

September 1 through August 31 because the proposed period did not allow sufficient time for producers to report. One industry association also requested that the base period be moved back to give industry more time for calculations.

RPC Subcommittee Recommendation.

The subcommittee members discussed the need to change the proposed base period. Producer groups indicated that the base period needed to be moved back at least 1 or 2 months. However, one State representative said that the base period needed to be as close to the calendar year as possible, but the State could accept moving it back to September 1 through August 31. The subcommittee ultimately recommended changing the base period to July 1 through June 30. The subcommittee felt that it was necessary to move the base period back in order for MMS to publish a **Federal Register** notice before the first of the calendar year listing which States were participating in the marginal property relief options. The subcommittee believes that the following schedule should meet the needs of all parties (industry, States, and MMS):

August 15: Operators submit production reports for June production.

October 1: MMS furnishes States a report of marginal properties for July-June base period.

November 1: States notify MMS if they wish to opt in or out of marginal property accounting and auditing relief (if a State fails to notify MMS, they are deemed to have opted out).

December 1: MMS publishes a **Federal Register** notice listing which States are opting in or out.

MMS Response. We agree with the RPC subcommittee recommendation to change the period to July 1 through June 30.

Definition of "Marginal Property"

1999 Proposed Rule. In § 204.4, MMS proposed to define a "marginal property" as a property having average daily well production of less than 15 barrels of oil equivalent (BOE) per well per day during the base period.

Public Comments. The law firm and the two industry associations suggested that MMS establish separate production levels for different situations, particularly offshore and onshore properties. One State was concerned that using all producing wells in the calculation could result in classifying properties with very prolific wells as marginal. The same State also objected to MMS delegating to itself the determination of what marginal production is because RSFA stated that

MMS and the States should determine the definition jointly.

RPC Subcommittee Recommendation.

The subcommittee members discussed the comment that separate qualification rates should be established for offshore and onshore. MMS representatives advised the subcommittee that industry had previously formed an operational group to establish a rate for offshore, but the group could not agree and the idea was dropped. Subcommittee members also discussed whether the States could set their own individual qualification rates. The subcommittee members decided this was not acceptable because of the administrative burden associated with tracking and auditing different rates for different States. One State representative was concerned that some States might want to offer some relief but not at 15 BOE. The RPC subcommittee did not recommend any changes in the definition of "marginal property."

MMS Response. We propose to retain the definition of "marginal property" contained in the 1999 proposed rule. MMS agrees with the subcommittee's conclusion that using different State production levels to define "marginal property" would be too administratively onerous for use. Such an approach also would result in a Federal law having different meanings in different States, which would raise serious legal concerns.

Although using all producing wells in the calculation to determine whether a property is marginal may result in some leases or units with high-producing wells being classified as marginal properties, we believe it would be too administratively burdensome to allow relief for individual wells, rather than by lease or unit or communitization agreement (hereinafter referred to as "agreement" in this context) as the rule provides. MMS believes that the proposed rule does allow the Secretary (acting through MMS) and the State to "jointly determine, on a case-by-case basis, the amount of what marginal production from a lease or leases or well or wells, or parts thereof" may obtain royalty accounting and auditing relief, as the statute provides (30 U.S.C. 1726(a)). Several State representatives on the subcommittee ultimately recommended using the production level in the proposed rule. Moreover, any State that does not agree with the production levels MMS ultimately adopts under this rule may decline to allow accounting, reporting, and auditing relief under § 204.208.

Statutory Requirements for Relief

1999 Proposed Rule. In § 204.5, MMS reiterated the RSFA statutory requirements that any relief granted for marginal properties must promote production, reduce administrative costs, and increase net receipts to the Federal Government and the States.

Public Comments. One State stated that the proposed rule was contrary to law because it was unlikely to promote production or increase net receipts. Further, the State argued that there is no way to determine if the relief will increase net receipts. The State also noted that we must take into account the loss of the time value of royalty receipts if we allow delayed reporting.

RPC Subcommittee Recommendation. The subcommittee discussed numerous times the difficulty in finding possible relief options that would meet all three RSFA objectives. The subcommittee recommended that two relief options be retained—cumulative reporting and "other" relief.

MMS Response. We understand the State's concerns, but do not agree that the relief offered will not promote production or increase net receipts. Because use of the annual reporting option is limited to properties producing 1,000 BOE or less annually, we believe there will be little loss of time value of the royalties. Moreover, we believe the administrative savings to the lessee will promote production, and the administrative savings to MMS and the States will more than offset any possible loss of interest. A member of MMS's reengineering team informed the subcommittee that each different relief option would require modifications to MMS's compliance programs and thus add cost. We propose to limit our relief options to those recommended by the subcommittee to avoid being cost-prohibitive.

State Liability for Denials of Requests for Relief

1999 Proposed Rule. In § 204.6, MMS proposed that if MMS denied a request for relief based on a State's denial, then the decision was final for the Department of the Interior and could not be appealed administratively.

Public Comments. One State believed that MMS's interpretation of RSFA was incorrect and left the States open to litigation in Federal court. Another State indicated that the proposed rule did not clearly acknowledge that nothing in RSFA serves to waive a State's immunity from suit.

RPC Subcommittee Recommendation. All of the State representatives on the subcommittee expressed grave concern