Federal Register

Thursday
January 15, 1987

Part IV

Department of the Interior

Minerals Management Service, Bureau of Land Management

30 CFR Parts 202, 203, 206, 212, and 218
43 CFR Part 3480
Revision of Coal Product Valuation Regulations and Related Topics; Proposed Rule

S-094999 0102(06)(14-JAN-87-14:36:15)
F4717.fmt...[16,30]...1-2-86

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Bureau of Land Management

30 CFR Parts 202, 203, 206, 212, and 218

43 CFR Part 3480

Revision of Coal Product Valuation Regulations and Related Topics

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rulemaking provides for the amendment and clarification of regulations governing the valuation of coal for royalty purposes. The regulations being amended affect Federal coal leases and Indian (Tribal and allotted) coal leases (except leases on the Osage Indian Reservation, Osage County, Oklahoma).

In addition, the proposed rule establishes definitions related to the valuation of coal covered in Subpart F of Part 206.

The purpose of this rulemaking is to update, consolidate, and clarify existing regulations in order to provide industry and the public with a comprehensive and consistent coal valuation policy.

DATES: Comments must be submitted on or before April 15, 1987. The hearing is scheduled to be held on: March 3, 1987, 8:30 a.m. to 4:00 p.m., in Denver, Colorado.

ADDRESSES: Written comments may be mailed to Minerals Management Service, Royalty Management Program, Rules and Procedures Branch, Denver Federal Center, Building 85, P.O. Box 25165, Mail Stop 660, Denver, Colorado 80225, Attention: Dennis C. Whitcomb.

The hearings will be held at the following location: Denver—Sheraton Airport Hotel, 3535 Quebec Street, Denver, Colorado.

FOR FURTHER INFORMATION CONTACT: Dennis C. Whitcomb (303) 231-3432, (FTS) 328-3432.

SUPPLEMENTARY INFORMATION: The principal authors of this proposed rule are Earl Cox, Herbert B. Wincentsen, Thomas J. Blair, Stanley J. Brown, and William H. Feldmiller, of the Royalty Valuation and Standards Division of the Minerals Management Service (MMS) Lakewood, Colorado; and Peter J. Schaumberg of the Office of the Solicitor, Washington, DC.

I. Introduction

On January 9 and 10, 1986, the first meeting of the Royalty Management Advisory Committee (RMAC) was held in Lakewood, Colorado. (See Notice of Meeting, 50 FR 52385, Dec. 23, 1985). The RMAC, which is composed primarily of representatives from States, Indian Tribes and allottees, and the coal, oil, and gas industry, was charged with the responsibility of advising the Secretary of the Interior about the form and content of changes to the MMS' regulations governing the value, for royalty purposes, of coal, oil, and gas production from Federal and Indian leases.

At the first RMAC meeting, the Committee asked the Secretary to withhold promulgation of proposed valuation regulations until the Committee had an opportunity to review the issues and make its recommendations. The Secretary agreed to the request, and in response to the Committee's request, the MMS made available to the RMAC its latest drafts of regulations governing the valuation of coal, oil, and gas, and those governing transportation and processing allowances. At the same time, MMS made copies of those same draft regulations available to the public (51 FR 4507, Feb. 5, 1986, and 51 FR 7811, March 6, 1986). Public comment on the drafts was requested both in written form and at a public meeting held in Lakewood, Colorado, on March 19, 1986.

The RMAC formed three working panels to review the draft coal, oil, and gas rules, and the transportation and processing rules related to each product. Between January and October 1986, the various working panels held several meetings to review the draft rules. The working panel meetings were published in the Federal Register and the meetings were open to members of the public, many of whom participated actively.

Each of the three working panels prepared a detailed set of recommendations to the RMAC. These were reviewed at the RMAC meetings held July 28-30, 1986, and October 20-22, 1986. The RMAC was unable to approve the reports of both the oil and the gas panels for transmission to the Secretary, which, by the terms of the RMAC's charter, required a two-thirds vote of the Committee membership. The RMAC did approve, for submission to the Secretary, a set of recommendations regarding certain of the provisions contained in the coal valuation regulations.

MMS representatives were present at, and participated in, all meetings of the RMAC and the working panels. As a consequence of the extensive discussion between members of the groups representing the States, Indians, and the industries, and the detailed written recommendations prepared by the working panels, MMS' task of drafting proposed valuation regulations has been enhanced significantly. In preparing these proposed regulations, MMS has carefully considered all of the discussions which occurred at the various meetings, regardless of whether they were adopted in any of the three working panel reports or by the full Committee. MMS also has considered the written and oral comments from the public on the draft rules and the resolution presented to the Secretary by the RMAC. MMS appreciates the hard work and dedication of a large number of people who were willing to work toward the common goal of clarifying and improving the regulations governing the valuation, for royalty purposes, of coal, oil, and gas production from Federal and Indian leases.

The policy of the Department of the Interior is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments, suggestions, or objections regarding the proposed rule to the location identified in the ADDRESSES section on this preamble. Comments must be received on or before April 15, 1987. A public hearing will be held on the date and at the location identified in the DATES and ADDRESSES sections of this preamble.

II. Purpose and Background

The Minerals Management Service (MMS) is proposing to revise the current regulations regarding the valuation of coal to accomplish the following:

1. Consolidation of the existing regulations currently at 30 CFR 203.200 and 43 CFR 3485.2.

2. Creation of regulations consistent with the present organizational structure of the Department of the Interior. (The existing regulations were issued when product valuation for coal was performed by an organization that is now part of the Bureau of Land Management (BLM).)

3. Placement of the coal product valuation regulations in a format compatible with the valuation regulations for all leasable minerals.

4. Clarification that royalty is to be paid on all consideration received by the lessee, less applicable allowances, for production removed or sold from the lease.

5. Creation of regulations to guide lessees in the determination of allowable washing and transportation costs for coal to aid in the calculation of the proper royalty due the lessor.

When published, these rules would supersede all curently effective coal royalty valuation directives, such as those contained in numerous Secretarial, MMS, and U.S. Geological Survey Conservation Division (now Bureau of Land Management Onshore Operations) decisions and orders, and would be applied prospectively from the effective date of the final rule to all leases including production from existing leases.

This proposed rule is one of several which MMS intends to propose in the near future. Other proposed rules will address valuation of oil and gas, as well as allowances for transportation and processing of oil and gas.

Structurally, the rules proposed today add sections to 30 CFR Parts 202, 203, and 206, revise sections in Parts 212 and 218, and remove paragraphs from 30 CFR 203.200 and 43 CFR 3485.2. Paragraphs (d) and (b) of § 203.200 would be redesignated to Part 218 as § 218.201 and Part 202 as § 202.251, respectively. A new § 203.250 would be added to Subpart F (formerly Subpart E) of Part 203. Also, §§ 206.250, 206.251, 206.252, 206.253, 206.254, 206.255, 206.256, 206.257, 206.258, 206.259, 206.260, 206.261, 206.262, 206.263, and 206.264 would be added to newly redesignated Subpart F (formerly Subpart E) of Part 206.

For the convenience of coal lessees, payors, and the public, the following chart summarizes the effects of the proposed rule:

Regulation changes (all from 30 CFR, except as noted)	Descriptions
I. Redesignations:	
1. Subparts E, F, and G of Parts 202, 203, and 206 are redesignated as Subparts F, G, and H, respectively. §§ 206.300, 206.301, are correspondingly redesignated §§ 206.350, 206.351.	This administrative action permits the insertion of a new Subpart E—"Solid Minerals, General" of these Parts.
2. Subpart F of Part 212 is redesignated as H.	This administrative action reorganizes more appropriately Part 212 to be consistent with Parts 202, 203, and 206.
3. Paragraph 203.200(b) is redesignated to Part 218 § 218.201.	This administrative action more appropriately locates within 30 CFR the information contained in this paragraph.
4. Paragraph 203.200(d) is designated to Part 202 as § 202.250.	This administrative action more appropriately locates within 30 CFR the information contained in this paragraph.
5. Paragraph 203.200(a) is redesignated to § 203.250.	This administrative action more appropriately locates within 30 CFR the information contained in this paragraph.
II. Deletions:	
1. Paragraphs 203.200(c), 203.200(e), 203.200(f), 203.200(g), 203.200(h), 203.200(i), 203.200(j), and 203.200(k) are removed.	This action eliminates the existing coal product valuation regulations.
2. Paragraphs 3485.2(b), 3485.2(e), 3485.2(f), 3485.2(g), 3485.2(h), 3485.2(i), and 3485.2(k) are removed.	This action eliminates the existing coal product valuation regulations found at Subpart 3485 of 43 CFR. These regulations are redundant with those at § 203.200, of 30 CFR Part 203, and would conflict with the new regulations intended to replace those in § 203.200.
III. Additions:	
1. Section 203.250 is added to Subpart F of Part 203.	This action is intended to clearly indicate that decisions to reduce a royalty rate are the responsibility of the Bureau of Land Management.
2. Sections 206.250, 206.251, 206.252, 206.253, 206.254, 206.255, 206.256, 206.257, 206.258, 206.259, 206.260, 206.261, 206.262, 206.263, and 206.264 are to be added to new Subpart F of Part 206.	The addition of these sections provides new coal valuation regulations to replace those currently found at § 203.200 of 30 CFR and § 3485.2 of 43 CFR.
3. Subpart I—"OCS Sulfur (Reserved)" is added to Parts 202, 203, 206, and 212.	This administrative action creates a new subpart for future rulemaking requirements.
4. Subpart F—"Coal (Reserved)" and Subpart G—"Other Solid Minerals (Reserved)" is added to Part 212.	This administrative action creates new subparts for future rulemaking requirements.
IV. Amendments:	
1. Section 212.250 is amended.	This technical amendment deletes the obsolete reference to the "District Mining Supervisor" and replaces the "Associate Director for Royalty Management" with "MMS" for consistence with other Parts.
2. Part 212, Subpart G—"Indian Lands—(Reserved)" is amended to read "Other Solid Minerals (Reserved)".	This administrative action changes the title of Subpart G of Part 212 to be consistent with Subpart G of Parts 202, 203, and 206.

These proposed rules would apply the same valuation standards to coal produced on Indian lands and coal produced on Federal lands. Except for cents-per-ton leases (which currently have specific royalty provisions in Title 25 of the Code of Federal Regulations, see 25 CFR 211.15(c), 212.18(c), 213.21(c), and 214.10(b)), this is a continuation of the practices under the existing regulations. MMS believes the proposed valuation methods would yield a reasonable and long-term maximum rate of return for both Federal and Indian leases. The basic premise underlying this methodology is that value is best determined by the interaction of competing market forces—the 7/8ths or 4/5ths owner is going to negotiate the best deal he can to further his own interests, advancing those of the royalty owner as well. This would add certainty to the market place and assure maximum, long-term revenues to all parties concerned. Comments are especially requested on this issue.

The proposed rules would expressly recognize, however, that where the provisions of any Indian lease, or any statute or treaty affecting Indian leases, are inconsistent with the regulations, then the lease, statute, or treaty would govern to the extent of the inconsistency. The same principle would apply to Federal leases.

III. Section-by-Section Analysis

Proposed § 206.250, Purpose and scope, is an introductory section stating that Subpart F would prescribe the procedures to establish the royalty value of coal produced from all Federal and Indian leases, except Osage Indian leases. However, paragraph (b) would incorporate the principle that if the specific provisions of any lease, statute, or treaty are inconsistent with the regulations, then the lease, statute, or treaty provisions would govern to the extent of the inconsistency. This principle would apply to existing leases as well as leases executed after the effective date of these regulations.

Paragraph (c) would expressly notify all lessees that all royalty payments are subject to audit and adjustment, where necessary, within the applicable statute of limitations. MMS conducts an ongoing audit program of lessees. States also conduct audits pursuant to cooperative agreements and delegations of authority as authorized by sections 202 and 205 of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. 1732 and 1735. Further, the DOI Office of Inspector General and the General Accounting Office (GAO) from time to time conduct lessee and payor audits. Hence, all records and supporting information necessary to support royalty payments made to MMS must be maintained for a period of 6 years from the date of payment. See 30 CFR 212.200, and 30 U.S.C. 1713 (which is applicable to oil and gas), the concept of which would be extended by that rule to coal.

Proposed § 206.251, Definitions, sets forth definitions applicable to the proposed coal valuation regulations as well as the coal transportation and washing allowance regulations.

Most of the proposed definitions are straightforward and self-explanatory. A few of the definitions, however, require some explanation. Comments are requested on all definitions because MMS may adopt any final definition necessary to implement policy or legal conclusions made in the formulation of the final substantive royalty valuation rules for coal.

"Ad valorem lease" would be defined as a lease where the royalty due to the lessor is based upon a percentage of the

amount or value of the production. This lease is now the most typical Federal and Indian lease form. Ad valorem coal leases are distinguished from cents-per-ton coal leases, where the royalty is based upon a dollar amount payable per ton prescribed in the lease.

"Arm's-length contract" would be defined as a contract or agreement between independent, nonaffiliated persons. The definition would further provide that two persons are affiliated if one person controls, is controlled by, or is under common control with another person, or if one person owns an interest (regardless of the amount), either directly or indirectly, in another person. This definition is important to the regulations because, as is explained further below, MMS is proposing that the gross proceeds under an arm's-length contract would be accepted as value. Other valuation criteria would apply to non-arm's-length contracts.

The thrust of the proposed arm's-length contract definition is to include within its coverage only those contracts between persons who have no affiliation or interrelationship of any kind that would cause the contract terms to be suspect as to their arm's-length nature. MMS recognizes that by excluding from the definition those contracts between persons where one party to the contract has any ownership interest in the other, it is narrowing the universe of contracts which would fall within the scope of the definition.

MMS has proposed a definition for arm's-length contract that excludes references to such matters as "adverse economic interests" or "free and open markets" because the inclusion of such sometimes subjective concepts would make a lessee's determination that its contract was arm's-length subject to uncertainty. The advantage to the proposed definition is that it would be almost purely objective, and lessees and other payors would have assurance that if they pay royalties on the basis of gross proceeds from an arm's-length contract, the royalty valuation would not later be susceptible to redetermination.

MMS would like commenters to address whether a list of items could be developed which could serve to define an arm's-length contract. Specifically, is there a list of questions which a lessee could answer which would lead to an objective determination of whether it was an arm's-length contract? Possible questions are: (1) Is there a common equity interest between the parties to the contract; (2) is there common control of the parties to the contract; (3) was there a consolidated tax filing by the parties to the contract. MMS would like commenters to address whether the development of such a list is possible and what questions should be part of the list.

The term "gross proceeds" is another term important to the regulations because it would be a common royalty value determinant. Gross proceeds is proposed to be defined as the total monies or other consideration paid to a coal lessee, or monies or other consideration to which such lessee is entitled, for the disposition of coal. Gross proceeds would be defined to include payments to the lessee for certain services such as crushing, storing, mixing, loading, treatment with chemicals or oil, and other coal preparation that the lessee is obligated to perform at no cost to the lessor. Gross proceeds also would be defined to include: payments or credits for advanced prepaid reserve payments, or advanced exploration or development costs, subject to recoupment through reduced prices in later sales; take-or-pay payments; and reimbursements where the purchaser reimburses the seller, or pays any costs on behalf of the seller, for such items as severance taxes and income taxes. In the proposed regulation, MMS has proposed language in brackets to exclude two types of reimbursements which otherwise would be included in the definition of gross proceeds, i.e.; reimbursements for Federal black lund fees and reimbursements for abandoned mine lands fees authorized by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 et seq. MMS received several requests to exclude these fees because the Federal Government effectively could increase royalties by increasing the fees. The MMS recognizes that similar arguments could be made about other items which are proposed to be included in the definition of gross proceeds and the exclusion of Federal black lung fees and abandoned mine lands fees could set a precedent for the exclusion of other items. The MMS also recognizes that the exclusion of these two Federal fees would lead to a reduction in royalty collections. MMS specifically requests comments on these issues.

The definition of gross proceeds is intended to be expansive to ensure that it includes all the benefits flowing from the purchaser to, or on behalf of, the seller for the disposition of the coal, with the possible exceptions noted above.

"Lessee" would be defined as any person to whom the United States, an Indian tribe, or an Indian allottee, issues a lease, and any person who has assumed an obligation to make royalty or other payments required by the lease. MMS also is proposing to expressly include in the definition all persons who may have to make royalty payments. This would include all persons who have an interest in a lease as well as an operator or other payor, including in some instances the purchaser, who has assumed a royalty payment responsibility by contract or other agreement with the persons who have the actual lease interests. By using this broad definition for the product valuation regulations, it would not be necessary to use multiple terms such as lessee/payor/operator throughout the rules. This definition is not intended to change any contractual obligations under the lease instrument between the lessor and the current or original lease holder, except as it pertains to royalty valuation.

MMS would like commenters to address whether other terms used in these proposed regulations need to be defined.

Proposed §§ 206.252, .253 and .254 are self-explanatory and straightforward.

Proposed § 206.255, Coal subject to royalties—general provisions, sets forth general policies regarding what coal is subject to royalty and which payments made to a lessee are subject to royalty. Proposed § 206.255(a) requires that royalty be paid on all coal used by the lessee, whether the coal is used on the lease or off the lease. An example of such usage by the lessee includes coal used for drying purposes when coal has been washed, or coal used for space heating in buildings, offices, warehouses, or other lessee facilities. Proposed § 206.255(a) requires that royalty be paid on coal avoidably lost, which determination is made by BLM. Proposed § 206.255(b) expresses MMS royalty policy regarding insurance compensation for coal unavoidably lost. MMS considers insurance payments to be proceeds on which royalties must be paid. Proposed § 206.255(c), which requires royalty payments on coal or coal products recovered from waste piles or slurry ponds, is a continuation and clarification of existing policy contained in the existing regulations at § 203.200(k). Royalty on coal recovered from waste piles or slurry ponds would be based on the current terms of the lease. Therefore, even if a lessee had initially extracted the coal from the ground under an earlier cents-per-ton royalty term, coal now recovered from waste piles or slurry ponds would require royalty on an ad valorem basis, if the lease royalty is now an ad valorem rate.

Proposed § 206.256, Quality and quantity measurement standards for reporting and paying royalties, requires that lessees for ad valorem leases report coal quality parameters of coal Btu's, percent sulfur, and percent ash. Coal quality markedly affects coal values. Often, if the coal shipped to a utility deviates from contract specifications, a price penalty will be levied against the shipper (lessee). When the lessee reports those lower values to MMS, the MMS must be aware that those lower values were caused by coal quality problems and are not necessarily an underpayment. This may avoid MMS investigations or audits triggered as a result of unexpectedly low values being reported from a particular lease or area. Coal quality and quantity information would be reported on forms already required for submittal under 30 CFR Part 216. Additionally, coal quantity information would be submitted on Form MMS–4014, Report of Sales and Royalty Remittance, already required pursuant to 30 CFR Part 210.

Proposed § 206.257, Point of royalty determination, would provide that, for royalty purposes, coal quantity and quality will be computed at the point of royalty measurement which BLM prescribes for lesses. This section would provide also that coal added to stockpiles or inventory at the mine does not require payment of royalties until it is later sold or disposed of. However, if the stockpile gets large, MMS may ask BLM or BIA to increase the lease bond to protect the lessor.

Proposed § 206.258, Valuation standards for cents-per-ton leases. The proposed regulations would distinguish between two classes of leases for royalty purposes. Section 206.258 would establish procedures to calculate royalties for those older coal leases that provide for the calculation of royalty on a cents-per-ton basis. Section 206.259, discussed below, would establish the procedures to determine the value of coal for the increasingly more common leases that require payment of royalty as a specified percentage of that value (ad valorem leases).

Existing Federal cents-per-ton leases are being readjusted to ad valorem leases as their current twenty-year lease terms end. See 43 CFR 3451.1.

Proposed § 206.258(b) would basically continue the existing requirement of § 203.200(e) that the royalty for coal from a cents-per-ton lease is based on the dollar amount per ton prescribed in the lease. In other words, the royalty is the prescribed rate multiplied by the tonnage. The proposed rule would specify, however, that the tonnage upon which the royalty rate is applied would be the actual volume measured in tons which is sold or used, including coal which is avoidably lost. This is a clarification of the existing requirements now contained at § 203.200(e). The valuation procedure prescribed in this section would apply whether the sales contract or other sales agreement is arm's-length or non-arm's-length.

As the terms of cents-per-ton leases become subject to readjustment, the royalty provisions of those leases are being changed to an ad valorem basis for royalty computation purposes. In many instances, coal mined before the readjustment date will not be sold until after that date. Paragraph (d) of proposed § 206.258 would provide that if coal is sold within 30 days after the readjustment date, then the royalty would be computed on the lease's old cents-per-ton basis. For all sales that occur after 30 days, no matter when the coal was mined, royalty would be computed on the new ad valorem basis.

The provision that royalty be paid for excess inventory in existing § 203.200(e) would be discontinued. This provision is inconsistent with a procedure which requires computation of royalty based upon the volume at the sales point. However, MMS is proposing to add language in § 206.257, discussed above, that expressly notifies the lessee that its lease bond may be increased to cover its royalty obligations for coal in stockpiles that is deemed excessive for normal business purposes.

Proposed § 206.259, Valuation standards for ad valorem leases, basically would establish a three-part process for royalty valuation. Paragraph (a) would state expressly that the value, for royalty purposes, of coal production would be the value of the coal determined pursuant to § 209.259, less applicable allowances for coal washing (§ 206.260) and transportation (§ 206.262). However, as explained further below, lessees would not be allowed to report a net number for the royalty value (i.e., value less allowances), but would be required to report the allowances separately on the Report of Sales and Royalty Remittance, Form MMS–4014. Lessees would not be entitled to deduct allowances in all situations (see discussion below). Paragraph (b) would retain the basic approach of existing § 203.200(f) that the value of coal sold pursuant to an arm's-length contract is the gross proceeds accruing, or which could accrue, to the lessee. As explained below, this value is subject to certain adjustments and allowances. If a contract does not meet the criteria for being arm's-length (see the definition in proposed § 206.251), then it is, of course, non-arm's-length. Non-arm's-length contracts are treated differently for valuation purposes, depending upon whether such a contract is comparable to other arm's-length contracts.

If the disposition of coal production from an ad valorem lease is not pursuant to an arm's-length contract, then the lessee must determine value using certain benchmarks. This valuation process would be used in the following circumstances: When there is no contract for the sale of coal; when coal is used in its entirety intra-company or intra-affiliate; when coal is passed, under contract or agreement, intra-company to an affiliate; or when coal is stolen, lost, wasted, or for any reason improperly disposed of without sale.

In situations such as the preceding, § 206.259(c)(2) of the proposed regulations would require that value must be determined through application of benchmarks in a prescribed order. In other words, the second benchmark would not be considered unless the first benchmark could not be applied. Likewise, the third and fourth benchmarks would not be considered unless each of those preceding it successively could not be applied.

The same considerations of certainty and consistency which underlie valuation under arm's-length contracts would also apply under non-arm's-length contracts when such arrangements accurately and fairly reflect the valuation principles of the proposed rules. Hence, for the first benchmark, pursuant to proposed § 206.259(c)(2)(i), if the gross proceeds under a non-arm's-length contract are equivalent to the lessee's gross proceeds derived from, or paid under, comparable arm's-length contracts for the sale or purchase of like-quality coal in the area, then the gross proceeds would be acceptable as value. To determine comparability, the factors to be considered would be price, time of execution, duration, market or markets served, terms, quality of coal, volume, and other factors which reflect the value of production.

Pursuant to proposed § 206.259(c)(2)(ii), the second benchmark would be similar to the first, except comparability of the gross proceeds under the lessee's non-arm's-length contracts would be measured against arm's-length contracts between other parties in the area, not with the lessee's own arm's-length contracts. However, the second benchmark would be used only if the first could not be applied.

If the first and second valuation benchmarks cannot be applied to a

particular situation, the third benchmark would be the coal prices reported (for the coal which is being valued) to a public utility commission and the fourth benchmark would be prices reported to the Energy Information Administration of the Department of Energy. Fuel prices reported to such regulatory bodies are used by those entities to evaluate the justness and reasonableness of electrical rates charged by electric utilities. MMS believes that the cost of fuel reported to the public utility commission or other regulatory agencies is an indicator of the value of the coal to the user and, hence, is acceptable as value for purposes of determining royalties.

In the event that prices reported to public utility commissions or other regulatory agencies are inapplicable to a particular valuation situation, a fifth benchmark, other relevant matters, would be implemented. Among the methods included in this benchmark are spot prices for the same quality coal which are published or publicly available. MMS also intends for this benchmark to include the relevant cost, price, or other information available to the lessee.

If the lessee cannot determine a reasonable value using any of the valuation procedures previously mentioned, it could use a net-back procedure to value the coal by working backwards from the end-use product's sales price to arrive at a value, for royalty purposes, at the lease or mine area. This last benchmark also would authorize use of any other reasonable method to determine value.

It should be noted here that when a valuation method other than gross proceeds is used for coal sold pursuant to a non-arm's-length contract, such as spot prices, the lessee may not be entitled to allowances. By way of illustration, if the value of coal is established under paragraph (iv) based upon spot prices in the area where the mine is located, the value would not be reduced by a transportation allowance even if the lessee actually sold the coal on a delivered basis at a point remote from the mine and incurred transportation expenses. The allowance would be inapplicable because the spot prices in this example already reflect value of coal in the mine area. However, pursuant to § 206.259(f), the valuation for the lessee's coal based on the spot prices could not be less than the lessee's gross proceeds reduced by its transportation costs.

Therefore, regardless of the valuation method used by MMS, under no circumstances can the value under § 206.259 be less than the gross proceeds accruing, or which could accrue, to the lessee, less applicable allowances. This long-standing principle is set forth at § 206.259(f), and is discussed in greater detail later in this preamble.

The MMS particularly solicits comments regarding the proposed ordering of valuation benchmarks.

Proposed § 206.259(d) would provide that for all production other than that valued pursuant to an arm's-length contract, as covered by § 206.259(b), the lessee is not required to obtain prior MMS approval of its value determination. However, all royalty values are subject to audit, and also are subject to other reviews and monitoring by MMS to determine compliance with the valuation criteria. If MMS determines that a lessee has not properly determined value, MMS could direct the lessee to pay at a different value. Also, a lessee may at any time request a value determination from MMS if it is unsure about how the lessee would be required to supply all available data to support valuation.

So as not to cause unnecessary delays, proposed § 206.259(h), discussed below, would permit the lessee who has requested a value determination to pay royalties at its proposed valuation until MMS issues its value determination. The lessee then would be entitled to a credit, or would be required to pay additional royalty plus an underpayment interest charge to compensate the Federal or Indian lessor for the time value of its loss of money. No penalties for improper reporting would be imposed for reporting initially the lower value, although penalties could be applied if there were other improper reporting or if the initial value obviously was not good faith.

Proposed § 206.259(e) would expressly impose a diligence requirement on lessees. For example, if pursuant to an arm's-length contract a lessee could charge its purchaser a higher price as of a certain date, if the lessee fails to take proper and timely action to collect that additional money, the lessee would be liable for royalty on the higher value. However, if the purchaser refuses to pay and the lessee attempts to enforce its right, using reasonable, documented measures, it would not be required to pay the additional royalties until the lessee's efforts are successfully concluded. MMS believes that this regulation reflects the lessee's obligation to operate the lease prudently for the mutual benefit of itself and the lessor.

Section 206.259(e) would not operate to excuse a lessee from paying any royalty if, for example, a purchaser received coal and then failed to pay. In such an event, the lessee still would be required to pay royalty based on the value of the coal. This section is intended to apply only to the lessee's obligation to pursue price increases to which it may be entitled under its contract.

Proposed § 206.259(f) restates the long-standing principle that under no circumstances can the value, for royalty purposes, be less than the gross proceeds accruing, or which could accrue, to the lessee, less applicable washing and transportation allowances. The definition of gross proceeds was discussed earlier with respect to § 206.251(k). It is worth noting again, however, that the gross proceeds accruing to the lessee includes all costs paid by the purchaser of the coal to (or to others on behalf of) the seller, including tax reimbursements and other reimbursements (with the exception of reimbursements for Federal black lung fees and abandoned mine land fees discussed above). This principle has been upheld in a long line of cases: *Wheless Drilling Co.*, 80 I.D. 599, 13 IBLA 21 (1973); *Amoco Production Co.*, 29 IBLA 234, 236 (1977); *Hoover & Bracken Energies, Inc.*, 52 IBLA 27, 88 ID 7 (1981), *aff'd*, 723 F.2d 1388 (10th Cir. 1983); *Knife River Coal Co.*, 29 IBLA 26 (1977); *Knife River Coal Co.*, 43 IBLA 104, 86 I.D. 472 (1979). Thus, if the purchaser reimburses the seller or pays any costs on behalf of the seller for such items as severance taxes or income taxes, then the seller must include those reimbursed costs as part of the gross proceeds upon which the royalty value is determined. As noted earlier, this section would permit the lessee to reduce the gross proceeds by applicable allowances when determining this minimum value for royalty purposes.

The proposed rules in § 206.259(g) also expressly retain the existing requirement that coal operations such as crushing, blending, storing, loading, and oiling or treating the coal with substances, are costs incurred to place the coal in marketable condition and are to be borne exclusively by the lessee. Proposed § 206.259(g) would provide further that where the royalty value is based on gross proceeds the value would be increased to the extent those gross proceeds were reduced because the purchaser, or any other person, is providing certain services the costs of which ordinarily are the sole responsibility of the lessee either to produce the coal or to place it in marketable condition.

Pursuant to proposed § 206.259(h), if lessees on ad valorem leases request a value determination by MMS, they may pay royalties for all coal production

based upon a value consistent with the regulation until MMS issues the value regulation. However, when the value determination is received, the lessee will be required to pay any additional royalties due for the retroactive period, plus an underpayment interest charge, and will be required to pay at the new value prospectively. If applicable, the lessee would get a credit for overpayment, without interest. The same requirements would apply in situations where MMS monitors, reviews, and audits a lessee's royalty payments and directs it to pay a different royalty value.

Proposed § 206.260, Washing allowances, continues a long-standing Department of the Interior policy of allowing deductions for coal preparation costs provided such preparation enhances the value of the coal. Section 206.260 is proposed to continue the policy of granting an allowance for washing coal from Federal or Indian leases to lessees paying royalties under ad valorem lease terms which are subject to the provisions of Subpart F. However, if the value determined pursuant to § 206.259 is based on a benchmark that reflects the value of like-quality unwashed coal, then the lessee would not be entitled to an allowance even if it actually incurred washing costs.

Paragraph (a)(1) would limit the washing allowance to 50 percent of the value of coal determined pursuant to § 206.259. Furthermore, it provides that in those instances where the lessee, under any given selling arrangement, can qualify for both a washing and transportation allowance, the total of the coal washing and transportation would be limited to 75 percent of the value of coal for that selling arrangement as determined pursuant to § 206.259.

Paragraph (a)(2) would provide for the MMS Director to approve a greater amount (in excess of the 50 or 75 percent limit contained in paragraph (a)(1)) if the lessee submits an application which demonstrates that the higher allowance is warranted and is in the best interests of the lessor. However, MMS believes it would be unreasonable and inappropriate to accept allowances of such a magnitude that the royalty payment would be effectively reduced to zero.

Under § 206.260(b)(1), the cost incurred by the lessee under an arm's-length coal washing contract would be accepted by MMS as the reasonable allowance for coal washing subject to the limitations of paragraph (a)(1). MMS approval of the allowance would not be required before the allowance could be taken. However, prior to or at the time an allowance is taken, the lessee would be required to submit to MMS a completed page one of Form MMS–4292 the same month the allowance first is reported on Form MMS–4014, Report of Sales and Royalty Remittance. This would be a one-time filing effective for the reporting period. The allowance would be denied for any production month for which a Form MMS–4292 is not received by the time the Form MMS–4014 is filed for that production month. Therefore, if a lessee begins incurring washing costs for January coal production pursuant to an arm's-length contract, if it did not submit a Form MMS–4292 until April 15, it would be entitled to an allowance only for March and subsequent months' production for a 12-month reporting period. No allowance would be permitted for January and February, and the lessee would be required to refund, with interest, any allowance that was taken.

The procedure for claiming a washing allowance under paragraph (b) is proposed to be a two-step process. The first step is the deduction of an estimated allowance. The estimated allowance is the dollar-per-ton amount the lessee expects to incur for washing during the current 12-month period. The estimated washing allowance would become effective beginning with the month the lessee first reports a washing allowance deduction on Form MMS–4014, Report of Sales and Royalty Remittance (provided the lessee also submitted a completed page one of Form MMS–4292). The estimated allowance would continue for 12 months or until the arm's-length contract terminates or in amended, whichever is earlier (the reporting period). The second step of the two-step process occurs when the initial reporting period ends. Under paragraphs (b)(1)(ii) and (c)(1), the lessee would submit a completed page one of Form MMS–4292 within 90 days after the end of the previous reporting period. This submittal would contain the actual costs for coal washing incurred during the previous 12 months. If coal washing is continuing, then this submittal would also contain an estimate of the costs to be incurred for the next 12 months. The estimated coal washing allowance could not be greater than the previous 12 months' actual coal washing costs, unless MMS approves a higher estimate upon written request from the lessee. Any differences between estimated and actual coal washing allowances would be reflected in an amended Form MMS–4014, Report of Sales and Royalty Remittance. For example, if a lessee has its coal washed under an arm's-length contract in January, the estimated washing allowance would first be reported in February. Form MMS–4292 would also be submitted in February. The estimated allowance is effective beginning January 1, 19X4, and would continue for 12 months. By April 1, 19X5, the lessee would submit Form MMS–4292 showing its actual costs incurred for the period January 1, 19X4, through December 31, 19X4.

Paragraph (b)(2) sets forth the procedures for a lessee to obtain a coal washing allowance when the coal washing is performed under a non-arm's-length contract, or no contract, including those situations where the lessee performs the washing service itself or an affiliate of the lessee performs the washing service. Paragraph (b)(2)(i) would not require prior MMS approval of coal washing costs incurred under non-arm's-length contract or no contract situations. Paragraph (b)(2)(ii) proposes a procedure similar to that previously discussed for arm's-length allowances. The non-arm's-length or no contract allowance determination is also a two-step process, consisting of a submittal of an estimated washing allowance for the current 12-month period and a submittal of the actual washing allowance within 90 days after the end of the 12-month period containing the actual costs incurred during the previous 12-month period. MMS approval is not required prior to commencing non-arm's-length or no contract washing deductions. However, MMS must receive a completed Form MMS–4292 and all available data to support its proposed estimated allowance in the same month the lessee first reports its allowance on Form MMS–4014, Report of Sales and Royalty Remittance (the filing is effective for all months in the reporting period), or the allowance will be denied until the Form is received. Within 90 days following the end of the 12-month period, the lessee would submit Form MMS–4292 and all available data supporting its actual costs incurred during the previous 12-month period.

Paragraph (b)(2)(iii) would provide that MMS will monitor, review, and audit coal washing allowances. If MMS determines that the lessee has incorrectly determined the estimated or actual allowance, MMS could direct the Lessee to adjust it. A Lessee also may request a coal washing allowance determination from MMS. If, as the result of an MMS action or a Lessee's request, MMS determines a different allowance than the one the Lessee has taken, then the lessee shall be required to adjust the allowances reported on its Form MMS–4014 for months in the

reporting period after the approval is received. Adjustments to estimated costs in months preceding the approval would not be required to be made until the lessee determines its actual costs. Then it would adjust from the originally reported estimate to the actual for that month as determined by the MMS. This will avoid requiring lessees to adjust Form MMS–4014 twice for the months preceding approval. However, the rules would authorize MMS to require immediate adjustment of the pre-determination months when justified.

Paragraph (v) would enumerate the types and nature of costs which MMS considers acceptable in determining a non-arm's-length or no contract washing allowance. The categories of expenses are operating and maintenance expenses, overhead, depreciation, and a return on undepreciated capital investment (or, alternatively, a return on the initial capital investment with no allowance for depreciation—see discussion below). Paragraphs (b)(v)(A) and (B) provide a list of operating and maintenance expense categories which MMS considers typical operating or maintenance expenses. Paragraph (b)(v)(C) would provide for overhead to be included as a washing cost, providing that the overhead is directly attributable or allocable to the operation or maintenance of the washing system.

MMS is proposing two alternatives regarding return on capital investment. Under alternative 1, paragraph (b)(v)(D) would provide for two financial depreciation methods: Straight-line depreciation and units of production depreciation. Accordingly, depreciation would be based on the useful life of the equipment or the life of the reserves the wash plant services. Also, salvage value must be observed and depreciation limited to that salvage value.

MMS is also proposing that the establishment of a washing facility depreciation schedule would not be altered by virtue of a change in ownership. If, for example, a wash plant has a depreciation schedule of 20 years and has been depreciated for 10 years by the first owner and then sold, the new second owner would be entitled to the remaining 10 years' depreciation based on the original capitalized cost. MMS specifically would like comments on whether or not this no-recapitalization provision should be adopted if alternative 1 is adopted.

As alternative 2, MMS is proposing, in paragraph (b)(v)(D), to disallow any cost deduction for depreciation. Instead, each year MMS would allow an amount equal to the initial capital investment in the washing facilities multiplied by a floating rate of return, as discussed below. Alternative 2, if adopted, would be supplemental to alternative 1 and is proposed to apply prospectively only to new facilities or newly acquired facilities. MMS would like commenters to address the feasibility of alternative 2.

Paragraph (b)(v)(E) would establish the rate of return to be applied to either the undepreciated wash plant capital investment under alternative 1, discussed above, or the initial wash plant capital investment under alternative 2. The rate of return is proposed to be determined by the Moody Aaa corporate bond rate as published in Moody's Investors Services, Inc. *Moody's Bond Records* on the first business day of the reporting period for which the allowance becomes applicable. At the beginning of each subsequent 12-month period that follows, the rate would be determined.

MMS would like commenters to address whether a specific rate of return for each lessee should be used and how such a rate of return would be calculated.

Paragraph (c) sets forth the reporting requirements subsequent to the initial reporting period. Paragraph (c)(1) would require page one of Form MMS–4292 to be submitted within 90 days after the end of the previous reporting period for arm's-length washing contracts. For non-arm's-length or no contract situations, completed Form MMS–4292 and all supporting information would be required to be submitted within 90 days following the end of the reporting period, unless MMS approves a longer period. Regardless of whether coal washing is conducted under arm's-length contract, non-arm's-length contract, or no contract conditions, if Form MMS–4292 and accompanying supporting information is not received within the 90-day timeframe, then the new allowance for the succeeding reporting period will not be effective until the first day of the month in which a proper Form MMS–4292 is received by MMS and will be applicable to Forms MMS–4014 received after that date. Section 206.260(c)(2) provides for MMS to make a change in the reporting cycle of submission of Form MMS–4292, and, if necessary, any accompanying data. This provision is intended to allow MMS the flexibility to equalize its workload in order to more effectively administer washing allowances. Nothing in this subsection should be construed to alter any of the royalty reporting and payment requirements contained either in this Part or in other Parts of 30 CFR.

Section 206.260(c)(3) would provide that washing allowances under either arm's-length, non-arm's-length, or no contract situations are to be reported on a separate line on Form MMS–4014, Report of Sales and Royalty Remittance. Unless otherwise directed and approved by MMS, lessees are not to report values that are net of washing allowances.

Paragraph (d) would specify the adjustment procedure when actual allowances are different from the estimates. If the lessee overestimated costs, the lessee would be required to pay the additional royalty plus interest. For underestimates, lessees would be allowed a credit without interest. The actual procedures to adjust Form MMS–4014 will be included in the MMS Payor Handbook.

Paragraph (e) is proposed to allow the use of the same administrative or computation procedures contained in § 206.260 to determine other washing costs when valuing coal under a net-back procedure or other valuation procedure contained in Subpart F of Part 206.

Proposed § 206.261, Allocation of washed coal, is applicable to both cents-per-ton leases and ad valorem leases which produce coal that is subjected to washing. This proposed section instructs lessees on procedures of how to properly allocate washed coal tonnages back to the leases from which the coal was originally produced. The proper allocation of washed coal is essential to the proper reporting and paying of royalties.

Proposed § 206.262, Transportation allowances, would grant an allowance to lessees when it is necessary to transport coal from the lease or mine to a wash plant remote from the lease or mine or to a point of sale remote from the lease or mine. The proposed regulation is a continuation of long-standing MMS policy; however, there has never been explicit guidance or regulation pertaining to coal transportation allowances. MMS has received several inquiries in the past questioning what conditions must be present in order to obtain approval to deduct a transportation allowance. The following explanation is not intended to be conclusive or exhaustive but is intended to convey the general criteria MMS would apply to determine whether a transportation allowance is warranted. First, transportation to a point of sale on the lease or on the mine property or to a point of sale in the vicinity of, or adjacent to the leases or mine, does not qualify for transportation allowances. Second, if the transportation is part of what MMS considers normal mine operation, then no transportation costs are allowed. Normal mine operation is considered to

include transportation on or about the mine. This includes transportation in the pit, from the pit(s) to the load-out silos or tipples, or to crushers or other coal preparation facilities including wash plants located on or near the mine.

A lessee would be entitled to a transportation allowance only if the value for the coal has been determined pursuant to § 206.259 at a point remote from the lease or mine. Thus, for example, if value has been determined based upon spot prices for coal at the mine, the lessee would not be entitled to a further deduction from that value. A transportation allowance would be allowed, however, in those circumstances where value is determined based upon the gross proceeds for the sale of coal at a sales point remote from the lease.

Paragraph (b)(1) proposes to limit the transportation allowance to 50 percent of the value of coal determined pursuant to § 206.259. Paragraph (b)(1) also contains a limitation on the amount of total deduction by selling arrangements for lessees that qualify for both washing and transportation allowances. As stated previously in the discussion of § 206.260(a) (washing allowances), total deductions are proposed to be limited to 75 percent of the value of coal determined pursuant to § 206.259. The 50 and 75 percent limitations contained in paragraph (b)(1) are not absolute. Paragraph (b)(2) provides for the MMS Director to approve an allowance in excess of those limits if the lessee submits an application which demonstrates that the higher allowance is warranted and is in the best interests of the lessor.

Paragraph (c) would require that the per ton transportation costs be determined based on the full tonnage transported. Therefore, if unwashed coal is transported to a wash plant remote from the mine, the transportation cost would be determined on the total weight of material transported, including the impurities. However, paragraph (c) further provides that MMS will not participate in the costs of transporting impurities.

Paragraph (d) provides for the determination of transportation allowances under arm's-length and non-arm's-length or no contract situations, including those situations where the lessee performs the transportation service. This section is virtually the same as § 206.260(b) (washing allowances). Therefore, the preamble discussion for that section applies here.

Paragraph (e) contains reporting requirements parallel to those provided for washing allowances at § 206.260(c). The earlier discussion provided herein with regard to washing allowances is equally applicable to this subsection. The same applies to §§ 206.262(f) and (g).

Proposed § 206.263, Contract submission, would provide that lessees must submit to MMS, upon request, coal sales contracts, supply agreements, contract amendments or any other documents affecting gross proceeds, whether or not related to the sales contract. This section would further require the lessee to certify, in writing, that all requested information has been provided. If a lessee falsely certifies, it will be subject to penalties and other sanctions pursuant to applicable laws and regulations. Also, under this section, MMS would specify whether the information is to be sent to MMS or made available at the lessee's office.

This section also would require lessees to include, as part of their submittal, any other contracts, agreements, or documents that affect the gross proceeds accruing to the lessee from the sale of coal. For example, if the lessee agrees to sell coal to a utility and, as part of the agreement, the utility provides mining equipment at a reduced price, that price reduction is part of the consideration for the sale of the coal. As such, the lessee is obligated to submit information about the mining equipment agreement as well as any other sales-related documents.

Paragraph (b) would provide that lessees and other payors would be required to advise MMS whether the contract is arm's-length or non-arm's-length. A definition of arm's-length contract is proposed to be included in § 206.251. This designation is important because, for ad valorem leases, it would determine which valuation method would be used. It is not proposed to make this designation part of the certification.

The lessee's designation of a contract as arm's-length would not be conclusive. Paragraph (c) provides that MMS may later audit the contract to ascertain that the lessee's designation of the contract as arm's-length meets the criteria of MMS' arm-length contract definition.

IV. Procedural Matters

Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the Order.

Regulatory Flexibility Act

Because this rule primarily consolidates and streamlines existing regulations into a single part for consistent application, there are no significant additional requirements or burdens placed upon small business entities as a result of implementation of this proposed rule. Therefore, the DOI has determined that this rulemaking will not have a significant economic effect on a substantial number of small entities and does not require a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601, et seq).

Paperwork Reduction Act of 1980

Lessee reporting requirements remain essentially the same. Coal washing and transportation allowance applications will be required to be submitted annually for review by MMS. Also, upon the request of MMS, lessees will be required to submit their coal sales contracts.

The information collection requirements contained in §§ 206.256, 206.260, 206.262, and 206.263 of this rule have been submitted for approval to the Office of Management and Budget (OMB) under 44 U.S.C. 3504(h). The collection of this information will not be required until it has been approved by OMB.

National Environmental Policy Act of 1969

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and that a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is not required.

Public Comment Procedures

A. Written Comments

You are invited to participate in this proceeding by submitting data, views, or arguments with respect to this notice. All comments should be submitted by 4:30 p.m. of the day specified in the "DATES" section to the appropriate address indicated in the "ADDRESSES" section of this preamble and should be identified on the outside envelope and on documents submitted with the designation "Revision of Coal Royalty Valuation Regulations and Related Topics." All comments received by the MMS will be available for public inspection in Room E104, Building 85, Denver Federal Center, Lakewood, Colorado, between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday.

Any information or data submitted which you consider to be confidential must be so identified and submitted in writing, one copy only. MMS reserves the right to determine the confidential

status of the information or data and to treat it according to its independent determination.

B. Public Hearing

1. *Procedure for requests to make oral presentations:* The time and place for the hearing are indicated in the "DATES" and "ADDRESSES" sections of the preamble. If necessary to present all testimony, the hearing will resume at 9:30 a.m. on the next business day following the first day of the hearing.

You may make a written request for an opportunity to make an oral presentation. The request should contain a business telephone number and also a telephone number where you may be contacted during the day prior to the hearing. If you are selected to be heard at the hearing, you will be notified before 4:30 p.m. of the day prior to the hearing. You will be required to submit 50 copies of your statement to MMS at the address indicated in the "ADDRESSES" section of the preamble by 4:30 p.m. [To be determined].

2. *Conduct of the hearing:* MMS reserves the right to select the persons to be heard at the hearing (in the event there are more requests to be heard than time allows), to schedule their respective presentations, and to establish the procedures governing the conduct of the hearing. The length of each presentation may be limited, based upon the number of persons requesting to be heard.

A Department of the Interior official will be designated to preside at the hearing. This will not be a judicial-type hearing. Questions may be asked only by those conducting the hearing. At the conclusion of all initial oral statements, each person who has made an oral statement will be given the opportunity, if he or she so desires, to make a rebuttal statement. The rebuttal statements will be given in the order in which the initial statements were made and will be subject to time limitations.

If you wish to ask a question at the hearing, you may submit the question, in writing, to the presiding officer. The presiding officer will determine whether the question is relevant, and whether time limitations permit it to be presented for answer at the hearing.

Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer at the opening of the hearing.

A transcript of the hearing will be made. The entire record of the hearing, including the transcript, will be retained by the MMS and made available for inspection in Room E104, Building 85, Denver Federal Center, Lakewood, Colorado, between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday. You may purchase a copy of the transcript from the reporter.

List of Subjects

30 CFR Part 202

Continental shelf, Government contracts, Mineral royalties, Oil and gas exploration, Public lands-mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 203

Coal, Continental shelf, Government contracts, Mineral royalties, Oil and gas exploration, Public lands-mineral resources.

30 CFR Part 206

Continental shelf, Geothermal energy, Government contracts, Mineral royalties, Oil and gas exploration, Public lands-mineral resources.

30 CFR Part 212

Coal, Government contracts, Mineral royalties, Oil and gas exploration, Public lands-mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 218

Coal, Continental shelf, Electric funds transfers, Geothermal energy, Government contracts, Indians-lands, Minerals royalties, Oil and gas exploration, Public lands-mineral resources.

43 CFR Part 3480

Government contracts, Intergovernmental relations, Mineral royalties, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements.

Date: December 23, 1986.

J. Steven Griles,

Assistant Secretary—Land and Minerals Management.

TITLE 30—[AMENDED]

For the reasons set out in the preamble, 30 CFR Parts 202, 203, 206, 212, and 218 are proposed to be amended as follows:

PART 202—[AMENDED]

30 CFR Part 202 is amended as follows:

1. The authority citation for Part 202 is revised to read as follows:

Authority: 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

2. Subparts E, F, G, and H of Part 202 are revised to read as follows:

Subpart E—Solid Minerals, General—[Reserved]

Subpart F—Coal

Subpart G—Other Solid Minerals—[Reserved]

Subpart H—Geothermal Resources—[Reserved]

3. A new Subpart I is added to read "Subpart I—OCS Sulfur—[Reserved]."

4. Section 203.200(d) under Subpart E of Part 203 is redesignated as a new § 202.250 under Subpart F of Part 202.

5. 30 CFR Part 202 is amended by revising newly redesignated § 202.250 to read as follows:

§ 202.250 Overriding royalty interest.

All overriding royalty interests, production payments, or similar interests created under Federal coal leases shall be subject to the provisions of 43 CFR Group 3400.

PART 203—[AMENDED]

30 CFR Part 203 is amended as follows:

1. The authority citation for Part 203 is revised to read as follows:

Authority: 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

2. Subparts E, F, G, and H of Part 203 are revised to read as follows:

Subpart E—Solid Minerals, General—[Reserved]

Subpart F—Coal

Subpart G—Other Solid Minerals—[Reserved]

Subpart H—Geothermal Resources—[Reserved]

3. A new Subpart I is added to read "Subpart I—OCS Sulfur—[Reserved]."

§ 203.200 [Amended]

4. Paragraphs (c), (e), (f), (g), (h), (i), (j), and (k) of § 203.200 are removed.

5. Paragraphs (a), (b), and (d) of § 203.200 are redesignated as new §§ 203.250, 218.201, and 202.250, respectively. Titles of the new sections are:

Sec.	
203.250	Advance royalty
218.201	Royalty payment
202.250	Overriding royalty interest

6. 30 CFR Part 203 is amended by inserting a new § 203.251 into Subpart F (formerly Subpart E) to read as follows:

§ 203.251 Reduction in royalty rate or rental.

An application for reduction in coal royalty rate or rental shall be filed and processed in accordance with 43 CFR Group 3400.

PART 206—[AMENDED]

30 CFR Part 206 is amended as follows:

1. The authority citation for Part 206 is revised to read as follows:

Authority: 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2101 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

2. Subparts E, F, G, and H of Part 206 are revised to read as follows:

Subpart E—Solid Minerals, General—[Reserved]

Subpart F—Coal

Subpart G—Other Solid Minerals—[Reserved]

Subpart H—Geothermal Resources

3. A new Subpart I is added to read "Subpart I—OCS Sulfur—[Reserved]."

4. Sections 206.300 and 206.301 under Subpart G are redesignated as new §§ 206.350 and 206.351 under new Subpart H, respectively.

5. 30 CFR Part 206 is amended by adding §§ 206.250, 206.251, 206.252, 206.253, 206.254, 206.255, 206.256, 206.257, 206.258, 206.259, 206.260, 206.261, 206.262, 206.263, and 206.264 to newly redesignated Subpart F (formerly Subpart E) to read as follows:

Subpart F—Coal

Sec.
206.250 Purpose and scope.
206.251 Definitions.
206.252 Information collection.
206.253 General royalty management responsibilities of MMS.
206.254 General royalty obligations of the lessee.
206.255 Coal subject to royalties—general provisions.
206.256 Quality and quantity measurement standards for reporting and paying royalties.
206.257 Point of royalty determination.
206.258 Valuation standards for cents-per-ton leases.
206.259 Valuation standards for ad valorem leases.
206.260 Washing allowances.
206.261 Allocation of washed coal.
206.262 Transportation allowances.
206.263 Contract submission.
206.264 In situ and surface gasification and liquefaction operations.

§ 206.250 Purpose and scope.

(a) This subpart prescribes the procedures to establish the value, for royalty purposes, of all coal production from Federal and Indian Tribal and allotted leases (except leases on the Osage Indian Reservation).

(b) If the specific provisions of any statute or treaty, or any coal lease subject to the requirements of this Part, are inconsistent with any regulation in this Part, then the lease, statute, or treaty provision shall govern to the extent of that inconsistency.

(c) All royalty payments made to the Minerals Management Service (MMS) are subject to later audit and adjustment.

§ 206.251 Definitions.

(a) *Ad valorem lease* means a lease where the royalty due to the lessor is based upon a percentage of the amount or value of the production.

(b) *Allowance* means an authorized, or an MMS-accepted or -approved deduction in determining value for royalty purposes.

(1) *Coal washing allowance* means an allowance for the reasonable, actual costs incurred by the lessee for coal washing, or an MMS-accepted or -approved deduction for the costs of washing coal, determined pursuant to this subpart.

(2) *Transportation allowance* means an allowance for the reasonable, actual costs incurred by the lessee for moving coal to a point of sale remote from the lease or mine, or an MMS-accepted or -approved deduction for costs of such transportation, determined pursuant to this subpart.

(c) *Area* means a geographic region in which coal has similar quality and economic characteristics. Area boundaries are not officially designated and the areas are not necessarily named.

(d) *Arm's-length contract* means a contract or agreement between independent, nonaffiliated persons. For purposes of this subpart, two persons are affiliated if one person controls, is controlled by, or is under common control with another person, or if one person owns an interest (regardless of how small), either directly or indirectly, in another person.

(e) *Audit* means a review, conducted in accordance with generally accepted accounting and auditing standards, of royalty payment compliance activities of lessees or other interest holders who pay royalties, rents, or bonuses on Federal or Indian leases. The term audit includes, but is not limited to, audit activities related to Federal leases located within the boundaries of any State which has entered into a cooperative agreement with MMS under the provisions of sections 202 or 205 of the Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. 1732 or 1735), audit activities related to leases located on Indian lands, and the review and resolution of exceptions processed by any accounting systems maintained by the MMS. Audits may also be conducted in response to irregularities identified by BLM, MMS, BIA or a State or Indian Tribe in the performance of production verification.

(f) *BIA* means the Bureau of Indian Affairs of the Department of the Interior.

(g) *BLM* means the Bureau of Land Management of the Department of the Interior.

(h) *Coal* means of all ranks from lignite through anthracite.

(i) *Coal washing* means any treatment to remove impurities from coal. Coal washing may include, but is not limited to, operations such as flotation; air, water, or heavy media separation; drying; and related handling (or combinations thereof).

(j) *Contract* means any oral or written agreement, including amendments or revisions thereto, between two or more persons and enforceable by law that with due consideration creates an obligation.

(k) *Gross proceeds (for royalty payment purposes)* means the total monies and other consideration paid to a coal lessee, or monies and other consideration to which such lessee is entitled, for the disposition of coal. Gross proceeds includes, but is not limited to, payments to the lessee for certain services such as crushing, storing, mixing, loading, treatment with substances including chemicals or oil, and other preparation of the coal to the extent that the lessee is obligated to perform it at no cost to the Federal Government or Indian owner. Gross proceeds, as applied to coal includes: Payments or credits for advanced prepaid reserve payments subject to recoupment through reduced prices in later sales; advanced exploration or development costs that are subject to recoupment through reduced prices in later sales; take-or-pay payments; and reimbursements, including but not limited to, reimbursements for royalties, taxes or fees, [provided, however, that gross proceeds shall not include reimbursements for Federal black lung taxes, or abandoned mine lands fees

authorized by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201, et seq.]. Tax reimbursements are part of the gross proceeds accruing to a lessee even though the Federal or Indian royalty interest may be exempt from taxation.

(l) *Indian allottee* means any Indian for whom land or an interest in land is held in trust by the United States or who holds title subject to Federal restriction against alienation.

(m) *Indian tribe* means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians for which any land or interest in land is held by the United States in trust or which is subject to Federal restriction against alienation.

(n) *Lease* means any contract, profit-share arrangement, joint venture, or other agreement issued or approved by the United States under a mineral leasing law that authorizes exploration for, development or extraction of, or removal of coal—or the land area covered by that authorization, whichever is required by the context.

(o) *Lessee* means any person to whom the United States, an Indian Tribe, or an Indian allottee issues a lease, and any person who has assumed an obligation to make royalty or other payments required by the lease. This includes all persons who have an interest in a lease as well as an operator or other payor who has no interest in the lease but who has assumed the royalty payment responsibility.

(p) *Like-quality coal* means coal which has similar chemical and physical characteristics.

(q) *Marketable condition* means coal which is sufficiently free from impurities and otherwise in a condition that it will be accepted by a purchaser under a typical sales contract for that area.

(r) *Mine* means an underground or surface excavation or series of excavations and the surface or underground support facilities that contribute directly or indirectly to mining, production, preparation, and handling of lease products.

(s) *Net-back method* means a procedure for valuing coal at the lease or mine when a sale has taken place downstream from the lease or mine. The procedure involves working back from the sales point to arrive at the value at the point of measurement for royalty purposes. Consideration is given to costs incurred in the transportation, handling, washing, etc., necessary to get the coal to the point of sale.

(t) *Net output* means the quantity of washed coal that a washing plant produces.

(u) *Person* means any individual, firm, corporation, association, partnership, consortium, or joint venture.

(v) *Selling arrangement* means a unique level of subaccounting required by MMS's Auditing and Financial System (AFS).

(w) *Spot sales agreement* means any sales transaction where planned or actual deliveries span a short period of time, usually not exceeding one year.

(x) *Take-or-payment* means any payment received by the lessee under a "take-or-pay" clause in its sales contracts. Such clauses normally require the purchaser to take, or, failing to take, to pay for a minimum contracted volume or other measure of coal. Under such a clause, the purchaser may have the right to take coal paid for (but undelivered) in succeeding years.

§ 206.252 Information collection.

The information collection requirements contained in Subpart F of Part 206 are being submitted for approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3504(h). The information collection OMB clearance numbers are requested for the following:

Information collection	OMB No
Requirement for submission of coal quality and quantity information under § 206.256.	1010- XXXX
Requirement for submission of coal sales contracts under § 206.263.	1010- XXXX
Requirement for submission of coal washing allowance reports under § 206.260.	1010- XXXX
Requirement for submission of coal transportation allowance reports under § 206.262.	1010- XXXX

The information is being collected by the Department of the Interior to meet its congressionally mandated responsibilities relating to Federal and Indian mineral royalty management. The information will be used to determine whether royalty payments represent the proper values for royalty purposes for minerals used or sold from Federal and Indian lands and to assure that proposed deductions from royalty payments are acceptable.

§ 206.253 General royalty management responsibilities of MMS.

It is the responsibility of MMS to:

(a) Obtain lessee reports of coal lease production, quantities, and qualities of coal lease products sold, reports of rentals and royalties due, and related matters;

(b) Collect and record rentals and royalties due from, and paid by, lessees;

(c) Process rental and royalty refunds;

(d) When necessary, obtain copies of lessee contract (including contract updates and amendments), sales agreements, coal washing agreements, coal transportation agreements, publicly available prices, and other royalty valuation records when needed by MMS to assure that royalties are properly determined;

(e) Safeguard all proprietary information and records submitted to MMS by the lessee pursuant to lease terms and regulations, and to maintain the confidentiality of any financial information and/or trade secrets which may come into its possession or about which it may gain knowledge;

(f) Promptly deposit rentals and royalties in the U.S. Treasury and/or Tribal or allottee account; and

(g) Audit the records of the lessee to determine that royalties have been paid properly to the Federal Government and Indian lessors.

§ 206.254 General royalty obligations of the lessee.

The lessee is required among other things to:

(a) Properly handle and protect coal;

(b) Place coal in marketable condition at no cost to the lessor;

(c) Accurately measure production, properly maintain it in inventory, and dispose of it in a manner beneficial to the public or Indian Tribe's or allottee's interest;

(d) Maintain accurate records of production and sales;

(e) Maintain copies of all contracts, sales agreements, washing or transportation agreements, and other records that support the prices used in valuing coal for royalty purposes. Copies of these contracts, etc., are to be made available to MMS either in the lessee's offices during normal office hours or provided to MMS in accordance with this Part at such time and in such manner as may be requested by the Department of the Interior;

(f) Make timely rental and royalty payments;

(g) Make timely reports on production and sales quantities and qualities; and

(h) Properly value production and correctly pay royalties.

§ 206.255 Coal subject to royalties—general provisions.

(a) All coal (except coal unavoidably lost as determined by BLM pursuant to 43 CFR Group 3400) produced from a Federal or Indian lease subject to this Part is subject to royalty. This includes coal used by the lessee on lease or off lease.

(b) If a lessee receives compensation for unavoidably lost coal through insurance coverage or other arrangements, royalties at the rate

specified in the lease are to be paid on the amount of compensation which is received.

(c) In the event waste piles or slurry ponds are reworked to recover coal, the lessee shall pay royalty at the rate specified in the lease at the time of recovery. The royalty rate shall be that rate applicable to the production method used to initially mine coal in the waste pile or slurry pond; i.e., underground mining method or strip mining method. Coal in waste pits or slurry ponds initially mined from Federal or Indian leases shall be allocated to such leases regardless of whether it is stored on Federal or Indian lands. The lessee shall maintain accurate records to determine to which individual Federal or Indian lease coal in the waste pit or slurry pond should be allocated. However, except as provided in § 206.259(f), nothing in this section requires payment of a royalty on coal for which a royalty has already been paid.

§ 206.256 Quality and quantity measurement standards for reporting and paying royalties.

(a) For leases subject to § 206.259, the quality of coal on which royalty is due shall be reported on the basis of percent sulphur, percent ash and number of British thermal units (Btu's) per pound of coal. Coal quality determinations shall be made at intervals prescribed in the lessee's sales contract. If there is no contract, the lessee shall propose a quality test schedule to MMS. In no case, however, shall quality tests be performed less than quarterly using standard industry recognized testing methods. Coal quality information shall be reported on the appropriate forms required under 30 CFR Part 216.

(b) For all leases subject to this subpart, the quantity of coal on which royalty is due shall be measured in short tons (of 2,000 pounds each) by methods prescribed by the BLM. Coal quantity information shall be reported on appropriate forms required under 30 CFR Part 216 and on the Report of Sales and Royalty Remittance, Form MMS–4014, as required under 30 CFR Part 210.

§ 206.257 Point of royalty determination.

(a) For all leases subject to this subpart, royalty shall be computed on the basis of the quantity and quality of coal in marketable condition at the point of royalty measurement prescribed by BLM.

(b) Coal produced and added to stockpiles or inventory does not require payment of royalty until such coal is later sold or otherwise disposed of. MMS may ask BLM or BIA to increase the lease bond to protect the lessor's interest when stockpiles or inventory become excessive as determined by BLM.

(c) The lessee shall pay royalty at a rate specified in the lease at the time the coal is sold or otherwise disposed of, unless otherwise provided for at 30 CFR 206.258(d).

§ 206.258 Valuation standards for cents-per-ton leases.

(a) This section is applicable to coal leases on Federal, Indian Tribal, and allotted Indian lands (except leases on the Osage Indian Reservation) which provide for the determination of royalty on a cents-per-ton (or other quantity) basis.

(b) The royalty for coal produced from leases subject to this section shall be based on the dollar rate per ton prescribed in the lease. That dollar rate shall be applicable to the actual volume of coal sold or used, including coal which is avoidably lost as determined by BLM pursuant to 43 CFR Group 3400.

(c) For leases subject to this section, there shall be no allowances for transportation, removal of impurities, coal washing, or any other processing or preparation of the coal.

(d) When a coal lease is readjusted pursuant to 43 CFR Subpart 3451 and the royalty valuation method changes from a cents-per-ton basis to an ad valorem basis, coal which is produced prior to the effective date of readjustment and sold or used within 30 days of the effective date of readjustment shall be valued pursuant to this section. All coal which is not sold or used within 30 days after the effective date of readjustment shall be valued pursuant to the provisions of § 206.259, and royalties shall be paid at the royalty rate specified in the readjusted lease.

§ 206.259 Valuation standards for ad valorem leases.

(a) This section is applicable to coal leases on Federal, Indian Tribal, and allotted Indian lands (except leases on the Osage Indian Reservation) which provide for the determination of royalty as a percentage of the value of production (ad valorem). The value for royalty purposes of coal production from such leases shall be the value of coal determined pursuant to paragraph (b) or (c) of this section, less applicable coal washing allowances and transportation allowances determined pursuant to §§ 206.260 and 206.262.

(b) The value of coal which is sold pursuant to an arm's-length contract shall be the gross proceeds accruing, or which could accrue, to the lessee. Prior MMS approval of this value is not required, although it is subject to monitoring, review, and audit. MMS may direct a lessee to pay royalty based on a different value if it determines that the lessee's reported value is inconsistent with the requirements of these regulations.

(c)(1) The value of coal production from leases subject to this section and which is not sold pursuant to an arm's-length contract shall be the reasonable value determined in accordance with this subsection.

(2) If the reasonable value of the coal cannot be determined pursuant to paragraph (b) of this section, then the reasonable value shall be determined through application of other valuation criteria. The criteria shall be considered in the following order, and the reasonable value shall be based upon the first applicable criterion: (i) The gross proceeds accruing, or which could accrue, to the lessee pursuant to a sale under its non-arm's-length contract (or other disposition other than by an arm's-length contract), provided that those gross proceeds are equivalent to the lessee's gross proceeds derived from, or paid under, comparable arm's-length contracts for sales, purchases or other dispositions of like-quality coal in the area. In evaluating the comparability of arm's-length contracts for the purposes of these regulations, the following factors shall be considered: price, time of execution, duration, market or markets served, terms, quality of coal, volume, and such other factors as may be appropriate to reflect the value of the production; (ii) the gross proceeds accruing, or which could accrue to the lessee pursuant to a sale under its non-arm's-length contract (or other disposition other than by an arm's-length contract), provided that those gross proceeds are equivalent to the gross proceeds under comparable arm's-length contracts between other persons for sales, purchases, or other dispositions of like-quality coal in the area. Comparability shall be determined using the same criteria as specified in paragraph (c)(2) (i) of this section; (iii) prices reported for that coal to a public utility commission; (iv) prices reported for that coal to the Energy Information Administration of the Department of Energy; (v) other relevant matters including, but not limited to, published or publicly available spot market prices, or information submitted by the lessee concerning circumstances unique to a particular lease operation or the salability of certain types of coal; (vi) if a reasonable value cannot be determined using paragraphs (c)(2)(i), (ii), (iii), (iv) or (v) of this section, then a net-back method or any other

reasonable method shall be used to determine value.

(d) Where the value is determined pursuant to paragraph (c) of this section, prior MMS approval is not required. However, a lessee shall notify MMS if the determination of value is pursuant to paragraph (c)(2)(v) or (vi) of this section. The notification shall be by letter to the Associate Director for Royalty Management or his designee. The letter shall identify which valuation method is being used and contain a brief description of the procedure being used. Values are subject to MMS review and audit, and MMS may direct a lessee to use a different value if it determines that the reported value is inconsistent with the requirements of the regulations. A lessee may request, at any time, a value determination from MMS. The lessee shall submit all available data to support its request. The determination by MMS shall remain effective for the period stated therein.

(e) Value shall be based on the highest price a prudent operator could receive under its contract. Absent contract revision or amendment, if the lessee fails to take proper or timely action to receive prices or benefits to which it is entitled, it must pay royalty at a value based upon that obtainable price or benefit. Contract revisions or amendments shall be in writing, and signed by all parties to an arm's-length contract, and may be retroactive. If the lessee makes timely application for a price increase allowed under its contract but the purchaser refuses, and the lessee takes reasonable measures, which are documented, to force purchaser compliance, the lessee will owe no additional royalties until monies or consideration resulting from the price increase are received. This subsection applies to price increments only and shall not be construed to permit a lessee to avoid its royalty payment obligation in situations where a purchaser fails to pay, in whole or in part, for a quantity of coal removed or sold from a lease.

(f) Notwithstanding any other provisions of this section, under no circumstances shall the value for royalty purposes be less than the gross proceeds accruing, or which could accrue, to the lessee, less applicable allowances determined pursuant to §§ 206.260 and 206.262. If take-or-pay payments are a part of gross proceeds, no additional royalty shall be due if make-up deliveries are taken, unless the purchaser is required to pay any additional amount as a result of price increases during the make-up period.

(g) The lessee is required to place coal in marketable condition at no cost to the Federal Government or Indian lessor. Where the value established pursuant to this section is determined by a lessee's gross proceeds, that value shall be increased to the extent that the gross proceeds have been reduced because the purchaser, or any other person, is providing certain services, the cost of which ordinarily is the responsibility of the lessee, to place the coal in marketable condition.

(h) If the lessee requests a value determination from MMS, the lessee may pay royalties based upon a value consistent with the requirements of this section until MMS issues a value determination. After MMS issues a value determination requested by a lessee, or after MMS issues a value determination based upon a review or audit of royalty values, the payor is required to pay any additional royalties due plus interest computed pursuant to 30 CFR 218.200, retroactive to the effective date of the value determination. If the lessee is entitled to a credit, MMS will provide instructions for the taking of that credit. MMS shall not pay interest on any credit.

(i) Certain information submitted to MMS to support valuation proposals, including transportation and/or processing allowances, is exempted from disclosure by the Freedom of Information Act, 5 U.S.C. 522. Any data specified by the Act to be privileged, confidential, or otherwise exempt, will be maintained in a confidential manner in accordance with applicable law and regulations. All requests for information about determinations made under this Part are to be submitted in accordance with the Freedom of Information Act regulation of the Department of the Interior, Title 43 CFR Part 2.

§ 206.260 Washing allowances.

(a) (1) For ad valorem leases subject to § 206.259, MMS shall, as authorized by this section, allow a deduction in determining value for royalty purposes for the reasonable, actual costs incurred to wash coal, unless the value determined pursuant to § 206.259 was based upon like-quality unwashed coal. The washing allowance shall not exceed 50 percent of the value of the washed coal, as determined pursuant to § 206.259, by individual selling arrangement. The combined total of the washing allowance (determined according to this section) and the transportation allowance (as determined pursuant to § 206.262), shall not exceed 75 percent of the value, by individual selling arrangement, as determined pursuant to § 206.259, of the coal being washed and transported.

(2) The MMS Director may approve an allowance in excess of the limitations contained in paragraph (a)(1) of this section if the lessee demonstrates that a higher allowance is in the best interests of the lessor. An application for exception shall contain all relevant and supporting data necessary for the MMS Director to make a determination. Under no circumstances shall the Director allow the value for royalty purposes of coal under any selling arrangement to be reduced to zero.

(b) *Determination of washing allowances.* (1) Arm's-length contracts. (i) For coal washing costs incurred by a lessee pursuant to an arm's-length contract, the washing allowance shall be the reasonable, actual costs incurred by the lessee for washing the coal under that contract, subject to review or audit. Such an allowance shall be subject to the limitations contained in § 206.260(a)(1). MMS approval is not required to deduct washing costs incurred under an arm's-length contract; however, the lessee must notify MMS of its deductions of these costs by submitting a completed page one of Form MMS-4292 the same month the washing allowance first is reported as an allowance on Form MMS-4014, Report of Sales and Royalty Remittance, pursuant to 30 CFR Part 210. This is a one-time filing effective for the entire reporting period. The allowance will be denied for any production month for which a Form MMS-4292 is not received prior to, or at the same time as, the Form MMS-4014 for that month.

(ii) A coal washing allowance determined pursuant to an arm's-length contract shall be effective for a reporting period beginning the month that the lessee first is authorized to deduct a washing allowance in accordance with paragraph (b)(1) (i) of this section and shall continue for 12 months, or until the washing contract terminates, whichever is earlier. For each reporting period, the lessee may report an estimated washing allowance deduction. As provided in § 206.260(c), at the end of the 12-month period or at the time the contract terminates, the lessee shall submit page one of Form MMS-4292, containing the actual costs for the previous reporting period and containing the estimated costs for the next reporting period. The estimated coal washing allowance shall not be greater than the reasonable, actual coal washing costs in the previous reporting period, unless MMS approves a higher estimate upon written request from the lessee.

(iii) Where the lessee's payments for washing under an arm's-length contract are not on a dollar value basis, the lessee shall convert whatever consideration is paid to a dollar value

equivalent for the purposes of this section.

(iv) MMS may require that a lessee submit arm's-length washing contracts, operating agreements, and other related documents. Documents requested by MMS shall be submitted within a reasonable time, as determined by MMS.

(2) Non-arm's-length or no contract. (i) If a lessee has a non-arm's-length washing contract or has no contract, including those situations where the lessee performs washing services itself, the washing allowance will be based upon the lessee's reasonable, actual costs. Such an allowance shall be subject to the limitations contained in § 206.260(a)(1). The MMS approval is not required to deduct washing costs incurred under non-arm's-length or no contract situations; however, the lessee must notify MMS of its deductions of these costs by submitting a completed Form MMS-4292 and all data used by the lessee to determine the washing allowance the same month the washing allowance first is reported as an allowance on Form MMS-4014, Report of Sales and Royalty Remittance, pursuant to 30 CFR Part 210. This is a one-time filing effective for the entire reporting period. The allowance will be denied for any production month for which a Form MMS-4292 is not received prior to, or at the same time as, the Form MMS-4014 for that month.

(ii) A coal washing allowance determined pursuant to a non-arm's-length contract or a no contract situation shall be effective for a reporting period beginning the month that the lessee first is authorized to deduct a washing allowance in accordance with paragraph (b)(2)(i) of this section and shall continue for 12 months, or until the non-arm's-length contract terminates or the no contract washing terminates, whichever is earlier. For each reporting period, the lessee may report an estimated washing allowance deduction. As provided in § 206.260(c), at the end of the 12-month period, or after the non-arm's-length or no contract washing terminates, the lessee shall submit a completed Form MMS-4292 containing the actual costs for the previous reporting period and all available data to support its allowance. If coal washing is continuing, the lessee shall include on Form MMS-4292 its estimated costs for the next reporting period and all data necessary to support its proposed estimated allowance. The estimates coal washing allowance shall not be greater than the reasonable, actual coal washing costs in the previous reporting period, unless MMS approves a higher estimate upon written request from the lessee.

(iii) MMS shall monitor, review, and audit coal washing allowances and may direct a lessee to adjust an estimated or actual allowance. A lessee also may request a coal washing allowance determination from MMS. If an MMS-determined allowance is different from the lessee's reported allowance, the lessee shall adjust allowances reported after the determination. Adjustments to estimated costs in months preceding the MMS determination shall not be required to be made until the lessee determines its actual costs pursuant to paragraphs (c) and (d) of this section, unless MMS directs otherwise.

(iv) For new washing facilities or arrangements, the lessee's initial Form MMS-4292 shall include estimates of the allowable coal washing costs for the applicable period. Cost estimates shall be based upon the most recently available operations data for the coal washing system, or if such data is not available, the lessee shall use estimates based upon industry data for similar washing systems.

(v) The non-arm's-length or no contract washing allowance shall be based upon the lessee's reasonable, actual costs for washing, including operating and maintenance expenses, overhead, [depreciation] and a return on [undepreciated] capital investment. The washing allowance shall be based upon actual costs incurred during the 12-month reporting period.

(A) Allowable operating expenses include: Operations supervision and engineering; operations labor; fuel; utilities; materials; ad valorem property taxes; rent; supplies; and any other directly allocable and attributable operating expense which the lessee can document.

(B) Allowable maintenance expenses include: Maintenance of the coal washing system; maintenance of equipment; maintenance labor; and other directly allocable and attributable maintenance expenses which the lessee can document.

(C) Overhead directly attributable and allocable to the operation and maintenance of the washing system is an allowable expense. State and Federal income taxes, production taxes or fees such as State severance taxes, or the Abandoned Mine Reclamation Fund fees and royalties are not allowable expenses.

Alternative 1

(D) To compute depreciation, the lessee may elect to use either a straight-line depreciation method or a unit of production method based on the life of equipment or the life of the reserves which the washing system services. Once an election is made, the lessee may not alternate methods without MMS approval. A change in ownership of a washing system shall not alter the depreciation schedule established by the original coal washer/lessee for purposes of the allowance calculation. Equipment shall not be depreciated below a reasonable salvage value.

Alternative 2

(D) MMS shall allow as a cost an amount equal to the initial capital investment in the washing facilities multiplied by a rate of return determined pursuant to subsection (E). No allowance shall be provided for depreciation.

(E) The rate of return on [undepreciated] capital investment shall be the Moody Aaa corporate bond rate as published by Moody's Investors Service, Inc. in *Moody's Bond Record* on the first business day of the reporting period for which the allowance is applicable. This rate will be effective during the entire reporting period. The rate shall be redetermined at the beginning of each subsequent reporting period.

(c) *Reporting requirements.* (1) After the initial reporting period, for succeeding reporting periods, lessees shall submit Form MMS-4292 (or page one of the Form MMS-4292 for arm's-length washing contracts) on an annual basis. Form MMS-4292 and, if necessary, other supporting information must be received by MMS within 90 days after the end of the previous reporting period, unless MMS approves a longer period. If the Form MMS-4292 is not received timely, then the allowance requested will not be effective until the first day of the month in which the Form MMS-4292 is received, and will be applicable to Forms MMS-4014, Report of Sales and Royalty Remittance, received after that date. The lessee will be required to refund, with interest, any unauthorized allowance which it has taken.

(2) This MMS may establish reporting dates for individual lessees different than those specified in this section in order to provide more effective administration. Lessees will be notified as to any change in their reporting period.

(3) Washing allowances must be reported as a separate line on the Report of Sales and Royalty Remittance, Form MMS-4014.

(d) *Adjustments.* (1) If actual coal washing costs differ from the estimated cost as reported on the Form MMS-4292, the lessee shall make adjustments on its Forms MMS-4014 in accordance with MMS established procedures. The lessee

must maintain, for audit purposes, a month-by-month reconciliation of the lease account, by AID number, product code, and selling arrangement.

(2) If the actual washing allowance is less than the amount the lessee has estimated and taken during the reporting period, the lessee shall be required to pay additional royalties due plus interest computed pursuant to 30 CFR 218.200, retroactive to the first month the lessee is authorized to deduct a washing allowance. If the actual washing allowance is greater than the amount the lessee has estimated and taken during the reporting period, the lessee shall be entitled to a credit without interest.

(e) *Other washing cost determinations.* The provisions of this section shall apply to the determination of washing costs when establishing value using a net back valuation procedure or any other procedure that requires deduction of washing costs.

§ 206.261 Allocation of washed coal.

(a) When coal is subjected to washing, the washed coal must be allocated to the leases from which it was produced.

(b) When the net output of coal from a washing plant is derived from coal obtained from only one lease, the quantity of washed coal allocable to the lease will be based on the net output of the washing plant.

(c) When the net output of coal from a washing plant is derived from coal obtained from more than one lease, the quantity of net output of washed coal allocable to each lease will be based on the ratio of measured quantities of coal delivered to the washing plant and washed from each lease compared to the total measured quantities of coal delivered to the washing plant and washed.

§ 206.262 Transportation allowances.

(a) For ad valorem leases subject to § 206.259, where the value for royalty purposes has been determined at a point remote from the lease or mine, MMS shall, as authorized by this section, allow a deduction in determining value for royalty purposes for the reasonable, actual costs incurred to:

(1) Transport the coal produced from a Federal or Indian lease to a sales point which is remote from the lease or mine; or

(2) Transport the coal produced from a Federal or Indian lease to a washing facility when that facility is remote from the mine and, if applicable, from the washing facility to a remote sales point. In-mine transportation costs are not to be included in the transportation allowance.

(b)(1) The transportation allowance shall not exceed 50 percent of the value of the transported coal, as determined pursuant to § 206.259, by individual selling arrangement. The combined total of the transportation allowance (determined according to this section) and the washing allowance (as determined pursuant to § 206.260) shall not exceed 75 percent of the value, by individual selling arrangement, determined pursuant to § 206.259, of the coal being transported and washed.

(2) The MMS Director may approve an allowance in excess of the limitations contained in paragraph (b)(1) if the lessee demonstrates that a higher allowance is in the best interests of the lessor. An application for exception shall contain all relevant and supporting data necessary for the MMS Director to make a determination. Under no circumstances shall the Director allow the value for royalty purposes of coal under any selling arrangement to be reduced to zero.

(c) When lease products contain non-coal products or material such as bone, ash, or other impurities, transportation costs must be allocated among all such products or materials transported. No transportation allowance shall be authorized for the transportation of lease products or materials which are not royalty bearing. Transportation allowances shall be expressed as a cost per ton of coal transported.

(d) *Determination of transportation allowances.*—(1) *Arm's-length contracts.* (i) For coal transportation costs incurred by a lessee pursuant to an arm's-length contract, the transportation allowance shall be the reasonable, actual costs incurred by the lessee for transporting coal under that contract, subject to review, audit, and adjustment. Such allowances shall be subject to the limitation of § 206.262(b)(1). MMS approval is not required to deduct transportation costs incurred under an arm's-length contract; however, the lessee must notify MMS of its allowance by submitting a completed page one of Form MMS-4293 the same month the transportation allowance first is reported on Form MMS-4014, Report of Sales and Royalty Remittance, filed pursuant to 30 CFR Part 210. This is a one-time filing effective for the entire reporting period. The allowance will be denied for any production month for which Form MMS-4293 is not received prior to, or at the same time as, the Form MMS-4014 for that month.

(ii) A coal transportation allowance determined pursuant to an arm's-length contract shall be effective for a reporting period beginning the month that the lessee first is authorized in accordance with paragraph (d)(1)(i) of this section to deduct a transportation allowance and shall continue for 12 months, or until the transportation contract terminates, whichever is earlier. For each reporting period, the lessee may report an estimated transportation allowance deduction. As provided in § 206.262(e), at the end of the 12-month period or at the time the contract terminates, the lessee shall submit page one of Form MMS-4293, containing the actual costs for the previous reporting period and containing the estimated costs for the next reporting period. The estimated coal transportation allowance shall not be greater than the reasonable, actual coal transportation costs in the previous reporting period, unless MMS approves a higher estimate upon written request from the lessee.

(iii) Where the lessee's payments for transportation under an arm's-length contract are not on a dollar value basis, the lessee shall convert whatever consideration is paid to a dollar value equivalent for the purposes of this section.

(iv) MMS may require that a lessee submit arm's-length transportation contracts, operating agreements, and other related documents. Documents requested by MMS shall be submitted within a reasonable time, as determined by MMS.

(2) Non-arm's-length or no contract. (i) If a lessee has a non-arm's-length transportation contract or has no contract, including those situations where the lessee performs transportation services itself, the transportation allowance will be based upon the lessee's reasonable, actual costs. Such an allowance shall be subject to the limitations contained in § 206.262(b)(1). The MMS approval is not required to deduct transportation costs incurred under non-arm's-length or no contract situations; however, the lessee must notify MMS of its deductions of these costs, by submitting a completed Form MMS-4293 and all data used by the lessee to determine the transportation allowances the same month the transportation allowance first is reported as an allowance on Form MMS-4014, Report of Sales and Royalty Remittance, pursuant to 30 CFR Part 210. This is a one-time filing effective for the entire reporting period. The allowance will be denied for any production month for which a Form MMS-4293 is not received prior to, or at the same time as, the Form MMS-4014 for that month.

(ii) A coal transportation allowance determined pursuant to a non-arm's-

length contract or a no contract situation shall be effective for a reporting period beginning the month that the lessee first is authorized in accordance with paragraph (d)(2)(i) of this section to deduct a transportation allowance and shall continue for 12 months, or until the non-arm's-length contract terminates or the no contract transportation terminates, which is earlier. For each reporting period, the lessee may report an estimated transportation allowance deduction. As provided in § 206.262(e), at the end of the 12-month period, or after the non-arm's-length or no contract transportation terminates, the lessee shall submit a completed Form MMS-4293 containing the actual costs for the previous reporting period, and all available data to support its allowance. If coal transportation is continuing, the lessee shall include on Form MMS-4293 its estimated costs for the next reporting period and all data necessary to support its proposed estimated allowance. The estimated coal transportation allowance shall not be greater than the reasonable, actual coal transportation costs in the previous reporting period, unless MMS approves a higher estimate upon written request from the lessee.

(iii) MMS shall monitor, review, and audit transportation allowances and may direct a lessee to adjust an estimated or actual allowance. A lessee may also request a transportation determination from MMS. If an MMS-determined allowance resulting from either a request from the lessee or from an MMS review or audit is different from the lessee's reported allowance, the lessee shall adjust allowances reported after the determination. Adjustments to estimated costs in months preceding the MMS determination shall not be required to be made until the lessee determines its actual costs pursuant to paragraphs (e) and (f), unless MMS directs otherwise.

(iv) For new transportation facilities or arrangements, the lessee's initial Form MMS-4293 shall include estimates of the allowable coal transportation costs for the applicable period. Cost estimates shall be based upon the most recently available operations data for the transportation system, or if such data is not available, the lessee shall use estimates based upon industry data for similar transportation systems.

(v) The non-arm's-length or no contract transportation allowance shall be based upon the lessee's actual costs for transportation, including operating and maintenance expenses, overhead, [depreciation], and a return on [undepreciated] capital investment. The transportation allowance shall be based upon actual costs incurred during the 12-month reporting period.

(A) Allowable operating expenses include: Operations supervision and engineering; operations labor; fuel; utilities; materials; ad valorem property taxes; rent; supplies; and any other directly allocable and attributable operating expense which the lessee can document.

(B) Allowable maintenance expenses include: Maintenance of the transportation system; maintenance of equipment; maintenance labor; and other directly allocable and attributable maintenance expenses which the lessee can document.

(C) Overhead directly attributable and allocable to the operation and maintenance of the transportation system is an allowable expense. State and Federal income taxes, production taxes or fees such as State severance taxes, or the Abandoned Mine Reclamation Fund fees and royalties are not allowable expenses.

Alternative 1:

(D) To compute depreciation, the lessee may elect to use either a straight-line depreciation method or a unit of production method based on the life of equipment or the life of the reserves which the transportation system services. After an election is made, the lessee may not alternate methods without MMS approval. A change in ownership of a transportation system shall not alter the depreciation schedule established by the original transporter/lessee for purposes of the allowance circulation. Equipment shall not be depreciated below a reasonable salvage value.

Alternative 2:

(D) MMS shall allow as a cost an amount equal to the initial capital investment in the transportation system multiplied by a rate of return determined pursuant to subsection (E). No allowance shall be provided for depreciation.

(E) The rate of return on [undepreciated] capital investment shall be the Moody Aaa corporate bond rate as published by Moody's Investors Service, Inc. in *Moody's Bond Record* on the first business day of the reporting period for which the allowance is applicable. This rate will be effective during the entire reporting period. The rate shall be redetermined at the beginning of each subsequent reporting period.

(e) *Reporting requirements.* (1) After the initial reporting period, all lessees shall submit Form MMS-4293 (or page one of Form MMS-4293 for arm's-length contracts) on an annual basis. Form MMS-4293 and, if necessary, other supporting information must be received by MMS within 90 days after the end of the previous reporting period, unless MMS approves a longer period. If the Form MMS-4293 is not received timely, then the allowance requested will not be effective until the first day of the month in which the Form MMS-4293 is received, and will be applicable to Form MMS-4014, Report of Sales and Royalty Remittance, received after that date. The lessee will be required to refund, with interest, any unauthorized allowance which it has taken.

(2) The MMS may establish reporting dates for individual lessees different than those specified in this subpart in order to provide more effective administration. Lessees will be notified as to any change in their reporting period.

(3) Transportation allowances must be reported as a separate line on the Report of Sales and Royalty Remittance, Form MMS-4014.

(f) *Adjustments.* (1) If actual transportation costs differ from the estimated cost as reported on the Form MMS-4293, the lessee shall make adjustments on its Forms MMS-4014 in accordance with MMS established procedures. The lessee must maintain, for audit purposes, a month-by-month reconciliation of the lease account by AID number, Product Code, and Selling Arrangement.

(2) If the actual transportation allowance is less than the amount the lessee has estimated and taken during the reporting period, the lessee shall be required to pay additional royalties due plus interest computed pursuant to 30 CFR 218.200, retroactive to the first month the lessee is authorized to deduct a transportation allowance. If the actual transportation allowance is greater than the amount the lessee has estimated and taken during the reporting period, the lessee shall be entitled to a credit without interest.

(g) *Other transportation cost determinations.* The provisions of this section shall apply to the determination of transportation costs when establishing value using a net back valuation procedure or any other procedure that requires deduction of transportation costs.

§ 206.263 Contract submission.

(a) The lessee and other payors shall submit to MMS, upon request, contracts for the sale of coal from ad valorem leases subject to this subpart. Contracts must be received by MMS within a reasonable period of time, as specified by MMS. Lessees shall include as part of the submittal requirements any contracts, agreements, contract amendments, or other documents which

affect the gross proceeds received for the sale of coal, as well as any other information regarding any consideration received for the sale or disposition of coal which is not included in such contracts. At the time of its contract submittals, the lessee shall certify in writing that it has provided all documents and information which reflect the total consideration provided by purchasers of coal from ad valorem leases subject to this subpart. Information requested under this section shall be available in the lessee's offices during normal business hours or provided to MMS at such time and in such manner as may be requested by authorized Department of the Interior personnel. Nothing in this subsection shall be construed to limit the authority of MMS to obtain or have access to information pursuant to 30 CFR Part 212.

(b) Lessees and other payors shall designate, for each contract submitted pursuant to this section, whether the contract is arm's-length or non-arm's-length.

(c) A lessee's determination that its contract is arm's-length is subject to future audit to verify that the contract meets the criteria of the arm's-length contract definition in § 206.251.

(d) Information required to be submitted under this section which constitutes trade secrets and commercial and financial information which is identified as privileged or confidential shall not be available for public inspection or made public or disclosed without the consent of the lessee or other payor, except as otherwise provided by law or regulation.

§ 206.264 In-situ and surface gasification and liquefaction operations.

If an ad valorem Federal coal lease is developed by in situ or surface gasification or liquefaction technology, the value of production for the purpose of computing royalty shall be determined by MMS.

PART 212—[AMENDED]

30 CFR Part 212 is amended as follows:

1. The Authority citation for Part 212 is revised to read as follows:

Authority: 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2107 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

2. Subparts F and G under Part 212 are revised to read as follows:

Subpart F—Coal—[Reserved]

Subpart G—Other Solid Minerals—[Reserved]

3. The following subparts are added to Part 212:

Subpart H—Geothermal Resources—[Reserved]

Subpart I—OCS Sulfur—[Reserved]

PART 218—[AMENDED]

30 CFR Part 218 is amended as follows:

1. The Authority citation for Part 218 is revised to read as follows:

Authority: 25 U.S.C. 396 et seq.; 25 U.S.C. 396a et seq.; 25 U.S.C. 2107 et seq.; 30 U.S.C. 181 et seq.; 30 U.S.C. 351 et seq.; 30 U.S.C. 1001 et seq.; 30 U.S.C. 1701 et seq.; 43 U.S.C. 1301 et seq.; 43 U.S.C. 1331 et seq.; and 43 U.S.C. 1801 et seq.

2. 30 CFR Part 218 is amended by revising newly redesignated § 218.201 (formerly § 203.200(b)) to read as follows:

§ 218.201 Royalty payments.

Operators/lessees shall submit royalty payments as provided for in the lease and the regulations in this Title. The payment shall be made by the end of the month after the end of the royalty reporting period for which the royalty accrued.

TITLE 43—[AMENDED]

For the reasons stated in the preamble, 43 CFR Group 3480 is amended as follows:

1. The authority citation for 43 CFR Part 3480 continues to read as follows:

Authority: The Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181 et seq.); the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351–359); the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201, et seq.); the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470, et seq.); the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, et seq.); the Act of March 3, 1909, as amended (25 U.S.C. 396); the Act of May 11, 1938, as amended (25 U.S.C. 396a–396g); the Act of February 28, 1891, as amended (25 U.S.C. 397); the Act of May 29, 1924 (25 U.S.C. 398); the Act of March 3, 1927 (25 U.S.C. 398a–398e); the Act of June 30, 1919, as amended (25 U.S.C. 399); R.S. 441 (43 U.S.C. 1457); the Federal Property and Administrative Services Act of 1949, as amended, (40 U.S.C. 471, et seq.); the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321, et seq.); and the Freedom of Information Act (5 U.S.C. 552).

2. 43 CFR 3485.2 is amended by removing paragraphs 3485.2(d), 3485.2(e), 3485.2(f), 3485.2(g), 3485.2(h), 3485.2(i), and 3485.2(k), and 3485.2(j) is redesignated to 3485.2(d).

[FR Doc. 87-808 Filed 1-14-87; 8:45 am]

BILLING CODE 4310-MR-M