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Regulatory Affairs
Deepwater and Shelf

VIA AIRBORNE EXPRESS

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Mr. David S. Guzy
Chief, Rules and Publications Staff
Minerals Management Service
Royalty Management Program
Building 85, Room A-613 (MS 3021)
Denver Federal Center
Denver, CO 80225

SUBJECT: COMMENTS ON MINERALS MANAGEMENT SERVICE PROPOSED RULEMAKING: APPEALS OF MMS ORDERS 64 FR 1930 (JANUARY 12, 1999)

Dear Mr. Guzy:

Shell Offshore Inc., Shell Deepwater Development Inc., Shell Deepwater Production Inc., and other Shell affiliates and subsidiaries (all referred to as "Shell"), appreciate the opportunity to offer comments regarding the proposal for appeals of MMS orders.

Shell has participated in and hereby adopts the comments prepared and submitted by the American Petroleum Institute (API).

Shell joins with API in suggesting that the MMS simplify the complex steps set out to perfect an appeal. The three requirements to perfect an appeal are: notice of appeal, statement of issues, and filing fee. They are burdensome and effectively shorten the appeal time through their requirements. Ordinarily, the order to initiate Electronic Fund Transfers (EFT) must be submitted at least twenty-four (24) hours prior to the transfer date itself. In emergencies a transfer can be made if a request is made at a bank by 8:00 a.m. of the day of transfer. Therefore, an appellant who discovers an appeal on the last day is effectively barred from taking an appeal because of the administrative time required to arrange for EFT transfer. EFT transfers are administratively burdensome for sums as low as $150. The approximate cost to arrange for such transfer is $25. This cost is excessive in light of the $150 appeal fee. The process set

out for obtaining an exception to the EFT process is ambiguous, contradictory and administratively complex. This three tier approach to perfecting an appeal will likely spawn numerous appeals over procedural matters which will waste productive resources of both Department of Interior (DOI) as well as industry.

MMS has also placed all appeals, large and small, in this same complex administrative process. Shell urges MMS to create the equivalent of a small claims appeal process which will more effectively and efficiently dispose of smaller issues such as AFS PAAS appeals, smaller non-recurring, and non-precedent setting appeals. This process could be simpler, less formal, and more closely resemble the current process. We believe both MMS and industry would appreciate such distinction. In considering this MMS could create a category of reporting discrepancies, claims of $300,000 or less which at the option of appellant, could be made subject to this process.

The MMS proposal also fails to effectively address one of the more serious problems of royalty underpayment, namely, efficient and timely appeal of MMS policy decisions on substantive issues. Experience over time and statistical data on pending appeals indicate that the majority of appeals which grow in number and age actually revolve around policy issues on royalty assessability. Industry, in these cases, has been unable to expeditiously secure either final agency action and a judicial review to bring the difference to final conclusion. An example of this is the truncated history of policy shifts within MMS on royalty assessability of gas contract settlements. Another is the various swings in MMS approach to tariff as a transportation deduction. We understand the various forces, the pressures of law, law changes and constituency input which impact the various executive branches of government. However, the regulated community should be provided with a tool to expeditiously and effectively request and receive a binding determination on policy issues which can then be appealed. The current Notice of Proposed Rulemaking on appeals fails to do this by affirming the ambiguous appellate status of Dear Payor Letters and advisory opinions. In practice, those who live day to day compliance realize that these letters and advisory documents have created a significant number of the appeals related to basic differences in principle between MMS and industry. What is needed is an agency process which can bring the administrative phase of this process to finality so all parties can, if they so choose, seek clarification in the judicial branch. This Notice of Proposed Rulemaking fails to achieve this goal.

We also believe the Notice of Proposed Rulemaking implementing changes to the Federal Oil and Gas Royalty Management Act (FOGRMA) civil penalties section is unduly restrictive and procedurally defective. In particular, the Notice of Proposed Rulemaking fails to recognize the two distinctive phases of litigation, namely, liability and quantum. 30 USC §1719(e) requires a hearing on both aspects before a penalty can be assessed. The twenty (20) day time for taking the appeal is too short to allow the notice to effectively circulate within larger companies. There appears to be no

reason why the appeal date could not be set at forty (40) days. Forty days is the effective date of the second tier penalty for non-compliance. Since one is allowed to correct within twenty (20) days with no consequence, it appears illogical to require appeal within the same time frame. This is especially true when a hearing is required for determining quantum even if the correction were not made in twenty (20) days. The short time frame allowed for correction after the notice reaches the right party which if not met forfeits appeal rights effectively forces a lessee to take an appeal if only to protect rights in case of a failure or inability to meet the twenty (20) day clock. This makes the process administratively inefficient and unduly burdensome. The intent of the statute was to foster voluntary compliance not unnecessary appeal.

These regulations also fail to define the term "violation" and fail to articulate objective standards for notifying the regulated community of the calculation process for fines. Since "violation" and the alleged number of violations is multiplied times the fine on a per day basis, it is incumbent on the agency to clearly define this term. Objective criteria are needed to provide standards by which fine assessment can be reviewed, both by regulated community as well as the judiciary. Past judicial precedents on administrative procedure require similarly situated parties to be treated equally in the administrative appeal process. The three general factors listed: history, severity and ability to pay, are far too broad to meet this requirement. For example, there is no definition of history. How long does a past violation impact calculation? We suggest that such criteria as degree of knowledge, impact of ordinary negligence, express corporate policy, internal audit and review procedures, limits and complexity of computer systems, good and bad faith interpretation of regulatory requirement, opportunity to correct, knowledge and failure to correct are among the more specific elements which should be articulated in determining size of penalty.

It is especially critical for these regulations to provide a procedure as required to designate a person or a position within a corporation for receipt of the notice of FOGRMA non-compliance. See 30 USC §1730(h). The statute gives lessee this right and the agency is required to promulgate guidance on how this is to be accomplished. This is especially important in light of the short twenty (20) day appeal window.

The Notice of Proposed Rulemaking on Offshore Minerals Management (OMM) appeals should be redrafted. The suggested process is to go directly to the Interior Board of Land Appeals (IBLA) from the OMM decisions but to apply the royalty rules. We concur with a direct appeal to IBLA but suggest that IBLA be left to apply its own existing rules which may or may not allow for factual development of the record. Experience over time indicates that those issues which have proceeded on appeal have been highly fact intensive, i.e. unitization disputes. In these cases, the record development is often both for benefit of MMS as well as competing parties. Immediate appeal to IBLA would expedite the process if the IBLA or rules similar to federal rules were used.

Shell sees no need to have appeal bonds posted by any lessee on offshore appeals. There is already a requirement of the OMM to post significant bonds for fulfillment of lease obligations. Royalty payment is included among those obligations. We believe posting of additional bonds is administratively costly and duplicitous. The MMS itself should be able to coordinate this process without requiring a lessee on the OCS to post double bonds for the same obligations.

We appreciate the opportunity to submit these comments. If you have any questions on the above comments, please contact Mike Coney (504-728-4643) or me (504-728-6982).

Sincerely,

Peter Velez

Peter K. Velez
Manager Regulatory Affairs