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**American Petroleum Institute Comments on
Minerals Management Service Proposal for
Appeals of MMS Orders
64 FR 1930 (January 12, 1999)**

Dear Mr. Guzy:

Attached are API's detailed comments on the MMS' January 12, 1999 proposal. If you have any questions or need more information, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'David T. Deal', written over a horizontal line.

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**American Petroleum Institute
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Proposal for Appeals of MMS Orders
64 FR 1930 (January 12, 1999)**

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The American Petroleum Institute ("API") welcomes this opportunity to submit written comments on the Minerals Management Service ("MMS") January 12, 1999 proposal governing appeals of MMS orders. API represents over 400 companies engaged daily in all aspects of the oil and natural gas industry, including exploration and producing activities on Federal and Indian lands. API and its member companies thus have a significant stake in the outcome of this rulemaking.

I. 43 CFR Part 4, Subpart J – Royalty Appeals

A. The Proposal Is Inconsistent with the Fairness Act.

Although the preamble to the proposed rule explains that the proposal is intended to implement the Federal Oil and Gas Royalty Simplification and Fairness Act ("Fairness Act"),¹ it is inconsistent with the Fairness Act in several important respects.

The definitions in the proposed rule provide a good example. While certain of the proposed rule's definitions needed to be modified because the rule would have broader applicability than required by the Fairness Act, there are other unexplained and unnecessary deviations from the Fairness Act definitions.

For example, to be consistent with the Fairness Act, the term "lessee" should be defined as "any person to whom the United States, or the United

¹ Pub. L. 104-185, as corrected by Pub. L. 104-200.

States on behalf of an Indian tribe or individual Indian mineral owner, issues a lease subject to this subpart, or any person to whom operating rights in a lease have been assigned." Compare 30 U.S.C. § 1702(7) with proposed § 4.903 (contains additional language regarding persons to whom all or part of the lessee's interest in a lease has been assigned). See also 64 FR at 1933 (MMS intends its definition to be essentially the same as the Fairness Act definition).

The terms "administrative proceedings" and "commence" are defined in the Fairness Act because they are relevant to the appeals process. However, the proposed rule adopts a different scheme. The proposed rule must be modified to implement, not change, the Fairness Act's requirements with respect to administrative appeals.

The Fairness Act provides that:

Demands or orders issued by the Secretary or a delegated State are subject to administrative appeal in accordance with the regulations of the Secretary 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.

30 U.S.C. § 1724(h)(1). The date on which an "administrative proceeding" is "commenced" is thus highly relevant.

The Fairness Act defines "administrative proceeding" as "any Department of the Interior agency process in which a demand, decision or order issued by the Secretary or a delegated State is subject to appeal or has been appealed." 30 U.S.C. § 1702(18). The term "commence" means, with respect to a demand, "the receipt by . . . a lessee or its designee . . . of the demand." 30 U.S.C. § 1702(20). Under the plain language of the statute, the lessee's receipt of a demand that is subject to appeal commences the administrative proceeding with

respect to that demand. The Fairness Act requires a decision in that administrative proceeding within 33 months.

The proposed rule is inconsistent with the statute. Under the proposal, an administrative proceeding is not commenced until a notice of appeal has been filed, a preliminary statement of the issues has been filed and a filing fee has been paid. Proposed § 4.911. MMS explains that it is more "efficient" to define "commencement" in this way. 64 FR 1938. Efficiency, however, does not justify disregarding statutory requirements. MMS also explains that it allegedly cannot begin to process an appeal until the appellant tells it what the issues are. *Id.* It could just as easily use this "justification" to define "commencement" as the filing of the appellant's Statement of Reasons, or even the appellant's final reply brief, since only then will the agency really know what all the issues are. Nevertheless, the agency cannot be allowed to circumvent the Fairness Act in this manner.

Even if MMS were correct in its assertion that the Fairness Act is silent with respect to when an "administrative proceeding" is "commenced", see 64 FR at 1937, MMS would not be free to circumvent the Fairness Act's 33-month limitation by creative semantics. Just as a judicial proceeding is begun when the complaint is served, see 30 U.S.C. § 1702(A), an administrative appeal is begun when the appellant's notice of appeal is filed, not at some later date when required filing fees are paid or when the issues are briefed. Thus, if the Fairness Act is deemed to be silent on the issue, at the very latest, the 33-month Fairness Act period must begin to run when the appellant files its Notice of Appeal.

The MMS' definitions of "monetary" and "nonmonetary" obligations also circumvent the Fairness Act. The plain meaning of the term "monetary" means payable in money. Under the Fairness Act, if the Secretary fails to issue a decision timely in an appeal that involves a "nonmonetary obligation" or a "monetary obligation the principal amount of which is less than \$10,000," the appeal is deemed decided in the appellant's favor. 30 U.S.C. § 1724(h)(2).

MMS is attempting to circumvent this statutory provision by defining the term "monetary obligation" to include orders requiring the recalculation of royalties. Proposed § 4.902. Royalty recalculation orders, however, are orders to perform. MMS does not have the discretion to define terms in a way that ignores their plain meaning or contravenes the clear intent of Congress.

The term "order to pay" is used in the proposed rule, but it is not defined. MMS apparently intends for the phrase to have the same meaning as it has under the Fairness Act, at least for production subject to that act. Compare 30 U.S.C. § 1702(26) with proposed 30 C.F.R. § 242.104. For clarity, a definition should be added to the definitional section of the proposed rule which tracks the definition contained in the Fairness Act.

The Fairness Act's requirement that an "order to pay" assert a specific, definite, and quantified obligation claimed to be due, and that it specifically identify the obligation by lease, production month and monetary amount, as well as the reason or reasons the obligation is claimed to be due, is important. MMS is not free to issue an order to pay now and figure out the reasons later.

This is not a new concept with the Fairness Act. The IBLA has repeatedly held that:

It is incumbent on MMS to ensure that its decision is supported by a rational basis, and that such basis is stated in the written decision, as well as in the administrative record accompanying the decision.

U.S. Oil and Refining Co., 137 IBLA 223, 232 (1996).

The issuance of an order to pay is a significant legal event for the lessee with myriad implications: legal expenses may be incurred; bonding or other surety may be required; disclosure requirements may be triggered under loan documents or other private contracts or under SEC or similar regulations; and the seven-year limitations period under the Fairness Act may cease to run. See

30 U.S.C. § 1724(b). None of these events should befall the lessee until MMS has met the minimum standards that the IBLA and Congress have said is required by fairness.

This concept should be made express in the final rule. At the very least, it should be explained in the preamble to the final rule that the "modification" of orders during the appeals process shall be only as permitted by of the Fairness Act or long-standing principles of administrative law and IBLA precedent. For example, while an order can be modified by having claims narrowed or dropped, the term "modify" cannot be read to include adding new claims or changing the basis of existing claims.

If the process permitted MMS to add new claims to an existing order or change the basis for its order mid-stream in an appeal (rather than issue a separate order covering the new claim or asserting the new basis), the sufficiency of the order under the Fairness Act (e.g., for the purpose of interrupting the statute of limitations) would be destroyed. Moreover, the efforts undertaken by the parties to narrow the issues and identify the administrative record would be a waste of time. Due process also would be implicated, since the appellant could be left with an administrative record that does not even address the "modified" basis for the order and no opportunity to develop an adequate record without giving up other rights (e.g., extending the 33-month Fairness Act time limit, since the Director would have the opportunity to "modify" the order after the record is certified).

This same comment has relevance to the proposed provisions regarding the development of the record. Certainly, the appellant should have access to all of the documents and information on which a demand is based and given a fair opportunity to supplement the record with whatever additional information the appellant believes is necessary for the IBLA to review the correctness of the order. Because of the Fairness Act requirements for a valid "order to pay",

however, MMS cannot be permitted to issue an order without an adequate basis in the record and then "fix" the order at some later stage of the proceedings by insisting that additional evidence be included in the record. An order must satisfy the minimum requirements of the Fairness Act and administrative law when it is issued.

MMS representatives at meeting of the Royalty Policy Committee ("RPC") acknowledged that MMS cannot use the existing appeals process to "cure" defective orders. The MMS assured RPC members that it would not use the RPC proposed rules, if adopted, to try to do so in the future. The RPC endorsed the proposed rules with this understanding and unanimously supported a clarification that even the IBLA may only "modify" orders "consistent with its existing statutory and regulatory authority." The proposal was adopted to make it clear that RPC opposed allowing defective orders to be "cured" through the appeals process. This should be made clear in the final rule.

B. The Proposal Disregards the Letter and the Spirit of the RPC Report

The Royalty Policy Committee's Subcommittee on Appeals and Alternative Dispute Resolution met regularly over the course of a year and one-half and included representatives of states, Indian tribes and industry. In addition, all meetings were facilitated by two high-level MMS employees, the Chief of the Office of Enforcement and the Deputy Associate Director for Policy and Management Improvement, who were quite active not only in the deliberations, but also in writing the Subcommittee Report ultimately adopted by the RPC.

Given the high level of participation by key MMS personnel in the process of achieving consensus from among widely disparate points of view, and in light of the strong concerns noted by Subcommittee members in several meetings held to review earlier drafts of this proposal, it is surprising and discouraging that

the proposed rule varies so markedly from the letter and spirit of the March 21, 1997, Royalty Policy Committee Report (“RPC Report”).

Under the consensus appeal process recommended by the RPC, orders and decisions were to be appealed directly to the Interior Board of Land Appeals. In order to achieve impartial review by the IBLA, however, industry representatives agreed to accept a more formalized appeal process containing short pleading deadlines that could be extended only if the lessee agreed to toll the 33-month time period established by the Fairness Act. Concerned states and Indian lessors would be afforded an opportunity to intervene and set forth their own positions in contrast to those of the lessee and MMS. MMS Director decisions would be eliminated, and the Assistant Secretary for Land and Minerals Management would be allowed to decide a case only upon petitioning the IBLA to relinquish its jurisdiction. Policy decisions were to be made in advance by the Royalty Valuation Division or the Royalty Policy Board and not deferred to the administrative appeal process.

The RPC consensus appeal process struck a delicate balance: lessees were to get impartial review; states and Indian lessors were to get the right to intervene in appeals; the MMS was to get maximum flexibility in meeting Fairness Act’s 33-month deadline; and everyone was to benefit from up-front policy decisions. Yet the proposed rule differs virtually ignores the consensus appeal process recommended by the RPC:

- Under the proposal, orders and decisions would be appealed to the MMS, not IBLA, and appeals would not be perfected until MMS received a Notice of Appeal, a filing fee, and a Preliminary Statement of Issues.
- Under the proposal, appeal to the IBLA would not occur until after the settlement conference, certification of the administrative record, and the MMS Director’s “notice” (i.e., decision) concurring with, modifying, or rescinding the

order, and only upon paying a second, separate filing fee. This hardly resembles a one-step appeal process.

- Under the proposal, the Assistant Secretary for Land and Minerals Management (or Indian Affairs) would have unlimited discretion to decide the appeal by merely notifying the appellant and IBLA up to 30 days prior to the due date for filing the Statement of Reasons, thereby resulting in the complete loss of impartial review for the appellant.
- Under the proposal, the proposal would impose on appellants several procedural bars (e.g., “Preliminary Statement of Issues . . . must specifically identify the legal and factual disagreements you have with the order”) and jurisdictional bars (e.g., missing filing deadlines, failing to serve all on the service list), while placing no such sanctions on MMS (“The MMS deadline under this section is only guidance for the MMS DRD. It creates no substantive rights in parties to the appeal.”).
- Conspicuously absent in the proposal is any provision for up-front policy decisions by the Royalty Valuation Division or the Royalty Policy Board.

Unfortunately, the MMS has taken the carefully crafted, even-handed consensus achieved at great expense and effort by members of the Royalty Policy Committee and refashioned it solely for its own benefit into a complex maze of procedural traps for appellants with little expectation of impartial review. Such a process would adversely impact all except the Federal Government, and would fall especially harshly on cash-strapped independents, states and Indian lessors without access to sophisticated legal support.

Only a return to the consensus appeal process recommended by the RPC will address the numerous problems identified with the existing appeal process

and avoid the many problems of the proposed rule. API strongly urges MMS to adopt a rule that remains true to the letter and spirit of the RPC report.

C. The Proposal Contains Traps for the Unwary

The procedurally complex and dogmatic nature of the MMS' proposed rule presents numerous potential traps and pitfalls for the unwary and/or inexperienced appellant. In contrast to the current rule, many of an appellant's procedural obligations and deadlines under the proposed rule are unnecessarily jurisdictional. If an appellant does not fully and timely comply with these requirements, the appellant's appeal may be dismissed. These potential pitfalls include at least the following.

First, pursuant to §§ 4.906 - 4.907 of the proposed rule, an appellant must file its Notice of Appeal, Preliminary Statement of Issues, and nonrefundable processing fee within sixty (60) days after being served with an order. If all three of these items are not received by the DRD within this period, the MMS will not consider the appeal. See § 4.914. This procedure differs significantly from the current rule, which merely requires that a Notice of Appeal be filed within thirty days after service of an order. The current rule even provides for a ten-day "grace period" if the appellant's Notice of Appeal not reach the proper MMS office within the thirty-day period. 30 C.F.R. § 290.5(b). The proposed rule offers no such grace period. Rather, if the Notice of Appeal, Preliminary Statement of Issues, and nonrefundable processing fee are not received in the proper MMS office "by 5:00 local time . . . on the 60th day" after receipt of the order, "your appeal is not timely filed and will not be considered." 64 F.R. at 1973.

In addition, if an appellant or intervening party does not file its Statement of Reasons or Intervention Brief, or request for extension of time to file either within the applicable times prescribed in §§ 4.933, 4.934, 4.939, the IBLA or Assistant Secretary will dismiss the appeal or disallow intervention. § 4.940.

Even if an appellant timely files its Notice of Appeal, Preliminary Statement of Issues or Statement of Reasons, but inadvertently fails to serve these documents on one of the several parties requiring service, as set forth at § 4.962 of the proposed rule, and such party is prejudiced thereby, then the IBLA may dismiss the appeal. §4.964.

Mandating as drastic a penalty as dismissal for an appellant's inadvertent failure to meet filing deadlines and notice obligations is unreasonably extreme and without justifiable purpose. API submits that there exists no compelling reasons that any of the procedural deadlines or obligations in the proposed rule should be jurisdictional. At the most, the 33-month time frame for deciding appeals should be extended until an appellant cures an inadvertent failure to timely file or serve. More reasonable treatment of an appellant's inadvertent failure to meet filing deadlines and notice obligations is clearly appropriate in light of the corresponding lack of such penalties for the MMS' failure to meet its deadlines. Under the proposed rule, once the appeals process is commenced, the MMS, unlike an appellant, does not risk dismissal for failing to meet its time deadlines. For example, pursuant to § 4.932 of the proposed rule, the MMS' deadline for submitting the administrative record to the IBLA "is only guidance for the MMS DRD. It creates no substantive rights in parties to the appeal or other persons." Id.

Further, API believes that extensions of these procedural deadlines in the proposed rule should be freely granted to appellants upon request in order to allow all parties the opportunity to fully prepare and present their case. This is especially so in light of the substantial advantages enjoyed by the MMS in the administrative appeals process under the proposed rule. Under the Federal Oil and Gas Royalty Simplification and Fairness Act, the MMS has seven years from the date the appellant's royalty obligation was originally due in which to develop the factual, policy and legal basis purportedly supporting its order. See 30 U.S.C. § 1724 (b)(1).

D. The Proposal Fails to Provide for Discovery.

An additional shortcoming of the proposed rule is MMS' failure to provide expressly for the appellant or an intervenor to engage in discovery during the administrative appeal process. This perpetuates the status quo, under which MMS refuses to respond to an appellant's discovery requests and requires an appellant to rely on the Freedom of Information Act ("FOIA") to obtain agency records.

The need for an appellant to be able to engage in discovery in connection with an appeal of an MMS royalty order to pay or perform is clear. First, MMS' valuation rules, as well as controlling Department of the Interior precedent, *e.g.*, *Getty Oil Co.*, 51 IBLA 47 (1980), require access to comparative valuation data. As Interior has recognized, a lessee ordinarily does not have access to such data:

Producers generally do not have access to prices paid under other producer's arm's-length contracts. And there are concerns about anti-trust violations if that price information is openly shared.

(Interior Department Assistant Secretary Bob Armstrong, responding to questions posed by Senator Murkowski). Without discovery, a lessee's ability to gain access to the valuation data necessary to apply MMS' regulations is unfairly restricted.

Moreover, without discovery, an appellant's ability to evaluate the MMS' valuation process is also unfairly restricted. For example, discovery would permit an appellant to determine whether MMS has, as it is required to do by a legion of Federal judicial decisions, considered all "relevant factors" in issuing an order to pay or perform. In addition, discovery would permit the appellant to determine

whether MMS' order is consistent with MMS' treatment of similarly situated lessees.²

Administrative and judicial decisions have recognized an administrative appellant's right to pursue discovery. *See, e.g., NLRB v. Rex Disposables*, 494 F.2d 588, 591-92 (5th Cir. 1974); *Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979); *United States v. Pittsburgh Pacific Co.*, 68 IBLA 342 (1982). Further, to permit an appellant in a royalty appeal to engage in discovery would be consistent with the rules of other Interior boards of appeal. *E.g.*, 43 CFR § § 4.115 et seq., 4.220 et seq.; *contra* 43 CFR § 4.423.

Finally, MMS' current position that the FOIA provides an appellant with the same rights as traditional civil discovery procedures is simply wrong. First, the FOIA obviously cannot substitute for interrogatories and depositions. Moreover, the FOIA is subject to its own inherent restrictions and rules that have nothing to do with the rights of a lessee appealing an MMS order to pay or perform. While it may be lawful under the FOIA for an agency to withhold information or to limit its search for documents responsive to a FOIA request, it may be unlawful for the agency to do so under general principles applicable to discovery disputes. An appellant's right to pursue discovery exists in addition to, and is entirely separate from, any rights that an appellant may have under the FOIA. *E.g., McClelland v. Andrus*, 606 F.2d at 1287 n.54. Federal courts have routinely recognized that the FOIA is not an adequate substitute for discovery. *E.g., Metex Corp. v. ACS Industries, Inc.*, 748 F.2d 150, 155 (3d Cir. 1984). In addition, as a practical matter, actual response time to FOIA requests tends to lag considerably the usual time limits for discovery.

² It is black letter law that an agency must act consistently. *See, e.g., Independent Petroleum Association of America v. Babbitt*, 92 F.3d 1248, 1259 (D.C. Cir. 1996) (agencies "must treat similar cases in a similar manner"); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) ("[A]gencies must apply the same basic rules to all similarly situated applicants. An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.")

II. 30 CFR Part 241 - Civil Penalty Appeals

Proposed §§ 241.50 - The proposal includes no definition of “violation.” This definition is critical for understanding and estimating the size of any civil penalty that might be assessed as a result of a FOGRMA violation. For example, in a failure to report controversy, is the violation a failure to submit the entire report, or is each separate line on the report a separate violation? This concept of “violation” in the environmental sector has been the source and cause of numerous appeals and the agency should clarify the meaning and application of violation in accordance with the Presidential Executive Order admonishing the executive branch agencies to promulgate regulations that avoid the need to resort to the courts.

Proposed §§ 241.51(b) - No provision has been included to give the lessee the option to designate an agent as specifically required in 30 USC §1719(h). The Department is obligated to do so. The short time periods provided for appeal and assessment of penalties may make the designation of such an agent for service a prudent action in order to avoid the running of the time period prior to assessment of fines and the running of the time for taking an appeal. In addition, the statutory notice provisions provide notice only by personal service or by registered mail. Express mail and certified mail are not specifically permitted but should be.

Proposed §§ 241.52 - As drafted, this provision conflicts with § 241.54. It should be clarified to indicate a lessee may take an appeal even if the lessee has already complied.

Proposed §§ 241.53, 241.54 and 241.55 -The proposal takes an approach for these three sections that does not conform with the intent of 30 USC §1719. Section 1719 addresses two separate considerations: 1. a determination of liability for a violation; and, 2. an assessment of the amount of

a civil fine or penalty. Section 1719 (and FOGRMA overall) is geared to encourage voluntary compliance, and Congress expressed no expressed intent to suspend due process when there is a valid substantive dispute or when there is a dispute about the amount of the assessment. Where there is a genuine dispute over the underlying liability issue, the regulations should provide some explicit mechanism for consideration of a timely stay response to avoid the risk of a penalty assessment as one element of the cost of appeal of a substantive issue. We suggest that the proposal be redrafted to incorporate the following concepts:

1. If the lessee remedies the alleged violation twenty (20) days of the date of service of the notice of violation, no penalty assessment occurs, but the lessee ought to be able to continue with its appeal of the notice of violation.
2. A lessee's right to take an appeal should extend to forty (40) days from the original date of service of the notice of violation.
3. An opportunity for a hearing on the amount of any civil penalty should be provided in the regulations themselves. This would include amounts levied due to a failure to correct within the twenty (20) day time period as well as failure to correct extending beyond forty (40) days. Criteria for assessing the amounts of penalties should be articulated in the regulation.
4. A mechanism for an expedited response to a request for a stay should be included in order to provide an opportunity for substantive review without the risk of incurring civil penalties. Such a response should be required within fifteen (15) days of the date of receipt of the request by the OHA. Moreover, the criteria contained in 43 CFR 4.21(b) are too harsh for the granting of a stay since they basically track the elements needed to obtain injunctive relief in Federal district court. Since FOGRMA deals principally

with the correct payment of royalty and the completion of forms, there should be a lower standard applicable, although a lessee might be able to ordered to post adequate security to protect the government's interest. The forty five (45) day period provided in 43 CFR Part 4 is unreasonable in light of the continuing assessment and penalties under FOGRMA .

5. The MMS must establish more specific criteria than those delineated in §241.70 for determining the amount fine and penalty amounts. To satisfy due process, some consideration must be given to the authenticity of the substantive dispute in determining the amount of the penalty to be assessed in case the lessee is deemed liable.

Proposed §§ 241.60(b) - The statute actually provides for an assessment of \$25,000 per violation for each day such violation continues. The MMS has proposed a \$25,000 per day for each day each violation continues. "Violation" must be more specifically defined and the criteria for determining the amount of the penalty articulated with more specification.

Proposed §§ 241.61, 241.62 and 241.63 - The general structure of these provisions is to provide for the issuance of two separate notices: 1. a notice of non-compliance explaining the violation; and, 2. a separate notice of civil penalty stating the amount of the penalty. As presently structured, no hearing or appeal on the notice of civil penalty is provided. We believe it violates 30 USC §1719(e) by imposing a penalty without an opportunity to present evidence on the amount of the penalty as well as to contest liability. A hearing on both matters of a violation must at least be provided to a lessee. Our earlier comments on service of the notice are equally applicable here, and some provision should be made for specific designation of parties to be served by a lessee.

Since the regulations and the statute impose a penalty for continued substantive violations (if liability exists), is no harm in providing for a forty (40)

day appeal right in order to assure a potentially liable party has enough time to file an appeal. A potential violator may file the appeal at any time after receipt of the notice, and extending the right to appeal by a reasonable period compromises no interest. The earlier comments made on providing a mechanism for securing a timely review of a stay request are applicable here as well. The price of substantive appeal comes at the risk of significant civil penalties. Failure to provide a mechanism for a reasonable timely review of a stay request makes appeal of the substantive issue a meaningless right.

Proposed §§ 241.70 - The criteria articulated for determining the quantum of a civil penalty are inadequate. As drafted, they may be briefly summarized as severity of violation, history of violation, and ability to pay. More specific criteria need to be articulated in order to provide a reviewing officer and a court more objective criteria for determining the exercise of the agency's authority. For example, degree of culpability, existence of policies and procedures to address such violations, established audit processes to ensure compliance, knowledge and failure to correct by corporate management, circumstances surrounding the violation itself, size of penalties and violations assessed for the same or similar incidents. Unfettered total discretion on the part of the agency to assess penalties is not consistent with due process.

Proposed §§ 241.74 - This section should include the 30 USC § 1719(j) requirement that judicial review must be taken in the United States district court for the judicial district in which the violation allegedly took place.

Proposed §§ 241.75 - The existing regulations provide no review for the amount of civil penalties and this proposal continues that approach. Indeed, the rule provides that the order assessing the penalty is not even appealable. Our prior comment on providing some review of the amount of the penalty are equally applicable here.

Proposed §§ 241.77 -There is no authority under the Federal Oil and Gas Royalty Management Act for execution against the lease surety or to offset amounts the United States owes to the violator. Some statutory authority or reference to statutory authority should be included in the regulation as a minimum in order to advise the regulated community of the source of the right and the scope of such right. In the absence of actual authority, this provision should be dropped.

III. 30 CFR Part 242 - Royalty Orders

Under the current regulations found at 30 CFR §290, “final orders or decisions of officers of the Minerals Management Service” are governed by the appeals procedures. The NOPR, however, proposes to redefine what constitutes an “Order” and what may be appealed. The proposed definition of “Order” in 43 CFR §4.903 specifically excludes: certain valuation determinations, certain policy determinations, and subpoenas. Proposed 43 CFR §4.905 further restricts what can be appealed by excluding orders to provide documents or information, if issued by the Associate Director for Royalty Management or his delegate. The combination of these two revised sections unduly limits a lessee’s rights to pursue an administrative appeal and unnecessarily complicates the process.

The current rules for Federal and Indian oil and gas valuation (30 CFR §§206.52, 102, 152, 153, 172, and 173) provide a mechanism for lessees to gain valuation certainty by requesting a valuation determination from MMS. These rules require that “MMS shall expeditiously determine the value based upon the lessee’s proposal and any additional information MMS deems necessary”. The NOPR would create two types of valuation determinations, those that contain mandatory or ordering language and those that do not. Only those that contain mandatory or ordering language are appealable; however, the NOPR fails to offer guidance on distinguishing the two types. Clearly, lessees only seek

valuation determinations if they are unsure of how to apply the regulations to their specific fact situations and require immediate guidance from MMS. Lessees deserve and are entitled to expeditious decisions by MMS that are immediately and automatically appealable. MMS' proposal undermines the concept of meaningful valuation determinations that provide certainty to and can be relied on by lessees, and it directly contradicts the intent of the current valuation regulations.

Policy determinations, such as a "Dear Payor Letter", suffer from the same pitfalls as valuation determinations. MMS proposes two types of such documents, those that contain mandatory or ordering language and those that do not. For policy determinations, however, the means of distinguishing the two types is further blurred since the NOPR only references this difference in the preamble (64 Federal Register 1935, January 12, 1999). Although prefaced by the term "non-binding", the proposed definition of "Order" at Part (2)(i)(C) in 43 CFR §4.903 fails to identify when a policy determination would be considered an "Order."

Subpoenas issued by MMS or a delegated State which fail to meet the requirements set forth in 30 U.S.C. §1724(d)(2) should be considered appealable orders.

Rather than distinguish between two types of orders to provide documents depending upon the relative authority of the individual issuing the order, all orders to provide documents or information should be considered appealable orders. MMS' concern to avoid the delay caused by administrative appeals of such orders may be minimized by the Assistant Secretary for Land and Minerals Management's choice to make a decision in a case.

In sum, valuation determinations, "Dear Payor Letters", subpoenas, and orders to provide documents or information should all be decisions that may

automatically be appealed administratively. Under any regulation, a Federal or Indian lessee should remain entitled to appeal any MMS decision that adversely affects it. The MMS should not attempt to undermine a lessee's rights by amending the appeals process.

IV. 30 CFR Part 243 – Bonding Requirements

API welcomes MMS' proposed rules for implementation of the Fairness Act's requirements regarding bonding: 1. the proposal that the recipient of an order to pay an obligation (other than an assessment) be allowed to provide evidence of financial solvency in order to suspend the order during the pendency of an appeal, and 2. the proposal that the recipient of an order to pay an assessment be entitled to an automatic stay. 64 FR 1961, et seq.; see also 30 U.S.C. §1724(l). API also welcomes MMS' proposal to apply these same rules to appeals not subject to the Fairness Act requirements, i.e., appeals involving Federal oil and gas production that occurred before September 1, 1996, and appeals involving other types of Federal mineral leases. 64 FR at 1961-62.

While the proposal does not apply to Indian leases, MMS specifically requested comments regarding the application of the rules to Indian leases. 64 FR at 1962. API believes that the same rules should apply to all appeals, including Indian lease appeals. Congress apparently was convinced that the financial solvency requirement would adequately protect the lessor's interest when the lessor is the Federal government. There is no reason the lessor's interest would not similarly be adequately protected when the lessor is an Indian Tribe or individual Indian mineral owner. The Interior Department's trust responsibility to Indian tribes and individual Indian mineral owners can be fulfilled by the financial solvency requirements of the proposed regulations just as well as it is by the existing bond requirements.

Moreover, having two sets of bonding rules will unnecessarily complicate the appeals process. For example, a single order may cover both Federal and Indian lands, in which case one set of bonding rules would be applicable to a portion of the order and another set of bonding rules would be applicable to the remainder of the order. Everyone would benefit from the simplified administrative process that would result if the same bonding rules were applicable to all appeals.

In addition, API urges the MMS to amend several specific features of the proposal.

Proposed § 43.3 - As noted above, the definitions in the rule should follow the Fairness Act definitions. Additionally, the proposed definition of the term "Order" as meaning only an order "to pay a monetary obligation", at best, creates an inconsistency in the proposed rules and, at worst, it may have the unintended result of causing other types of orders to become operative notwithstanding an appeal and therefore subject to immediate judicial review.

Currently, § 43.2 provides:

Compliance with any orders or decisions issued by the Royalty Management Program (RMP) of the Minerals Management Service (MMS), including orders for payments . . . shall be suspended by reason of an appeal having been taken . . . unless the Director, MMS, notifies the appellant in writing that the decision or order shall not be suspended pending appeal. Unless the amount under appeal is \$1000 or less, suspension of an order or decision requiring the payment of a specified amount of money shall be contingent upon the appellant's submission within a time period prescribed by MMS of an MMS-specified surety instrument deemed adequate to indemnify the lessor from loss or damage.

There is no similar provision in the proposed rule.

The preamble states that appeals of orders that do not involve the payment of a specified amount would not require the posting of a bond or other

surety to stay compliance. 64 FR 1962. Additionally, proposed § 43.8 refers to the suspension of "orders . . . regarding the payment and reporting of royalties," indicating that a broader category of orders is perhaps intended to be covered by the section. There is nothing in the proposed rules themselves, however, that provides for a stay of compliance of anything other than an "order" which, as noted, is defined to mean only an order "to pay a monetary obligation."

The proposed rules must be amended to make it clear that all decisions and orders (not just orders to pay a monetary obligation) will be suspended if an appeal is filed unless, as the current rule provides, the recipient of the order or decision is expressly notified in writing that compliance will not be suspended during an appeal.

Proposed § 43.5 - MMS requested comments regarding whether limitations should be imposed on who can post surety or demonstrate financial solvency on behalf of an appellant. 64 FR at 1963. API does not believe that any limitations are appropriate, especially since the conditions contained in the rule as proposed are more than adequate to protect the lessor's interest when someone posts surety or demonstrates financial solvency on behalf of another.

Proposed § 43.6 - This section should be amended to make it clear that only one bond or demonstration of financial solvency is required for any particular alleged liability. Thus, for example, if a lessee's designee receives and appeals an order and, within the 60 days allowed, meets the bonding or financial solvency requirements, the lessee(s) receiving a Notice of Order should not also have to meet those requirements. Conversely, if the lessee meets the bonding or financial solvency requirements, the designee should not also have to meet those requirements, even though both may have filed appeals. One guarantee of payment is enough; requiring more than one unnecessarily complicates the process and may have a chilling effect on appeals.

But it appears that MMS intends to require only one guarantee. In the preamble, MMS explains that:

Designees retain the ability to decide whether they are willing to assume this contingent liability [arising from an agreement to post bond or demonstrate financial solvency on behalf of another person]. If a designee does not wish to act as the surety for the lessees for whom it is paying, it does not need to do so. MMS will attempt to collect first from the liable persons, the lessees, and will only demand payment from designees who accept this responsibility if MMS is unable to collect from the liable person.

64 FR at 1963 (emphasis added).

MMS should make it clear in the rule itself that EITHER the lessee OR the designee, but not both, is required to post surety or demonstrate financial solvency. Similarly, where there are multiple lessees with undivided interests in a lease, MMS should make it clear that it is entitled to surety or a demonstration of financial solvency only for 100 percent of the alleged liability under the lease, not 100 percent from each undivided interest owner.

Proposed § 43.8 - API applauds MMS' proposal to increase the minimum amount under appeal for which a bond or demonstration of financial solvency will be required. API urges, however, that the same rules be made applicable to Indian appeals. As noted above, self-bonding will adequately protect the lessor's interest, regardless of whether Federal or Indian lands are involved. Moreover, as MMS correctly points out: "Appeals with monetary amounts less than \$10,000 typically involve appellants who have adequate lease surety coverage to secure the indebtedness during the administrative appeals process." 64 FR 1963. Lease bonds are the same regardless of whether Indian lands are involved. There is no reason a different rule should be applied to appeals involving Indian leases.

Proposed § 43.10 - API urges MMS to amend this proposed section to provide that MMS may initiate collection actions against the bond or other surety

instrument or the person demonstrating financial solvency within 90 days (instead of 30 days) of an adverse decision by the IBLA. As proposed, the section is inconsistent with the Mineral Lands Leasing Act, which allows 90 days for a judicial appeal of an adverse decision involving Federal onshore leases, 30 U.S.C. § 226.2, and proposed § 243.9, which states that, if judicial review is sought, the obligation to comply with a challenged order will continue to be suspended pending judicial review.

Proposed § 243.12 - MMS requested comments on its proposal to make determinations of financial solvency by the Bond-Approving Officer final and non-appealable. So long as MMS makes it clear that Bond-Approving Officer's final decision is judicially reviewable, and so long as sufficient time is allowed for such a judicial appeal to be filed, API does not object to the proposal.

Proposed § 243.12 - API urges that this section be amended to allow appellants to replace a surety with a self-bond any time after the effective date of the final rule, not only "when the surety instrument is due for renewal." 64 FR at 1989. Lessees may have a number of bonds that are due for renewal at different times. Depending on the circumstances, it may be more administratively convenient and/or less costly for a lessee to replace all of its outstanding bonds with a demonstration of financial solvency at the same time. Allowing lessees flexibility in this regard will not prejudice MMS.

At the very least, MMS should clarify that it intends to allow lessees to self-bond at least annually when MMS reviews the adequacy of the surety for additional interest, even if the surety instrument is automatically renewable for several years.

Proposed §§ 243.200(b) and (c) - The proposed rule should be made consistent with the preamble's explanation. According to the preamble, if MMS determines that you are financially solvent and can self-bond, "you would not be

required to update the audited financial statement you provided if you file subsequent appeals during the calendar year . . . unless you file for bankruptcy Thereafter, you would submit this statement annually so long as you have pending appeals." 64 FR 1964. As proposed, the rule provides that you must submit an audited consolidated balance sheet annually, if you file for bankruptcy or if "MMS notifies you that you must redemonstrate financial solvency", i.e., "whenever MMS requests". 64 FR 1989.

At the very least, MMS should specify the circumstances, other than bankruptcy filings, that might justify requiring an appellant to redemonstrate financial solvency. MMS bonding officials should not be allowed unfettered discretion to impose additional obligations in this regard.

V. 30 Part 290 – Offshore Minerals Management Appeal Procedures

The suggested process of mimicking the appeal rules provided for settling royalty disputes is not adequate to address the needs of the offshore Minerals Management Service. Although we concur that a direct appeal to the Interior Board of Land Appeals is the appropriate procedure for offshore program appeals, we believe that Subpart 290 should merely be rewritten to adopt the existing procedures in 43 CFR §4 Subpart E, and Subparts A and B, as applicable.

These existing rules adequately address the appeals process. They provide for a fact-finding procedure for resolving factual disputes and a briefing procedure involving stipulated facts with the application of law. Furthermore, there no need to exclude from this appeal process bid rejections or requests for royalty relief under the Deepwater Royalty Relief Act. The Gulf of Mexico is now a mature area and there is no obvious reason why the Interior Department should be reluctant to have the bid adequacy process reviewed by the Board of Land Appeals before going directly to Federal district court.

The requirement to make an EFT transfer to pay the filing fee is administratively burdensome and effectively deprives the appellant of several days of appeal time because of the administrative requirements to set up such transfers in advance of the notice of appeal. In addition, EFT transfers are not made without administrative cost; indeed, the administrative cost of making a transfer of such a small amount of money is excessive in light of the small payment involved.

Section 290.5 provides that a party may request MMS either for a reduction of fee or of a waiver of the requirement to make EFT payment. However, §290.6, which requires payment of the fee thirty (30) days after the MMS DRD decision, appears to contradict the §290.4 requirement that the sixty (60) day period for payment of the fee cannot be extended. Moreover, §290.6 also contradicts the §290.8 requirement that you may not obtain an extension of the time to file the notice of appeal. Payment of the fee is part of the process of filing the notice of the appeal. MMS should at least clarify this issue.

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