DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 870 and 872

RIN 1029–AC47

Coal Production Fees and Fee Allocation

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule.

SUMMARY: This rule sets forth the criteria and procedures that we are proposing to use to establish fees under the abandoned mine reclamation program provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The fixed-rate fees established under SMCRA expire September 30, 2004. However, the Act requires that, for coal produced after that date, fees be established to continue to provide for transfers from the Abandoned Mine Reclamation Fund (the AML Fund or the Fund) to the Combined Benefit Fund (the Combined Fund or CBF). This proposed rule would implement that requirement in part. We are also publishing a final rule in today's **Federal Register** that mirrors the fee establishment criteria and procedures in this proposed rule and establishes a fee for the fiscal year beginning October 1, 2004. Comments received on this proposed rule will assist us in determining whether to modify that final rule. We are also proposing to revise our regulations governing allocation and disposition of the fees collected and of other AML Fund income.

DATES: *Electronic or written comments:* We will accept written comments on the proposed rule until 4:30 p.m., Eastern time, on by November 16, 2004.

Public hearing: If you wish to testify at a public hearing, you must submit a request on or before 4:30 p.m., Eastern time, on October 18, 2004. We will hold a public hearing only if there is sufficient interest. Hearing arrangements, dates and times, if any, will be announced in a subsequent **Federal Register** notice. If you are a disabled individual who needs special accommodation to attend a public hearing, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: If you wish to comment on this proposed rule, you may submit your comments by any of the following methods to the address indicated:

- *E-mail: osmregs@osmre.gov.* Please include docket number 1029–AC47 in the subject line of the message.
- *Mail/Hand-Delivery/Courier:* Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 210, 1951 Constitution Avenue, NW., Washington, DC 20240. Please identify the comments as pertaining to docket number 1029–AC47.
- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions provided at *http://www.regulations.gov* under the ''How to Comment'' heading for this rule.

You may submit a request for a public hearing on the proposed rule to the person and address specified under **FOR FURTHER INFORMATION CONTACT.** If you are disabled and require special accommodation to attend a public hearing, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Dennis Rice, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240. Telephone: (202) 208–2829. E-mail address: *drice@osmre.gov.* You will find additional information concerning OSM, fees on coal production, the Abandoned Mine Reclamation Fund, and abandoned mine reclamation in general on our home page at *http://www.osmre.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background Information
  A. What Is the History of the SMCRA Fee on Coal Production?
  B. What Is the Combined Benefit Fund?
  C. Why Do We Transfer Monies From the AML Fund to the CBF and How Do We Determine the Amount To Transfer?
II. How Do We Propose To Determine the Total Amount of Fees To Collect Each Year?
III. How Are We Proposing To Revise 30 CFR Part 870?
IV. What Alternatives Did We Consider in Developing the Proposed Changes to 30 CFR Part 870?
V. What Is the Rationale for the Cap on Annual Transfers to the CBF?
VI. What Would the Fees Be Under This Proposed Rule for Coal Produced After September 30, 2004?
VII. How Would the Fees Collected for Coal Produced After September 30, 2004, Be Used?
VIII. How Else Are We Proposing To Revise the AML Fund Rules in 30 CFR 872.11?
IX. Why Are We Publishing a Final Rule at the Same Time as This Proposed Rule?
X. How Do I Submit Comments on the Proposed Rule?
XI. Procedural Matters

I. Background information

A. What Is the History of the SMCRA Fee on Coal Production?

Title IV SMCRA created an abandoned mine land reclamation program funded by a fee, known as the reclamation fee, assessed on each ton of coal produced for sale, transfer, or use (''produced''). The fees collected are placed in the AML Fund. We, either directly or through grants to States and Indian tribes with approved AML reclamation plans under SMCRA, use appropriations from the Fund primarily to reclaim lands and waters adversely impacted by mining conducted before the enactment of SMCRA and to mitigate the adverse impacts of mining on individuals and communities. In addition, subject to appropriation, up to $10 million per year may be used for the small operator assistance program under section 507(c) of SMCRA, which pays for certain costs involved with the preparation of coal mining permit applications under Title V of SMCRA. Also, since Fiscal Year (FY) 1996, an amount equal to the interest earned by and paid to the Fund has been available for direct transfer to the United Mine Workers of America Combined Benefit Fund to defray the cost of providing health care benefits for certain retired coal miners and their dependents.

Section 402(a) of SMCRA and existing 30 CFR 870.13 fix the reclamation fee at 35 cents per ton (or 10 percent of the value of the coal, whichever is less) for surface-mined coal other than lignite; 15 cents per ton (or 10 percent of the value of the coal, whichever is less) for coal from underground mines; and 10 cents per ton (or 2 percent of the value of the coal, whichever is less) for lignite. Under section 402(b) of SMCRA, our authority to collect fees at those rates will expire with respect to coal produced after September 30, 2004, as will our authority to collect fees for AML reclamation purposes. However, unappropriated monies remaining in the Fund after that date will remain available for grants to State and tribal AML reclamation programs and the other purposes for which the AML Fund was established.

As originally enacted, section 402 of SMCRA authorized collection of reclamation fees for 15 years following the date of enactment (August 3, 1977), meaning that our fee collection authority would have expired August 3, 1992. However, Congress has twice extended that deadline. As enacted on November 5, 1990, Section 6003(a) of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508, 104 Stat. 1388) extended both the fees and our fee

collection authority through September 30, 1995. Section 6002(c) of that law also required that the Fund be invested in interest-bearing public debt securities, with the interest becoming part of the Fund. Section 19143(b) of Title XIX of the Energy Policy Act of 1992 (Pub. L. 102–486, 106 Stat. 2776, 3056) subsequently extended the fees and our fee collection authority through September 30, 2004.

Section 2515 of Title XXV of the Energy Policy Act (106 Stat. 2776, 3113) further amended section 402(b) of SMCRA by adding the requirement that, after September 30, 2004, ''the fee shall be established at a rate to continue to provide for the deposit referred to in subsection (h) [of section 402 of SMCRA].'' See 30 U.S.C. 1232(b). The rule that we are proposing today would implement this provision of SMCRA by establishing criteria and procedures for establishment of the fee for coal produced on or after October 1, 2004.

B. What Is the Combined Benefit Fund?

The Energy Policy Act of 1992 also included provisions known as the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act), which is codified at 26 U.S.C. 9701 *et seq.* See Pub. L. 102–486, 106 Stat. 2776, 3036. The Coal Act created the United Mine Workers of America (UMWA) Combined Fund or CBF by merging two financially troubled health care plans, the UMWA 1950 Benefit Plan and Trust and the UMWA 1974 Benefit Plan and Trust, effective February 1, 1993. See 26 U.S.C. 9702. The CBF is a private employee benefit trust fund that provides health care and death benefits to UMWA coal industry retirees and their dependents and survivors who were both eligible to receive and were receiving benefits from the 1950 Benefit Plan or the 1974 Benefit Plan on July 20, 1992. See 26 U.S.C. 9703(f). Most current beneficiaries are widows and dependents of coal miners. The CBF health insurance plan provides ''Medigap'' coverage; *i.e.*, it pays for health care expenses remaining after Medicare and Medicaid reimbursement and covers prescription drugs.

Under the Coal Act, the Social Security Administration (SSA) has the duty of assigning retirees and their dependents to former employers or related companies. See 26 U.S.C. 9706. Coal operators and related companies pay monthly premiums (also determined by the SSA) to the CBF to cover the costs of benefits for the beneficiaries assigned to them. In addition, under 26 U.S.C. 9704(a)(3), those companies must pay a monthly premium for the health care costs of eligible unassigned beneficiaries; *i.e.*, those beneficiaries associated with now-defunct coal operators for which no related company exists or remains in business. However, as discussed in Part I.C. below, Congress created a mechanism to wholly or partially offset premium costs for unassigned beneficiaries by transferring an amount equal to certain interest earned by the AML Fund to the CBF.

C. Why Do We Transfer Monies From the AML Fund to the CBF and How Do We Determine the Amount To Transfer?

In paragraphs (a) and (b) of section 19143 of the Energy Policy Act of 1992, respectively, Congress amended the Internal Revenue Code of 1986 and SMCRA to require that, at the beginning of each fiscal year, starting with FY 1996, an amount equal to the AML Fund's estimated interest earnings for that year be transferred to the CBF to help defray the cost of health care benefits for unassigned beneficiaries. See section 402(h) of SMCRA (30 U.S.C. 1232(h)) and section 9705(b) of the Internal Revenue Code (26 U.S.C. 9705(b)). See also Pub. L. 102–486, 106 Stat. 3047 and 3056.

Section 9705(b)(2) of the Internal Revenue Code provides that any amount transferred to the CBF under section 402(h) of SMCRA ''shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.'' However, to the extent that these transfers do not fully cover costs for unassigned beneficiaries, assigned operators remain obligated to pay the difference under 26 U.S.C. 9704(a)(3) and (d)(3)(A).

Section 402(h) of SMCRA (30 U.S.C. 1232(h)) states that—

(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

(2) The Secretary shall transfer from the [AML] fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 for any fiscal year an amount equal to the sum of—

(A) The amount of interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

(B) The amount by which the amount described in subparagraph (A) is less than $70,000,000.

(3)(A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

(B) The aggregate amount which may be transferred under paragraph (2)(B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992, and before October 1, 1995.

(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year.

In sum, section 402(h)(2)(A) of SMCRA requires an annual transfer of estimated interest earnings from the AML Fund to the CBF. Paragraphs (h)(2)(B) and (3)(B) of section 402 require the transfer of an additional amount from a reserve (the interest earned on the AML Fund between FY 1993 and FY 1995) if the estimated interest earnings during the fiscal year will not cover eligible estimated CBF expenditures for that year. However, as explained further below, the amounts in the reserve fund were fully utilized in FY 2003 and no longer are available to supplement the annual transfer. In addition, the total amount transferred under paragraphs (h)(2)(A) and (B) for any one year may not exceed $70 million, as discussed more fully in Part V below.

The section 402(h)(2)(A) transfer is further limited by section 402(h)(3)(A), which precludes the transfer of monies to the CBF in excess of the CBF's yearly costs for health benefits for unassigned beneficiaries. However, under a memorandum of understanding between OSM and the CBF trustees, which was signed on January 19, 2001, the amount transferred is not limited to estimated costs based on premium amounts determined by the SSA—it includes all actual health care expenditures for all unassigned beneficiaries, up to the amount authorized in section 402(h)(3) of SMCRA (subject to the $70 million cap). This approach reflects language in the conference report accompanying the FY 2001 appropriations bill for Interior and related agencies. Page 200 of that report (H.R. Rep. No. 106–914) states:

As a general matter, the managers note that it has been the practice for the amount of the annual interest transfers under current law to be based on a calculation which multiplies the number of unassigned beneficiaries by that year's per beneficiary premium rate established by the Social Security Administration (SSA) with adjustments made later (normally two years after the initial transfer) to reflect the Combined Benefit Fund's actual expenditures for unassigned beneficiaries. This practice has an adverse effect on the Combined Benefit Fund's cash

flow and is contributing to its financial difficulties. * * * The managers believe that the interest transfer at the beginning of each fiscal year should be based on the Combined Benefit Fund trustees' estimate of the year's actual expenditures for unassigned beneficiaries, which may be adjusted to the actual amount of those expenditures at a later time if the initial transfer proves to be either too high or too low. This approach is completely consistent with the underlying statutory provision found in section 402(h) of the Surface Mining Control and Reclamation Act of 1977 which provides that the amount of interest transferred ''shall not exceed the amount of expenditures that the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account.''

The transfer from the AML Fund to the CBF occurs at the beginning of the fiscal year based on our estimate of interest the AML Fund will earn during the fiscal year and the CBF trustees' estimate of their health care expenditures for unassigned beneficiaries for that year. After the close of the fiscal year, we adjust the amount of the transfer to reflect actual interest earnings and CBF expenditures. There is no statute of limitations on adjustments to the number of beneficiaries. Therefore, several adjustments to the transfer for a particular year may be made in following years as figures are refined (usually as a result of bankruptcies and litigation), provided that the statutory transfer cap of $70 million for that year has not been reached. For example, our transfer in FY 2002 included adjustments to our first transfer in FY 1996.

II. How Do We Propose To Determine the Total Amount of Fees To Collect Each Year?

As explained above, section 402(b) of SMCRA requires the establishment of a fee ''to continue to provide for the deposit referred to in subsection (h)'' of SMCRA. We interpret that language as requiring establishment of a fee that will generate revenue up to, but not more than, the amount of net interest that the AML Fund is anticipated to earn in the coming fiscal year, subject to certain limitations described in detail below. This interpretation gives meaning to the section 402(b) requirement that some ''rate'' be established. Furthermore, this reading construes the phrase ''deposit referred to subsection (h)'' in section 402(b) to mean only what is currently provided for in section 402(h) (*i.e.*, the transfer of an amount of money equal to estimated AML Fund interest earnings subject to the ''caps'' described below) and nothing more.

The legislative history of paragraphs (b) and (h) of section 402 sheds little light on congressional intent with respect to the amount of fees to be collected for coal produced after September 30, 2004. The provision in section 402(b) concerning post-September 30, 2004, fees appears to have originated in two bills introduced in 1992 in the 102nd Congress. Those bills, H.R. 4344 and H.R. 776, both included a version of section 402(h) that would have required an annual transfer of $50 million from the AML Fund to the CBF. However, H.R. 4344 was never adopted, and the House removed the CBF transfer provisions from H.R. 776 prior to passage. In acting on H.R. 776, the Senate added a variation of the provisions that the House had removed. However, instead of authorizing the transfer of $50 million from the AML Fund to the CBF each year as in the prior House version of section 402(h), the Senate version authorized transfer only of an amount equal to interest earned or estimated to be earned by the Fund. See 138 Cong. Rec. 10558, July 29, 1992. The Senate did not make any conforming changes to section 402(b). The House subsequently accepted the Senate version without change and the provisions became law as part of the Energy Policy Act of 1992.

Thus, the rationale for the fee collection target in section 870.13(b)(2) of the proposed rule that we are publishing today is the plain language of the statute and the absence of any legislative history to support a contrary reading. Section 402(b) of SMCRA provides that, after September 30, 2004, ''the fee shall be established at a rate to continue to provide for the deposit referred to in subsection (h).'' Section 402(h) of the Act lists two components of the deposit:

(1) An estimate of the interest that will be earned by and paid to the AML Fund during the fiscal year (paragraph (h)(2)(A)); and

(2) A ''supplement'' to increase that amount to $70 million if necessary (paragraph (h)(2)(B)), but with a cap on the total amount of the supplement for ''all fiscal years'' equal to the interest earned and paid to the AML Fund from October 1, 1992 to September 30, 1995 (paragraph (h)(3)(B)), and further capped by the needs of the CBF (paragraph (h)(3)(A)).

The supplement referenced in paragraph (h)(2)(B) is no longer available because the cap in paragraph (h)(3)(B) has been reached. By its terms, the cap applies to ''all fiscal years'' without any limitation. There is nothing in the legislative history to suggest that in section 402(b) Congress meant to refer only to certain portions of section 402(h). That is, we have no indication that Congress intended to continue the supplement in paragraph (h)(2)(B) without regard to the cap on that supplement in paragraph (h)(3)(B)). Moreover, the cap resulted in a transfer from the AML Fund to the CBF of only $49.8 million in FY 2004, which was based only on the estimate of interest that the Fund would earn in FY 2004. There was no supplement provided to raise that amount because the supplement already was exhausted. It would be anomalous to suggest that Congress intended for the cap in paragraph (h)(3)(B) to apply to the transfer in FY 2004 (as it did), but not in FY 2005, when the plain language of that paragraph applies the cap to ''all fiscal years.''

In sum, at this time nothing in SMCRA authorizes transfer of any monies to the CBF in excess of an amount equal to estimated interest earnings for that year (adjusted in future years to reflect actual interest earnings). Furthermore, there is no indication in the legislative history of sections 402(b) and (h) that Congress intended otherwise.

Therefore, the reference in section 402(b) to ''the deposit referred to in subsection (h)'' is best read as meaning that the fees established for coal produced after September 30, 2004, must be designed to generate an amount of revenue equal to the estimated interest earnings transferred to the CBF at the beginning of each fiscal year, with any modifications needed to reflect the true-up adjustments required by section 402(h)(4).

For the reasons discussed above, we believe that the proposed rule is a reasonable reconciliation of the statutory language with congressional intent as evidenced by the legislative history.

III. How Are We Proposing To Revise 30 CFR Part 870?

As discussed in Part IX of this preamble, we are publishing a final rule in today's **Federal Register** that adopts the same changes to Part 870 that we are proposing in this rule and puts them into effect immediately. However, we will fully consider all comments that we receive on this proposed rule. If we determine that changes are needed in response to those comments, we will issue a new final rule containing the appropriate modifications. As mentioned in Part IX, we seek comment on whether those changes should be effective as of October 1, 2004.

We are proposing to revise 30 CFR 870.13 by—

• Changing the section heading from ''Fee computations'' to ''Fee rates'';

• Redesignating existing paragraphs (a) through (d) as paragraphs (a)(1) through (4);

• Adding a new title and introductory language for paragraph (a) to clarify that the rates in that paragraph apply only to fees for coal produced on or *before* September 30, 2004; and

• Adding a new paragraph (b), which would establish criteria and procedures for use in establishing fees for coal produced *after* September 30, 2004.

In addition, in a conforming technical change, we are proposing to revise 30 CFR 870.12(d) to remove the September 30, 2004, expiration date for fee payment obligations.

Proposed paragraph 870.13(b) would implement in part the provision in section 402(b) of SMCRA that requires that, after September 30, 2004, ''the fee shall be established at a rate to continue to provide for the deposit referred to in subsection (h).'' As discussed in Part I.C. above, section 402(h) of SMCRA essentially requires the transfer from the AML Fund to the CBF, at the beginning of each fiscal year, of an amount equal to estimated AML Fund interest earnings during that year to defray the cost of health care benefits for the plan's unassigned beneficiaries. Those transfers effectively are capped at the estimated AML Fund interest earnings for that year, $70 million, or the CBF's estimated expenditures for health care benefits for unassigned beneficiaries for that year, whichever is the smallest amount. Therefore, effective October 1, 2004, we must determine the fee based on the amount of the transfer from the AML Fund to the CBF.

We recognize that section 402(h) of SMCRA does not expressly require adjustments to reflect differences between estimated and actual AML Fund interest earnings and estimated and actual CBF expenditures for unassigned beneficiaries. Paragraphs (h)(1), (2), and (3) of section 402 refer only to the use of estimates when determining the amount required to be transferred. However, section 402(h)(4) of the Act provides that, ''[i]f, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year.'' In our view, that provision essentially requires that the Secretary adjust the amount transferred to reflect any difference between the estimates used to determine the transfer amount at the beginning of the year and actual data for that year, as determined at a later date. Otherwise, section 402(h)(4) would have no real meaning, which would conflict with established principles of statutory construction. We invite comment on whether there is any other interpretation that would give effective meaning to section 402(h)(4). If so, we may reconsider adoption of proposed 30 CFR 870.13(b)(2)(ii).

Proposed paragraph 870.13(b)(1) would require us to establish fees on an annual basis. We selected this frequency because the amount transferred to the CBF each year will vary. We would publish the fees for each fiscal year after FY 2005 in the **Federal Register** at least 30 days before the start of the fiscal year to which the fees would apply. Although not specified in the rule, we also would provide notice of the new fees by modifying the Abandoned Mine Land Payer Handbook (*http://ismdfmnt5.osmre.gov*), revising the OSM–1 form, and issuing Payer Letters to permittees.

Under the proposed rule, once we publish the fees for a given fiscal year, they would not change during that year. Later in this preamble we explain how we would make adjustments for differences between the estimates (for factors as interest earnings and coal production) used to establish the fees and actual data once the actual data becomes available.

Proposed paragraph 870.13(b)(2) of the rule essentially would require that each year's fee be established to generate an amount of revenue equal to the amount of estimated AML Fund interest earnings that will transfer from the AML Fund to the trustees of the CBF at the beginning of that year under section 402(h) of SMCRA. Consistent with paragraphs (h)(2)(B) and (h)(3)(A) of section 402 of SMCRA (see Part V of this preamble), paragraph (b)(2)(i) of the rule would cap the amount of estimated interest earnings transferred—and hence the total amount of fee collections needed—at the lesser of either $70 million or the amount that the trustees of the CBF estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 (26 U.S.C. 9704(e)) for that fiscal year.

Under proposed section 870.13(b)(2), calculation of the total amount of fee collections needed would be a three-step process. First, under proposed paragraph (b)(2)(i), we would estimate the amount that must be transferred to the CBF at the beginning of that fiscal year. We would compare the net amount of interest the AML Fund is estimated to earn during that fiscal year, the most recent estimate from the CBF trustees of their needs for unassigned beneficiaries for that year, and the statutory cap of $70 million. The estimated transfer amount would be the smallest of the three numbers.

The second step, under proposed paragraph (b)(2)(ii), would be to adjust the estimated transfer amount to account for overcollections or undercollections in prior years. SMCRA requires us to establish a fee that will provide for the transfer under section 402(h). As explained above, the initial transfer to the CBF under that section of the Act is based on estimates of AML Fund interest earnings and the CBF's needs for unassigned beneficiaries during that year. After the close of the fiscal year, the amount of the transfer is adjusted to reflect actual interest earnings (and, if necessary, actual CBF expenditures) when that data becomes available. As explained more fully below, any difference between estimated and actual data would not result in a revision of the previously established fee for that year. We would account for any excess fees collected, or any deficiencies, by adjusting the next fee scheduled to be determined.

For example, if we underestimate interest earnings, we would transfer the difference to the CBF, provided the CBF needs that amount for expenditures from the unassigned beneficiary premium account during that year and the transfer would not exceed the $70 million statutory cap. We would then need to increase fee collections in the following year to recover the additional amount transferred. On the other hand, if we overestimate interest earnings or if the CBF's expenditures were lower than the original amount transferred, the CBF would refund the difference and we would need to address the excess amount of fees collected. However, this requirement would apply only to adjustments for fiscal years after FY 2004. Therefore, if we determine in FY 2005 that we underestimated FY 2003 interest earnings by $10 million, we would not include that adjustment in the fee calculation for FY 2006 (*i.e.*, we would not increase the fee collection needs for FY 2006 by $10 million), although we would send the $10 million to the CBF.

The third step under proposed paragraph (b)(2)(iii) would be to adjust the estimated transfer amount to reflect differences between estimated and actual coal production in prior years. As explained above, the fee calculation for a fiscal year would essentially be a fraction. The numerator would be the amount of total fees to be collected for that fiscal year (with all adjustments), and the denominator would be based on our estimate of coal production for that year. If we overestimate production, the

calculated per-ton fee would be too low and we would undercollect for that year. Conversely, if we underestimate production, the calculated per-ton fee would be too high and we would overcollect for that year. Therefore, just like when we adjust the estimated interest and CBF needs to actual in step two, when we obtain actual production figures for fiscal years after October 1, 2004, we would calculate the fees we overcollected or undercollected and that number would become an adjustment in the next fee calculation.

We identified two options to remedy fee undercollections and overcollections. Under the first option, we would recalculate the fee and have all operators submit amended reports with additional payments or requests for credit or refund. We find this option impractical for several reasons. First, it would impose a huge paperwork burden on both operators and OSM. Second, we often make several adjustments over a number of years as actual data become available for comparison with the estimates used to establish the fees. Therefore, multiple supplemental reports would be required. Third, the adjustments likely would be very small (fractions of a cent), so the cost to operators and OSM of accounting for adjustments may exceed the dollar value of the adjustment. For all these reasons, we propose to reject this option. Under this proposed rule, we would not change the fee for a given fiscal year after we publish that fee in the **Federal Register**.

Instead, we are proposing to adopt the second possible approach to account for adjustments. Under that approach, we would adjust fee calculations for future years to account for adjustments to transfers in prior years. However, we would not adjust the fee calculations for future years when the transfer adjustments relate to FY 2004 or earlier fiscal years. Adjustments for transfers in those years would be inappropriate because the fee was statutorily set for those years.

The following example illustrates how this process would work: Assume estimated AML Fund interest earnings for FY 2008 are $60 million and the CBF's estimated unassigned beneficiary needs are $85 million. Under that scenario, the amount transferred to the CBF would be $60 million. Under paragraph (b)(2)(i) of the proposed rule, that amount also would be the starting point for our fee calculations for FY 2008. Assume further that in FY 2006 we overestimate AML Fund interest earnings by $3 million, which means that fee collections for FY 2006 are $3 million higher than they should have been. To correct this situation, we would subtract the $3 million overcollection for FY 2006 from the $60 million estimated transfer in FY 2008, thereby reducing fees collected for that year. Hence, in FY 2008 operators as a group would recover the $3 million fee overcollection in FY 2006.

If there are multiple adjustments for more than one prior fiscal year, they all would be incorporated in the next fee calculation. In addition, if we later find that further adjustments are needed for a previously adjusted fiscal year, we would account for that adjustment in the next fee calculation. Thus, returning to the example in the previous paragraph, if we determine in FY 2008 that FY 2006 interest was overestimated by $4 million, not $3 million, we would adjust the next scheduled fiscal year's fee calculation (*i.e.*, FY 2009) by the additional $1 million.

Finally, if Congress were to specifically appropriate additional funds for transfer from the AML Fund to the CBF, that appropriation would not become part of the fee calculation process. Thus, for example, if, in the FY 2007 appropriations act for the Department of the Interior, Congress designated a one-time $25 million supplemental payment to the CBF, we would not include that $25 million in the fee calculations for FY 2007.

Proposed paragraph 870.13(b)(3) provides that we would determine per-ton fees after comparing the amount of the estimated transfer to the CBF (and hence the total amount of fee collections needed) with projected coal production for that fiscal year. Proposed paragraph (b)(3)(ii) specifies that the new fees would maintain the same proportionality among surface-mined coal, coal produced by underground mining, and lignite as did the fees previously in effect under section 402(a) of SMCRA. In section 402(a) of SMCRA, Congress originally established lower fees for lignite and for coal produced by underground methods than it did for non-lignite coal produced by surface mining methods. According to the legislative history, the lower fees for underground mining reflect the ''disproportionately high social costs incurred by underground coal mine operators in meeting responsibilities under the Coal Mine Safety and Health Act of 1969, as amended.'' H.R. Rep. No. 94–1445 (1976), at 85. Section 402(b) of SMCRA is silent on the question of whether this fee differential should continue to apply to coal produced after September 30, 2004.

After evaluating those factors, we propose to retain the per-ton fee ratios that have been in place since the enactment of SMCRA. Therefore, under proposed paragraph (b)(3)(ii), the fee per ton of non-lignite coal produced by underground methods would be 43 percent of the fee per ton of non-lignite coal produced by surface methods and the fee per ton of lignite coal produced would be 29 percent of the fee per ton of non-lignite coal produced by surface methods. The provision concerning fees for coal produced by in situ mining methods also would remain substantively unchanged from the rule governing fees for coal produced by in-situ mining methods before October 1, 2004, in that it would continue to apply the underground fee to all non-lignite coal produced by in-situ methods and the lignite fee to lignite coal produced by in-situ methods.

IV. What Alternatives Did We Consider in Developing the Proposed Changes to 30 CFR Part 870?

In developing this proposed rule, we considered and rejected the following options to implement the provision of section 402(b) of SMCRA requiring the establishment of a fee for coal produced after September 30, 2004:

- Set the fee at zero and transfer only estimated interest earnings.

This option is inconsistent with the principles of statutory construction because it would render the section 402(b) provision concerning establishment of post-September 30, 2004, fee rates superfluous and essentially inoperative. See *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) (''It is, however, a fundamental principal of statutory construction that 'effect must be given, if possible, to every word, clause and sentence of a statute * * * so that no part will be inoperative or superfluous, void or insignificant.' ''), quoting from and citing to 2A Sutherland, *Statutory Construction*, at § 46.06 (4th ed. 1973). See also *Boise Cascade Corp.* v. *EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (statutes should not be construed so as to render any of their provisions superfluous). In addition, a fee of zero likely would not satisfy the section 402(h)(1) requirement that transfers from the AML Fund to the CBF may be made only when ''fees are required to be paid under this section.'' Under this approach, the AML Fund and, consequently, the interest earned thereon, would decline the fastest.

- Assess fees at a rate that would generate revenues adequate to maintain the AML Fund at a level that would earn an amount of interest sufficient to meet CBF needs for unassigned beneficiaries, up to a maximum of $70 million.

• This option could be construed to comply with the requirement to establish a fee that provides for the transfer to the Combined Fund under section 402(h). However, to maintain the principal in the AML Fund at a level that would earn sufficient interest to continue to provide for transfers to the CBF at recent levels, the fees under this option could be almost equal to, or even higher than, the current fees. There is no evidence that, in enacting section 402(b), Congress intended that the principal balance of the AML Fund would or should be maintained at a level adequate to generate interest sufficient to meet CBF needs. This option also could have the effect of indefinitely extending the AML reclamation program by requiring collection of fees to replace appropriations for grants to States and tribes for those programs. There is no evidence that Congress intended for fees collected from coal produced after September 30, 2004, to be used for this purpose. Instead, the fact that Congress terminated the statutorily established reclamation fee in section 402(a) as of September 30, 2004, suggests the opposite, as does the language in section 402(b) that requires that, after September 30, 2004, the fee be established at a rate sufficient to continue to provide for transfers to the CBF.

• Assess a fee at a rate sufficient to meet any deficit between anticipated CBF health care benefit needs for unassigned beneficiaries (or $70 million, whichever is less) and the amount of estimated interest earnings transferred.

There is insufficient statutory authority to implement this option because nothing in either the statutory language or the legislative history of SMCRA suggests that, in section 402(b), Congress intended for any transfers to be made to the CBF in excess of an amount equal to yearly estimated AML Fund interest earnings (plus the reserve supplement of prior interest earnings, which is now depleted). Moreover, it would be anomalous to suggest that Congress intended for the CBF to receive a transfer of funds in an amount equal to estimated interest earnings in FY 2004 (as it did) and then to receive transfers in excess of that amount in FY 2005 and thereafter.

V. What Is the Rationale for the Cap on Annual Transfers to the CBF?

Proposed 30 CFR 870.13(b) and 872.11(e) would cap the amount transferred to the CBF at the beginning of each fiscal year at the estimated amount of interest earned by the AML Fund, estimated CBF expenditures for health care benefits for unassigned beneficiaries, or $70 million, whichever is the smallest amount. The first two items would later be adjusted to reflect actual interest earnings and actual CBF expenditures for that fiscal year, provided the adjustments would not cause aggregate transfers for that year to exceed $70 million. This cap is consistent with both historical practice and section 402(h) of SMCRA. Paragraphs (3)(A) and (4) of section 402(h) impose the cap relating to CBF expenditures. The $70 million cap receives implied support from section 402(h)(2)(B) of SMCRA, which allows transfers of estimated interest earnings to be supplemented by prior interest earnings, but only up to a total transfer amount of $70 million. It also reflects the intent of Congress as described in the conference report on the Energy Policy Act. See 138 Cong. Rec. 17578, 17605 (1992) (''provision is made for monies to be transferred from the Abandoned Mine Land Fund in an amount up to, but not more than, $70 million per year * * *''). In addition, a report from the House Resources Committee on a bill approved by the Committee but never adopted by the full House characterizes section 402(h) in its entirety as allowing ''the transfer to the CBF of not more than $70 million annually.'' See H.R. Rep. No. 106–1014, pt. 1 (2000).

VI. What Would the Fees Be Under This Proposed Rule for Coal Produced After September 30, 2004?

Under proposed 30 CFR 870.13(b)(1), we would determine fees on an annual basis, with notice of the fees for each year published in the **Federal Register** 30 days before the beginning of the fiscal year to which they would apply.

Part VII of the preamble to the final rule that we are publishing in today's **Federal Register** establishes fees for FY 2005.

Table 1 shows the fees for FY 2005 and our projection of fees for the following ten years based on this rule; on currently available estimates on interest rates, CBF needs, and coal production; and on maintaining current congressional appropriations, grant formulas, and AML Fund assets available for investment.

TABLE 1.—FEES FOR FY 2005 AND FEE PROJECTIONS FOR FY 2006–2015

Fiscal year	Estimated AML Fund interest earnings (millions of dollars)	Estimated CBF needs for unassigned beneficiaries (millions of dollars)	Fees for non-lignite coal produced by surface methods (cents per short ton)	Fees for non-lignite coal produced by underground methods (cents per short ton)	Fees for lignite coal (cents per short ton)
2005	69.0	85.0	8.8	3.8	2.5
2006	72.0	99.6	8.7	3.7	2.5
2007	71.9	97.9	8.5	3.7	2.4
2008	69.4	96.3	8.5	3.6	2.4
2009	65.8	94.1	7.8	3.4	2.2
2010	61.6	92.2	7.3	3.1	2.1
2011	22.1	90.1	2.6	1.1	0.7
2012	17.6	87.7	2.0	0.9	0.6
2013	14.2	85.4	1.6	0.7	0.5
2014	10.9	83.2	1.2	0.5	0.4
2015	46.4	81.0	5.2	2.2	1.5

In accordance with proposed 30 CFR 870.13(b) and 872.11(e), the fees in Table 1 are based upon a maximum annual transfer to the CBF of $70 million or the amount of estimated AML Fund interest earnings for that year, whichever is less. (The other limiting factor, estimated CBF needs for unassigned beneficiaries, does not come

into play because those estimates are in excess of $70 million for all years shown in the table.)

Because section 402(h)(2)(A) of SMCRA refers to the transfer of an amount equal to the estimated interest ''earned and paid to the Fund during the fiscal year,'' we originally invested the Fund's assets only in short-term securities so as to maximize the amount of interest actually paid to the Fund during each year. By so doing, we also maximized the amount available for transfer to the CBF. However, we reevaluated that policy when short-term interest rates declined to the point that the Fund was earning less than $70 million in interest each year. We determined that interest on long-term securities could be deemed to be constructively earned and paid to the Fund on a prorated basis over the life of those securities even though it is not physically collected until the securities reach maturity. The estimated annual interest earnings reported in Table 1 reflect this interpretation. After changing our policy, in FY 2004, we invested $1.3 billion of the Fund in long-term public debt securities with an average interest rate of 4.18 percent. That rate is significantly more than the minuscule returns (currently hovering around one percent) recently available on short-term securities. However, we anticipate that we will need to redeem those long-term securities before their maturity dates to meet future Fund obligations because Congress has not reauthorized collection of a fee for AML reclamation. Consequently, the net interest earnings shown in Table 1 for FY 2011–2014 reflect the early redemption penalties that we expect to incur in those years. In other words, we will need to subtract early redemption penalties from the total estimated interest earnings in each of those years. The increase in net interest earnings shown for FY 2015 reflects the fact that, based on current estimates and assumptions, as of the end of FY 2014, all long-term securities will have been redeemed and that we will therefore incur no further early redemption penalties. By that time, the AML Fund would be invested exclusively in short-term securities and all estimated interest earnings on those securities would be available for transfer without first deducting any early redemption penalties for long-term securities.

Table 2 contains the coal production estimates that we used to establish fees for FY 2005 and to estimate fees for the other years in Table 1.

TABLE 2.—ESTIMATED COAL PRODUCTION FOR COAL SUBJECT TO FEE PAYMENT REQUIREMENTS

[In millions of short tons]

Fiscal year	Non-lignite surface mines	Underground mines	Lignite	Total
2005	628	317	82	1,027
2006	640	327	85	1,052
2007	651	335	87	1,073
2008	643	346	91	1,080
2009	672	340	86	1,098
2010	672	350	86	1,108
2011	680	346	86	1,112
2012	695	345	82	1,122
2013	707	352	82	1,141
2014	709	351	82	1,142
2015	723	359	82	1,164

The total production estimates in Table 2 are based upon projections in the Annual Energy Outlook (December 2003) prepared by the Energy Information Administration within the Department of Energy (DOE). We reduced those projections by ten percent to reflect our historical experience concerning the difference between DOE data and the tonnage subject to SMCRA's fee payment requirements. Allocation among the three production categories (surface, underground, and lignite) is based upon an extrapolation of our fee collection data for FY 2003.

VII. How Would the Fees Collected for Coal Produced After September 30, 2004, Be Used?

Section 401(b) of the Act provides that the AML Fund consists of ''amounts deposited in the fund,'' including, among other things, ''reclamation fees levied under section 402,'' and ''interest credited to the fund under subsection (e).'' Thus, under section 401(b) of SMCRA, fees collected under section 402 of the Act must be deposited into the AML Fund. Consistent with this requirement, the proposed rule considers all fees collected to be Fund revenues. See proposed 30 CFR 872.11(a).

The proposed rule would not affect the process by which transfers are made between the AML Fund and the CBF. That process will remain the same as in previous fiscal years under applicable law and our agreements with the Treasury Department and the CBF trustees.

Section 402(g) of the Act establishes an allocation formula that has been applied to date to the fees collected and to other AML Fund income. Fifty percent of the fees collected (but no other type of Fund income) was allocated to the appropriate State or tribal share account (''State share'' or ''Tribal share''). The remaining fifty percent of the fees collected, together with all other Fund income (including interest), were allocated among three other accounts, which are sometimes referred to collectively as the ''Federal share,'' as follows:

- Twenty percent to the Secretary of Agriculture for use under section 406 of the Act, which authorizes use of those funds for the rural abandoned mine program (RAMP). This account is known as the RAMP allocation.
- Forty percent for supplemental AML reclamation grants to non-certified States and tribes, based on historical coal production before August 3, 1977. This account is known as the historical production allocation.
- Forty percent for the other purposes of Title IV, including items such as the small operator assistance program, the Clean Streams program, the emergency reclamation program, reclamation of high priority AML sites in States and tribes without approved AML reclamation plans, minimum program makeup grants, and the cost of administering the AML program and collecting fees. This account is known as the Secretary's discretionary share.

The existing regulations at 30 CFR 872.11(a) and (b) implement the

statutory requirements discussed above. Under our proposed rule, fees collected for coal produced for sale, transfer, or use before October 1, 2004, would be allocated according to the statutory scheme. Similarly, any other Fund income listed in section 401(b) of SMCRA, including, but not limited to, interest, user charges, recovered monies, and donations, would continue to be allocated according to that scheme.

However, we are proposing to add new paragraphs (d) and (e) to section 872.11 to address the disposition of fees collected for coal produced for sale, transfer, or use after September 30, 2004, and modify paragraphs (a) and (b) accordingly. Paragraph (d) would allocate fees collected for coal produced in any fiscal year beginning after September 30, 2004, only to the accounts from which the amount of the transfer to the CBF (as provided in new paragraph (e)) was taken at the beginning of that year. Fee collections would be distributed among the contributing accounts in amounts proportionate to which those accounts contributed to the transfer.

We are proposing to adopt this approach because we believe that the direction in SMCRA section 402(b) to establish the fee at a rate to provide for the CBF transfer conflicts with the allocation scheme in section 402(g) and that the two provisions cannot both be given effect. Section 402(b) states that, after September 30, 2004, ''the fee shall be established at a rate to continue to provide for [transfers to the CBF].'' SMCRA section 402(b), 30 U.S.C. 1232(b). The *only* purpose of the fee after September 30, 2004, is to support the continued funding of the CBF. In this regard, any fees collected would effectively replace the amount transferred to the CBF. Thus, we believe that the section 402(b) requirement to establish a fee to provide for the CBF transfer provides us with a directive to put whatever fees are collected back into the account from which the transfer was taken.

Transfers to the CBF after September 2004 will take place in the manner illustrated by the following example for FY 2005. On or about October 1, 2004, we will direct the Treasury Department to transfer from the AML Fund to the CBF an amount equal to the amount of interest that is estimated to be earned by the Fund during FY 2005. We will note from which accounts the transferred funds were withdrawn. We will levy a fee on mine operators pursuant to section 402(b) of the Act, with the goal of achieving aggregate fee collections in an amount equal to the amount transferred to the CBF. The section 402(b) directive can be construed as a requirement to use those fees, once collected, to replenish the accounts that contributed monies for the transfer to the CBF at the beginning of the year.

We recognize that the section 402(g) allocation formula arguably conflicts with that requirement. However, we believe that it is anomalous to suggest that Congress intended, in requiring establishment of the fee based on the CBF transfer, to also require that the fees collected continue to be allocated in accordance with the formula established in section 402(g) of the Act. Thus, for fees from coal produced after September 30, 2004, there is an inherent conflict between the direction in section 402(b) and the allocation scheme in section 402(g).

When there is an ambiguity that cannot be reconciled, the agency has discretion to reasonably interpret the statute. It is well-settled that when a court reviews an agency's construction of a statute that the agency administers, the first question for the court is—

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress * * * [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984)(footnotes omitted).

Here, the question is whether Congress has directly spoken to the precise question at issue; *i.e.*, whether the statute mandates the allocation of fees collected for coal produced after September 30, 2004, and, if not, whether an interpretation that such allocation is not required is reasonable. In this case, the statute does not unambiguously require allocation of these fees. Therefore, the agency may make the reasonable interpretation that fees collected pursuant to section 402(b) for transfer to the CBF are not required to be allocated pursuant to section 402(g). Our proposed addition of paragraph (d) to section 872.11 of our rules reflects this interpretation.

VIII. How Else Are We Proposing To Revise the AML Fund Rules in 30 CFR 872.11?

We are proposing to reorganize 30 CFR 872.11 to incorporate plain language principles and make the rules more user-friendly. Those changes are not substantive revisions. In addition, we are proposing to eliminate redundant or unnecessary language, improve clarity and consistency of terminology, consolidate provisions concerning interest, and add a paragraph reflecting the statutory requirements concerning transfers to the CBF. The most significant proposed changes (other than those discussed in Part VII of this preamble) are listed below:

- Removal of the sentence from 30 CFR 872.11(a)(6) providing that interest and other non-fee income to the Fund will be credited only to ''the Federal share.'' ''Federal share'' is an anachronistic term that refers to the structure of section 402(g) of SMCRA as originally enacted. At that time, there were only two types of accounts: State/tribal share and the Secretary's discretionary share. However, as part of the Abandoned Mine Reclamation Act of 1990 (Pub. L. 101–508, 104 Stat. 1388–289 through 1388–299), Congress carved several other mandatory allocations (the RAMP allocation and the historical production allocation) from the original Secretary's discretionary share. The preamble to 30 CFR 872.11(a)(6), as revised on May 31, 1994 (*see* 59 FR 28148–49), clarifies that the term Federal share refers to three separate allocations (RAMP, historical production, and the Secretary's discretionary share), consistent with the changes that Congress made to section 402(g) of the Act.

Paragraph (b) of 30 CFR 872.11 also specifies that interest must be allocated among those three accounts. Therefore, we are proposing to remove this sentence from paragraph (a), both to eliminate any confusion that it may cause and because it is redundant to provisions in paragraph (b). Furthermore, the purpose of paragraph (a) is to identify all types of Fund revenues, not to allocate those revenues. Paragraph (b) addresses allocations.

- Removal of language from 30 CFR 872.11(a)(6), (b)(3), and (b)(4) that references transfers from the AML Fund to the CBF. Proposed new paragraph (e) would address those transfers in a comprehensive fashion. Specifically, consistent with paragraphs (g)(1) and (h)(1) of section 402 of SMCRA, proposed new paragraph (e)(4), like the language proposed for deletion, specifies that the amount transferred to the CBF is not subject to the allocation provisions of section 402(g) of the Act and 30 CFR 872.11(b).
- Modification of the introductory language of paragraph (b) of section 872.11 to clarify that that paragraph governs allocation of all Fund revenues (except fees collected for coal produced after September 30, 2004, and an amount of other revenues equal to

monies transferred to the CBF), not just those appropriated by Congress.

• Modification of the provision in paragraphs (b)(1) and (2) of section 872.11 concerning withdrawal of unexpended grant funds from States and Indian tribes to clarify that we will withdraw those funds only if the State or tribe no longer has any eligible and available abandoned mine sites to reclaim. This change is consistent with the explanation of the meaning of this provision in the preamble to the existing rule (see 59 FR 28150–51, May 31, 1994). In relevant part, the preamble states at 59 FR 28151 that:

> OSM's practice since the beginning of the AML program is not to withdraw funds from the States/Indian tribes. Rather, funds which are not expended by a State/Indian tribe during the grant period are returned to the State/Indian tribe account for future grants.

Therefore, we are proposing in paragraphs (b)(1)(iii) and (2)(ii) to specify that unexpended grant funds will be reallocated only if the Director finds in writing that the amounts involved are not necessary to carry out reclamation activities on lands within the State or on Indian lands subject to the tribe's jurisdiction.

• Modification of paragraph (b)(3) of section 872.11 to specify that, consistent with the provisions of section 402(g)(2) of SMCRA, the RAMP allocation consists of 20 percent of all Fund revenues (including available interest) remaining *after* making State and tribal share allocations. The existing rule assigns RAMP ten percent of *all* Fund revenues plus 20 percent of available interest earnings and other miscellaneous Fund receipts.

• Removal of paragraph (b)(8) of section 872.11 as that paragraph merely duplicates the requirements of paragraph (b)(5)(iii).

• Revision of paragraph (b)(5)(iv) of section 872.11 to adopt language more consistent with that of section 402(g)(3)(D), which provides that money from the Secretary's discretionary share may be used ''[f]or the administration of this title by the Secretary.'' Existing paragraph (b)(5)(iv) provides that the Secretary may use those monies for ''[a]dministration of the Abandoned Mine Land Reclamation Program.'' To avoid any confusion about the scope of that provision, we are proposing to revise this paragraph to authorize expenditures for ''[a]dministration of title IV of the Act and this subchapter [subchapter R of our regulations].''

• Modification of paragraph (b)(7) of section 872.11 to replace references to statutory provisions with references to the corresponding provisions of our regulations. This change would make our regulations more specific and user-friendly as the reader would not have to flip through the statute and then compare those provisions to our regulations to determine their applicability.

• Addition of a new paragraph (e) to section 872.11 to provide a partial counterpart in our regulations to the CBF transfer requirements of section 402(h) of SMCRA and to clarify certain of those requirements, especially the applicability of the $70 million cap on annual transfers (see Part V of this preamble).

IX. Why Are We Publishing a Final Rule at the Same Time as This Proposed Rule?

In this proposed rule, we are publishing and seeking comment on the same changes that we are making to 30 CFR part 870 in a final rule published separately in today's **Federal Register**. As explained in the preamble to the final rule, we are making those changes effective immediately because of the need to have a fee in place on October 1, 2004, and ensure the continued transfer of monies to the Combined Benefit Fund. As discussed in Parts VII and VIII of this preamble, the proposed rule also includes changes to 30 CFR Part 872, the most significant of which would provide that the new fees need not be allocated under section 402(g) of SMCRA. After considering comments on the proposed rule, we may make changes to any or all of the provisions of this proposed rule. Because the proposed rule mirrors the final rule that we are adopting today with respect to 30 CFR Part 870, the public will have the opportunity to comment on all issues that we are addressing in both the proposed and final rules. However, the final rule that we are adopting today will remain in place until the effective date of any changes that we make. We invite comment on whether any changes that we make to 30 CFR Part 870 as a result of comments received should be made effective as of October 1, 2004, to ensure that they apply during the entirety of FY 2005.

X. How Do I Submit Comments on the Proposed Rule?

Electronic or Written Comments

Your comments should reference a specific portion of the proposed rule or preamble, explain the reason for any recommended change or objection, and include supporting data when appropriate. The most helpful comments are those that include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent Federal laws or regulations, technical literature, or other relevant publications or that involve personal experience.

We will not consider anonymous comments, but you may request that identifying information be withheld as discussed below under ''Availability of comments.'' Please include the docket number for this rulemaking (1029–AC47) at the beginning of all written comments and in the subject line of all electronic comments. Except for comments provided in electronic format, please submit three copies of your comments if practicable. Comments received after the close of the comment period (see **DATES**) or at locations other than those listed above under **ADDRESSES** will not be considered or included in the administrative record of this rulemaking.

Availability of Comments

Except as noted below, all comments, including the names and addresses of commenters, will be available for review during regular business hours in our Administrative Record room at the location listed under **ADDRESSES**.

You may request that we withhold your home address from the administrative record. We will honor all such requests from individual commenters to the extent allowable by law. We also will withhold your identity upon request, to the extent allowable by law. If you wish us to withhold your name and/or address, you must state this request prominently at the beginning of your comment. In addition, if you wish this information withheld, please do not submit your comments by electronic means.

We will not withhold names or addresses in comments submitted by organizations, business entities, or individuals identifying themselves as representatives or officials of organizations or business entities. All such comments will be available for public inspection in their entirety.

Public Hearings

We will hold a public hearing on the proposed rule upon request only. We will announce the time, date, and address for any hearing in the **Federal Register** at least 7 days before the hearing.

If you wish to testify at a hearing please contact the person listed in **FOR FURTHER INFORMATION CONTACT**, either orally or in writing, by 4:30 p.m., Eastern time, on November 16, 2004. If no one expresses an interest in testifying at a hearing by that date, we will not hold a hearing. If only one person

expresses an interest, we will hold a public meeting rather than a hearing. We will place a summary of the public meeting in the administrative record of this rulemaking.

The public hearing will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak but wish to do so, you will be allowed to testify after the scheduled speakers. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony.

Public meeting: If there is only limited interest in a hearing, we may hold a public meeting in place of a public hearing. If you wish to meet with us to discuss the proposed rule, you may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All meetings will be open to the public and, if appropriate, we will post notice of the meetings. A written summary of each public meeting will be included in the administrative record of this rulemaking.

XI. Procedural Matters

A. Executive Order 12866

This proposed rule is considered a significant rule and is subject to review by the Office of Management and Budget under Executive Order 12866.

a. This proposed rule would not have an effect of $100 million or more on the economy. It would not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. The rule would not add to the existing cost of operating a mine under an approved regulatory program in any significant fashion. We anticipate that the average fee under this rule over the next ten years would be 5.7 cents per ton of surface-mined coal, which is less than 0.2 percent of the value of the coal, assuming an average price of $30 per ton. Furthermore, the fees established under this rule would be lower than the existing AML reclamation fees, which expire on September 30, 2004. The fees imposed under this rule would result in the collection of an estimated $469 million from the coal industry during FY 2005–2014, an average of $46.9 million per year. That amount is approximately $3 billion less than what would be collected if the existing AML reclamation fee were extended another 10 years.

b. This proposed rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This proposed rule would not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This proposed rule raises novel legal and policy issues, which is why the rule is considered significant under Executive Order 12866.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). See the discussion in Part XI.A. above.

C. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not considered a significant energy action under Executive Order 13211. The replacement of the AML reclamation fee by a much smaller fee for continuation of the transfers to the CBF would not have a significant effect on the supply, distribution, or use of energy.

D. Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons stated in Part XI.A. above, this proposed rule would not:

a. Have an annual effect on the economy of $100 million or more.

b. Cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises for the reasons stated above.

E. Executive Order 12630—Takings

This proposed rule does not have any significant takings implications under Executive Order 12630. Therefore, a takings implication assessment is not required.

F. Executive Order 13132—Federalism

This proposed rule does not have significant Federalism implications because it does not concern relationships between the Federal government and State or local governmental units. Therefore, there is no need to prepare a Federalism Assessment.

G. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

To the extent that this proposed rule may have a substantial direct effect on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, potentially affected tribal governments will be notified through this publication in the **Federal Register**, and by direct notification from OSM, of the ramifications of this rulemaking. This will enable tribal officials and other tribal constituencies throughout Indian Country to have meaningful and timely input in the development of the final rule. Upon receipt and evaluation of all comments, we will publish a document addressing the comments and making any appropriate changes to the final rule.

H. Executive Order 12988 on Civil Justice Reform

The Department of the Interior has determined that this proposed rule meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988, ''Civil Justice Reform'' (56 FR 55195).

I. Unfunded Mandates Reform Act

This proposed rule would not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

J. Federal Paperwork Reduction Act

The Department of the Interior has determined that this rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* OMB has previously approved the collection activities and assigned clearance numbers 1029–0063 and 1029–0090 for the OSM–1 form and coal weight determination, respectively. Under this rule, the only change to the OSM–1 form would be a reduction in the fee rates printed on the form.

K. National Environmental Policy Act

OSM has determined that this rulemaking action is categorically excluded from the requirement to prepare an environmental document under the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4332 *et seq.* In addition, we have

determined that none of the ''extraordinary circumstances'' exceptions to the categorical exclusion apply. This determination was made in accordance with the Departmental Manual (516 DM 2, Appendixes 1.9 and 2).

L. Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the rule clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?

(4) Would the rule be easier to understand if it were divided into more numerous but shorter sections? (A ''section'' appears in bold type and is preceded by the symbol ''§'' and a numbered heading; for example, ''§ 870.13.'')

(5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the rule?

(6) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov*.

List of Subjects

30 CFR Part 870

Abandoned Mine Reclamation Fund, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 872

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: September 7, 2004.

Chad Calvert,

Acting Assistant Secretary, Land and Minerals Management.

For the reasons set forth in the preamble, the Department is proposing to amend 30 CFR Parts 870 and 872 as follows:

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

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

Authority: 28 U.S.C. 1746, 30 U.S.C. 1201 *et seq.*, and Pub. L. 105–277.

2. In § 870.12, paragraph (d) is revised to read as follows:

§ 870.12 Reclamation fee.

* * * * *

(d) The reclamation fee shall be paid after the end of each calendar quarter beginning with the calendar quarter starting October 1, 1977.

3. Amend § 870.13 as follows:

A. Revise the section heading.

B. Redesignate paragraphs (a) through (d) as paragraphs (a)(1) through (4).

C. Add a heading for paragraph (a).

D. Add a new paragraph (b).

The revision and additions read as follows.

§ 870.13 Fee rates.

(a) *Fees for coal produced for sale, transfer, or use through September 30, 2004.* (1) * * *

* * * * *

(b) *Fees for coal produced for sale, transfer, or use after September 30, 2004.* In this paragraph (b), ''we'' refers to OSM, ''Combined Fund'' refers to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 (26 U.S.C. 9702), and ''unassigned beneficiaries premium account'' refers to the account established under section 9704(e) of the Internal Revenue Code of 1986 (26 U.S.C. 9704(e)).

(1) *Fees to be set annually.* We will establish the fee for each ton of coal produced for sale, transfer, or use after September 30, 2004, on an annual basis. The fee per ton is based on the total fees required to be paid each fiscal year, as determined under paragraph (b)(2) of this section, allocated among the estimated coal production categories, as provided in paragraph (b)(3) of this section. We will publish the fees for each fiscal year after Fiscal Year 2005 in the **Federal Register** at least 30 days before the start of that fiscal year. Once we publish the fees, they will not change for that fiscal year and they will apply to all coal produced during that fiscal year.

(2) *Calculation of the total fee collections needed.* The total amount of fee collections needed for any fiscal year is the amount that must be transferred from the Fund to the Combined Fund under section 402(h) of the Act (30 U.S.C. 1232(h)) for that fiscal year, with any necessary adjustments for the amount of any fee overcollections or undercollections in prior fiscal years. We will calculate the amount of total fee collections needed as follows:

(i) *Step one.* We will determine the smallest of the following numbers:

(A) The estimated net interest earnings of the Fund during the fiscal year;

(B) $70 million; or

(C) The most recent estimate provided by the trustees of the Combined Fund of the amount that will be debited against the unassigned beneficiary premium account for that fiscal year (''the Combined Fund's needs'').

(ii) *Step two.* We will increase or decrease, as appropriate, the amount determined under step one by the amount of any adjustments to previous transfers to the Combined Fund resulting from a difference between estimated and actual interest earnings or the estimated and actual Combined Fund's needs. This paragraph (b)(2)(ii) applies only to adjustments to transfers for prior fiscal years beginning on or after October 1, 2004, and only to those adjustments that have not previously been taken into account in establishing fees for prior years.

(iii) *Step three.* We will adjust the amount determined under steps one and two of this section by an amount equal to the difference between the fees actually collected (based on estimated production) and the amount that should have been collected (based on actual production) for any prior fiscal year beginning on or after October 1, 2004, if the difference has not previously been taken into account in establishing fees for prior years.

(3) *Establishment of fees.* We will use the following procedure to establish the per-ton fees for each fiscal year:

(i) *Step one.* We will estimate the total tonnage of coal that will be produced during that fiscal year and for which a fee payment obligation exists, categorized by the types of coal and mining methods described in paragraph (b)(3)(ii) of this section.

(ii) *Step two.* We will allocate the total fee collection needs determined under paragraph (b)(2) of this section among the various categories of estimated coal production under paragraph (b)(3)(i) of this section to establish a per-ton fee based upon the following parameters:

(A) The per-ton fee for anthracite, bituminous or subbituminous coal produced by underground methods will be 43 percent of the rate for the same type of coal produced by surface methods.

(B) Regardless of the method of mining, the per-ton fee for lignite coal will be 29 percent of the rate for other types of coal mined by surface methods.

(C) The per-ton fee for in situ mined coal will be the same as the fees set under paragraphs (b)(3)(ii)(A) and (B) of this section, depending on the type of coal mined. The fee will be based upon the quantity and quality of gas produced at the site, converted to Btu's per ton of coal upon which in situ mining was conducted, as determined by an analysis performed and certified by an independent laboratory.

PART 872—ABANDONED MINE RECLAMATION FUNDS

4. The authority citation for Part 872 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

5. Amend § 872.11 as follows:

A. In paragraph (a):

i. Revise the introductory text.

ii. Revise paragraph (a)(1).

iii. Remove the word ''and'' in paragraph (a)(4).

iv. Remove the period and add in its place ''; and'' in paragraph (a)(5).

v. Revise paragraph (a)(6).

B. In paragraph (b):

i. Revise the introductory text.

ii. Revise paragraphs (b)(1) through (b)(5).

iii. Add a new heading in paragraph (b)(6).

iv. Revise paragraph (b)(7).

v. Remove paragraph (b)(8).

C. Add paragraphs (d) and (e).

The revisions and additions read as follows.

§ 872.11 Abandoned Mine Reclamation Fund.

(a) Fund revenues. Revenues to the Fund include—

(1) Fees collected under section 402 of the Act and part 870 of this chapter;

* * * * *

(6) Interest and any other income earned from investment of the Fund.

(b) *Allocation of Fund revenues.* Except as provided in paragraphs (d) and (e) of this section, monies deposited in the Fund will be allocated and used as follows, subject to appropriation by Congress—

(1) *State share.* An amount equal to 50 percent of the reclamation fees collected under § 870.13(a) of this chapter during each fiscal year will be allocated at the end of that year to the State in which they were collected.

(i) Reclamation fees collected from Indian lands will not be included in the calculation of amounts to be allocated to a State.

(ii) No monies will be allocated to any State that advises OSM in writing that it does not intend to submit a State abandoned mine reclamation plan under section 405 of the Act.

(iii) Amounts granted to a State that have not been expended within three years from the date of grant award will be available for use under paragraph (b)(5) of this section if the Director finds in writing that the amounts involved are not necessary to carry out reclamation activities on lands within the State.

(2) *Tribal share.* An amount equal to 50 percent of the reclamation fees collected from Indian lands under § 870.13(a) of this chapter during each fiscal year will be allocated at the end of that year to the Indian tribe or tribes having an interest in the lands from which the fees were collected.

(i) No monies will be allocated to any Indian tribe that advises OSM in writing that it does not intend to submit a tribal abandoned mine reclamation plan under section 405 of the Act.

(ii) Amounts granted to an Indian tribe that have not been expended within three years from the date of grant award will be available for use under paragraph (b)(5) of this section if the Director finds in writing that the amounts involved are not necessary to carry out reclamation activities on Indian lands subject to the tribe's jurisdiction.

(3) *Rural Abandoned Mine Program.* An amount equal to 20 percent of the monies collected and deposited in the Fund each fiscal year (including interest but excluding monies allocated under paragraphs (b)(1) and (2) of this section) will be allocated for transfer to the Secretary of Agriculture for the Rural Abandoned Mine Program authorized by section 406 of the Act.

(4) *Grants based on historical coal production.* An amount equal to 40 percent of the monies collected and deposited in the Fund each fiscal year (including interest but excluding monies allocated under paragraphs (b)(1) and (2) of this section) will be allocated for use by the Secretary to supplement annual grants to States and Indian tribes under section 405 of the Act.

(i) States and Indian tribes eligible for supplemental grants are those that have not—

(A) Certified the completion of all eligible coal-related reclamation needs under section 411(a) of the Act; and

(B) Completed the reclamation of all sites meeting the priorities in paragraphs (a)(1) and (2) of section 403 of the Act.

(ii) In allocating these funds to eligible States and Indian tribes, the Secretary will use a formula based upon the amount of coal historically produced before August 3, 1977, in the State or from the Indian lands concerned.

(iii) The Secretary will not provide funds under this paragraph to a State or Indian tribe in any year in which funds to be granted during that year from the State's allocation under paragraph (b)(1) of this section or the tribe's allocation under paragraph (b)(2) of this section will be sufficient to address all remaining eligible coal-related sites in the State or on the tribe's Indian lands that meet the priorities in paragraphs (a)(1) and (2) of section 403 of the Act.

(iv) Funds awarded to a State or Indian tribe under this paragraph may not exceed the amount needed to fully address all remaining eligible coal-related sites in the State or on the tribe's Indian lands that meet the priorities in paragraphs (a)(1) and (2) of section 403 of the Act after utilizing all available funds under paragraph (b)(1) or (2) of this section.

(5) *Secretary's discretionary share.* Monies collected and deposited in the Fund that are not allocated under paragraphs (b)(1) through (4) of this section may be used for any of the following purposes—

(i) Up to $10 million per year for the small operator assistance program under section 507(c) of the Act;

(ii) Emergency projects under section 410 of the Act, including grants to States and Indian tribes for this purpose;

(iii) Non-emergency abandoned mine land reclamation projects on eligible lands in States without an approved abandoned mine reclamation plan under section 405 of the Act or on eligible Indian lands where the Indian tribe does not have an approved abandoned mine reclamation plan under section 405 of the Act;

(iv) Administration of title IV of the Act and this subchapter; and

(v) Projects authorized under section 402(g)(4) of the Act in States without an approved abandoned mine reclamation plan under section 405 of the Act or on Indian lands where the Indian tribe does not have an approved abandoned mine reclamation plan under section 405 of the Act.

(6) *Minimum program grants.* * * *

(7) *Special allocation provisions.* Funds allocated or expended by the Secretary under paragraphs (b)(3) and (5) of this section will not be deducted from funds allocated or granted to a State or Indian tribe under paragraphs (b)(1), (2), (4), and (6) of this section.

* * * * *

(d) *Disposition of fees collected for coal produced after September 30, 2004.* Fees collected under § 870.13(b) of this

chapter for a fiscal year will be allocated to the accounts from which the amount transferred under paragraph (e) of this section was taken at the beginning of that fiscal year. The amount allocated to each account will be proportionate to the amount transferred from that account.

(e) *Transfers to Combined Benefit Fund.* (1) At the beginning of each fiscal year for which fees must be paid under section 402 of the Act and § 870.13 of this chapter, the Secretary will transfer monies from the Fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 (26 U.S.C. 9702) for the purpose described in section 402(h)(3)(A) of the Act and in the amount prescribed in paragraphs (h)(2) through (4) of section 402 of the Act.

(2) The amount of estimated Fund interest earnings transferred to the Combined Benefit Fund under paragraph (e)(1) of this section in any one fiscal year may not exceed the lesser of $70 million or the amount of the expenditures described in section 402(h)(3)(A) of the Act.

(3) If actual Combined Benefit Fund expenditures differ from the estimates provided under section 402(h)(3)(A) of the Act, or if interest earnings differ from the projections used to determine the amount of the transfer under section 402(h)(2)(A) of the Act, the amount transferred from the Fund to the Combined Benefit Fund in future years will be adjusted accordingly. However, the total amount ultimately transferred for any one fiscal year may not exceed $70 million, although adjustments for transfers in prior fiscal years may result in the transfer of more than $70 million during any given year.

(4) The amount transferred under paragraph (e)(1) of this section will be deducted from the amount of Fund revenues subject to allocation under paragraphs (b)(3) through (5) of this section at the end of the fiscal year.

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