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September 20, 2013

Armand Southall  
Regulatory Specialist, ONRR  
P.O. Box 25165, MS 64000A  
Denver, CO 80225-0165

Re: Comments on Proposed Rule to Amend ONRR/OHA Appeal Procedures

Dear Mr. Southall:

On July 22, 2013, the Office of Natural Resources Revenue (“ONRR”) and the Office of Hearings and Appeals (“OHA”) issued a Proposed Rule entitled “Clarification of Appeal Procedures.” 78 Fed. Reg. 43,843. The American Petroleum Institute (“API”) appreciates the opportunity to submit comments on this Proposed Rule.

API is a national trade association that represents over 500 members involved in all aspects of the oil and natural gas industry, including the exploration and production of both onshore and offshore federal resources. The U.S. oil and natural gas industry supports 9.2 million U.S. jobs and more than 7.5 percent of the U.S. economy. The industry has paid more than 150 billion dollars in royalty revenues to the federal treasury. API member companies are committed to continued compliance with royalty regulations consistent with the mineral leasing statutes.

The stated purpose of the proposed rule is to make “technical corrections” to 30 CFR part 1290 and 43 CFR part 4, subpart J, relating to appeals of ONRR orders to report and pay royalties and other payments due under federal and Indian mineral leases. However, for the reasons explained below, some of the proposed changes create confusion, are contrary to controlling legal principles and precedent, and perpetuate serious flaws in the existing regulations that should be corrected. API respectfully requests that ONRR and OHA revise the Proposed Rule to address these shortcomings prior to issuing any Final Rule.

**I. The definition of “order” in 30 C.F.R. § 1290.102 and 43 C.F.R. § 4.903 should not be amended to categorically exclude any document lacking express appeal rights.**

Under the Proposed Rule, both 30 C.F.R. § 1290.102 and 43 C.F.R. § 4.903 would add a new subparagraph 2(vi) under the definition of “order” to exclude “[a]ny correspondence that does not include the right to appeal in writing.” This significant change is overbroad and unnecessary.

API understands that under new subparagraph 2(v), a “Dear Payor,” “Dear Operator,” or “Dear Reporter” letter is not enforceable by ONRR precisely because it may not include explicit right to appeal language. However, API believes that new subparagraph 2(vi) is unwarranted. There



have been circumstances where a lessee or operator received a directive from the agency to pay additional royalties or other monetary obligations or to perform certain actions, but the agency failed to include express appeal rights language. Such omissions may be entirely unintentional. Under the changes ONRR and OHA are proposing, such a demand would no longer meet the definition of the term “order,” and thus could not be appealed either to the ONRR Director under 30 C.F.R. § 1290.104 or to the IBLA under § 1290.108. This result places lessees/payors in a serious and unfair predicament. The lessee may still have the substantive obligation to perform or pay the royalty or other monetary obligation per the terms of the ONRR demand, but have no right to appeal and to put up a bond or self-bond in lieu of paying the disputed amount pending appeal under 30 C.F.R. part 1243. The lessee that was thus deprived of appeal rights could also potentially be subject to civil penalties or other enforcement actions for its failure to comply with the demand, and could be barred from contesting the merits of the underlying demand in any appeal of that enforcement action.

Consistent with the existing definition of “order,” and well-established principles of administrative law, ONRR documents containing “mandatory or ordering language” should be immediately appealable. Thus, ONRR’s rules should remain clear that correspondence is either (1) enforceable and appealable, (2) or unenforceable and unappealable. The existing exceptions to “order” in 30 C.F.R. § 1290.102 meet the latter category. Any additions to that list must likewise meet this criterion; placing dispositive importance on express appeal rights does not. Moreover, the IBLA case cited in the proposed rule (*Xanadu Exploration Co.*, 157 IBLA 183 (2002)) does not state a categorical rule that ONRR correspondence lacking express appeal rights is not administratively appealable, and API contends that such a categorical rule would clearly be inconsistent with the fact that correspondence from ONRR and its sister agencies is regularly appealed within the Department notwithstanding the absence of express appeal language.

To resolve these problems in the Proposed Rule, proposed subparagraph 2(vi) under the definition of “order” in 30 C.F.R. § 1290.102 and 43 C.F.R. § 4.903 should be deleted from any Final Rule. Alternately, those subparagraphs should be revised to state that, in addition to being non-appealable, any ONRR correspondence without express appeal language has no immediate legal effect on the recipient.

## **II. The proposed rule perpetuates flaws in the existing appeals rule.**

In proposing to “clarify” its Part 1290 regulations, ONRR should simultaneously take this opportunity to make other necessary corrections to the rule. Section 1290.102 defines “order” as a document issued by the ONRR *Director*. This makes little sense because § 1290.105 provides that “orders” may be appealed *to* the Director (in other words, a futile appeal of the Director’s action to the Director himself). Moreover, § 1290.110 does not require exhaustion of administrative remedies by appealing under Part 1290 if an order was made effective by the Director – which would be the case if the Director issued an order. Thus, any Final Rule should remove the word “Director” from the definition of “order.”



ONRR should also use this opportunity make a necessary clarification to 30 C.F.R. § 1290.108. That provision, which addresses appeals directly to the IBLA, uses the term “final decision of the ONRR Director.” “Final decision of the ONRR Director” is undefined and used nowhere else in the context of appeals within ONRR under Part 1290. “Final decision of the ONRR Director” should be replaced by “order issued or made effective by the ONRR Director” in 30 C.F.R. § 1290.108. *See Statoil USA E&P Inc.*, 183 IBLA 61, 66 (2012) (“The regulation at 30 C.F.R. § 1290.108, by its own language, pertains to appeals from orders of the ONRR Director (there are no other final decisions of the Director under Part 1290) ...”). The term “final decision” should be reserved for decisions that are final for the entire Department. *See* 30 C.F.R. §§ 1290.107, 1290.109. At a minimum, ONRR should explain how the terms are different.

### **III. The premise for a prolonged answer period is flawed.**

The Proposed Rule would amend § 1290.108(b) to extend ONRR’s answer period before the IBLA from 30 days to 60 days. However, the rationale stated in the preamble, “to allow ONRR to assemble the administrative record in royalty appeals,” is flawed. ONRR should have already prepared and submitted the administrative record in support of its order prior to the due date for the appellant’s Statement of Reasons. The administrative record equally informs the appellant’s filing and ONRR’s response, and there is no basis for ONRR to seek an unfair advantage by withholding relevant record information from the appellant during the briefing schedule. Accordingly, the IBLA has regularly granted extensions to file the Statement of Reasons pending the Agency’s filing of the administrative record. Thus, assembly of the administrative record should have no effect on the time needed for ONRR’s preparation of its answer to the Statement of Reasons. API would not object to the proposed 60-day answer period for ONRR if and only if that extended period does not impair appellants’ access to the administrative record sufficiently in advance of the due date for the Statement of Reasons.

Thank you for your time and attention. As always, API is committed to working with the Department of the Interior in its efforts to improve and strengthen its appeals processes. Please do not hesitate to contact me (202-682-xxxx) if you have any questions.

Sincerely,

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

Emily Kennedy  
Policy Advisor, Upstream