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CONTROLLER'S DEPARTMENT
OWNERSHIP & ROYALTY

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Comments of Exxon Company, U.S.A. Related to
Notice of Proposed Rules Governing Appeals of
MMS Orders; 64 Federal Register 1930.

VIA FACSIMILE 303-231-3385 AND AIRBORNE EXPRESS MAIL

Mr. David S. Guzy
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Building 85, Room A 613
Denver Federal Center
Denver, Colorado 80225

Dear Mr. Guzy:

Exxon Company, U.S.A., a division of Exxon Corporation ("Exxon"), welcomes this opportunity to submit written comments concerning the Minerals Management Service's ("MMS") proposed rules governing appeals of MMS Orders published at 64 FR 1930 (January 12, 1999) ("proposed rule"). As one of the largest producers of oil and gas from federal leases in the United States, a frequent participant in Department of the Interior appeals proceedings, and an industry participant with the MMS' Royalty Policy Committee that adopted the proposed rule, Exxon has a significant interest in the outcome of this rulemaking.

Exxon supports the comments submitted by the American Petroleum Institute ("API"), which address in detail most of Exxon's concerns with the proposed rule. While Exxon will not repeat at length the comments tendered by the API, we will highlight some of the key areas of particular concern to Exxon, and point out a few other areas that are not addressed by API.

I. The Proposed Rule disregards both the Letter and the Spirit of the RPC Report.

Exxon was disappointed to see the proposed rule vary so significantly from the March 21, 1997, Royalty Policy Committee Report ("RPC Report"). Much time, energy and give-and-take consensus building were invested over the course of one and one-half years among states, Indian tribes and Industry in the negotiation and drafting of the RPC Report. This process was facilitated by two high-level MMS employees, the Chief of the Office of Enforcement and the Deputy Associate Director for Policy and Management Improvement, who were quite active not only in the deliberations, but also in writing the Subcommittee Report ultimately adopted by the RPC. Given this level of participation by key MMS personnel in the process of achieving consensus from widely disparate points of view, and in light of the strong concerns noted by Subcommittee members in several meetings held to review earlier drafts of this proposed rule, it is surprising and discouraging that the proposed rule continues to vary so markedly from the RPC Report.

As discussed in API's comments, the consensus appeals process adopted in the RPC report reflects the interests of all parties involved with the RPC. That process gave lessees an impartial, one-step review by the IBLA; states and Indian lessors the right to intervene in appeals; and the MMS the maximum flexibility in meeting the Federal Oil and Gas Royalty Simplification and Fairness Act's ("Fairness Act")¹ 33 month deadline. The MMS Director decisions would be eliminated, and the Assistant Secretary for Land and Minerals Management would be allowed to decide a case only upon petitioning the IBLA to relinquish its jurisdiction and showing good cause. Policy decisions were to be made in advance by the Royalty Valuation Division or the Royalty Policy Board and not deferred to the administrative appeal process.

In many important respects, the fundamental elements of the RPC Report were omitted or changed in the proposed rule. The proposed rule provides for a *de facto* two-step appeals process whereby MMS orders and decisions would continue to be appealed to the MMS, and not the IBLA. Appeals to the IBLA would not occur until after the settlement conference, certification of the administrative record, and the MMS Director's "notice" (in essence, a Director's Decision) concurring with, modifying, or rescinding the order, and only upon paying a second, separate filing fee.

The RPC report clearly recommended that the MMS Director take a position on the appeal in the form of an internal memorandum. This "internal memorandum" has now become an official MMS action, which may receive undue deference and create a presumption of regularity with the IBLA and reviewing courts, thus raising the potential need for an appellant to challenge the Director's decision. Clearly, the MMS' proposal does not resemble the one-step appeals process adopted by the Royalty Policy Committee. Any language in the proposed rule that contemplates or may be interpreted as creating something other than a single-level appellate procedure within the Department should be clarified in the final rule.

Additionally, under the proposed rule, the Assistant Secretary for Land and Minerals Management (or Indian Affairs) would have unlimited discretion to decide the appeal by merely notifying the appellant and IBLA up to 30 days prior to the due date for filing the Statement of Reasons. This would result in the complete loss of impartial review for the appellant. The consensus of the Royalty Policy Committee subcommittee was that such assumption of jurisdiction by the Assistant Secretary in individual appeals was to be the exception to the rule, to

¹ Pub. L. 104-185, as corrected by Pub. L. 104-200.

be invoked only upon a showing of good cause. The final rule should reflect this limited right of the Assistant Secretary to assume jurisdiction of an appeal.

Exxon reinforces API's comment that only a return to the consensus appeals process recommended by the RPC will address the numerous problems identified with the existing appeal process and avoid the numerous problems with the proposed rule. Exxon strongly urges MMS to adopt a rule that remains true to the letter and spirit of the RPC report.

II. The Proposed Rule is Inconsistent with the Fairness Act.

The proposed rule is inconsistent with the mandates of the Fairness Act in several important respects, to include the following.

First, as is discussed at length in the API's comments, the definitions in the proposed rule contain unnecessary deviations from the Fairness Act definitions, to include the definition of "Lessee", "administrative proceedings", and "commence". These definitions have significant bearing upon an appellant's rights and obligations regarding MMS orders and should be modified to implement, rather than alter, the Fairness Act's requirements.

Second, the Fairness Act's requirement that an "order to pay" assert a specific, definite, and quantified obligation claimed to be due, and that it specifically identify the obligation by lease, production month and monetary amount, as well as the reason or reasons the obligation is claimed to be due, is also of significant importance to an appellant. The final rule should make clear that the potential "modification" of orders by the MMS Director will not add new claims or change the factual, legal or policy basis of existing claims.

Stated differently, pursuant to the Fairness Act's requirement of a valid "order to pay", MMS should not be permitted to issue an order without an adequate basis in the record and then "fix" the order at some later stage of the proceedings. An order must satisfy the minimum

requirements of the Fairness Act, administrative law and due process when it is issued. The final rule should confirm the intent of the Royalty Policy Committee that the MMS is not allowed to "cure" defective orders during the appeals process.

III. The Proposed Rule Contains Unreasonable and Unnecessary Traps for the Unwary Appellant.

The proposed rule is procedurally complex and unforgiving for the unwary or inexperienced appellant. If an appellant inadvertently fails to fully and timely comply with many of the proposed rule's procedural requirements, then the appellant's appeal may be dismissed.

Exxon believes that mandating as drastic a penalty as dismissal for an appellant's inadvertent failure to meet filing deadlines and notice obligations is unreasonably extreme and without justifiable purpose. Exxon submits that there exists no compelling reason that any of the procedural deadlines or obligations in the proposed rule should be jurisdictional. Exxon concurs with the API's comments that at most, the 33-month time frame for deciding appeals should be extended until appellants cure an inadvertent failure to timely file or serve. Such more reasonable treatment of an appellant's inadvertent failure to meet filing deadlines and notice obligations is clearly equitable in light of the corresponding lack of such penalties for the MMS' failure to meet its deadlines.

Further, the granting of extensions of these procedural deadlines in most cases is at the discretion of the MMS. Exxon believes that the proposed rule should expressly state that extensions should be freely granted to appellants in order to allow all parties the opportunity to fully prepare and present their case. At the very least, the final rule should address the circumstances in which extensions will not be granted, and not leave such decisions solely to the MMS' discretion. Such treatment of appellants is certainly equitable in light of the substantial

advantages enjoyed by the MMS in the administrative appeals process. Under the Fairness Act, the MMS has seven years from the date the appellant's royalty obligation was originally due in which to develop the factual, policy and legal basis purportedly supporting its order. See 30 U.S.C. § 1724 (b)(1).

IV. Valuation Determinations, Policy Determinations, and Subpoenas Should Be Appealable Orders.

In defining what constitutes an appealable "Order", the proposed rule specifically excludes certain valuation determinations, certain policy determinations, and subpoenas. Proposed 43 CFR §4.903. Proposed 43 CFR §4.905 further restricts what can be appealed by excluding orders to provide documents or information, if issued by the Associate Director for Royalty Management or his delegate. Exxon submits that valuation determinations, "Dear Payor Letters", administrative subpoenas, and orders to provide documents or information should all be "orders" or decisions that may automatically be appealed administratively.

Valuation Determinations. The current valuation regulations for both Federal and Indian oil and gas valuation (30 CFR §§206.52, 102, 152, 153, 172, and 173) provide a mechanism for lessees to gain royalty valuation certainty by requesting a valuation determination from the MMS. These rules require that "MMS shall expeditiously determine the value based upon the lessee's proposal and any additional information MMS deems necessary". *Id.* The proposed rule, however would create two types of valuation determinations, those that contain mandatory or ordering language and those that do not. Only those that contain mandatory or ordering language would be appealable

Payors deserve and are entitled to expeditious valuation decisions by MMS which are binding on the MMS and immediately and automatically appealable. MMS' proposal undermines

the concept of meaningful valuation determinations that provide certainty to and can be relied on by lessees, and in doing so, directly contradicts the intent of the current valuation regulations. The final rule should provide that all valuation determinations or other valuation guidance provided by the MMS at the request of a payor are binding on the MMS and are automatically appealable by the party who sought the valuation determination.

Policy Determinations. As with valuation determinations, the MMS proposes two types of policy determinations, those that contain mandatory or ordering language and those that do not. For policy determinations, however, the means of distinguishing the two types is further blurred since the proposed rule only references this difference in the preamble (64 Federal Register 1935, January 12, 1999). Although prefaced by the term "non-binding", the proposed definition of "Order" at Part (2)(i)(C) in 43 CFR §4.903 fails to identify when a policy determination would be considered an "Order" The final rule should provide that all policy determinations by the MMS are binding on the MMS and are automatically appealable.

Subpoenas. Subpoenas issued by MMS or a delegated State which fail to meet the requirements set forth in 30 U.S.C. §1724(d)(2) should be considered appealable orders. Rather than distinguish between two types of orders to provide documents depending upon the relative authority of the individual issuing the order, the final rule should make explicit that all orders to provide documents or information are considered appealable orders. MMS' concern to avoid the delay caused by administrative appeals of such orders may be minimized by the Assistant Secretary for Land and Minerals Management's option to make a decision in any such appeal.

V. The Issuance of a Preliminary Determination Letter Should be Mandatory.

One of the primary objectives of the RPC's recommendations was to ensure that the proposed appeals procedures would encourage the parties to resolve disputes at the earliest

possible opportunity. *See* Preamble to Proposed Rule, 64 F.R. at 1931. In implementing this intent, the RPC report recommended, *inter alia*, that MMS, State or tribal auditors be required to issue a mandatory Preliminary Findings Letter to lessees as a prerequisite to issuing an order. *Id.* This letter would provide information concerning the scope of the audit, the factual, legal, and policy basis for the preliminary determination, as well as how a payor could seek an informal resolution of the dispute. Proposed 30 C.F.R. § 242.103.

Contrary to the recommendations of the RPC report, however, the MMS in the proposed rule leaves the issuance of the preliminary findings letter to an auditor's discretion. The stated reason is that "time constraints" may make such preliminary communications "overly burdensome." *See* 64 F.R. at p. 1959.

Exxon submits that on balance any additional time an MMS, State or Tribal auditor may encounter by sending a preliminary findings letter is outweighed by the time, money and resources saved by both the MMS and the payor by resolving any key factual and/or legal misconceptions. It has been Exxon's experience that such preliminary findings letters initiate early communications with the auditor that in many instances lead directly to such early resolutions or clarifications, and, correspondingly, yield significant savings of time and resources for all parties involved. On the other hand, when Exxon receives an order to pay without the benefit of a preliminary findings letter or other communication with the auditor, the chances that the order will be appealed are significantly greater.

Consequently, Exxon recommends that 30 C.F.R. § 242.102 in the final rule be revised to require that the issuance of a preliminary issue letter be a mandatory prerequisite before an auditor may issue a subsequent order.

VI. The Filing Fees Requirements should be dropped in the Final Rule.

Exxon opposes for a number of reasons the proposed rule's requirement that an Appellant pay two nonrefundable \$150 filing fees via electronic funds transfer upon filing of the Notice of Appeal and Statement of Issues. These fees effectively preclude the appeal of orders or demands for monetary obligations less than \$300. Regardless of the propriety of the MMS' order at issue, it makes no economic sense for a party to pay the \$300 filing fees and invest the requisite time and resources required to appeal demands for amounts less than \$300. In effect, Exxon and other similarly situated payors are compelled by simple economics to pay such demands without appeal.

Further, the filing fee requirements are objectionable on general policy grounds. The substantial administrative burden and expense of appealing MMS orders under the highly formalized procedures in the proposed rule will be onerous enough without the added imposition and jurisdictional nature of the of nonrefundable filing fees. The federal government receives substantial revenue from federal lessees in the form of lease bonus and royalty payments. A lessee should not have to pay again to have its appeal resolved by the Department of the Interior.

For these reasons, Exxon recommends that the filing fees requirements be dropped in the final rule. Alternatively, if the MMS ultimately determines that the filing fees requirements should be maintained in the final rule, Exxon offers the following suggestions.

First, to make the process more equitable to appellants, the final rule should provide that the MMS, states and Tribes may not serve orders to pay or similar demands for amounts less than \$300. This would eliminate the inordinate effort and burden on both the MMS and the payor to address the payment of such relatively small amounts and further would obviate the situation discussed above whereby potential appellants are compelled to pay any amount under \$300 because of the filing fee.

Second, for orders to pay or other demands over \$300, Exxon suggests that the final rule incorporate a minimum threshold amount of at least \$1,000 below which no filing fees would be required of the appellant to pursue an appeal. Further, for appeals of orders for payment over this \$1,000 threshold amount, the MMS should consider dropping the fee for filing a Notice of Appeal and adding a one-time \$300 fee for filing the Statement of Reasons. This arrangement would provide an incentive for appellants to resolve their appeal early in the process, thereby saving all parties, including the MMS, significant time and resources. Additionally, any filing fees paid by an appellant should be refunded with interest in the event that an order is subsequently withdrawn or rescinded by the MMS. In keeping with the "fairness" aspects of the Fairness Act, an appellant should not be required to pay any filing fee to pursue the administrative appeal of a defective order.

Finally, the requirement that filing fees be paid by electronic funds transfer ("EFT") unless the appellant receives the MMS' prior approval to use another payment method is too restrictive. An appellant should have a choice of payment methods and be allowed, at its discretion, to use the method that is least burdensome to the appellant.

VII. Proposed amendments to 30 CFR Part 243 (Bonding Requirements).

Exxon welcomes the MMS' implementation of the Fairness Act's requirements regarding bonding, specifically referring to the proposal (1) that the recipient of an order to pay an obligation (other than an assessment) be allowed to provide evidence of financial solvency in order to suspend the order during the pendency of an appeal, and (2) that the recipient of an order to pay an assessment be entitled to an automatic stay. 64 FR 1961, *et seq.*; *see also* 30 U.S.C. § 1724(l). Exxon also welcomes the MMS' proposal to apply these same rules to appeals not subject to the Fairness Act requirements, *i.e.*, appeals involving federal oil and gas production that

occurred before September 1, 1996, and appeals involving other types of federal mineral leases.

Exxon suggests that these same rules should apply to all appeals, including Indian lease appeals.

Exxon concurs with and encourages the MMS to consider the specific suggestions for amending and clarifying the proposed rule's bonding requirements set forth in the API's comments.

VIII. Conclusion.

Again, Exxon appreciates the MMS' consideration of our comments on this important proposed regulation. We look forward to working with the MMS and the Department on its implementation.

Sincerely,

W. L. Otonari