



July 21, 2014

**VIA E-FILING ON [www.regulations.gov](http://www.regulations.gov)**

Mr. Armand Southall  
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United States Department of the Interior  
Post Office Box 25165, MS 61030A  
Denver, Colorado 80225

**Re: RIN 1012-AA05. *Amendments to Civil Penalty Regulations*, proposed rule published in the Federal Register on May 20, 2014 (79 Fed. Reg. 28,862).**

Dear Mr. Southall,

On May 20, 2014, the Department of the Interior's Office of Natural Resources Revenue ("ONRR") published several proposed amendments to its civil penalty regulations in the Federal Register and requested public comments on the proposal.<sup>1</sup> This submission constitutes the comments of the Independent Petroleum Association of America ("IPAA") and the National Ocean Industries Association ("NOIA") and addresses in detail important aspects of the proposed amendments.

IPAA is the leading, national upstream trade association representing oil and natural gas producers and service companies. IPAA represents thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts. It is the members of these groups that the proposed amendments will most significantly affect. Independent producers drill about ninety-five percent of American oil and natural gas wells, produce more than fifty percent of American oil, and more than eighty-five percent of American natural gas.

NOIA is the only national trade association representing all segments of the domestic offshore energy industry and related industries. NOIA's membership is comprised of more than three hundred companies that are dedicated to the safe development of offshore energy for the

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<sup>1</sup> 79 Fed. Reg. 28,862 (May 20, 2014).

Mr. Armand Southall  
July 21, 2014  
Page 2

continued growth of the United States. NOIA member companies are engaged in a variety of business activities, including production, drilling, engineering, marine and air transport, offshore construction, equipment manufacture and supply, telecommunications, finance and insurance, and renewable energy.

These comments are filed on behalf of IPAA, NOIA, and the following organizations:

Arkansas Independent Producers and Royalty Owners Association  
California Independent Petroleum Association  
Coalbed Methane Association of Alabama  
Colorado Oil & Gas Association  
East Texas Producers & Royalty Owners Association  
Eastern Kansas Oil & Gas Association  
Florida Independent Petroleum Association  
Illinois Oil & Gas Association  
Independent Oil & Gas Association of New York  
Independent Oil & Gas Association of West Virginia  
Independent Oil Producers Agency  
Independent Oil Producers Association Tri-State  
Independent Petroleum Association of New Mexico  
Indiana Oil & Gas Association  
Kansas Independent Oil & Gas Association  
Kentucky Oil & Gas Association  
Louisiana Oil & Gas Association  
Michigan Oil & Gas Association  
Mississippi Independent Producers & Royalty Association  
Montana Petroleum Association  
National Association of Royalty Owners  
Nebraska Independent Oil & Gas Association  
New Mexico Oil & Gas Association  
New York State Oil Producers Association  
North Dakota Petroleum Council  
Northern Alliance of Independent Producers  
Northern Montana Oil and Gas Association  
Ohio Oil & Gas Association  
Oklahoma Independent Petroleum Association  
Panhandle Producers & Royalty Owners Association  
Pennsylvania Independent Oil & Gas Association  
Permian Basin Petroleum Association  
Petroleum Association of Wyoming  
Southeastern Ohio Oil & Gas Association  
Tennessee Oil & Gas Association  
Texas Alliance of Energy Producers  
Texas Independent Producers and Royalty Owners Association

Mr. Armand Southall  
July 21, 2014  
Page 3

Utah Petroleum Association  
Virginia Oil and Gas Association  
West Virginia Oil and Natural Gas Association  
Western Energy Alliance

In addition to the specific comments made herein, we support those comments that the participants identified above may submit separately.

ONRR proposes to amend 30 C.F.R. Part 1241, subparts A through C.<sup>2</sup> In ONRR's view, the proposed rules are meant "to clarify ambiguities, simplify the processes for issuing notices of noncompliance and civil penalties and for contesting notices of noncompliance and civil penalties, and rewrite the regulations in Plain Language." But as presently drafted, the proposed amendments only further complicate existing administrative processes and imperil the procedural protections that the law affords private individuals conducting business with the government. The proposed amendments will raise penalty amounts in a manner that threatens to undermine operators' legal rights to challenge improperly assessed penalties and are certain to have a disproportionate (and mostly adverse) impact on small and independent oil and gas producers.

The agency owes it to the public to be candid about the dramatic changes it is proposing. Since the passage of the Federal Oil and Gas Royalty Management Act ("FOGRMA") in 1983, ONRR and its predecessor conducted its regulatory activity through two principal means: (i) notice-and-comment rulemaking for general rules having the force of law; and (ii) appealable orders in individual cases applying the rules to the findings of company-specific audits. To be sure, the agency did from time to time issue guidance documents ("Dear Payor" letters and the like), but these were universally acknowledged to be non-appealable and non-binding. If a company wished to challenge the guidance, it had to await an order applying the guidance after an audit. The *pro quo* for this *quid* was that a company could not be subjected to civil penalties for not immediately complying with the non-binding, non-appealable guidance document. The proposed rules, however, stand that practice on its head. If the proposed amendments were adopted, a company could still not appeal the guidance document, but would be subject to immediate penalty for failing to comply with the document's terms. This inequitable approach fails to safeguard the due process rights of American-owned and American-operated businesses.

ONRR also proposes to hold royalty payors liable for penalties (not just the amount of royalties owed) under a theory of "vicarious liability." But ONRR applies that theory in defiance of Supreme Court precedent limiting the circumstances in which vicarious liability may be imposed in the context of punitive sanctions. An operator should not be penalized for an employee's errant acts unless ONRR can establish that the operator failed to guide and monitor the employee's work in reckless disregard of regulatory requirements.

We ask that ONRR carefully consider the concerns discussed in these comments. We request that ONRR rescind or significantly modify the proposed amendments to eliminate requirements

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<sup>2</sup> *Id.*

Mr. Armand Southall  
July 21, 2014  
Page 4

that impose costs without promoting regulatory compliance, and undermine procedural protections that must accompany government enforcement actions.

Thank you for your consideration of these comments,

A handwritten signature in black ink, reading "Barry Russell". The signature is written in a cursive style with a large, sweeping initial "B".

Barry Russell  
President & CEO  
Independent Petroleum Association of America

A handwritten signature in black ink, reading "Randall Luthi". The signature is written in a cursive style with a large, sweeping initial "R".

Randall Luthi  
President  
National Ocean Industries Association

## Table of Contents

PRELIMINARY NOTE ON NOMENCLATURE .....	1
I. POLICY CONCERNS. ....	1
A. THE PROPOSED AMENDMENTS UNFAIRLY TARGET INDEPENDENT PRODUCERS. ...	2
B. THE PROPOSED AMENDMENTS VIOLATE STATUTORY RIGHTS AND OFFEND DUE PROCESS.....	3
II. PENALTY PROPOSALS.....	3
A. <i>Proposal: Eliminate Discretion to Stay Accrual of Penalties While a Hearing is Pending.</i> .....	3
B. <i>Proposal: Increase Daily Penalties.</i> .....	4
C. <i>Proposal: Limit ALJs Discretion to Reduce Penalties.</i> .....	5
D. <i>Proposal: Penalties to Accrue from Date NONC Is Served.</i> .....	7
E. <i>Proposal: Penalties for Failure to Comply with Non-Binding Guidance.</i> .....	7
F. <i>Proposal: Expand the Scope of Civil Penalties Regulations.</i> .....	9
III. LIABILITY STANDARD PROPOSALS.....	9
A. <i>Proposal: Equate “Knowingly Or Willfully” with “Gross Negligence”</i> .....	9
B. <i>Proposal: Impose Strict and Vicarious Liability.</i> .....	12
IV. PROCEDURAL PROPOSALS.....	15
A. <i>Proposal: Apply Universal Thirty-Day Limit to Hearing Requests.</i> .....	15
B. <i>Proposal: Prohibit Certain Hearing Requests.</i> .....	17
C. <i>Proposal: ONRR’s Initial Burden Satisfied Via NONC, ILCP, or FCCP</i> .....	18
D. <i>Proposal: Eliminate Early Discovery.</i> .....	19
V. PROPOSED DEFINITIONS.....	19

## **PRELIMINARY NOTE ON NOMENCLATURE**

To maintain consistency with the language ONRR uses in the proposed amendments, these Comments incorporate the following acronyms:<sup>3</sup>

“**ALJ**” means Administrative Law Judge in the Hearings Division;

“**NONC**” means a Notice of Noncompliance, which “states the violation(s) and how to correct the violations to avoid civil penalties.” This proposed Notice is identical to the Notices of Noncompliance presently issued under 30 C.F.R. § 1241.51(a);

“**FCCP**” means a Failure to Correct Civil Penalty Notice, which “assesses civil penalties if you fail to correct the violations in a NONC.” An FCCP is analogous to the Notice of Civil Penalty presently issued under 30 C.F.R. § 1241.53(a) when a party fails to correct violations identified in a Notice of Noncompliance within the time period provided for in the Notice; and

“**ILCP**” means an Immediate Liability Civil Penalty Notice, which “assesses civil penalties for specified violation(s) without providing a prior opportunity to correct the violation(s).” An ILCP is analogous to the Notice of Noncompliance and Civil Penalty presently issued under 30 C.F.R. § 1241.61 when ONRR has determined that a party has committed a violation identified in 30 U.S.C. § 1719(c)-(d).<sup>4</sup>

### **I. POLICY CONCERNS.**

ONRR suggests that it intends to tighten the rules governing civil penalties as means to promote strict compliance with the regulations. Yet the proposal would not promote compliance so much as strong-arm oil and gas operators into following any directive ONRR might issue, regardless of the directive’s legality or reasonableness. By elevating penalty amounts and divesting ALJs of the power to stay the accrual of a penalty during an administrative appeal of an agency decision, among other provisions, ONRR would effectively remove the right of companies to challenge government decision-making premised on errors of fact or law. And while we support ONRR’s stated goal to simplify the administrative appeal process, ONRR’s current proposal falls short of that objective. The amendments ONRR proposes would actually have the perverse effect of forcing operators to choose between immediately appealing virtually all agency action -- unnecessarily adding to the agency’s administrative caseload -- or risk forever losing procedural protections that the law currently affords operators when ONRR action is improper or unlawful.

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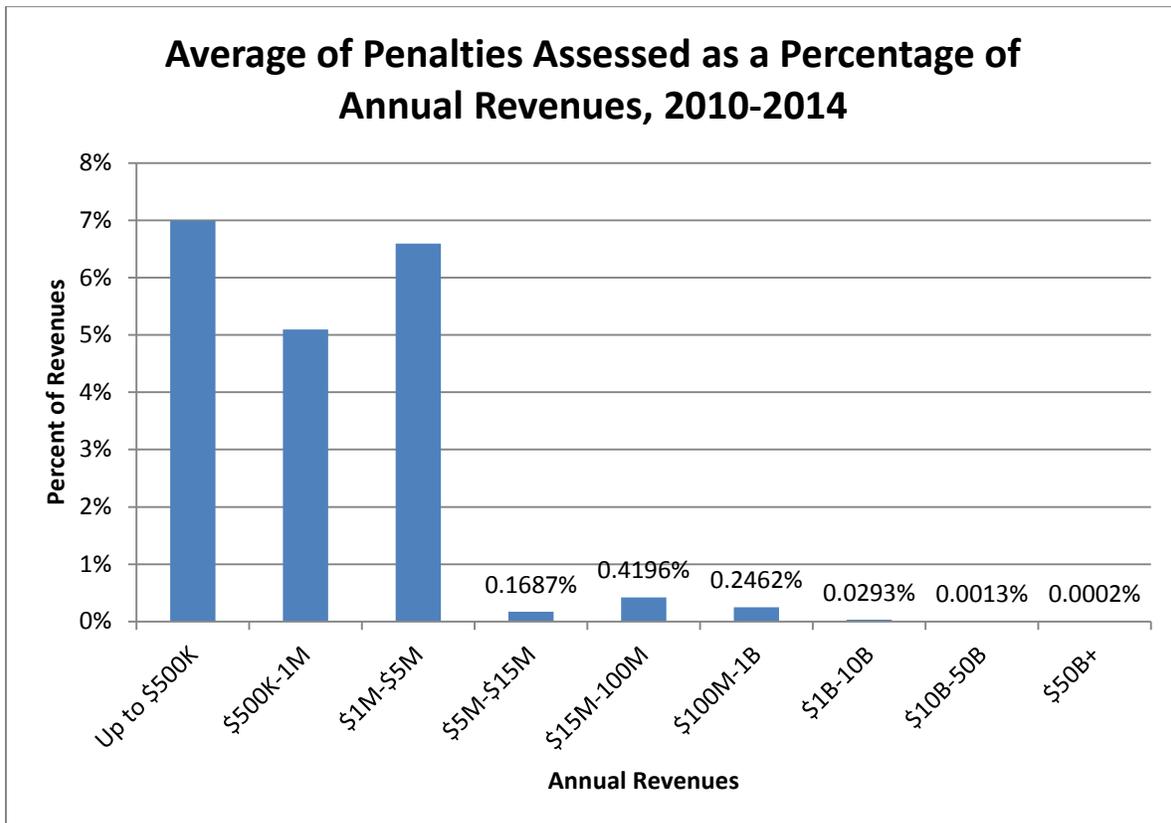
<sup>3</sup> See 79 Fed. Reg. at 28,873-74.

<sup>4</sup> For a comprehensive discussion of the violations identified in 30 U.S.C. § 1719(c)-(d), see discussion *infra* Parts III.A & III.B.

**A. THE PROPOSED AMENDMENTS UNFAIRLY TARGET INDEPENDENT PRODUCERS.**

As referenced above, independent producers are responsible for the overwhelming amount of domestic oil and gas production. Just last year, oil and gas reserves increased nine percent, virtually all of which is attributable to independent producers as opposed to major, integrated oil companies.<sup>5</sup>

It is therefore not surprising that independent producers are also the target most vulnerable to ONRR’s regulatory enforcement activity. The graph below demonstrates the relationship between the size of the civil penalties that ONRR imposed between 2010 and 2014 and the annual revenues of the companies upon whom the penalties were imposed.<sup>6</sup> Particularly for companies with annual revenues below five million dollars, the size of the penalties that ONRR imposed represent a meaningful percentage of revenues, implicating the company’s fiscal solvency and its ability to survive economically. Recognizing the importance of independent producers to America’s energy industry and overall economy, policies that exacerbate this disproportionate effect on small businesses are unjustifiable.



<sup>5</sup> EY, *US Oil and Gas Reserves Study* at 6-7 (2013), available at: [http://www.ey.com/Publication/vwLUAssets/US\\_oil\\_and\\_gas\\_reserves\\_study\\_2013/\\$FILE/US\\_oil\\_and\\_gas\\_reserves\\_study\\_2013\\_DW0267.pdf](http://www.ey.com/Publication/vwLUAssets/US_oil_and_gas_reserves_study_2013/$FILE/US_oil_and_gas_reserves_study_2013_DW0267.pdf).

<sup>6</sup> ONRR publishes the amounts of the civil penalties it collects on its website. See Office of Natural Res. Revenue, *Civil Penalties*, available at: <http://onrr.gov/compliance/civil-penalties.htm>. Information related to individual companies’ annual revenues was collected from internet searches of publicly available websites.

## **B. THE PROPOSED AMENDMENTS VIOLATE STATUTORY RIGHTS AND OFFEND DUE PROCESS.**

Given the size and the resources of the producers that ONRR's rules impact, the cost of compliance with ONRR's proposed amendments will often serve as an effective barrier to administrative appeal, notwithstanding the merits of any directive a producer might wish to challenge. But the amendments' prohibitions are not limited to *de facto* restrictions. In many aspects the amendments constitute an express limitation of affected producers' procedural rights. The amendments curtail the discretion of hearing officers, limit appellants' access to discovery procedures that may narrow the scope of an appeal or streamline an appeal's adjudication, and subject producers to substantial penalties for failure to comply with unofficial guidance that is otherwise legally non-binding.

To the extent that ONRR's proposed rules function to restrict companies' ability to appeal agency decisions, those rules contravene statutory requirements. Congress has directed that "[n]o penalty . . . shall be assessed until the person charged with a violation has been given the opportunity for a hearing on the record."<sup>7</sup> ONRR may not use its rulemaking process to eviscerate a right that Congress has guaranteed.

Equally important, the proposed rules offend constitutional due process principles. ONRR would give legal potency to "guidance" documents that are neither Congressionally authorized nor the product of a proper administrative rulemaking process, while at the same time denying companies the tools necessary to challenge improper decisions made through these documents. The amendments do not articulate the standards to which ONRR must adhere in application of penalty provisions and do not establish the requirements ONRR must meet or findings it must make before issuing its directives. In the end, the civil penalty regime ONRR envisions subjects operators and producers to the whim of the agency, without providing meaningful recourse for setting aside arbitrary agency action.

## **II. PENALTY PROPOSALS.**

### **A. *Proposal: Eliminate Discretion to Stay Accrual of Penalties While a Hearing is Pending.***

Under current rules, a person receiving a NONC and requesting a hearing may petition the Office of Hearings and Appeals to stay the accrual of penalties pending the hearing and decision.<sup>8</sup> ONRR proposes to eliminate this ability to seek a stay of penalty accrual. Under the proposed amendment, "[n]either the ALJ nor the IBLA may stay the accrual of penalties pending a decision on your hearing request."<sup>9</sup> Nor would "posting . . . a bond or other surety instrument, or demonstration of financial solvency, . . . stay the accrual of penalties during the pendency of the hearing."<sup>10</sup>

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<sup>7</sup> 30 U.S.C. § 1719(e).

<sup>8</sup> 30 C.F.R. §§ 1241.55(b), 1241.63(b).

<sup>9</sup> 79 Fed. Reg. at 28,875.

<sup>10</sup> *Id.* at 28,867.

Although ONRR states that ALJs “routinely deny” petitions to stay the accrual of penalties, stays have in fact been granted upon sufficient justification.<sup>11</sup> When a person demonstrates a sufficient likelihood of success on the merits of its appeal and can establish the likelihood of immediate and irreparable harm if a stay is denied, the public interest favors granting a stay.<sup>12</sup> This type of relief is particularly essential for small and mid-size companies that may be facing significant penalties that accrue daily, and it encourages efforts to resolve various identified violations while appealing only those believed to be incorrectly alleged.<sup>13</sup>

Without the possibility of a stay, some companies will choose to forego challenging agency action even if the company knows the company is correct factually and legally, because the accrual rate can be prohibitive and challenges within ONRR’s administrative system can take so long.<sup>14</sup> Even when a company has a good faith basis to believe that it will be successful in an administrative appeal, the risk of exponentially multiplying the penalty should the company not prevail will frequently deter the company from filing an otherwise meritorious appeal.

### **B. Proposal: Increase Daily Penalties.**

If a person receives a NONC and does not correct all identified violations within twenty days (or longer, if so specified in the Notice), ONRR may send a Notice of Civil Penalty, assessing a penalty of up to \$500 per day for each violation identified.<sup>15</sup> If the person does not correct all the violations identified within forty days of receipt of the NONC (or longer, if so specified), ONRR may increase the penalty up to \$5,000 per day for each violation.<sup>16</sup> ONRR proposes to increase these penalty amounts to \$550 and \$5,500 per day, respectively.<sup>17</sup> ONRR’s proposal does not contain any discussion of the agency’s basis for increasing these levels or support for the amount of the fines the agency intends to impose.

ONRR’s proposal to increase these penalties while eliminating the ability to stay accrual represents a mandate that persons comply with all agency directives, regardless of merit. The dollar value of the penalty amounts, complete with the lack of procedural flexibility to account for the circumstances of a specific appeal, will force companies to choose between gambling on a successful administrative appeal or simply paying meritless penalties because even the small chance of an adverse agency decision could have a severe, and possibly lethal, economic impact.

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<sup>11</sup> See, e.g., *Merit Energy Co. v. Minerals Mgmt. Serv.*, 172 IBLA 137 (2007); *Plains Exploration & Prod. Co. v. Minerals Mgmt. Serv.*, MMS-2009-4 & MMS-2009-5 (Apr. 27, 2009).

<sup>12</sup> See *Plains Exploration & Prod. Co.*, *supra* n.11.

<sup>13</sup> See *id.*

<sup>14</sup> It is not uncommon for hearing processes to take multiple years. See, e.g., *Enter. Prods. Partners, L.P. v. Office of Natural Res. Revenue*, MMS 2009-8. Case No. CP08-052 (Dep’t of Interior June 3, 2011) (delaying indefinitely appeal of a NONC dated June 29, 2009); *Cimarex Energy Co. v. Office of Natural Res. Revenue*, MMS 2009-9, Case No. CP08-123 (Feb. 25, 2011) (extending discovery deadlines through at least May 9, 2011 in an appeal of a NONC dated July 2, 2009); *K2 Am. Corp. v. Bureau of Ocean Energy Mgmt.*, MMS 2008-1, 2008-2, 2009-1 (Aug. 31, 2010 Order) (denying motion to enforce settlement agreement and ordering appeals of five NONCS issued in 2007 and 2008 to proceed); *Statoil USA E&P Inc. v. Office of Natural Res. Revenue*, ONRR 2012-03, Case No. CP11-098 (Mar. 7, 2013) (denying summary judgment in appeal of NONC issued February 17, 2012).

<sup>15</sup> 30 C.F.R. § 1241.53(a).

<sup>16</sup> 30 C.F.R. § 1241.53(b).

<sup>17</sup> 79 Fed. Reg. at 28,869 (discussing proposed 30 C.F.R. § 1241.52).

**C. Proposal: Limit ALJs' Discretion to Reduce Penalties.**

ONRR's current regulations contemplate the possibility that a civil penalty once assessed may be reduced. The rules provide expressly that "the Director or his or her delegate may compromise or reduce civil penalties assessed under [30 C.F.R. Part 1241]." <sup>18</sup> Nothing in the present rules circumscribes the discretion of the Director to modify any penalty assessed by any amount. Nor is there any rule circumscribing the discretion of ALJs adjudicating a challenge to the amount of a penalty assessed.

ONRR now proposes to curtail this power, however, and to "limit an ALJ's discretion to reduce the penalty assessed when the ALJ finds that the factual basis for imposing a civil penalty exists." <sup>19</sup> Under the proposed rule, "if the ALJ finds that the factual basis for imposing a civil penalty exists," the ALJ may not: (i) reduce the penalty below half the amount ONRR assessed; (ii) review ONRR's decision to impose a civil penalty; or (iii) consider any factors to reduce the penalty amount other than those specified in 30 C.F.R. § 1241.70. <sup>20</sup>

None of the reasons that ONRR has provided for curtailing the discretion of ALJs is persuasive. ONRR contends first that it is limiting ALJs' review of the penalty assessed because it "will be posting civil penalty matrices on [ONRR's] Web site in order to have greater transparency." <sup>21</sup> But ONRR has not provided any sample matrix nor provided any information about what information such a matrix will contain. ONRR merely observes that the Bureau of Safety and Environmental Enforcement ("BSEE") presently publishes that agency's civil penalty matrix in a Notice to Lessees which is available on BSSE's website and represents that ONRR will do likewise. <sup>22</sup>

Adopting an approach similar to BSSE, however, will do little to increase transparency into how ONRR calculates penalties. BSSE's Notice to Lessees provides nothing more than a table listing the possible range of penalties for various categories of violations. <sup>23</sup> The range of penalties can be significant. The penalties BSSE could impose for a "Category B" violation, for example, range from \$10,000 to \$40,000 per violation per day. <sup>24</sup> And Category B violations could include, among others, "[m]inor harm or damage to the marine or coastal environment" or "[m]inor damage to any mineral deposit." <sup>25</sup> Nothing about BSSE's table provides any information regarding how to determine whether a particular incident represents "minor harm or damage" (as opposed to "major" or "significant" harm or damage). Nothing about BSSE's table provides any

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<sup>18</sup> 30 C.F.R. § 1241.76.

<sup>19</sup> 79 Fed. Reg. at 28,868.

<sup>20</sup> *Id.* When determining the amount of penalty to assess under 30 C.F.R. § 1241.70, ONRR considers the severity of the alleged violations, the alleged offender's compliance history, and whether the alleged offender is a small business. *See* 30 C.F.R. § 1241.70.

<sup>21</sup> 79 Fed. Reg. at 28,868.

<sup>22</sup> 79 Fed. Reg. at 28,871. IPAA notes that, when its counsel attempted to follow the link to BSSE's civil penalty matrix that ONRR includes at page 28,871, that link returned an error message.

<sup>23</sup> *See* Bureau of Ocean Energy Mgmt., NTL No. 2011-N06, *Nat'l Notice to Lessees & Operators of Fed. Oil & Gas & Sulphur Leases in the Outer Continental Shelf* (effective July 30, 2011), available at: [http://www.bsee.gov/uploadedFiles/BSEE/Enforcement/Civil\\_Penalties\\_and\\_Appeals/NTL2011-N06\(1\).pdf](http://www.bsee.gov/uploadedFiles/BSEE/Enforcement/Civil_Penalties_and_Appeals/NTL2011-N06(1).pdf).

<sup>24</sup> *Id.* at 1. Although BSSE's table indicates that this is the range of possible penalties, the notes appended to the agency's Table suggest that the starting point for assessment of penalties for a Category B violation is \$20,000. *See id.*

<sup>25</sup> *Id.* at 2.

information about how BSSE calculates where within that \$30,000 range an individual penalty will fall.

Contrary to ONRR's suggestion, simply publishing a table that lists the statutory maximum penalties for broad categories of undefined potential violations does not provide any transparency into the agency's penalty assessment calculations. ONRR observes that it will consider several factors: (i) the severity of the violations; (ii) the alleged violator's history of noncompliance; and (iii) the size of the alleged violator's business.<sup>26</sup> But ONRR's proposal does not explain how ONRR will apply these factors or how the factors will be weighed against each other. ONRR does not enumerate any criteria it will evaluate to determine the severity of a particular alleged offense. And ONRR does not clarify what importance the size of an alleged violator's company will have on the agency's decision making. Will size serve as a mitigating factor in circumstances where, because of the large size of a company, executive level employees might not directly supervise personnel responsible for royalty payments? Or will it be used exclusively as a measure of an alleged offender's ability to pay a fine?

While ONRR is cryptic about what it will consider when assessing penalties, the agency clearly identifies one factor that it will *not* consider-- "the royalty consequences of the underlying violation."<sup>27</sup> ONRR's refusal to consider this factor contravenes applicable federal law. When considering whether a civil penalty is excessive under the Excessive Fines Clause of the United States Constitution,<sup>28</sup> courts have recognized the importance of evaluating "the nature of the harm caused by the [offender's] conduct."<sup>29</sup> Whether an alleged violation has had adverse royalty consequences on the government is highly relevant to an analysis of what penalty should be applied, and ONRR's failure to consider this factor represents an unconstitutional attempt to maximize penalties without any corresponding evaluation of culpability or damage attributable to the alleged offender's conduct.

ONRR's second contention in support of its proposal to limit ALJs' discretion is that the agency's proposal "is consistent with other Federal civil penalty regulations," citing to 42 C.F.R. § 488.438(e) as a similar provision.<sup>30</sup> Unlike ONRR's proposal, however, § 488.438(e) does nothing more than prohibit an ALJ from reducing penalties assessed to zero-- in other words, when a grounds for a penalty exists, § 488.438(e) requires that the ALJ impose *some* penalty; the provision does not otherwise limit the ALJ's discretion to impose any other amount of penalty. ONRR has not cited, and our research has not identified, any federal civil penalty regulation that similarly prohibits an ALJ from reducing penalties assessed below half or circumscribes an ALJ's discretion in the manner ONRR proposes.

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<sup>26</sup> 79 Fed. Reg. at 28,875 (proposing 30 C.F.R. § 1241.70(a)(1)-(3)).

<sup>27</sup> 79 Fed. Reg. at 28,875 (proposing 30 C.F.R. § 1241.70(b)).

<sup>28</sup> See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>29</sup> *Collins v. Secs. & Exch. Comm'n*, 736 F.3d 521, 526 (D.C. Cir. 2013). See also *United States v. Bajakajian*, 524 U.S. 321, 339 (1998) (finding a civil forfeiture excessive in part because "[t]he harm that respondent caused was also minimal"); *United States v. Malewicka*, 664 F.3d 1099, 1104 (7th Cir. 2011); *United States v. Collado*, 348 F.3d 323, 328 (2d Cir. 2003).

<sup>30</sup> 79 Fed. Reg. at 28,868. Section 488.438(e) is a provision that governs administrative review of some penalties that the Department of Health and Human Services issues under regulations governing Medicare and Medicaid Services.

Finally, ONRR notes that the penalties it imposes are “already far below the maximum authorized by statute,”<sup>31</sup> suggesting that the agency can assess any penalty it wants within the confines of that statutory authorization. ONRR is incorrect. The fact that a penalty is within the statutory limits is meaningless if the penalty is unreasonable or disproportionate to the gravity of the offense.<sup>32</sup> A penalty that is otherwise arbitrary and capricious cannot escape judicial review simply because it falls below the statutory maximum.<sup>33</sup>

**D. *Proposal: Penalties to Accrue from Date NONC Is Served.***

As the rules are presently implemented, if a person does not correct a violation identified in a NONC, civil penalties will begin to accrue from the date the NONC is issued.<sup>34</sup> ONRR proposes to modify when penalties begin to accrue. Rather than accruing on the date the NONC is issued, the accrual date would be the date on which the NONC is served on a person, typically a date *after* the NONC is issued.<sup>35</sup> We agree with ONRR that it is unfair for penalties to begin accruing before a company is served with notice of its alleged violation.

Although this appears to be a welcomed proposal, the proposed amendment should be modified to clarify that a NONC, FCCP, or ILCP is “served” on the date that it is *received*, not the day that the document is delivered. Basing service on receipt, rather than on delivery, will ensure that the company or payor has the full period within which to appeal the civil penalty assessment or to take other permitted actions in response to the assessment. We understand and acknowledge that this approach will require both ONRR and private companies to adopt and maintain processes for regularly and accurately date-stamping mail when received in order to document this beginning accrual date.

**E. *Proposal: Penalties for Failure to Comply with Non-Binding Guidance.***

Under current law, Dear Reporter and Dear Operator letters do not have the force of law and do not represent binding interpretations of agency regulation.<sup>36</sup> Yet under its proposed amendments, ONRR would consider a person’s failure to follow such Dear Reporter and Dear Operator letters as establishing the “knowing or willful” element of a violation enumerated under 30 U.S.C. § 1719(c)-(d), subjecting a person to penalties of \$11,000 per day per violation or \$27,500 per day per violation (depending on the violation).<sup>37</sup> ONRR will assume that a violation is “knowing or

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<sup>31</sup> 79 Fed. Reg. at 28,868.

<sup>32</sup> *Collins*, 736 F.3d at 526 (“A civil penalty violates the Excessive Fines Clause if it ‘is grossly disproportional to the gravity of’ the offense.”) (quoting *Bajakajian*, 524 U.S. at 334).

<sup>33</sup> *Corder v. United States*, 107 F.3d 595, 598 (8th Cir.1997) (reversing imposition of civil penalty when method of agency’s calculation was arbitrary and capricious even though amount assessed was less than statutory maximum and amount paid was approximately one-half of statutory maximum).

<sup>34</sup> 30 C.F.R. § 1241.53.

<sup>35</sup> 79 Fed. Reg. at 28,875.

<sup>36</sup> See *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1039-41 (D.C. Cir. 2008).

<sup>37</sup> See 79 Fed. Reg. at 28,869 & 28,875 (discussing proposed 30 C.F.R. § 1241.60). For a detailed discussion of the application of the “knowing and willful” standard to violations under 30 U.S.C. § 1719(c)-(d), see discussion *infra* Part III.A.

willful” not only when a person fails to cure a violation identified in informal correspondence, but also when the person commits “substantially the same” violation in the future.<sup>38</sup>

There is no support for the approach ONRR proposes. ONRR has not provided any justification for the proposed penalty amounts, which reflect an increase over existing penalty amounts. Nor has ONRR provided any guidance as to what it would consider as “substantially the same violation,” or provided any mechanism for advising companies that it considers certain offenses “the same,” thereby placing companies in the position of having to guess what ONRR may deem “the same.” ONRR has also not provided any time parameters during which such knowledge or willfulness would be imputed to alleged subsequent violations, meaning that companies are exposed to potentially endless and limitless liability for “knowing and willful” offenses based solely on unknowable and unchallengeable agency interpretations.<sup>39</sup>

ONRR instead refers only to a March 10, 2011, “Dear Reporter” letter as an example of guidance that it will enforce through its power to punish “knowing and willful” violations. That letter advises royalty payors that they must produce “records” that ONRR requests.<sup>40</sup> If payors do not have the “records” requested, ONRR may assess civil penalties. This “guidance” does not clarify what records must be maintained, and refers to the general recordkeeping requirement of 30 C.F.R. § 1212.51. The difficulty for independent producers is that ONRR has a long history of modifying the agency’s interpretations of what the royalty value regulations require, and documents that formerly were not needed become, without further notice and comment rulemaking or compliance with the Paperwork Reduction Act, documents that ONRR may now demand under pain of penalty. The process is playing out now as ONRR attempts to “unbundle” costs producers pay to third-party gatherers and processors.<sup>41</sup> Producers often have no access to the information ONRR requires; gatherers or processors that are not under the producer’s control hold that confidential information and do not share the information with producers.

The proposed rule is also ripe for abuse. The regulatory scheme ONRR advances would permit the agency to manufacture a civil penalty enforceable without notice and subject to the substantial penalties that 30 U.S.C. § 1719(c)-(d) contemplates. ONRR could simply issue a non-binding guidance letter advising that particular conduct is a violation -- a letter that a recipient has no mechanism to appeal or challenge -- and then having done so, ONRR could subsequently issue an ILCP for a violation under 30 U.S.C. § 1719(c)-(d), asserting that the action identified in the ILCP was “knowing and willful.” A rule that allows ONRR to construct, as oppose to merely uncover, statutory violations represents a blatant affront to due process and the statutory right to a hearing on the record embodied in 30 U.S.C. § 1720.

The scope of ONRR’s authority, like that of any executive agency, is limited to that which Congress has afforded through statute. ONRR’s authority to impose civil penalties is limited to

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<sup>38</sup> *Id.* at 28875.

<sup>39</sup> ONRR’s declaration that subsequent “substantially same” violations are knowing and willful *per se* removes entirely an express element that ONRR must prove to establish any individual violation of 30 U.S.C. § 1319(c)-(d): that the violation charged was committed “knowingly or willfully.” For a more extensive discussion of ONRR’s improper dilution of this requirement under the proposed amendments, *see* discussion *infra* Parts III.A & III.B.

<sup>40</sup> 79 Fed. Reg. at 28,869

<sup>41</sup> *See, e.g.*, Oct. 7, 2009 Dear Reporter Letter, *available at* <http://onrr.gov/ReportPay/PDFDocs/20091007.pdf>.

offenders who violate “requirements.”<sup>42</sup> Dear Reporter letters are not “final and binding agency interpretations” of ONRR’s regulations.<sup>43</sup> Dear Reporter letters do not “require” anything, and failing to adhere to them cannot be a knowing or willful violation. ONRR must withdraw its proposal to hold producers liable after receiving “emails” or “any other written communication” expressing interpretations that differ from those the producer is legally required to follow.<sup>44</sup>

**F. *Proposal: Expand the Scope of Civil Penalties Regulations.***

The civil penalty regulations in 30 C.F.R. Part 1241 historically have applied only to Federal and Indian oil and gas leases.<sup>45</sup> Congress recently broadened that applicability, authorizing the Secretary of the Interior to expand applicability “to any lease authorizing exploration for or development of coal, any other solid mineral, or any geothermal resource on any Federal or Indian lands, and any lease . . . or other agreement . . . for use of the Outer Continental Shelf.”<sup>46</sup> ONRR therefore proposes to “implement that new authority” and enforce the amended regulation on “all Federal and Indian mineral leases, geothermal leases, and agreements for outer continental shelf energy development under 30 U.S.C. § 1337(p).”<sup>47</sup>

ONRR’s reference to 30 U.S.C. § 1337 appears to be a typographical error. Congress authorized the Secretary of the Interior to expand applicability of its penalty regulations to energy agreements on the outer continental shelf executed under 43 U.S.C. § 1337(k) & (p).<sup>48</sup> Should ONRR insist on keeping this provision, it should correct the text of the regulatory language to cross-reference the appropriate statute.

**III. LIABILITY STANDARD PROPOSALS.**

**A. *Proposal: Equate “Knowingly Or Willfully” with “Gross Negligence”***

Certain violations under 30 U.S.C. § 1719 presently accrue penalties up to \$10,000 per day.<sup>49</sup> Other violations are subjected to penalties of up to \$25,000 per day.<sup>50</sup> Although many of these

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<sup>42</sup> 30 U.S.C. § 1719(a)(1).

<sup>43</sup> *Devon Energy Corp. v. Kempthorne*, 551 F.3d at 1040 (holding a Dear Payor letter is not binding).

<sup>44</sup> *Little v. Eni Petroleum Co., Inc.*, No. CIV-06-120-M, 2009 WL 2424215, at \*4 (W.D. Okla. 2009) (explaining that it is not a knowingly false statement for a producer to act on an interpretation “about which reasonable minds may differ”) (quoting *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 F. App’x 980, 982-83 (10th Cir. 2005)).

<sup>45</sup> See 30 C.F.R. Part 1241, Subpart B (“Penalties for Federal and Indian Oil and Gas Leases”); see also 30 U.S.C. §§ 1701(a)(1) (directing the Secretary to “enforce effectively and uniformly existing regulations under the mineral leasing laws providing for the inspection of production activities on lease sites on Federal and Indian land”).

<sup>46</sup> 30 U.S.C. § 1720a.

<sup>47</sup> 79 Fed. Reg. at 28,863 (indicating that Congress authorized the Secretary to apply FOGPMA to all outer continental shelf agreements under 30 U.S.C. § 1337(p)).

<sup>48</sup> 30 U.S.C. § 1720a.

<sup>49</sup> These violations include: (i) knowing or willful failure to make a required royalty payment; (ii) failure to permit lawful entry, inspection, or audit or operations; and (iii) knowing or willful failure to timely notify the Secretary of the Interior that any well associated with a lease has begun production. See 30 U.S.C. § 1719(c)(1)-(3).

<sup>50</sup> These violations include: (i) knowing or willful preparation, maintenance, or submission of false, inaccurate, or misleading reports, notices, affidavits, records, data, or other written information; (ii) knowing or willful removal, transportation, or diversion of oil or gas from a lease site without valid legal authority; or (iii) purchasing, accepting, selling, transporting, or conveying any oil or gas when knowing or having reason to know that such oil or gas was stolen or unlawfully removed or diverted. See 30 U.S.C. § 1719(d)(1)-(3).

violations require that the alleged offender conduct the offense “knowingly or willfully,” the phrase “knowingly or willfully” is not expressly defined in the current rules.

ONRR now proposes to include a definition of “knowing or willful” that would govern the agency’s enforcement of the violations identified in 30 U.S.C. § 1719.<sup>51</sup> Under the proposed amendment, “[k]nowing or willful means that a person, including its employee or agent, with respect to the prohibited act, acts with gross negligence.”<sup>52</sup> ONRR believes “gross negligence” requires only that the agency show a company or person has “fail[ed] to exercise even that care which a careless person would use” and “does not require specific intent.”<sup>53</sup>

ONRR represents that the agency’s intention is to define “‘knowing and willful’ as the lowest possible standard so that it encompasses all higher standards.”<sup>54</sup> But “knowing and willful” is not a generic standard that Congress intended to apply broadly to all categories of violations. To the contrary, the statutory structure of 30 U.S.C. § 1719 demonstrates that “knowing and willful” is a high standard that reflects the gravity of the most severe offenses to which Congress made it applicable.

Congress recognized that not all violations of reporting and payment requirements are equal and structured a civil penalty statute, 30 U.S.C. § 1719, that accounts for varying degrees of significance and culpability. Certain violations are deemed more minor and require companies have an opportunity to correct a noticed violation of a lease term, regulation, or agency order before ONRR may impose a penalty. Subsection (a) provides for penalties of up to \$500 per day for those persons who receive a NONC and fail to correct the noticed violation within twenty days.<sup>55</sup> Subsection (b) provides for penalties of up to \$5,000 for those persons who receive a NONC and fail to correct the noticed violation within forty days.

Subsection (c) provides for larger penalties -- up to \$10,000 per day -- without opportunity to correct for more significant offenses: the knowing or willful failure to make timely royalty payments, the knowing or willful failure to alert the government that production has commenced from a well on a federal lease, or the refusal to allow an inspection or audit of operations. It is only here, in subsection (c), that the “knowing and willful” condition is first found in the statutory language, applicable only to those violations that Congress determined were sufficiently serious that the violations did not even warrant an opportunity to correct. And even in this subsection, the “knowing and willful” standard does not apply to every enumerated offense; Congress has chosen not to apply the standard to refusals to allow audits or inspections.

Subsection (d) is structured similarly to subsection (c). Under subsection (d), ONRR may impose penalties of up to \$25,000 per day for the most serious offenses: the knowing or willful stealing of government oil or gas, either through direct removal of the oil or gas or through the provision of false reports, or the purchase or acceptance of gas that the purchaser knows to be stolen. Like

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<sup>51</sup> ONRR represents that “knowing and willful” is “largely self-explanatory and readily implementable without regulation.” 79 Fed. Reg. at 28,863. Given this admission, it is difficult to understand why ONRR believes amending existing regulations to provide a definition is necessary at this time.

<sup>52</sup> 79 Fed. Reg. at 28,863.

<sup>53</sup> *Id.* (internal quotation omitted).

<sup>54</sup> *Id.*

<sup>55</sup> The statute expressly prohibits the imposition of any penalty under subsection (a) if the violation is corrected within twenty days. *See* 30 U.S.C. § 1719(a)(2).

subsection (c), subsection (d) does not provide alleged offenders any opportunity to correct. Unlike subsection (c), however, all of these offenses enumerated in subsection (d) require ONRR to establish a knowledge element. This elevated standard of proof is not surprising, given that the violations listed in subsection (d) also subject alleged offenders to possible criminal liability.<sup>56</sup>

ONRR's attempt to dilute the "knowing and willful" standard disregards this statutory structure entirely. Unlike ONRR, Congress did not choose to establish one standard of proof, applicable to all offenses irrespective of the gravity of the conduct being penalized. Congress did the opposite. Congress' decision to apply the "knowing and willful" standard only to those offenses deemed most serious belies ONRR's suggestion that "knowing and willful" is somehow a minimum, easily-proven standard. By exposing producers to the very severe penalties that 30 U.S.C. § 1719(c)-(d) imposes even for the relatively minor and inadvertent violations that Congress intended to be enforced under 30 U.S.C. § 1719(a)-(b), ONRR would establish a major disincentive to produce oil or gas from leases on federal and Indian lands.

And regardless of ONRR's objectives, ONRR's proposed definition cannot be reconciled with existing law. In *Marathon Oil Co. v. Minerals Management Service*,<sup>57</sup> the Interior Board of Land Appeals ("IBLA") explained that before an alleged violation of 30 U.S.C. § 1719(c) could be considered "knowing or willful," it must be established "that the party either knew or showed reckless disregard of whether its actions violated the order."<sup>58</sup> In reaching its conclusion, the IBLA relied on the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*,<sup>59</sup> a case in which the Supreme Court determined that an employer is "willful" under the Age Discrimination in Employment Act if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited.<sup>60</sup>

ONRR's understanding of "knowing and willful" is also inconsistent with the understanding of its sister agencies. The Bureau of Land Management ("BLM"), for example, interprets "knowing or willful" to require more than a mistake or inadvertence, but rather "reckless disregard of the requirements of the law, regulations, orders, or terms."<sup>61</sup> BLM notes that "knowing and willful" conduct includes, though does not require, "performances or failures to perform that result from a criminal or evil intent or from a specific intent to violate the law."<sup>62</sup> Unlike BLM, ONRR entirely disregards the statutory requirement that it establish the element of knowledge before holding producers liable for the offenses identified in 30 U.S.C. § 1719(c)-(d).

To the extent that ONRR would equate "gross negligence" with "reckless disregard," ONRR's interpretation represents a misunderstanding of the former standard. Courts have ruled that gross negligence is not sufficient to implicate statutes that require willful or intentional conduct; to the contrary, "most courts consider that 'gross negligence' falls short of a reckless disregard of

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<sup>56</sup> 30 U.S.C. § 1720.

<sup>57</sup> 106 IBLA 104 (1998).

<sup>58</sup> *Id.* at 123-24.

<sup>59</sup> 469 U.S. 111 (1985).

<sup>60</sup> *Id.* at 126.

<sup>61</sup> 43 C.F.R. § 3160.0-5.

<sup>62</sup> *Id.*

consequences.”<sup>63</sup> Yet ONRR seeks to apply a gross negligence standard to statutory offenses that require “knowing or willful” conduct despite that the gross negligence standard “falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong.”<sup>64</sup>

ONRR expresses its belief that “penalizing prohibited acts committed with a mental state equivalent to gross negligence is appropriate given Congressional intent in FOGPMA to establish a robust enforcement system and to ensure the integrity of the royalty accounting system.”<sup>65</sup> But regardless of what ONRR believes Congress intended, the statute Congress passed says “knowing and willfully,” not “grossly negligent.” “Gross negligence” is not an unknown legal standard and if Congress wished to apply that standard it could have. Congress chose not to. Nor is that choice surprising. It is inconceivable that Congress intended to allow ONRR to punish and fine producers without due process or to empower ONRR to strong-arm producers into compliance with any agency directive.

Unlike ONRR, the IBLA has interpreted “knowingly and willfully” in a manner consistent with how ONRR’s sister agencies have applied the standard and the manner in which the federal courts have interpreted the requirement in a variety of other contexts.<sup>66</sup> Contrary to the expansive view of liability that ONRR advances, as a matter of established law “violations . . . are not fraud unless the violator knowingly lies to the government about them.”<sup>67</sup> ONRR may interpret its own regulations, but it may not use its regulations to change the meaning of Congress’ statutory language.<sup>68</sup>

## **B. *Proposal: Impose Strict and Vicarious Liability.***

Current law defines a “person” as “any individual, firm, corporation, association, partnership, consortium, or joint venture,”<sup>69</sup> and provides that “[a]ny person” who “knowingly or willfully” commits certain identified acts “shall be liable for a penalty” of up to \$10,000 or \$25,000 (depending on the act) “per violation for each day such violation continues.”<sup>70</sup> But as referenced above, Congress has not expressly defined “knowingly or willfully.” Nor has Congress included

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<sup>63</sup> *Doe v. Gen. Servs. Admin.*, 544 F. Supp. 530, 541 (D. Md. 1982) (quoting W. Prosser, *Law of Torts* § 34 at 183-84 (4th ed. 1971) (holding that the “willful and intentional” standard of the Privacy Act was “somewhat greater” than gross negligence)).

<sup>64</sup> *Conway v. O’Brien*, 312 U.S. 492, 495 (1941) (quoting *Shaw v. Moore*, 162 A. 373, 374 (Vt. 1932); *Burke v. Spear*, 277 F.2d 1, 2-3 (2nd Cir. 1960) (same)).

<sup>65</sup> 79 Fed. Reg. at 28,863.

<sup>66</sup> *See, e.g., United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (explaining that to “knowingly” make a false claim under the False Claim Act requires more than the statement be false; the alleged offender must have actual knowledge of the falsehood and act in deliberate ignorance or reckless disregard of the truth); *Hagood v. Sonoma Cnty. Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996) (“[T]he statutory phrase ‘known to be false’ does not mean incorrect as a matter of proper accounting methods, it means a lie.”).

<sup>67</sup> *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931 (10th Cir. 2008) (quoting *City of Green Bay*, 168 F.3d at 1020).

<sup>68</sup> *Texas v. Envtl. Prot. Agency*, 726 F.3d 180, 195 (D.C. Cir. 2013) (“A valid statute always prevails over a conflicting regulation, and a regulation can never trump the plain meaning of a statute.”) (internal quotations and citations omitted).

<sup>69</sup> 30 U.S.C. § 1702(12).

<sup>70</sup> 30 U.S.C. § 1719(c)-(d). For a list of violations covered under these provisions, *see supra* notes 49-50.

any provision applying the rules of vicarious liability to the violations identified in 30 U.S.C. § 1719(c)-(d), or any other component of FOGRMA.

ONRR nevertheless proposes to “to hold persons who are subject to FOGRMA strictly and vicariously liable for the prohibited actions of their employees and agents.”<sup>71</sup> This proposal would provide that “corporations and other persons subject to FOGRMA are liable for the actions of their agents and employees regardless of the level of knowledge of managers, principals, or owners in the definition of ‘knowing or willful.’”<sup>72</sup> ONRR states that through this amendment, it “intend[s] to penalize companies whose management remains deliberately ignorant of the actions of their employees and agents” and “intend[s] to penalize companies whose management is in reckless disregard as to whether their employees and agents are committing prohibited acts.”<sup>73</sup> Because a corporation or person would have “the same knowledge or willfulness as its employees and agents,” it would “thus [be] liable for the civil penalty even if the managers, principals, or owners may not have actual knowledge of specific prohibited acts their agents or employees commit.”<sup>74</sup>

Although ONRR states that “the proposed rule is guided by judicial precedent . . . impos[ing] strict vicarious liability on corporations for the knowledge of their employees and agents,” ONRR has not cited any caselaw deciding the scope of vicarious liability under FOGRMA, and our research has not identified any authority applying vicarious or secondary liability under that statute. Nor do any of the cases that ONRR does cite apply vicarious liability in the expansive manner that ONRR proposes. The fact that an employee committed a violation does not automatically make an employer liable for that violation. In each of the decisions that ONRR cites, at least some showing that the agent or employee possessed apparent authority and/or intended to benefit the company is required before liability will be extended to the principal.<sup>75</sup> ONRR’s attempt to apply strict liability omits any reference to this element of the principal-agent relationship.

ONRR’s proposal is particularly troubling because, as written, it imputes the knowledge of employees to establish the knowledge element of violations alleged against employers, without placing any limits on the relationship between the employee and the employer. ONRR could provide notice of a violation to one person at a company, regardless of that person’s position or role and regardless of the form in which the notice was delivered. Then immediately following

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<sup>71</sup> 79 Fed. Reg. at 28,863.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See *Am. Society of Mechanical Eng’rs v. Hydrolevel Corp.*, 456 U.S. 556, 565-570 (1982) (emphasizing that to proceed on an apparent authority theory it must be established that “the agent’s position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him”); *United States ex rel. Shackelford v. Am. Mgmt., Inc.*, 484 F. Supp. 2d 669, 676 (E.D. Mich. 2007) (observing that vicarious liability requires that employees be acting within the scope of their employment or with apparent authority); *United States ex rel. Bryant v. Williams Bldg. Corp.*, 158 F. Supp. 2d 1001, 1008 (D.S.D. 2001) (same); *United States ex re. Fago v. M&T Mortg. Corp.*, 518 F. Supp.2d 108 (D.D.C. 2007) (referencing authorities finding vicarious liability in the context of claims under the False Claims Act). See also *United States v. S. Md. Home Health Servs.*, 95 F.Supp.2d 465, 468-69 (D. Md. 2000) (“[A]n employer is not vicariously liable under the FCA for wrongful acts undertaken by a non-managerial employee unless the employer had knowledge of her acts, ratified them, or was reckless in its hiring or supervision of the employee.”).

delivery of that notice, ONRR would consider management-level employees to have acted knowingly or willfully if any person at the company, in any role, subsequently engages in similar conduct. Beyond legal restraints, ONRR's proposal violates basic tenets of reasonableness and fairness.

Equally important, each of the cases upon which ONRR relies involves a claim under the False Claims Act ("FCA"). But unlike FOGRMA, the FCA actually defines the term "knowingly," explaining that, for the purposes of that statute, "knowingly" encompasses "actual knowledge," "deliberate ignorance," or "reckless disregard."<sup>76</sup> The federal courts have recognized that this definition, added to the FCA in 1986, "decreased the level of scienter required for a violation of the FCA and obviated the concerns about attributing the heightened level of intent of an employee to an employer."<sup>77</sup> In short, the government need not show actual knowledge and specific intent on the part of the employer in an FCA case because Congress affirmatively relieved the government of that obligation. Congress has taken no such steps to modify the definition of "knowingly or willfully" under FOGRMA, and therefore the customary usage of that standard -- which incorporates an elevated "level of scienter" -- must prevail when interpreting that statute.

The FCA is also a unique statute intended to "encourage private citizen involvement in exposing those types of fraud that might result in financial loss to the government"<sup>78</sup>-- a purpose distinct from punitive statutes like FOGRMA's civil penalty provisions. In *Kolstad v. American Dental Association*,<sup>79</sup> the Supreme Court considered whether to hold a corporate employer liable under Title VII for punitive damages as a result of an employee's gender discrimination against another employee, when the employer did not know about, authorize, or ratify the illegal discrimination. Because Title VII reflected an effort to prevent, as well as remediate, discriminatory conduct, the Supreme Court held that "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'"<sup>80</sup>

ONRR concedes that, like Title VII, enforcement of FOGRMA's civil penalty provisions is intended to prevent, as well as remediate, violations of the statute's provisions.<sup>81</sup> Given ONRR's own characterization of the regulatory objective, ONRR's attempt to impute knowledge from employee to employer is unreasonable and without legal support. Consistent with the requirements of 30 U.S.C. § 1719(c)-(d), ONRR must be able to establish institutional knowledge or willfulness before compelling companies to make punitive payments that well exceed the amount necessary to make the government whole. If a company has a rigorous regulatory compliance program and an individual employee still breaks the law, it is nonsensical to find the company morally culpable. Punishing a company that has an effective compliance program based on the act of a single employee, without more, is inconsistent with the Supreme Court's holding in *Kolstad*, does not deter malfeasance, and fails to reward companies that take affirmative steps to comply with applicable regulations.

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<sup>76</sup> 31 U.S.C. § 3729(b)(1)(A)(i)-(iii).

<sup>77</sup> *Shackelford*, 484 F. Supp. 2d at 675.

<sup>78</sup> *Williams Bldg. Corp.*, 158 F. Supp. 2d at 1008.

<sup>79</sup> 527 U.S. 526 (1999).

<sup>80</sup> *Id.* at 545.

<sup>81</sup> 79 Fed. Reg. at 28,863-64.

#### IV. PROCEDURAL PROPOSALS.

##### A. *Proposal: Apply Universal Thirty-Day Limit to Hearing Requests.*

Current rules afford a person who receives a NONC thirty days from the date the NONC is received to request a hearing, irrespective of whether the NONC provides for a period of time to correct the alleged violation.<sup>82</sup> And a person who does not request a hearing on the merits of a NONC may still request a hearing to challenge the amount of the civil penalty within ten days after receiving a Notice of Civil Penalty.<sup>83</sup>

ONRR proposes to consolidate the hearings processes for recipients of NONCs, FCCPs, and ILCPs, allowing thirty days for each but prohibiting any extension of time.<sup>84</sup> Should the Request for Hearing and associated required items not be received within thirty days from service of the NONC, FCCP, or ILCP, ONRR will not consider the Request for Hearing and the applicant “may not appeal that decision.”<sup>85</sup> When a Hearing Request is made responsive to an ILCP, ONRR would require that any request for a hearing identify whether the person is contesting liability for the ILCP, challenging the amount of the penalties assessed, or both.<sup>86</sup> If a Hearing Request does not include such a statement, it will be deemed to have requested a hearing only on the amount of the penalty assessed.<sup>87</sup> Under those circumstances, a person will have waived the right to a hearing on any underlying liability.<sup>88</sup>

While consolidating the various appeals processes would appear to be a welcomed change, we are concerned that the thirty-day timeframe within which to request a hearing “cannot be extended for any reason” and that all documentation necessary to request a hearing must be received within the thirty-day period.<sup>89</sup> We do not contest the requirement that companies wishing to challenge an agency decision will have to be diligent and organized. But the lack of flexibility is likely to result in situations where companies are forced to comply with agency decisions made in error. Should there be circumstances in which material necessary to initiate an appeal cannot be submitted within thirty days regardless of a company’s diligence and organizational ability, a company will have no recourse but to comply with ONRR’s decision.

ONRR’s proposal overlooks the fact that, depending on the nature of the civil penalty being challenged, the amount of data that must be reviewed to determine whether a company is truly in violation of regulations or has a legitimate defense to a NONC could be voluminous. That data

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<sup>82</sup> 30 C.F.R. § 1241.54 (granting the recipient of a Notice of Noncompliance thirty days to request a hearing); 30 C.F.R. § 1241.62 (granting the recipient of a Notice of Noncompliance without opportunity to correct thirty days to request a hearing).

<sup>83</sup> 30 C.F.R. § 1241.56 (granting the recipient of a Notice of Civil Penalty ten days to request a hearing on the amount of the civil penalty); 30 C.F.R. § 1241.64 (granting the recipient of a Notice of Civil Penalty regarding a violation without opportunity to correct ten days to request a hearing on the amount of the civil penalty). Once a notice of civil penalty is issued, a company may not contest the underlying liability if it did not request a hearing on the merits at the time the original Notice of Noncompliance or Notice of Noncompliance and Civil Penalty was issued. *See* 30 C.F.R. § 1241.56; 30 C.F.R. § 1241.64.

<sup>84</sup> 79 Fed. Reg. at 28,864.

<sup>85</sup> 79 Fed. Reg. at 28,867.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

may consist of archived historical information preserved in systems and locations that are not readily accessible. More specifically, gathering that data will often require the use of offsite records, the marshalling of information technology resources that smaller companies may not have in-house, and the compilation of collected data into a format that is meaningful and coherent. Often the information that a company might need to collect is in the possession of independent outside sources, such as third-party gas processing plant operators.

ONRR's own materials constitute the best evidence for how complex royalty calculation and reporting can be. ONRR has developed no less than five handbooks meant to guide companies responsible for payment and reporting under the proposed amendments: the *Minerals Revenue Reporter Handbook* is 489 pages; the *Minerals Production Reporter Handbook* is 473 pages, plus an Appendix containing 10 pages of disposition/adjustment codes; the *Oil and Gas Payor Handbook* related to product valuation is 416 pages; the *AFS Payor Handbook [for] Solid Minerals* is 134 pages; and the *Geothermal Payor Handbook* related to product valuation is 147 pages.<sup>90</sup> To suggest that the type of information necessary to respond to allegations of a violation will always be able to be collected, synthesized, and evaluated within thirty days constitutes a fundamental misunderstanding of contemporary business practices, modern information management systems, and ONRR's own systems and requirements.

Nor are delays in gathering necessary information always attributable to companies. It is not uncommon that, before a company can determine whether a potential appeal has merit, the company will need to communicate with ONRR to obtain clarification regarding the bases for an assessed penalty or to determine whether subsequently taken action might restore the company to compliance. Yet ONRR's communication systems fail to provide payors the access to information needed to reach these conclusions. Our members report that it is typically many days, and often weeks, before ONRR responds to voice messages and electronic mail submitted to the agency.

Even absent delay, the proposed amendment would impose a burdensome suite of filing prerequisites that could be quite difficult to complete in thirty days. Under the proposed rule, a request for a hearing must "explain[] your reasons for challenging the notice."<sup>91</sup> The proposed language does not specify whether ONRR envisions a summary paragraph outlining basic reasons for an appeal akin to the notice pleading standard that Rule 8 of the Federal Rules of Civil Procedure imposes, or whether the agency expects a comprehensive opening brief outlining in totality the factual and legal bases for the appeal. Should it be the latter, ONRR has not explained how any appellant could provide such a statement before an administrative record has been lodged and discovery has been conducted. Requiring companies that request a hearing to provide a comprehensive factual statement on an expedited basis, while simultaneously denying those companies access to the mechanisms designed to uncover facts, does not comport with due process.

The proposed amendment also provides that, for a hearing request to be properly filed, the applicant must submit a bond, letter of credit, or demonstration of financial solvency that

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<sup>90</sup> Office of Natural Res. Revenue, *Handbooks*, available at: <http://www.onrr.gov/ReportPay/Handbooks/default.htm>.

<sup>91</sup> 79 Fed. Reg. at 28,874 (proposing 30 C.F.R. § 1241.5(a)(2)(ii)).

includes “any additional penalties that have accrued since ONRR issued the FCCP or ILCP.”<sup>92</sup> Without knowing what size bond will be required or what ONRR defines as financial solvency, we cannot evaluate exactly how onerous this requirement would be. Judging by the significant size of the penalties that ONRR can impose, however, it is not unrealistic to believe that any bond requirement ONRR might impose will be unduly burdensome and will prevent some companies from filing appeals, irrespective of the merits of their factual or legal arguments.

In some cases, furthermore, the amount of additional penalties may be unclear or difficult to determine. While the proposed amendments provide that ONRR may send courtesy notices informing the payor of additional royalties that have accrued,<sup>93</sup> there is no requirement that ONRR do so. As a result, payors may not have specific guidance from ONRR concerning the additional royalties that have accrued. Given that possible uncertainty, the proposed amendment should be revised to make clear that this will not be a basis for ONRR to find that the bond, letter, or demonstration of financial solvency is deficient and that the Request for Hearing cannot be heard. And the proposed amendment should state expressly that, should ONRR determine that any bond, letter of credit, or demonstration of financial insolvency submitted with a Request for Hearing is incorrect or insufficient for any reason, the company or payor will be given a reasonable period or opportunity to correct or amend the bond, letter of credit, or demonstration of financial solvency, and the incorrect or insufficient bond, letter of credit, or demonstration of financial solvency will not otherwise be a basis for ONRR to not consider the Request for Hearing.

#### **B. *Proposal: Prohibit Certain Hearing Requests.***

The IBLA has held that when a person does not appeal an ONRR Order and is subsequently issued a NONC, that person may request a hearing on the NONC and also challenge the merits of the Order.<sup>94</sup> ONRR intends to “supersede [that] decision.”<sup>95</sup> ONRR’s amended rules would provide that a person may *not* request a hearing on: “(a) liability for a violation in an FCCP if the violation is your failure to comply with an order you did not timely appeal . . . ; and (b) [a] courtesy notice we [ONRR] send to you under § 1241.12(a) informing you that additional penalties have accrued.”<sup>96</sup>

Although ONRR states that it intends to prohibit hearing requests on courtesy notices only “if [ONRR] issue[s] you an FCCP or ILCP, and you do not request a hearing on those notices,” this caveat is not provided for in the regulatory text of the proposed amendments.<sup>97</sup> Without this regulatory language, producers have no legal protection against ONRR attempting to give non-binding orders the effect of law-- assessing penalties and establishing violations for failures to comply with directives that producers have no legal obligation to follow.

Equally important, ONRR’s approach creates an incentive to request a hearing on everything ONRR issues -- even non-binding guidance documents -- rather than waiving an appeal right

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<sup>92</sup> 79 Fed. Reg. at 28,874.

<sup>93</sup> 79 Fed. Reg. at 28,875 (proposing 30 C.F.R. § 1241.12(a)).

<sup>94</sup> See *Merit Energy Co.*, 172 IBLA at 150.

<sup>95</sup> 79 Fed. Reg. at 28,867.

<sup>96</sup> *Id.* at 28,874.

<sup>97</sup> *Id.*

should ONRR subsequently issue a NONC for failure to comply with an Order that might be issued in error. Rather than streamline or simplify the administrative review process, ONRR's proposed approach will result in a significant expansion of administrative litigation. Whereas operators in the past may have attempted to reach a mutually agreeable settlement agreement with ONRR or worked to otherwise resolve disputed matters referenced in an ONRR order, operators will now be forced immediately to appeal all orders and guidance documents (within thirty days) or forever lose all rights to challenge the merits of ONRR's decision-making.

**C. Proposal: ONRR's Initial Burden Satisfied Via NONC, ILCP, or FCCP**

The existing regulations do not include any provision assigning the burden of proof in hearings challenging the assessment of a civil penalty. ONRR appears to acknowledge that, in any contest hearing, the agency must first establish a prima facie case justifying the administrative action being challenged.<sup>98</sup> ONRR contends that "by establishing [its] prima facie case in the NONC, FCCP, or ILCP" the agency will have met its initial burden under the amended rules.<sup>99</sup> At that point, the company requesting the hearing "would then have the burden of showing by a preponderance of the evidence that [it is] not liable or that the penalty amount should be reduced."<sup>100</sup>

We agree that ONRR has a prima facie burden to establish that a violation has occurred before imposing a civil penalty. ONRR's proposal is nevertheless flawed because it fails to provide any objective standards the agency itself must meet before issuing a NONC, FCCP, or ILCP in the first instance. The proposed amendments do not reference the audit standards ONRR must employ, the factual findings ONRR must make, or the procedural processes to which ONRR must adhere before the agency may issue a NONC, FCCP, or ILCP. The proposed rule does not expressly incorporate any guidance contained in ONRR's Audit or Compliance Manuals--neither of which are available to the public on the agency's web site. As written, ONRR may issue an NONC, FCCP, or ILCP on nothing more than the agency's whim, and in doing so, alleviate itself of any procedural or evidentiary burden the agency might otherwise have in an administrative challenge. This approach offends due process and contravenes the standards that govern agency decision-making under the Administrative Procedures Act and other procedural protections. ONRR must either expressly include objective standards against which the propriety of its initial issuance of a NONC, FCCP, or ILCP may be measured, or it must eliminate this proposed provision entirely in the Final Rule.

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<sup>98</sup> ONRR's understanding is consistent with the approach other federal agencies have adopted when adjudicating challenges to civil penalties assessed. *See In re Ne. Freightways, Inc.*, No. FMCSA-2011-0204, 2013 FAA LEXIS 199, at \*14 (Aug. 8, 2013) (acknowledging that the Federal Motor Carrier Safety Administration shouldered the burden to establish a prima facie case that the agency had properly calculated a civil penalty); *Premium Coal Co. v. Office of Surface Mining Reclamation & Enforcement*, No. NX94-1-P (Office of Surface Mining, Mar. 26, 1996) ("In civil penalty proceedings [the agency] has the burden of going forward to establish a prima facie case as to the fact of the violation and the amount of the civil penalty and the ultimate burden of persuasion as to the amount of the civil penalty.").

<sup>99</sup> 79 Fed. Reg. at 28,868.

<sup>100</sup> *Id.*

#### **D. Proposal: Eliminate Early Discovery.**

Hearings of ONRR decisions have traditionally been conducted under 43 C.F.R. Part 4, which includes discovery. Under the current process, “after recipients of NONCs, FCCPs, and ILCPs request a hearing, in most instances, discovery begins before any briefings that might dispose of legal issues and factual matters for which there is no genuine issue of material fact in dispute.”<sup>101</sup> ONRR proposes to eliminate such early discovery. ONRR would specify that, if neither party files a motion for summary decision or the ALJ denies any such motions, only “then the ALJ will, to the extent necessary, authorize discovery.”<sup>102</sup>

ONRR states that its proposal to eliminate early discovery and allow motions for summary decision before discovery is “to narrow the disputed issues.”<sup>103</sup> Yet one of discovery’s major purposes is to do precisely that — to narrow and sharpen the issues.<sup>104</sup> For an ALJ to properly determine whether a genuine issue of material fact exists, it is essential that the ALJ, and both parties, be properly apprised of the facts. On summary judgment, a court’s “obligation is to examine the[] facts developed in discovery.”<sup>105</sup> Rather than promote judicial economy, ONRR’s attempt to eliminate early discovery will only encourage a pre-discovery round of premature and incomplete summary disposition motions-- motions whose very purpose is to resolve those issues that can adjudicated based solely on the facts uncovered in discovery.

ONRR’s suggestion that summary disposition motions can be filed before discovery is also inconsistent with ONRR’s proposed standard of review for deciding those motions. The proposed amendments would require that motions for summary judgment be premised on facts “verif[ied] . . . with supporting affidavits, declarations, and other evidentiary materials.”<sup>106</sup> Because discovery will often be necessary to develop or to rebut the evidence ONRR will require on summary judgment (either as the movant or respondent), precluding early discovery prevents adherence to ONRR’s own standard.

#### **V. PROPOSED DEFINITIONS.**

Present regulations governing the administration of civil penalties do not include any definitions, but simply provide that the terms used in 30 C.F.R. Part 1241 “have the same meaning as in 30 U.S.C. 1702.”<sup>107</sup> ONRR proposes to define new terms for purposes of the civil penalty regulations; among others, the proposed regulation as amended would provide that:

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> 79 Fed. Reg. at 28,868.

<sup>104</sup> *See O2 Micro Intern. v. Monolithic Powers Sys.*, 467 F.3d 1355, 1365 (Fed. Cir. 2006) (explaining that discovery allows the parties to develop facts necessary to support the theories of the complaint and defenses and confines trial preparation to information that is pertinent to the theories of the case); *see also* Fed. R. Civ. Proc. 33, advisory committee’s note to 1970 amendment of subsection (b) (observing that narrowing and sharpening the issues “is a major purpose of discovery”).

<sup>105</sup> *Gregory v. Dillard’s*, 565 F.3d 464, 492 (8th Cir. 2009); *see In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1239-40 (9th Cir. 2006) (“An important purpose of discovery is to reveal what evidence the opposing party has, thereby helping determine which facts are undisputed — perhaps paving the way for a summary judgment motion — and which facts must be resolved at trial.”) (internal citation omitted).

<sup>106</sup> 79 Fed. Reg. at 28,874 (proposing 30 C.F.R. § 1241.9(a)(3)).

<sup>107</sup> 30 C.F.R. § 1241.50.

(b) The following definitions apply to this part: . . .

*Information* means any data you provide to an ONRR data system, or otherwise provide to ONRR for our official records, including but not limited to, any reports, notices, affidavits, records, data or documents you provide to us, any documents you provide to us in response to our request, and any other written information you provide to us.

*Maintenance of false, inaccurate, or misleading information* means you provided information to an ONRR data system, or otherwise for us for our official records, and you later learn the information you provided was false, inaccurate, or misleading, and you do not correct that information or other information you provided to us that you know contains the same false, inaccurate, or misleading information.

*Submission of false, inaccurate, or misleading information* means you provide information to an ONRR data system, or otherwise to us for our official records, and you knew, or should have known, the information that you provided was false, inaccurate, or misleading at the time you provided the information.

*You (I)* means the recipient of an NONC, FCCP, or ILCP.<sup>108</sup>

First, ONRR's proposed definition of "information," which includes "any other written information you provide to us," is so broad that it explains nothing.<sup>109</sup> When a definition is so circular -- using the word "information" to define the term "information" -- a court construing it is likely to look elsewhere for an appropriate definition.<sup>110</sup> Because this definition provides no assistance in interpreting or applying the regulations, it should be eliminated.

Second, while ONRR's proposed definitions of "maintenance" and "submission" would appear innocuous, ONRR's definition of "maintenance" includes a reference to "information that you provided to us that you know contains the same false, inaccurate, or misleading information" as other information that has previously been made available to ONRR.<sup>111</sup> ONRR's preamble text, however, is broader than its proposed regulatory language, suggesting that information "of the same type" would be sufficient to implicate this new definition.<sup>112</sup> Because prohibiting the "same" information twice is duplicative, and because ONRR has not proposed any objective

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<sup>108</sup> 79 Fed. Reg. at 28,873-74 (proposing 30 C.F.R. § 1241.3).

<sup>109</sup> See *Fed. Aviation Admin. v. Cooper*, 132 S.Ct. 1441, 1450 n.4 (2012) (criticizing a definition of "actual damages: premised on a reference to "actual injury"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) ("ERISA's nominal definition of "employee" as "any individual employed by an employer," . . . is completely circular, and explains nothing.").

<sup>110</sup> See *Nationwide Mut. Ins. Co.*, 503 U.S. at 323 (adopting a common law interpretation when statutory definition was circular and unhelpful).

<sup>111</sup> 79 Fed. Reg. at 28,873 (proposing 30 C.F.R. § 1241.3).

<sup>112</sup> 79 Fed. Reg. at 28,864.

standard to determine whether information is “of the same type,” ONRR should revise the definition of maintenance to omit any reference to the “same” information.

The definition of “maintenance” must also be clarified to acknowledge that, should a company learn of an inaccuracy in information in its possession, the company has a “reasonable period of time under the circumstances” to advise ONRR. As written, the definition of maintenance does not expressly provide the company with a period of time within which to correct the information. Although ONRR may contend this is implicit, it should be made explicit in the definition.

The definition of “submission of false, inaccurate, or misleading information” should likewise be modified to include a reasonableness component. Rather than hold companies liable for submitting information that the company “should have known” was false or inaccurate, the definition should state expressly that the definition applies only to information that the company “knew, or reasonably should have known,” was false or inaccurate. This change is necessary to make the definition consistent with the “knowing and willful” standard applicable to significant violations under FOGRMA.

Third, ONRR proposes to define “you” and “I” as the mere “recipient of an NONC, FCCP, or ILCP.”<sup>113</sup> Given that most recipients of ONRR directives will be entities, using personal references like “you” and “I” is confusing. It would be advisable that ONRR more precisely define “you” and “I,” to avoid improperly asserting regulatory jurisdiction over individuals-- as opposed to institutional producers. More precise definitions would also make the rules clearer to understand and follow.

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<sup>113</sup> 79 Fed. Reg. at 28,874.