

HOWREY & SIMON

June 2, 1997



Attorneys at Law
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004 2402
(202) 783-0800
FAX (202) 383-6610

Charles J. Engel, III
(202) 383-6505

VIA FEDERAL EXPRESS

David S. Guzy, Chief
Rules and Publications Staff
Royalty Management Program
Minerals Management Service
Building 85
Denver Federal Center
Denver, Colorado 80225

Re: Proposed Rulemaking, Policy For Release Of Third-Party
Proprietary Information, 62 Fed. Reg. 16116 (April 4, 1997)

We appreciate the opportunity to submit these comments on behalf of Scurlock Permian Corporation ("SPC") to MMS' April 4, 1997 Notice of Proposed Rulemaking regarding a new Policy for Release of Third-Party Proprietary Information. 62 Fed. Reg. 16116 (1997). The proposed rule would allow MMS to disclose SPC's and other companies' confidential trade secret and proprietary commercial or financial information to possible competitors when the information forms the basis of a royalty assessment that a federal lessee is appealing or attempting to settle. 62 Fed. Reg. at 16117. MMS proposes to turn over such trade secrets and other competitively sensitive materials, without the owner's consent, in return for a confidentiality agreement from the recipient. SPC objects strenuously to a rule that would allow the release of our trade secrets to competitors without our consent.

MMS admits that release of such information "could cause competitive harm" to the owner. However, MMS is in no position to assess on a case by case basis the competitive injury that such a release could cause. In many cases, no confidentiality agreement could ever erase from the minds of our competitors information that could be used to gain a competitive advantage. In contrast to the proposed procedure here, a court in similar circumstances ordering disclosure of, for example, confidential pricing information to a competitor would not likely allow an employee with pricing authority to see the information absent a showing of special need. The proposed rule allows the competitor/recipient to decide who gets to see the information with no input whatsoever from the owner of the information. The recipient would merely need to assign and designate such persons as "individuals actually working on the appeal or a related ADR." Although proposed section 243.18 would allow MMS to require more stringent confidentiality standards if the recipient is a direct competitor of the owner of

the information, no means are provided for MMS to make a determination of when to do so. Again, the owner of the information would have no input.

As will be demonstrated by these comments, MMS lacks the authority to promulgate this rule. Congress has not delegated to MMS the power to enact regulations authorizing the release of confidential commercial information, which is protected from government disclosure by the Trade Secrets Act, 18 U.S.C. § 1905. Therefore, such promulgation exceeds MMS' statutory authority, is contrary to law and is an abuse of agency discretion, in violation of the Administrative Procedure Act. 5 U.S.C. §§ 706(2)(A), (C). Furthermore, MMS lacks the authority to require a recipient of confidential information pursuant to a Freedom of Information Act request, to accept all liability for wrongful disclosure of the information. Such a proposal is unlawful and ultimately unworkable.

1. MMS' Proposed Rule Exceeds Its Statutory Authority And Is Contrary to Law In Violation Of The Administrative Procedure Act

MMS' proposed release of confidential and proprietary information submitted to it by third parties is contrary to the Trade Secrets Act, 18 U.S.C. § 1905, and to the intent of Exemption 4 to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4). The Trade Secrets Act bars government employees from disclosing, unless specifically authorized by law, any confidential or proprietary information they receive in the course of their duties. 18 U.S.C. § 1905. The Act imposes both fines and imprisonment on violators. *Id.* Any disclosure of information that violates § 1905 is considered contrary to law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 298 (1979). The Trade Secrets Act has become a source of both substantive and procedural rights in favor of federal contractors resisting disclosure of confidential information under the FOIA. *General Motors Corp. v. Marshall*, 654 F.2d 294, 296 (4th Cir. 1981).

The Freedom of Information Act requires that the government disclose to the public any information in its possession that does not fall within one of the Act's nine exemptions from disclosure. 5 U.S.C. § 552. Exemption 4 to the FOIA states that the mandatory disclosure principles of the statute do not apply to "trade secrets and commercial or financial information obtained from a person . . ." 5 U.S.C. § 552 (b)(4). The Supreme Court has held that the FOIA exemptions are permissive; agencies are not required to withhold information falling within them, and may release such information in their discretion. *Chrysler Corp.*, 441 U.S. at 293-94. However, as MMS notes, the information protected by Exemption 4 and the Trade Secrets Act is identical; therefore, whenever a party demonstrates that the information at issue falls within Exemption 4, the government is necessarily precluded from releasing it by the Trade Secrets Act. *McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162, 1164 (D.C. Cir. 1995); *see also CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987) (scope of Trade Secrets Act coextensive with that of FOIA) *cert. denied*, 485 U.S. 977 (1988); *Charles River*

Park "A", Inc. v. HUD, 519 F.2d 935, 941 n.6 (D.C. Cir. 1975) (consideration of Trade Secrets Act appropriate only when information falls within both Exemption 4 and the prohibitions of § 1905).

The Trade Secrets Act bars disclosure of information within the boundaries of its own prohibitions, coextensive with those defined by Exemption 4, unless such disclosure is "authorized by law." 18 U.S.C. § 1905. The Supreme Court has held that administrative agency regulations can provide the authorizing law envisioned by Section 1905 if those regulations are: 1) substantive; 2) the product of a congressional grant of legislative authority; and 3) promulgated in accordance with applicable procedural requirements. *Chrysler*, 441 U.S. at 295. MMS' proposal fails to comply with the second, and arguably most important, criterion set out by the Supreme Court in *Chrysler*. The proposal is *not* a product of a "congressional grant of legislative authority" to promulgate regulations disclosing information protected by the Trade Secrets Act.

To fulfill this requirement, MMS must establish a nexus between its proposed disclosure policy and a delegation of authority from Congress to implement such a regulation. *Chrysler*, 441 U.S. at 304. The statute on which the agency relies must be subject to a reasonable interpretation which contemplates the promulgation of the regulation. *Id.* MMS cannot rely on the FOIA as authorization for this rule, since the proposal would permit the release of information within an exemption to the FOIA. *General Motors*, 654 F.2d at 296-97; *Charles River Park*, 519 F.2d at 942. The federal "general housekeeping" statute, 5 U.S.C. § 301, which MMS cites as one authority for its rule, has also been held insufficient to authorize releasing protected information since it is "simply a grant of authority to the agency to regulate its own affairs." *Chrysler*, 441 U.S. at 309; *see also Jackson v. First Fed. Sav.*, 709 F. Supp. 887, 892 (E.D. Ark. 1989); *St. Joseph's Hosp. Health Ctr. v. Blue Cross, Inc.*, 489 F. Supp. 1052, 1058 n.10 (N.D.N.Y. 1979). Other grants to administrative agencies of general authority to promulgate regulations necessary to carry out their functions have similarly been held insufficient authorization for Trade Secrets Act purposes. *See J.H. Lawrence Co. v. Smith*, 545 F. Supp. 421, 426 (D. Md. 1982) (NASA "housekeeping" statute, 42 U.S.C. § 2473(b)(1)); *St. Joseph's*, 489 F. Supp. at 1057 (Department of Health, Education and Welfare "housekeeping" statutes, 42 U.S.C. § 405, § 1302). MMS cites similarly general statutes as authority for its proposed rule, which statutes are accordingly insufficient to overcome the protections of the Trade Secrets Act. *E.g.*, 30 U.S.C. § 359; 30 U.S.C. § 1023; 30 U.S.C. § 1751(a); 43 U.S.C. § 1334(a), as cited at 62 Fed. Reg. 16116, 16119 (1997).

By way of example, the Social Security Act's pronouncement that no disclosure of information submitted by Medicare providers be made "except as the head of the applicable agency may by regulations prescribe . . ." 42 U.S.C. § 1306(a), has been held by many courts to constitute sufficient authorization under the Trade Secrets Act for the agency's promulgation of regulations releasing otherwise protected information. *St. Joseph's*, 489 F. Supp. at 1058; *St. Mary's Hosp., Inc. v. Harris*, 604 F.2d 407, 410 (5th Cir.

1979); *Doctors Hospital v. Califano*, 455 F. Supp. 476, 482 (M.D. Fla. 1978). The statutory language quoted above was described by one court as "specifically concerned with the disclosure of information pertaining to a discrete subject matter, and by its very terms contemplates the issuance of substantive regulations permitting such disclosure." *Cedars Nursing & Convalescent Ctr., Inc. v. Aetna Life & Cas. Ins. Co.*, 472 F. Supp. 296, 298 (E.D. Pa. 1979); see also *RSR Corp. v. Browner*, 924 F. Supp. 504, 510 (S.D.N.Y. 1996) (Clean Water Act's granting of specific permission to release "effluent data" held sufficient authorization for EPA regulation disclosing such information regardless of its confidential status) *aff'd*, No. 96-6186, 1997 U.S. App. LEXIS 5523 (2d Cir. Mar. 26, 1997).

The only statute cited by MMS as authority for this proposal which has been held to grant authority to release confidential information protected by the Trade Secrets Act is the Outer Continental Shelf Lands Act (OCSLA) which authorizes, in part, the promulgation of regulations regarding the release of information submitted by applicants for permits for geophysical and geological exploration on the outer continental shelf. 43 U.S.C. § 1352(c); *United States v. Geophysical Corp.*, 732 F.2d 693, 702 (9th Cir. 1984). However, the Ninth Circuit's decision that Section 1352(c) authorized disclosure for Trade Secrets Act purposes was limited to the release of information submitted by applicants for permits for exploration offshore; neither onshore operations nor royalty calculation information is encompassed by that section. *Id.* at 702. OCSLA also gives the Secretary some discretion with regard to the release of information obtained from parties for purposes of preparing an Environmental Impact Statement, 43 U.S.C. §§ 1344(g), (h). The royalty payment, pricing and production volume information contemplated by the proposed rule does not fall within these statutory authorizations of information release, and therefore they are insufficient delegations of congressional authority for MMS to promulgate this rule. Other statutes cited as enabling authority by MMS similarly do not provide the necessary congressional authorization. The Minerals Leasing Act allows the Secretary to disclose information regarding coal resources to the public at certain designated times, but does not authorize the release of any other information. 30 U.S.C. §§ 208-1(d), (e). MMS also cites the Geothermal Steam Act as authority, yet that statute specifically directs the Secretary to keep confidential information received from business entities regarding the price to be paid for geothermal steam. 30 U.S.C. § 1018.

Under the Federal Oil and Gas Royalty Management Act (FOGRMA), Congress specifically permits the release of trade secrets, proprietary and other confidential information only to a State or Indian Tribe with which MMS has a cooperative agreement to share such royalty information. 30 U.S.C. § 1733(a). These cooperative agreements are to be entered into by MMS with States and Indian tribes to "carry out inspection, auditing, investigation or enforcement . . . activities . . . in cooperation with the [agency]." 30 U.S.C. § 1732(a). In order to obtain confidential information to engage in those activities, a State or Tribe must 1) consent in writing to restrict dissemination to those directly involved in the audit or investigation under the cooperative agreement with MMS; 2) accept liability for wrongful disclosure; 3) if a State, demonstrate that

information is essential to the conduct of an audit or to litigation; and 4) if a Tribe, demonstrate that information is essential to the conduct of an audit, and waive sovereign immunity for wrongful disclosure of the information. 30 U.S.C. § 1733(a).

An agency regulation may not "serve to amend a statute, . . . or to add to the statute 'something that is not there.'" *Iglesias v. United States*, 848 F.2d 362, 366 (2d Cir. 1988) (citing *United States v. Calamaro*, 354 U.S. 351, 359 (1957)). With its proposal, MMS would effectively amend FOGRMA by adding entities appealing a royalty assessment to the list of parties to whom confidential information can be released. Such an attempt violates Congress' intent in providing for the release of information only to those assisting MMS in its royalty management function under cooperative agreements that essentially render those parties MMS' agents.

Furthermore, to determine Congressional intent, it is proper to examine the legislative history of the statute at issue. *Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 162 (D.C. Cir. 1990). The legislative history of FOGRMA demonstrates Congress' awareness of the confidential nature of the documents to be inspected under the Act, and its intent that such information be protected. Federal Oil and Gas Royalty Management Act of 1982, H. Rep. No. 97-859 at 39 (1982), reprinted in 1982 U.S.C.C.A.N. 4268, 4293. The limitations on disclosure of confidential information embodied in 30 U.S.C. § 1733 effect this intent, and MMS may not, by regulation, authorize additional disclosures.

Therefore, since MMS is not authorized by any statute to promulgate this regulation in derogation of the Trade Secrets Act and FOGRMA, such promulgation will exceed its statutory authority in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C), and be contrary to law in violation of 5 U.S.C. § 706(2)(A).

2. MMS' Promulgation Of This Rule Abuses Its Discretion In Violation Of 5 U.S.C. § 706(2)(A) Since It Ignores The Statutory Mandate Of The Trade Secrets Act And Fails To Consider All Relevant Factors

Promulgation of the proposed disclosure is an abuse of discretion since it ignores the Trade Secrets Act's explicit prohibition of the release of such information. *Charles River Park*, 519 F.2d at 942. As the D.C. Circuit has held, "any voluntary agency disclosure of information exempted by FOIA but intercepted by the Trade Secrets Act would constitute a serious abuse of agency discretion. *National Org. for Women v. Social Sec. Admin.*, 736 F.2d 727, 743 (D.C. Cir. 1984); see also *Charles River Park*, 519 F.2d at 941 (agency's ignorance of mandates of Trade Secrets Act ruled an abuse of discretion).

When promulgating regulations permitting release of confidential information, an agency must consider three factors before authorizing disclosure. Those factors are: 1) whether disclosure of the particular information will aid the agency in fulfilling its

functions; 2) the harm, if any, to providers and the public if the information is disclosed; and 3) alternatives to full disclosure which will provide consumers with adequate knowledge to make informed choices and participate in the regulatory process. *Pennzoil Co. v. Federal Power Comm'n*, 534 F.2d 627, 653 (5th Cir. 1976); *St. Joseph's*, 489 F. Supp. at 1065. As a final matter, the agency must weigh the public interest in disclosure against the potential harm to the provider of the information. *Pennzoil*, 534 F.2d at 631-32; *St. Joseph's*, 489 F. Supp. at 1065.

MMS admits numerous times throughout the Preamble to its proposed rule that the proposed disclosure would harm providers of information. MMS states that its historic application of FOIA Exemption 4 to retain confidential information "protects submitters . . . from the competitive disadvantages of public disclosure." 62 Fed. Reg. at 16117. MMS further states that the information it proposes to release to third parties undoubtedly meets the *Critical Mass* test for confidentiality. *Id.* SPC submits that MMS' release of its proprietary information to third parties will cause it to breach its agreements with its customers under which those customers have an expectation that information regarding specific terms of their agreements with SPC will remain confidential. Furthermore, the release of such confidential information will seriously damage SPC's ability to competitively bid for future business by disclosing terms of its existing and prior contracts to its competitors.

Undoubtedly, MMS believes that by only releasing confidential information to those parties appealing or attempting to settle a royalty assessment with the agency, it is sufficiently limiting disclosure so as to cause minimal harm to submitters. However, this limitation allows MMS to release a submitter's information to those third parties the submitter least wants to receive it, its competitors. No restrictions on types of employees who would be given access to the information are required under the proposal. No input from the owner of the information, let alone consent, is sought. The confidentiality agreement and liability imposed by the proposal are insufficient to protect the competitive interests of information owners given that MMS would make no attempt to learn what those interests are.

**3. MMS' Proposal To Compel Recipients Of
Information Under Its New Rule To Assume All
Liability For Wrongful Disclosure Of Information
Exceeds The Agency's Statutory Authority**

MMS' authority to promulgate regulations must stem from an express act of Congress. *Killip v. Office of Personnel Mgmt.*, 991 F.2d 1564, 1569 (Fed. Cir. 1993). Administrative agencies are not vested with legislative authority; any rule or regulation promulgated by an agency cannot confer upon that agency any more power or authority than that conferred by Congress. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). As demonstrated above, Congress has not delegated to MMS the authority to override the protections of the Trade Secrets Act by releasing confidential

or proprietary information to companies appealing MMS royalty assessments. Similarly, Congress has not delegated to MMS the authority to require recipients of information, pursuant to a Freedom of Information Act request or otherwise, to sign confidentiality agreements and assume all liability for wrongful disclosure of the information received. Financial liability for wrongful disclosure of trade secret information can be extensive, and MMS lacks the authority to require those who obtain the information lawfully to assume such a legal and financial risk.

MMS proposes to use the FOIA process to release records to entities appealing a royalty assessment, subject to the above-mentioned conditions. A request for records is submitted to the FOIA Officer, and the FOIA Officer is the custodian of the statements which are required to be signed by those parties who will review the released documents, certifying their agreement to comply with confidentiality and liability provisions. Proposed 43 C.F.R. § 243.12, § 243.17(e), 62 Fed. Reg. at 16118. However, neither the Freedom of Information Act nor any other act of Congress authorizes MMS to impose such conditions on the release of information. MMS' proposal to impose such restrictions as part of its royalty management function is contrary to Congress' intent in delegating that function to the Department.

MMS does not specify which of its organic statutes provides the necessary authority to enact this rule. FOGRMA, as discussed above, specifically addresses the conditions for release of confidential information submitted to MMS by federal lessees. 30 U.S.C. § 1733. When a court reviews MMS' construction of FOGRMA through promulgation of these regulations, its first inquiry will be whether Congress has directly spoken to the precise question at issue. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter . . ." *Id.* at 842; see also *Home Mortgage Bank v. Ryan*, 986 F.2d 372, 376 (10th Cir. 1993). Through FOGRMA, Congress has directly spoken on the issue of which entities may be required by MMS to assume liability for wrongful information release. As explained above, MMS may release confidential information to States and Indian Tribes which have entered into cooperative arrangements with the agency to provide royalty management assistance. FOGRMA also authorizes the imposition of confidentiality and liability restrictions on those entities.

Any State or Tribe receiving confidential information must accept all liability for wrongful disclosure, and consent to confidentiality agreements. 30 U.S.C. § 1733(a). MMS is absolved by FOGRMA of liability for wrongful disclosure by any individual, State or Tribe that receives information pursuant to the section. 30 U.S.C. § 1733(b). Furthermore, Section 1733(c) specifically subjects any individual, State or Tribe in possession of confidential information to federal laws preventing disclosure. Nowhere in this extremely specific statute does Congress mention releasing information to entities appealing an assessment of MMS royalties; only those entities assisting MMS in carrying out its royalty management functions are given access, and only as to those

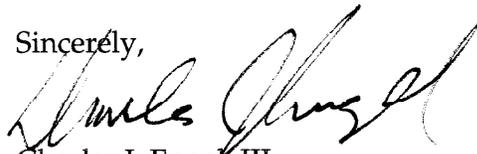
entities is MMS authorized to require confidentiality agreements and assumptions of liability for wrongful disclosure.

An agency regulation may not "serve to amend a statute, . . . or to add to the statute 'something that is not there.'" *Iglesias v. United States*, 848 F.2d 362, 366 (2d Cir. 1988) (citing *United States v. Calamaro*, 354 U.S. 351, 359 (1957)). By enlarging the class of persons who can be held liable for wrongful disclosure of information lawfully obtained, MMS has effectively amended FOGRMA. Similarly, by conditioning the release of information under the FOIA on assumption of liability, MMS has unlawfully amended that statute as well. The only condition of release authorized by Congress in its enactment of the FOIA is that of requiring reasonable fees for searching and copying. 5 U.S.C. § 552(a)(4)(A). By purporting to release information under FOIA, and at the same time subjecting that release to additional restrictions, MMS has exceeded the authority granted it under that statute as well as FOGRMA.

The proposed rule effectively requires information recipients to be bound by an agency-imposed protective order. However, MMS lacks authority a court would possess in issuing such an order and, as noted above, MMS would make no attempt to weigh the circumstances of a release of information and tailor its order accordingly, which any court would do. A court has inherent power to assess reasonable sanctions on attorneys and litigants who abuse the judicial process. *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991). Federal district courts may impose sanctions on violators in the form of financial penalties, contempt citations, assessment of attorney's fees or even default judgments. *Coleman v. American Red Cross*, 979 F.2d 1135, 1141 (6th Cir. 1992). MMS cannot, through an agency regulation lacking proper congressional delegation, grant itself greater power than a district court to compel a party to assume civil and criminal liability, simply by virtue of violating what amounts to an agency-imposed protective order.

SPC urges MMS to reconsider and withdraw this proposed rule. In the context of the proposal, the potential harm to submitters of confidential and proprietary information outweighs any interest of the MMS. Furthermore, as explained above, MMS lacks the statutory authority to release the information as proposed, so must wait for Congress to delegate the necessary authority. SPC urges MMS to continue to comply with all federal laws protecting the confidentiality of information submitted to the agency by private parties.

Sincerely,



Charles J. Engel, III
Kristen M. Schuler

cc: Lawrence J. Dreyfuss, Esq.