



# United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

OCT 15 2001

Memorandum

To: Acting Director, Minerals Management Service

From: Acting Associate Solicitor for Mineral Resources *Bt Kelly*

Subject: Royalty on Federal Coal Recovered from Coal Washing Waste Piles

The Minerals Management Service ("MMS") has requested an opinion on whether royalty is due on coal recovered from coal washing waste piles ("recovered coal") under six different scenarios in which the variables are (1) whether the originating mine is operating or is closed; (2) whether the Federal lease from which the coal originated is still effective or has been relinquished; and (3) whether the waste pile is located on or off the lease, and, if off the lease, on Federal or non-Federal land. The six situations the memorandum asked us to address are as follows:

<u>Status of Original Mine</u>	<u>Status of Federal Lease from which Coal Originated</u>	<u>Waste Pile Location</u>
Operating	Effective	On Lease
Operating	Effective	Off Lease
Closed	Effective	On Lease
Closed	Effective	Off Lease
Closed	Relinquished	On Federal Land
Closed	Relinquished	Off Federal Land

MMS personnel have explained to us their understanding that in every situation of which they are aware in which the wash plant and associated waste pile are located on private land, the lessee owns the wash plant and the waste pile. This opinion therefore proceeds on that assumption. If that turns out not to be the case in any particular situation, MMS should advise us, because further analysis and explanation are necessary. MMS personnel also told us that in many instances, although the lessee owns the waste pile, it is being worked by a third party. This opinion specifically addresses that scenario.

For the reasons explained more fully below, we have concluded as follows:

1. If the lease is still in effect, the lessee owes royalty on coal recovered from waste piles at the lease royalty rate at the time the recovered coal is used, sold or otherwise finally disposed of, regardless of whether the mine is operating or closed, and regardless of the location of the waste pile.

2. If the lease has been relinquished before coal from the waste pile is used, sold, or otherwise disposed of, royalty does not accrue on the recovered coal, regardless of the location of the waste pile.

### **BACKGROUND — FEDERAL COAL LEASE ROYALTY PROVISIONS**

Before 1976, the royalty rate specified in Federal coal leases was a "cents per-ton" rate. At that time, section 7 of the Mineral Leasing Act ("MLA"), 30 U.S.C. § 207 (1972), required that all coal leases establish a royalty of not less than five cents per ton and an indeterminate term, subject to readjustment every twenty years. During the 1970s energy crisis, however, coal prices began to rise and the cents-per-ton minimum became increasingly inadequate, leading Congress to conclude that "the public is being paid a pittance for its coal resources." H.R. Rep. No. 94-681, at 17 (1976), reprinted in 1976 U.S.C.C.A.N. 1943, 1953. Congress enacted the Federal Coal Leasing Amendments Act ("FCLAA") in 1976, which sought, among other things, to ensure that the public receives a fair return for its coal leases. The FCLAA amended MLA section 7, 30 U.S.C. § 207, by replacing the cents-per-ton minimum rate with an *ad valorem* rate. After the FCLAA amendment, 30 U.S.C. § 207(a) provides in relevant part:

A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12 ½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations.

To bring existing leases into conformity with this new royalty rate, 30 U.S.C. § 207(a) provided for readjustment of the lease terms as follows:

Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended . . . .

Bureau of Land Management ("BLM") regulations at 43 C.F.R. § 3451.1 further require:

- (a)(1) All leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the current 20-year period. . . .
- (2) Any lease subject to readjustment which contains a royalty rate less than the minimum royalty prescribed in 43 CFR 3473.3-2 of this title shall be readjusted to conform to the minimum prescribed in that section.

The standard Federal coal lease entered into under the MLA, as amended by FCLAA, states that royalty is due at "\_\_\_ percent of the value of coal . . ." For surface mines, BLM regulations at 43 C.F.R. § 3473.3-2(a)(1) provide for a royalty rate of not less than 12 ½ percent. For underground mines, BLM regulations, at 43 C.F.R. § 3473.3-2(a)(2), provide for a royalty rate of 8 percent of the value of coal removed from the mine.

### ANALYSIS

**I. IF THE LEASE IS STILL IN EFFECT, THE LESSEE OWES ROYALTY ON COAL IT RECOVERS FROM A WASTE PILE, REGARDLESS OF THE LOCATION OF THE WASTE PILE.**

MMS regulations at 30 C.F.R. § 206.253(a) provide:

All coal (except coal unavoidably lost as determined by BLM under 43 CFR part 3400) from a Federal lease subject to this part is subject to royalty. This includes coal used, sold, or otherwise disposed of by the lessee on or off the lease. (Emphasis added.)

Coal that is deposited in waste piles or slurry ponds as a result of washing coal that is mined from a Federal lease is part of the coal mined from that lease. The regulation specifically governing coal that is later recovered from washing waste piles is found at 30 C.F.R. § 206.253(c). It provides:

If waste piles or slurry ponds are reworked to recover coal, the lessee shall pay royalty at the rate specified in the lease at the time the recovered coal is used, sold, or otherwise finally disposed of. The royalty rate shall be that rate applicable to the production method used to initially mine coal in the waste pile or slurry ponds; *i.e.*, underground mining method or surface mining method. Coal in waste pits or slurry ponds initially mined from Federal leases shall be allocated to such leases regardless of whether it is stored on Federal lands. The lessee shall maintain accurate records to determine to which individual Federal lease coal in the waste pit or slurry pond should be allocated. However, nothing in this section requires payment of a royalty on coal for which a royalty has already been paid. (Emphasis added.)<sup>1</sup>

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<sup>1</sup> The predecessor to this regulation was promulgated in 1982 and contained similar provisions. See former 30 C.F.R. § 203.200(k) (1983), originally codified as 30 C.F.R. § 211.63(k), promulgated at 47 Fed. Reg. 33154, 33192 (July 30, 1982). The current rule was promulgated at 54 Fed. Reg. 1492 (Jan. 13, 1989).

Under this rule, the lessee must pay royalty when coal from a waste pile or slurry pond is "used, sold, or otherwise finally disposed of." It also expressly provides that royalties are due regardless of whether the waste pile is stored on Federal or non-Federal land. That provision, together with the last sentence of 30 C.F.R. § 206.253(a) underscored above, necessarily imply that it does not matter if the waste pile is located on or off the lease (or on or off Federal land). If coal in the waste pile has been derived from more than one property, the lessee must maintain adequate records to properly determine the portion of the waste pile allocable to coal mined from a particular Federal lease.

It follows that if a lease is in effect, the lessee must pay royalties when it uses, sells or disposes of recovered coal, regardless of where the coal waste pile is located. Whether the particular mine from which the coal in the waste pile was derived is still operating is of no relevance as long as the lease is still in effect.

During conversations with your staff, we learned that most coal waste piles are being worked by third parties, not the lessee. However, this fact does not change the conclusion that if the lease is in effect "at the time the recovered coal is used, sold, or otherwise finally disposed of," the lessee owes royalties. 30 C.F.R. § 206.253(c). Nor does this fact change the conclusion that if the lease is in effect, royalties are due regardless of whether the waste pile is on Federal or non-Federal land.

MMS personnel have explained that they do not yet know the specific terms of the various contracts under which the third parties who are working the waste piles obtained the right to recover coal from the waste piles. What triggers the lessee's royalty obligation under 30 C.F.R. § 206.253(c) is that the recovered coal is "used, sold, or otherwise finally disposed of." It follows that the question of when and how much of the coal in the waste pile become royalty-bearing depends at least in large measure on the terms of the contract that gives the third party the right to recover the coal.

For example, assume that a lessee grants a third party the right to work the waste pile to recover the coal and the third party agrees to pay the lessee \$ 1.00 for every ton the third party recovers. Assume further that the agreement does not identify any minimum quantity to be recovered, and any coal left in the waste pile remains the property of the lessee. In that event, the lessee effectively will have sold or disposed of a ton of the coal in the waste pile at the time the third party recovers that amount of coal. Under this hypothetical, royalty would be due incrementally as the third party recovers a particular volume of coal.

Alternatively, assume that the lessee transfers the right to recover 1,000 tons of coal in a waste pile to a third party who wishes to recover that amount of coal, and the third party pays for the 1,000 tons up front. In that event, the lessee will have sold or disposed of 1,000 tons of coal, and the entire volume sold will be royalty-bearing.

The terms of the contract under which the third party acquires the right to recover coal from the waste pile will have to be examined on a case-by-case basis to determine when recovered coal

is "used, sold, or otherwise finally disposed of." Because of the potential variety of contract terms, it is not possible in this opinion to definitively state when coal recovered from a waste pile becomes royalty-bearing in each particular case.

We further observe that the royalty rate applicable to coal recovered from a waste pile is the lease royalty rate in effect at the time the coal is sold or transferred, if that rate is different from the rate that was in effect at the time the coal that was washed was severed from the ground. Section 206.253(c) quoted above requires this result, as does the analysis in section II.A. below.

Finally, as quoted above, the last sentence of section 206.153(c) provides that "nothing in this section requires payment of a royalty on coal for which a royalty has already been paid." Situations could arise in which royalty has already been paid on coal extracted from a waste pile. One example would be where the coal from which the washing waste was derived was originally sold on the basis of its volume or weight before washing and the lessee paid royalty on the basis of that volume or weight. Similarly, if the coal originally produced was not disposed of through an arm's-length sale, and if the lessee paid royalty on the applicable value on the basis of the volume or weight before washing, royalty would have been paid already on the coal deposited to (and later recovered from) the waste pile. In such situations, the analysis above would not apply, and the lessee would not owe royalty on coal recovered from the waste pile, even if the lease is still in effect.

The analysis and conclusions in this section govern the first four of the six situations outlined above.

## **II. IF THE FEDERAL LEASE HAS BEEN RELINQUISHED BEFORE COAL IS USED, SOLD, OR OTHERWISE DISPOSED OF, ROYALTY DOES NOT ACCRUE ON THE RECOVERED COAL.**

The question then arises whether the lessee owes royalty on waste pile coal sold or disposed of after the lease from which the coal originally was mined has been relinquished - the question posed in the last two of the six situations. Federal coal leases may be relinquished under 30 U.S.C. § 187. It provides in relevant part:

The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease . . . . (Emphasis added.)<sup>2</sup>

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<sup>2</sup> A prior Solicitor's opinion has observed that the phrase "relieved of all future obligations under said lease" in 30 U.S.C. § 187 "may well mean that on the instant of acceptance, the lessee is by such acceptance relieved of future obligations" under the lease. *Relinquishment of a Coal Lease*, Sol. Op. M-36511 (June 17, 1958). The purpose of the relinquishment provision is to "promote the  
(continued...)

The lease terms and BLM regulations at 43 C.F.R. § 3452.1 implement this provision. The BLM regulations provide:

No relinquishment shall be approved until the authorized officer determines . . . that the accrued rentals and royalties have been paid and that all the obligations of the lessee under the regulations and terms of the lease have been met.

43 C.F.R. § 3452.1-3. The standard Federal coal lease contains almost identical language.

Therefore, the question is whether the obligation to pay royalties on coal not yet recovered from waste piles and not yet sold or disposed of before relinquishment of the lease is, at the time of relinquishment, a future obligation or an already accrued obligation. That in turn depends on when the lessee's liability for royalty on coal mined from Federal leases accrues.

**A. Liability for Royalty on Coal Mined from Federal Leases Accrues Upon Sale or Disposition of the Coal, Not Upon Physical Severance from the Ground.**

The first sentence of 30 C.F.R. § 206.253(c) quoted above provides:

If waste piles or slurry ponds are reworked to recover coal, the lessee shall pay royalty at the rate specified in the lease at the time the recovered coal is used, sold, or otherwise finally disposed of.

The phrase "at the time the recovered coal is used, sold, or otherwise finally disposed of" modifies the phrase "at the rate specified in the lease," as accepted grammatical construction indicates, and not just the clause "shall pay royalty." Any doubt in that regard is settled by the rulemaking history.

The first sentence of 30 C.F.R. § 206.255(c) in the proposed rule (which became section 206.253(c) in the final rule) read as follows:

In the event waste piles or slurry ponds are reworked to recover coal, the lessee shall pay royalty at the rate specified in the lease at the time of recovery.

52 Fed. Reg. 1840, at 1851 (Jan. 15, 1987). The preamble explained:

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<sup>2</sup>(...continued)  
prospecting and development of mineral deposits on the public domain with due protection to the public interest." *Ametex Corp.*, 121 IBLA 291, 292 n.1 (1991).

Proposed § 206.255(c), which requires royalty payments on coal or coal products recovered from waste piles or slurry ponds, is a continuation and clarification of existing policy contained in the existing regulations at § 203.200(k). Royalty on coal recovered from waste piles or slurry ponds would be based on the current terms of the lease. Therefore, even if a lessee had initially extracted the coal from the ground under an earlier cents-per-ton royalty term, coal now recovered from waste piles or slurry ponds would require royalty on an ad valorem basis, if the lease royalty is now an ad valorem rate.

52 Fed. Reg. at 1842 (emphasis added).<sup>3</sup>

If a lessee must pay royalty on recovered coal at the *ad valorem* rate in effect at the time of disposition, even if the recovered coal had been extracted during the effectiveness of the cents-per-ton rate, the necessary implication is that royalty liability did not accrue at the time of extraction. Instead, royalty liability accrued at the time of sale or other disposition. If liability for royalty had accrued at the time of extraction, the lessee's obligation to pay on a cents-per-ton basis would have been established and fixed at that time — even if the requirement to pay is postponed — and subsequent readjustment to an *ad valorem* rate would have been irrelevant.

This is consistent with the royalty consequences of other coal extracted from the ground before lease readjustment but sold after the effective date of readjustment to an *ad valorem* royalty rate. The January 1989 rulemaking included a provision at 30 CFR § 206.256(d) to "deal with practical situations for paying royalty when coal is sold, used, or otherwise finally disposed of" and to generally clarify valuation policy during the lease readjustments under the statutory mandate of 30 U.S.C. § 207 and the regulations of 43 C.F.R. subpart 3451. 54 Fed. Reg. 1509-10 (Jan. 13, 1989). Title 30 C.F.R. § 206.256(d) provides:

When a coal lease is readjusted pursuant to 43 CFR part 3400 and the royalty valuation method changes from a cents-per-ton basis to an ad

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<sup>3</sup> The first two sentences of the 1982 rule whose policy the new rule continued (the former 30 C.F.R. § 203.200(k), previously 30 C.F.R. § 211.63(x), 47 Fed. Reg. 33192) read as follows:

In the event waste piles or slurry ponds are reworked to recover coal, or if a market becomes available to sell the waste products containing coal, the operator/lessee shall pay Federal royalty at a rate specified in the Federal lease at the time of recovery. The operator/lessee shall make payment based on the Federal share of the coal when the coal is recovered regardless of whether it is stored on Federal lands.

The preamble to this provision did not include any further explanation.

valorem basis, coal which is produced prior to the effective date of readjustment and sold or used within 30 days of the effective date of readjustment shall be valued pursuant to this section [*i.e.*, at the cents-per-ton rate]. All other coal that is not used, sold, or otherwise finally disposed of within 30 days after the effective date of readjustment shall be valued pursuant to the provisions of § 206.257 of this subpart [*i.e.*, at the *ad valorem* rate], and royalties shall be paid at the royalty rate specified in the readjusted lease. (Emphasis added.)

MMS could have required that the adjusted royalty rate be applied to coal sold beginning on the effective date of the adjusted rate. Instead, MMS provided a 30-day grace period that allowed the lessee to pay on the old royalty rate for coal sold or used during the first month after readjustment. But if coal extracted before the effective date of readjustment is not sold within the grace period, the *ad valorem* rate applies, and the lessee must pay royalty on the specified percentage of the value of that coal. Just as with section 206.253(c), this provision necessarily implies that royalty liability accrues at the time of sale or disposition, not at the time of extraction. If royalty liability accrued at the time of extraction, then a cents-per-ton liability would have been fixed for all coal extracted before the effective date of readjustment.

These provisions also are consistent with the royalty treatment of stockpiled coal. Title 30 CFR § 206.255(b) and (c) provide:

(b) Coal produced and added to stockpiles or inventory does not require payment of royalty until such coal is later used, sold, or otherwise finally disposed of. . . .

(c) The lessee shall pay royalty at the time the coal is used, sold, or otherwise finally disposed of, unless otherwise provided for at 206.256(d) of this subpart.

The preamble discussion of this provision in the January 1989 rule states:

The term "used" was added to the paragraphs (b) and (c) to make it clear that the use of coal by the lessee triggers the royalty payment obligation.

54 Fed. Reg. 1509 (Jan. 13, 1989) (emphasis added). The preamble further noted (*id.*):

The MMS does not intend this provision to mean that royalty normally is due when coal is removed from a lease and transferred to a nearby stockpile prior to sale.

Plainly, therefore, royalty is not due until coal is used, sold, or otherwise disposed of. Royalty is not owed on coal severed from the ground but stockpiled on or near the lease premises.

Indeed, no coal lessee has argued that royalty liability has accrued on stockpiled coal. If royalty liability accrued on stockpiled coal, every coal producer on Federal leases would owe the Federal government large sums in unpaid royalties -- or, at a minimum, large sums in interest for the period between when liability accrued at the time of extraction and when the lessee finally must pay at the time of sale or disposition. Nothing in this regulation implies or suggests that the royalty obligation attaches immediately upon severance and simply lies dormant for some indefinite period until coal is finally sold or used.

The principles discussed above make particular sense in light of the nature of coal mining and coal sales. Coal is a solid mineral mined in very large volumes. Coal mines continue normal operations, and extracted coal will be added to a stockpile, at the same time that the volume sold from the stockpile in particular periods may vary. Commonly, coal is added to the stockpile long before the coal is sold, and may remain in a stockpile for many months before actual sale or other disposition. In these circumstances, it is logical not to impose royalty liability immediately upon physical severance from the ground.

Moreover, the wording of 30 U.S.C. § 207 (prescribing royalty as a percentage of "the value of coal as defined by regulation") contrasts with the statutory royalty provisions applicable to fluid minerals (oil and gas) in both the MLA and the Outer Continental Shelf Lands Act ("OCSLA"). The MLA, at 30 U.S.C. § 226, prescribes royalty on oil or gas as a percentage of the "amount or value of the production removed or sold from the lease." (Emphasis added.) Similarly, the OCSLA prescribes royalty on oil or gas as a percentage of the "amount or value of the production saved, removed, or sold." 43 U.S.C. § 1337 (emphasis added). Under these provisions, extraction and removal from the lease (with or without sale) trigger the royalty obligation. But the coal royalty provision at 30 U.S.C. § 207 contains no language similar or analogous to "removed or sold from the lease" or "saved, removed, or sold."

**B. If a Lease Is Relinquished Before Coal in Waste Piles is Sold or Otherwise Disposed of, Neither the Former Lessee, Nor Any Other Party, Incurs Any Royalty Liability for the Recovered Coal.**

It follows from the preceding analysis that at the time a lessee relinquishes a lease, royalty on coal not yet recovered from waste piles and not yet sold or otherwise disposed of is a future, and not an already accrued, obligation. Therefore, if the Department accepts relinquishment of the lease, then by virtue of 30 U.S.C. § 187, quoted above, the lessee is relieved of any future liability for royalties that has not yet accrued. Thus, if the lessee recovers coal from a waste pile and uses, sells, or disposes of it after lease relinquishment, no royalty under the terms of the lease accrues on that

coal.<sup>4</sup> Additionally, that principle applies regardless of the location of the waste pile, and answers the question for the last two situations of the six posed at the outset.

If the waste pile is not stored on Federal land, that is the end of the matter. If the waste pile is stored on Federal public land, the BLM should consider other alternatives by which it might obtain value from coal recovered from the waste pile. However, a full discussion of BLM's possible alternatives is beyond the scope of this memorandum.

**C. The Royalty Consequences of Recovery of Coal from Waste Piles Are Not Inconsistent with the Treatment, for Reclamation Fee purposes, of Recovered Coal Transferred to FERC-Qualifying Small Power Production or Cogeneration Facilities.**

In the course of preparation of this opinion, questions were raised regarding whether assessment of royalty on recovered coal is inconsistent with how the Office of Surface Mining Reclamation and Enforcement ("OSM") treats recovered coal for purposes of assessment of reclamation fees for the Abandoned Mine Reclamation Fund under sections 401 and 402 of the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1231 and 1232. (The reclamation fees are commonly known as "Abandoned Mine Land" or "AML" fees.) Some background explanation is necessary.

SMCRA section 402(a), 30 U.S.C. § 1232(a), provides in relevant part:

All operators of surface coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining . . . or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less . . . (emphasis added).

Coal recovered from waste piles is subject to this provision. See 30 C.F.R. §§ 870.5 (definitions of "reclaimed coal" and "surface coal mining") and 870.12(a) (surface mining fee computation). Because this recovered coal often sells for much less than \$3.50 per ton, the AML fee on such coal has been 10 percent of the value of the coal.

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<sup>4</sup> In the unlikely event of a sale of waste pile coal in place before its actual recovery, any volume of coal actually sold by the lessee before relinquishment of the lease would be royalty-bearing even if physical extraction from the waste pile occurs after relinquishment. If sale occurs after lease relinquishment, the coal is not royalty-bearing.

Assessing an AML fee of 10 percent of the value of the recovered coal is consistent with requiring royalty on the value of that coal when the lease is still in effect. However, in the AML context, an exception has arisen for coal waste pile material used unrefined as fuel in small power production or cogeneration facilities that burn waste and that qualify for special arrangements with electric utilities under certain amendments to the Federal Power Act enacted by the Public Utilities Regulatory Policies Act of 1978. See 16 U.S.C. § 824a-3 and the applicable definitions at 16 U.S.C. § 796(17)(A) and (C) and 18(A) and (B), and implementing Federal Energy Regulatory Commission ("FERC") regulations at 18 C.F.R. §§ 292.201 *et seq.* and 292.301 *et seq.* (For ease of reference, qualifying small power production and cogeneration facilities will be referred to hereinafter as "FERC-qualifying facilities.")

In cases where unrefined coal waste pile material is sold to a FERC-qualifying facility, the operator recovering the waste material will request OSM to determine that the waste coal has no value for AML fee purposes. During the last several years, OSM has made several such determinations. A memorandum to the OSM Assistant Director for Finance and Accounting from the Assistant Solicitor for Compliance and Abandoned Mine Lands dated January 26, 1995, states:

This responds to your request to review the documents concerning RNS Services, Inc.'s request for a "no value" determination for the waste material it is mining and transferring to a FERC approved facility. I have reviewed the documentation and agree with the preliminary findings. These findings meet the criteria drafted by OSM for establishing that the material has "no value" for AML fee purposes. This is consistent with the discretionary authority provided to the Secretary in section 402(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1232. (Emphasis added.)

The theory behind these determinations is that but for its use in FERC-qualifying facilities, coal waste would have no real value in the open market because the value of the recovered coal does not exceed the costs of recovery.<sup>5</sup> We are further informed that OSM considers each request on a case-by-case basis and makes its determination on the basis of comparing costs to expected return. Moreover, cleanup of existing waste piles furthers the overall objectives and policies of SMCRA and related regulations. Consequently, there is an incentive for the Department to exercise discretion given to it by the statute to encourage such cleanup activity. For this reason, the Secretary has chosen to exercise the discretion granted in SMCRA section 402(a) quoted above ("10 per centum

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<sup>5</sup> The reason it is economically worthwhile in such cases to recover the coal is the tax credit for nonconventional fuels under section 29 of the Internal Revenue Code, 26 U.S.C. § 29.

of the value of the coal at the mine, as determined by the Secretary") to determine that the unrefined waste pile material has no value for AML fee assessment purposes.<sup>6</sup>

While ascribing no value for AML fee purposes is a plainly permissible result under section 402(a), it is not compelled by SMCRA or the regulations. It is, as described, a discretionary decision for purposes of that statute only and is in furtherance of that statute's overall objectives. Thus, it is not inconsistent with finding that the same coal waste may have value for royalty purposes under the mineral leasing statutes and the regulations quoted previously.

Under current rules, MMS does not have the option of making a "no value" determination for royalty purposes when waste pile coal is sold (at least if the lessee actually receives some payment for the coal in the waste pile that exceeds any applicable allowances). MMS rules at 30 C.F.R. § 206.257(c) quoted above require payment of royalty "at the time the recovered coal is used, sold, or otherwise finally disposed of." The current MMS royalty valuation rules provide in relevant part:

[U]nder no circumstances shall the value for royalty purposes be less than the gross proceeds accruing to the lessee for the disposition of produced coal . . . less applicable allowances determined pursuant to §§ 206.258 through 206.262 and § 206.265 of this subpart.

30 C.F.R. § 206.257(g). It follows that these rules currently preclude MMS from making a "no value" determination similar to the determination OSM makes for AML fee purposes if the lessee receives payment for the coal waste. However, because 30 U.S.C. § 207(a), as quoted above, provides for a royalty of "not less than 12 ½ per centum of the value of coal as defined by regulation," MMS could change its regulations prospectively to allow a determination of "no value" for royalty purposes in circumstances similar to OSM's "no value" determinations.

If you have questions, please feel free to call Geoffrey Heath or Howard Chalker of my staff at 208-4036.

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<sup>6</sup> Not all coal recovered from waste piles is disposed of through transfer to FERC-qualifying facilities for use as fuel in such facilities. Material recovered from waste piles may be cleaned through a mechanical or liquid gravity separation process to raise the Btu factor to allow it to be blended with other coal for use at a non-FERC-qualifying facility. The discussion above regarding "no value" determinations would not apply to such coal.