

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

AMENDING THE DEFINITION OF “FAIR MARKET VALUE” IN THE FEDERAL COAL LEASING ACT

I. Introduction

Pursuant to the Sabin Center’s Legal Pathways to Deep Decarbonization project, Allen & Overy (A&O) drafted model legislation based on recommendations from the book *Legal Pathways to Deep Decarbonization in the United States*. A&O selected the recommendation from Chapter 24, *Phasing Out the Use of Fossil Fuels for the Generation of Electricity*, that Congress should consider amending the legislative definition of “fair market value” (FMV) with regard to coal leasing. In response to that recommendation, A&O drafted a proposal to amend the Federal Coal Leasing Act to more concretely define FMV (the **Coal FMV Act** or the **Bill**).

II. Background

As the global economy transitions towards a renewables-based energy sector, phasing out coal production and energy conversion will be one of the most important steps to achieve a carbon-free economy. Burning coal for electricity is heavily carbon-intensive, and coal mining also produces significant greenhouse gases as waste.¹ Coal mining releases pollutants such as sulfur dioxide, nitrogen oxide, particulates, mercury, and ash.² Methane is also formed during coal formation, and is released during mining.³ Methane is approximately thirty times as potent a greenhouse gas as carbon dioxide.⁴ Both of those processes also create significant air and water pollution hazards for the nearby areas.⁵ If the United States and the world at large are to achieve a carbon-free power sector, eventually eliminating coal-fired electricity will be necessary.

Selling coal, however, is lucrative; a few areas of the country, most prominently the Powder River Basin in Wyoming and Montana, produce a prodigious amount of coal.⁶ Some communities in the Powder River area rely heavily on coal mining for employment and revenue.⁷ Although the use of coal for electricity has diminished in the United States with the rise of natural gas as a source of energy, it still remains popular in some parts of the country and former President Trump ran on a pro-coal platform.⁸ Even more important for the U.S. coal industry is the export of coal to foreign countries. As China and India rapidly industrialize, they have expanded coal-burning operations for electricity to uplift communities from poverty.⁹ The American coal industry has reaped significant profits from the export of coal into Asian markets, in part because the current legal framework enables that profit.

III. Federal Coal Leasing

¹ U.S. Energy Information Administration, *Coal explained: coal and the environment* (January 21, 2020).

² *Id.*

³ World Coal Association, *Coal seam methane*, available at: <https://www.worldcoal.org/coal/coal-seam-methane>.

⁴ U.S. Environmental Protection Agency, *Understanding Global Warming Potentials*, available at: [https://www.epa.gov/ghgemissions/understanding-global-warming-potentials#:~:text=The%20Global%20Warming%20Potential%20\(GWP,carbon%20dioxide%20\(CO2\)](https://www.epa.gov/ghgemissions/understanding-global-warming-potentials#:~:text=The%20Global%20Warming%20Potential%20(GWP,carbon%20dioxide%20(CO2)).

⁵ Union of Concerned Scientists, *Coal and Air Pollution* (Dec. 19, 2017); Union of Concerned Scientists, *Coal and Water Pollution* (Dec. 6, 2017).

⁶ U.S. Energy Information Administration, *Sixteen mines in the Powder River Basin produce 43% of U.S. coal* (Aug. 26, 2019), available at: <https://www.eia.gov/todayinenergy/detail.php?id=41053#:~:text=More%20than%2040%25%20of%20coal,the%20Basin's%20coal%20in%202018>.

⁷ See Seth Feaster and Karl Cates, *Powder River Basin Coal Industry Is in Long-Term Decline*, Institute for Energy Economics and Financial Analysis (Mar. 2019).

⁸ James Murray, *Has Trump lived up to his promise to revive the US coal industry?*, NS Energy (May 18, 2020), available at: <https://www.nsenergybusiness.com/features/trump-us-coal-industry/>.

⁹ Akane Okutsu, *Asia's appetite for coal grows, with China the key decider*, NIKKEI ASIAN REVIEW (Jan. 13 2020), available at: <https://asia.nikkei.com/Business/Markets/Commodities/Asia-s-appetite-for-coal-grows-with-China-the-key-decider>.

The Bureau of Land Management (**BLM**) is responsible for leasing federal lands for coal mining, which constitutes about 570 million acres of land with development potential.¹⁰ The current regulatory framework for this leasing includes numerous gaps which create room for industry exploitation. The Federal Coal Leasing Act prohibits the BLM from accepting a bid for less than the FMV of the proposed lease.¹¹ The Act, however, provides no definition for FMV, leaving that determination entirely to the Secretary of the Interior; it also specifically states that the Secretary will not be required to make public their determination of FMV or any comments on the FMV submitted by the public.¹²

In many cases, this regulatory gap has allowed industry to profit significantly, arguably at the expense of the federal government. The Secretary does not consider a number of factors which are relevant to the actual value of the land to be leased, contributing to a flawed bidding process.¹³ For example, the export value of the coal, which is important as the sale of coal to Asian markets grows in scope, is not considered.¹⁴ Likewise, the Secretary does not weigh the option value of not mining the coal and preserving the land as a public asset. Perhaps most significant, no measure of the social cost of coal mining – pollution and carbon emissions, among others – is used in calculating the appropriate price for private industry to pay to the federal government in exchange for leasing the land for coal mining. All in all, the existing legislative scheme allows private industry to reap great profits at the expense of the public because the Secretary is not required to do an appropriate cost-benefit analysis; the result is that government funds are flowing disproportionately towards coal companies.

IV. Overview of the Proposed Bill

The proposed Bill seeks to ameliorate these issues by providing a more robust definition of FMV. The proposed Bill would help incentivize a transition away from coal and end the private exploitation of the federal government by filling three gaps in the current law: (1) provide a definition of “fair market value” which considers all of the relevant factors, including the social costs and export value of coal mining; (2) provide a requirement that the leasing program does not create an imbalance of benefits between the federal government and the lessee or purchaser; and (3) provide an oversight mechanism which requires the Secretary to publish their calculations and subject them to public scrutiny.

To the first end, the Bill amends the current law to limit the discretion that the Secretary has in defining FMV. The Secretary must account for the export potential of the coal to be extracted in determining the FMV, must rely on information from lease sales conducted within the past five years of the proposed lease sale, and must consider the domestic coal reserves. Additionally, the Secretary may not accept a bid that is less than the FMV, even if the bid is above the minimum bid requirement. These inclusions are not a complete list, but are some of the most important factors currently ignored which would create meaningful incentive to change the price of coal leasing and give other energy sources an equal opportunity. It might also create funds the federal government could use to mitigate the negative effects of coal-related pollution, for example.

Second, the Bill specifically requires the Secretary to ensure as much as possible that the lease does not create an imbalance of benefits. This provision codifies the intention of the Bill to end a regime of exploitation by private industry of the American public. To this end, the Bill requires that the Secretary maximize the financial return per ton of coal for the government, and conduct sale-leases in a manner that considers human health impacts and environmental impacts, including the harm to other impacted resources. The Bill also requires that the Secretary ensure that the timing and location of exploration and mining development is based on consideration of the region, environmental risks, and the interests of the local community, and that exploration and mining development are balanced against potential environmental damages, including the impact on climate change.

¹⁰ U.S. Bureau of Land Management, *Coal Data*, available at: <https://www.blm.gov/programs/energy-and-minerals/coal/coal-data>.

¹¹ 30 U.S.C. §201 (2005).

¹² *Id.*

¹³ Jayni Foley Hein and Peter Howard, *Reconsidering Coal's Fair Market Value*, Institute for Policy Integrity (Oct. 2015), at 3-4, available at: https://policyintegrity.org/files/publications/Coal_fair_market_value.pdf.

¹⁴ *Id.*, at 5.

Finally, the Bill requires the Secretary to publish their calculation of the FMV of the land to be leased. These calculations must be submitted in a formal, documented appraisal report that is accessible via the BLM's website, and the report must include the FMV determination. This requirement provides much needed oversight, and is in line with the way other federal agencies in similar positions conduct their business.

V. Potential Opposition

The coal industry would likely lobby against the Bill, given that it would directly cut into their profits. Moreover, it would accelerate the end of their industry. Furthermore, legislators from the Powder River Basin area in particular, as well as those in other coal-producing parts of the country (West Virginia, for example) could oppose such an amendment because it might create economic hardship for their constituents.

Those opposed to the proposed Bill might also focus on the possible adverse impact the resulting increase in the price of exported coal might have on those countries importing the coal. A real and important issue for the international community is access to reliable energy for developing countries and regions with high poverty. At the same time, however, locations with poverty, governance challenges and limited access to basic services and resources have higher vulnerability to climate hazards.¹⁵ Energy generation diversification, including with renewable energy resources and generation that can be decentralized depending on context (*e.g.*, wind, solar, small scale hydroelectric) can reduce vulnerabilities to climate change, especially in rural populations.¹⁶ Likewise, the global trend of urbanization offers a critical opportunity in the near-term to advance climate resilient development by reducing reliance on energy intensive models and integrating ecological and social approaches; to continue to emphasize coal for these markets risks locking in maladaptation and exacerbating structural inequalities.¹⁷ By helping ensure a fairer price for coal, the Bill should help move developing countries, and other countries purchasing U.S. coal, in that more positive direction.

There are of course challenges in determining some of the relevant FMV factors precisely; past exports and current energy market trackers would be good sources to use for determining export value, for example. Calculating the cost of greenhouse gas emissions associated with combustion of leased coal may be particularly challenging, though there are several tools available to measure the social cost of carbon. The same is true for coal mining more specifically.¹⁸ Most importantly, it is appropriate and within the capacity of the BLM to conduct these evaluations, and with the methods made public, public comment can help to keep the BLM's methodology transparent.

VI. Conclusion

The sooner the United States, and the world at large, phases out coal production and coal-fired electricity generation, the sooner we will be able to reach renewable energy goals and transition to a carbon-free economy. Beyond simply climate change-related goals, the reduction of coal production would benefit public health. The American public also has an interest in leveling the playing field for energy leasing and ensuring that fair prices are reached with all relevant factors taken into account. With all of those considerations in mind, the U.S. legislature should consider the proposed amendments to the Federal Coal Leasing Act and pass them into law as soon as possible.

¹⁵ Intergovernmental Panel on Climate Change (IPCC), 2022: Summary for Policymakers. In: *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge University Press (Feb. 2022).

¹⁶ *Id.*

¹⁷ IPCC, 2022: *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change: Summary for Policymakers*. Cambridge University Press (Feb. 2022), at 33-35.

¹⁸ See, *e.g.*, Kyle Bonney, Darshan Joshi, and Matt Strain, *It Starts With A Social Cost of Carbon*, University of Chicago Booth School of Business and Harris School of Public Policy (2017); Samuel Grausz, *The Social Cost of Coal: Implications for the World Bank*, Climate Advisers (Oct. 2011), available at: <https://www.climateadvisers.com/wp-content/uploads/2014/01/2011-10-The-Social-Cost-of-Coal.pdf>.