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MMS comments

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Minerals Management Service  
Minerals Revenue Management  
Regulations and FOIA Team  
P.O. Box 25165, MS 320B2  
Denver, CO 80225-0165

RE: Solid Mineral Reporting Requirements (66 Fed. Reg. 30121, June 5, 2001)

Dear Sir or Madam:

This letter contains the comments of the National Mining Association (NMA) in response to the solicitation contained in the referenced notice of proposed rulemaking. NMA is a national trade association whose members are the producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to mining. Many of these companies mine federally controlled leasable minerals and, as such, are directly affected by the proposed rulemaking published at 66 Fed. Reg. 30121 on June 5, 2001.

NMA generally supports the proposed Form MMS-4430 and the Internet submission thereof. Reducing the number of reporting forms that must be submitted from eight to one obviously simplifies the reporting of solid mineral royalties. However, the reduction of paperwork provided by the simplified Form MMS-4430 is nullified by the proposed submission of sales summaries (§210.202), sales contracts (§210.203), facility data (§210.204) and additional documents or evidence (§210.205). These requirements will increase the industry's cost and eliminate the assurance that it is in compliance compared to the current reporting scheme.

The proposed rule significantly modifies the current rules regarding the submission of information to the MMS and expands the requirements in current Bureau of Land Management (BLM) leases. The proposed rule changes the existing rule's requirement that information be provided "upon request" to an overly broad requirement that all additional documents and evidence must be submitted at the end of each calendar quarter. This vague mandate leaves the lessee responsible for trying to determine what documents and other supplemental information has to be provided without specific guidance or direction, and conflicts with BLM lease agreements that only require the that the lessee provide "information and documents that are reasonably necessary to verify lessee compliance with the terms and conditions of the lease."

MMS has deleted from the proposed rule the confidentiality section found in §206.263(d). of the current rule. This omission raises the serious concern that the information required by the proposal would not be maintained as proprietary information by MMS.

NMA is deeply concerned by the provisions of the proposed rule as set forth below and believe that they are of such consequence that they overwhelm the benefits that might be derived from the simplified reporting provided be Form MS-4430. For that reason, NMA urges the agency to reopen and extend the comment period for proposed rulemaking in order to carefully review and evaluate the impact of the vague and overly broad information collection requirements the agency has bootstrapped onto Form MMS-4430.

## SPECIFIC COMMENTS

### I. MMS has understated the average reporting burdens

NMA believes that the average reporting requirements are significantly understated. NMA members will be submitting individual comments regarding the accuracy of the burden estimates set out in the Paperwork Reduction Act analysis published in the June 5, 2001 Federal Register notice. Several of these inadequacies will be raised in the course of NMA's comments (below).

### II. The proposed rule implies that royalty payment has to be submitted at the same time as filing the Form MMS-4430

Proposed §210.201(a)(1) states that "you must submit a completed Form MMS-4430 for all coal and other solid minerals produced from Federal and Indian leases accompanied by all required royalty and rental payments (except for first year rentals)." Emphasis added.

A literal reading of the proposed rule would indicate that a solid mineral lessee has to make his payment for royalty liability on the same day that the Form MMS-4430 is submitted. If this is the intent of the proposed rule, it is a notable departure from the current practice. If this is the case, lessees will be forced not to submit their Form MMS-4430 until the last day of the month when they are making their wire transfer payment for their royalty liability. Further, the proposed rule conflicts with the existing payment procedures for solid minerals in §218.200 and 218.201.

NMA submits that the phrase "accompanied by all required royalty and rental payments (except for first year rentals)" be deleted from the final rule.

III. A separate sales summary for each remote storage site is needlessly burdensome. Proposed §210.202(a) states that "if you sell from five or fewer remote storage sites, you must submit a sales summary for each site."

NMA opposes this proposed requirement, because sales from remote sites are included as sales for the mine providing the coal to the remote site. It is unnecessary to have a separate sales summary, because MMS will already have a copy of the sales contract which indicates that the coal being sold from a remote site has been produced from a specific mine. If a lessee has one remote site, it would have to create two new internal reports to comply with this provision—one for the remote site and another for the operating mine excluding its sales from that reported by the remote site.

IV. The processing or washing costs and transportation costs submission is ambiguous. Proposed §210.202(a) includes a table indicating the time frames for submitting sales summaries and the other data elements that the lessee must provide. Two of the elements that must be submitted on a monthly basis are processing or washing costs (element 4) and transportation costs (element 5). Since the proposed rule provides no guidance regarding the cost information which must be submitted for processing or washing cost and transportation costs, one must conclude that these costs must be calculated and submitted monthly in accordance with §206.259 (determination of washing allowances) and §206.262 (determination of transportation allowances).

If NMA has correctly interpreted this ambiguity, a significant increase in the cost of compliance would occur. Some of the data required by these sections are determined on an annual basis. The degree to which this cost will increase depends upon whether the contract in question is arm's-length or non-arm's-length. The calculation under a non-arm's-length contract will require significantly more time and resources than the calculation under an arm's-length contract.

This ambiguity must be addressed in the final rule or the benefits of the Form MMS-4430 will further decline.

V. The submission of coal size data element is unnecessary

The table at §210.202(a) requires that the size of coal shipped to each customer be submitted monthly. NMA objects to this requirement because many NMA members do not indicate coal size by customer on existing internal reports. Also, MMS would already have the individual customer contracts that detail the coal size requirements. Once again, if this requirement were to stand in the final rule, the time and paperwork reduction benefits to the lessee of the new form would be compromised.

VI. The proposed rule appears to require the submission of sales summary information for months when there is not federal production

Proposed §210.202(b)(1) states that "for leases with ad valorem royalty terms...you must submit your sales summaries monthly at the same time you submit Form MMS-4403." One must infer that even if an ad valorem royalty term lessee does not have federal production in a given month, he nevertheless is required to submit sales summaries for that month.

While it appears reasonable to require that a Form MMS-4430 be filed for months when there is not federal production, mandating that sales summaries be filed for those months creates unjustifiable paperwork that contradicts the paperwork reduction objectives of the proposed rule. This problem would be rectified by adding the following provision to this subsection:

\*\*\*\*Form MMS-4430 reporting federal production. In the event that you did not have federal production in a specific month, you must submit sales summaries only if we specifically request that you do so."

VII. The submission of sales contracts is ambiguous

NMA is deeply disturbed by proposed §210.203(a) which requires the lessee to "submit sales contract, agreements, contract amendments, or other documents that affect gross proceeds received for the sale of all coal." The phrase "other documents that affect gross proceeds received for the sale of all coal" is not defined or otherwise amplified in the proposed regulation and places an undue burden on the lessee to determine what other documents must be submitted.

This overly broad and vague requirement could mean that every document received from a third party or worksheet created by the lessee to support the amount invoiced (e.g., train manifests with weights or individual shipments quality analysis) must be submitted. This provision also could mean that the lessee must submit all supporting documentation to a price escalation calculated pursuant to the terms of a contract and all correspondence between the lessee and its customer. Not only is this requirement overly broad and prohibitively vague, but it also is arbitrary and capricious. It establishes an impossible burden of trying to determine what "other documents" must be submitted. It is a "gotcha" provision designed to guarantee non-compliance.

NMA urges the agency to remove the phrase "other documents that affect gross proceeds received" from the final rule. Other documents that MMS deems necessary to ensure compliance could be requested as set forth below in NMA's discussion of recommended changes to §210.205(a).

#### VIII. Submission of sales contracts quarterly is ambiguous and burdensome

The proposed requirement in §210.203(b)(1) that sales contracts be submitted quarterly implies that the lessee is required to submit a copy of multi-period contracts each quarter. Further, this subsection is ambiguous regarding what is to be submitted quarterly and when the quarterly report is due.

The proposed rule should be clarified to indicate that a multi-period contract is submitted only once. Since most coal contracts are prospective, lessees' reporting burden is increased unnecessarily by the quarterly submission requirement. The agency can accomplish the same objectives by requiring that contracts be submitted less frequently, semi-annually for instance.

The final rule should reflect that, for coal and metal production, new sales contracts, agreements, and contract amendments should be submitted no more frequently than semi-annually. It also should clearly identify the reporting period and the subsequent filing date for that period. The quarterly reporting requirement in §219.10(c)(20) should be changed to be consistent with §210.203(b)(1).

#### IX. The proposal should make it clear that facility data need not be submitted for months when there is no federal production

Proposed §210.204(a)(1) states that "if you operate a wash plant, refining, ore concentration, or other processing facility for any coal, potassium, metals, or other solid minerals produced from Federal or Indian leases with ad valorem royalty terms, you must submit facility data, regardless of whether the facility is located on or off the lease." It appears that this information must be reported even if there is no federal production during a given month. This requirement adds an unnecessary paperwork requirement to a rule that is taunted as reducing needless paperwork obligations.

This subsection should be amended to clarify that facility data need not be reported in months when there is no production from federal leases.

X. §210.205(a) requirements exceed the current federal and Indian lease terms

Proposed §210.205(a) which allows MMS "to request detailed statements, documents, or other evidence that supports our compliance and asset management responsibilities" conflicts with lessees lease terms with BLM. Leases state that "[lessee] shall allow lessor access to and copying of documents reasonably necessary to verify [lessee] compliance with terms and conditions of the lease". Current §206.250(b) provides that if the specific provisions of any lease are inconsistent with any MMS regulation, the lease provision shall govern to the extent of that inconsistency.

The increased burden this proposed provision places on the lessee is inconsistent with the simplification objectives of the proposed rule. To make this provision more harmonious with the stated goals of the new rule, §210.250(a) should be revised to read: "MMS may request other information and documents that are reasonably necessary to verify lessee compliance with the terms and conditions of the lease."

XI. References to mailing addresses should be deleted

The proposed rule contains several references to specific addresses where reports should be mailed when they are not submitted electronically. Since mailing addresses are subject to change, all references to mailing addresses should be deleted or the rule will have to be amended every time a mailing address changes. Instead, the final rule should provide a reference to where the current mailing address can be found.

XII. The proposal does not include confidentiality provisions

The proposed rule deletes the current confidentiality provisions found at §206.263(d) and therefore the proposed regulations does not provide the same protections afforded by the existing rule. NMA urges that a §210.206 be added to the final rule that would read:

"Information required to be submitted under this part 210 that constitutes trade secrets and commercial and financial information that is identified as privileged or confidential shall not be available for public inspection or made public or disclosed without the consent of the lessee or other payor, except as otherwise provided by law or regulation."

## CONCLUSION

Although NMA supports the objective of reduced paperwork and increased efficiencies in the MMS royalty reporting program, there are areas of the proposed rule which cause us grave concern. Our comments have identified several requirements in the proposed rule that are vague and overreaching and, as such, increase rather than reduce the workload of the lessee. Nowhere in the proposal is this increase justified by a demonstration of commensurate benefits or a showing of need.

While Form MMS-4430 reflects a considerable increase in efficiency and reduction of paperwork, the supplemental information requirements fall far short of agency's objectives and create a new and substantial burden on the lessor. The new requirement that the lessee provide all documents and other supplemental information is so broad and vague that, if not altered in the final rule, it leaves the most reasonable and prudent lessee without direction and subject to the whim of the agency as to whether the requirement has been met. The lessee should be required to provide no more than that information specifically requested by MMS and is necessary.

Further, the rule provides no justification for deleting the confidentiality requirements. These must be returned to the rule to ensure the protections previously afforded.

For these reasons, NMA strongly urges that MMS withdraw and reevaluate the information reporting requirements in the proposed rule which are not essential to the replacement of the eight forms currently used with the new Form MMS-4430. The flaws in the non-essential sections thwart the objective of the agency's re-engineering effort and greatly expand the information gathering authority of the MMS without adequate justification.

Sincerely,

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