a certified testing laboratory acceptable to OSMRE.

The final rule has been modified in certain respects from the proposal. Section 870.18 establishes the standards by which an operator may take a calculated weight reduction allowance for the excess moisture in coal. Specific requirements for such a reduction are set forth in Section 870.18 (a) through (e), described below. As set forth in the proposal, this allowance is only valid for coal produced on or after the effective date of the rule. For ease in administering the rule and to accord with *5 U.S.C. 553*(d), the rule will be effective at the beginning of the first calendar quarter after 30 days from promulgation of this rule.

NO RETROACTIVE APPLICABILITY

One commenter stated that the rule should be applied retroactively to all coal produced and shipped after January 1, 1985, to make "excess moisture" deductions for AML fees consistent with Black Lung tax deductions taken pursuant to the decision in *A.J. Taft Coal Co. v. United States, 605 F.Supp. 366 (N.D. Ala. 1984),* aff'd without opinion, *760 F.2d 279 (11th Cir. 1985).* If the rule were applied retroactively, several commenters stated that operators who have properly calculated the excess moisture portion of these fees and paid them under protest would be rewarded. One commenter asserted that operators in Alabama who have not paid AML fees, or who have deducted an excess moisture allowance from their past AML fees, should be given a credit against future fees, and not have to repay fees assessed after January 1, 1985. This commenter stressed that these operators paid AML fees on their understanding of the law, and that small coal operators in Alabama who have taken an excess moisture allowance over the years may be denied future permits by OSMRE's permit blocking system due to any deficiencies in payment. Another commenter encouraged OSMRE to apply the rule retrospectively, arguing that certain Federal court decisions validate an excess moisture deduction for AML fee determination without the restriction of prospective application.

OSMRE does not agree that the rule should be applied retroactively to 1985. On June 30, 1982, OSMRE amended its regulations to clarify the point in time at which fees are to be assessed, as well as the weight parameters on which fee payments are to be made. The 1982 rules are valid and explicitly require fee payment based on the weight of the coal at the time of initial sale, transfer of ownership, or use. Any operator who took an unauthorized deduction for excess moisture prior to the date this rule becomes effective has failed to comply with the law and will not be excused. No compelling circumstances to the contrary have been provided.

SECTION 870.18(a)

Section 870.18(a) requires an operator to demonstrate through competent evidence that there is a reasonable basis for determining the existence and amount of excess moisture. OSMRE believes that the final rule clarifies the standard that was implicit in the proposal. It is incumbent upon the operator to be able to provide OSMRE with sufficient documentation to fulfill the purpose of this subsection. For instance, such documentation could include a detailed written narrative description of methods of sampling and analytical procedures used at each mine with an explanation of any deviations made from standard acceptable sampling and analytical procedure. Also, the source or sources of excess moisture should be identifiable. It is incumbent upon the operator to update such documentation as necessary to establish the continuing validity of the excess moisture allowance. This may involve repeated tests for inherent moisture, and will likely involve total moisture measurements for most shipments.

In adopting Section 870.18(a), OSMRE has considered a suggestion from the IRS as to the test to use until adequate and fully reliable testing procedures become available. IRS recommended that "[i]n the interim, we would suggest a facts and circumstances test allowing the reduction for excess moisture where the taxpayer can demonstrate through competent evidence that there is a reasonable basis for determining the existence and amount of excess moisture." IRS November 18, 1987 letter, p.2.

Many commenters objected to OSMRE's proposal that standardized laboratory test results be updated annually in order to establish the percentage of excess moisture. Several commenters stated that a "total moisture" test of the coal is performed on every shipment, and that total moisture can vary from shipment to shipment, due to processes employed at the mine. These commenters added that inherent moisture is a property of coal which does not have large variances, and therefore the inherent moisture need not be tested as frequently. One commenter stated the total moisture determination should be a test of relative high frequency. Another commenter stated that a particular coal bed over an area of many square miles should not have an appreciable variance in inherent moisture. Another commenter remarked that annual updates are unnecessary and burdensome for smaller companies that mine in a specific area longer than one year and suggested that updates be made only when there is a geological change in the strata from which the coal is extracted.

One commenter remarked that testing should be performed on an as-needed basis, rather than annually, explaining that the surface moisture component of total moisture is variable, whereas inherent moisture tends to remain constant. Another commenter stated that, due to the significant variability of coal, annual laboratory testing is grossly insufficient. One commenter said that it is reasonable to require any mine claiming this allowance to determine equilibrium (inherent) moisture on a periodic basis, either monthly or when new seam or pit is opened. The commenter stated that many mines do this routinely, and that routine representative samples used to determine other coal characteristics may be used for this purpose.

OSMRE has considered the diverse opinions expressed by these commenters, various options for establishing testing frequency, and the ongoing work of the ASTM Committee on Coal and Coke, which is currently considering which tests have the greatest reliability. Many of the comments have merit. OSMRE will not specify an annual update of the laboratory analysis as proposed because the variability of conditions make it infeasible for the agency at this time to prescribe a specific frequency for testing inherent or total moisture.

Under the final rule, the operator must be able to provide OSMRE with sufficient documentation to sustain the weight reduction. Although the final rule does not specify a uniform frequency for performing tests, the operator must update such documentation as necessary to establish the continuing validity of the excess moisture allowance. For example, to account for the concern that one test may provide different results an operator may need to test for the inherent moisture of a coal seam frequently during the initial period of operation so as to establish sufficient baseline data to develop an accurate estimate of the seam's inherent moisture content. Also, because of the variability of each shipment, an operator may have to test total moisture at the time of each initial bona fide sale, transfer of ownership, or use of the coal by the operator. The operator may choose the time frame from which to sample and test the excess moisture of its coal under the final rule. However, it remains the responsibility of the operator to prove through competent evidence that it has chosen reasonable time frames in which to measure the existence and amount of excess moisture.

The proposed rule did not specify the point or points in time when sampling and testing must be performed. Several commenters stated that the sample should be taken at the point of initial bona fide sale, transfer of ownership, or use by the operator, to facilitate sampling. These commenters asserted that a sample taken at this point would represent the coal in its "as shipped" or "salable product" state. One commenter stated that sampling and testing should take place when the coal is first weighed for invoicing control purposes, prior to sale and shipment. That commenter recommended that this requirement should be in the rule and not merely discussed in the preamble. The same commenter remarked that this "first weighed" approach and the alternative "fresh tipple" sampling technique will result in the use of a proper inherent moisture analysis to reflect the sale and shipment of coal, rather than the coal in place. This commenter advised that this approach would resolve a potential problem for operators who wash some or all of their coal and account for a change in inherent moisture that results from the loss of ash during the washing process. Another commenter stated it the ASTM D 1412-85 method is used to sample inherent moisture on the end-use sample, the results would be representative of the coal at the point of bona fide sale and of the coal shipped.

Under Section 870.12(b), reclamation fees are determined by the weight and value at the time of initial bona fide sale, transfer of ownership or use by the operator. This rule is not intended generally to change the practices which OSMRE has accepted as valid with regard to when the operator weighs the coal. What this rule does is allow the operator to take a weight reduction for excess moisture that the coal contains when the weight of the coal is determined. Typically, this will involve determination of both the inherent moisture and the total moisture.

The final rule allows the operator to determine when sampling and testing is needed, so long as the operator can establish by competent evidence the existence and amount of the excess moisture allowance. OSMRE expects to issue guidance to inform operators of the practices which would be acceptable. This guidance will evolve as the agency gains experience on this issue and as reliable testing standards are developed.

One commenter stated the cost to OSMRE would be substantial because of the complexity of enforcing the proposed rule. This commenter stated that certain minimum analyses will now have to be conducted at the point of severance, as well as the point of fee assessment. The commenter added that the rule would increase enforcement problems in assuring proper testing and reporting of assessments, since the agency cannot merely audit transfer operation records (e.g., tipples) or sales records, but would have to investigate the testing of the coal both at point of severance and end use.

OSMRE disagrees with the comment that OSMRE's cost of enforcing the rule will be substantial. OSMRE intends to modify its quarterly Coal Production and Reclamation Fee Report (Form OSM-1) so that each operator who takes an excess moisture weight reduction will have to report the amount of the reduction, as well as the inherent and total moisture percentages upon which the reduction is based. In this manner, OSMRE will be able to keep track of operators taking an excess moisture weight reduction. OSMRE can use its audit resources to monitor documentation retained by operators claiming the allowance. The audit efforts should be able to focus on whether the reduction was taken correctly rather than whether the operator took any allowance for moisture. In each instance, the operator will have to show that the weight reduction was proper and provide the requisite documentation.

SECTION 870.18(b)

Section 870.18(b) requires inherent and total moisture to be tested using standard laboratory analyses. OSMRE has not adopted in this rule any requirement as to who must perform the analysis or where it has to be performed.

The requirement for standardized laboratory analysis appeared in proposed Section 870.12(b)(3)(i)(B), together with a requirement that the analysis be performed by a certified testing laboratory acceptable to OSMRE.

STANDARD TESTS

In the proposed rule, OSMRE solicited comments on the adequacy of procedures for testing the moisture content of coal and ways to ensure the accuracy of excess moisture measurements. One commenter stated that implementation of the proposed rule could lead to inaccurate measurements and a disproportionate allocation of the burden of AML fees to companies using more accurate procedures. The commenter asserted that the proposed rule failed to require an acceptable measurement method, and pointed out that the accuracy of the testing procedures will determine the uniformity of the results obtained from the application of this rule. This commenter asserted that OSMRE's recognition of the ASTM methods in the final rule should help avoid disputes regarding proper measurement of moisture. Many commenters generally agreed that ASTM standard test methods, which specify procedures of the method, as well as its accuracy, are well established in the industry and should be adopted in the final rule.

One commenter questioned the reference in the proposal's preamble to ASTM Standard Test Method for Total Moisture in Coal, D 3302-74, explaining that the proposed rule failed to recognize a second test method, to test for inherent moisture, must also be performed. Another commenter described the proposal to require only one test to calculate excess moisture as clearly insufficient because a test run once provides no comparative data upon which to calculate inherent versus excess moisture. A number of commenters argued that excess moisture, also known as surface moisture and free moisture, can only be established after two tests are performed, a test for inherent or bed moisture, ASTM Standard Test Method for Equilibrium Moisture of Coal at 96 to 97 Percent Relative Humidity and 30 degrees Centigrade (ASTM D 1412-85), and the ASTM Standard Test Method for Total Moisture in Coal (ASTM D 3302-82). These commenters opined that the existence and amount of excess moisture would be the difference between the ASTM D 302-82 and the ASTM D 1412-85 test results.

Several commenters cautioned that the ASTM D 1412-85 test method may yield erratic results on some subbituminous and lignite coals. One commenter recommended the exclusion of equilibrium moisture test results as estimates of inherent moisture in low rank coal. The same commenter also recommended the elimination of channel samples for determining inherent moisture unless the effect of out-of-seam dilution is taken into account. Another

commenter stated that the operator may be able to differentiate between bed moisture and total moisture by performing a test on fresh channel samples for the former, and tippled coal for the latter.

OSMRE recognizes that some low rank coals have equilibrium moisture values below bed moisture, and that the ASTM Committee on Coal and Coke, whose membership includes representatives of the IRS, is currently working to develop and/or confirm precision statements for ASTM D 1412-85, as this test applies to all ranks of coal. OSMRE expects that deviations from standard laboratory test methodologies to account for low rank coals would be noted and fully described in the operator's records. OSMRE will work with the ASTM Committee on Coal and Coke in its effort to further refine an inherent moisture test methodology for all coal ranks.

In its November 18, 1987 letter commenting on the rule, the IRS expressed concern that even use of the ASTM D 1412-85 Equilibrium Moisture Test may have problems. Specifically, IRS stated that although using such a test "might provide a reasonable measure of inherent moisture for coals of high rank, * * * the results obtained under this test may differ each time the test is run. This problem is particularly evident in coals of low rank where test results are especially erratic." IRS recommended that "the results of the ASTM or a similar study should be received before one test is prescribed for use by all taxpayers." November 18, 1987 letter from the IRS, p.2.

Nevertheless, the amount of total moisture and inherent moisture must be established in order to determine the estimated amount of excess moisture present in a particular coal seam. The operator must be able to show through competent evidence that inherent and total moisture figures used in calculating excess moisture weight deductions are valid and have been derived properly. In most instances, OSMRE will currently accept the standard test methods adopted by the ASTM to determine inherent moisture, ASTM D 1412-85, and total moisture, ASTM D 3302-82, because of the lack of more suitable alternatives. Because existing standard test sampling and analytical methods may not always be reliable for testing inherent moisture of some subbituminous and lignite coal, other testing methods may be needed for certain low rank coals. The agency also acknowledges that other standard laboratory test methods could possibly be used to determine the existence and extent of excess moisture present in the coal. For instance, in certain situations the test for proximate analysis, ASTM D 3172-73, may be appropriately used.

Some commenters expressed concern that OSMRE's discussion regarding moisture found with the coal as removed from the seam suggests that only "pit or channel" sampling, a time-consuming and expensive sampling technique, would be acceptable. These commenters stated that "fresh tipple" sampling is equally valid for inherent moisture testing and should be available as an alternative testing technique. OSMRE agrees that standard acceptable sampling and analytical procedures may allow the operator to use fresh tipple sampling to establish inherent moisture.

One commenter stated that although in theory the inherent moisture subtracted from the total moisture would yield the free or excess moisture, it is inappropriate to compare absolute weights when the calculation to determine the adjusted weight is based on percentages. This commenter recommended that one adjustment factor be applied to the total weight of coal and that the fee be assessed on the adjusted weight. OSMRE disagrees with this commenter's proposal. To ensure a comparable measurement of the estimated amount of inherent and total moisture, OSMRE recommends that weight reductions be based on the weighted average of each.

For instance, if the inherent moisture of a coal seam is measured monthly and varies from month to month and the coal produced during more than one month is commingled, OSMRE would expect that the percentage of inherent moisture of the commingled coal would be based on a weighting factor reflective of the differing monthly amounts of coal produced. Similarly, if one total moisture percentage is applied for a shipment of coal, it should reflect a weighting factor for different total moisture percentage of component batches.

OSMRE recognizes that varying circumstances could require different sampling and testing frequencies and averaging techniques to establish reliable results. OSMRE intends to develop technical guidance to assist operators and to assure fair and consistent application of the excess moisture allowance.

CERTIFIED LABORATORIES NOT REQUIRED

One commenter asserted that OSMRE's proposal to require that moisture analyses be prepared by independent certified testing laboratories acceptable to OSMRE was unnecessarily restrictive because many large coal producers regularly perform these tests in their own laboratories. Several commenters noted that the ASTM is presently examining

how to implement a certification process for coal laboratories. These commenters agreed that some commercial services "certify" laboratories outside the coal industry which are not widely accepted or used by the industry. These commenters stated that it would be costly and burdensome for OSMRE to certify laboratories.

One commenter urged that the operator be allowed to select a sampling and testing laboratory, and to assume the risk that OSMRE will disallow any deduction if the operator is unable to establish the appropriateness of the methodologies, equipment, and training of its own laboratory or any commercial laboratory it selects. Another commenter stated that the rigid ASTM standards provide accurate analysis and that a company should be allowed to certify its own analysis, as the Act provides criminal penalties for false certification. This commenter added that it is unclear what was meant by the proposed phrase "acceptable to the Office," and that *Revenue Ruling 86-96* allows a deduction based upon "competent evidence," with no restriction similar to that proposed by OSMRE.

OSMRE agrees with the concerns raised by commenters about only "certified" laboratories being able to perform analyses of coal. Based on the comments, the final rule allows the operator to select who performs the laboratory analysis, but makes the operator responsible for demonstrating that sampling and testing were performed properly.

SECTION 870.18(c)

Section 870.18(c) requires an operator to test the inherent moisture in each seam mined when coal produced from multiple seams is blended prior to the initial sale, transfer or use by the operator.

Commenters addressed the need to test coal prior to blending where it is produced from different seams and commingled after mining and prior to sale. One commenter suggested that operators engaging in such practices should calculate the variation in inherent moisture, if any, between seams and pits, and, should this variation exceed 10 percent, the operator should also be required to provide separate calculations for the approximate tonnages mined from each seam or pit. OSMRE agrees that an operator who blends coal from multiple seams should determine the inherent moisture of each seam. A weighted average of the inherent moisture test results for each seam should be used to determine the excess moisture allowance where any variation in inherent moisture is found.

The rule does not contain the "10 percent" factor suggested by the commenter, or expressly impose separate testing requirements for each pit. Whether separate inherent moisture tests are required for separate pits in which the same seam is mined depends upon the proximity of the pits and other factors which could cause the percentages to differ from one another.

SECTION 870.18(d)

Section 870.18(d) requires an operator to retain the results of all laboratory analyses and all other relevant documentation (including the operator's books and records) for not less than six years after the date of each analysis. This provision is similar to the proposed rule which required that analyses be retained for six years.

The operator is responsible for adequate quality control over the sample collection and preparation process, verification of the validity and frequency of all sampling and testing, and maintenance of the documentation for not less than six years. Specification of a minimum six-year retention period is not intended to limit an operator's responsibility to pay, or limit the Secretary's right to collect improperly deducted AML fees after the six-year period.

SECTION 870.18(e)

Section 870.18(e) cross-references 30 CFR 870.15(c), which allows OSMRE to collect interest upon delinquent AML fee payments. It makes explicit what was implicit in the proposal, namely, that OSMRE can disallow an incorrectly taken weight reduction and compute interest from its point of delinquency.

DISCUSSION OF GENERAL COMMENTS

OSMRE sought comments on specific economic hardships caused by the prior rule, and the degree to which the proposed rule would alleviate such impacts. Also, OSMRE solicited comments on the likely impact of the proposed rule on the coal industry, as well as information on changes in the industry since 1982.

Many commenters asserted that bituminous and anthracite coal operators were treated differently than lignite coal operators under the prior regulations, because, in their view, for reclamation fee purposes OSMRE excluded water from the computation of tonnage for lignite produced.

There has been no preferential regulatory treatment of lignite operators by OSMRE, as alleged by these commenters. Section 701(30) of the Act defines lignite coal to mean "consolidated lignitic coal having less than 8,300 British thermal units per pound, moist and mineral matter free." Lower-rank coal is classified "according to gross calorific value on the moist basis," as stated in ASTM Standard Classification of Coals by Rank, D 388-84. Under the definition of "lignite coal" in 30 CFR 870.5 the word "moist" refers to coal containing its natural inherent or bed moisture, but not including water adhering to the surface of the coal. However, once coal is determined to be of the lignite rank, the fee is assessed on the same basis (tonnage or value) as any other coal, although at a lower rate. Thus, prior to the promulgation of this rule, lignite producers were not allowed a moisture deduction.

Commenters stated that foreign countries impose little, if any environmental regulation or taxes on coal production. They argued that the Federal Government should not unnecessarily burden the U.S. coal producer with unfair and illogical fees or taxes. Several commenters viewed the proposed rule as a way to make coal more competitive and reduce the need for foreign oil to meet the energy needs of this country. One commenter thought that the sampling and testing procedures would alleviate economic hardships on coal suppliers by eliminating numerous record retention requirements. However, the rule requires operators to retain all documentation concerning any claimed excess moisture allowance for at least six years.

One commenter noted that purchasers of coal pay for it based on its calorific value (heat content), rather than its delivered gross weight and that this pattern automatically compensates for excess moisture. A public utility commented that AML fees paid on the gross weight of the coal at the point of first disposition, including total moisture, inflate the taxable tonnage by the amount of additional moisture accumulated during mining, processing, and delivery. This commenter, stated that it paid $9 million per year in AML fees, noted that reclamation fees are ultimately "passed through" to the consumers, through open market or contract price adjustment, and estimated that the proposed rule could reduce its annual costs by $350,000. One commenter characterized the market for coal as weaker and more competitive than in 1982, claiming that it is now more difficult for coal producers to pass on reclamation fees to consumers. The commenter suggested that the excess moisture allowance would provide some relief to industry because it would permit operators to use that money in their businesses. All of these comments have been considered in formulating the final rule.

USER FEE NOT ADOPTED

At the request of the Office of Management and Budget, OSMRE also requested comments on whether a user fee should be imposed on operators taking the allowance. One commenter remarked that, if OSMRE's "policing" of proposed laboratory certification procedures would be the reason for imposing an operator's user fee, then abandonment of such a procedure would obviate any need for the fee. Another commenter stated that, since the proposed rule would place the burden of documenting the allowance claimed on the producer, OSMRE's costs to administer the allowance claim process should be minimal. Still another commenter asserted that, if the rule proposed that OSMRE perform the calculation, there might be some logic in requiring the payment of a user fee, but that this is not the case. One commenter asserted that there is no statutory authority to require payment of monies because an operator has taken an allowance authorized by regulation, and argued that a user fee would penalize a company for complying with the law. This commenter claimed that most companies would forgo the allowance due to the expense of determining total and inherent moisture, if it would not save them a substantial amount of money. In addition, the commenter stated that such a fee would again require coal producers to make two calculations, only one of which would exclude surface moisture. Finally, a commenter suggested that OSMRE's consider all its user fees together, to ensure consistency and rationality in any user fee schedule it adopts.

OSMRE agrees that its justification for the imposition of a user fee upon operators who take an excess moisture allowance was not fully explained in the proposed rule. Section 412(a) gives OSMRE the authority to impose a user fee to offset the cost of agency services. OSMRE has evaluated the advantages and disadvantages of imposing a user fee on operators who take the allowance. Under final 30 CFR 870.18, an operator is required to establish the basis for the excess moisture allowance through standardized laboratory tests. OSMRE is not required to certify laboratories. The

operator must pay for the tests, ensure that they are valid, and retain documentation to support the claimed excess moisture allowance. Therefore, OSMRE's cost to administer the rule should not be substantial and no user fee is needed.

If in the future, OSMRE observes that administrative costs of implementing this rule are significantly higher than currently estimated, OSMRE will propose a rule to establish a user fee.

REGIONAL EFFECTS

OSMRE also sought comments on the regional application of the prior rule and whether the final rule could more equitably address regional differences in climate, business practices, or other factors. One commenter stated that there is no need to apply the rule differently in different regions. The commenter added that the natural geological makeup of coals will compensate for differences in the minerals, and that any differences in mineral constituents is geological, not geographical. Another commenter stated that the rule will only benefit operators if the coal is processed prior to marketing, and would have very limited benefit in regions where coal preparation routinely is not required.

Several commenters observed that the amount of tax calculated under the present rule varies from region to region due to variations in climate, the amount of rainfall, and the preparation or washing required for an operator to sell coal. One commenter stated that regional differences in excess moisture content result from the climatic conditions under which the coal is mined, type of mining, proximity to markets, and mode of transportation. Another commenter stated that an operator should not be penalized or required to pay a premium with respect to reclamation fees simply because its operation includes a coal washing operation or because the coal contains additional noninherent moisture from rainfall or other sources. A commenter stated that the proposed rule should be applied on a national basis and that there should be consistency within a mining district or region with regard to the allowable inherent moisture. This commenter recommended the use of uniform standard values for inherent moisture to reduce the need for expensive exploration, sampling, testing, and retention of records. OSMRE generally agrees with these commenters.

The final rule will apply on a national basis. In part, it is intended to reduce regional disparities based upon climatic and other conditions which affect amounts of excess moisture. At this time OSMRE is not willing to specify uniform standard values for inherent moisture and prefers to base the deduction on site-specific determinations. OSMRE recognizes that it may be possible to develop uniform standards that could be valid for particular coal seams in local geographic areas. Such standards would have to evolve over time.

COMMENTS ON CONGRESSIONAL INTENT

A commenter asserted that Congress chose a 15-year period for the imposition of AML fees "in order to assure the availability of monies for program purposes," and that any reduction in the amount of AML fees would negatively impact the reclamation of eligible lands, contrary to Congressional intent. One commenter stated that there is no Congressional intent to allow any adjustments to be made prior to calculation and assessment of the fee, and that Congressional intent was to assess the fee on the gross weight of coal, including both inherent and excess moisture. The commenter stated that Congress where it intended to differentiate or adjust the fee, such as in the case of lignite, stated so explicitly.

OSMRE disagrees with the commenter's view that Congressional intent can be discerned on this issue. In the Drummond case, cited earlier, the court concluded that the Act is ambiguous and the legislative history is silent on the issue. Regarding the Act, the court observed that "Congress, however, did not define 'coal' in the statute -- still less the term 'coal produced,' upon which the fee is levied. Like the district court, we do not find the ordinary meaning of that term unambiguous * * *." *Drummond, supra, at 505.* At to the legislative history, the court stated that "[t]he legislative history simply does not disclose the requisite specific intent upon which a court could properly rely to overturn the Secretary's regulations. Congress in fact never addressed the particular issue that we confront in this case." *Id. at 506* (footnote omitted).

One commenter stated that Congress established the rate of assessment for AML fees based on assumptions which the commenter believed are inconsistent with the proposed rule. The commenter asserted that Congressional projections concerning the yield of the fee were based upon tonnage figures compiled by the U.S. Bureau of Mines, based on a methodology with no reduction of gross weight for excess moisture. The commenter asserts that, had Congress contemplated such a deduction, the matter certainly would have appeared of record since such a deduction would impact

the fund by approximately 10 percent, and Congress would likely have offset that deduction by an increase in the assessment rate. The commenter, quoting the Act's legislative history, stated that the projections were "based on the most recent annual coal statistics concerning tonnage."

Again, OSMRE agrees with the court of appeal's conclusion that the legislative history does not address the issue of a moisture deduction. Additionally, OSMRE disagrees with the analysis presented by the commenter. The complete quote, which was not presented by the commenter is: "It is estimated that the reclamation fee adopted by the committee would yield approximately $140-$160 million per year based on the most recent annual coal statistics concerning tonnage, method of mining and estimated average value at the mine." H.R. Rep. 95-218, 95th Cong. 1st Sess. 137 (1977). Thus, more than just tonnage was a factor in setting the fee structure. In fact, actual receipts to the fund, over its ten year history, have been greater than $200 million per year, more than 25 percent higher than Congressional projections. The House Report does include the following principal Congressional considerations concerning the basis for AML fees: "First, to set the fee at such a level that it is not a burden on the industry; second, to provide at the same time sufficient funds for meeting program objectives within a reasonable timeframe; and third, to structure the fee so it would not exert an inflationary influence in the economy." Id. There is little evidence that a moisture deduction figured in these considerations.

COORDINATION WITH IRS

One commenter asserted that consistency with IRS treatment of Black Lung taxes is insufficient to support OSMRE's policy because the IRS and OSMRE programs are not required to be consistent and serve different purposes.

Under Section 201(c)(12) of the Act, the Secretary is required to cooperate with other Federal agencies to minimize duplication of inspections, enforcement and administration of the Act. As a step towards more consistent treatment, this rule fosters cooperation between OSMRE and IRS and is intended to reduce duplication of both enforcement and administration. In its November 18, 1987 letter to the Department of the Interior, the IRS stated: "The DOI proposed regulation recognizes the importance of consistent positions between the DOI and the IRS rules. We agree that the calculations for the AML fees and the Black Lung tax ideally should be based on the same measurement system * * *."

Although the IRS cannot generally provide information to OSMRE on specific taxpayers, *26 U.S.C. 6103,* such information may be disclosed in certain circumstances. For instance, under *26 U.S.C. 6103*(c), if a taxpayer consents to such disclosure, the IRS may disclose information to OSMRE. An operator may consent if such information would benefit the operator. Also, under *26 U.S.C. 6103*(i), upon request, certain information may be disclosed to OSMRE employees for use in criminal investigations, such as under Section 402(d) of the Act. Moreover, where the two agencies have consistent regulations, the IRS can provide technical advice and training to OSMRE.

OSMRE has been coordinating its AML reclamation fee compliance with IRS Black Lung tax enforcement efforts for years. Since 1982, the Interior Department has had a Memorandum of Agreement with the IRS and routinely sends its audit results to the IRS Assistant Commissioner (Examination).

The importance of the assistance that can be provided to IRS by OSMRE's AML fee auditors was expressly recognized in testimony by the National Wildlife Federation (NWF) on July 14, 1987 before the U.S. House of Representatives Subcommittee on Mining and Natural Resources of the Committee on Interior and Insular Affairs. NWF noted that both the AML fund and the Black Lung Tax are based on payments by coal operators for each ton of coal produced. NWF suggested an expanded use of AML auditors to check whether Black Lung payments are appropriately made.

One commenter stated that the proposed definition of "excess moisture" understates the allowance permitted under *Revenue Ruling 86-96.* This commenter urged that, to conform to that Revenue Ruling and the Taft decision, the allowance must cover all moisture in excess of inherent moisture. The commenter stated that, because proper application of the IRS ruling requires the use of ASTM analytic methods and definitions, OSMRE should substitute the term "free moisture" in coal for "excess moisture." Another commenter noted that coal producers are currently working with the IRS to develop a consensus on the method to be used to measure excess moisture content in coal for Black Lung tax purposes. This commenter suggested that the OSMRE and the IRS explore the possibility of implementing the same testing procedures to avoid confusion.

To the extent the revised rule offers a coal operator an opportunity to reduce an estimated excess moisture amount from the weight of coal tonnages on which a reclamation fee is paid, it is consistent with IRS Revenue Ruling 86-96.

OSMRE considered joint rulemaking with the IRS to prescribe a standard test to calculate excess moisture for both Black Lung tax and AML fee purposes. The IRS advised that it could not use the ASTM D 1412-85 Equilibrium Moisture Test as a universal standard for determining excess moisture due to the controversial nature of that test. Further, the IRS does not plan at this time to prescribe any specific tests or definitions for use in determining excess moisture. They will instead rely on the competent evidence requirement discussed above. Coal operators should be aware that an excess moisture determination accepted or acceptable under this rule for purposes of the AML fee may not meet the IRS requirements for the Black Lung tax.

RELATION TO 1982 RULE

One commenter pointed out that the current proposal was considered and rejected by the agency in the 1982 revisions to 30 CFR Part 870 *(47 FR 28578*, June 30, 1982). OSMRE has reevaluated its 1982 statements on this issue. The basis for rejecting an excess moisture deduction in 1982 was the following:

"If moisture deductions were allowed, audit of operator records would be further complicated and laboratory analyses required to document moisture content. Moreover, such deductions could reduce fee collections by many millions of dollars over the 15-year life of the Fund."

47 FR 28578 (June 30, 1982).

The earlier concerns about auditing can be resolved. Under this final rule and the anticipated change to the OSM-1 Form, operators will have to report the amount of the excess moisture weight reduction and the inherent and total moisture percentages upon which it is based. Although OSMRE auditors will have to examine these factors, Section 870.18(a) requires operators to demonstrate that the deduction is properly taken and Section 870.18(d) requires the operators to retain the relevant documentation. Thus auditing can be successfully achieved.

As to the requirement for laboratory analysis, alluded to in 1982, that is a cost of taking the deduction. If an operator wishes to avoid laboratory analyses, he or she is not obligated to take an excess moisture weight reduction.

Regarding the concern that an excess moisture weight reduction will reduce fee liability over the life of the AML fund, the prospective nature of this rule will limit its applicability to less than five years. Although this could mean an effect of several million dollars, no overriding reason exists as to why operators should pay a fee on excess moisture. The amount actually lost to the fund will depend on the number of operators who claim the allowance, and the amount of the allowances they claim. All operators will not claim an allowance because coal is not always exposed to conditions under which excess moisture may accumulate prior to the point of bona fide sale, transfer of ownership, or use. Therefore, no one can precisely predict the impact of the final rule on the fund.

In 1982, OSMRE also rejected a proposal which would have allowed operators to take moisture deductions in particular States where similar deductions were allowed for state coal severance tax purposes. OSMRE rejected such an approach because it believed that to be equitable the Federal rules should be applied uniformly. Because of the wide variety of State severance tax approaches, OSMRE was concerned that a rule based upon State taxing mechanisms could result in considerable competition among the States and encourage similar proposals for other deductions. See *47 FR 28578* (June 30, 1982).

One commenter asserted that, because State severance tax programs generally have not changed since 1982 with regard to allowing moisture deductions, OSMRE's earlier concerns about interstate competition and the effect on other programs remain valid.

OSMRE agrees that its earlier concerns are valid, but disagrees that this rule will have such deleterious effects. The competition among states about which OSMRE was concerned would have resulted, not from allowing the moisture deduction generally, but from allowing it only in those states with particular taxing structures. This final rule grants an excess moisture allowance nationwide, and it should not encourage competition among States that might have resulted from a State-by-State allowance. Moreover, OSMRE does not intend to encourage proposals for other deductions.

Although in 1982 the agency rejected the excess moisture allowance contained in this final rule, circumstances have changed. In 1982, the IRS did not recognize the excess moisture weight reduction for Black Lung Tax purposes. Since the Taft decision in 1985, cited earlier, and the 1986 revenue ruling, IRS does allow such a reduction.

A moisture deduction is a rational policy choice within the bounds of the Secretary's discretion. Since Congress did not determine what the weight of coal should include, the Secretary has discretion to adopt a reasonable option for determining fee liability. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question * * * is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).* A reviewing court will need not conclude that the agency's interpretation of the statute was the only permissible one, only that it was reasonable, and not arbitrary, capricious, or contrary to law.

In the case of *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 42 (1983),* the court stated that

Your estimated cost = $100 X 1,500 / 1,000 X 12.06 / 8.04 operating costs, based on 8.04¢ per "[r]egulatory agencies do not establish rules of conduct to last forever, and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances." The agency is obliged to articulate a reasonable basis for its current position. It has done so.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The information collection requirements in the rule have been approved by the Office of Management and Budget in accordance with *44 U.S.C. 3501* et seq. and assigned clearance no. 1029-0090. The information is needed to meet the requirements of section 402 of the Act, and will be used by OSMRE to fulfill its statutory mission to collect reclamation fees. The obligation is imposed to obtain a benefit.

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this document is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. 601* et seq. The rule does not distinguish between small and large entities. These determinations are based on the findings that the regulatory additions in the rule will not change costs to industry or to the Federal, State or local governments. The rulemaking will provide an economic benefit to the fee payer. Therefore, the rule should not add appreciably to the cost of operating a mine in compliance with a regulatory program. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

National Environmental Policy Act

OSMRE has prepared a final environmental assessment (EA) and has determined that the final rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 102*(2)(C). A Finding of No Significant Impact has been approved for the final rule in accordance with OSMRE procedures under NEPA. The EA is on file in the Administrative Record (see "ADDRESSES"). Because potential impacts of this rule on the AML Fund are speculative and, in any case, not related to any identifiable reclamation projects, the programmatic environmental impact statement, OSMEIS-2, covering the implementation of program policies should also be consulted for discussions of the impacts of varying allocation approaches.

Authors

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LIST OF SUBJECTS IN 30 CFR PART 870

Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, Part 870 is amended to read as follows:

Dated: April 13, 1988.
J. Steven Griles, Assistant Secretary -- Land and Minerals Management.

PART 870 -- ABANDONED MINE LAND RECLAMATION FUND -- FEE COLLECTION AND COAL PRODUCTION REPORTING

1. The authority citation for Part 870 continues to read as follows:

Authority: *30 U.S.C. 1201* et seq., and Pub. L. 100-34.

2. Section 870.5 is amended by adding the following definitions of "excess moisture," "inherent moisture," and "total moisture" in alphabetical order:

SECTION 870.5 - DEFINITIONS.

* * *

EXCESS MOISTURE means moisture determined to be the difference between total moisture and inherent moisture.
* * *

INHERENT MOISTURE means moisture that exists as an integral part of the coal seam in its natural state, including water in pores, but not that present in macroscopically visible fractures.

* * *

TOTAL MOISTURE means the moisture determined as the loss in weight in an air atmosphere under rigidly controlled conditions of temperature, time and air flow.

* * *

3. Section 870.12(b)(3)(i) is revised to read as follows:

SECTION 870.12 - RECLAMATION FEE.

* * *

(b) * * *
(3)(i) Impurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator, excluding excess moisture for which a reduction has been taken pursuant to Section 870.18, shall not be deducted from the gross weight.

* * *

4. Section 870.18 is added as follows:

SECTION 870.18 - EXCESS MOISTURE CONTENT ALLOWANCE.

For coal produced on or after July 1, 1988, the operator may take a calculated weight reduction to allow for the weight of excess moisture in the coal, subject to the following requirements:

(a) The operator shall demonstrate through competent evidence that there is a reasonable basis for determining the existence and amount of excess moisture. Documentation shall be updated as necessary to establish the continuing validity of the excess moisture content allowance taken by the operator.

(b) Inherent and total moisture shall be tested using standard laboratory analyses.

(c) The operator shall test for variations in inherent moisture amounts for different seams of coal produced which are blended prior to the initial bona fide sale, transfer of ownership, or use of the coal by the operator.

(d) The operator shall retain the results of all laboratory analyses and all other relevant documentation (including the operator's books and records) for not less than six years after the date of each analysis.

(e) If the Office disallows all or part of the allowance, the operator shall submit the additional fee, together with interest computed under Section 870.15(c).

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