

THE UNITED STATES DEPARTMENT OF THE INTERIOR (DOI)
OFFICE OF HEARINGS AND APPEALS (OHA)
MINERALS MANAGEMENT SERVICE (MMS)

IN THE MATTER OF

Proposed Rules For
Appeals of MMS Orders

(64 *Fed Reg* 1930, et seq., January 12, 1999)

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INITIAL COMMENTS OF
COASTAL OIL & GAS CORPORATION

Attention: Mr. David S. Guzy, Chief
Rules and Publications Staff
Royalty Management Program
Building 85, Room A-613
Denver Federal Center
Denver, Colorado 80225

Via E-Mail
(RMP.comments@mms.gov)
and
Overnight Courier

Dear Mr. Guzy:

Coastal is pleased to respond to the request of the MMS and the OHA for comments on the subject proposed new rules for appeals of MMS orders (the **Proposed Rules**), as published in 64 *Federal Register* 1930, et seq., January 12, 1999 (the **Notice**).

I. COASTAL

The Coastal Corporation (the **Company**) is a diversified energy holding company with consolidated assets of over \$11 Billion. Acting through its subsidiaries and affiliates, including Coastal Oil & Gas Corporation, ANR Production Company, and CIG Exploration, Inc. (collectively **Coastal**), the Company has domestic and international operations in oil and gas exploration and production; natural gas gathering, processing, transmission, storage and marketing; crude oil gathering, transportation, and refining; marketing and distribution of refined

products; coal mining; chemicals; trucking; and electric power generation. Coastal is a Federal and Indian lands Lessee, and, therefore, has an interest in the Proposed Rules.

II. BACKGROUND

In May 1994, the MMS began a review of its administrative appeals process. It determined that the current process was too lengthy (sometimes lasting several years) and cost both sides too much money.

In 1995, the DOI established a Royalty Policy Committee (RPC) to advise the Secretary of the Interior (the Secretary). In September 1995, the RPC established several sub-committees, including the Appeals and Alternative Dispute Resolution Subcommittee (the Subcommittee). The Subcommittee was made up of representatives of the oil and gas industry, the State audit offices, and the Indians. The MMS provided staff to the Subcommittee, but did not have a vote.

After the formation of the RPC and the Subcommittee, but unrelated to their work, the President signed the Federal Oil & Gas Royalty Simplification and Fairness Act (FOGRSFA) into law on August 13, 1996, and on October 28, 1996, the MMS published a Notice of Proposed Rulemaking covering MMS appeals (officially withdrawn in this Notice). Among other things, the FOGRSFA set a 33-month deadline for resolving administrative appeals of MMS orders.

In reviewing the current rules on MMS appeals in light of FOGRSFA and real world experience, the Subcommittee acknowledged that the current MMS appeals process was under serious criticism and believed that substantial reform was needed. The Subcommittee identified many problems with the current appeals process, among them:

1. Lack of clarity in some MMS orders;
2. Lack of timely resolution of appeals;
3. Lack of independence of MMS Director-level decisions; and
4. Duplication of effort between the first step of the appeals process - to the MMS Director - and the second step of the appeals process - to the Interior Board of Land Appeals (IBLA).

The Subcommittee agreed that the goals of the MMS appeals process should be the expeditious and independent review of appeals (My emphasis). The Subcommittee made a number of recommendations to implement these goals and solve the problems it found, including:

1. Resolve MMS policy questions before issuing orders;
2. Encourage resolution of disputes prior to completing the formal appeals process; and
3. Change the fundamental structure of the appeals process so that appeals are taken directly to the IBLA (My emphasis).

On **March 27, 1997**, the RPC unanimously adopted and approved the recommendations of the Subcommittee and submitted its report to the Secretary (the **RPC Report**). The Secretary accepted the Report, with some minor changes and modifications, by letter dated **September 22, 1997** (the **Letter**).

On **December 31, 1997**, as a direct result of the RPC Report and the Secretary's acceptance of same, the MMS published a Revised Notice of Proposed Rulemaking (62 *Federal Register* 68244), and announced that they intended to withdraw the October 28, 1996 proposed rules.

Following the issuance of the RPC Report and the Letter, the MMS formed a drafting team, composed only of representatives of the MMS, the IBLA, the Office of the Solicitor, and State audit offices (the **Team**). The stated goal of the Team was to draft changes to the current rules to implement the recommendations in the RPC Report in accordance with the modifications contained in the Letter.

The Proposed Rules were then drafted by the Team over the course of the next year (but without the advice and counsel of the RPC, the Subcommittee, or any other industry representatives), and first published in the Federal Register on **January 12, 1999**.

The Notice requires written comments to be filed on or before **March 15, 1999** (i.e., within 60 days of publication).

By separate notice in the Federal Register (64 *Federal Register* 3262 and 63, **January 21, 1999**), the MMS advised interested parties that it would hold a single public hearing on the Proposed Rules in Houston, Texas, on Tuesday, **February 16, 1999**.

Although Coastal was able to attend the hearing and made several comments on the record, it was obvious by the light attendance for such an important matter that many interested Lessees could not attend. It should also be noted that at the hearing, the MMS announced that (i) the March 15, 1999 deadline for written comments would not be extended, and that (ii) the MMS was planning to publish the Proposed Rules as final rules within six weeks after the comment deadline (i.e., by the end of **April, 1999**).

III. COASTAL'S COMMENTS

Coastal is a member of the FOGRSFA Implementation Group, and has joined with the other members of the Group in submitting written comments drafted by Patricia Dunmire Bragg on behalf of the Group.

Coastal is also a member of American Petroleum Institute (the API), and has joined with other members of the API in submitting written comments drafted by the API on behalf of its members.

Coastal, therefore, endorses and incorporates herein by reference the comments filed in this matter by the FOGRSFA Group and by the API.

Subject to the comments of the FOGRSFA Group and the API, Coastal hereby submits the following additional comments on its own behalf:

1. **THE PROPOSED RULES FAIL TO ADOPT THE MOST IMPORTANT RECOMMENDATIONS OF THE RPC REPORT, AND DO NOT COMPLY WITH THE SECRETARY'S LETTER.**

The principle recommendation of the RPC Report (i.e., to adopt a single-step appeal process directly to the IBLA - the same administrative appeal process as other agencies within the Department of the Interior) has not been incorporated into the Proposed Rules. While changing a lot of words, the drafters have retained the old two-step appeal process, with the first step being an appeal to the MMS Director. In fact, the Proposed Rules are now more complicated, contain more arbitrary deadlines (traps?), are less flexible, and

are more burdensome than the present system they seek to replace. It is almost as if the drafters had reversed the RPC Report's recommendations and written the Proposed Rules from that perspective. This results perhaps from the drafters being part of the system that is to be changed and not seeking industry comment before publishing. The drafters simply didn't get it.

2. THE PROPOSED RULES ARE STILL A TWO-STEP APPEAL PROCESS.

The drafters of the Proposed Rules claim the Proposed Rules comply with that recommendation of the RPC Report because the MMS Director no longer makes a "decision," but this is just playing with words. The drafters claim the Director does not make a decision because they do not use the word "decision" in the Proposed Rules, but the Director still has the authority to "concur with, rescind, or modify an order" (§4.929). This still looks like, still smells like, and still feels like a decision, and still appears to have the same effect on the appeals process as a decision, therefore, it must still be a decision. As additional proof that the drafters still intend a two-step appeal, following the decision of the MMS Director, the Lessee must pay an additional fee and file its Statement of Reasons if it desires to continue the appeals process (§4.933 and 4.939).

One of the primary goals of the recommendations of the RPC Report was to create an appeals process that is (1) expeditious, and (2) impartial (i.e., decided by an independent, impartial decision maker). The only way to do this, per the RPC Report, was to totally eliminate the first step in the old appeal process - the appeal to the MMS Director - which the RPC unanimously agreed was wasteful, time-consuming, inefficient, and certainly not impartial. Contrary to the statements of the drafters at the public hearing in Houston, the Proposed Rules retain the same old two-step appeal process with the first appeal to the MMS Director.

3. RESOLUTION OF DISPUTES SHOULD COMMENCE IMMEDIATELY AFTER THE ISSUANCE OF THE ISSUE LETTER.

Coastal applauds the provisions in the Proposed Rules which provide for meetings, discussions, and impartial mediation after the formal appeals process commences, however, if the MMS and the OHA really desire efficiency and early resolution of disputes, they should similarly provide for meetings, discussions, and impartial mediation prior to the issuance of the formal MMS Order. While the appeals process commences

with the issuance the MMS Order, the dispute actually commences with the issuance of the MMS Issue Letter. Issuing an Order prior to holding meaningful discussions on the Issue Letter seems entirely counter-productive to the goal of early resolution, because the Lessee must immediately turn its attention to filing a Notice of Appeal, paying a processing fee, and drafting and filing a Preliminary Statement of Issues to protect its appeal rights (§4.907).

It has been Coastal's experience that meetings and negotiations between, for example, MMS auditors and company representatives, after the issuance of an Issue Letter, but before the issuance of an Order, have been very useful to both sides in identifying and narrowing the underlying issues, and resolving at least some of the disputed matters before the Order is issued. Impartial mediation at this point in time, prior to the drafting of written formal legal positions, would, in Coastal's opinion, be more effective than mediation after the two sides had "barricaded" themselves behind formal, written positions.

It is Coastal's recommendation that, upon the request of the Lessee, representatives of the MMS and the Lessee, both of whom have authority to settle the dispute, should be required to meet with an impartial mediator, experienced in oil and gas operations and MMS royalty issues, to attempt, in good faith, to settle the dispute prior to the issuance of a formal MMS Order.

4. INFORMAL DISPUTE RESOLUTION SHOULD NOT BE CUT OFF BY
ARBITRARY INTERNAL MMS DEADLINES.

Coastal anticipates that the drafters will respond to Comment No. 3, above, by saying such informal meetings and negotiations are not barred by the Proposed Rules and may still occur, but since one of the new goals of the MMS is to issue Orders within 60 days after the issuance of the Issue Letter (a goal stated by the drafters on the record at the Houston public hearing), and since the Order must comply with certain specific requirements (§242.105), which will necessarily take thought and time to draft, it seems obvious that every Issue Letter will be quickly followed by an Order, which, in turn, must be promptly appealed by the Lessee, before any meaningful resolution discussions can even be started. Further, the MMS will have no incentive to meet and negotiate in good faith with the Lessee to attempt resolution after the issuance of an Issue Letter when they are at the same time working on drafting an Order, and know the Order will be issued unless the Lessee simply capitulates.

Since the 33-month appeals clock does not start running until the issuance of the Order (or under the Proposed Rules, the filing of an appeal), there is no legal or logical reason (other than the running of the Statute of Limitations) to issue an Order until after the Lessee has had the opportunity to respond to the Issue Letter, and the opportunity to meet with the MMS and discuss the issues and attempt in good faith to resolve the dispute on an informal basis, including the right to impartial mediation. The Order should only be issued as a last resort, after all reasonable efforts to settle the dispute have been exhausted, not as the first step in the settlement process.

5. THE LESSEE'S PRELIMINARY STATEMENT OF ISSUES SHOULD BE JUST THAT - A PRELIMINARY STATEMENT.

Section 4.907 states, "You must specifically identify the legal and factual disagreements you have with the order . . . you are appealing." (My emphasis) Further, Appendix A, page 1981, the sample PSOI, paragraphs 2, 3, and 4, provide for the insertion of "citation to applicable case law, statutes, and/or regulations." Although the drafters stated at the public hearing in Houston that this was not the intent, as presently written, the Proposed Rules could be interpreted to exclude from consideration in an appeal any legal or factual arguments not clearly stated in the PSOI and supported by proper citations.

As explained above, it has been Coastal's experience that in many cases the real facts and issues are not apparent from the Issue Letter or the Order, and only become clear during or after meetings and discussions with the MMS, which is after the filing of a Notice of Appeal and Preliminary Statement of Reasons (now a Preliminary Statement of Issues under the Proposed Rules).

Section 4.923 permits the Lessee to supplement the record, but only on a showing of good cause and only with the permission of the MMS.

Coastal recommends that the Proposed Rules be clarified to expressly allow the Lessee the right to supplement the record by clarifying the facts, introducing additional evidence, asserting additional legal and factual arguments, and citing additional law and cases in its Statement of Reasons. Under the Proposed Rules, the Lessee's Statement of Reasons is filed after the MMS Director renders his/her decision if the Lessee desires to proceed to the second step of the appeals process (§4.933), which would also be after settlement discussions have been held between the parties.

If the Proposed Rules require the Lessee to file a “full-blown” legal brief at the very outset of the appeals process, it will have a chilling effect on Lessees’ right to appeal. For those Lessees who do not have specialized attorneys in-house, it means retaining an outside lawyer to draft an appeal brief if it wishes to exercise its right to appeal.

6. UPON THE REQUEST OF THE LESSEE, REASONABLE EXTENSIONS OF TIME SHOULD BE AUTOMATICALLY GRANTED.

Section 4.958 provides for extensions of time to file pleadings, but “the office or official with whom you must file your request has the discretion to decline any request for an extension of time.” (My emphasis)

Since this same section requires the Lessee to agree to extend the 33-month decision deadline, and since the Lessee/Appellee is also required to post an appeal bond guaranteeing payment in the event the appeal is ultimately decided in favor of the MMS, what harm is caused by a reasonable extension? It should be noted that few Lessees have the luxury of having specialized in-house counsel experienced in such matters who are able to devote their full time to the legal research and drafting of detailed pleadings. Coastal believes that the granting of reasonable extensions of time to file pleadings that are well researched and well written are really in everyone’s best interests, and should be encouraged, not left up to the discretion of MMS officials who may have an interest in denying the request.

IV. CONCLUSION

1. Coastal requests the MMS and the OHA to withdraw the Proposed Rules. The Proposed Rules do not solve the problems identified by the RPC and re-stated by the MMS and the OHA as justification for its changes. The Proposed Rules do not comply with the recommendations of the RPC Report, and they do not achieve the goals and objectives stated in the Report, the Letter, and this Notice.

Since the Proposed Rules not only failed to incorporate the most important recommendations of the RPC Report, but also made the whole appeals process more complex and more burdensome, Coastal would prefer to leave the current MMS rules in place, with the addition of the FOGRSFA statutory requirements, e.g., 33-month deadline

for resolving appeals, self-bonding, 60 day period to files notice of appeal, etc., rather than adopting the Proposed Rules.

2. In the alternative, Coastal requests the MMS and the OHA to extend the comment period on the Proposed Rules for at least an additional 120 days. Even though it took the Team over a year to draft the Proposed Rules, which, along with the MMS' section-by-section analysis of the changes, comprise some sixty-two (62) pages of three columns of small print, the Notice requires written comments to be filed on or before March 15, 1999 (i.e., within 60 days of publication). For those of us who were not intimately involved in this matter, 60 days hardly seems to be an adequate length of time to read, review, and analyze the Proposed Rules, let alone draft comprehensive written comments.

One could easily infer from the announcements made by the MMS/OHA at the Houston public hearing (i.e., that the comment period was not going to be extended and that the final rules would be issued in six weeks) that what the MMS/OHA was really telling Lessees and other interested parties was that they were going to publish the Proposed as final rules regardless of what was said at the public hearing and regardless of what was stated in any written comments.

3. In either event, the MMS and the OHA should hold more public workshops to gain valuable input from Lessees and other interested parties who have been directly affected by MMS Orders and have personally been through the appeal process. For example, the date of the single public hearing was "Fat Tuesday," the last day of Marti Gras in New Orleans, and was strongly objected to by interested parties in New Orleans due to the fact that by the time the notice was published, it was virtually impossible to book a flight to Houston. Those objections were ignored by the MMS/OHA, and the hearing was held as originally scheduled.

After the workshops, the MMS and the OHA should re-draft the Proposed Rules to actually incorporate the recommendations of the RPC Report, to incorporate the recommendations, comments, and clarifications obtained from the written comments and the workshops, and to truly achieve the stated goals and objectives of the Proposed Rules, i.e., an impartial, efficient, one-step appeal process which encourages early resolution. After the Proposed Rules have been redrafted, they should be re-proposed in the form of a Second Revised Notice of Proposed Rulemaking so that Federal and Indian Lessees can respond to the changes and clarifications.

4. The Proposed Rules should be amended so that, after the issuance of an Issue Letter, and upon the request of the Lessee, representatives of the MMS and the Lessee should be required to meet and negotiate in good faith, to attempt to settle the dispute prior to the issuance of an Order. If they are unable to resolve the dispute on their own, at the request of the Lessee, the parties should be required to meet with an impartial mediator, experienced in oil and gas operations and MMS royalty issues, to attempt to resolve the dispute before the issuance of an Order.
5. There should be no arbitrary time schedule in which to issue an Order, unless the Lessee fails to respond to the Issue Letter. As long as the parties are talking, and so long as the Statute of Limitations is not running out, no Order should issue.
6. The Proposed Rules should be clarified to expressly allow the Lessee the right to supplement the record by clarifying the facts, introducing additional evidence, asserting additional legal and factual arguments, and citing additional law and cases in its Statement of Reasons.
7. The Proposed Rules should be clarified to expressly allow the Lessee the right to obtain extensions of time to file pleadings, so long as the Lessee agrees to extend the 33-month time limit for equal amounts of time.
8. Although the MMS referred to both the Report of the RPC and the Secretary's Letter accepting the Report, they were not published in the Federal Register along with the Proposed Rules. Coastal requests that the Report of the RPC and the Secretary's Letter be published in the Federal Register along with the re-proposed rules.

Minerals Management Service
Mr. David S. Guzy
March 12, 1999
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RESPECTFULLY SUBMITTED this 12th day of March 1999.

COASTAL OIL & GAS CORPORATION

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