July 21, 2014

VIA E-FILING ON www.regulations.gov

Mr. Armand Southall
Regulatory Specialist
Office of Natural Resources Revenue
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 the civil penalty regulations in the Federal Register and requested public comments on the proposal.[1] This submission constitutes the comments of the Independent Petroleum Association of America ("IPAA") and addresses in detail each aspect of the proposed amendments.

IPAA is the leading, national upstream trade association representing oil and natural gas producers and service companies. IPAA represent the 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 about fifty-four percent of American oil, and more than eighty-five percent of American natural gas.

ONRR proposes to amend 30 CFR Part 1241, subparts A through C.[2] 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

[1] 79 Fed. Reg. 28,862 (May 20, 2014).
[2] *Id.*

amendments only further complicate existing administrative processes and imperil that procedural protections 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 change it is proposing. Since the passage of the Federal Oil and Gas Royalty Management Act in 1983, ONRR and its predecessor conducted its regulatory activity through two principal means: (1) notice-and-comment rulemaking for general rules having the force of law, and (2) 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 rule, however, stands that practice on its head. If the rule were adopted, a company could still not appeal the guidance document, but would be subject to immediate penalty for failing to comply with its terms. We think Americans will be surprised to learn that this is how the Interior Department proposes to treat the citizens for whom it works.

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. A small 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 that impose costs without promoting regulatory compliance, undermine procedural protections that must accompany government enforcement actions, and that better balance costs and benefits.

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PRELIMINARY NOTE ON NOMENCLATURE

To maintain consistency with the language ONRR uses in the proposed rules, these Comments incorporates the following acronyms:[3]

"***ALJ***" means Administrative Law Judge in the Hearing 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 on 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).[4]

I. POLICY CONCERNS.

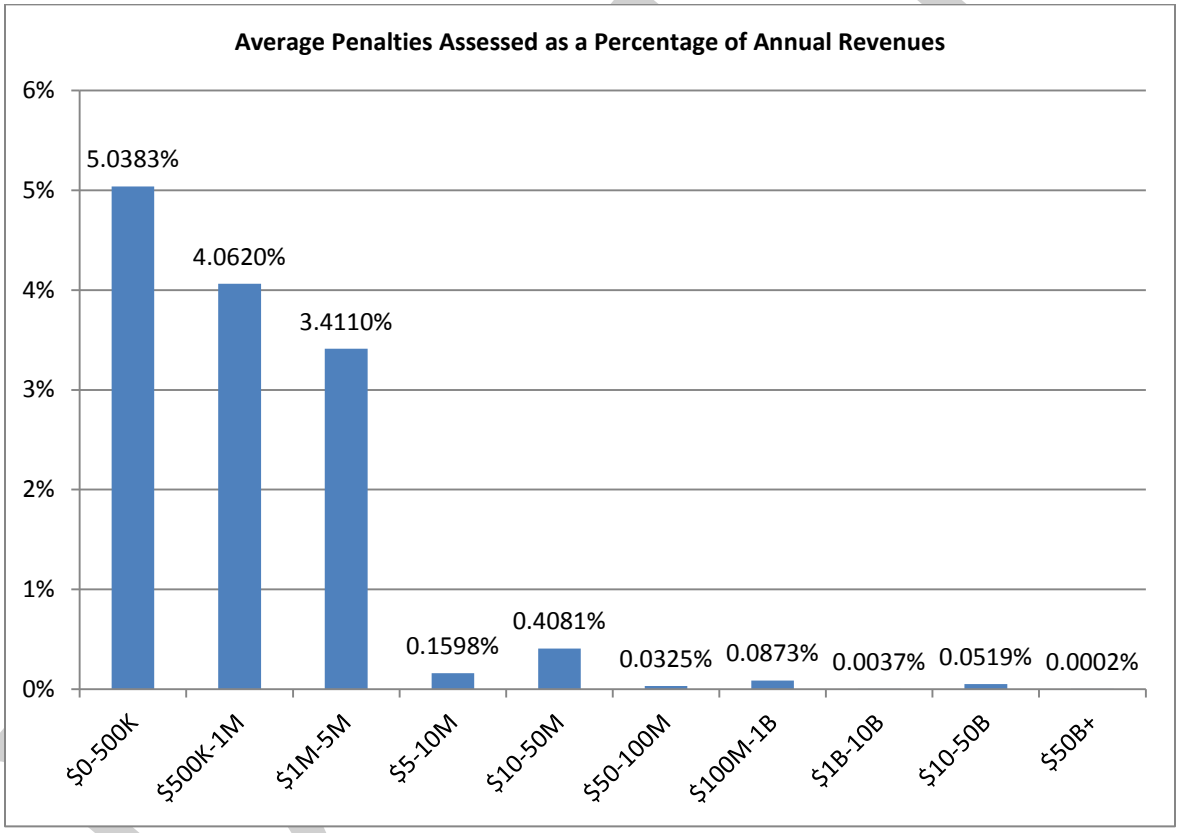
ONRR suggests that it intends to tighten the rules governing civil penalties as means to promote strict compliance with the regulations. Yet the proposal would not promote compliance so much as strong-arm oil and gas operators into following any directive ONRR might issue, regardless of the directive's 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 small and medium size companies to challenge government decision-making premised on errors of fact or law. And while ONRR's stated goal to simplify the administrative appeal process is laudable, 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 an immediate appeals of virtually all agency action -- unnecessarily adding to the agency's administrative caseload -- or risk forever losing procedural protections the law currently affords operators when ONRR action is improper or unlawful.

[3] *See id.* at 28873-74.
[4] For a comprehensive discussion of the violations identified in 30 U.S.C. § 1719(c)-(d), see discussion *infra* Part XX.

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. In the last year specifically, oil and gas reserves increased nine percent, virtually all of which is attributable to independent producers as opposed to major, integrated oil companies.[5]

It is therefore not surprising that small, independent producers are also the target in the overwhelming majority of ONRR's regulatory enforcement activity:



B. THE PROPOSED AMENDMENTS 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 on 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

[5] 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.

subject producers to substantial penalties for failure to comply with unofficial guidance that is otherwise legally non-binding.

ONRR would give legal potency to "guidance" documents which are neither Congressionally authorized nor the product of a proper administrative rulemaking process, while at the same denying private companies the tools necessary to challenge improper decisions made through these documents. The amendments do not provide any standards to which ONRR must adhere in application of penalty provisions and do not establish any 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 any 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.[6] 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."[7] 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."[8]

Although ONRR states that ALJs "routinely deny" petitions to stay the accrual of penalties, stays have in fact been granted upon sufficient justification.[9] 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.[10] 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 inaccurately alleged.[11]

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.[12] If the person does not correct all the violations identified within forty days of receipt of the NONC (or longer, if so specified), ONRR

[6] 30 CFR §§ 1241.55(b), 1241.63(b).
[7] 79 Fed. Reg. at 28,875.
[8] *Id.* at 28,867.
[9] *See, e.g., Plains Exploration & Prod. Co. v. Minerals Mgmt. Serv.*, MMS-2009-4 & MMS-2009-5 (Apr. 27, 2009); *Merit Energy Co. v. Minerals Mgmt. Serv.*, 172 IBLA 137 (2007).
[10] *See Plains Exploration & Prod. Co., supra.*
[11] *See id.*
[12] 30 C.F.R. § 1241.53(a).

may increase the penalty up to $5,000 per day for each violation.[13] ONRR proposes to increase these penalty amounts to $550 and $5,500 per day, respectively.[14] 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 undermine the company's long term solvency.

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]."[15] 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 "limit an ALJ's discretion to reduce the penalty assessed when the ALJ finds that the factual basis for imposing a civil penalty exists."[16] 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.[17]

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."[18] But no sample matrix has been provided. ONRR also explains that its proposal "is consistent with other Federal civil penalty regulations," citing to 42 C.F.R. § 488.438(e) as a similar provision.[19] 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

[13] 30 C.F.R. § 1241.53(b).
[14] 79 Fed. Reg. at 28,869 (discussing proposed 30 C.F.R. § 1241.52).
[15] 30 C.F.R. § 1241.76.
[16] 79 Fed. Reg. at 28,868.
[17] *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.
[18] *79* Fed. Reg. at 28868.
[19] *Id.* 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.

from reducing penalties assessed below half or circumscribes an ALJ's discretion in the manner ONRR proposes.

As support for its proposal, ONRR notes that the penalties it imposes are "already far below the maximum authorized by statute,"[20] 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.[21] A penalty that is otherwise arbitrary and capricious cannot escape judicial review simply because it falls below the statutory maximum.[22]

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.[23] 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.[24] IPAA agrees 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. IPAA understands and acknowledges that this approach will require both ONRR and private companies, however, 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.[25] 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).[26] ONRR will assume that a violation is "knowing or willful" not only when a person fails to cure a violation identified in informal correspondence,

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[20] 79 Fed. Reg. at 28,868.

[21] *Collins v. Secs. & Exch. Comm'n*, ("A civil penalty violates the Excessive Fines Clause if it 'is grossly disproportional to the gravity of' the offense.") (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)).

[22] *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).

[23] 30 C.F.R. § 1241.53.

[24] 79 Fed. Reg. at 28,875.

[25] *See Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1039-41 (D.C. Cir. 2008).

[26] *See* 79 Fed. Reg. at 28,869, 28,875 (discussing proposed 30 C.F.R. § 1241.60).

but also when the person commits "substantially the same" violation in the future.[27] ONRR has not provided any justification for the proposed penalty amounts, which reflect an increase over existing penalty amounts, nor any guidance as to what it would consider as "substantially the same violation."

As an illustration of the power it intends to create, ONRR refers to a March 10, 2011, "Dear Reporter" letter as an example of guidance that it will enforce through it's power to punish "knowing and willful" violations. That letter advises royalty payors that they must produce "records" ONRR requests.[28] 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.[29] Producers often have no access to the information ONRR requires, as gatherers or processors it is hold that information as confidential.

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 penalty is limited to offenders who violate "requirements."[30] Dear Reporter letters are not "final and binding agency interpretations" of ONRR's regulations.[31] 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 required to follow.[32]

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

The civil penalty regulations in 30 CFR Part 1241 have historically applied only to Federal and Indian oil and gas leases.[33] Congress recently broadened that applicability, however, 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."[34] ONRR therefore proposes to "implement that new authority" and enforce the amended regulation

[27] *Id.* at 28875.
[28] 79 Fed. Reg. 28,869
[29] *See, e.g.*, Oct. 7, 2009 Dear Reporter Letter, *available at* http://onrr.gov/ReportPay/PDFDocs/20091007.pdf.
[30] 30 U.S.C. § 1719(a)(1).
[31] *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1040 (D.C. Cir. 2008) (holding a Dear Payor letter is not binding).
[32] *Little v. Eni Petroleum Co., Inc.*, 2009 WL 2424215 (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") (quotiing *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 Fed. Appx. 980, 982-83 (10th Cir. 2005).
[33] *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").
[34] 30 U.S.C. § 1720a.

on "all Federal and Indian mineral leases, geothermal leases, and agreements for outer continental shelf energy development under 30 U.S.C. § 1337(p)."[35]

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 executed under 43 U.S.C. § 1337(k) & (p).[36] 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.[37] Other violations are subjected to penalties of up to $25,000 per day.[38] Although many of these violations require that the alleged offender conduct the offense "knowingly or willfully," the phrase "knowingly or willfully" is undefined 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. 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."[39] ONRR believes "'gross negligence' requires only that it 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."[40]

ONRR indicates its intention is to define "'knowing and willful' as the lowest possible standard so that it encompasses all higher standards."[41] Regardless of ONRR's intention, ONRR's proposed definition cannot be reconciled with existing law. In *Marathon Oil Co. v. Minerals Management Service*,[42] 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."[43] In reaching its conclusion, the IBLA relied on the Supreme Court's

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[35] 79 Fed. Reg. at 28,863 (indicating that Congress authorized the Secretary to apply FOGRMA to all outer continental shelf agreements under 30 U.S.C. § 1337(p)).
[36] 30 U.S.C. § 1720a.
[37] 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) 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).
[38] 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).
[39] 79 Fed. Reg. at 28,863.
[40] *Id.*
[41] *Id*.
[42] 106 IBLA 104 (1998).
[43] *Id.* at 123-24.

decision in *Trans World Airlines, Inc. v. Thurston*,[44] 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.[45]

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."[46] BLM note 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."[47] 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 consequences."[48] Yet ONRR attempts 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."[49]

IBLA's interpretation of "knowing and willfully" is consistent with the manner in which 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.[50] 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."[51] ONRR is of course free to

[44] 469 U.S. 111 (1985).
[45] *Id.* at 126.
[46] 43 C.F.R. 3160.0-5.
[47] *Id.*
[48] *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")).
[49] *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).
[50] *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.").
[51] *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931 (10th Cir. 2008) (quoting *City of Green Bay*, 168 F.3d at 1020).

interpret its own regulations, but it may not use its regulations to change the meaning of Congress' statutory language.[52]

B. *Proposal: Impose Strict And Vicarious Liability.*

Current law defines a "person" as "any individual, firm, corporation, association, partnership, consortium, or joint venture,"[53] and provide 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."[54] But as referenced above, Congress has not expressly defined "knowingly or willfully." Nor has Congress included 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 the Federal Oil and Gas Royalty Management Act ("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."[55] 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.'"[56] 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."[57] 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."[58]

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 proposed. 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.[59]

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[52] *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)).

[53] 30 U.S.C. § 1702(12).

[54] 30 U.S.C. § 1719(c)-(d). For a list of violations covered under these provisions, *see supra* notes 23-24.

[55] 79 Fed. Reg. at 28863.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *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

ONRR's attempt to apply strict liability omits any reference to this element of the principal-agent relationship.

Equally important, each of the cases upon which ONRR relies involves a claim under the False Claims Act ("FCA"). But the FCA is unique statute intended to "encourage private citizen involvement in exposing those types of fraud that might result in financial loss to the government" [60] -- a purpose distinct from punitive statutes like FOGRMA's civil penalty provisions. In *Kolstad v. American Dental Association*,[61] 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.'"[62]

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.[63] Given ONRR's own characterization of the regulatory objective, ONRR's attempt to impute knowledge from employee to employer is unreasonable. 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 little to deter malfeasance, and fails to reward companies that take affirmative steps to comply with applicable regulations.

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

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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 Building Corp.*, 158 F. Supp. 2d 1001, 1008 (D.S.D. 2001) (same); *United States ex re. Fago v. M&T Mortgage 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). *But see United States v. S. Maryland 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.").

[60] *Williams Bldg. Corp.*, 158 F. Supp. 2d at 1008.

[61] 527 U.S. 526 (1999).

[62] *Id.* at 545.

[63] 79 Fed. Reg. at 28,863-64.

correct the alleged violation.[64] 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.[65]

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.[66] 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."[67] 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.[68] 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.[69] Under those circumstances, a person will have waived the right to a hearing on any underlying liability.[70]

While consolidating the various appeals processes would appear to be a welcomed change, IPAA is 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.[71] IPAA does 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.

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 includes "any additional penalties that have accrued since ONRR issued the FCCP or ILCP."[72] In some cases, however, the amount of additional penalties may be unclear or difficult to determine. While the proposed amendments provides that ONRR may send courtesy notices informing the payor of additional royalties that have accrued,[73] there is no requirement that ONRR do so. As a result, payors may not have specific guidance from ONRR concerning the

[64] 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).

[65] 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.

[66] 79 Fed. Reg. at 28,864.

[67] 79 Fed. Reg. at 28,867.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] 79 Fed. Reg. at 28,874.

[73] 79 Fed. Reg. at 28,875 (proposing 30 C.F.R. § 1241.12(a)).

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: $300 Processing Fee.*

ONRR's current regulations do not contain any express provision requiring the payment of an processing fee to submit a request for a hearing. In its proposed amendments, ONRR proposes to require any person requesting a hearing on receipt of a Notice to electronically pay a nonrefundable processing fee of $300.[74] ONRR states that it determined the reasonability of this amount by using various factors, including its actual costs.[75] ONRR estimated that "accepting and date stamping the hearing request, deciding if the hearing request was timely and properly filed, and forwarding the request to the Hearings Division if it was timely filed" would take four hours at a total cost of $201.[76]

Oil and gas producers understand that there are certain administrative costs associated with processing a request for an appeal. Those costs, however, must be kept as close as possible to actual costs incurred, so as not to discourage meritorious appeals or incentivize dubious enforcement actions. To balance these competing concerns, ONRR should adopt a provision where, when a producer prevails on the merits of a challenge to an enforcement provision, ONRR should refund the appellant's $300 processing fee.

C. *Proposal: Prohibit Certain Hearing Requests.*

The IBLA has held that when a person does not pay or 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.[77] ONRR intends to "supersede [that] decision."[78] 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."[79]

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

[74] 79 Fed. Reg. at 28,864.
[75] *Id.*
[76] *Id.*
[77] *See Merit Energy Co.*, 172 IBLA at 150.
[78] 79 Fed. Reg. at 28,867.
[79] *Id.* at 28,874.

caveat is not provided for in the regulatory text of the proposed amendments.[80] Without this regulatory language, producer have no legal protection against ONRR attempting to give non-binding orders the effect of law — measuring penalties and establishing violations for failure to comply with directives that producers have no legal obligation to follow.

Equally important, ONRR's approach creates the perverse incentive to request a hearing on everything ONRR issues — even non-binding guidance documents — rather than waiving an appeal right should ONRR subsequently issue a NONC for failure to comply with an Order that might be issued in error. Rather than streamline or simply the administrative review process, ONRR's proposed approach is certain to 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, they will now be forced to immediately appeal all orders and guidance documents (within thirty days) or forever lose all rights to challenge the merits of ONRR's decision-making.

D. *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.[81] 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.[82] 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."[83]

ONRR's proposal is flawed because it fails to provide any objective standards the agency itself must meet before issuing a NONC, FCCP, or ILCP in the first place. The proposed amendments do not reference any audit standards ONRR must employ, any factual findings it must make, or any procedural processes it must employ 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 own whim, and doing so, alleviate itself of any procedural burden the agency might otherwise have in an administrative challenge. This approach offends due process and is in contravention to the standards that govern agency decision-making under the Administrative Procedures Act and

[80] *Id.*

[81] 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.").

[82] 79 Fed. Reg. at 28,868.

[83] *Id.*

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.

E. *Proposal: Eliminate Early Discovery.*

Hearings of ONRR decisions have traditionally been conducted under 43 CFR 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."[84] 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."[85]

Yet for an ALJ to properly determine whether a genuine issue of material fact exists, it is best for the ALJ, and both parties, to be properly apprised of the facts. On summary judgment, a court's "obligation is to examine the[] facts developed in discovery." *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." (citation omitted)).

ONRR states that its proposal to eliminate early discovery and allow motions for summary decision before discovery is "to narrow the disputed issues." 79 Fed. Reg. at 28868. Yet one of discovery's major purposes is to do precisely that — to narrow and sharpen the issues. *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"). Rather than promoting judicial economy, ONRR's attempt to eliminate early discovery will only encourage a pre-discovery round of useless 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."[86] 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), early discovery cannot be discarded.

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[84] *Id.*
[85] *Id.*
[86] 79 Fed. Reg. at 28,874 (proposing 30 C.F.R. § 1241.9(a)(3)).

V. PROPOSED DEFINITIONS.

Present regulations governing the administration of vil penalties do not include any definitions, but simply provide that the terms used in 30 CFR Part 1241 "have the same meaning as in 30 U.S.C. 1702." [87] ONRR proposes to define new terms for purposes of the civil penalty regulations; among others, the proposed regulation as amended would provide that:

> (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.[88]

First, ONRR's proposed definition of "information," which includes "any other written information you provide to us," is circular and therefore "explains nothing."[89] When a definition is so circular, a court construing it is likely to look elsewhere for an appropriate definition.[90] 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 to "maintenance' includes a reference to "information that you provided to us that you know contains the same false, inaccurate, or misleading information" as

[87] 30 C.F.R. § 1241.50.
[88] 79 Fed. Reg. at 28,873-74 (proposing 30 U.S.C. § 1241.3).
[89] *See Federal Aviation Admin. v. Cooper*, 132 S.Ct. 1441 (2012) ("[T]his general (and notably circular) definition is of little value."); *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.").
[90] *See Nationwide Mut. Ins. Co.*, 503 U.S. at 323 (adopting a common law interpretation when statutory definition was circular and unhelpful).

other information that has previously been made available to ONRR.[91] 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.[92] Because prohibiting the "same" information twice is duplicative, and because ONRR has not proposed any objective 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 of 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."[93] 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.

[91] 79 Fed. Reg. at 28,873 (proposing 30 U.S.C. § 1241.3).
[92] 79 Fed. Reg. at 28,864.
[93] 79 Fed. Reg. at 28,874.