

GARDERE & WYNNE, L.L.P.

ATTORNEYS AND COUNSELORS

200 ONEOK PLAZA
 100 WEST FIFTH STREET
 TULSA, OKLAHOMA 74103-4240
 918-699-2900
 TELECOPIER 918-699-2929

WRITER'S DIRECT DIAL NUMBER
 918-699-2920

DALLAS
 3000 THANKSGIVING TOWER
 1601 ELM STREET
 DALLAS, TEXAS 75201-4761
 214-999-3000
 HOUSTON
 THREE ALLEN CENTER
 535 GLAY AVENUE, SUITE 800
 HOUSTON, TEXAS 77002-4086
 713-308-5500
 MEXICO CITY
 RIO PANUCO NO. 7
 COL. CUAUHTEMOC
 06500 MEXICO, D.F.
 011 (525) 546-8023

*via facsimile (303) 231-3385
 and certified mail*

March 15, 1999

Mr. David S. Guzy, Chief
 Rules and Publications Staff
 Minerals Management Service
 Royalty Management Program
 P.O. Box 25165
 MS 3021
 Building 85
 Denver Federal Center
 Denver, Colorado 80225-0165

**Re: Notice of Proposed Rulemaking: Department of the Interior,
 Office of Hearings and Appeals, Minerals Management Service,
 Appeals of MMS Orders
 64 Fed. Reg. 1930 dated January 12, 1999**

Dear Mr. Guzy:

The undersigned Trade Association and companies are pleased to have the opportunity to comment in the above referenced proposed rulemaking. These companies are lessees and payors who report and pay federal royalties. The IPAA is a national trade association representing independent oil and natural gas producers in the 33 producing states. As such, the undersigned are impacted by the proposed rule. Having participated in the congressional dialogue surrounding the passage of the Federal Oil and Gas Royalty Simplification and Fairness Act (FOGRSFA), these companies are keenly aware of the intent of FOGRSFA to

March 15, 1999
Page 2

streamline, simplify and shorten the Department's appeals process.

I. FOGRSFA

On August 13, 1996 the Federal Oil and Gas Royalty Simplification and Fairness Act (FOGRSFA), was signed into law by President Clinton. The Act provided that the Department's appeals process be streamlined in order that appeals be completed in 33 months from commencement to completion. 30 U.S.C. § 1724(h):

"APPEALS AND FINAL AGENCY ACTION.

PERIOD. - Demands or orders issued by the Secretary or a delegated State are subject to administrative appeal in accordance with the regulations of the Secretary. No State shall impose any conditions which would hinder a lessee's or its designee's immediate appeal of an order to the Secretary or the Secretary's designee. The Secretary shall issue a final decision in any administrative proceeding, including any administrative proceedings pending on the date of enactment of this section, within 33 months from the date such proceeding was commenced or 33 months from the date of such enactment, whichever is later. The 33-month period may be extended by any period of time agreed upon in writing by the Secretary and the appellant."

II. October 28, 1996 Federal Register Notice

On October 28, 1996, the MMS published a proposed regulation that would have amended 30 CFR 290, *Administrative Appeals Process*. On December 23, 1997, the comment period for the October 1996 notice was extended until March 23, 1997. There were several comments submitted to the proposed rule amendments. On December 31, 1997, MMS announced its intent to withdraw the October 1996 proposed rule.

III. Royalty Policy Committee

To implement the appeals provisions of FOGRSFA, the Royalty Policy Committee (RPC) established a subcommittee which met numerous times. On March 21, 1997, the RPC Subcommittee on Appeals and Alternative Dispute Resolution issued their report (the

March 15, 1999
Page 3

"Report"), which contained a number of recommendations. The Report was accepted unanimously by the RPC, and presented to the Secretary of the Interior on March 27, 1997. Subsequently, on September 22, 1997 the Secretary accepted the report for implementation with qualifications.

IV. Current Federal Register Notice - 64 Fed. Reg. 1930, January 12, 1999

On January 12, 1999 the MMS withdrew its October 28, 1996 Proposed Rule. The 63 page Federal Register Notice proposed new regulations which varied considerably from the RPC report.

V. General Comments to Proposed Rule

1. *The issue of the application of correct and consistent policy during the appeals process is critical and has not been addressed in the proposed regulations. There are long-lived concerns with either unstated, unclear or changing policy determinations during the audit and appeals process which occurs years after the royalty payments are due.*
2. *While an "order" or "demand" may be appealed, MMS has the sole discretion to classify a policy decision as either an order or a demand. Any value determination or policy decision should be classified as a demand or an order with the right to appeal given to any person affected by the demand or order. There is a very ambiguous and uncertain gray area between express rules promulgated under the APA and actual orders. This gray area includes policy statements and some payor letters that contain policy statements. This ambiguity on what is appealable should be eliminated in order to provide certainty and access to the appeals process.*

VI. Specific Comments

3. Proposed Rule § 242.3

"Reporter means a person who submits reports for leases subject to this part regardless of whether that person has payment responsibility."

March 15, 1999
Page 4

Comment:

This definition introduces a new concept which is different from, but related to, the definitions of lessee, designee, and payor. The reason for including this term is not clear.

2. Proposed Rule §242.102. What may MMS, tribes, or delegated States do before issuing an order?

“Before issuing an order under this subpart, MMS, a tribe, or a delegated State may send you a Preliminary Determination Letter.”

Comment:

RPC Recommendation 4 directs that audit officials will issue a preliminary finding prior to issuance of an order. To the contrary, §242.102 makes the issuance of a PDL totally discretionary. The RPC subcommittee believed the process of issuing a preliminary finding was an important one. The discretionary “may” language in the proposed rule should be changed to “shall” or otherwise made applicable to the majority of cases.

3. Proposed Rule §242.105. What does an order contain?

“(a) An order must include:

- (1) A description of the audit, review, or investigation that results in the order;
- (2) The factual findings and the legal or policy basis for the order;
- (3) Instructions on how to comply with the order;
- (4) Instructions on how to appeal the order; and
- (5) A list specifying:
 - (i) Lessees who receive notice under §242.106(b);
 - (ii) Representatives of any Indian lessors affected by the order; and

March 15, 1999
Page 5

(iii) Relevant MMS offices, the Office of the Solicitor, delegated State or tribal offices, and representatives of States concerned.”

Comment:

Pursuant to FOGRSFA, a demand or an order to pay must contain

- 1. A reasonable basis to conclude that the obligation is due and owing;*
- 2. A specific, definite and quantified obligation claimed to be due and*
- 3. Specifically identify the obligation by lease, production month and monetary amount; and*
- 4. The reasons the obligation is claimed to be due.*

These criteria should be added to the proposed rule.

4. Proposed Rule §242.106. How will MMS and delegated States serve orders?

“(a) MMS and delegated States will serve orders under §242.303 to the address that you provide under §242.304.

(b) If MMS or a delegated State serves an order to a designee, as defined in 30 U.S.C. 1701(23), MMS or the delegated State will notify the designee's lessee(s). This notification will be in the form of a Notice of Order that:

- (1) Tells the lessee that MMS or the delegated State has issued an order to the lessee's designee;
- (2) Includes information about the designee who received the order; and
- (3) Is served at the same time and in the same way the order was served.

(c) If a lessee does not designate a designee in writing as required under 30 CFR 218.52, then MMS or a delegated State will serve the order on the person currently making royalty or other payments on the lessee's behalf. In these cases:

March 15, 1999
Page 6

(1) MMS or the delegated State is not required to serve the lessee with the Notice of Order required under paragraph (b) of this section; and

(2) The lessee remains liable for any royalty or other payments due under the order, regardless of the fact that MMS or the delegated State did not serve the lessee with a Notice of Order under paragraph (c)(1) of this section.”

Comment:

This provision of the regulation is troublesome. MMS is assuming that if it does not have a designation on file, that the payor is the lessee. Under FOGRSFA's definition of demand, the order must be issued to a lessee or its designee. The drafted provision would not therefore fall within the express definition of demand. The regulation attempts to impose liability on a lessee who has not been provided notice or served with the order. This appears violative of due process.

5. Proposed Rule §242.303. How will MMS and delegated States serve official correspondence?

“(a) MMS and delegated States will serve official correspondence using a method that provides for receipt confirming delivery, such as: certified mail, overnight delivery service, or personal service.”

Comment:

The correspondence should be sent restricted to the addressee. If received by someone other than the addressee, it should not be considered served.

6. Proposed Rule §242.305. When is official correspondence considered served?

“(a) Except as provided in paragraph (b) of this section, official correspondence is considered served on the date that it is received at the address of record under §242.304. A receipt from any person at the address of record is evidence that the correspondence was received. If official correspondence is served by more than one method, the date of service is the earliest date it is received by a method authorized under §242.303(a).

March 15, 1999

Page 7

(b) If MMS or a delegated State cannot deliver the official correspondence after reasonable effort to the addressee of record under §242.304, official correspondence is deemed to have been constructively served 7 days after the date that MMS or a delegated State mailed the document...

Comment:

It is questionable whether this service provision is constitutional. Most laws provide that in lieu of actual service due process requires a diligent effort to locate and serve a defendant after which publication service may be acceptable. This provision does not appear to meet that criteria.

7. Proposed Rule - 43 CFR PART 4 SUBPART J §4.904. Who may file an appeal?

“(a) If you receive an order that adversely affects you, you may appeal that order except as provided under §4.905.

(b) If you are a lessee and you receive a Notice of Order, and if you contest the order, you may either appeal the order or join in your designee's appeal under §4.908.

(c) If you are an Indian lessor, you may file an appeal of any MMS decision not to issue an order under 30 CFR part 242 that adversely affects you.”

Comment:

A provision must be added that specifically permits a designee to appeal an order and contemporaneously give notice of appeal to the lessee.

8. Proposed Rule §4.903. What definitions apply to this subpart?

“**Affected** means, with respect to delegated States and States concerned, that the appeal concerns an order regarding a Federal onshore or OCS lease, within a State's borders or offshore of the State, from which the State, or a political subdivision of the State, receives a statutorily-prescribed portion of the royalties; and, with respect to Indian lessors, that the appeal concerns an order regarding the Indian lessor's federally-administered mineral lease.”

March 15, 1999
Page 8

Comment:

This definition is difficult to understand. Both of the terms "delegated state" and "State Concerned" are defined by FOGRSFA. It appears "affected" means the same as "State Concerned"

9. Proposed Rule - Definition

"Monetary obligation means any requirement to pay or to compute and pay any obligation in any order. For purposes of the default rule of decision in §§ 4.956 and 4.972, and 30 U.S.C. 1724(h):

(1) If an order asserts a monetary obligation arising from one issue or type of underpayment that covers multiple leases or production months, the total obligation for all leases or production months involved constitutes a single monetary obligation;

(2) If an order asserts monetary obligations arising from different issues or types of underpayments for one or more leases, the obligations arising from each separate issue, subject to paragraph (1) of this definition, constitute separate monetary obligations; and

(3) If an order asserts a monetary obligation with a stated amount of additional royalties due, plus an order to perform a restructured accounting arising from the same issue or cause as the specifically stated underpayment, the stated amount of royalties due plus the estimated amount due under the restructured accounting, subject to paragraphs (1) and (2) of this definition, together constitutes a single monetary obligation."

Comment:

This is a convoluted definition which uses the term it is attempting to define within the context of the definition. It appears the definition of monetary obligation should be "monetary obligation means any duty of the lessee to pay, offset or credit monies which arise from or relate to any lease administered by the Secretary."

It appears that the purpose of this paragraph is to capture all orders into the category of a monetary obligation over \$10,000 so they will not be subject of the default provisions of (h)(2)(A). Under FOGRSFA, obligation is a very finite term

March 15, 1999
Page 9

which is the principal amount due on each lease for each month. This provision attempts to use the term obligation to mean all leases for all months, and appears to be an attempt to avoid the statute of limitations provisions of FOGRSFA altogether. This use of the definition of obligation is inaccurate.

10. Proposed Rule - Definition

“ Nonmonetary obligation means any duty of a lessee or its designee to deliver oil or gas in kind, or any duty of the Secretary to take oil or gas royalty in kind.”

Comment:

This definition is a creative interpretation of a nonmonetary obligation and curiously also includes a duty of the Secretary. The definition of monetary obligation does not likewise include duties of the Secretary.

“**Proposed Rule**”- Order means any document issued by the MMS Director, MMS RMP, or a delegated State that contains mandatory or ordering language that requires the recipient to do any of the following for any lease subject to this subpart: report, compute, or pay royalties or other obligations, report production, or provide other information. An order includes any order issued under 30 CFR part 242 by MMS or a delegated State.

(1) Order includes but is not limited to the following:

(i) An order to pay;

(ii) An MMS or delegated State decision to deny a lessee's, designee's, or payor's written request that MMS make a payment, refund, offset, or credit of money to the lessee or designee related to the principal amount of any royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or any interest or assessment related to a lease obligation;

Comment:

The (ii) subsection appears to be denial of a “demand” as defined in FOGRSFA. It would be preferable to use the word demand here.

March 15, 1999
Page 10

11. Proposed Rule §4.907. How must I file an appeal?

“(a) For your appeal to be filed, the MMS DRD must receive all of the following by the deadline in §4.906:

(1) A written Notice of Appeal and a copy of the order, or MMS decision not to issue an order, that you are appealing. You cannot extend the 60-day period for MMS to receive your Notice of Appeal;

(2) A written Preliminary Statement of Issues you will raise on appeal. You must specifically identify the legal and factual disagreements you have with the order, or MMS decision not to issue an order, that you are appealing. See appendix A to this subpart for an example of a Preliminary Statement of Issues;

(3) A nonrefundable processing fee of \$150 or a request for reduction or waiver under §§4.965 or 4.966. Indian lessors do not have to pay a processing fee.”

* * *

Comment:

The \$150 filing fee will have a chilling effect on smaller companies because of limited resource issues. The proposed fee is considerably more burdensome than existing rules. The fee is also objectionable and burdensome on the lessee for disputes which involve smaller amounts; sometimes less than \$1,000. The timing of when the filing fee is due should be addressed for bills that are resolved and withdrawn.

In addition, the existing rules provide for a grace period for instances where an appeal is inadvertently misdirected but which reaches the proper location within 10 days. This provision should be incorporated in the proposed rule. Further, to reduce administrative burdens, provisions (2) and (3) above should be implemented at a later stage in the appeals process. Moreover, if these provisions are included in the proposed rule compliance with them should not rise to the level of a jurisdictional question, failure to comply with which would result in the dismissal of an appeal.

March 15, 1999

Page 11

12. Proposed Rule §4.911. When does my appeal commence?

“(a) For purposes of the period in which the Department must issue a final decision in your appeal under §4.956, or which the Department uses as guidance to track your appeal under §4.948, your appeal commences on the date the MMS DRD receives the last of all the items you must file under §4.907(a).

(b) If you file a request for an extension of time to file your Preliminary Statement of Issues or processing fee under §4.907(c), your appeal does not commence until the date the MMS DRD receives your Preliminary Statement of Issues and processing fee.

(c) If you requested a fee waiver or reduction under §4.966, your appeal does not commence until the date the MMS DRD:

- (1) Grants your request for a waiver;
- (2) Receives the reduced fee, if MMS grants your request for a reduction in the fee;
or
- (3) Receives the entire fee if MMS denies your request for a reduction in the fee.”

Comment:

This provision attempts to rewrite the statute of limitations provisions of FOGRSFA regarding the calculation of time. Its provisions place the date of commencement at the latest possible date upon which the appellant files the paper specified by the rule, and is therefore inconsistent with FOGRSFA provisions. The intent of FOGRSFA was for the commencement to occur, at the latest, on the date the Notice of Appeal was filed. The 33 month limitation period should start when the Notice of Appeal is filed.

13. Proposed Rule §4.916. Who must and who may participate in record development conferences?

“(a) Mandatory participation. The following persons must participate in all record development conferences:

March 15, 1999
Page 12

- (1) The appellant; and
- (2) Relevant MMS offices.

Comment:

What are the relevant MMS offices. The appeals branch? The policy branch? The auditors? The RVD? As mentioned previously the definition of "affected" is confusing in its use.

14. Proposed Rule §4.929. May the MMS Director concur with, rescind, or modify an order or decision not to issue an order that I appealed?

" (a) Within 60 days after the MMS DRD receives the record under §4.919 or § 4.920, the MMS Director may concur with, rescind, or modify the order or decision not to issue an order that you have appealed.

(b) Before the MMS Director rescinds or modifies an order or decision not to issue an order under paragraph (a) of this section, MMS will consult informally with:

- (1) The MMS office that issued the order or decision not to issue the order; and
- (2) Affected tribes or affected delegated States that participated in any record development or settlement conference.

(c) MMS also may consult informally with:

- (1) Other relevant MMS offices;
- (2) States concerned; and
- (3) Affected Indian lessors.

(d) MMS will notify you in writing that the MMS Director has concurred with, rescinded or modified the order or decision not to issue an order you have appealed. A notice of rescission or modification will state the reasons for the rescission or

March 15, 1999

Page 13

modification.

(e) If the MMS Director does not act by the deadline in paragraph (a) of this section, the MMS Director is deemed to have concurred with the order or decision not to issue an order.”

Comment:

The RPC recommended that the Director take a position in the form of an internal memo. The RPC report clearly stated that there would be a single appeals process to the IBLA. This provision has been reframed now as an official bureau action. This may put the burden of proof on the lessee. The reframing of this provision creates the presumption of regularity, and raises the possibility for the need of lessee to challenge the “Director’s decisions”. Any language which contemplates or leaves ambiguous the fact of a single level appeals system within the Department should be clarified. Such revisions are imperative in properly implementing the RPC report.

15. Proposed Rules §4.931. If the MMS Director rescinds or modifies an order, how does it affect the statutory limitations period?

“For purposes of determining whether an order is timely under 30 U.S.C. 1724(b)-(d): (a) If the MMS Director modifies an order under §4.929, the timeliness of the order is not affected and the modified order is timely if the original order was timely. The MMS Director’s modification will not address production not included in the original order.

(b) If the MMS Director rescinds all or part of an order under §4.929, and if IBLA, an Assistant Secretary, the Director of OHA, the Secretary, or a court reinstates that order, in whole or in part, then the reinstated order relates back to the date the order was originally issued, and the reinstated order is timely if the original order was timely.”

Comment:

This provision appears to be in conflict with FOGRSFA and its definition of order which requires specificity as to lease identification, product month and amount. Permitting of the director to unilaterally modify an order after the of limitations period has run would contravene FOGRSFA.

March 15, 1999
Page 14

16. Proposed Rule §4.939. How do I file my Statement of Reasons or Intervention Brief?

“(a) If the IBLA is deciding your appeal, you must file your Statement of Reasons or Intervention Brief with IBLA under §4.960 within the times required under §§4.933 and 4.934.

(b) If an Assistant Secretary is deciding your appeal under §4.937, you must file your Statement of Reasons with that Assistant Secretary under § 4.960 within 60 days after the MMS DRD has received the record under §§4.919 or 4.920.

(c) You must pay a nonrefundable processing fee of \$150 with your Statement of Reasons as required under §4.965 or seek a reduction or waiver under §4.966 within the time required under §§4.933 and 4.934. Indian lessors and delegated States do not have to pay a processing fee.

(d) You must serve your Statement of Reasons or Intervention Brief on all parties to the appeal, and on other persons as required under §4.962.”

Comment:

The \$150 filing fee will have a chilling effect on smaller companies because of obvious resource issues. It is also objectionable for disputes which involve smaller amounts, sometimes less than \$1,000. The timing of when the filing fee is due should be addressed for bills that are resolved and withdrawn.

17. Proposed Rule §4.937. May an Assistant Secretary decide an appeal?

“(a) The Assistant Secretary for Land and Minerals Management (or the Assistant Secretary for Indian Affairs for an appeal involving an Indian lease) may decide an appeal if the Assistant Secretary notifies the appellant, the MMS DRD, interveners, and IBLA in writing any time up to 30 days before the date the appellant must file its Statement of Reasons or an intervener must file its Intervention Brief under §4.939

(b) If an Assistant Secretary will decide under paragraph (a) of this section, you must file all subsequent documents required under this subpart with the Assistant Secretary under §4.960.”

March 15, 1999
Page 15

Comment:

A document that the MMS sends to a lessee needs to have specific wording that indicates whether or not it is appealable. Also, it is fundamentally unfair for the Assistant Secretary to have the ability assume jurisdiction and decide an appeal, without first being required to submit a petition to the IBLA showing cause why he should be able to assume jurisdiction. The RPC recommended that the Assistant Secretary be required to go through these steps prior to exerting jurisdiction. The provisions of RPC Recommendation 30 should be incorporated into the proposed rule.

The undersigned Trade Association and companies appreciate the opportunity to comment on this important provision of FOGRSFA and look forward to continuing to work with MMS and the Department on its implementation. Please call if you have any questions or if we can be of assistance.

Sincerely,



Patricia Dunmire Bragg
on behalf of

Independent Petroleum Association of America

Anadarko Petroleum Corporation
BP Amoco
Chevron U.S.A. Production Company
Coastal Oil & Gas Corporation
Conoco, Inc.
Devon Energy Company
Dugan Production Company
Marathon Oil Company
Murphy Exploration and Production Company
Texaco, Inc.
Vastar Resources, Inc.