



## DEPARTMENT OF THE INTERIOR

### Office of Natural Resources Revenue

#### 30 CFR Parts 1206 and 1241

[Docket No. ONRR-2020-0001; DS63644000 DRT000000.CH7000 212D1113RT]

RIN 1012-AA27

#### ONRR 2020 Valuation Reform and Civil Penalty Rule: Delay of Effective Date

**AGENCY:** Office of Natural Resources Revenue (“ONRR”), Interior.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** ONRR is delaying the effective date of the final rule entitled “ONRR 2020 Valuation Reform and Civil Penalty Rule” (“2020 Rule”) from April 16, 2021 to November 1, 2021. The purpose of this second delay is to avoid placing undue regulatory burdens on lessees caused by allowing the 2020 Rule to go into effect while ONRR considers whether it will revise or withdraw some or all of that rule due to apparent defects in that rule.

**DATES:** As of [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], the effective date of the rule published on at 86 FR 4612 on January 15, 2021, which was initially delayed at 86 FR 9286 on February 12, 2021, is further delayed until November 1, 2021.

*Compliance date:* With respect to the amendments to 30 CFR part 1206, published at 86 FR 4612 on January 15, 2021, the May 1, 2021, compliance date is delayed indefinitely at this time, and will be addressed in a future rulemaking issued prior to the 2020 Rule’s effective date.

**FOR FURTHER INFORMATION CONTACT:** For questions on procedural issues, contact Dane Templin, Regulations Supervisor, at (303) 231-3149 or

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On January 15, 2021, ONRR published the 2020 Rule in the *Federal Register*, amending certain regulations that inform the manner in which ONRR values oil and gas produced from Federal leases for royalty purposes; values coal produced from Federal and Indian leases for royalty purposes; and assesses civil penalties for violations of certain statutes, regulations, lease terms, and orders associated with Federal and Indian energy and mineral leases. *See* 86 FR 4612. In addition, the 2020 Rule made minor, non-substantive corrections to ONRR's regulations. As published, the 2020 Rule had an effective date of February 16, 2021, and, for amendments to 30 CFR part 1206 only, a compliance date of May 1, 2021.

On January 20, 2021, the Assistant to the President and Chief of Staff issued a memorandum entitled "Regulatory Freeze Pending Review" ("Regulatory Freeze Memorandum") which, coupled with the guidance on implementation of the memorandum issued by the Office of Management and Budget ("OMB") in Memorandum M-21-14 dated January 20, 2021, directed agencies to consider delaying the effective date of rules published in the *Federal Register* that had not yet become effective. *See* 86 FR 7424.

Accordingly, on February 12, 2021, ONRR published a final rule in the *Federal Register* to delay the 2020 Rule's effective date until April 16, 2021 ("First Delay Rule," 86 FR 9286). The First Delay Rule opened a 30-day comment period, inviting public comment on the facts, law, and policy underlying the 2020 Rule, the effect of the 60-day delay, impacts of a potential further delay, and the criteria listed in OMB Memorandum M-21-14. Of the ten questions posed in the First Delay Rule, eight of the questions pertained to the 2020 Rule and two pertained to the effect of the delay. *See* 86 FR 9287-9288.

In response, ONRR received 1,339 pages of comment material from commenters representing industry members, trade associations, environmental groups, non-governmental organizations, States, and members of the public. Many commenters raised significant concerns pertaining to different aspects of the 2020 Rule, while a few expressed support for the 2020 Rule. Among those concerns, commenters identified potential procedural flaws in the 2020 Rule and expressed that ONRR failed to adequately consider relevant facts or otherwise address objections that had been raised prior to the publication of the 2020 Rule. Some commenters stated that ONRR did not provide certain information in the proposed rule (*see* 85 FR 62054) and, therefore, failed to provide an opportunity for meaningful public comment in the rulemaking process that preceded the 2020 Rule.

ONRR received comments (in response to the First Delay Rule) that identified potential defects in the 2020 Rule – both substantively and procedurally. In addition, since the publication of the 2020 Rule, ONRR’s 2021 reexamination has identified potential shortcomings of the 2020 Rule. Potential defects and shortcomings of the 2020 Rule include:

1. The 2020 Rule relied on executive orders that were withdrawn within days after the 2020 Rule’s publication and before its effective date. Thus, when the 2020 Rule was to become effective, part of justification for the 2020 Rule no longer existed. Moreover, prior to the current effective date, additional executive orders have been issued which reflect different policy considerations which should be evaluated.

2. The 2020 Rule contained significantly expanded and new justifications for its amendments that were not included in the proposed 2020 Rule, potentially without the full benefit of public comment.

3. The 2020 Rule contained inconsistent language on whether it was intended to incentivize production that would not occur in the absence of the 2020 Rule. And, where

the 2020 Rule suggested an amendment was meant in part to incentivize production, the rule lacked an analysis that showed how or to what extent production would increase.

4. ONRR, as the agency charged with collecting and distributing royalties, may lack the authority to propose regulations in an attempt to incentivize production.

5. The reason given for the 2020 Rule's reinstatement of deepwater gathering allowances and extraordinary processing allowance was to incentivize production, but the rule failed to provide adequate factual evidence that the deepwater gathering allowance would, in fact, do so.

6. The proposed 2020 Rule failed to include proposed regulation text to reinstate a deepwater gathering allowance for Federal gas, and also failed to include much of the proposed regulation text to reinstate a deepwater gathering allowance for Federal oil. As a result, the public may not have been given adequate opportunity to comment on the proposed changes.

7. The economic analyses supporting the amendments to the index-based valuation option included in the 2020 Rule assumed that 50% of eligible lessees would elect the option and 50% would not without regard to their individual financial interests, rather than assuming that lessees would elect the option—or not—based on their own financial interests. As a result, the proposed and final rules may have understated or misstated the royalty consequences of the option.

8. ONRR did not consider alternatives when it proposed and finalized a change to the index-based options (from the highest to an average).

9. ONRR decided, in the 2020 Rule, to eliminate the requirement of signed contracts. ONRR never considered alternatives such as amending the definition of contract to eliminate “oral contracts” or to require the lessee to contemporaneously memorialize the terms of oral contracts for its records.

10. ONRR eliminated the definition of “misconduct” rather than considering clarifying amendments.

11. ONRR eliminated the default provision rather than considering clarifying the circumstances under which it would apply (or other amendments).

12. ONRR eliminated the “coal as electricity” valuation option but did not discuss potential clarifying amendments or alternatives.

13. ONRR eliminated the definition of “coal cooperative” but did not discuss potential clarifying amendments.

14. Whether the Tenth Circuit Court of Appeals decision in *API v. U.S. Dep’t. of the Interior*, 823 Fed. App’x 583 (10th Cir. 2020) renders ONRR's reliance on Judge Frudenthal’s decision in *API v. U.S. Dep’t. of the Interior*, 366 F. Supp. 3d 1292, 1309-10 (D. Wyo. 2018) improper. Specifically, whether the dismissal of API’s petition makes reliance on Judge Frudenthal’s decision on 30 CFR 1241.11(b)(5) questionable.

## **II. Purpose of this Action**

The First Delay Rule’s comment period closed on March 15, 2021. Upon preliminary review of the comments received, ONRR finds it needs additional time to review the comments on the 2020 Rule (received in response to the First Delay Rule), identifying both procedural and substantive defects in the 2020 Rule. These comments raise new issues and, in part, suggest legitimate bases for a litigation challenge to the 2020 Rule. During this second period of delay, ONRR will review and analyze the comments as well as conduct factual and legal research. ONRR will address and respond to the substantive comments specific to those issues in a subsequent *Federal Register* publication. In the event ONRR finds it appropriate to withdraw or modify the 2020 Rule, it will publish a proposed rule and seek public comment. For this rule, ONRR has summarized and responded to the substantive comments that specifically related to the delay of the 2020 Rule’s effective date.

*Public Comment:* A few commenters urged ONRR to begin implementing the 2020 Rule without further delay. Some commenters disagreed with ONRR's decision to publish the First Delay Rule. These commenters generally advocated against any further delays and urged that the 2020 Rule be allowed to become immediately effective. According to one commenter, ONRR's First Delay Rule failed to sufficiently explain how the change in Executive orders and protracted litigation satisfy the OMB Memorandum's criteria to justify the delay. The commenter additionally noted that ONRR failed to identify any specific defects in the 2020 Rule when it published the First Delay Rule.

*ONRR Response:* ONRR appreciates that commenters who generally supported or opposed the 2020 Rule at the proposed rule stage continue to support it becoming effective or further delayed, respectively. At this time, one of ONRR's primary concerns is with a fair and transparent rulemaking process that provides adequate time to thoughtfully consider the comments received and to research and develop a response thereto. ONRR disagrees that it failed to justify the first delay in a manner required by the OMB Memorandum. In addition, ONRR finds that it is appropriate, and in the interest of all parties, to delay the 2020 Rule a second time, while it considers any defects in the facts, law, or policy underpinning the 2020 Rule and researches and develops a response to the comments on the 2020 Rule received in response to the First Delay Rule.

*Public Comment:* One commenter claimed that ONRR's statement relating to the extensive IT system (computer programming), accounting, and other business process modifications ignored the 2020 Rule's conclusion that the minor administrative burden imposed by that rule would be offset by much larger royalty impacts. Another commenter stated that clarity on when the 2020 Rule and its changes will go into effect allows companies to make the appropriate system changes in order to comply with the new requirements. Multiple commenters stated that continually delaying the effective date

would create uncertainty, place an undue burden on the regulated entities, and exacerbate the challenges created by ONRR's 2016 Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform Rule ("2016 Valuation Rule"). *See* 81 FR 43337 (July 1, 2017).

*ONRR Response:* ONRR agrees that most lessees would pay less royalties under the 2020 Rule. However, further examination of the facts, law, and policy underpinning the 2020 Rule may not support the 2020 Rule's reduction in royalties.

ONRR acknowledges that changes to its valuation rules often require changes to the business and system processes lessees use to report and pay royalties to ONRR. Historically, ONRR has worked to avoid situations where lessees are required to comply with reporting and payment requirements before lessees have had adequate time to adapt processes to make compliance possible. Production accounting and commodity valuation are technical and complex subjects. As such, before and after the dates on which a rule becomes effective and compliance is required, ONRR works extensively with industry to train, provide guidance, and otherwise assist industry in its efforts to report and pay in compliance with new or amended ONRR regulations. When ONRR published the 2016 Valuation Rule, it provided 6 months between the date of publication and the effective date to allow ONRR and the regulated public time to make system and programming changes. Both following publication of the 2016 Valuation Rule and vacatur of its repeal on March 29, 2019, ONRR provided numerous training sessions and responses to guidance requests from lessees on how to comply with that rule. Even with those outreach efforts, based on the continued concerns lessees raised about their ability to come into compliance with the 2016 Valuation Rule by the deadlines set, ONRR issued three reporter letters (June 13, and November 20, 2019 and June 30, 2020) to provide lessees a total of 18 months of additional time to comply with the 2016 Valuation Rule prior to ONRR's commencement of compliance activities:

1. The first reporter letter gave lessees until January 1, 2020 to come into compliance with the 2016 Valuation Rule, stating “lessees may need time to modify their royalty reporting systems and submit amended royalty reports.”
2. The second reporter letter further extended the reporting and payment deadline to July 1, 2020. It stated that “the Department of the Interior received feedback from industry stating that because this reinstatement [of the 2016 Valuation Rule] requires system changes and re-reporting for the period January 1, 2017 through the present, that additional time was necessary for industry to comply.”
3. The third reporter letter, further extended the reporting and payment deadline to October 1, 2020 for reasons similar to the first two reporter letters.

Delaying the 2020 Rule requires no system changes and is necessary to ensure that ONRR has the opportunity to fully review and analyze public comments and to research and develop a response thereto. In that response, ONRR may address substantive issues, if any, underlying the 2020 Rule and take appropriate action, which could include revision or withdrawal of some or all of the 2020 Rule. If ONRR were to determine that substantive issues exist with the 2020 Rule after the 2020 Rule’s effective date, it would necessitate another rulemaking that would force industry to undertake and, in many instances, pay for another system change, with the prior system change only being applicable for a brief period between the effective date of the 2020 Rule and ONRR’s revision or withdrawal of that rule. As one commenter pointed out, this situation is especially burdensome to small producers with limited staff and resources. In sum, ONRR finds that this delay, which preserves the currently effective regulatory requirements, will contribute to an increase in long-term certainty for lessees and avoid the possibility of administrative costs necessitated by multiple system changes.



*Public Comment:* One commenter stated that a delay of the 2020 Rule's effective date would result in higher royalty revenue, which in turn impacts the Federal Government, State governments, and taxpayers. The commenter's assumption was based on the analysis in the 2020 Rule that estimated a net decrease in annual royalty revenues of \$28.9 million. The commenter asserted that ONRR neither adequately measured the resulting impacts nor explained why the 2020 Rule's benefits justified the costs. The commenter concluded that an additional delay would allow ONRR the opportunity to correctly evaluate the 2020 Rule's impacts.

Other commenters supported further delaying the 2020 Rule's effective date to the extent necessary to accomplish a withdrawal or repeal of the 2020 Rule, which the commenters believe is in the interests of regulatory certainty and the public, and would avoid unnecessary administrative costs.

*ONRR Response:* ONRR appreciates the concerns from all commenters on the changes to royalty and administrative costs associated with this rule. While ONRR understands the general concerns expressed by some of the commenters, none of the comments received provided tangible evidence showing that a second delay will significantly harm or affect the operational decision-making of lessees prior to the 2020 Rule's effective date as extended by the First Delay Rule or a second delay. The second delay provided by this rule leaves in place the requirements that have been applicable since January 1, 2017, which, as the commenter and 2020 Rule's economic analysis conclude, result in higher royalties overall than the 2020 Rule. The delay will allow time for additional research into the validity of the issues raised by the comments, as well as time for compliance with the requirements of the 2020 Rule.

Throughout the period of this second delay, ONRR will continue to fulfill its statutory responsibility to ensure prompt and proper collection and disbursement of royalties in accordance with the regulations that are currently in effect. Given that ONRR

received no evidence demonstrating a delay is harmful to the public, States, or industry, ONRR finds that a second delay of the effective date will have no impact on its ability to perform its statutory duties. Moreover, a second delay of the 2020 Rule's effective date will ensure a fair, transparent, and procedurally-sound final decision.

*Public Comment:* One commenter requested clarification on whether a delay in the 2020 Rule's effective date would also postpone the compliance date for the 30 CFR part 1206 amendments, or if the compliance date continues to be May 1, 2021.

*ONRR Response:* This rule delays the 2020 Rule's effective date to November 1, 2021. ONRR could not require compliance on May 1, 2021 because that date now falls before the 2020 Rule's effective date. ONRR did not receive comments discussing the appropriate time period between the effective date and the compliance date. If ONRR determines it is appropriate to allow the 2020 Rule to go into effect, ONRR will provide a reasonable time period for lessees to come into compliance with the amendments, if any, to 30 CFR part 1206 included in the 2020 Rule.

### **III. Good Cause**

This rule will become effective immediately upon its publication in the Federal Register and is based on the good cause exception in 5 U.S.C. 553(d)(3). This delay avoids burdens to lessees associated with a rule change by postponing any rule change while ONRR reviews the potential substantive and procedural concerns with 2020 Rule—including those identified in this rule. Lessees will continue to comply with the requirements that have been applicable since January 1, 2017 and remain effective today. Also, it provides additional time for regulated entities to plan for implementation of system modifications required for compliance with the 2020 Valuation Rule. Furthermore, ONRR seeks to review new information submitted through public comment that identifies fundamental deficiencies in the 2020 Valuation Rule and may result in different conclusions regarding the impact of certain provisions. (See, for example, the

potential shortcomings in the 2020 Rule identified in the numbered paragraphs in Background section, above). ONRR will also review the 2020 Rule in light of public comments suggesting the potential for litigation, which would generate further uncertainty for regulated entities. Further, since this rule effects only a continuation of the delay of the effective date, there is no substantive change to which parties would need time to adjust their business practices or procedures on account of the delay.

ONRR finds that it is in the public interest to not allow the 2020 Rule to go into effect on April 16, 2021. As explained in the comment responses above, lessees incur significant costs to adapt their computer and accounting systems and reporting activities to changes in ONRR's valuation regulations. Also explained above, ONRR provided an initial 6 months between publication and effective dates of the 2016 Valuation Rule, and then after the 2019 vacatur of the 2017 repeal of the 2016 Valuation Rule, industry sought, and ONRR provided, an additional 18 months for industry to come into compliance with the 2016 Valuation Rule before beginning compliance activities. The 2020 Rule covers a number of the same subjects that were covered in the 2016 Valuation Rule. If the 2020 Rule were allowed to go into effect on April 16, and ONRR, following its on-going review, concluded it is appropriate to withdraw or revise, in whole or in part, the 2020 Rule, it would cause lessees to incur significant administrative costs to first adapt to the 2020 Rule, and then incur a similar amount to adapt to the 2020 Rule's withdrawal or revision. Thus, ONRR believes it is in the public interest to pursue a course that results in no more than one effort by lessees to adapt their systems and practices, and which allows adequate time for computer and accounting system changes.

This delay preserves the currently effective requirements while ONRR's review of comments is ongoing and final decisions are being made consistent with (1) the withdrawal of the Executive orders on which the 2020 Rule was, in part, based and (2) the issuance of new Executive orders, including, but not limited to, Executive Order

13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” Executive Order 13992, “Revocation of Certain Executive Orders Concerning Federal Regulation,” and Executive Order 14008, “Tackling the Climate Crisis at Home and Abroad.” *See* 86 FR 7037 (Jan. 25, 2021), 86 FR 7049 (Jan. 25, 2021), and 86 FR 7619 (Feb. 1, 2021), respectively.

The Administrative Procedure Act’s (APA) legislative history indicates that the purpose of the notice requirement at 5 U.S.C. 553(d)(3) is to “afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of rules may prompt.” S. Rep. No. 752, 79th Cong., 1st Sess. 201 (1946) and H.R. Rep. No. 1980, 79th Cong., 2nd Sess. 259 (1946). Delaying the effective date provides certainty for the regulated industry during the delay period while ONRR continues to review the 2020 Rule, and eliminates circumstances which would otherwise require regulated entities to update their reporting processes in anticipation of compliance with a rule that may be subject to further revision or withdrawal. ONRR is committed to ensuring transparency and providing certainty in the adequacy and finality of the 2020 Rule. Thus, it would be contrary to the public interest for the 2020 Rule to go into effect, with its accompanying changes in reporting and payment requirements, while the 2020 Rule remains under review. To do otherwise would lead to uncertainty and confusion regarding reporting and payment requirements, duplication of effort, a potential and unnecessary increase in administrative costs, and a strain on lessees and recipient States while the interpretation and application of valuation and payment rules change.

In the First Delay Rule, ONRR anticipated that a second delay might be necessary. *See* 86 FR 9288. For the reasons stated above, and specifically those related to the identified potential shortcomings in the 2020 Rule as well as undue burdens on regulated entities, ONRR believes this second delay, until November 1, is appropriate.

Thus, ONRR finds that there is good cause for this action under 5 U.S.C. 553(d)(3) for this rule to become effective immediately upon publication. This action is taken pursuant to delegated authority.

**List of Subjects**

*30 CFR Part 1206*

Coal, Continental shelf, Geothermal energy, Government contracts, Indians-lands, Mineral royalties, Oil and gas exploration, Public lands-mineral resources, Reporting and recordkeeping requirements.

*30 CFR Part 1241*

Administrative practice and procedure, Coal, Geothermal energy, Indians-lands, Mineral royalties, Natural gas, Oil and gas exploration, Penalties, Public lands-mineral resources.

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[FR Doc. 2021-07886 Filed: 4/14/2021 4:15 pm; Publication Date: 4/16/2021]