DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 870

RIN 1029–AC46

Coal Production Fees

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

ACTION: Final rule.

SUMMARY: This rule sets forth the criteria and procedures that we will use to establish fees under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) for coal produced after September 30, 2004, when the current statutory fees expire. We also are providing notice of the fees established for FY 2005. We are establishing the fee at a rate to provide for the transfer from the Abandoned Mine Reclamation Fund (AML Fund or the Fund) to the Combined Benefit Fund (CBF), a total expected to be approximately $69 million for FY 2005. The fees necessary to generate the transfer amount are established as follows for each ton of coal produced for sale, transfer, or use: Surface-mined coal (except lignite), 8.8 cents per ton; Underground-mined coal (except lignite), 3.8 cents per ton; and, Lignite, 2.5 cents per ton.

We also are publishing in today's **Federal Register** a proposed rule that includes the changes made in this final rule as well as some additional issues related to the fee and the AML Fund.

DATES: This rule is effective September 17, 2004.

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I. Background Information

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

Title IV of 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 CBF 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 adopting today implements this provision of SMCRA by establishing criteria and procedures for establishment of fees for coal produced on or after October 1, 2004.

B. What Is the CBF?

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 Benefit Fund 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) may not exceed $70 million for any one year, 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. What Is the Rationale for Our Determination of the Total Amount of Fees To Be Collected Each Year Under This Rule?

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 basis for the fee collection target in new section 870.13(b)(2) of the final rule that we are adopting 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).

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

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

III. What Will This Rule Accomplish?

This final rule revises 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 heading 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 establishes criteria and procedures for use in establishing the fee for coal produced *after* September 30, 2004.

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

As explained further below, we are publishing a proposed rule in today's **Federal Register** that proposes the same changes we are making in this final rule. The proposed rule also includes some provisions (*i.e.*, proposed revisions to 30 CFR 872.11) that are not in this final rule. After considering any comments that we receive on that proposed rule, we may adopt a new final rule that makes changes to the final rule we are adopting today.

New paragraph (b) of section 870.13 of the final rule implements 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.

New paragraph (b)(1) of section 870.13 of the final rule requires us to establish fees on an annual basis because the amount transferred to the CBF each year will vary. We will 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 will apply. Part VII of this preamble provides notice of the fees that we have established for FY 2005. Although not specified in the rule, we also will 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.

Once we publish the fees for a given fiscal year, they will not change during that year. Later in this preamble we explain how we will 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.

New paragraph (b)(2) of section 870.13 of the final rule essentially provides that each year's fee must 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 caps 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 new section 870.13(b)(2), calculation of the total amount of fees that must be collected is a three-step process. First, under paragraph (b)(2)(i), we will estimate the amount that must be transferred to the CBF at the beginning of that fiscal year. We will compare the net amount of interest the AML Fund is estimated to earn in the coming 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 will be the smallest of the three numbers.

The second step, in paragraph (b)(2)(ii), is 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 will be 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 will be 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 will not result in a revision of the previously established fee for that year. We will 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 will 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 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 will 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 new paragraph (b)(2)(iii) is 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 essentially is a fraction. The numerator is the amount of total fees to be collected for that fiscal year (with all adjustments), and the denominator is based on our estimate of coal production for that year. If we overestimate production, the calculated per-ton fee will be too low and we will undercollect for that year. Conversely, if we underestimate production, the calculated per-ton fee will be too high and we will 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 will calculate the fees we overcollected or undercollected and that number will 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 will 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 rejected this option. We will not change the fee for a given fiscal year after we publish that fee in the **Federal Register**.

Instead, we are adopting the second possible approach to account for adjustments. We will adjust fee calculations for future years to account for adjustments to transfers in prior years. However, we will 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 will 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 this 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 will recover the $3 million fee overcollection in FY 2006.

If there are multiple adjustments for more than one prior fiscal year, they all will 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 will 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 will 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. 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.

Paragraph (b)(3) of section 870.13 of the final rule provides that we will 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. Paragraph (b)(3)(ii) specifies that the new fees will 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 differential rates should continue to apply to coal produced after September 30, 2004.

After evaluating those factors, we have decided to retain the per-ton fee ratios that have been in place since the enactment of SMCRA. Therefore, under paragraph (b)(3)(ii) of section 870.13 of the final rule, the fee per ton of non-lignite coal produced by underground methods will 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 will 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 will remain substantively unchanged from the existing 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?

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?

This final rule (*see* 30 CFR 870.13(b)) caps 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 are later adjusted to reflect actual interest earnings and actual CBF expenditures for that fiscal year, provided the adjustments do 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 actual 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. Will the Fees Collected Continue To Be Deposited Into the AML Fund?

Yes. Section 401(b)(1) of SMCRA requires that fees collected under section 402 be deposited into the AML Fund. In a proposed rule published separately in the **Federal Register** today, we are seeking comment on how those fees should be accounted for within the AML Fund. However, neither this final rule nor the proposed rule will affect the process for transfers 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.

VII. What Are the Fees for Coal Produced in FY 2005?

Under new section 870.13(b)(2)(i), as adopted in this rulemaking, the total amount of fees collected for coal produced during FY 2005 should equal the amount of estimated AML Fund interest earnings that we anticipate will be transferred from the AML Fund to the trustees of the CBF at the beginning of the fiscal year pursuant to section 402(h) of the Act. The other two elements of the transfer cap—$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—do not come into play for FY 2005 because estimated AML Fund interest earnings for that year are less than $70 million while the CBF estimate of its needs for unassigned beneficiaries during that year exceeds $70 million.

We estimate that the AML Fund, which is invested in a mix of long-term and short-term public debt securities, will earn $69,040,000 in interest during FY 2005. The most current available actuarial estimate of the CBF's health care benefit expenditures for unassigned beneficiaries in FY 2005 is approximately $85 million. The CBF trustees will provide an updated estimate in September 2004. However, that estimate will arrive too late for use in calculating fee rates for FY 2005. As provided in new section 870.13(b)(2)(ii) of this rule, any difference between the estimate we used to set the fees for FY 2005 in this rule and the estimate that the CBF provides in September (or a later actual number) will appear as an adjustment to the fee collection target for a subsequent fiscal year and thus will be reflected in the fee calculation for that year. However, no adjustment will be necessary if the new estimate or actual numbers show CBF needs for FY 2005 exceed the AML Fund's interest earnings for that year.

To summarize, because estimated AML Fund interest earnings during FY 2005 are less than $70 million while estimated CBF expenditures for unassigned beneficiaries during that year are in excess of $70 million, we estimate that the amount that we must transfer to the CBF at the beginning of the 2005 fiscal year will be $69,040,000.

Under new section 870.13(b)(3) of this rule, we must establish per-ton fees for FY 2005 based upon a comparison of the total amount of fee collections needed for that year, as determined under new section 870.13(b)(2) of this rule, with estimated coal production during FY 2005, broken out by type of coal and method of mining. We estimate that 1,027 million short tons of coal will be subject to fee payment obligations during FY 2005. We based that estimate on Department of Energy (DOE) projections published in December 2003. Relying upon our experience with historical differences between DOE data and our own fee compliance data, we reduced the DOE projection by ten percent to include only coal for which we anticipate that there will be a fee payment obligation. Applying the same ratios as in our data from fee collections in FY 2003, we estimate that the total amount of coal produced in FY 2005 will include 628 million tons of non-lignite coal mined by surface methods, 317 million tons of non-lignite coal mined by underground methods, and 82 million tons of lignite coal.

Under new section 870.13(b)(3)(ii) of this rule, the fee per ton of non-lignite coal produced by underground methods must be 43 percent of the fee for non-lignite coal produced by surface methods, while the fee for lignite coal must be 29% of the fee for non-lignite coal produced by surface methods. Applying those ratios and rounding to the nearest 0.1 cent, we are establishing the following fees for coal produced during FY 2005:

- Surface-mined coal (except lignite): 8.8 cents per ton.
- Underground-mined coal (except lignite): 3.8 cents per ton.
- Lignite: 2.5 cents per ton.

By our calculations, those are the fees necessary to generate the $69,040,000 needed to equal the amount that we estimate will be transferred to the CBF at the beginning of the 2005 fiscal year, while maintaining the appropriate fee ratios. To the extent that the estimates upon which our calculations are based prove inaccurate, we will adjust the fee collection target for future years accordingly, as required by new section 870.13(b)(2)(ii) and (iii) of this rule.

We do not anticipate any in situ mining during the 2005 fiscal year. However, if such mining occurs, the fee will be the same as the fee for underground-mined coal (if the in situ-mined coal is anthracite, bituminous, or subbituminous coal) or for lignite (if that is the type of coal being mined by in situ methods). If in situ mining occurs, 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.

Stockpiled coal that was mined before October 1, 2004, is subject to the fees established in this rule at the time it is used, sold, or transferred. For example, coal that was sold before October 1, 2004, but that has not physically left the minesite is subject to the fees established in section 402(a) of the Act, which will now be codified in paragraph (a) of section 870.13.

This portion of the preamble satisfies the notice requirements of new section 870.13(b)(1) of this rule with respect to the establishment of fees for FY 2005.

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

As explained further below, we are publishing a proposed rule in today's **Federal Register** that proposes the same changes that we are making in this final rule. The proposed rule also addresses some additional issues related to allocation and disposition of monies deposited in the AML Fund. Most significantly, the proposed rule includes a provision addressing whether the new fees should be allocated under section 402(g) of SMCRA. Because AML Fund revenues are not allocated until the end of the fiscal year, we have time to consider the allocation issue at a later date. Thus, we will not publish a final rule addressing the allocation issue until after the public has received notice and an opportunity for comment. In addition, after considering comments on the proposed rule, we may publish a new final rule that makes changes to the provisions of the final rule that we are adopting today.

IX. Why Are We Publishing This Rule as a Final Rule Without Opportunity for Comment?

We are adopting these regulations as final under the ''good cause'' exception in the Administrative Procedure Act (APA) at 5 U.S.C. 553(b)(3)(B). That provision of the APA allows an agency to issue a rule without prior notice or opportunity for public comment ''when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Using the same rationale, we are also invoking the good-cause exemption at 5 U.S.C. 553(d)(3) to the APA requirement that rules be published at least 30 days prior to their effective date.

Section 402(b) of SMCRA imposes a clear expiration date (September 30, 2004) for the fee rates established in section 402(a) of the statute. It also specifies that, after that date, fees shall be established at a rate that will continue to provide for the deposit referred to in section 402(h), which pertains to transfers to the CBF. As explained above, we believe that provision is susceptible to only one reasonable interpretation. Therefore, comment is unnecessary.

Further, waiting to adopt a final rule until we provide advance notice and an opportunity for public comment would be impracticable and contrary to the public interest. Generally, the existence of a statutory deadline will provide an agency with a good cause justification for the publication of a final rule without advanced notice and an opportunity for comment. See, *e.g.*, *United States Steel Corp.* v. *United States Environmental Protection Agency*, 605 F.2d 283 (5th Cir.), *cert. denied*, 444 U.S. 1035 (1979). In the current situation, a statutory deadline exists because unless operators are required to pay fees for coal produced during the fiscal year beginning on October 1, 2004, we may be unable to transfer AML Fund monies to the CBF. This is explained in greater detail below.

We recognize that an agency delay in beginning a rulemaking may not necessarily establish the time constraint that would give rise to good cause for dispensing with advance notice and comment. However, unusual circumstances causing the delay in the present situation justify the use of the APA good cause exception. In this case, we delayed initiating a rulemaking to implement a new fee requirement because we thought that considerable activity in Congress, including the introduction of at least seven bills (H.R. 3778, H.R. 3796, H.R. 4529, S. 2049, S. 2086, S. 2208, and S. 2211), would lead to enactment of legislation that would establish fees for coal produced after September 30, 2004. In short, we thought it highly imprudent to begin the rulemaking process to attempt to solve a problem that Congress itself appeared prepared to solve. Moreover, we thought it to be an unnecessary waste of agency resources to begin the rulemaking process earlier given the likelihood that any new rule ultimately would become moot in light of what we believed to be a forthcoming congressional solution.

However, because those legislative efforts have thus far been unsuccessful, we now must establish those fees through the rulemaking process to provide for the transfer to the CBF on or about October 1. Section 402(h)(1) of SMCRA specifies that the Secretary may make the transfer to the CBF only in any fiscal year ''with respect to which fees are required to be paid under this section.'' Therefore, unless we adopt this rule as final, allowing us to set new fees for coal produced on or after October 1, 2004, operators may be under no obligation to pay fees in the coming fiscal year and we may not be authorized to make the transfer to the CBF. Such a situation would be untenable and would adversely affect the approximately 17,000 unassigned beneficiaries currently receiving health care benefits from the CBF. See *N. Am. Coal Corp.* v. *Dir., Office of Workers' Compensation Programs, United States Dep't of Labor*, 854 F.2d 386 (10th Cir. 1988) (''good cause'' found for emergency rule concerning claims for medical benefits under the Black Lung Act since any delay in publication of the rule that caused loss or interruption of medical benefits to eligible coal miners would be ''contrary to public interest'').

Maintaining the continuity of payment of health care premiums is an important public policy goal that will be accomplished through the continuing payment of fees by coal operators at a level significantly lower than they paid for coal produced before October 1, 2004. We do not intend to jeopardize health care benefits for unassigned beneficiaries by waiting to publish a final rule until after October 1, 2004.

In addition, because the fee may be a factor in negotiating sale prices for coal, it is beneficial to notify industry as soon as possible about changes in fees. Companies enter into a variety of mining and sales contracts with varying provisions for payment of the fee. For example, a mining contract may call for the mine owner, the permittee, the person extracting the coal, or the purchaser to pay the fee.

For those reasons, it is not in the public interest to provide notice and an opportunity for public comment before publication of a final rule establishing fees for coal produced after September 30, 2004.

Adoption of this rule on a final basis does not mean that we have no interest in seeking input from the public. To the contrary, in a separate document published in today's **Federal Register**, we are also publishing these rule changes as a proposed rule, soliciting comment on what changes, if any, we should make in the final rule that we are adopting today. Upon receipt and evaluation of those comments, we will publish a document addressing the comments and, if necessary, a new final rule making any appropriate changes to the final rule that we are adopting today.

X. Procedural Matters

A. Executive Order 12866

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

a. This rule will not have an effect of $100 million or more on the economy. It will 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 will 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, non-lignite 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 will be lower than the existing AML reclamation fees, which expire on September 30, 2004. The fees imposed under this rule will 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 ten years.

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

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

d. This 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 rule will 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 X.A. above.

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

This 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 will not have a significant effect on the supply, distribution, or use of energy.

D. Small Business Regulatory Enforcement Fairness Act

This 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 X.A. above, this rule will 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.

E. Executive Order 12630—Takings

This 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 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 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. More importantly, in a separate document published in today's **Federal Register**, we are publishing this rule as a proposed rule, soliciting comment on what changes, if any, we should make in the final rule. 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 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 rule will 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 will 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 in 30 CFR Part 870

Abandoned Mine Reclamation Fund, 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 amending 30 CFR Part 870 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.

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