

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>

[X]th CONGRESS
[X]th Session

H.R. [XXXX]

To amend the Coal Leasing Act of 1976 to include a more robust definition of Fair Market Value.

IN THE HOUSE OF REPRESENTATIVES
[DATE]

[Congressperson] introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend the Coal Leasing Act of 1976 to include a more robust definition of Fair Market Value.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the “Coal Leasing Act of [20XX].”

SECTION 2. “FAIR MARKET VALUE” DEFINITION.

(a) Chapter I of the Federal Coal Leasing Amendments Act 30 U.S.C. 201 is amended by inserting a new subsection under 201(a)(2)(A) as follows:

“Fair market value” is defined as that amount in cash, or on terms reasonably equivalent to cash, that represents the full and fair value of federal land proposed for coal leasing. The Secretary must consider the following principles when determining the fair market value:

- 1) the price a reasonable buyer or seller would purchase, sell, or lease the land for;
- 2) the export value of any coal mined from the federal land, including:¹
 - a) the export potential for the coal; and²
 - b) the price at which the coal could be sold in export
- 3) the option value of the federal land, including the decision not to mine the land;³

¹ The value of coal exports, mostly to East Asia, provides a significant windfall for U.S. coal companies that lease land for coal extraction from the federal government and then sell the extracted coal at great profit offshore. The current calculation provides no consideration of export value and thus undervalues the coal mined from leased federal lands, at the expense of the public. An alternative to the proposed text could include a more robust requirement, to the effect of requiring that “‘export value’ means the amount in cash any coal mined from the proposed tract would sell for in international markets.” This should be reasonably calculable via global coal marketplaces.

² According to a 2013 GAO report, BLM was “not fully considering the export potential of a lease tract’s coal” and where coal’s export potential was considered, state offices were not consistent in their approach. U.S. Gov’t Accountability Office, GAO-14-140, Coal Leasing (2013). Among other potential tools for capturing export price, BLM could request pricing details of any contracts for overseas export held by a bidder or require submission of contracts held by the bidder and its affiliates as part of the leasing process.

³ Option value, sometimes referred to as “non-use value”, could potentially exceed the FMV (as otherwise calculated) of the lease. In such cases BLM may increase the leasing price or decline to execute the lease altogether.

- 4) the social cost of mining the coal, including:⁴
 - a) greenhouse gas emissions related to the mining, transport, and use of coal;⁵
 - b) pollution of nearby areas, including but not limited to water sources, groundwater, and soil, from mining runoff and industrial waste;⁶
 - c) air pollution related to the mining, transport and use of coal resulting in detrimental health effects;⁷
 - d) other environmental harms, including the impact of mining on other natural resources like water usage and habitat loss, and soil erosion; and⁸
 - e) other impacts on human health, such as fatal injuries, black lung disease, asthma, lung cancer, congestive heart failure and strokes.⁹

The calculation must also ensure that the timing and location of exploration and mine development:

- a) is based on consideration of the region, environmental risks, and interests of the local community;
- b) balances the potential environmental damages; and
- c) considers the impact of coal leasing and development on climate change.

The Secretary shall not accept a bid for lease that is less than the fair market value of the federal land to be leased, even if a bid is above the minimum bid requirement.¹⁰

In determining the fair market value, the Secretary:¹¹

- 1) may utilize external agency data, including:
 - a) consulting with other agencies with relevant expertise relating to coal exports; or
 - b) consulting with local government officials and representatives of individuals or organizations engaged in activity in areas that will be impacted by the lease; or
 - c) obtaining or pay for information from other agencies or private sources.
- 2) shall not rely on information from lease sales conducted more than 5 years before the date of the proposed lease sale for purposes of calculating fair market value; and
- 3) shall consider domestic coal reserve estimates; and
- 4) shall maximize the financial return per ton of coal for the United States government.¹²

⁴ Some of these social costs may be calculated as part of the NEPA process or otherwise at a later stage of the coal leasing process, such that they would not ordinarily be available for use in FMV determinations. However, BLM (together with prospective lessees) may be required to reach at least provisional assessments of these costs in order to take them into account in calculating FMV, even if these variables are not calculated with the same degree of precision as at subsequent stages of the process.

⁵ Determining the cost of GHG emissions from mining, transport, and, especially, use of coal from a prospective lease may be challenging at this stage in the coal leasing process, and may create practical and political difficulties. Given the critical impact of GHG emissions from coal combustion, the associated costs should be considered within the scope of FMV. However, this component could be removed if critical. Any number of social cost of carbon tools are available to evaluate the emissions-based cost on the public of these activities. A draft bill could mandate the use of a tool, without mandating a specific one. Greenhouse gas emissions are “likely the most significant externality from coal mining.” Jayni Foley Hein & Peter Howard, *Reconsidering Coal’s Fair Market Value: The Social Costs of Coal Production and the Need for Fiscal Reform*, Inst. For Pol’y Integrity 11 (2015). In the U.S., coal mining is the fourth largest source of methane gas emissions. *Id.* Methane has a global warming potential that is 86 times greater than carbon dioxide in the first twenty years after it is released. *Id.*

⁶ Coal mining can pollute waterways and sensitive waterways with acid drainage and other runoff.” Jayni Foley Hein & Peter Howard, *Reconsidering Coal’s Fair Market Value: The Social Costs of Coal Production and the Need for Fiscal Reform*, Inst. For Pol’y Integrity 11 (2015).

⁷ Air pollution from the expenditure of the coal for electric (or other) purposes could be quantified, but it might be easier to start with just nearby air pollution from the mining byproducts.

⁸ For example, the U.S. Department of Energy estimates that domestic coal mining uses 70 to 260 million gallons of water daily. .” Jayni Foley Hein & Peter Howard, *Reconsidering Coal’s Fair Market Value: The Social Costs of Coal Production and the Need for Fiscal Reform*, Inst. For Pol’y Integrity 11 (2015). Additionally, the transportation of coal emits greenhouse gases and particulate matter. *Id.* A 2016 Obama Administration report states, “[o]n net, increasing royalty payments to ensure a fair return to the taxpayer would decrease . . . total nationwide emissions,” and create a better return for taxpayers, which would improve coal mining’s economic efficiency. Executive Office of the President of the United States, *The Economics of Coal Leasing on Federal Lands: Ensuring a Fair Return to Taxpayers* (2016).

⁹ EarthTalk, *How Coal Kills*, Sci. Am. (Feb. 17, 2015) <https://www.scientificamerican.com/article/how-coal-kills>.

¹⁰ The minimum bid has been \$100 per acre since 1982. U.S. Gov’t Accountability Office, GAO-14-140, *Coal Leasing* (2013). If the statute accounted for inflation, in 2015 the minimum bid would have been \$247 per acre. Jayni Foley Hein & Peter Howard, *Reconsidering Coal’s Fair Market Value: The Social Costs of Coal Production and the Need for Fiscal Reform*, Inst. For Pol’y Integrity 8 (2015).

¹¹ These requirements are taken from Senator Markey’s bill proposal, S. 737, 115th Cong. § 5 (2017).

¹² Although the Coal Leasing Amendments Act of 1976 requires BLM to offer federal coal leases competitively, the 2013 GAO report found that approximately 90% of coal leases since 1990 attracted only one bidder. U.S. Gov’t Accountability Office, GAO-14-140, *Coal Leasing* (2013). The lack of competition costs American taxpayers billions of dollars on the nearly 400 million tons of coal produced annually from federal lands. *Senator Markey to Reintroduce Legislation to Reform Coal Leasing on America’s Public Lands* (Aug. 8, 2017), <https://www.markey.senate.gov/news/press-releases/senator-markey-to-reintroduce-legislation-to-reform-coal-leasing-on-americas-public-lands>.

The Secretary shall publish the Secretary's calculation of fair market value for all proposed and actually leased tracts, where such calculation has taken place on or after the effective date of this Act, to ensure that calculation fulfills the requirements of this Section.¹³ Such calculation must:¹⁴

- 1) be presented in a formal, documented appraisal report;
- 2) include a fair market value determination; and
- 3) be accessible to the public on the website of the Bureau of Land Management.

¹³ This requirement is key to ensuring actual compliance and removing a fog, which creates opportunity for regulatory capture.

¹⁴ These requirements are taken from Senator Markey's bill proposal, S. 737, 115th Cong. § 5 (2017).