



KATIE SWEENEY
General Counsel

October 11, 2013

Armand Southall
Regulatory Specialist
Office of Natural Resources Revenue
P.O. Box 25165, MS 61030A
Denver, CO 80225-0165

Dear Mr. Southall:

The National Mining Association (NMA) submits these comments in response to the August 12 Office of Natural Resources Revenue (ONRR) proposed regulations to implement certain coal leasing provisions of the Energy Policy Act of 2005 (EPAAct). 78 Fed. Reg. 49061. NMA is submitting separate comments on the Bureau of Land Management (BLM) proposal to implement EPAAct. 78 Fed. Reg. 49079. Since both the ONRR and BLM proposed rules would impact the calculation of advanced royalty, NMA has attached its comments on the BLM proposal for your reference.

NMA represents producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to coal and hardrock mining. While NMA appreciates the agency finally moving forward to codify EPAAct in their regulations, NMA has significant concerns with the proposed rules, especially provisions that may not appropriately implement EPAAct or are not directly relevant to the subject or intent of EPAAct.

As a general comment, NMA believes that many of its concerns with the proposed rule could have been avoided had the agency vetted its approach with the Royalty Policy Committee (RPC), a group convened in 1997 by the Secretary of the Interior and charged with advising Interior on managing federal leases and revenues. Over the years, the RPC has been viewed as a reliable and trusted source of expertise on federal leasing issues. The RPC designated certain members with coal leasing expertise or interest to convene a RPC Coal Subcommittee to address coal royalty issues. Differing interests are represented on the committee including agencies, states, Tribes, industry and the public, which has resulted in open and frank discussion of federal royalty issues

from the perspective of all attendees. However, the RPC has not been very active over the last few years and in fact, the last meeting of the RPC Coal Subcommittee, the subcommittee most appropriate to review the ONRR proposal, was in early 2010.

NMA has been represented on the RPC and believes that this open dialogue has resulted in a better understanding and appreciation of the concerns of each constituency of the RPC and has provided the agency with valuable insights. The proposed rule should have been informed by the RPC expertise prior to its release.

COMMENTS ON THE ONRR PROPOSED RULE

- **New Information Collection Requirements**

ONRR is proposing a new form, "Solid Minerals Sales Summary" (Form ONRR-4440) to collect information from operators in order to determine a company's compliance with applicable laws, rules, and regulations. In addition, ONRR would use this proposed form to identify spot market sales of comparable coal from the same region and to determine an average price for Federal coal advance royalty purposes, despite the fact that existing contract data already provided to ONRR would provide such information.

Form ONRR-4440 will be implemented in two phases. Phase 1 is a modified version of the current system used to submit and handle unformatted sales summary data. Under this proposed rule, lessees would submit Form ONRR-4440 in a "standardized format" that would incorporate the critical additional data fields the proposed rule would require. It is unclear if ONRR will provide the standardized format reporting or whether the producer will have to create it. Therefore, NMA cannot comment directly on how resource intensive Phase 1 would be but the proposal does contemplate the continued use of Microsoft Excel. NMA supports the use of Excel as it will allow companies to link the current internal spreadsheets being submitted, after adjusting for the new required data to be reported, into the standardized format report that would be submitted.

Phase 2 would require lessees to submit proposed Form ONRR-4440 electronically in a specific format permitting the Web site to accept the form. Again, given the lack of detail in the proposal, it is difficult for NMA to comment of the burden associated with Phase 2. Specifically, the proposal does not indicate if the Phase 2 electronic reporting will allow for an upload of an Excel spreadsheet in a standardized format into the electronic form or if the information will need to be input directly for each customer/contract on a monthly basis. NMA urges ONRR to ensure that the Phase 2 electronic reporting system continue the availability of uploading the required data from a standardized Excel formatted report to significantly reduce the amount of time to report the required information each month compared to a requirement to input the information directly into the Web-based format.

In addition, under the proposal ONRR would require reporters to submit a *revised* Form ONRR-4440 when a reporter submits an *adjusted* Form ONRR-4430, the Solid Minerals Production and Royalty Report form. Reporters would be required to revise Solid Mineral Sales Summaries as often as they revise Solid Minerals Production and Royalty Reports. Without the Form ONRR-4430 instructions being available, it appears this would be an onerous proposed reporting change that may result in significant additional time to complete the current month Form ONRR-4430 and require amending previously filed Forms ONRR-4430 for any contract pricing adjustments invoiced and reported during the current month.

ONRR maintains that the revised Form ONRR-4440 data is necessary to ensure that ONRR has up-to-date spot market data as needed key to implement ONRR's and BLM's proposed coal advance royalty rules. Furthermore, ONRR asserts the submission of Form ONRR-4440 during these situations would enable the agency to monitor lessees' sales contract performance and continuity as needed to enhance ONRR's royalty compliance efforts. NMA is concerned that submission of the revised Form ONRR-4440 in these circumstances will create significant confusion. For example, requiring the prior month activity to be reported as a revision to a previously submitted Form ONRR-4440 creates a difference between the reported information for a period compared to the actual invoiced activity recorded for that period per the lessees' books and records. As a result, there will be significant confusion during future audits when auditors request invoices to compare against the gross proceeds reported for that month.

Furthermore, to the extent ONRR moves forward with a final rule and collects any new information, NMA believes this information should not be subject to public disclosure pursuant to the Freedom of Information Act (FOIA). Not only is this information confidential business information it would be subject to misinterpretation by those unfamiliar with the terms and processes.

- **Calculation of Advance Royalty by ONRR**

ONRR's proposed § 1218.602 sets forth a new method of computing advance royalty payments. This proposed provision states that ONRR will compute the value of coal advance royalties due for a lease or LMU by multiplying the commercial quantities in tons calculated under BLM proposed rule by the value that ONRR calculates under § 1218.602(a) and by the royalty rate that BLM prescribes under its proposed 43 C.F.R. § 3483.4(d). Essentially, it appears ONRR plans to apply an exact calculation definition to the spot market price used for the advance royalty calculation. This approach ignores the fact that advance royalties under the Mineral Leasing Act are intended to be an estimate of the royalty has the coal been actually produced and sold, rather than an actual calculation. See, for example, the due diligence requirements rule proposed in 1981. ("Advance royalties are payments made in advance of actual production and are

based on an **estimate** of the production royalties that would have been owed if the lessee had actually produced the amount of coal necessary to meet the requirement of continued operations;" and "Because advance royalties are payments made on coal which has not been produced, they can only **approximate** the actual amount of payment that will be due at the time of production." 46 Fed. Reg. 62232

Another flaw in moving from an estimate to an exact calculation is evidenced in § 1218.602(a)(1) which requires ONRR calculate advance royalty using "the weighted average spot market price lessees reported to ONRR . . . during the last month of each applicable continued operation year". Under ONRR proposed approach, the agency would be actually using the reported spot market price for all contracts entered into prior to the last month of each applicable continued operation year with shipments in the last month of each applicable continued operation year. Since coal contracts are generally agreed to and signed prior to the commencement of shipments under the contract (the lag time from agreeing and actual shipping will vary), and depending when the last month of the applicable continued operation year falls compared to when the contract was signed, ONRR's proposed method of using the reported spot market price during last month of the continued operation year may actually be using the reported spot market price for a contract entered into more than a year before from the last month of each applicable continued operation year.

In the proposal, ONRR specifically requests comments on whether to define the 'applicable continued operation year' (COY) referenced in §1218.602 in the manner proposed, or in a manner consistent with previous practice. NMA believes ONRR should define COY as proposed since that approach is consistent with the language of EAct. ONRR hesitancy to proceed as proposed relates to concerns that the proposed approach would result in time loss of the value of revenue since the previous practice was determine value using prices of coal produced and sold during the immediately preceding production royalty payment period. ONRR cannot use this rationale as the basis to ignore the EAct statutory language that the advance royalty is due at the end of the continuous operating year instead at the beginning as was the past practice. Furthermore, ONRR lament about the time loss of the value of revenue ignores the fact that the spot market price for coal is in constant flux and change and in fact the market price in some instances may be greater at the end of the continuous operating year than at the beginning of the continuous operating year thus resulting in more revenue to the State governments and the Federal Government.

Finally, as relates to calculation of advance royalty, NMA notes that currently a significant lag exists between when a reporter applies to BLM to pay advanced royalty and the time ONRR provides the calculated amount that a reporter owes for advance royalty. Any changes to ONRR's calculation of advance royalty should ensure that ONRR can supply the amount of advance royalty in a timely manner.

- **Definition of Comparable Coal, Region, and Spot Market**

ONRR proposes a number of definitions to assist the agency in determine weighted average spot prices needed to calculate advance royalty. ONRR specifically requests comments on the proposed definition of comparable coal as coal that is “sold in a similar market and is similar in chemical and physical characteristics to the coal produced at the lease or mine for which payment of advance royalties is required in lieu of continued operation.” NMA believes this definition is too narrow as it fails to provide any discussion of what constitutes a similar market.

The proposal’s discussion of “similar market” appears to only distinguish markets as i) steam/stoker; ii) utility/industrial; and iii) captive/open market. The term similar market should be defined or expanded to include “in the same market area” with “similar transportation issues.” The proposed definition for “region” only further confuses the issue of what constitutes a similar market since region is merely defined to be consistent with BLM identified regions. If ONRR adopts the BLM regions, it will be grouping mines for advance royalty purposes in very large specific geographic regions where mines within those regions may serve dissimilar end markets where no comparison would be readily available. NMA believes adopting this definition is contrary to the Interior Board of Land Appeals decision in *BTU Empire Corporation*, IBLA 2006-21 decided August 28, 2007. In that decision, IBLA refused to uphold MMS (ONRR’s predecessor) broadly defined region in determining advance royalty when the lessee identifies a more appropriate comparison mine(s).

Therefore, if ONRR defines region to be specific geographic regions, the logic employed by IBLA in *BTU Empire Corporation* would be negated and the spot market price obtained by a lessee in the same geographic region selling to a utility in an entirely different final market region than the market region of the utility customers the lessee requesting the advance royalty would sell to would be used since this is the position staked out by ONRR when the regulation did not have a specific reference to geographic coal regions. Therefore, NMA urges the geographic definition of “region” be eliminated and redefined “to be same market region served by similar modes of transportation.” Failure to appropriately define region may also doom the alternatives ONRR proposes for determining value when there is an absence of spot market coal for comparable coal in the same region. If ONRR defines region as proposed, it may be precluding the use of the alternatives since there may not always be spot sales from the region. NMA believes sales data from nearby mines operating in the same coal seam will be more reliable that data from arbitrarily defined regions.

ONRR proposes to define *spot market* to mean “a market in which sales transactions occur where a seller agrees to sell to a buyer a specified amount of coal at a specified price over a fixed period usually not exceeding a year. Such transactions do not normally require a cancellation notice to terminate, do not contain an obligation, nor do they imply intent to continue in subsequent periods.” ONRR requests comments on this

definition, particularly whether to include in the definition, sales agreements of approximately 1-year duration in which an initial agreement continues upon renegotiation of the sales price. NMA disagrees that the spot market definition should include any contract in which the initial agreement continues upon renegotiation of the sales price.

Additionally, ONRR requests comments on whether to narrow the definition of spot market price to include only prices in arm's-length spot market contracts. Based on the "comparable coal" definition, NMA does not believe the spot market price would need to include the term "arm's-length."

Conclusion

NMA appreciates the opportunity to submit these comments. NMA urges ONRR to confer with the RPC on the advisability of the proposed rule prior to moving forward with finalizing any new regulations. The RPC was specifically established to provide expert advice to Interior on managing federal leases and revenues and should be allowed to fulfill this duty with the proposed rules.

Sincerely,

A handwritten signature in black ink that reads "Katei Doemey". The signature is written in a cursive, flowing style.