

**National Wildlife Federation · Montana Wildlife Federation  
Association of Northwest Steelheaders**

May 2, 2017

**Via regulations.gov and email at armand.southall@onrr.gov**

Office of Natural Resources Revenue  
PO Box 25165, MS 61030A  
Denver, CO 80225

**Re: ONRR-2017-0002**

To Whom It May Concern:

Thank you for the opportunity to comment on the Department of the Interior Office of Natural Resources Revenue (ONRR) Proposed Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule (the Rule).<sup>1</sup> The rule became effective January 1, 2017. ONRR retroactively “postponed” the Rule on February 27, 2017, citing pending industry litigation as the justification.<sup>2</sup>

National Wildlife Federation (NWF) and its affiliates Montana Wildlife Federation (MWF) and Association of Northwest Steelheaders (Steelheaders) are opposed to the Rule’s repeal. Repealing the Rule would take us back to an outdated, flawed and illegal regulatory regime that substantially shortchanges the public and states from approximately two-thirds of the royalty payments they are legally entitled to. The Rule’s repeal would be a sweetheart deal for coal producers at the expense of our public lands and wildlife.

NWF, MWF and Steelheaders attach and resubmit our previous comments, first submitted on May 7, 2015, in support of the then proposed rule for inclusion in the record. We also submit the below comments which reiterate many of the same points as our previous comments.

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<sup>1</sup> 82 FR 16323 (Apr. 4, 2017). The rule is published at 81 FR 43338 (July 1, 2016).

<sup>2</sup> 82 FR 11823 (Feb. 27, 2017)

Our organizations represent millions of hunters, anglers, birders, tribal members, and other users of federal and tribal lands. As we stated in previous comments, federal coal leasing has serious impacts and costs on these lands including destruction and degradation of wildlife habitat. Coal leasing also leads to coal combustion and greenhouse gas emissions that contribute to climate change, which poses a host of threats to wildlife and the outdoors such as species extinction, increased flood and droughts, loss of habitat, shifting wildlife ranges, increased forest fires and other extreme events.

For reasons stated herein and stated in our previous comments urging the promulgation of the Rule, the Rule serves the public interest by ensuring the public gets a fair return for the use of public resources and that public assets are better protected through fair and accurate pricing to determine royalty rates. The Rule brings the coal leasing program in better alignment with the Mineral Leasing Act of 1920 (MLA) and its repeal would conflict with the MLA. We also believe ONRR's move to "postpone" the Rule was a violation of the Administrative Procedure Act (APA).

#### **I. The Postponement of the Rule Was Improper and ONRR Must Allow for Proper Notice and Comment**

The rule became effective on January 1, 2017. The APA states that, "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."<sup>3</sup> ONRR's "postponement" of the effective date of the rule came on February 27, 2017, nearly two months after the effective date of the rule.<sup>4</sup> In effect, rather than postpone the effective date, ONRR used section 705 of the APA to rescind an already effective rule without notice or comment. This effectively denied the public the process it is due pursuant to the law.

Any repeal, revision or replacement of the Rule must undergo the all required procedure under the APA and any and all applicable laws, including the National Environmental Policy Act and National Historic Preservation Act. This includes adequate notice of proposed changes to the Rule and the opportunity for public comment.

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<sup>3</sup> 5 U.S.C. § 705.

<sup>4</sup> 82 FR 11823 (Feb, 27, 2017).

## **II. The Rule in Protects Wildlife, Public Lands and is in Keeping with the Law**

The Rule is a needed, legal and proper update to help better ensure that royalty payments from coal leasing on federal and tribal lands more properly reflect the impacts and costs of coal mining to wildlife and federal and tribal lands. The law requires that coal lessees pay royalty at a rate of 12.5%, the fair return due U.S. taxpayers.<sup>5</sup>

Under the system that was in place before the Rule, taxpayers were receiving substantially less than this. Indeed, a 2015 study found that the under the regulatory structure that preceded the Rule, U.S. taxpayers and the states that share in royalty collections could receive an effective royalty rate of 4.9% as a result of reductions and subsidies for coal companies – well under half of what they are due.<sup>6</sup> A return to this regulatory structure – which is what a repeal of the Rule would result in – would leave the public and the states holding the bag while coal companies escape paying royalties at fair market rates.

The Rule, if left in place, will result in fairer royalty payments that will benefit wildlife, federal and tribal lands, and the public. It will bring in hundreds of millions of dollars in royalty payments to the federal and state governments that can help preserve wildlife habitat. It will also end an unjustified subsidy to the coal industry that contradicts the intent of the MLA.

Demand for coal, both domestically and internationally, is declining. It is important that as this decline continues, the lands, waters and climate impacted by federal coal mining is properly taken care of so that communities, habitat areas and wildlife are not left stranded with the costs. As we stated in previous comments, coal companies should not be allowed to take advantage of the public by selling federal coal at depressed prices to affiliated companies to escape higher, fairer royalty payments.

It is worth restating that a Reuters investigation estimated that this practice resulted in companies escaping \$40 million in royalty payments on coal exports from Wyoming and

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<sup>5</sup> 30 U.S.C. § 207(a).

<sup>6</sup> MARK HAGGERTY, HEADWATERS ECONOMICS, AN ASSESSMENT OF U.S. FEDERAL COAL ROYALTIES: CURRENT ROYALTY STRUCTURE, EFFECTIVE ROYALTY RATES, AND REFORM OPTIONS 1 (2015), <http://headwaterseconomics.org/wphw/wp-content/uploads/Report-Coal-Royalty-Valuation.pdf>.

Montana alone in 2011.<sup>7</sup> Additionally, according to the U.S. Energy Information Administration, 42% of all coal produced in Wyoming was sold through a captive transaction (from one company to an affiliated company), up from 4% in 2004.<sup>8</sup> These results are contrary to the intent of the MLA. They are also contrary to the public will, as ending subsidy giveaways to the coal industry enjoys broad, bi-partisan support with nearly two-thirds of Americans opposing providing federal subsidies to companies that mine coal on America's public lands.<sup>9</sup>

### III. Impacts to Wildlife from Coal Mining

As stated in our previous and attached comments, wildlife is affected by coal mining in many ways and it is important that the public get properly compensated for the use of its coal to more properly account for the costs to wildlife and natural resources from mining activities. Mining and related activities cause direct wildlife mortalities and disturb and displace wildlife. Reptiles, amphibians and small mammals are generally not mobile enough to avoid mining equipment and are often directly killed during mining. Birds die when they collide with electrical transmission lines and other mine support structures. Fish and other aquatic wildlife are killed when streams are re-routed, and from construction and mining activities that occur near stream channels.<sup>10</sup>

Coal mining fragments habitat and causes extreme disturbances that displace larger, more mobile wildlife. Displaced wildlife are placed at risk because, among other impacts like road crossings, they must move to locations already occupied by other wildlife and will experience greater competition for resources they need to survive.

Wildlife in habitat near mines like pronghorn and raptors are often forced to move given the intense noise and destructive activity associated with mining. For example, it has

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<sup>7</sup> Patrick Rucker, *Asia Coal Export Boom Brings No Bonus for U.S. Taxpayers*, REUTERS, (Dec. 4, 2012), available at <http://www.reuters.com/article/2012/12/04/us-usa-coal-royalty-idUSBRE8B30IL20121204>.

<sup>8</sup> ENERGY INFORMATION ADMINISTRATION, COAL DISPOSITION BY STATE (2012), <http://www.eia.gov/coal/annual/pdf/table8.pdf>; ENERGY INFORMATION ADMINISTRATION, ANNUAL COAL REPORT: 2004 (2005), <http://www.eia.gov/coal/annual/archive/05842004.pdf>.

<sup>9</sup> Poll Conducted by Hart Research Associates, Public Opinion on Coal Mining on Public Lands (January 16-19, 2015).

<sup>10</sup> U.S. Forest Service General Technical Report INT-126, "Wildlife: User guide for mining and reclamation," (July 1982), available at <http://babel.hathitrust.org/cgi/pt?id=umn.31951d03009787s>.

been shown that energy development taking place within 3 km or less of greater sage grouse leks – areas where male sage grouse perform in front of females as part of the birds’ mating ritual – can cause an increase in the distance females travel to nesting sites and result in lower rates of nest initiation.<sup>11 12</sup>

Coal mining also harms wildlife by polluting nearby water and air. Mining equipment emits sulfur dioxide, nitrous oxide, and toxic trace metals such as lead in areas that oftentimes would otherwise be relatively free of these pollutants. In areas near access roads and other locations with heavy traffic, “increased levels of lead in vegetation and wildlife have been observed.”<sup>13</sup>

Over time, increased exposure of wildlife to trace elements through dust from various mining activities can cause animals to “suffer from disorders of the mucous membranes and pulmonary complication.”<sup>14</sup> Surface water contamination from increased sediment loads and the leaching of toxic elements from exposed ores and rocks can cause decreases in aquatic oxygen content and light penetration, reducing the growth of aquatic plants and resulting in fish mortality as well as habitat degradation and destruction in streams.<sup>15</sup>

Carbon pollution from coal combustion and other sources further presents profound impacts to wildlife. We are already experiencing record-breaking and destructive storms and floods, unprecedented severe droughts, earlier, more frequent and more intense wild fires, decreased snow pack, ocean acidification, and other troubling impacts.<sup>16</sup> This warming is projected to get more intense.<sup>17</sup>

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<sup>11</sup> Lyon, A.G. and S.H. Anderson, “Potential gas development impacts on sage grouse nest initiation and movement,” *Wildlife Society Bulletin* 31(2)486-491 (2003), available at <http://www.jstor.org/stable/3784329>.

<sup>12</sup> U.S. Department of Interior, Bureau of Land Management Instruction Memorandum No. 2014-100, “Gunnison Sage-grouse Habitat Management Policy on Bureau of Land Management-Administered Lands in Colorado and Utah,” (May 30, 2014), available at [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2014/IM\\_2014-100.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2014/IM_2014-100.html).

<sup>13</sup> U.S. Forest Service General Technical Report INT-126, “Wildlife: User guide for mining and reclamation,” (July, 1982), available at <http://babel.hathitrust.org/cgi/pt?id=umn.31951d03009787s>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> U.S. Global Change Research Program, *2014 National Climate Assessment* (2014), available at <http://nca2014.globalchange.gov/report/our-changing-climate/observed-change>.

<sup>17</sup> *Id.*

With a warming world comes shifting habitats and changes in suitable wildlife ranges. As a result, many wildlife species are finding or will find themselves without a home. Plant and animal species are moving their entire ranges in search of colder locales, in many cases two-to-three times faster than scientists anticipated.<sup>18</sup> If carbon pollution continues at the current rate, higher temperatures will lead to high rates of extinction around the globe.

### **Conclusion**

ONRR's proposed repeal of the Rule is a step backwards that is contrary to the MLA. Going back to the outdated rule will deprive the American public of significant royalty rates they are entitled to, effectively subsidize coal producers and leave the wildlife, impacted communities and habitats effected by mining on federal and tribal lands shortchanged. Finally, it is critical that any change to or repeal of the Rule – which is currently the law – take place pursuant to required notice and comment process, with the public and stakeholders given appropriate opportunity to weigh in and be heard.

Sincerely,

Jim Murphy  
Senior Counsel  
National Wildlife Federation

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<sup>18</sup> National Wildlife Federation, *Wildlife in a Warming World* (Jan. 2013), available at [www.nwf.org/climatecrisis](http://www.nwf.org/climatecrisis).