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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

September 28, 1984

RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION

RELEASED

B-178726

The Honorable Mike Synar
Chairman, Subcommittee on Environment,
Energy and Natural Resources
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

Subject: Verification of Abandoned Coal Mine Reclamation Fees Reported and Paid to the Department of the Interior Through Third Party Sources (GAO/RCED-84-202)

Section 402 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1232, provides that all operators of coal mining operations subject to the provisions of the act shall pay to the Secretary of the Interior a reclamation fee of 35 cents per ton of coal produced by surface coal mining, 15 cents per ton of coal produced by underground mining, or 10 percent of the value of the coal at the mine, as determined by the Secretary, whichever is less. Reclamation fees are to be paid by coal operators no later than 30 days after the end of each calendar quarter.

Your February 21, 1984, letter asked that we conduct a review to provide information on the extent of underreporting of reclamation fees due and payable to the Department of the Interior. During our work, we accompanied officials from Interior's Office of Surface Mining (OSM) on several audits of coal mine operators in Kentucky. We noted instances where coal production reported by the operators was less than their records showed they had produced.

This type of underreporting is easy to detect. On the other hand, if an operator produces more coal than he records in his production records and reports to OSM, an examination of his records will not disclose such underreporting. An independent third party source of production information is therefore needed to verify the accuracy of an operator's records. Such sources would include the records of the recipients of the operator's coal. Such recipients would include railroads, which transport coal, and tipples, which receive, crush, store, and load coal into railroad cars.

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In a July 3, 1984, meeting with your office, we turned over to you, in response to your February 21, 1984, request, a statement of facts that presented the results of our field work in Kentucky on the extent of underreporting of abandoned mine reclamation fees due and payable to the Department of the Interior. This statement discussed (1) the process OSM uses to verify reported coal production and abandoned mine reclamation fees paid, (2) the results of several on-site OSM audits of coal mine operators in Kentucky, and (3) OSM's access to records of independent third parties, which is needed to verify the accuracy of coal mine operators' records.

We also advised your office that neither OSM nor GAO had access to the records needed to perform the work you requested. This position was taken based on our legal analysis and several contacts we had with Interior and other federal agencies and one railroad. In this connection, there has been a recent court decision, which, if upheld, may ultimately result in a substantial expansion of Interior's authority to obtain records from third party sources which could be used to verify coal operators' production figures.

In response to your July 9, 1984, request and subsequent agreements with your office, this letter presents in greater detail the results of our efforts to obtain records of third parties. Also, to the extent third parties have relevant information but we do not have access to such information, you asked for a legal analysis of our inability to obtain such information.

DETERMINATION AND POSSIBLE USE OF THIRD PARTY INFORMATION

After our work started in February 1984, we pointed out to your office our initial concerns that to meet your request a method was needed to determine the accuracy of a coal mine operator's production records. On May 2, 1984, we advised your office that (1) our preliminary legal analysis revealed that no reasonable method was available to us that would produce the information needed to show the extent of underreporting of coal produced and fees owed by verifying coal production figures at sources other than the coal operators and (2) auditing selected coal operators' records at their place of business would be essentially the same approach as OSM fee compliance officers use.

We also advised your office of the reasons why other approaches, which would have involved using third party information, did not appear feasible. Generally, these approaches involved verifying each selected coal operator's production through information reported to the Interstate Commerce Commission and examining the records of private railroads and tipple

operators who crush, store, load, or transport coal. We performed this work by interviewing officials at the Department of the Interior, the Energy Information Administration of the Department of Energy, and the Interstate Commerce Commission. We reviewed records, reports, and other documents as well as applicable federal laws and regulations. We also interviewed an official of the Chessie System Railroads. Except for not obtaining agency comments, our review was performed in accordance with generally accepted government auditing standards.

Our access rights to independent third party records is discussed on the following pages.

General access authority

Our general access to records authority (31 U.S.C. 716(a) (1982)) does not apply to private parties--it applies only to federal agencies. In order for us to have access authority over records of private parties such as private railroads and tipple operators, such authority would have to be specifically established by law or by agreement. We are aware of no law or agreement that gives us access to records to perform the work you requested. Several specific statutes grant us access to records of private parties. However, as discussed below, none is applicable here.

Section 501(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6381(a) (1982), authorizes us to examine, for purposes of verification, records of (1) any person required to submit energy information to Interior, among other agencies, under any rule, regulation, order, or other legal process of such agency, or (2) any person engaged in the production, processing, refining, transportation by pipeline, or distribution (at other than the retail level) of energy resources if (a) such person furnished, directly or indirectly, energy information to any federal agency (other than the Internal Revenue Service) and (b) we determine that such information has been or is being taken into consideration by a federal agency in carrying out its responsibilities.

Section 501(a) of the act does not give us access to the records of the private parties here in question because they do not fit within either of the two categories set out in the statute. Neither the railroads nor the tipple operators, as far we can determine, is legally required to supply energy information to Interior; nor are the railroads or tipple operators engaged in the production, processing, refining, transportation by pipeline, or distribution (at other than the retail level) of energy resources.[1] By specifying "transportation by pipeline,"

[1]Arguably, railroads or tipple operators owned by parties engaged in one of the enumerated activities could fit within this category.

the statute implicitly excludes transportation by rail. Similarly, although it could be argued that tipple operators and railroads are persons engaged in "distribution," had the Congress intended distributors to encompass persons engaged in transportation, it was unnecessary to use the phrase "transportation by pipeline." Indeed, such a construction makes the phrase "transportation by pipeline" superfluous. A more natural construction of "distribution (at other than the retail level)" is to read it to encompass wholesalers of energy resources.

Furthermore, 42 U.S.C. 6381(a) authorizes our access for purposes of the verification of "energy information." The information to be verified is ultimately reclamation fee information, which is not energy information as defined in subsection 6381(c). The purpose of verifying the accuracy of energy information under section 6381(a) is "to permit independent and objective evaluation of energy data from which realistic projections can be made and on which future energy policy decisions will be based." Even if the coal production information were to be considered energy information, the purpose of the verification remains to determine the accuracy of reclamation fees, which is not consistent with the quoted purpose of section 6381(a).

A second possible source of access to private records is section 12 of the Federal Energy Administration Act of 1974, 15 U.S.C. 771(a) (1982), which gives us access, in order to monitor and evaluate the operations of the Department of Energy (DOE), to "such data within the possession or control of the [Department of the Energy] from any public or private source as are necessary to carry out [its] responsibilities under this [law]." In addition, 15 U.S.C. 771(b) permits us to request access to any

> "books, documents, papers, statistics, data, records, and information of any person owning or operating facilities or business premises who is engaged in any phase of energy supply or major energy consumption, where such material relates to the purposes of this [law], including but not limited to energy costs, demand, supply, industry structure, and environmental impacts."

Section 12 of the act gives us access to and the right to examine any "books, documents, papers, records, or other recorded information of any recipients of Federal funds or assistance under contracts, leases, cooperative agreements, or other transactions entered into [under this law]."

Our authority under 15 U.S.C. 711 to obtain records and information from private parties is limited to situations where

the material or information relates to the operations, policies, or activities of DOE or where the party is a recipient of federal funds or assistance under provisions of the Federal Energy Administration Act of 1974. Records of railroads and tipple operators would be subject to our access authority only to the degree they are related to our monitoring responsibility over DOE. Since our work is related only to Interior operations, this provision would not authorize access to the private records in question.

Interstate Commerce Commission

On June 28, 1984, we requested that the Commission, in connection with its regulation of transportation, provide any information or records showing how much coal was transported from specific locations and the dates of such transportation. The Commission responded on July 17, 1984, by disclosing that it keeps some shipping data, which are based on a sample of waybills from all terminated shipments. But because of 49 U.S.C. 11910, the Commission takes the position that it "cannot disclose data for individual shippers 'except as directed by the Commission, a court, or a judge of court.'" The Commission said also that the waybill data are based on a probability sample and do not lend themselves to meaningful comparisons on a mine location or county basis.

The Commission said that it could provide, without limitations, a tabulation, in tons, of coal shipments originated by state for any recent year up to 1982. If the data are released by county, they must be aggregated so that they contain at least three shippers and at least three railroads. In our opinion, aggregate data either by county or state will not be useful to measure the coal production of individual mine operations.

Railroad transportation data

On July 11, 1984, we contacted the Chessie System Railroads to determine our ability to access that company's records in order to identify coal shippers or consignees, coal tonnages transported from specific locations, and dates of shipments. In response to our inquiry, the company's general counsel stated on July 12, 1984, that the Interstate Commerce Act, as revised by Public Law 95-473, does permit, by not preventing, a carrier to give transportation information to a federal agency without violating the act's unlawful disclosure of information provision (49 U.S.C. 11910(b)).

Although the company could grant us access to its records and files, the company's general counsel stated that a "voluntary" release of those data by his company would jeopardize his

company's relationship with its customers. The company's general counsel said that without a court order the company would not provide GAO access to its records. As previously discussed, GAO's right of access under existing statutes does not provide a basis for seeking such a court order.

Tipple operators

On July 5, 1984, OSM published revised regulations (30 C.F.R. 870) concerning reclamation fee collection requirements and coal production reporting procedures. OSM clarified 30 C.F.R. 870.16(a) to put all surface mining operators and any persons engaging in or conducting a surface coal mining operation on notice that they will be required to keep records of coal produced, used, bought, or sold. The previous rule implied but did not specifically require these persons to keep records of purchased coal. OSM also clarified 30 C.F.R. 870.16(b) by stating that its fee compliance officers have the authority to review records of all surface mining operations, including preparation plants and support facilities (tipples), resulting from or incident to a mine or other regulated activity.

A recent decision in the United States District Court for the District of Columbia, Civil Action No. 79-1144, July 6, 1984, written by Judge Thomas A. Flannery, construed the scope of the Department of the Interior's authority under SMCRA and may ultimately result in a substantial expansion of Interior's authority. In his decision, Judge Flannery ruled that Interior had too narrowly defined its authority under SMCRA to regulate coal processing and support facilities. The decision also struck down Interior's position that its authority under SMCRA to regulate support or processing facilities was limited to those facilities that were geographically near surface coal mining operations. This decision, if upheld, could ultimately result in a substantial expansion of Interior's authority to obtain the records of independent tipple operators which are determined by Interior to result from or are incident to surface coal mining operations (30 U.S.C. 1291(28)). Interior officials estimated that from 1,000 to 2,000 additional tipple operations might come under Interior's authority if this decision is upheld. As of September 6, 1984, Interior had no plan to appeal the decision.

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Although this letter concludes our work in accordance with your February 21, 1984, request, we intend to follow closely the impact of the recent court decision. If the scope of Interior's SMCRA jurisdictional authority as outlined in Judge Flannery's decision is implemented either by regulation or by judicial or administrative decision, we will be glad to work with your office in determining the extent to which coal mine operators are

underreporting abandoned mine reclamation fees to the Department of the Interior.

In accordance with a request by your office, we did not obtain agency comments on this report. Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time, we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

J. Dexter Peach
Director