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Volume 89
Issue 3 *Issue 3, The National Coal Issue*

Article 7

April 1987

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Recommended Citation

Deborah S. Colby, *Assessing Abandoned Mining Land Reclamation Fees on Coal*, 89 W. Va. L. Rev. (1987).
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ASSESSING ABANDONED MINING LAND RECLAMATION FEES ON COAL

DEBORAH S. COLBY*

I. INTRODUCTION

Section 401 of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act")[1] provides that a fee is to be imposed on each "ton of coal produced" by surface or underground mining.[2] This provision, which on its face establishes a simple and straightforward basis for assessing fees on coal for funding repairs of damage done by past coal mining, has proved to be controversial in its implementation. Rock, clay, and debris may be scooped up at the mine site. Water may be introduced into the mined materials by rainfall or water used during the mining or preparation of coal. Including these "impurities" when weighing coal for the purpose of assessing reclamation fees would increase the total fee liability of the mine operators. Thus, the question arises as to how and when the determination should be made as to the amount of coal an operator has produced for the purpose of assessing fees.

The Office of Surface Mining Reclamation and Enforcement ("OSM"), which has the task of implementing SMCRA, has taken the position that in enacting SMCRA, Congress gave OSM sufficient discretion to promulgate rules which require coal mining operators to count anything in the truck or rail car at the time of sale in measuring the weight of coal produced for the purpose of collecting fees. Coal operators have argued that SMCRA does not give OSM such discretion, but rather, permits OSM to count only that portion of the materials produced and sold that are actually "coal" (*i.e.*, excluding the weight of rock, debris, and water added to coal in excess of the amount inherently present in the coal seam).

This debate concerning the interpretation of SMCRA's reclamation fee assessment provisions is of importance to both the government and to the coal industry, since there could be a significant difference in the amount of fees col-

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[1] 30 U.S.C. §§ 1201 to -1328 (1982).

[2] *Id.* at § 1232(a).

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lected between the two approaches.[3] Furthermore, the question of what should be included in weighing coal arises in other contexts in which payments are based on coal tonnage, such as black lung taxes, royalties to pension funds, and coal supply agreements.

Federal courts in Alabama, Pennsylvania, and the District of Columbia have addressed the issue of what operators must weigh in measuring the amount of coal on which fees may be assessed under SMCRA, and arrived at different answers; but the Supreme Court recently refused to grant certiorari to resolve the apparent conflict between the circuits. This Article discusses the statute and its legislative history, regulations promulgated under SMCRA, the practices of the coal industry, and the case law, as they relate to the underlying issue of what is "coal" for the purpose of assessing reclamation fees.

II. THE SURFACE MINING CONTROL AND RECLAMATION ACT

SMCRA was enacted by Congress to control and ameliorate the environmental consequences of surface mining while insuring the continued existence and health of the coal mining industry.[4] To accomplish these goals, the Act established the Office of Surface Mining Reclamation and Enforcement[5] and various institutes and programs for the study of coal mining and its consequences;[6] provided for the establishment of standards and procedures for the regulation of surface coal mining,[7] including the designation of lands unsuitable for coal mining;[8] and established a program for reclamation of abandoned mining land, including the creation of a fund to pay for it.[9] Under SMCRA, the Secretary of the Interior, through OSM, is authorized to implement the abandoned mine land reclamation fund and program.[10] The Act provides for assessment of a reclamation fee of

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[3] OSM collects over $225 million a year in reclamation fees, OSM ANN. REP. 18 (1985), on approximately 890 million tons of surface and underground coal production per year. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 707 (1986). While there are no industry-wide estimates of the difference in fees that could result, use of simple arithmetic provides a glimpse, albeit of limited use in extrapolating an industry total, of what the difference could be. If a coal operator mined 10 million tons of coal a year, with inherent moisture content of two percent and total moisture at the time of sale of six percent, the reclamation fee would be four percent higher under OSM's interpretation than if adjustments for excess moisture were permitted. On 10 million tons of surface mined coal, the additional fee would be $140,000.

[4] 30 U.S.C. §§ 1201, 1202. SMCRA explicitly strikes a balance between the potentially conflicting goals of "protection of the environment and agricultural productivity, and the Nation's need for coal as an essential source of energy." *Id.* at § 1202(f).

[5] *Id.* at § 1211.

[6] *Id.* at §§ 1221-1230, 1311-1327.

[7] *Id.* at §§ 1251-1279.

[8] *Id.* at § 1281.

[9] *Id.* at §§ 1231-1243.

[10] *Id.*

> [thirty-five] cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.[11]
> The Act also requires mine operators to submit records of the method of mining and the amount of coal produced, the accuracy of which must be sworn to by the operator and notarized.[12] Any operator who knowingly makes a false statement or certification in the records submitted to OSM may be subject to a fine of up to $10,000 and imprisonment of up to one year.[13]

III. The Legislative History

The voluminous legislative history of SMCRA addresses in detail the central issues of concern to Congress—the creation of a strip mining bill that would balance adequate reclamation of mining areas and "at the same time give some stability to the mining industry and encourage the members of industry to move forward with the tremendous investments they have made in order to mine this coal."[14] Working in the context of the 1977 energy crisis, the members of Congress who fashioned the final version of SMCRA were extremely sensitive to the need to foster domestic energy production in the face of uncertainity about foreign energy supplies. Furthermore, because President Ford had vetoed a 1975 strip mining bill as unduly burdensome to the coal industry, the legislators had tempered provisions of the earlier bill to further accommodate the wishes of coal producers.

Both Senate Report 95-128 and House Report 95-218 reflect a recognition of the emphasis placed at that time on greater use of domestic coal resources and the need to foster coal production. The clear and express intent of Congress was to balance the "growing demand for energy resources with the increasing stress . . . on the environment in satisfying that demand"[15] and to avoid the imposition of any extra or unnecessary burdens upon the coal industry.

While the legislative history contains detailed descriptions of mining processes in different coal-producing regions of the nation, no actual definition of coal appears at any point in the thousands of pages of the legislative account. Furthermore, the legislative history does not indicate that Congress intended any unusual meaning of the word "coal," or that it intended interpreters of SMCRA to apply a broad definition of "coal" which would include added moisture and

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[11] *Id.* at § 1232(a).
[12] *Id.* at § 1232(c).
[13] *Id.* at § 1232(d).
[14] Cong. Rec. § 12,424 (daily ed. July 20, 1977) (statement of Sen. Metcalf).
[15] S. Rep. No. 128, 95th Cong., 1st Sess. 52 (1977).

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debris for the purpose of calculating reclamation fees. On the other hand, there are indications that Congress did not intend the inclusion of excess moisture in coal for fee assessment purposes. During consideration of the bill, Congress debated at length the question of which parties should bear the final costs of reclamation fees, especially for abandoned mine sites. In Senate Report 95-128, which accompanies the Senate version of SMCRA, the Committee clearly expressed the belief that "the burden of paying for this reclamation is rightfully assessed against the coal industry, and by extension, the consumers of coal."[16]

Although Congress rejected a British thermal unit (Btu) tax, which could penalize producers in certain regions which yield high-Btu coal,[17] it clearly intended the costs of reclamation to be passed on to consumers, primarily in the form of higher electric rates. The assessment of fees based on weight, including noncombustible moisture or debris for which coal producers may receive no payment, and from which consumers receive no benefit, would violate this intention.

In addition, the provisions designed to "help the small to medium-size operator comply with the requirements"[18] of SMCRA, which were taken from earlier, vetoed strip mining bills and included in the final version of SMCRA, indicate that Congress did not intend to assess the reclamation fees on excess moisture and debris found with coal. Small operators may be unable to afford the coal cleaning and drying processes used by the larger operators to remove such moisture and debris.

IV. OSM Regulations Implementing Section 402 of SMCRA

On December 13, 1977, the Secretary of the Interior, acting through OSM, promulgated the first set of rules governing the collection of reclamation fees under section 402 of SMCRA.[19] These rules were incorporated, without revision, in the permanent surface mining regulations issued by OSM on October 25, 1978.[20] Section 870.12(b) of the 1978 regulations stated in pertinent part that "[t]he [reclamation] fee shall be determined by the weight and value [of the coal] at the time of initial bona fide sale, transfer of ownership or use by the operator."[21] In other words, the Secretary focused on the *timing* of the measurement of the weight of coal produced, rather than exactly what should be included in the measurement.

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[16] *Id.* at 56-57.

[17] H.R. Rep. No. 1072, 93d Cong., 2d Sess. 197-98 (1974).

[18] House Comm. on Interior and Insular Affairs, Surface Mining Control and Reclamation Act of 1977, H.R. Rep. No. 218, 95th Cong., Ist Sess. 61 (1977).

[19] 42 Fed. Reg. 62,713 (1977).

[20] 43 Fed. Reg. 49,932 (1978) (codified at 30 C.F.R. §§ 870.1 to -.17).

[21] 30 C.F.R. § 870.12(b) (1978).

OSM's 1978 regulations did not establish any method for determining the weight or value of coal for the purpose of calculating section 402 reclamation fees. However, they did define coal as "combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77, referred to and incorporated by reference in the definition of 'anthracite' . . . ."[22]

On December 11, 1981, OSM proposed revisions to the abandoned mine land reclamation program, including changes to its section 402 fee assessment regulations.[23] The revised fee regulations, which were ultimately promulgated in final form on June 30, 1982, state in relevant part:

> (a) The operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining. (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator.
>
> . . . .
>
> (3) The weight of each ton shall be determined by the actual gross weight of the coal.
>
> (i) Impurities, including water, that *have not* been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator *shall not* be deducted from the gross weight.[24]

In the preamble to its proposed revisions, OSM explained that the intent of the change in its reclamation fee regulations was "to allow fees to be based on coal to be sold, and to prevent any deduction for impurities that have not been removed."[25] Thus, the revised regulation[26] requires mine operators to pay a fee on impurities, including water, that are not removed prior to sale, even if they do not get paid for those materials.

The reclamation fee regulations also require detailed production records to be kept for six years, including information necessary to substantiate the accuracy of reclamation fee reports and payments.[27] Operators selling coal "on a clean coal basis shall retain records that show run-of-mine tonnage, and the basis for the clean coal transaction."[28] If the records are insufficient, the operator shall be subject to fees based on the raw tonnage data.[29]

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[22] 30 C.F.R. § 700.5 (1986) (emphasis in the original).

[23] 46 Fed. Reg. 60,778 (1981).

[24] 30 C.F.R. § 870.12(a), (b), (3), (i) (1986) (emphasis in original).

[25] 46 Fed. Reg. 60,782 (1981). The other two reasons advanced by OSM for its revised reclamation fee regulations were administrative convenience and the desire for uniform treatment of all oeprators. 47 Fed. Reg. 28,578 (1982).

[26] 30 C.F.R. § 870.12(b)(3)(i) (1986).

[27] *Id.* at § 870.16

[28] *Id.* at § 870.12(b)(3)(ii).

[29] *Id.* at § 870.12(b)(3)(iii).

V. Industry Practices—What is Coal and How is it Weighed?

For someone unfamiliar with the mining industry, it would seem an elementary problem to weigh coal in order to determine the number of tons produced, and thus the amount of fees owed under SMCRA. In fact, the weighing of coal for most purposes is more a matter of calculation than of placing each rail car or truckload of coal on a scale and weighing it.[30] To understand how coal tonnage is determined in the industry, a brief overview of the physical properties of coal, and how it is mined, prepared, and sold is useful.

Coal is a combustible, carbonaceous material that was formed by the gradual transformation by pressure and compression of plant matter in the absence of oxygen.[31] Because of variations in the type of plant matter, the timing and conditions of submersion of the plant matter in water, and the degree of pressure and the length of time to which the plant matter is subjected to it, there is a great deal of diversity in the composition of coal from one seam to another.[32] Each bed or seam of coal may be analyzed and classified, and this information is collected for easy use and reference.[33] As a result of the variations in coal, methods for classifying coal have been developed, some focusing on the chemical composition of coal, some on the physical properties of coal (*e.g.*, hardness and crushability), and still others on the energy value of the coal.

The American Society for Testing and Materials ("ASTM") Standard D 388, which is referred to and incorporated in OSM's definition of coal, classifies coal by rank, based primarily on a "proximate analysis" of coals. The ASTM Standard D 388 ranks coals on a scale beginning with lignite, which has only slightly less water and volatile matter than peat, and ending with meta-anthracite, which has the least amount of water and volatile matter per ton. ASTM Standard D 388 calls for analysis of coals on a moist, mineral matter free basis, explaining that "moist" means with the moisture content inherent in coal, with no excess surface moisture.[34]

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[30] Even if "simple" weighing of each rail car or truckload was the approach used in the industry, complexities are introduced by the need to subtract the weight of the empty rail car or truck from the total weighed tonnage, and to adjust for inaccuracies caused by motion of the rail car or truck, and by calibration errors or other problems affecting the reliability of the scale. At times, the process of weighing may be little more than an educated guess.

[31] *See* N. Berkowitz, An Introduction to Coal Technology 3-20 (1979) (for a good description of coal formation).

[32] *Id.*

[33] *See, e.g.*, McGraw-Hill, Inc., Keystone Coal Industry Manual (1983), which lists the characteristics of individual coal seams throughout the United States.

[34] *See* Parr's Formula for Calculation of Fixed Carbon and Calorific Value, ASTM D388-77 (Philadelphia 1977) n.2 at 222. *See also* Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining Minerals, and Related Terms 721 (P.W. Thrush, ed. 1968) [hereinafter cited as Dictionary], which defines moist coal as "coal containing natural bed moisture but not including visible surface moisture." The Dictionary also defines "moisture allowance" as "a deduction from the initial weight of washed coal to allow for the expected loss of water by drainage." *Id.*

Depending on the type of coal, the thickness of the seam, and the distance of the seam from the surface, coal may be extracted by underground or surface mining. Depending on a variety of factors, such as the thickness of the seam and mining techniques, the coal may be relatively free of debris and other impurities, or may require various types of cleaning and sorting before it is useable. Coal may be sold cleaned or uncleaned, on the "spot market" or by long-term coal supply agreement.

Water may be present at two stages of production in the coal industry — at the mining or extraction stage, and at the coal cleaning or preparation stage. At the mining or extraction stage, it may be present in the form of ground water or precipitation, or it may be purposely introduced for dust suppression and equipment cooling.[35] At the coal preparation stage, water is extensively used for separating coal from debris and impurities, and as part of the process of sulfur removal.[36]

In addition to factors such as supply and demand, and coal production costs, coal prices are affected by sulfur content, moisture content, ash content, Btu value, and coarseness.[37] Thus, both buyer and seller will sample coal supplies for price determination, and for ascertaining whether the coal supplied meets the buyer's specifications.[38]

One method of coal analysis that is used for ranking coals and for determining the quality and quantity of coal for contractual and other purposes is proximate analysis. Unlike ultimate analysis, which determines the percentages of carbon, hydrogen, nitrogen, sulfur, and other trace elements present in the coal,[39] proximate analysis determines the amount of moisture, volatile matter, fixed carbon,

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[35] *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, DEVELOPMENT DOCUMENT FOR EFFLUENT LIMITATIONS GUIDELINES AND STANDARDS FOR THE COAL MINING POINT SOURCE CATEGORY, EPA 440/1-82/057, 34 (Oct. 1982). Federal environmental and safety laws and regulations may require the use of water in coal mining for dust suppression. *See, e.g.,* 30 U.S.C. § 864(b) (1982).

[36] DEVELOPMENTAL DOCUMENT FOR EFFLUENT LIMITATIONS GUIDELINES, *supra,* note 35, at 34. *See also* Norton & Hambleton, *Cleaning to Zero Seldom Pays,* COAL AGE (Jan. 1983), *reprinted in* McGRAW-HILL, INC., *supra* note 33 at 742 (1983) for a description of coal producers' economic dilemmas associated with coal cleaning, including the results of increased moisture content.

[37] An excellent source of practical information about production and sale of coal is L.J. PETROVIC, QUESTIONS AND ANSWERS ON COAL SUPPLY AGREEMENTS (1984).

[38] Ascertainment of whether the coal meets the buyers' specifications in a coal supply agreement is particularly important to electric utilities, which may face scrutiny from public utility commissions as to whether they are receiving full value under the contract. *See In re* Potomac Elec. Power Co., 50 Pub. Util. Rep. (PUR) 4th 500, 548-551 (1982); *In re* Niagara Mohawk Power Corp., 56 Pub. Util. Rep. 4th (PUR) 315, 321-22 & 328 (1983).

[39] N. BERKOWITZ, *supra* note 31, at 33-35. Ultimate analysis may be used by engineers to determine what types of coal best meet the specific requirements of a boiler, what types of coal should be ordered to meet these requirements, and what coal blending might also enhance boiler performance or minimize undesirable byproducts of combustion such as air pollution and residue that could foul boiler components.

and ash present in the coal.[40] Proximate analysis is frequently reported along with the percentage of sulfur and heating value, in Btus, of the coal.[41] The standard methods of proximate analysis used in the United States are based on methods devised by ASTM.[42] An explanation of proximate analysis of the moisture content of coal is provided by Berkowitz in *An Introduction to Coal Technology:*

> To understand what analytically determined moisture contents means, a distinction must be made between *natural bed moisture* contents, also referred to as capacity moisture, and *received* moisture. The former represents the amount of water that coal will hold when fully saturated at nearly 100% relative humidity (as in an undisturbed coal seam) and thus reflects the total pore volume of the coal accessible to moisture . . . . In contrast, *as received* moisture contents relate to the amounts of water in samples as submitted for analysis, and these may be substantially smaller than bed moistures (if the samples have been allowed to partly dry) or greater (if they contain a significant quantity of excess surface water).[43]

With this background in mind, it becomes clear that determining the weight of coal produced, for whatever purpose, may not be so simple. Coal supply agreements often contain provisions concerning where weighing is to take place, what method is to be used, and how the scales are to be calibrated and inspected.[44] Such agreements also may have provisions allowing for adjustments, either in the weight of coal deemed delivered, or in the purchase price per ton, to account for variations in moisture and other elements ascertainable through proximate analysis.[45] Since the contract generally will provide for proximate analysis of only a sample of coal from some percentage of the rail cars in a delivery (there are ASTM techniques for determining where and how often to sample), weight and moisture calculations are commonplace in the industry.

VI. THE CASE LAW

A. *United States v. Brook Contracting Corporation*

In *United States v. Brook Contracting Corp.*,[46] two coal producing companies appealed from a judgment of the district court finding them liable for payment of additional reclamation fees on coal they had produced. Over a period of several years, the companies had paid fees only on combustible coal that was mined, excluding from their calculations of fees the weight of rock, clay, dirt, and other

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[40] *Id.* at 29-33.

[41] *See* DICTIONARY, *supra* note 34, at 222.

[42] N. BERKOWITZ, *supra* note 31.

[43] *Id.* at 31-32.

[44] L.J. PETROVIC, *supra* note 37, at 29-30.

[45] *See* 4 COAL LAW & REGULATION 84-26, 84-33, 84-34 (D. Vish & P. McGinley 1983).

[46] United States v. Brook Contracting Corp., 759 F.2d 320 (3d Cir. 1985).

debris that was mined with coal.[47] The government urged that the question was controlled by *United States v. Devil's Hole, Inc.*,[48] in which the Third Circuit had ruled that anthracite silt, which contained noncombustible materials, was "coal" upon which reclamation fees might be assessed. The Third Circuit, however, was not convinced that *Devil's Hole* settled the matter.[49] "In *Devil's Hole,*" the court explained, "the district court's finding that anthracite silt was 'coal'. . . was supported in the record by expert testimony and other evidence that anthracite silt was combustible and qualified as 'coal' under American Society for Testing and Materials (ASTM) standard D 388-77 based on its fixed carbon and BTU content."[50] On the other hand, with regard to the debris mined with coal, the Third Circuit noted that the district court had made no factual finding that "the aggregate of material mined by appellants [the three coal operators] qualifie[d] as coal under the ASTM standards."[51]

It is unclear what the Third Circuit understood "the aggregate of material mined" to mean when it made this statement—whether it meant that if the material could be burned without any cleaning or processing it would qualify as coal, or whether the aggregate of the material to be weighed in assessing fees would all be classifiable as coal. Whatever the court may have intended, this observation was not ultimately the basis of its decision. The district court in *Brook* had concluded that SMCRA should be given a broad reading and, therefore, that "the tonnage of material produced and sold, and not just pure coal, is properly assessed with the Act's reclamation fee, as . . . 'coal' for the purposes of the Act."[52] The Third Circuit, noting its plenary authority to review the district court's interpretation of the Act, concluded that the legislative history of SMCRA "counsels against an expansive interpretation of the term 'coal' and a broad-based imposition of the reclamation fee."[53] In so concluding, the court reviewed the

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[47] *Id.* at 321.

[48] United States v. Devil's Hole, Inc., 747 F.2d 895 (3d Cir. 1984).

[49] The Third Circuit also rejected the government's argument that Combs v. Hawk Contracting, Inc., 543 F. Supp. 825 (W.D. Pa. 1982), supported its position. In that case, employees sought to deduct the ash content of coal from the weight of "coal produced for sale" that was subject to royalties payable to the Miners' Pension Fund under a collective bargaining agreement. The *Brook* court distinguished *Combs* on two grounds: First, in *Combs* the district court was interpreting an agreement between employers and the union, rather than a statute. Second, in *Combs* the employees sought reductions in coal tonnage "based on impurities within the combustible coal itself." *Brook Contracting Corp.*, 759 F.2d at 327. This distinction was noted by the district court when it rejected Hawk Contracting's argument because, *inter alia,* Hawk's intepretation was "over-inclusive" in that its proposed deductions would have put it in a better position than an operator selling clean coal, since some impurities are not subject to removal by the coal cleaning process. *Combs,* 543 F. Supp. at 829.

[50] *Brook Contracting Corp.*, 759 F.2d at 323.

[51] *Id.* at 324.

[52] United States v. Brook Contracting Corp., Civil No. 83-0171, slip op. (E.D. Pa. July 6, 1984), *rev'd,* 759 F.2d 320 (3d Cir. 1985).

[53] *Brook Contracting Corp.*, 759 F.2d at 324.

three principal considerations that formed the basis for Congress' creation and structuring of the reclamation fee:

> First, to set the fee at such level that it is not a burden on the industry;
> Second, to provide at the same time sufficient funds for meeting program objectives within a reasonable time frame; and
> Third, to structure the fee so it would not exert an inflationary influence in the economy.[54]

The court then examined the legislative history in detail and, based on that examination, found several indications that Congress did not intend to impose a reclamation fee on anything other than combustible coal. First, economic projections before Congress suggested that it was only the combustible portion of mined material that was intended to be subject to fees.[55] Second, discussions in Congress addressing the amount of the fee to be assessed suggested to the court that noncombustible materials were not intended to be included in the weight of coal.[56] Finally, the *Brook* court stated that the Secretary's own definition of "coal" contained in the SMCRA regulations[57] "militates against" an expansive reading of OSM's ability to assess reclamation fees on noncombustible materials.[58]

The most noteworthy aspect of *Brook* is that the Third Circuit did not merely order a refund of excess reclamation fees to the plaintiffs. Rather, the Third Circuit expressly held "as a matter of law, that as used in the statute, 'coal produced by surface coal mining' means combustible coal that would qualify as such under ASTM standards and excludes the weight of rock, clay, dirt and other debris in the computation of the reclamation fee."[59] The court also invalidated 47 C.F.R. section 870.12(b), to the extent that OSM interpreted it to permit assessment of fees on *non-coal* material.[60]

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[54] *Id.* at 324-25 (quoting H.R. REP. No. 218, 95th Cong., 1st Sess. 137, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 669).

[55] The court quoted sections of the legislative history linking the effect of the fees to the cost of electric power due to coal consumption by the electric utility industry. It also noted that in its cost projections Congress assumed an approximate Btu value of 10,000 Btus per pound of coal on which it intended to assess fees. The court reasoned that this assumption would be rendered incorrect by the imposition of the reclamation fee or significant amounts of non-energy producing matter. *Brook Contracting Corp.*, 759 F.2d at 325.

[56] *Id.* at 326.

[57] The definition states in pertinent part: "Coal means combustible carbonaceous rock classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D388-77, referred to and incorporated by reference in the definition of 'anthracite' immediately above." 30 C.F.R. § 700.5 (1986).

[58] *Brook Contracting Corp.*, 759 F.2d at 326.

[59] *Id.* at 327.

[60] *Id.*

B. *A.J. Taft Company v. United States*

The treatment of excess moisture in determining the weight of coal for the purposes of assessing a fee on each ton of coal has also been addressed in the context of the black lung tax[61] in *A.J. Taft Coal Co. v. United States.*[62] Internal Revenue Code section 4121(a) imposes a tax on each ton of "coal sold by the producer." For a number of years, the A.J. Taft Company had deducted the weight of excess moisture in determining the amount of black lung tax it was obligated to pay.[63] The Internal Revenue Service audited Taft, and determined that additional tax was due because it rejected the adjustments Taft had made based on excess moisture. Taft sought a refund of the additional tax assessed against it. In *Taft,* the court addressed two questions:

> (1) Is it reasonable to broadly apply the term "coal" to include water which is not inherently a part of the mineral in its unmined state *in the absense of a clear intention expressed in the statute or the regulation? (2)* Was there a reasonable basis *in this case* on which to determine the weight of the coal *sans* non-inherent moisture or water (excess water)?[64]

In *Taft,* as in the *Brook* case, the court had before it the testimony of expert witnesses. There was evidence concerning the way in which coal is prepared for sale, how it is priced, the difference between excess and inherent moisture in coal and how it is measured, and how the tax calculations were carried out.[65] The Internal Revenue Service relied on the argument that there was no language in the statute or regulation that permitted the excess moisture deduction.[66] The *Taft* court distinguished the case before it from the Alabama district court's decision in *Drummond Coal Co. v. Watt,*[67] stating that not only did the statute evidence no intention to assess a tax on excess moisture, but, unlike the situation in *Drummond v. Watt,* there was no regulation that expressed a clear intention "to tax water or any other 'impurities.' "[68] The court did not agree or disagree with the decision in *Drummond v. Watt,* but noted that its only task was to interpret a statute and regulation that make reference only to "coal."[69]

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[61] The "black lung tax" is imposed on each ton of coal sold by coal producers, with a higher tax assessed on coal from underground mines. I.R.C. § 4121 (1982).

[62] A.J. Taft Coal Co. v. United States, 605 F. Supp. 366 (N.D. Ala. 1984), *aff'd without opinion,* 760 F.2d 279 (11th Cir. 1985).

[63] *Id.* at 368.

[64] *Id.* at 370 (first emphasis added, second emphasis in original).

[65] *Id.* at 367-69.

[66] *Id.* at 371.

[67] Drummond Coal Co. v. Watt, Civil No. CV82-H-1838-S, slip op. (N.D. Ala. May 18, 1983), *rev'd on jurisdictional grounds,* 735 F.2d 469 (11th Cir. 1984).

[68] *A.J. Taft Coal Co.,* 605 F.Supp. at 371.

[69] *Id.* at 372.

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The court ignored what it termed "the usual contradictory arguments concerning Congress' intent," but based its conclusion on "what appears to be the plain language of the statute and the regulation."[70] The court found that in the absence of a clear intent to the contrary in the statute or in the regulation, this plain meaning must control. As such, the court concluded that "coal," by definition, does not include excess moisture.[71] This is the most critical finding made by the court in terms of the issues ultimately at stake in all of these cases. Despite the court's somewhat narrow "ultimate conclusion,"[72] any analysis of the reclamation fee provisions of SMCRA must address the Eleventh Circuit's underlying conclusion that, based on expert testimony, "coal" does not include excess moisture.

C. *The Drummond Coal Company Cases*

The Office of Surface Mining's revised reclamation fee regulations did not go unchallenged. Drummond Co., an Alabama-based coal producer, simultaneously filed actions challenging the regulations in the United States District Courts for the Northern District of Alabama, and for the District of Columbia.[73] The United States District Court for the District of Columbia held proceedings in abeyance pending resolution of the Alabama case. The Alabama district court ruled that it had jurisdiction to hear the case, and entered judgment on the merits in favor of the government.[74]

On appeal, the Eleventh Circuit ruled that the United States District Court for the District of Columbia had exclusive jurisdiction to hear Drummond's challenge of the regulations, and vacated the Alabama district court's decision.[75] The Eleventh Circuit, though it disposed of the case on jurisdictional grounds, expressed its agreement with the substance of the district court opinion.[76] Thus, a

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[70] *Id.*

[71] *Id.*

[72] The court's "ultimate conclusions" were that:

> (1) Neither the statute nor the regulation can be reasonably interpreted to require the inclusion of water which is excess to inherent moisture content as being "coal," when the weight of the excess water can be reasonably ascertained and there is no clear statutory or regulatory language to the contrary; and
>
> (2) *In this case* there was a reasonable basis for determining the weight of the excess water.

Id. (footnote omitted) (emphasis in original).

[73] Drummond filed in both jurisdictions as a protective measure since it believed the statute to be unclear as to whether the District Court for the District of Columbia had exclusive or concurrent jurisdiction.

[74] *Drummond Coal Co. v. Watt*, Civil No. CV82-H-1838-S, slip op.

[75] *Drummond Coal Co. v. Watt*, 735 F.2d 469.

[76] *Id.* at 470.

review of the Alabama district court's decision denying Drummond relief on the merits is worthwhile.[77]

In its decision, the Alabama court focused first on the authority granted by the Act to the Secretary of the Interior to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act," and "to engage in any work and do all things necessary or expedient, including promulgation of rules and regulations, to implement and administer" the abandoned mine land program.[78] Based on these provisions, the court reasoned that the challenged regulations were designed to establish a simple method of determining the amount of fees to be collected and, as such, were within the scope of the agency's authority under the Act.[79] The court was not convinced that the regulation conflicted with the plain language of the Act, since Congress, the court concluded, was well aware that there are impurities mixed with coal and that coal is exposed to water from a variety of sources. Therefore, the court reasoned, Congress could have expressly distinguished coal from its impurities in enacting the reclamation fee collection provisions of SMCRA.[80] The court also rejected the argument that the revised regulations were an arbitrary and capricious departure from existing policy without a rational explanation. The court found that the regulations had been uniformly applied everywhere except Alabama,[81] and that the new regulations were merely "a clarification of the statute by the agency so as to ensure uniform application of the law."[82]

After the Eleventh Circuit vacated the Alabama district court's decision on jurisdictional grounds, the D.C. case was reactivated, ultimately resulting in a ruling on appeal by the United States Court of Appeals for the District of Columbia Circuit in *Drummond Coal Co. v. Hodel*.[83]

The D.C. Circuit rejected Drummond's argument that SMCRA permits assessment of fees only on combustible coal, as well as Drummond's argument that moisture which is not part of coal when mined is simply not taxable coal. Instead, the court adopted the government's reasoning, focusing its inquiry on the term "coal produced," and finding that the term was ambiguous as used in the Act.[84]

[77] The District Court for the District of Columbia also relied heavily on its Alabama counterpart's decision. *See* Drummond Coal Co. v. Hodel, 610 F. Supp. 1489, 1494 (D.D.C. 1985), *aff'd*, 796 F.2d 503 (D.C. Cir. 1986), *cert. denied*, 55 U.S.L.W. 3639 (U.S. Mar. 23, 1987) (No. 86-1057).

[78] *Drummond Coal Co. v. Watt*, Civil No. CV82-H-1838-S, slip op. at 2 (citing §§ 201(c)(2), 412(a) of the Act, 30 U.S.C. §§ 201(c)(2) and 412(a) (1982)).

[79] *Id.* at 7.

[80] *Id.*

[81] *Id.* at 3-4.

[82] *Id.* at 6.

[83] *Drummond Coal Co. v. Hodel*, 796 F.2d 503.

[84] The court also noted that Drummond's "plain meaning" argument was not supported by the record, which it said showed that "the vast majority of U.S. coal operators, as well as OSM personnel

The court noted that Congress did not define "coal" or a taxable "piece" of coal in SMCRA.[85] In rejecting Drummond's "coal is coal" argument, the D.C. Circuit explicitly disagreed with the *Taft* case to the extent that it contradicted its conclusion that the term "coal" is ambiguous.

In view of what it considered an ambiguity, the court turned to the legislative history, stating that "unless Congress in the legislative history specifically disclosed its intent on the question at issue, we must defer to the Secretary's construction of the Act."[86] The court expressly rejected the Third Circuit's analysis of the legislative history in *Brook,* opining that "the legislative history simply does not disclose the requisite specific intent upon which a court could properly rely to overturn the Secretary's regulations."[87] The D.C. Circuit found no specific intent with regard to the proper meaning of the words "coal produced," concluding that by leaving the term undefined and delegating broad rulemaking authority to the Secretary, Congress left a regulatory "gap" for the agency to fill.[88]

Having determined that the agency had the discretion to interpret the statute, the court concluded that the OSM's particular interpretation was not unreasonable.[89] Specifically, the goals of administrative convenience and national uniformity were held to support the Secretary's action.[90] Finally, the court found that the regulation was not inconsistent with the definition of coal found elsewhere in the SMRCA regulations.[91]

On December 26, 1986, Drummond Company, Inc., filed a petition for a writ of certiorari to the United States Supreme Court, arguing that the Court should hear the case to determine the meaning of "coal" under SMCRA, to resolve the split between the Third and District of Columbia Circuits concerning OSM's authority to assess fees under SMCRA on debris and excess moisture, and to review the D.C. Circuit's approach to statutory construction in this case. The government responded that the Supreme Court should not review the case, since OSM has the discretion to interpret the Act because SMCRA is ambiguous in that it permits assessment of fees on "coal produced," and does not define that term. The government also suggested that there is a conflict within the Third Circuit concerning the interpretation of SMCRA, and that the Third Circuit should

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outside of Alabama, interpreted the phrase 'coal produced' as do the revised regulations." *Id.* at 505. In fact, the record is not particularly instructive as to the interpretation of the regulation by coal operators in the United States, since the only information on this point was supplied by OSM, and was not based on a study of coal production practices.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 506.

[88] *Id.* at 507.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 507-08.

be allowed to resolve it in the context of the appeal of another fee collection case, which is now pending.[92] In its reply, Drummond argued that there is no internal conflict within the Third Circuit and that the split between the circuits is likely to remain until the Supreme Court resolves it.

On March 23, 1987, the Supreme Court denied the writ of certiorari. Thus, the split between the Third and D.C. Circuits remains, although the Third Circuit may now decide to abandon the *Brook* decision and adhere to the D.C. Circuit's opinion upholding the validity of the reclamation fee regulations.

The fundamental difference between the Third Circuit's analysis and that of the D.C. Circuit will not be put to the test before the Supreme Court. However, an analysis of the cases is still important because OSM may ultimately revisit the regulations and squarely face the question of assessing fees on noncombustible materials found with coal.

VII. Do the Reclamation Fee Regulations Hold Water?

As previously discussed, the questions of what is coal and how it is weighed can be approached in a variety of ways. In *Taft* and *Brook*, the courts focused directly on the problem, attempting to cope with it by reference to analytical methods existing in the industry. Relying on expert testimony, the *Taft* and *Brook* courts found that moisture in excess of that inherently found in coal, as well as noncombustible rock, clay, and debris mined with coal, are not part of "coal" as the term is ordinarily used. Specifically, they determined that such noncombustible materials, which could be readily segregated from coal by proximate analysis as commonly practiced in the industry, were not to be included in "coal" as that term was understood by Congress.

Primarily for administrative reasons, OSM decided that it would not attempt to define coal, but would focus instead on the weight of the aggregate of material sold by a coal operator, regardless of whether it was "coal" or whether the operator was paid for it. The D.C. Circuit upheld OSM's approach in *Drummond v. Hodel*, while apparently misinterpreting Drummond's argument concerning administrative convenience. Drummond did not contend, as the court stated, that "whatever administrative problems the Secretary would encounter elsewhere, . . . OSM's Alabama regional office would be able to police deductions."[93] Rather, Drummond argued that its experience in Alabama showed that the fee program could be successfully administered without assessing fees on excess moisture.[94] Furthermore, neither OSM nor the D.C. Circuit addressed alternative regulatory

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[92] United States v. Troup, No. 86-1409 (3d Cir. Jan. 21, 1987).
[93] *Id.* at 507.
[94] Brief for Appellant at 46, *Drummond Coal Co. v. Hodel*, 796 F.2d 503 [hereinafter cited as Drummond Brief].

approaches that were proposed by commenters in the rulemaking proceeding, nor did they explain why OSM's revised rule would simplify administration of the abandoned mining lands reclamation fee program.

As for the industry, it appears that debris and excess moisture are not commonly thought of as "coal." The *weight* of delivered coal may or may not be adjusted to account for debris or excess moisture, depending on whether the coal supply agreement provides other means for reducing the price to account for these Btu-reducing elements, and on the bargaining power of the individual coal operator.

The practical consequence of the excess moisture is, of course, that it increases the weight of a shipment of coal without adding to its value. Assessing fees on excess moisture and debris present at the time of sale results in variations in the amount of fees paid depending on how an operator cleans or prepares its coal, if at all; the amount of water used in mining and processing for dust suppression and equipment cooling; and factors that operators cannot control, such as rainfall and ground water. Variations in weight may also occur because of factors such as where the sale is deemed to take place; the shipment distance and weather, if it is to take place at the customer's premises; and the condition of the raw, unprocessed mine output.

When fees and taxes per ton of coal are passed on directly to the customer,[95] the public, largely through higher electric rates, ultimately pays the fees on the noncombustible tonnage. To the extent that an operator is unable to pass all its fees and taxes on to the customer, the fees may fall more heavily on some operators than others, depending on where their point of first sale is, and what coal preparation they might undertake. Smaller coal companies with less sophistication and bargaining power might be particularly helpless in their efforts to structure coal supply agreements to shift the additional fee burden to the customer.

The effect of the various cases that have considered the treatment of excess moisture for assessing fees or taxes has been mixed. The Internal Revenue Service has recently "acquiesced" in the *Taft* ruling by permitting adjustments to the weight of coal produced for purposes of calculating the black lung tax "where the taxpayer can demonstrate through competent evidence that there is a reasonable basis for its determination of the existence and amount of excess moisture."[96] In the reclamation fee context, the situation is not so clear.

In *Brook,* section 870.12(b) of the reclamation fee regulations was invalidated, and since that decision, the regulation has been unenforceable in the Third Circuit to the extent that it would permit assessment of fees on noncombustible materials

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[95] Some coal supply agreements expressly pass various taxes and fees on to the customer as a separate component of the purchase price.

[96] Rev. Rul. 86-96, 1986-32 I.R.B. 5.

found with coal. *Drummond v. Hodel* expressly affirmed the validity of the same regulation, and OSM is apparently enforcing it by requiring payment of fees on the weight of "coal produced," including excess moisture. The Supreme Court's denial of certiorari in that case may not settle the matter, at least in the Third Circuit, depending on the Third Circuit's ruling in *United States v. Troup.*

Unlike the *Brook* and *Taft* cases, the D.C. Circuit in *Drummond v. Hodel* did not address whether the ordinary meaning of the word "coal" in SMCRA was clear on its face,[97] or what the industry understood to be part of coal, nor did it examine the general intent of Congress as expressed in the legislative history of SMCRA to determine whether a meaning other than the common, ordinary meaning of the word "coal" could have been intended. Instead, it focused on the term "coal produced," and found that it was ambiguous. It left undisturbed OSM's approach of not attempting to define coal, thus permitting the measuring of gross weight of the mine product at the time of first sale, whether "non-coal" materials might be incidentally included in the tonnage on which fees were assessed.

OSM decided on this path despite the fact that in the rulemaking process commenters had raised the issue of whether debris and excess moisture were properly counted as "coal,"[98] and never attempted a determination on the merits of this issue. Similarly, the D.C. Circuit specifically rejected the *Taft* and *Brook* opinions to the extent that they made a determination of what should be included in "coal" as that term is commonly understood, and to the extent that they would require the exclusion of noncombustible debris and excess moisture from tonnages of coal produced for the purpose of assessing reclamation fees.

In reaching its decision, the D.C. Circuit deferred to OSM rather than the plain language of the statute. Citing *Chevron U.S.A. v. Natural Resources Defense Council Inc.*,[99] the D.C. Circuit required the party challenging the regulation to show the existence of a specific intent expressed by Congress not to assess fees on excess moisture, in effect, establishing a presumption of validity of the regulation that would be almost impossible to overcome. If a word is used throughout congressional deliberations in its ordinary sense, logic dictates that it is highly unlikely that an expression of specific intent will appear anywhere in the legislative history indicating that the word will be used in its ordinary sense. The court's ruling, if permitted to stand, would allow an agency to take almost any interpretation of a statute, so long as that interpretation was not expressly disavowed

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[97] The Alabama District Court in *Drummond Coal Co. v. Watt,* Civil No. CV82-H-1838-S, slip op., made at least a superficial attempt to deal with the question by supposing that Congress could have distinguished coal from its impurities if it had wanted to. *Id.* at 7.

[98] Drummond Brief at 44.

[99] Chevron, U.S.A. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984).

by Congress in the legislative history.[100] This is a broader view of the *Chevron* case than most courts have been willing to take.

Chevron outlines a two-prong analytical framework for reviewing an agency's construction of a statute. The first step is to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . ."[101] In conducting this first analytical step under *Chevron,* a court begins by examining the language of the statute itself[102] as the best indicator of congressional intent under the assumption that Congress expresses its intent through the ordinary meaning of words.[103] Should the court find that a statute's plain language is clear, "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[104] Before the court's analysis departs from the "ordinary meaning" of words and turns to the agency's interpretation of the statute, there must be some convincing indication that such an interpretation is necessary—that there is an ambiguity or an inconsistency[105] or that use of the "plain" language would lead to an absurd result.[106]

In *Drummond v. Hodel,* the agency and the courts never addressed whether interpretation of the word "coal" was necessary, but instead turned to the phrase "coal produced" to support OSM's regulation. Neither the court nor OSM made any finding that the plain meaning of coal as "combustible carbonaceous rock,"

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[100] Contrast *Drummond v. Hodel* with Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), *cert. denied,* 444 U.S. 1015 (1980) (where a preparation plant which separated a "low grade burnable material akin to coal" from material dredged from a river bed was determined to be a "mine" for purposes of the Mine Safety and Health Amendments Act of 1977.) In *Stoudt,* the Act defined "mine" very broadly, and the court concluded that "although it may seem incongruous to apply the label 'mine' to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it—the word means what the statute says it means." *Id.* at 592.

[101] *Chevron,* 467 U.S. at 842; FAIC Securities, Inc. v. United States, 768 F.2d 352, 361 (D.C. Cir. 1985).

[102] *See, e.g.,* Board of Governors v. Dimension Financial Corp., 106 S. Ct. 681 (1986); Coalition to Preserve the Integrity of Am. Trademarks v. United States, 790 F.2d 903, 908 (D.C. Cir.), *cert. granted sub nom.,* K-Mart Corp. v. Cartier Inc., 107 S. Ct. 642 (1986).

[103] Montana v. Clark, 749 F.2d 740, 745 (D.C. Cir. 1984), *cert. denied,* 106 S. Ct. 246 (1985); Rubin v. United States, 449 U.S. 424, 430 (1981); North Dakota v. United States, 460 U.S. 300, 312 (1983).

[104] Community Nutrition Inst. v. Young, 757 F.2d 354, 358-59 (D.C. Cir.), *rev'd.,* 106 S. Ct. 246 (1985) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

[105] Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S 395, 403-405 (1975); Save Our Cumberland Mountains Inc. v. Clark, 725 F.2d 1422, 1427 (D.C. Cir. 1984) (citing Symons v. Chrysler Corp. Loan Guarantee Bd., 670 F.2d 238, 241 (D.C. Cir. 1981)).

[106] Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 n.29 (1978).

as set forth in OSM's regulation[107] was improper in the reclamation fee context.[108]

At this point, there are some indications that OSM may revisit the reclamation fee regulations to consider whether to permit deductions for debris and excess moisture. If OSM indeed undertakes such a review, it should focus on what Congress meant by the term "coal" when it set reclamation fees on each ton of coal mined. While the legislative history may not be conclusive, it is at the very least indicative that Congress had no unusual meaning in mind when it used the term "coal."[109] The question should be whether there is an ordinary meaning of the word "coal," and whether such term excludes excess moisture or noncombustible debris. Two courts, based on expert testimony and on an analysis of legislative history, have answered in the affirmative.

VIII. Conclusion

One of the most sensible aspects of the *Taft* decision, which is echoed in the Internal Revenue Service Revenue Ruling issued as a result of that case, is the notion that when the weight of excess water reasonably can be ascertained and the operator can carry the burden of proving the tonnage of excess moisture, this non-coal component of gross weight is properly excludable when calculating taxes. This approach would have a number of practical benefits if adopted in the context of SMCRA as well. It comports with the intent of Congress not to base fees on Btu value, since fees per ton would remain the same regardless of the classification and Btu value of the coal (except lignite, as provided in the statute). The fee would not be based on the price per ton, which Congress did not want since the fees would then fluctuate with the market price of coal. Instead, this approach would tie the fees to the benefit obtained by mining, since the fee would only be assessed on material that is combustible. This would be accomplished not merely by the fact that only useable material would be taxed, but also because it would lessen the impact of factors that are related more to the size and bargaining power of the mine operator than to the quantity of coal produced. All this means that the balancing of interests intended by Congress could be more accurately reflected reclamation fees are assessed.

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[107] 30 C.F.R. § 700.5.

[108] The definition was prefaced by the words "except where otherwise indicated," and the court saw OSM's revised regulation 30 C.F.R. § 870.12(b) as "otherwise indicating" that impurities included in the gross weight prior to sale are to be treated as "coal" for purposes of the fees. *Drummond Coal Co. v. Hodel*, 796 F.2d at 508. The *Brook* court took the opposite tack and invalidated the regulation to the extent that it contradicted what the court found to be the plain meaning of the word "coal." *Brook Contracting Corp.*, 759 F.2d at 327.

[109] Ironically, the word "coal" is one of the most frequently appearing terms in SMCRA and throughout its legislative history, yet it was never defined by Congress. The fact that Congress saw no need for definition of the term is in itself indicative of the lack of an intention on the part of Congress to use the term in any but its most ordinary manner.

Contrary to OSM's fears, administrative difficulties should not be a problem if the *Taft* approach is used. SMCRA and its regulations already contain reporting, recordkeeping, and audit provisions. Information on percentages of inherent moisture at coal seams throughout the United States is readily available. If the burden is on the coal operator to demonstrate the amount of adjustment to which it is entitled, OSM would have ample information with which to check the accuracy of operators' calculations. Finally, estimation of weight is already a fact of life in the industry and operators are accustomed to sampling and auditing. No drastic changes would be required of either OSM or the coal operators in order to manage the fee program without assessing fees on non-coal materials.

As a revenue raising device—essentially a tax—SMCRA's imposition of reclamation fees should not be broadened to assess fees on non-coal materials by creating ambiguity as to the term "coal produced." The statute provided for fees on *coal*; therefore, the question of whether debris and excess moisture are properly included in the assessment of fees on coal should be expressly resolved.