

# Appeals of ONRR, BSEE, and BOEM Orders, Decisions, INCs, NONCs, and Penalty Assessments: What Do I Do Now?

By

**Sarah L. Inderbitzin\***  
**Program Manager, Office of Enforcement**  
**Acting Program Manager, Royalty Appeals Program**  
**Office of Natural Resources Revenue**  
**Lakewood, CO**

## I. INTRODUCTION

So you got an order, decision, incident of noncompliance (INC), notice of noncompliance (NONC), or assessment of civil penalties the Office of Natural Resources Revenue (ONRR), Bureau of Safety and Environmental Enforcement (BSEE), or Bureau of Ocean Energy Management (BOEM) issued. Because appeals of orders, decisions, INCs, NONCs, and civil penalties are time sensitive, it is critical that the recipient of such documents be familiar with the process and timing. In all but very limited circumstances, failure to comply with ONRR, BSEE, and BOEM appeal procedures forfeits a lessee's right to challenge orders, decisions, INCs, NONCs, and civil penalties. What follows is a brief history of the Department of the Interior's (DOI) administrative appeals process, and a discussion of the current ONRR, BSEE, BOEM, and Office of Hearings and Appeals (OHA), Interior Board of Land Appeals (IBLA) and Hearings Division appeals procedures, as well as any applicable DOI decisions addressing those procedures.

## II. HISTORY OF THE DOI APPEALS PROCESS

Since 1849, the DOI has used an administrative appeal process in which either the Secretary of the Interior (Secretary), an Administrative Judge, or Administrative Law Judge (ALJ) decides a dispute.<sup>1</sup> The DOI's administrative appeal process for ONRR, BOEM, and BSEE is still in place today

---

\*This article was written by Ms. Inderbitzin in her private capacity. No official support or endorsement by Department of the Interior, any person or office within the agency, or any other agency of the Federal Government is intended or should be inferred.

<sup>1</sup> Sarah L. Inderbitzin, *et al.*, *The Use Of Alternative Dispute Resolution In Natural Resource Damage Assessments*, 20 Wm. & Mary Env'tl. L. & Pol'y Rev. 1, 2 (1995). Within the IBLA, reviews of ONRR, BSEE, and BOEM orders, decisions, INCs, and penalty assessments are conducted by Administrative Judges. See 43 C.F.R. § 4.1(b)(3). The term "Administrative Judge," means non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings. Paul R. Verkuil, *et al.*, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 Admin. L.J. Am. U. 589, 628 n.1 (1994).

under the authority of numerous federal statutes including the Administrative Procedure Act.<sup>2</sup>

In May 1994, the then-Minerals Management Service (MMS)<sup>3</sup> began reviewing its administrative appeals process.<sup>4</sup> One of the primary concerns raised was the length of time it took for the DOI to process an appeal.<sup>5</sup> In September 1995 the DOI Royalty Policy Committee (RPC) established an Appeals and Alternative Dispute Resolution (ADR) Subcommittee to make recommendations to the RPC to improve the appeals and ADR processes.<sup>6</sup> As a result of subcommittee recommendations, the RPC submitted a report to the Secretary of the Interior suggesting that the DOI change the then-MMS two-step appeals process (first to the MMS Director, and then to the IBLA) into a one-stage IBLA administrative appeal process.<sup>7</sup>

On August 13, 1996, Congress enacted the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA)<sup>8</sup> amending portions of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA).<sup>9</sup> Those amendments included a new FOGRMA Section 115(h), mandating that for appeals of ONRR orders involving royalties and other payments due on Federal oil and gas leases, DOI has 33 months from the date a proceeding is commenced to complete all levels of administrative review.<sup>10</sup> If DOI does not decide the appeal within 33

---

<sup>2</sup> 5 U.S.C. §§ 301 *et seq.* See also 25 U.S.C. §§ 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. §§ 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. §§ 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

<sup>3</sup>By Secretarial Order 3302 issued June 18, 2010, the Secretary of the Interior renamed the MMS the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE). A subsequent Secretarial Order 3306 issued September 30, 2010, transferred the Minerals Revenue Management Program and the Policy and Appeals Division from BOEMRE to the Office of Natural Resources Revenue (ONRR), which was established as a new office by Secretarial Order 3299 issued on May 19, 2010. References to “ONRR” herein include its predecessor, the MMS Minerals Revenue Management program. On Oct. 1, 2011, the DOI formally established BSEE and BOEM to carry out the offshore energy management and safety and environmental oversight missions that were under BOEMRE.

<sup>4</sup>See *Appeals of MMS Orders*, 64 Fed. Reg. 1930 (1999), *Appeals of MMS Orders*, 64 Fed. Reg. 26,240 (1999).

<sup>5</sup>See 64 Fed. Reg. 1930, 64 Fed. Reg. 26,240.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>Pub. L. 104-185, as corrected by Pub. L. 104-200.

<sup>9</sup>30 U.S.C. §§ 1701 *et seq.*

<sup>10</sup>30 U.S.C. § 1724(h). The 33-month deadline does not apply to appeals involving Indian leases or Federal leases for minerals other than oil and gas. RSFA expressly is an Act “[t]o improve the management of royalties from *Federal and Outer Continental Shelf oil and gas leases.*” Pub. L. 104-185, as corrected by Pub. L. 104-200, 110 Stat. 1700 (Aug. 13, 1996) (emphasis added). See also S. Rep. 260, 104th Cong., 2d Sess. 13 (1996) (when RSFA was under consideration in the Senate, one of the Bill’s cosponsors stated “Let me make clear . . . [t]his legislation applies only to royalties from oil and gas production on Federal lands.” Finally, RSFA also explicitly stated

months, the appeal is deemed decided either for or against DOI, depending on the type of ONRR order and the monetary amount at issue in the appeal.<sup>11</sup>

On January 12, 1999, the DOI proposed a rule implementing many of the RPC recommendations, including a one-step appeal of then-MMS orders to the IBLA.<sup>12</sup> DOI adopted that recommendation for appeals of BOEM and BSEE orders,<sup>13</sup> but ultimately decided to retain the two-step process for ONRR orders because it (1) received numerous negative written and oral comments regarding the proposed one-step process and (2) needed to publish a final rule implementing the RSFA appeals adjudication time requirements and the associated rule of decision before May 13, 1999 for cases in which there is no final DOI decision.<sup>14</sup> Therefore, on May 13, 1999, the DOI issued a comprehensive rulemaking addressing its appeals procedures for then-MMS Minerals Revenue Management program royalty and other orders, NONCs and civil penalties, and the then-MMS Offshore Energy and Minerals Management orders, INCs, and civil penalty assessments.<sup>15</sup>

On May 19, 2010, the Secretary established ONRR as a separate office within the Office of the Assistant Secretary for Policy, Management and Budget.<sup>16</sup> As part of that reorganization, the administrative appeal rules in the former 30 C.F.R. Part 290, Subpart B, were re-codified to a new 30 C.F.R. Part 1290, Subpart B, without substantive change.<sup>17</sup> On Oct. 1, 2011, the DOI formally established BSEE and BOEM.<sup>18</sup> As part of that reorganization, the regulations that apply to BSEE remained in 30 CFR Chapter II, but were retitled “Bureau of Safety and Environmental Enforcement” and the regulations that apply to BOEM were removed from Chapter II and were recodified into a new 30 CFR Chapter V titled “Bureau of Ocean Energy Management.”<sup>19</sup>

### III. ONRR’S ADMINISTRATIVE APPEALS PROCESS

The Secretary has delegated his authority to DOI’s Office of Hearings and Appeals (OHA) to

---

it did not apply to Indian leases. Pub. L. 104-185 §9, as corrected by Pub. L. 104-200, 110 Stat. 1700.

<sup>11</sup>30 U.S.C. § 1724(h). *See also* 64 Fed. Reg. 1930.

<sup>12</sup>64 Fed. Reg. 1930.

<sup>13</sup>64 Fed. Reg. at 26,245.

<sup>14</sup>*Id.* at 26,241. May 13, 1999 was 33-months after RSFA was enacted and, thus, when the RSFA rule of decision would be effective in cases where DOI had not issued a final decision by that date. 30 U.S.C. § 1724(h)(2).

<sup>15</sup>*Appeals of MMS Orders*, 64 Fed. Reg. 26,240 (1999).

<sup>16</sup>*See supra* note 3.

<sup>17</sup>*Reorganization of Title 30, Code of Federal Regulations*, 75 Fed. Reg. 61051 (Oct. 4, 2010).

<sup>18</sup>*See supra* note 3.

<sup>19</sup>*Reorganization of Title 30: Bureaus of Safety and Environmental Enforcement and Ocean Energy Management, Part II*, 76 Fed. Reg. 64432 (2011).

hear and finally decide appeals of agency officials' decisions for the DOI.<sup>20</sup> However, ultimately, the Secretary retains authority to revise final decisions of the DOI, including OHA decisions,<sup>21</sup> and the Assistant Secretaries have concurrent authority with OHA to issue final decisions for the DOI.<sup>22</sup>

A. Administrative Appeals of ONRR Orders to the ONRR Director

ONRR conducts its administrative review of ONRR orders in a two-step process, first to the ONRR Director, and then to the DOI's OHA, Hearing Division, IBLA.<sup>23</sup> ONRR orders are appealable under 30 C.F.R. Part 1290, Subpart B.<sup>24</sup> The appeal procedures under Subpart B apply to all Federal and Indian mineral leases,<sup>25</sup> and any recipient of an "order" that is adversely affected by the order may appeal.<sup>26</sup> You may not appeal an action that is not an "order."<sup>27</sup> ONRR will reject any appeal of a document that is not an "order" under its regulations. An "order" is defined as

any document issued by the ONRR Director, or a delegated State that contains mandatory or ordering language that requires the recipient to do any of the following for any lease subject to this subpart: report, compute, or pay royalties or other obligations, report production, or provide other information.

(1) Order includes:

- (i) An order to pay or to compute and pay; and
- (ii) An ONRR or delegated State decision to deny a lessee's, designee's, or payor's written request that asserts an obligation due the lessee, designee or payor.

(2) Order does not include:

- (i) A non-binding request, information, or guidance, such as:

---

<sup>20</sup> 43 C.F.R. § 4.403.

<sup>21</sup> *Id.* at § 4.5(a)(2).

<sup>22</sup> *See Blue Star, Inc.*, 41 IBLA 337 (1979); *Marathon Oil Co.*, 108 IBLA 177 (1989).

<sup>23</sup> *See* 30 C.F.R. Part 1290, Subpart B (2007), 43 C.F.R. § Part 4, Subpart J (2007). *See also supra* notes 12 – 14 and 20-22, and *infra* notes 25-110, and accompanying text.

<sup>24</sup> 30 C.F.R. §§ 1290.100 to 1290.110.

<sup>25</sup> 30 C.F.R. § 1290.101.

<sup>26</sup> *Id.* at § 1290.103(a). In cases where the order is not sent to the lessee, ONRR may send a Notice of Order to the Lessee. *Id.* at § 1290.102. A Notice of Order is "the notice that ONRR or a delegated State issues to a lessee that informs the lessee that ONRR or the delegated State has issued an order to the lessee's designee." *Id.* Lessees who receive a Notice of Order may either appeal the notice or join in an appeal of the order. *Id.* at § 1290.103(b). The provisions for how to join an appeal are in 30 C.F.R. § 1290.106. If your designee appeals, and you do not appeal or join in that appeal, you will be bound by any decision in the designee's appeal. *Id.* at § 1290.106(c). *See also W & T Offshore, Inc.*, MMS-1 0-0020-0CS, ONRR -11-000 1-0CS, at 21-23 (July 20, 2012).

<sup>27</sup> 30 C.F.R. § 1290.104(a). You also may not appeal ONRR's decision on a surety amount or financial solvency rendered under 30 C.F.R. Part 1243, Subparts B or C. *Id.* at § 1290.104(b). *See also infra* note 69, and accompanying text.

- (A) Advice or guidance on how to report or pay, including a valuation determination, unless it contains mandatory or ordering language; and
- (B) A policy determination;
  - (ii) A subpoena;
  - (iii) An order to pay that ONRR issues to a refiner or other person involved in disposition of royalty taken in kind; or
  - (iv) A Notice of Noncompliance or a Notice of Civil Penalty issued under 30 U.S.C. 1719 and 30 CFR part 1241, or a decision of an administrative law judge or of the IBLA following a hearing on the record on a Notice of Noncompliance or Notice of Civil Penalty.<sup>28</sup>

ONRR must reject any appeal of a document that is not an “order” as defined above.<sup>29</sup> In *Xanadu Exploration Company*<sup>30</sup> the IBLA faced the question of whether a document contained “mandatory or ordering language” sufficient to constitute an appealable “order.” In *Xanadu*, the company received an invoice (bill) from ONRR.<sup>31</sup> However, the invoice was not accompanied by the standard cover letter explaining the recipient’s appeal rights.<sup>32</sup> The IBLA held that the invoice was not an appealable order because it did not contain “mandatory or ordering language.”<sup>33</sup> Specifically, the IBLA stated that “We are unable to find that the invoice, which neither explains the basis for the assessment nor advises the recipient that it is an appealable order, constitutes an appealable order.”<sup>34</sup> Therefore, the IBLA reversed and remanded the appeal to ONRR because ONRR improperly dismissed the appeal as untimely, when it should have dismissed because the bill was not an appealable order.<sup>35</sup> Accordingly, ONRR invoices that do not contain the basis for the assessment are not appealable “orders.”

In *Devon Energy, et al.*, the IBLA again faced the question of whether a document contained “mandatory or ordering language.”<sup>36</sup> In *Devon*, several gas producers appealed a “Dear Reporter Letter” in which the Associate Director for the then-MMS Minerals Revenue Management program provided “guidelines” to all reporters of coalbed methane production from Federal and Indian leases (Guidance), including the appellants.<sup>37</sup> ONRR rejected that appeal, and the IBLA affirmed that Associate Director’s decision.<sup>38</sup> Specifically, the IBLA examined three factors to determine whether the Guidance was appealable. First, a document may be an appealable order even if it does not give

---

<sup>28</sup>30 C.F.R. § 1290.102.

<sup>29</sup>*Devon Energy, et al.*, 171 IBLA 43 (2007).

<sup>30</sup>157 IBLA 183, 186 (2002).

<sup>31</sup>157 IBLA at 183.

<sup>32</sup>*Id.* at 185-6.

<sup>33</sup>*Id.* at 186 (citing 30 C.F.R. § 290.102).

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Devon*, 171 IBLA at 43.

<sup>37</sup>*Id.* See *Reporting Coalbed Methane Production*, MMS, MRM (October 4, 2005), available at <http://www.onrr.gov/FM/PDFDocs/20051004.pdf>.

<sup>38</sup>*Devon*, 171 IBLA 43.

the recipient the right to appeal.<sup>39</sup> Second, “to be subject to appeal, an order must (1) contain mandatory or ordering language and (2) require the recipient to report, compute, or pay royalties or other obligations.”<sup>40</sup> Finally, to be subject to an appeal, a document must “constitute an adjudication of the existence of facts sufficient to support a ruling’ on the issues presented.”<sup>41</sup>

In applying the three factors to the Guidance, the IBLA first held that even though the Guidance did not contain the right for recipients to appeal, that fact alone did not render it not appealable.<sup>42</sup> However, in examining the second factor, the IBLA concluded that because the Guidance did not “contain mandatory or ordering language,” it was not an appealable order.<sup>43</sup> The IBLA explained that although the Guidance contained what could be construed as mandatory language, because it did not “direct that specific action be taken within a specific time frame with specific consequences for failure” it did not contain “mandatory or ordering language.”<sup>44</sup> Finally, the IBLA held that the Guidance also was not appealable under the third factor because there simply were no specific facts to adjudicate.<sup>45</sup> Indeed, the Guidance did not apply to “specific leases, gas volumes, treatment costs, additional royalties due, or any other facts at issue . . . .”<sup>46</sup> Therefore, Dear Payor or Reporter letters containing generic guidance sent to all lessees are not appealable orders under *Devon*.

If you receive a document from ONRR that is an “order” you must file your appeal “within 30-days from service of the order”<sup>47</sup> or “not later than 10 days after the required filing date” if the notice was transmitted within that 30-day period.<sup>48</sup> ONRR regulations regarding the method of service state that ONRR will serve orders by sending the order by certified or registered mail, return receipt requested, to the addressee of record at the address of record the recipient provided on Form MMS-4444.<sup>49</sup> The date on which the return receipt card is signed by any person at that address is the date of

---

<sup>39</sup>*Id.* at 47-8. *But see Sun Exploration and Production Co.*, 104 IBLA 178, 183 (1988) (a document is not an appealable order if there is no copy of demand letter in the record).

<sup>40</sup>*Devon*, 171 IBLA at 51 (emphasis in original).

<sup>41</sup>*Id.* (quoting *Blackwood & Nichols Co.*, 139 IBLA 227, 229 (1997)).

<sup>42</sup>*Id.* *But see supra* note 39, and accompanying text.

<sup>43</sup>*Devon*, 171 IBLA at 51.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* The IBLA found this “obvious” given that the Guidance “was sent to scores of other parties.” *Id.*

<sup>47</sup>30 C.F.R. § 1290.105(a).

<sup>48</sup>30 C.F.R. § 1290.105(c). However, you have 60-days to file an appeal of an order to perform a restructured accounting involving only Federal oil and gas leases under RSFA, 30 U.S.C. § 1724(d)(4)(B)(ii)(V). In addition, such orders must be signed by “the most senior career professional position having responsibility for the royalty management program . . . .” *Id.* at § 1724(d)(4)(B)(ii). That position is the ONRR Director. Because the ONRR Director signs such orders, they are appealable directly to the IBLA. *See infra* notes 93-108, and accompanying text. ONRR is in the process of amending its regulations in part 1290 to reflect this 60-day period.

<sup>49</sup>30 C.F.R. §§ 1218.540(a), (b), and (c) (2012) (replacing 30 C.F.R. § 1290.111(2005) (originally codified at 30 C.F.R. § 243.4(a)). *See Service of Official Correspondence*, 71 Fed. Reg. 51,751 (2006). The “[ad]dress of record is the address to which official correspondence is

service, and, thus the date from which the 30-days to file a notice of appeal runs.<sup>50</sup> Nevertheless, ONRR will deem correspondence constructively served 7 days after it makes a reasonable effort to deliver the document.<sup>51</sup> If ONRR sends the document to the wrong address, it is not considered served.<sup>52</sup> However, if lessees do not provide ONRR with their address of record, the current regulations allow ONRR such a broad array of addresses and persons to serve, that this is unlikely to occur.<sup>53</sup>

So, assuming that the document you received was an “order” and that you were properly served, you may not request or receive an extension of time to file a notice of appeal.<sup>54</sup> If you do not timely file your appeal “the [ONRR] Director will not consider the Notice of Appeal and the case will be closed.”<sup>55</sup> Thus, “the timely filing of a notice of appeal is a jurisdictional requirement, and if an

---

served.” *Id.* at § 1218.520. The

[a]ddressee of record . . . is the person or position to whom official correspondence is served, as specified on Form-MMS-4444, or in the absence of such a form, as established in § 218.540(b)(2). The addressee of record in a part 290, subpart B, appeal will be the person or representative making the appeal.

*Id.* Form MMS-4444 may be obtained on ONRR’s website at <http://www.onrr.gov/fm/PDFDocs/4444.pdf>. 30 C.F.R. § 1218.560. All companies were required to submit an initial Form MMS-4444 by November 29, 2006, and any changes within 2 weeks of the change. *Id.* § 218.580. Section 1218.540(b)(2) states that if you do not send ONRR the Form MMS-4444 addressee of record information, it “may use the individual name and address, position title, or department name and address in our database, based on previous formal or informal communications or correspondence for the type of official correspondence at issue.” ONRR also may use public records to may obtain contact information and will send correspondence to any one of a list of entities including registered agents, corporate officials, or addressees of record in the files of other Federal or state agencies. *Id.* Thus, a company’s failure to submit the Form MMS-4444 addressee of record information gives ONRR leeway to serve almost any person, at any company address in its database.

<sup>50</sup>30 C.F.R. § 1218.540(c). *See also Apache Corporation*, 152 IBLA 30 (2000) (construing former 30 C.F.R. § 1243.4) (document considered served when received by mailroom employee, not when subsequently opened by addressee of record); *Phillips Petroleum Co.*, 147 IBLA 363, 369-70 (1999) (order is served when received and signed for by employee at the post office, not when subsequently date stamped and processed in the company’s mailroom).

<sup>51</sup>30 C.F.R. § 1218.540(d). This regulation effectively overrules previous IBLA decisions holding that the date a company receives a fax of a document does not establish service where the regulation specifies service must be by certified mail (return receipt requested). *Animal Protection Institute of America*, 124 IBLA 231 (1992).

<sup>52</sup>*See F. Howard Walsh, Jr.*, 93 IBLA 297, 307-08 (1986).

<sup>53</sup>*See supra* note 49.

<sup>54</sup>30 C.F.R. § 1290.105(b).

<sup>55</sup>30 C.F.R. § 1290.105(d).

appeal is not timely filed in the office of the officer who made the decision, the appeal must be dismissed.”<sup>56</sup> However, if you receive an invoice from ONRR that does not contain the right to appeal, and you do not timely file your appeal, the IBLA has held that it will not dismiss the appeal as untimely.<sup>57</sup> So what should you do if you receive a document that looks like a bill or demand, yet contains no appeal rights? The answer is to timely file an appeal in order to preserve any rights you may have.

When you receive an ONRR Order, if you appeal, in order to stay the effectiveness of the order on appeal, you must post a bond or other surety, or demonstrate financial solvency (“self bond”) under 30 C.F.R. Part 1243.<sup>58</sup> ONRR requires a bond for orders involving Indian mineral leases for amounts greater than \$1,000<sup>59</sup> and for orders involving Federal mineral leases for amounts greater than \$10,000.<sup>60</sup> Acceptable surety instruments you may submit include: Administrative Appeal Bonds, Form MMS-4435, Letters of Credit, Form MMS-4436, Certificates of Deposit, (you must use Form MMS-4437 and request permission to use this security in writing, and U.S. Treasury Securities (you must request permission to use this security in writing).<sup>61</sup> The surety instrument must include the amount being appealed and any accrued interest plus one additional year of interest.<sup>62</sup> If your appeal is not decided within one year, you must increase the surety annually to cover estimated interest.<sup>63</sup>

For orders involving Federal mineral leases for amounts greater than \$10,000, you may self bond to suspend payment.<sup>64</sup> To self bond, the appellant must demonstrate financial solvency by

---

<sup>56</sup>*American Petroleum Energy Company*, 160 IBLA 59 (2003) (citing *Pamela Neville*, 155 IBLA 303, 304 (2001); *Friends of the River*, 146 IBLA 157, 161 (1998); *Ron Williams Construction Co.*, 124 IBLA 340, 341 (1992); *State of Alaska v. Patterson*, 46 IBLA 56, 59 (1980).

<sup>57</sup>*Xanadu*, 157 IBLA at 186 (“The absence from a document of a notice advising the recipient of a right to appeal the decision has been found by the Board to militate against dismissal of an appeal as untimely when it is filed in response to a subsequent decision informing the recipient of the right to appeal”) (citations omitted). *See also supra* notes 30-35, and accompanying text.

<sup>58</sup>30 C.F.R. §§ 1243.1 through 1243.202. The order will include instructions on how to post a bond or other surety, or to self bond.

<sup>59</sup>30 C.F.R. § 1243.8(b)(2). For orders involving the payment of additional royalties under \$1,000, ONRR will use the BIA lease surety. *Id.* at § 1243.8(b)(1).

<sup>60</sup>30 C.F.R. § 1243.8(a)(2)(i). For orders involving the payment of additional royalties under \$10,000, ONRR will use the BLM lease surety for onshore leases, and OEMM lease surety for offshore leases. *Id.* at § 243.8(a)(1).

<sup>61</sup>30 C.F.R. § 1243.100.

<sup>62</sup>*Id.* at § 1243.101(a)(1). Treasury book-entry bonds or note amounts must equal at least 120 percent of this amount. *Id.* at 1243101(a)(2).

<sup>63</sup>*Id.* at § 1243.101(b).

<sup>64</sup>30 C.F.R. § 1243.8(a)(2)(ii). As discussed above, RSFA only applies to Federal oil and gas leases. *See supra* note 10, and accompanying text. However, ONRR stated in the preamble to the rule proposing self-bonding that it would apply the self-bonding provisions to all Federal mineral leases because it would: “[t]reat all production dates consistently; [s]treamline the administrative appeals process; [s]implify record keeping; and [r]educe costs for both



submitting a request to self bond along with a copy of an audited consolidated balance sheet.<sup>65</sup> If the appellant's net worth minus the amount of all issues being appealed (including interest) is greater than \$300 million, ONRR will deem the company financially solvent and will not require it to post a surety instrument.<sup>66</sup> If the company does not meet the \$300 million requirement, it may submit a \$50 filing fee and ONRR will determine whether it is financially solvent using information obtained from a business information or credit reporting agency.<sup>67</sup> Appellants must continue to demonstrate financial solvency by submitting consolidated balance sheet, and tax return if requested, to ONRR annually on the date ONRR first determined their financial solvency.<sup>68</sup>

ONRR's determination of a surety amount or financial solvency is the final decision of the DOI and is not subject to administrative appeal.<sup>69</sup> In addition, neither an appeal nor the posting of a bond or self bonding suspends the running of interest on the amount of additional royalties in the order during the pendency of the appeal. The only way to stop interest from running on the additional royalties is to pay the additional royalties under protest.<sup>70</sup> In such instances, the interest will run from the date the payment was due until the date you paid under protest.<sup>71</sup>

During the same 30-day period for filing the notice of appeal, you must file a "statement of reasons or written arguments or briefs that include the arguments on the facts or laws that you

---

Government and industry. 64 Fed. Reg. at 1961-2. ONRR chose not to apply the self-bonding provisions to Indian leases because it

decided that there are important reasons for having different sets of rules for Indian and Federal leases. First, Indian lessors are not in a comparable position to the United States in their ability to absorb the risk of default by a person believed to be financially solvent but who later defaults on an appealed obligation. Indian lessors are much smaller, less diversified in their portfolio of risks than the United States, and are in a significantly less advantageous position than the United States. Second, the standards that we apply, and must apply, to Indian leases are different from those applied to Federal leases. We have a trust responsibility to Indian lessors and believe that requiring the protection of sureties for appeals of obligations on Indian leases is appropriate. Finally, Congress declined to extend the benefit of self-bonding by demonstration of financial solvency to lessees on Indian lands.

64 Fed. Reg. at 26,243-44.

<sup>65</sup>30 C.F.R. § 1243.200(a). In addition, ONRR may request up to three years of the company's tax returns. *Id.*

<sup>66</sup>30 C.F.R. § 1243.201(b).

<sup>67</sup>*Id.* at § 1243.201(c).

<sup>68</sup>*Id.* at § 1243.200(b).

<sup>69</sup>*Id.* at § 1243.11. *See also supra* note 27.

<sup>70</sup>30 C.F.R. § 1243.8(c).

<sup>71</sup>*See e.g.*, 30 C.F.R. §§ 1218.54, 1218.102, 1218.150(c), 1218.202, and 1218.302.

believe justify reversal or modification of the order” with the ONRR Royalty Appeals Program.<sup>72</sup> Unlike the notice of appeal, there is no prohibition on requesting or receiving an extension of time to file a statement of reasons.<sup>73</sup> However, if an appellant requests an extension of time to file a statement or reasons, or any other pleading other than a notice of appeal, from the ONRR Director or IBLA, and the appeal involves an ONRR Order subject to the 33-month time period, then the appellant must also agree to extend the 33-month period by the amount of time requested in the extension.<sup>74</sup>

Once you file your statement of reasons, the ONRR Royalty Appeals Program will review the record, and the ONRR Director (for orders involving Federal mineral leases) or Director of the Bureau of Indian Affairs (BIA Director) (for orders involving Indian mineral leases) will issue a decision.<sup>75</sup> If you are adversely affected by a decision of the ONRR Director or BIA Director, you may appeal that decision to the IBLA under the procedures in 43 C.F.R. Part 4, Subpart E.<sup>76</sup> Indeed, with few exceptions, you must appeal to the IBLA in order to exhaust administrative remedies prior to filing in Federal District Court.<sup>77</sup> Those exceptions are when the Assistant Secretary for Policy, Management and Budget, Assistant Secretary for Indian Affairs, IBLA, or ONRR Director issues an order in the first instance,<sup>78</sup> or the Assistant Secretary for Policy, Management and Budget or Assistant Secretary for Indian Affairs issues a decision in the appeal because the Assistant Secretaries have concurrent jurisdiction with the IBLA.<sup>79</sup>

For appeals of ONRR orders involving monetary<sup>80</sup> or nonmonetary obligations<sup>81</sup> of

---

<sup>72</sup>30 C.F.R. § 1290.105(a)(1).

<sup>73</sup>30 C.F.R. § 1290.109 and 43 C.F.R. § 4.909. *See also supra* note 54, and accompanying text.

<sup>74</sup>30 C.F.R. § 1290.109 and 43 C.F.R. § 4.909. *See also supra* notes 8-11 and *infra* notes 99-101, and accompanying text.

<sup>75</sup>30 C.F.R. §§ 1290.105(a) and (g).

<sup>76</sup>30 C.F.R. § 1290.108. *See also infra* notes 93-110, and accompanying text.

<sup>77</sup>30 C.F.R. § 1290.110(a).

<sup>78</sup>30 C.F.R. § 1290.110(b).

<sup>79</sup>*See supra* note 22, and accompanying text.

<sup>80</sup>A “monetary obligation” is “a lessee’s, designee’s or payor’s duty to pay, or to compute and pay, any obligation in any order, or the Secretary’s duty to pay, refund, offset, or credit the amount of any obligation that is the subject of a decision by ONRR or a delegated State denying a lessee’s, designee’s, or payor’s written request for the payment, refund, offset, or credit.” 43 C.F.R. § 4.903. A lessee’s duty to “[m]ake a lease-related payment, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, interest, penalty, civil penalty, or assessment” and the Secretary’s duty to “[m]ake a lease-related payment, refund, offset, or credit, including royalty, minimum royalty, rental, bonus, net profit share, proceeds of sale, or interest.” 30 C.F.R. § 1290.102. ONRR may provide an estimate of the monetary obligation in an order or ONRR Director’s decision if any part of a monetary obligation is not specifically stated in that order or ONRR Director’s decision. 43 C.F.R. § 4.906(d).

<sup>81</sup>A “nonmonetary obligation” is “any duty of a lessee or its designee to deliver oil or gas in kind, or any duty of the Secretary to take oil or gas royalty in kind.” 43 C.F.R. § 4.903. *See also* 30

Federal oil and gas leases,<sup>82</sup> the DOI has 33-months from the commencement of the administrative proceeding to issue a final decision in an appeal.<sup>83</sup> The rules concerning application of the RSFA 33-month period to ONRR orders and decisions are located in 43 C.F.R. Part 4, Subpart J.<sup>84</sup> Part 4, Subpart J tells you both how appeals are decided if the 33-month period is not met, and to which DOI action the 33-month rule of decision applies.

With respect to how appeals are decided, if the DOI does not issue a decision in an appeal by the end of the 33<sup>rd</sup> month, and the appeal involves a nonmonetary obligation or a monetary obligation of less than \$10,000, then under 30 U.S.C. § 1724(h)(2), the appeal is deemed decided in favor of the appellant.<sup>85</sup> However, if the DOI does not issue a decision in an appeal by the end of the 33<sup>rd</sup> month, and the appeal involves a monetary obligation of \$10,000 or more, then under 30 U.S.C. § 1724(h)(2), the appeal is deemed decided in favor of the DOI.<sup>86</sup>

The 33-month rule of decision discussed above<sup>87</sup> can apply to an ONRR Order if the 33-month period ends before the ONRR Director issues a decision in an appeal<sup>88</sup> or to an ONRR Director's Decision if the 33-month period ends before the IBLA issues a decision in an appeal.<sup>89</sup> If you do not appeal an ONRR Director's decision to the IBLA, then the ONRR Director's decision is the final decision of the DOI and the 33-month rule of decision does not apply.<sup>90</sup> If the IBLA issues a decision before the end of the 33-month period, then the IBLA's decision is the final decision of the DOI and the 33-month rule of decision does not apply.<sup>91</sup> In addition, "[a] petition for reconsideration does not extend or renew the 33-month period."<sup>92</sup>

#### B. Appeals of ONRR Director's Decisions to the IBLA

With respect to appeals of ONRR Orders, as discussed above, after you receive an ONRR Director's decision regarding an ONRR royalty order that adversely affects you, you may appeal that decision to the IBLA under the procedures at 43 C.F.R. § Part 4, Subpart E.<sup>93</sup> You must file your appeal in the office of the officer who made the decision, *i.e.* the ONRR Director within 30

---

C.F.R. § 1290.102.

<sup>82</sup>See *supra* note 10 (RSFA only applies to Federal oil and gas leases).

<sup>83</sup>See *supra* notes 8-11, and accompanying text.

<sup>84</sup>30 C.F.R. § 1290.107.

<sup>85</sup>43 C.F.R. § 4.906(a)(1).

<sup>86</sup>*Id.* at § 4.906(a)(2).

<sup>87</sup>See *supra* notes 8-11, 80-86, and accompanying text.

<sup>88</sup>43 C.F.R. § 4.906(b)(1).

<sup>89</sup>*Id.* at § 4.906(b)(2). This concept would also apply if an Assistant Secretary's decision is not issued within the 33-month period. See *supra* notes 18-19, and accompanying text.

<sup>90</sup>43 C.F.R. § 4.906(b)(3).

<sup>91</sup>*Id.* at § 4.906(c).

<sup>92</sup>*Id.*

<sup>93</sup>See *supra* note 76, and accompanying text.

days of being served with the decision.<sup>94</sup> Service may be by personal delivery or certified mail, return receipt requested at the address of record in ONRR.<sup>95</sup> Like appeals to the ONRR Director, you may not request or receive an extension of time to file a notice of appeal,<sup>96</sup> and, thus, timely filing of a notice of appeal is jurisdictional.<sup>97</sup>

You must file a statement of reasons containing your arguments within 30 days after you filed your notice of appeal, and are limited to 30 pages.<sup>98</sup> There is no rule for allowing extensions of time for the filing of statements of reasons or answers in the IBLA regulations in 43 C.F.R. Part 4, Subpart E. Nevertheless, the IBLA routinely grants such requests when submitted in the form of a pleading and served on all parties to the appeal. However, in 43 C.F.R. Part 4, Subpart J, there is an IBLA regulation requiring written requests for extension of time in appeals involving ONRR orders.<sup>99</sup> As discussed above,<sup>100</sup> that regulation requires appellants to agree to extend the RSFA 33-month period in which the DOI has to decide an appeal by the amount of additional time the appellant requests.<sup>101</sup>

After the appellant submits its notice of appeal to the IBLA, ONRR must file an administrative record with the IBLA that includes the record for the ONRR Director's decision, the record for the ONRR Order, and the Director's decision itself. The record is filed by the appropriate Division of the Office of the Solicitor (SOL). The SOL then must file an answer to the statement of reasons within 30 days after being served the notice of appeal or statement of reasons if it is filed after the notice of appeal.<sup>102</sup> The IBLA then renders a decision based on the administrative record, statement of reasons, answer, and reply.

The IBLA may remand an ONRR Director's decision to ONRR for further action. In

---

<sup>94</sup>43 C.F.R. § 4.411(a).

<sup>95</sup>*Id.* at § 4.401(c).

<sup>96</sup>*Id.* at § 4.411(c). *See also supra* note 54, and accompanying text.

<sup>97</sup>*See supra* notes 54-6, and accompanying text. *See also infra* notes 107-9, and accompanying text.

<sup>98</sup>43 C.F.R. § 4.412(a). The 30 page limit does not apply to "exhibits, declarations, or other attachments." *Id.* Failure to timely file a statement of reasons will "subject the appeal to summary dismissal as provided in § 4.402, unless the delay is waived as provided in § 4.401(a)." *Id.* at §4.412(c). The IBLA "discourage[s]" filing of a reply to an answer, *id.* at § 4.412(a), but will allow a reply if it is filed within 15 days after the answer is served, *id.*, is limited to issues raised in the answer, *id.* at §4.412(d)(1), and does not exceed 20 pages. *Id.* at §4.412(d)(2).

<sup>99</sup>43 C.F.R. § 4.909.

<sup>100</sup>*See supra* note 74 and accompanying text.

<sup>101</sup>43 C.F.R. §4.409(c).

<sup>102</sup>43 C.F.R. § 4.414(a). Like the statement of reasons, *see supra* note 98, and accompanying text, answers may not exceed 30 pages. 43 C.F.R. § 4.414(a)(1). The party filing an answer may not submit any other pleadings. *Id.* at § 4.414(a). The failure to file an answer will not result in a default, *id.* at § 4.414(c), but, if not timely filed, the IBLA may "disregard it in deciding the appeal." *Id.*

such cases, after the agency follows the directives of the IBLA in the remand decision. If the appellant was adversely affected by the ONRR Director’s decision on remand involving leases not subject to the RSFA 33-month period, the appellant could appeal that decision back to the IBLA under the procedures discussed above.<sup>103</sup> However, once an IBLA decision is rendered, including a remand to recalculate royalties due on ONRR Orders involving leases subject to the RSFA 33-month period, it is the final judicially reviewable decision for the DOI and is effective the date it is issued unless it provides otherwise.<sup>104</sup>

Any party may request reconsideration of an IBLA decision within 60 days of the date of the IBLA decision,<sup>105</sup> but that neither stays the effectiveness of the decision unless you request, and the IBLA grants, a stay,<sup>106</sup> nor does it affect the 33-month period within which the DOI must issue a decision in an appeal of an ONRR Order.<sup>107</sup> You do not have to file a request for reconsideration to exhaust administrative remedies.<sup>108</sup> Parties also may move that the IBLA refer a case to an ALJ for an evidentiary hearing on issues of material fact.<sup>109</sup> If the IBLA orders such a hearing, which is rare, the hearing is conducted under 43 C.F.R. §§ 4.430 to 4.438 and “the general rules in subpart B of [part 4].”<sup>110</sup>

#### C. Requests for Hearing on ONRR FOGRMA NONCs and Civil Penalty Notices

ONRR also has a hearing process for NONCs and CPs.<sup>111</sup> Because the hearing process for ONRR NONCs and civil penalty assessments is to an ALJ in the OHA Hearings Division, not the IBLA, it involves a full-blown administrative hearing and associated procedures.<sup>112</sup> Therefore, this paper will not discuss those procedures in detail.

---

<sup>103</sup>See *supra* notes 93-102, and accompanying text.

<sup>104</sup>43 C.F.R. §§ 4.403 and 4.907(a). For ONRR orders involving leases subject to the RSFA 33-month period, ONRR has 60 days to perform a recalculation on remand, *id.* at § 4.907(c), and the IBLA remand decision plus the recalculation together constitute the final decision for DOI. *Id.* at § 4.907(d).

<sup>105</sup>43 C.F.R. § 4.403(b)(1). The IBLA will only reconsider its decision in “extraordinary circumstances,” *id.* § 4.403(b)(1), including “[e]rror in the Board’s interpretation of material facts,” “[r]ecent judicial development,” [c]hange in Departmental policy,” or new evidence. *Id.* § 4.403(d). The other party has 21 days to respond to a request for reconsideration. *Id.* § 4.403(b)(3).

<sup>106</sup>43 C.F.R. § 4.403(b)(4).

<sup>107</sup>*Id.* at § 4.906(c).

<sup>108</sup>*Id.* at § 4.403(b)(5).

<sup>109</sup>*Id.* at § 4.415.

<sup>110</sup>*Id.* at § 4.415(e).

<sup>111</sup>See *infra* notes 112-122, and accompanying text.

<sup>112</sup>See generally 30 C.F.R. Part 1241 and 43 C.F.R. Part 4, Subparts B and L (2012). Unlike appeals to the IBLA, such hearings are before Administrative Law Judges appointed under 5 U.S.C. § 3105. 30 C.F.R. § 1241.72. .

For ONRR, recipients of NONCs issued under 30 C.F.R. § 1241.51 (2012) and associated civil penalties under 30 C.F.R. § 1241.53 (2012) may request a hearing on the record with OHA regarding the merits of the notice of noncompliance,<sup>113</sup> and/or on the amount of the civil penalty.<sup>114</sup> You must file requests for a hearing on the merits within 30 days after you receive the NONC, and on the amount of the civil penalties assessed for failure to comply with the NONC within 10 days after you receive the notice of civil penalties.<sup>115</sup> Recipients of knowing or willful notices of civil penalties issued under 30 C.F.R. § 1241.60 (2012) also may request a hearing on the record regarding the merits of the civil penalty notice,<sup>116</sup> and/or on the amount of the civil penalty.<sup>117</sup> You must file requests for a hearing on the merits of a knowing or willful civil penalty notice within 30 days after you receive the notice, and on the amount of the civil penalties assessed within 10 days after you receive the notice of civil penalties.<sup>118</sup>

If you request a hearing on the record, as stated above,<sup>119</sup> an OHA ALJ will conduct the hearing.<sup>120</sup> “After the hearing, the Administrative Law Judge will issue a decision in accordance with the evidence presented and applicable law.”<sup>121</sup> If you are adversely affected by the ALJ’s decision, you may appeal that decision to the IBLA.<sup>122</sup>

#### **IV. BOEM AND BSEE’S ADMINISTRATIVE APPEALS PROCESS**

##### **A. Appeals of BSEE and BOEM Orders and Decisions**

Appeals of BSEE and BOEM orders and decisions go directly to the IBLA.<sup>123</sup> BSEE orders and decisions are appealable under 30 C.F.R. Part 290, Subpart A (2012),<sup>124</sup> and BOEM orders and decisions are appealable under 30 C.F.R. Part 590, Subpart A (2012).<sup>125</sup> Prior to the comprehensive appeal rulemaking in 1999,<sup>126</sup> BSEE and BOEM had a two-step appeals process like the current process appeal for ONRR orders discussed above.<sup>127</sup> However, DOI believed it

---

<sup>113</sup>30 C.F.R. § 1241.54.

<sup>114</sup>30 C.F.R. § 1241.56.

<sup>115</sup>30 C.F.R. §§ 1241.54 and 1241.56.

<sup>116</sup>30 C.F.R. § 1241.62.

<sup>117</sup>30 C.F.R. § 1241.64.

<sup>118</sup>*See supra* note 112, and accompanying text.

<sup>119</sup>30 C.F.R. §§ 1241.62 and 1241.64.

<sup>120</sup>*Id.* at § 1241.72.

<sup>121</sup>*Id.*

<sup>122</sup>*Id.* at § 1241.73.

<sup>123</sup>*See* 30 C.F.R. Part 290, Subpart A (2012) (BSEE), 30 C.F.R. Part 590, Subpart A (2012) (BOEM), and 43 CFR Part 4, Subpart E (202012) (IBLA).

<sup>124</sup>30 C.F.R. §§ 290.1 to 290.8.

<sup>125</sup>30 C.F.R. §§ 590.1 to 590.8.

<sup>126</sup>64 Fed. Reg. at 1932, 64 Fed. Reg. at 26,245. *See also supra* notes 12-15, and accompanying text.

<sup>127</sup>*See supra* notes 23-92, and accompanying text.

would be advantageous to revise the appeals procedures applicable to then-MMS offshore management program orders at the same time it considered changes to then-MMS royalty management program orders.<sup>128</sup> In the preamble to the proposed rule, ONRR explained that the “[BSEE and BOEM] appeals process is patterned after the process the BLM uses for appeals of BLM officials’ decisions because they have similar responsibilities with respect to onshore Federal and Indian trust lands.”<sup>129</sup>

Therefore, a recipient of a BSEE or BOEM Order that is adversely affected by the BSEE or BOEM Order may appeal directly to the IBLA.<sup>130</sup> Recipients of BSEE and BOEM Orders must appeal to the IBLA in order to exhaust administrative remedies prior to filing in Federal District Court<sup>131</sup> unless the Assistant Secretary for Land and Minerals Management or the IBLA makes a decision effective immediately notwithstanding your appeal.<sup>132</sup>

Unlike ONRR appeals to the IBLA,<sup>133</sup> after a BSEE or BOEM official issues a BSEE or BOEM decision or order, the lessee or operator has 60 days from its receipt of the order to file an Notice of Appeal, not the 30 days the IBLA allows under 43 C.F.R. § 4.411(a).<sup>134</sup> Like ONRR royalty orders,<sup>135</sup> the date of receipt of a BSEE or BOEM decision or order is the date the recipient “sign[s] a receipt confirming delivery . . . .”<sup>136</sup> However, unlike ONRR royalty regulations that specifically enumerate a broad array of methods of service and constructive service,<sup>137</sup> the BSEE and BOEM regulations merely state that “if there is no receipt, the date

---

<sup>128</sup>64 Fed. Reg. at 1932.

<sup>129</sup>*Id.*

<sup>130</sup>*See* 30 C.F.R. Part 290, Subpart A (2012) (BSEE), 30 C.F.R. Part 590, Subpart A (2012) (BOEM), and 43 CFR Part 4, Subpart E (202012) (IBLA). In *Firstland Offshore Exploration Co.*, 149 IBLA 117 (1999), the IBLA considered whether an assignee of an interest in an offshore lease was “adversely impacted.” The IBLA held that “for an appellant to have standing to appeal . . . the appellant must be a party to the case and have a legally cognizable interest that is adversely impacted by the decision on appeal. . . . If either of these two requirements is absent, an appeal must be dismissed.” *Firstland*, 149 IBLA at 126 (citations omitted). In *Firstland*, the lessee’s successor-in-interest sought to intervene in an appeal of a then-MMS offshore management program decision to terminate a suspension of production. Although the IBLA found that “it was clear” that the successor-in-interest was “neither a party to the case nor adversely affected by the MMS decision at the time it issued (since it had no interest in the leases at the time)”, the IBLA held that the successor’s “contingent” interest as an approved assignee was sufficiently adversely affected to grant standing. *Id.* at 126-7 (citations omitted).

<sup>131</sup>30 C.F.R. § 290.8(a) (BSEE) and 30 C.F.R. § 590.8(a) (BOEM).

<sup>132</sup>*Id.* at §§ 290.8(b) and 590.8(b).

<sup>133</sup>*See supra* note 94, and accompanying text.

<sup>134</sup>30 C.F.R. §§ 290.3 and 590.3.

<sup>135</sup>*See supra* note 50, and accompanying text.

<sup>136</sup>30 C.F.R. §§ 290.3 and 590.3.

<sup>137</sup>*See supra* notes 49-53, and accompanying text.

otherwise documented.”<sup>138</sup> Arguably, this provision is even broader than the ONRR service regulations, encompasses constructive service, and allows BSEE and BOEM to demonstrate the date of receipt through any form of documentation, including a facsimile receipt.<sup>139</sup>

Like the ONRR order appeal regulations,<sup>140</sup> you may not request or receive an extension of time to file a notice of appeal of a BSEE or BOEM decision or order.<sup>141</sup> Thus, “the timely filing of a notice of appeal is a jurisdictional requirement, and if an appeal is not timely filed . . . the appeal must be dismissed.”<sup>142</sup> However, unlike the ONRR order appeal regulations, the BSEE and BOEM appeal regulations also require the submission of a “nonrefundable processing fee of \$150 paid with the Notice of Appeal.”<sup>143</sup> Like the notice of appeal, you may not request or receive an extension of the 60-day period for payment of the processing fee.<sup>144</sup> Thus, like the notice of appeal, it appears that timely filing of the \$150 processing fee is a jurisdictional requirement, and if the \$150 processing fee is not timely filed, the appeal must be dismissed.<sup>145</sup>

For appeals of BSEE and BOEM orders and decisions, after the BSEE or BOEM official receives a timely notice of appeal, processing fee, and, where applicable, a bond, the BSEE or BOEM official forwards a copy of the notice of appeal, the administrative record, and the BSEE or BOEM decision to the SOL. The SOL reviews the file for completeness and, if complete, notifies the BSEE or BOEM official to forward the file to the IBLA. These steps are critical since BSEE and BOEM orders and decisions are no longer part of a two-step appeals process that results in a Director’s decision before an appeal to the IBLA.<sup>146</sup> The IBLA will set aside or remand a BSEE or BOEM order or decision that is not supported by an adequate record, or forward the appeal to the Hearings Division for an evidentiary hearing.<sup>147</sup>

---

<sup>138</sup>30 C.F.R. §§ 290.3 and 590.3.

<sup>139</sup>Like 30 C.F.R. § 1218.540(d), this regulation effectively overrules previous IBLA decisions holding that the date a company receives a fax of a document does not establish service where the regulation specifies service must be by certified mail (return receipt requested). *Animal Protection Institute of America*, 124 IBLA 231 (1992). See also *supra* note 51, and accompanying text.

<sup>140</sup>30 C.F.R. § 1290.105(b). See also *supra* note 54 and accompanying text.

<sup>141</sup>30 C.F.R. §§ 290.4(a) and 290.5 and 30 C.F.R. §§ 590.4(a) and 590.5.

<sup>142</sup>*American Petroleum Energy Company*, 160 IBLA at 70 (citations omitted). See also *supra* note 56 and accompanying text.

<sup>143</sup>30 C.F.R. §§ 290.4(b) and 590.4(b). You must pay electronically using Pay.gov. *Id.* at §§ 290.4(b)(1) and 590.4(b)(1).

<sup>144</sup>30 C.F.R. §§ 290.4(b)(2) and 590.4(b)(2).

<sup>145</sup>See *supra* notes 140-41, and accompanying text. This conclusion is bolstered by the fact that in the proposed rulemaking, the then-MMS specifically proposed to allow extensions of time for filing of the processing fee at proposed 43 C.F.R. § 4.907(c), 64 Fed. Reg. at 1937, 1972, but eliminated that provision in the final rule. 64 Fed. Reg. at 26,257.

<sup>146</sup>See *supra* note 23, and accompanying text. See also *Samedan Oil Corp. Aera Energy LLC.*, 163 IBLA 63, (2004).

<sup>147</sup>*Samedan*, 163 IBLA 63.



Within 30 days after filing the notice of appeal, like appeals of ONRR orders to the IBLA, the appellant must submit to IBLA, with copies to the issuing official and the SOL, a complete statement of reasons (limited to 30 pages) explaining why they are appealing.<sup>148</sup> If the appellant fully stated their reasons as part of their notice of appeal, no additional statement is needed.<sup>149</sup> If you do not file a statement of reasons within the 30-day period, the IBLA will “summarily dismiss” the appeal under 43 C.F.R. § 4.402, unless it waives the delay under 43 C.F.R. § 4.401(a).<sup>150</sup>

Like the ONRR process discussed above,<sup>151</sup> IBLA also may remand a BSEE or BOEM Order to the agencies for further action. In such cases, after the agency follows the directives of the IBLA in the remand decision, if the appellant was adversely affected by the BSEE or BOEM Order on remand, the appellant could appeal that decision back to the IBLA under the procedures discussed above.<sup>152</sup> However, once an IBLA decision is rendered, it is the final judicially reviewable decision for the DOI and is effective the date it is issued unless it provides otherwise.<sup>153</sup>

Like appeals of ONRR Director’s decisions to the IBLA, any party may request reconsideration of an IBLA decision regarding a BSEE or BOEM order,<sup>154</sup> but that does not stay the effectiveness of the decision unless you request, and the IBLA grants, a stay,<sup>155</sup> You do not have to file a request for reconsideration to exhaust administrative remedies.<sup>156</sup> Parties also may move that the IBLA refer a case to and ALJ for an evidentiary hearing on issues of material fact.<sup>157</sup> If the IBLA orders such a hearing, which is rare, the hearing is conducted under 43 C.F.R. §§ 4.430 to 4.438 and “the general rules in subpart B of [part 4].”<sup>158</sup>

## B. Appeals of BOEM and BOEM Outer Continental Shelf Lands Act INCs and Civil Penalties

INC and civil penalties BSEE and BOEM issue under the Outer Continental Shelf Lands

---

<sup>148</sup>43 C.F.R. § 4.412(a). *See also supra* note 98, and accompanying text.

<sup>149</sup>43 C.F.R. § 4.412(a).

<sup>150</sup>*Id.* at § 4.412(c). Section 4.401(a) provides for a grace period of 10 days if the IBLA determines the statement of reasons was transmitted or probably was transmitted within the 30-day period.

<sup>151</sup>*See supra* note 102, and accompanying text.

<sup>152</sup>*Id.*

<sup>153</sup>43 C.F.R. §§ 4.403.

<sup>154</sup>*Id.* *See also supra* notes 105-107, and accompanying text.

<sup>155</sup>*Id.*

<sup>156</sup>43 C.F.R. § 4.403(b)(5). *See also supra* note 108, and accompanying text.

<sup>157</sup>43 C.F.R. § 4.415.

<sup>158</sup>*Id.* at § 4.415(e).

Act (OCSLA)<sup>159</sup> are appealable to the IBLA under 30 C.F.R Part 290, Subpart A (BSEE) and 30 C.F.R Part 590, Subpart A (BSEE).<sup>160</sup> Such appeals follow the same procedures as those for appeals of BSEE and BOEM orders and decisions discussed above.<sup>161</sup>

If you file an appeal of an OCSLA INC or civil penalty assessment BSEE issues under 30 C.F.R. Part 250, Subpart N,<sup>162</sup> or BOEM issues under 30 C.F.R. Part 550, Subpart N,<sup>163</sup> in addition to the notice of appeal and processing fee, you must post a bond with the Leasing Office in the Region where the penalty was assessed in the amount of the penalty assessed at the time of the appeal.<sup>164</sup> In the alternative, you may request that the Leasing Office in the Region where the penalty was assessed allow you to use the lease-specific/area-wide bond you filed as the bond for the civil penalty.<sup>165</sup> However, if you request this alternative and the BOEM Regional Director determines you need additional security, he or she may require you to post a supplemental bond under 30 C.F.R. §§ 556.53(d) through (f) or to establish a lease abandonment account under 30 C.F.R. § 556.56.<sup>166</sup>

### C. Requests for Hearings on BSEE and BOEM FOGRMA NONCs and Civil Penalties

As part of the separation of responsibilities between ONRR, BSEE, and BOEM discussed above,<sup>167</sup> some of the FOGRMA penalty provisions located in ONRR's regulations under 30 C.F.R. Part 1241 were moved to the then-BOEMRE,<sup>168</sup> and then subsequently to BSEE and BOEM.<sup>169</sup> As a result, in addition to the OCSLA penalties BSEE and BOEM may assess,<sup>170</sup>

---

<sup>159</sup>43 U.S.C. § 1350(b). These are appealable to the IBLA rather than to an ALJ in the hearings division because unlike FOGRMA, 30 U.S.C. § 1719 which requires a "hearing on the record," OCSLA only requires a "hearing."

<sup>160</sup>30 C.F.R. §§ 250.1409(a) and 550.1409(a). *See also supra* notes 123-158, and accompanying text. A History of the BSEE civil penalty program and other civil penalty information is available at <http://www.bsee.gov/Inspection-and-Enforcement/Civil-Penalties-and-Appeals/Civil-Penalties-Assessments-and-Appeals.aspx>

<sup>161</sup>*See supra* notes 123-158, and accompanying text.

<sup>162</sup>30 C.F.R. §§ 250.1400 to 250.1409.

<sup>163</sup>30 C.F.R. §§ 550.1400 to 550.1409.

<sup>164</sup>30 C.F.R. §§ 290.7(a)(2) and 250.1409(b)(1) (BSEE) and 30 C.F.R. §§ 590.7(a)(2) and 550.1409(b)(1) (BOEM). You must post the bond following instructions for posting the bond BSEE or BOEM Reviewing Officer provided in the civil penalty decision. 30 C.F.R. §§ 250.1409(b)(1) (BSEE) and 550.1409(b)(1) (BOEM).

<sup>165</sup>30 C.F.R. §§ 250.1409(b)(2) (BSEE) and 550.1409(b)(2) (BOEM).

<sup>166</sup>30 C.F.R. at §§ 250.1409(c) and 550.1409(c).

<sup>167</sup>*See supra* notes 16-19, and accompanying text.

<sup>168</sup>*See supra* note 3, and accompanying text.

<sup>169</sup>*Reorganization of Title 30, Code of Federal Regulations*, 76 Fed. Reg. 38555 (2011). *See also supra* note 19, and accompanying text.

<sup>170</sup>*See supra* notes 165-166, and accompanying text.

those Bureaus also may assess civil penalties under FOGRMA.<sup>171</sup> If BSEE or BOEM issue a penalty under FOGRMA, the hearing process before an OHA ALJ is the same as that for ONRR discussed above.<sup>172</sup>

## V. JUDICIAL APPEALS OF FINAL DOI DECISIONS INVOLVING ONRR, BSEE, OR BOEM ORDERS

Once an appellant has exhausted its administrative remedies<sup>173</sup> and there is a final decision of the DOI (via an IBLA or Assistant Secretary's decision,<sup>174</sup> an ONRR decision on a bond amount or an appellant's financial solvency,<sup>175</sup> or in the case of Federal oil and gas leases, application of the RSFA 33-month rule of decision),<sup>176</sup> then an appellant may appeal the decision to Federal District Court. How much time an appellant has to file in court depends on the type of lease. For production from Federal oil and gas leases subject to RSFA,<sup>177</sup> RSFA requires appellants to commence a judicial proceeding within 180 days of the appellant's receipt of the final agency action.<sup>178</sup> For Federal oil and gas leases not subject to RSFA, appellants must file an action for judicial review within 90 days of the DOI final decision.<sup>179</sup> For final decisions involving all other Federal and Indian mineral leases, including BSEE or BOEM Orders involving Federal offshore leases, appellants may seek judicial review of that decision under the Administrative Procedure Act.<sup>180</sup> In such cases, the only time constraint appears to be any applicable statute of limitations.<sup>181</sup>

There are two exceptions to the above for certain actions of the Secretary involving offshore leases. The first exception is for judicial review of a Secretary's action to approve a leasing program.<sup>182</sup> Those actions are only subject to judicial review in the United States Court

---

<sup>171</sup>30 C.F.R. §§ 250.1451-250.1497 (BSEE) and 30 C.F.R. §§ 550.1451-250.1497 (BOEM).

<sup>172</sup>*See supra* notes 111-122, and accompanying text. *See also* 30 C.F.R. §§ 250.1454 - 250.1456, §§ 250.1462 - 250.1464, and §§ 250.1472-250.1473 (BSEE), and 30 C.F.R. §§ 550.1454 - 550.1456, §§ 550.1462 - 550.1464, and §§ 550.1472-550.1473 (BOEM).

<sup>173</sup>*See supra* notes 77-79, 131-132, and accompanying text.

<sup>174</sup>*See supra* notes 22 and 132, and accompanying text.

<sup>175</sup>30 C.F.R. § 1243.11.

<sup>176</sup>*See supra* notes 85-92 and accompanying text.

<sup>177</sup>RSFA does not apply to Federal oil and gas production prior to its enactment on August 13, 1996. Pub. L. 104-185, § 11, as corrected by Pub. L. 104-200. As discussed above, it also does not apply to Indian mineral leases or federal solid mineral and geothermal leases. *See supra* note 10.

<sup>178</sup>30 U.S.C. § 1724(j).

<sup>179</sup>30 U.S.C. § 226-2.

<sup>180</sup>5 U.S.C. § 702.

<sup>181</sup>*See e.g.* 28 U.S.C. § 2401(a). Titled "Time for commencing action against United States," Section 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

<sup>182</sup>43 U.S.C. § 1349(c)(1).

of Appeals for the District of Columbia.<sup>183</sup> The second exception is for judicial review of a Secretary's action to approve, require modification of, or disapprove an exploration plan or any development and production plan.<sup>184</sup> Those actions are only subject to judicial review in the United States Court of Appeals in the circuit where an affected State is located.<sup>185</sup> In both cases, the appellant has 60 days after the date of the Secretary's action to file an appeal with the appropriate court.<sup>186</sup>

## V. CONCLUSION

So, what to you do when you receive a document from ONRR, BSEE, or BOEM that tells you to do, or not to do something? The answer depends on whether it is an ONRR order or decision, BSEE, or BOEM order, decision, INC or civil penalty assessment issued under OCSLA, or ONRR, BSEE, or BOEM NONC or civil penalty assessment issued under FOGRMA. It also may depend on whether the document you receive gives you appeal rights. If so, and you want to contest the order, decision, INC, NONC, or penalty assessment, you must appeal an ONRR order to Pay within 30-days of receipt, an ONRR order to perform a restructured accounting within 60-days of receipt (for federal oil and gas leases), a BSEE or BOEM order or decision, or INC or penalty assessment under OCSLA within 60 days of receipt, and your liability for an ONRR, BSEE, or BOEM NONC or penalty notice issued under FOGRMA within 30 days after you receive the NONC or penalty notice, or the amount of the penalty within 10 days after receipt. For ONRR Orders, it also depends on whether the order involves Federal oil and gas leases subject to RSFA. To further complicate matters, for ONRR Orders, the order must contain "mandatory or ordering language" in order to be appealable – and that will vary with the facts of each case. What is clear is that an invoice, without an accompanying cover sheet with appeal rights, and Dear Payor Letters are not appealable orders. Clear as mud!

---

<sup>183</sup>*Id.*

<sup>184</sup>*Id.* at § 1349(c)(2).

<sup>185</sup>*Id.*

<sup>186</sup>*Id.* at § 1349(c)(3).