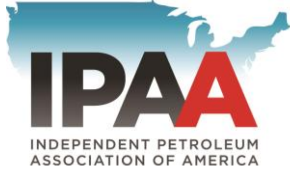

September 7, 2023

Bureau of Ocean Energy Management (BOEM)
Information Collection Clearance Officer, Office of Regulations
Attn: Ms. Kelley Spence
456000 Woodland Road
Mailstop VAM–BOEM DIR
Sterling, VA 20166

Re: ***Risk Management and Financial Assurance for OCS Lease and Grant Obligations,*** **(RIN 1010-AE14)**

Dear Ms. Spence:

The Gulf Energy Alliance ("***GEA***"), the Independent Petroleum Association of America ("***IPAA***"), the U.S. Oil and Gas Association ("***USOGA***"), the Southeast Oil and Gas Association ("***SOGA***"), the Mississippi Energy Institute ("***MEI***"), and the Louisiana Oil and Gas Association ("***LOGA***") respectfully submit the following comments on the Bureau of Ocean Energy Management's ("***BOEM***") proposed rule entitled *The Risk Management and Financial Assurance for OCS Lease and Grant Obligations*[1] (the "***Proposed Rule***").[2]

1. Introduction

The GEA is a coalition of leading independent oil and natural gas producers and allied organizations supporting policies and regulations that encourage sustainable investment, innovation, and job creation in the Gulf of Mexico ("***GOM***"). Almost all our members are focused exclusively on producing oil and natural gas from the GOM. Independent oil and gas companies may not be household names, but independents are responsible for approximately 35% of the total Outer Continental Shelf ("***OCS***") oil and natural gas production. Independent oil and natural gas

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[1] (June 29, 2023) (RIN 1010-AE14) (to be enacted at 30 CFR Parts 550, 556, and 590).

[2] While the GEA's comments merely refer to "lessees" or "owners," the comments herein apply equally to grant holders. The signatories to this letter are sometimes referred to collectively as "we" or "our."

companies are small businesses that also support a host of other small businesses across the Gulf South and throughout the country, including steel manufacturers, longshoreman, vessel providers, seamen, laborers, construction workers, shipyard workers, and equipment manufacturers.

The IPAA is a national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 90% of the nation's oil and natural gas wells. These companies account for 54% of America's oil production, 85% of its natural gas production, and support over 2.1 million American jobs.

The USOGA's mission is to promote national public policy that supports exploration and production for the domestic oil and natural gas industry. It is the nation's oldest oil and gas trade association, founded in 1917.

The SOGA serves the oil and gas association for Mississippi and Alabama, seeking productive public policy outcomes towards the furtherance and success of the oil and gas industry.

The MEI's mission is to conduct research and develop coordinated state-level policies that support a reliable and expanding energy portfolio that is environmentally responsible; to understand and engage in the national energy debate; and to take advantage of the market opportunities ensuring Mississippi's economic development competitiveness.

LOGA has been representing the independent and service sectors of the oil and gas industry in Louisiana since its founding in 1993.

We are deeply concerned that BOEM failed to consider or adequately address the devastating financial impacts the Proposed Rule will have on the U.S. economy and the domestic oil and gas industry, the environment, national security interests, and the American people. The Proposed Rule ignores the feasibility of securing further financial assurance in the current struggling surety market and marks a radical shift from the reliance on the bedrock joint and several liability framework, which holds both predecessors and current lessees in the chain of title accountable for decommissioning obligations.

The Proposed Rule aims to solve a problem that does not exist. Although the agency claims to undertake this rulemaking for to benefit the American taxpayer, the Proposed Rule ignores how the longstanding joint and several liability system has successfully shielded taxpayers from decommissioning costs. Although the liability that American taxpayers have *actually* absorbed from decommissioning is quite minimal, in its wake, the Proposed Rule will impose significant burdens on the current lessees who are largely independent oil companies. Which will, in turn, delay decommissioning activity and harm the environment, weaken domestic oil and natural gas production, strengthen the positioning of other oil producing countries who pose national security risks to the U.S., increase oil prices and related consumer costs, and ultimately damage the U.S. economy and the American people.

Indeed, the Proposed Rule serves to only potentially benefit the major oil and gas companies who sold the oil and gas fields to the current lessees and will now effectively be relieved of their contingent joint and several decommissioning obligations as predecessors-in-title. These predecessor companies drilled the wells, installed the offshore infrastructure, and took substantial

profits from the oil and gas production, and still further profited from the sale of these properties to independent producers. Fairness, equity, and the current regulatory system—which has worked phenomenally well for decades to protect U.S. taxpayers from exposure to decommissioning liabilities—demand that these companies not be shielded from their joint and several liability.

As further explained below, the Proposed Rule is a profound, unjustified departure from the current regulatory scheme and threatens severe consequences for the domestic energy industry, the U.S. economy, and the American people. With such sweeping consequences of "economic and political significance,"[3] BOEM has exceeded its rulemaking authority delegated by Congress, and BOEM's failure to adjust for the disproportionate costs and benefits of the Proposed Rule is arbitrary and capricious under the Administrative Procedure Act ("***APA***").[4]

Accordingly, we urge that BOEM withdraw the Proposed Rule, further evaluate the relevant issues, and adopt a rule similar to the approach taken in the 2020 Proposed Rule and otherwise consistent with these comments.

2. The Proposed Rule Fails to Sufficiently Identify the Hierarchy of Security

The Proposed Rule does not adequately identify where the new bonds will be placed in the hierarchy of security already available to the taxpayer. The placement of the new bonds is critical for lessees and the surety market to fully evaluate the feasibility and potential cost of the additional supplemental bonding required in the Proposed Rule. Further, as discussed *infra* at Section 10, if the bonds required by the Proposed Rule are placed ***before*** the predecessors (i.e., allowing the government to call the new bonds prior to relying on predecessors to perform the decommissioning), the international surety market has informed the GEA that the market has ***no capacity*** to support the bonds.

However, if the bonds required by the Proposed Rule are placed between the predecessors and the taxpayer (i.e., the bonds are callable ***only*** upon the exhaustion of existing private and supplemental bonds ***and*** after the default of predecessors to perform the decommissioning), the international surety market likely has the capacity to issue such bonds at reasonable pricing, based on our preliminary discussions with the market.[5] For any properties other than "sole liability" properties, sureties would be able to rely on the $1.8 trillion of market capitalization being exhausted before taxpayers incur any losses associated with decommissioning liabilities, which BSEE estimates to be $42.9 billion.

If the objective of the Proposed Rule is the protection of the taxpayer, placing the new bonds between the predecessors and the taxpayer achieves this objective and allows for the government to increase the level of bonding available in the event of a default of the existing lessee and predecessors.

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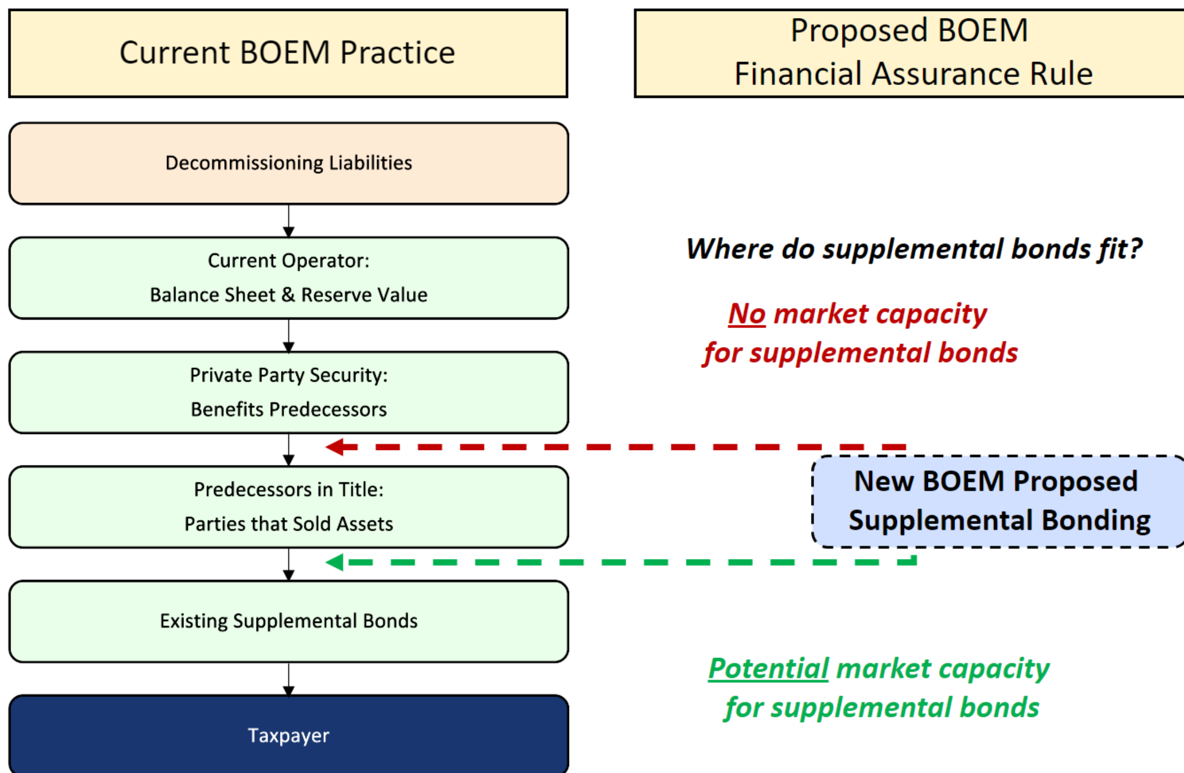
[3] *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

[4] *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007).

[5] It is the long-standing practice of the Department of Interior to first pursue the joint and severally liable predecessors before calling on bonds.



In short, and as discussed more fully *infra* at Section 13, the Proposed Rule should establish the following hierarchy and sequencing for the availability of each level of security for the taxpayer:

BOEM should clearly identify where bonds required in the Proposed Rule will be placed in the existing hierarchy of security available to the taxpayer before issuing a final rule. This essential information is necessary for lessees and the international surety market to fully understand the impact of the Proposed Rule and to allow for lessees and the surety market to provide comprehensive comments to the Proposed Rule. The answer to this question will determine (i) whether a surety market exits for the new bonds, and (ii) whether the supplemental bonds will be reasonably priced and available.

3. The Importance of the Gulf of Mexico

A. The Gulf of Mexico's Oil and Natural Gas Production and Economic Impact

The Outer Continental Shelf Lands Act provides that "the outer Continental Shelf is a vital national resource held by the Federal Government for the public, which should be made available for expeditious and orderly development."[6] The GOM has indeed proven to be a vital resource for the country, providing 15% of domestic oil and gas production that has created a vibrant supply chain of shipyards, ports, vessels, drilling rigs, and manufacturing and repair facilities along the Gulf Coast and generated hundreds of thousands of jobs along the Gulf South and

[6] 43 USC § 1332(3).

throughout the country. Indeed, a recent study found that offshore oil and gas activity supports 345,000 jobs carrying wages 29% higher than the national average, with many of these jobs in disadvantaged communities.[7]

From 2004-2022, offshore oil and natural gas production contributed $125 billion to the U.S. Treasury through royalties, lease bonuses and rentals. These funds are used to support several important government programs across the country:

- The Land and Water Conservation Fund ("***LWCF***") is funded by revenues from offshore oil and gas production and is responsible for funding conservation programs in all 50 states, including programs such as the Outdoor Recreation Legacy Partnership Program, which provides funding to build and repair parks in economically distressed urban neighborhoods. In 2022, the LWCF received $125 million from OCS revenues.

- Offshore oil and gas production is the largest contributor to coastal restoration efforts across the Gulf Coast, having provided over $353 million in 2023 alone in disbursements through state-revenue sharing under the Gulf of Mexico Energy Security Act ("***GOMESA***").

B. GOM: Environmentally Advantaged Production

The Gulf of Mexico produces the cleanest barrels of oil on the planet. A recent ICF study concluded that "[t]he U.S. Gulf of Mexico has a carbon intensity 46% lower than the global average outside of the U.S. and Canada, outperforming nations like Saudi Arabia, Venezuela, Libya, Columbia, Brazil, Iran, Iraq, and Nigeria."[8] And the industry continues to improve. From 2011 to 2017, according to a BOEM study, carbon emissions from the Gulf of Mexico operations *decreased* by approximately 60% even though oil production *increased* by 35%.[9] These achievements are driven by the industry's unrelenting focus on safety and the environment and buttressed by the fact that the offshore oil and gas industry is one of the most highly regulated industries in the world. The offshore industry has been intensely regulated for nearly 70 years and is overseen by over 13 federal agencies, including the Bureau of Safety and Environmental Enforcement ("***BSEE***"), BOEM, U.S. Coast Guard, the Environmental Protection Agency, the Pipeline Hazard Material Safety Administration and the Army Corp of Engineers, among others.

C. Demand for Oil and Gas will Continue for Decades

While the transition to a lower carbon future is inevitable, underway, and fully supported by the industry, global demand for oil and natural gas will continue for decades. The Energy Information Agency predicts that we will need more forms of production from ***all*** forms energy in the future,

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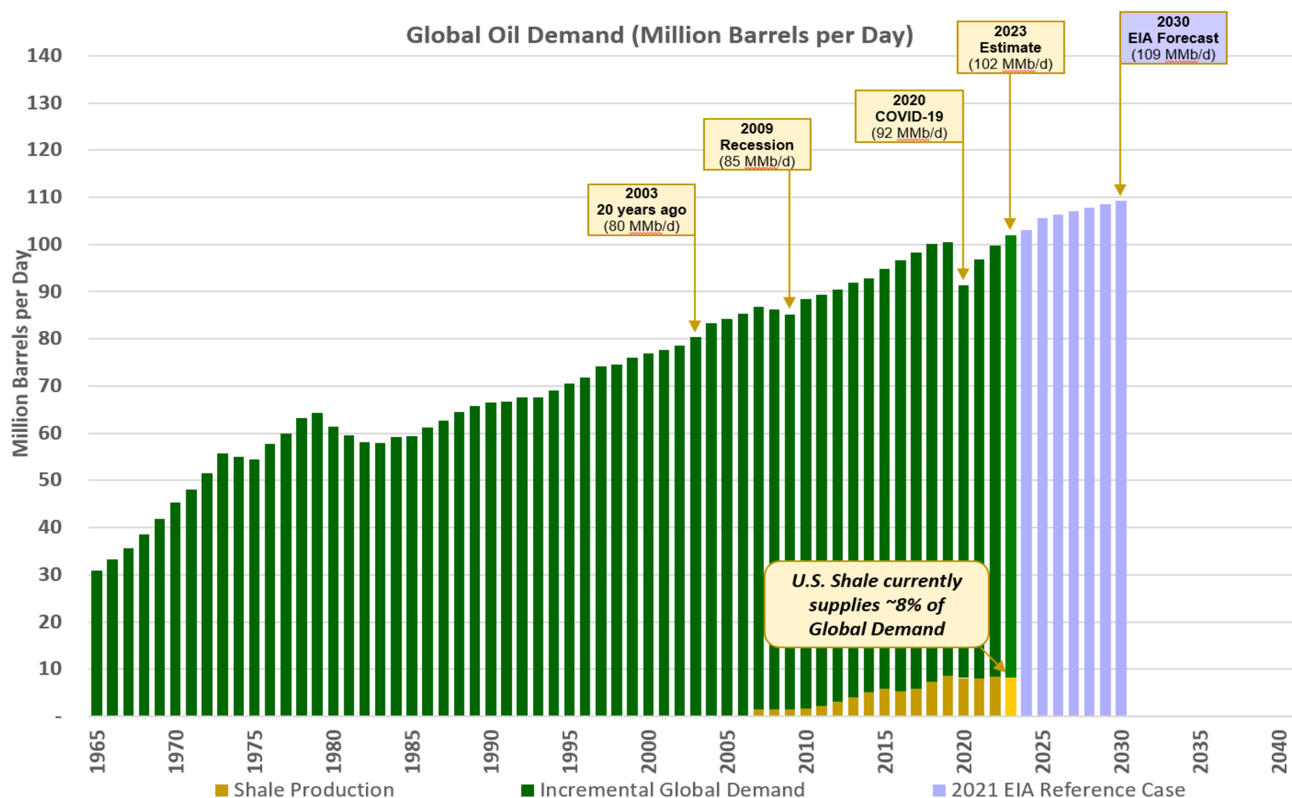
[7] The-Economic-Impacts-of-the-Gulf-of-Mexico-Oil-and-Natural-Gas-Industry.pdf (noia.org).

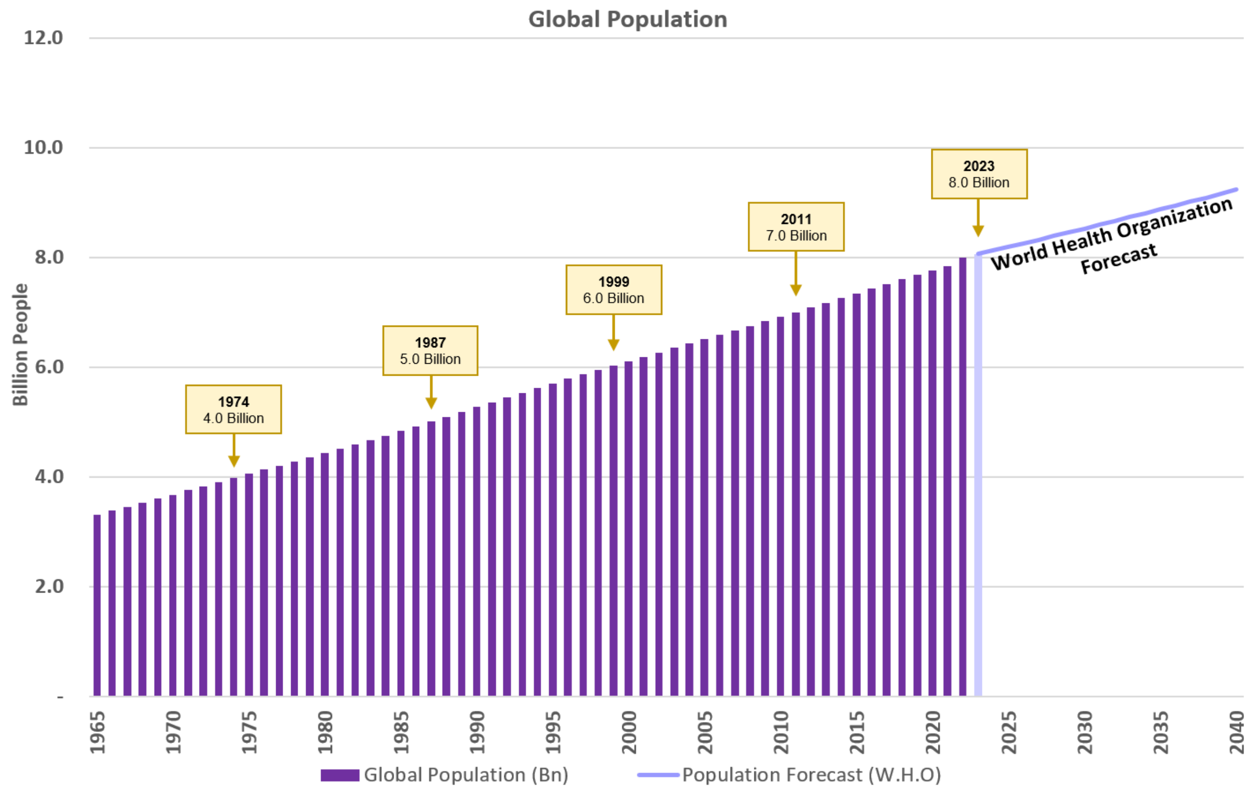
[8] *GHG Emission Intensity of Crude Oil and Condensate Production*, ICF (May 8, 2023).

[9] *See Year 2017 Emissions Inventory Study*, OCS Study, BOEM 2019-072 available: BOEM_2019-072.pdf

including oil and gas, projecting worldwide energy consumption to grow 50% by 2050.[10] Indeed, the International Energy Administration projected that demand for oil will grow to 105 million barrels of oil per day by 2028. The world's population is growing, and the growth is most rapid in regions of the world with higher rates of poverty and underdeveloped energy resources. In these growing and developing parts of the world, affordable and readily available energy is the fundamental catalyst for raising standards of living, improving quality of life, and expanding economic opportunities. In these developing areas, affordable and available energy is an essential human right and these areas will rely on oil and gas to achieve the well-deserved improvement in living conditions, regardless of the energy policies of the developed world. Even in the developed world, and here in the U.S., oil and natural gas will serve an essential role in meeting the growing energy demands, even as the energy transition continues. By any measure, this continued reliance on oil and gas for the foreseeable future is inevitable.



[10] Capuano, Dr. Linda, "U.S. Energy Information Administration's International Energy Outlook 2020," *Center for Strategic and International Studies*, Washington, DC (Oct. 14, 2020) p. 36, https://www.eia.gov/outlooks/ieo/pdf/ieo2020.pdf.



With demand for oil and gas increasing for decades, our choice is simple: we can either produce oil and gas at home and reap the economic and environmental benefits that comes with that production, or we will be forced to import the oil and gas we need from foreign countries that do not impose the same environmental safeguards and that are often hostile to our national interests and values.

D. GOM Production is Critical for Energy and National Security Interests

The need for domestic oil and natural gas production is vital for the country's energy and national security interests. The global COVID-19 pandemic exposed the consequences of a lack of domestic supply chains for critical materials. The ongoing war in Ukraine further solidified the need for the country to be energy self-sufficient. Russia holds approximately 5% of the global proven oil reserves and approximately 25% of the global proven gas reserves.[11] Russia's invasion of Ukraine caused global energy prices to spike, and Russia used oil and gas supply as a geopolitical weapon. Given Russia's vast oil and gas reserves, if Russia chose to use energy as a weapon again, Russia could immediately throw the energy markets into turmoil, cause sweeping economic devastation and create energy scarcity all around the world which could endanger

[11] *Country Analysis Brief: Russia*, U.S. Energy Information Administration (Jan. 17, 2023). Country Analysis Brief: Russia (eia.gov).

lives.[12] Other major oil and gas producing countries such as Saudi Arabia, Venezuela, Iran and other members of the Organization of the Petroleum Exporting Countries ("***OPEC***") have proven to be unreliable partners in ensuring the country's energy security.[13] In short, continued robust domestic production is vital to ensuring that the country is not beholden to the whims of a foreign autocrat or the aims of the other oil and gas producing countries.

In summary, to meet global and domestic demand in the short and medium term, to advance emissions reduction efforts, and to protect U.S. energy and national security, it is critical that we continue to produce the least carbon-intensive barrels from the GOM.

4. The Proposed Rule Re-Trades Decades of Private Commercial Transactions and Ignores the Security Already in Place for Decommissioning

The first "out of sight of land" offshore well was drilled in the Gulf of Mexico in 1947 just off the Louisiana coast.[14] The early days of offshore drilling were dominated by large, international oil and gas companies that possessed the capital and technical capability to drill in the new frontier of the offshore waters of the U.S. After drilling wells, installing platforms, pipelines and offshore infrastructure and reaping the benefits of decades of oil and gas production, these large, sophisticated international companies began exploring in progressively deeper waters, chasing larger and untapped reservoirs. Over the last 30 years, these large, international companies began selling their shallower water properties to independent oil and gas companies. Given the foundational principle of joint and several liability, discussed *infra* at Section 6, the sellers entered these transactions knowing full well that they remained jointly and severally liable for decommissioning the properties despite the sale. As a result, an essential part of the commercial negotiation in these transactions was the determination by the seller of the level of security to secure decommissioning that would be required to be posted by the buyer in the transaction. In ***every*** transaction the seller made the commercial decision to either maximize the sales price, thereby reducing the decommissioning security issued to the seller by the buyer, or to maximize the decommissioning security, thereby reducing the sales price. As a result of these transactions, the industry has posted approximately $3 billion in private bonds and security, which are currently in existence.

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[12] Dan Yergin, Vice-Chair of S&P Global and renowned oil and gas analyst warned against the power that Russia has over energy markets and pointing out that "Vladimir Putin is also the CEO of Russia Oil Inc. and he understands the dynamics of the market very well." *Rising Petrol Prices Spark New Concern in Washington*, Financial Times, August 5, 2023. The article also notes that "Market watchers are also concerned that Russia could choose to weaponize its oil exports next year to try to influence the US election, in a manner similar to its decision to cut gas supplies to Europe last year." *Id.*

[13] Indeed, during the 1973 Arab-Israeli War, Arab members of OPEC imposed an embargo against the U.S. in retaliation for the U.S.'s decision to re-supply the Israeli military and to gain leverage in the post-war peace negotiations.

[14] Offshore Drilling History - American Oil & Gas Historical Society (aoghs.org).

The Proposed Rule ignores the $3 billion in existing private security that is in place for decommissioning. Instead, the Proposed Rule would re-trade decades worth of transactions and step in to shield the large, international companies that voluntarily engaged in these transactions and elected to maximize the sales price rather than to demand more security from the buyer. As a result, the Proposed Rule would require independent oil and gas companies to issue double bonds on many properties, further exacerbating the compliance costs of the Proposed Rule.

The large, international companies that engaged in these transactions knowing that they remained jointly and severally liable for decommissioning obligations are the real beneficiary of the Proposed Rule, not the American taxpayer. The presence of one of these major oil and gas companies in the chain of title more than adequately protects the taxpayer, as these companies are some of the largest and most sophisticated corporations in the world and have an average net worth of $115 billion. Requiring independents to post supplemental bonds in this instance only benefits the major oil and gas companies to the detriment of the independents. Picking winners and losers between independent oil and gas companies and major oil and gas companies that knew they retained liability for decommissioning when they entered into sales agreements is an inappropriate use of federal rulemaking and fails to advance the interests of the taxpayer.

5. The Government's Exposure is Overstated and Rapidly Declining

Before addressing the substance of the Proposed Rule, it is important to point out that even though the rule is aimed at protecting the taxpayer from assuming decommissioning liability, ***the Proposed Rule fails to identify what liability has actually been absorbed by the taxpayer***. Indeed, in one of the "pass backs" of the draft rule, the Office of Information and Regulatory Affairs ("***OIRA***") asked BOEM the question of how much liability taxpayers have absorbed:

> Do you have any numbers about how often taxpayers have been left to pay for OCS decommissioning or environmental response costs because of a lack of bonding, or what the cumulative price tag has been? The text above gives the $7.5 billion figure, but then explains why this amount does not reflect the actual decommissioning costs that have been incurred by taxpayers. ***Some numbers that address the actual cost to taxpayers would help make the case for this regulation,*** if they exist.[15]

(emphasis added).

The question was left unanswered. Department of Interior officials have been questioned repeatedly on the record on what exactly is the scope of the problem that is being solved by financial assurance regulations. It was only recently, in response to written questions for the record and follow-up to oversight questioning by the House Natural Resources Committee's Subcommittee on Energy and Mineral Resources that we understand that BOEM disclosed that the total liability for decommissioning that the taxpayer has absorbed in the history of the offshore oil and gas industry is $58 million.[16] This figure hardly makes the case for a regulation that would

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[15] OIRA Pass back of April 28, 2023, available at www.regulations.gov.

[16] The Proposed Rule states that BSEE has identified $30 million in orphaned infrastructure. 88 Fed. Reg. at 42139.

require $9.2 billion of additional bonding at an annual cost to the industry of $379 million and would cause the catastrophic economic damage and the weakening of the country's energy and national security, discussed *infra* at Section 8.

The Proposed Rule claims that the total decommissioning liabilities are approximately $42.8 billion.[17] This exposure is overstated. A recent study by Opportune LLP, a leading business advisory firm, found that the total decommissioning associated with properties in which the major oil and gas companies or large independents (representing $1.8 trillion in combined market capitalization) are *not* part of the current ownership or previous chain-of-title is only $1.2 billion, which represents approximately 7% of the total decommissioning liability.[18] Approximately $761 million in bonding has already been posted to the benefit of BOEM to cover this exposure, leaving an estimated unbonded risk to the taxpayer of $391 million or approximately 2% of the total decommissioning liability in the GOM. This exposure hardly warrants the heavy-handed regulatory reaction of the Proposed Rule.[19]

Additionally, the total decommissioning liability is ***rapidly declining***. According to BSEE data, of the 7,000 platforms installed in the Gulf of Mexico in the history of the offshore oil and gas business, just over 1,500 remain and the industry is removing platforms at a rate of 111 platforms each year, which is being conducted almost entirely by independent oil and gas companies. In short, independent oil and gas companies are fulfilling their decommissioning obligations and the total decommissioning liability faced by the government is being reduced year-by-year, which the Proposed Rule fails to recognize. ***By requiring an additional $379 million in annual costs, the Proposed Rule will actually decelerate the decommissioning that is already taking place by diverting finite capital to pay for the newly required bonding.*** Additionally, imposing these substantial financial burdens on lessees will only increase the risk of default.

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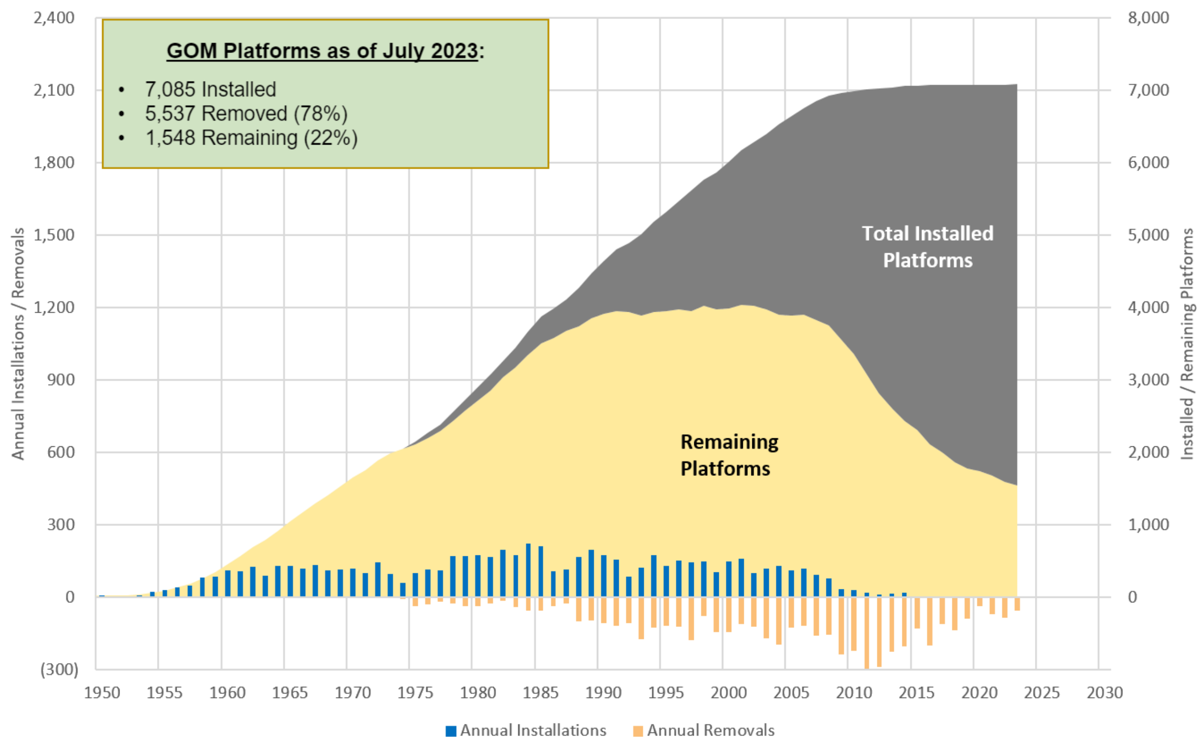
[17] 88 Fed. Reg. at 42137.

[18] *A Cost-Benefit Analysis of Increased OCS Bonding*, Opportune LLP (July 2023), attached hereto as Exhibit A. Stated differently, 93% of the total decommissioning liability has a major oil and gas or large independent in the chain of title and, therefore, jointly and severally liable with the current owners. *See infra* at Section 6.

[19] The taxpayer should not bear any decommissioning liability. But as discussed *infra* at Section 13, there are risk-calibrated ways to provide bonding for these "sole risk" properties or properties without a sufficiently creditworthy predecessor in the chain of title but avoid the draconian results of the Proposed Rule.



In evaluating a regulatory alternative that would include consideration of the creditworthiness of predecessors when determining the need for supplemental bonding, which would be significantly less stringent than the Proposed Rule, BOEM concludes that the more stringent provisions of the Proposed Rule are necessary to prevent a "moral hazard":

> Although the less stringent alternative [that considers the creditworthiness of predecessors] would result in lower bonding costs for industry and small businesses than the proposed rule, ***consideration of predecessor lessees and grantees encourages moral hazard by incentivizing current lessees to pass risk to predecessors rather than proactively prepare for decommissioning and related obligations.***

88 Fed. Reg. at 42159 (emphasis added).

BOEM offers no evidence that lessees are engaging in the "moral hazard" of ignoring their decommissioning obligations and the evidence cited above clearly shows that this purely theoretical philosophical construct is just simply untrue: ***the independents are faithfully performing their decommissioning obligations***.[20]

[20] Regulating purely on a theoretical philosophic construct is inappropriate in the modern regulatory environment. Additionally, given the consequential geopolitical risks in energy security, suppressing domestic energy security based on a philosophical idiom is clearly capricious. If considering hypothetical philosophic notions was appropriate, the Proposed Rule

In short, to answer OIRA's pass back question: ***there is simply no "case" for the Proposed Rule***.

6. The Proposed Rule is Unnecessary and Ignores Long-Standing Legal Realities

In introducing the Proposed Rule, BOEM states that its "objective" is to ensure that taxpayers do not bear the costs of decommissioning of offshore wells and infrastructure by providing "greater protection to the taxpayers."[21] The Proposed Rule is unnecessary to accomplish this objective. As the Proposed Rule repeatedly states, the current regulations hold current owners ***and all predecessors jointly and severally responsible for decommissioning obligations that accrue during their ownership***.[22] This joint and several liability regime is a foundational principle for the offshore oil and gas industry and has effectively protected the taxpayer for decades.[23] Indeed, the Proposed Rule admits that the cases "… where taxpayers have actually paid costs of decommissioning are rare."[24] This is in spite of the more than 30 bankruptcies the Proposed Rule identifies. The Proposed Rule clearly explains this apparent dichotomy as follows:

> However, the actual financial risk to the United States is significantly less than the total offshore decommissioning liability associated with offshore corporate bankruptcies. This is in part because other private parties may be responsible for decommissioning costs. ***Co-lessees and predecessors retain pre-existing obligations to fund or perform decommissioning***. Also, a bankrupt company's assets were often sold to financially stronger buyers who assumed those liabilities.

88 Fed. Reg. at 42139 (emphasis added).

Just a few years ago, in 2020, in a joint proposed rulemaking with BSEE, BOEM was more direct in explaining why these corporate bankruptcies are not a direct cause of taxpayer liability:

> Further, the fact that a company entered bankruptcy does not necessarily suggest that there would be no private party responsible for decommissioning costs, as company assets may be sold, and predecessors would retain their pre-existing obligation to fund or perform the decommissioning.

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creates another "moral hazard" by disincentivizing the major oil and gas companies from conducting proper due diligence on the financial and operational capability of buyers when they engage in sales transactions. For a discussion of the dubiousness of utilizing "moral hazard" in the law *see On the Genealogy of Moral Hazard*, Texas Law Review, Vol. 75 No. 2 (1996).

[21] 88 Fed. Reg. at 42142.

[22] *See e.g.*, 88 Fed. Reg. at 42139 (citing 30 CFR §§ 556.604(d) and 556.605(e) and 30 CFR § 250.1701).

[23] In a 1997 rulemaking, the Department of Interior noted that joint and several liability of all current and predecessor entities has been the law since the enactment of the Outer Continental Shelf Lands Act in 1953. *See* 62 Fed. Reg. 27948, 27950 (May 22, 1997).

[24] 88 Fed. Reg. at 42141.

85 Fed. Reg. 65904, 65906 (Oct. 16, 2020) (the "***2020 Proposed Rule***").[25]

There are countless examples of the success of the joint and several liability framework effectively protecting taxpayers. The best example is the recent bankruptcy of Fieldwood Energy. The industry witnessed the largest offshore oil and gas bankruptcy in 2020 when Fieldwood filed for chapter 11 bankruptcy protection.[26] According to the claims made by the government in the case, Fieldwood carried over $7 billion in decommissioning liability, representing hundreds of wells and platforms. Despite this, ***the taxpayers absorbed no liability*** in the case. Instead, all the predecessors of the abandoned properties were issued decommissioning orders to take responsibility for maintenance and monitoring of the properties and to perform the decommissioning, which is currently being done at a rapid pace. Other properties were sold to a more financially secure party who assumed the decommissioning liability on the properties purchased. In short, even in the largest offshore bankruptcy in the history of the offshore oil and gas industry, the existing joint and several liability regulations ensured that the taxpayer ***was not liable for any decommissioning costs***.

Due to the proven effectiveness of the joint and several liability system, the 2020 Proposed Rule premised the evaluation of the need for supplemental financial security on the creditworthiness of the current lessees ***and predecessors***. Recognizing the holistic regulatory and legal realities, the 2020 Proposed Rule explained:

> Further, the proposed rule's new approach would be rooted in the joint and several liability of all lessees, co-lessees, and predecessor lessees for all non-monetary obligations on a lease. In most cases of default by a current lessee, a predecessor lessee can be called upon to perform decommissioning. This proposed rule would rely on the combined responsibility of all current and predecessor lessees to perform required decommissioning. Regardless of the proposed rule, even in cases where a predecessor divested its full interest in a lease to another company by assignment after accruing an obligation to decommission certain infrastructure (i.e., well, platform, pipeline), the predecessor remains jointly and severally liable for decommissioning that infrastructure. ***The proposed rule would acknowledge the larger universe of companies to whom BSEE can look for performance under***

[25] To the extent philosophical constructs like "moral hazard" are appropriate influences on federal rulemaking, the 2020 Proposed Rule identifies a genuine moral hazard: "In light of the proposed approach [of considering the presence of a creditworthy predecessor in the chain of title in determining the need for supplemental bonding], lessees and grant holders wanting to sell their leases or grants may choose to consider financially stronger companies as potential purchasers or assignees. Under the proposal, both parties to such transactions would know in advance that BSEE would turn first to the most recent assignor to perform decommissioning if the current lessee or grant holder fails to perform its decommissioning obligation; in that case, the seller may well want some assurance that the purchasing company has the means to perform." 85 Fed. Reg. at 65909. Sellers had the volition to select the buyers and to ensure sufficient security was in place at the time of the sale.

[26] Case No. 20-33948 (S.D. Tex. 2020).

> ***the law, and so would reduce the circumstances under which BOEM would need to require additional security.***

85 Fed. Reg. at 65907 (emphasis added).[27]

Without a defensible explanation of the complete reversal in course, the Proposed Rule ignores the "larger universe of companies to whom BSEE can look for performance under the law" and instead maximizes the circumstances when supplemental bonding will be required, with no incremental benefit to the taxpayer. [28]

BOEM attempts to justify moving away from the reality that a "larger universe" of companies is responsible for funding and performing decommissioning by claiming that a lack of a supplemental bonds issued by the defaulting lessee will somehow harm the environment:

> The proposed rulemaking takes a new approach to update the financial assurance criteria to ensure that current lessees have sufficient resources to meet their lease and regulatory obligations, therefore providing more protection to the taxpayer. BSEE is expected to continue to exercise its regulatory authority to issue decommissioning orders to predecessor lessees, seek an appropriation, or intervene as necessary to address an environmental or safety risk, regardless of the outcome of this proposed rule. ***However, without this proposed rule (i.e., without the financial assurance fully in place), it could take longer to arrange for decommissioning, which could result in additional environmental damage or increased obstacles to navigation.***

88 Fed. Reg. 42138 (emphasis added).

The statement is internally inconsistent and just incorrect. As the statement noted, BSEE is expected to continue to exercise regulatory authority and issue decommissioning orders to predecessors. The decommissioning orders require predecessors take ***immediate*** action to safeguard and, ultimately, decommission abandoned properties. In fact, just this year, BSEE

[27] BOEM itself acknowledged that recognizing the joint and several regime is appropriate and narrows the areas of risk to the taxpayer to sole risk properties (properties without a creditworthy predecessor) in 2021 when it issued a *Note to Stakeholders* related to financial assurance. BOEM Expands Financial Assurance Efforts | Bureau of Ocean Energy Management In the Note to Stakeholders, BOEM expanded the focus on bonding to also include inactive properties, properties where the production life is less than 5 years and properties with damaged infrastructure. This risk-based approach should be continued by BOEM.

[28] In reversing course from the premise of the 2020 Proposed Rule, BOEM merely states "as an exercise of its judgement and expertise" BOEM decided to not move forward with the principles set forth in the 2020 Proposed Rule. 88 Fed. Reg. at 42138. *See also*, 88 Fed. Reg. at 42141 ("BOEM has decided, as an exercise of its judgement and expertise, not to move forward with the joint proposed rule [the 2020 Proposed Rule]"). BOEM offers no explanation on why reliance on the long-standing and effective joint and several liability framework is no longer warranted. The industry has relied upon the joint and several regime since 1953 and has engaged in trillions of dollars of sales transactions in reliance of this framework.

clarified its decommissioning regulations to require prompt—almost immediate—action from predecessors:

> **§ 250.1708 How will BSEE enforce accrued decommissioning obligations against predecessors?**
>
> (a) When BSEE issues an order to predecessors to perform accrued decommissioning obligations, the order recipients must, unless otherwise specified in the order:
>
> (1) ***Within 30 days of receiving the order, begin maintaining and monitoring, through a single entity identified to BSEE, any facility, including wells and pipelines, as identified by BSEE in the order and in accordance with applicable requirements under this part (including, but not limited to, testing safety valves and sensors, draining vessels, and performing pollution inspections).***
>
> (2) Within 90 days of receiving the order, designate a single entity to serve as operator or agent for the decommissioning operations;
>
> (3) Within 150 days of receiving the order, submit through the entity identified in paragraph (a)(2) of this section a decommissioning plan for approval by the Regional Supervisor that includes the scope of work and a reasonable decommissioning schedule for all wells, platforms and other facilities, pipelines, and site clearance, as identified in the order; and
>
> (4) Perform the required decommissioning in the time and manner specified by BSEE in its decommissioning plan approval . . .

88 Fed. Reg. 23568, 23580 (Apr. 18, 2023) (amending 30 CFR § 250.1708) (emphasis added) ("***2023 Final Rule***").[29]

In justifying the provisions of § 250.1708 in the 2023 Final Rule, BSEE explained in response to a comment:

> When current interest holders fail to perform required decommissioning, BSEE must ensure that predecessors holding the accrued obligations expeditiously and properly monitor, maintain, and decommissions wells, pipelines, and facilities to minimize safety hazards, environmental harm, and interference with navigation or other uses of the OCS (such as fishing and future resource development) . . . .

---

[29] In the final rule, BSEE clarified that it retains the right to order predecessors to respond to a default on different timelines than the timelines contained in § 250.1708. *See* 88 Fed. Reg. at 23575 ("BSEE is revising paragraph § 250.1708(a) in the final rule by adding 'unless otherwise specified in the order' to acknowledge its authority under existing regulations to order performance on timelines other than those established in paragraphs (a)(1) through (a)(3) when warranted by the circumstances. *See, e.g.*, §§ 250.101, 250.106, 250.107, 250.1711 and 30 CFR 556.710.")

88 Fed. Reg. at 23571.

Section 250.1708 provides BSEE with the ability to ensure that predecessors are required to expeditiously and properly monitor, maintain, and decommission wells and offshore infrastructure. The presence or absence of a supplemental bond held by the defaulting current owner in this instance is irrelevant at best and absolutely would not enhance the government's ability to protect the environment.

In other words, current regulations allow BSEE to order predecessors to begin "maintaining and monitoring" abandoned wells and infrastructure within 30 days. The purpose of this maintenance and monitoring is to safeguard against environmental damage, maintain aids to navigation, and to perform all regulatory inspections and reports. The lack of a supplemental bond from the defaulting party would ***not*** impact BSEE's ability to enforce this regulation and have a predecessor take immediate responsibility of the abandoned properties and, pursuant to the other deadlines in the regulation, decommission the properties. BOEM's justification for such a sweeping change in course is a hollow strawman.

In a similar attempt to justify the requirement for supplemental bonds, BOEM notes that "some BOEM lessees have entered bankruptcy without the resources to cover decommissioning. In these cases, BOEM is required to ***negotiate*** with predecessors, co-lessees, and bankruptcy courts to obtain the funds needed for decommissioning" thereby increasing the risks to the environment in the delay.[30] This is untrue. As noted above, BSEE has the authority to ***order*** all co-lessees and predecessors to immediately perform maintenance and monitoring and decommissioning.[31] And BSEE routinely does so. The government need not —and does not —"negotiate" when it wields such clear policing and enforcement powers.

In short, the most effective tool that the government has in protecting the taxpayer from liability is the presence of creditworthy predecessors in the chain of title.[32] Ignoring the presence of predecessors in the chain of title for purposes of evaluating the need for supplemental bonding distorts the evaluation of the ***actual risks*** to the taxpayer and ignores the existing and most effective tools that the current regulations provide to the government to ensure the prompt safeguarding and decommissioning of abandoned properties. If the stated objective of the Proposed Rule is true – to protect the taxpayer and not maximizing costs and bonding obligations on the industry, reliance on the joint and several liability regime is the best way to ensure the protection of the taxpayer from decommissioning liability. BOEM's unexplained disregard of this long-established regulatory framework is arbitrary and capricious.

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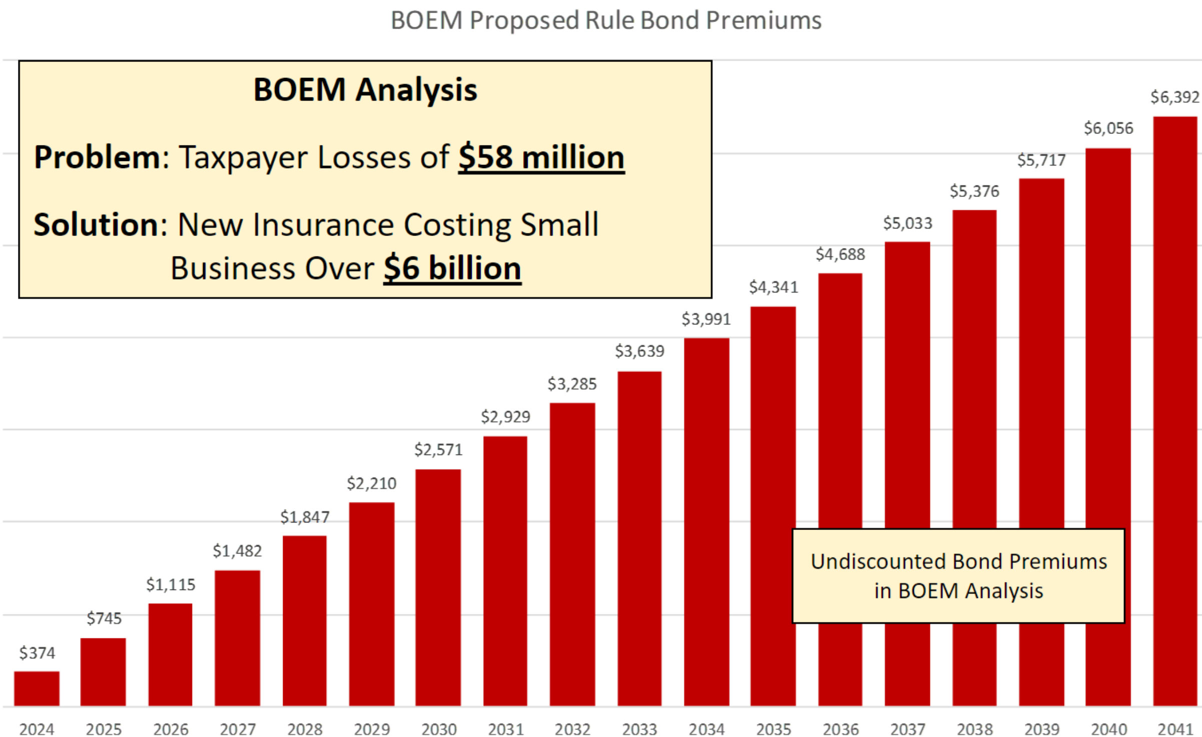
[30] 88 Fed. Reg. at 42141 (emphasis added).

[31] *See* 30 CFR § 250.1708. Additionally, the bankruptcy exempts from the automatic stay of enforcement any governmental action to enforce the government's "police or regulatory power." *See* 11 U.S.C. § 362(b)(4). Consequently, the government can issue orders to the bankrupt debtor to perform decommissioning despite the bankruptcy filing.

[32] The credit rating of the major oil and gas companies and large independents will be vastly superior to the credit ratings of surety companies.

7. The Proposed Rule is Uncalibrated and Prejudicial to Small Businesses

As stated above, the Proposed Rule does not disclose how much decommissioning liability has been absorbed by the taxpayer. However, assuming BOEM's report that the total liability absorbed by taxpayers is $58 million, the Proposed Rule is widely disproportionate to the regulatory problem it attempts to solve. While taxpayers should not be responsible for *any* decommissioning liability,[33] to solve a $58 million problem, the Proposed Rule calls for the issuance of an additional $9.2 billion in bonds at an annual cost of $379 million, and also creates the severe consequences discussed *infra* at Section 8.[34] Such an uncalibrated and disproportionate regulatory response is unwarranted, is not based on the facts and the law, and is arbitrary and capricious.



While substantial, the calculated annual cost of $379 million or over $6 billion over a 20-year period relies on ridiculous and fallacious assumptions. In Table 7 of BOEM's Regulatory Impact Analysis, BOEM assumes that all offshore oil and gas companies have access to unlimited capital at an annual cost of 1.75%. This assumption is fanciful at best. The U.S. government's own cost of borrowing is nearly 5.5% (based on 1-year Treasury Rates as of August 2023). Even putting aside the fact that capital is not unlimited, the borrowing costs for small, independent oil and gas companies is vastly higher than the capital costs to the U.S. government. However, assuming there is capital available for the industry to post $2 billion in collateral to the surety industry to secure

[33] See the discussion, *infra* at Section 13, for GEA's recommendation on supplemental bonding for "sole liability" properties.

[34] *See* 88 Fed. Reg. at 42158.

the additional $9.2 billion in bonds, the costs of these bonds (including the cost of collateral) would exceed $800 million per year or over $12 billion over the next 12 years.

Much of these staggering costs will be borne by small businesses:

> Based on these criteria, approximately 407 (76 percent) of the businesses operating on the OCS subject to this proposed rule are considered small; the remaining businesses are considered large entities. All of the operating businesses meeting the SBA "small business" classification are potentially impacted; therefore, BOEM expects that the proposed rule would affect a substantial number of small entities.

88 Fed. Reg. at 42157.

Additionally, much of the supply chain that supports the independent oil and gas companies are small businesses along the Gulf Coast. These companies will also be negatively impacted by the Proposed Rule.

In addition to being wildly disproportionate in solving the regulatory issue presented, the Proposed Rule ignores the guiding principles of modern rulemaking. Executive Order 12866 (September 30, 1993) provides:

> When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the ***most cost-effective manner*** to achieve the regulatory objective.
>
> Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, ***propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs***.

Executive Order 12866, Section 1(b)(5) (emphasis added).

Similarly, Executive Order 12866 provides that:

> Each agency shall tailor its regulations to impose the ***least burden*** on society, including individuals, businesses of differing sizes . . . .

Executive Order 12866, Section 1(b)(11) (emphasis added).

Clearly, the Proposed Rule is not the most cost-effective and least burdensome manner to achieve the goal of protecting the taxpayer from decommissioning liability. In fact, BOEM has already introduced an effective and less costly manner of achieving its regulatory objective: the 2020 Proposed Rule.[35] The 2020 Proposed Rule would only require supplemental bonding if there were no creditworthy co-lessee or predecessor in the chain of title. This risk-based approach would

[35] BOEM admits that the consideration of creditworthy predecessors in the chain of title "would result in lower bonding costs for industry and small businesses than the proposed rule." 88 Fed. Reg. at 42159.

result in the issuance of far fewer supplemental bonds than would be required in the Proposed Rule – *and* still achieve the goal of protecting the taxpayer, as BOEM concluded in the 2020 Proposed Rule, and as would be accomplished by the GEA proposal set forth *infra* at Section 13.[36]

Given the enormous cost of complying with the Proposed Rule, the rule will have an unintended pernicious effect: slowing the decommissioning that independents are currently conducting thereby increasing the potential universe of properties that could be orphaned in the event of a default of the current owners. Like all companies, the independents have limited capital to deploy to their operations, including their decommissioning programs. Diverting $379 million of capital per year to unnecessary bonds will reduce the capital available for decommissioning campaigns which will prolong the presence of wells and platforms in the Gulf which increases the potential decommissioning liability that is present in the event the current owner defaults or files for bankruptcy protection. In short, the Proposed Rule ***increases*** the exposure to the taxpayer.

8. The Proposed Rule Fails to Conduct a Cost-Benefit Analysis and Fails to Recognize the Devastating Impacts of the Rule

The Proposed Rule, if implemented, would have a devastating impact on independent oil and gas companies operating in the GOM. The Proposed Rule would:

- Decrease oil and gas production in the GOM
- Destroy high-paying jobs, mostly in the disadvantaged Gulf South
- Decrease revenue paid to the U.S. Treasury, taking away funding available for conservation and coastal restoration programs
- Decrease the country's energy and national security at a time when geopolitical events are driving up energy costs and the price at the pump
- Increase overall emissions and degrade the environment by turning away from the cleanest barrels in the world – barrels produced in the GOM – and instead, importing barrels needed to meet the country's demand from countries with lower environmental standards and with interests often hostile to the country
- Reduce competition in the offshore oil and gas industry, leaving the basin only to large, international major oil and gas companies, which could lead to higher energy prices and a more volatile and uncertain future for producing oil and gas in the GOM
- Weaken an already tenuous supply chain that supports the offshore oil and gas industry (shipyards, steel manufacturers, rig owners, equipment manufacturers, construction

[36] This presumes that only "sole risk" properties are subject to supplemental bonding, as described *infra* at Section 13.

workers and welders, seaman and vessel providers, aviation contractors, etc.), which could *permanently* harm the industry's ability to continue production[37]

- Disproportionately harm small businesses.

The Proposed Rule recognizes nearly all of these dire consequences:

> This action, which is a significant regulatory action under Executive Order 12866 is likely to have a ***significant effect on the supply, distribution, and use of energy.***
>
> ***
>
> BOEM recognizes that this action may 'adversely affect[] ***in a material way the productivity, competition, or prices in the energy sector***.' By increasing industry compliance costs, the regulations could adversely make the U.S. offshore oil and gas sector less attractive than regions with lower operating costs. ***Additionally, increased costs may depress the value of offshore assets or cause continuing production to become uneconomic sooner, leading to shorter-than-otherwise useful life and potentially a loss of production.***

88 Fed. Reg. at 42168 (emphasis added).

While these consequences were identified by the Proposed Rule, ***the costs of these consequences were not evaluated nor compared to the benefits the Proposed Rule would provide, as required by Executive Order 12866.***[38] The Executive Order provides:

> In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.
>
> ***
>
> Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, ***propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs***.

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[37] For example, in 2014, there were 36 active jack-up drilling rigs in the GOM; today, there are only 6 active jack-up drilling rigs. *See* IHS Petrodata.

[38] *See Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1218–19 (D.C. Cir. 2004) ("[T]he model disregarded the effects of 'time on task' because, the agency said, it did not have sufficient data on the magnitude of such effects. The mere fact that the magnitude of time-on-task effects is *uncertain* is no justification for *disregarding* the effect entirely. . .. In light of this dubious assumption, the agency's cost-benefit analysis is questionable . . ..").

Executive Order 12866, Section 1 and Section 1(6) (emphasis added).

An informed evaluation of the Proposed Rule is not possible without a robust cost-benefit analysis, which is completely lacking in the Proposed Rule. The Proposed Rule also distorts and inflates the benefits of the proposed regulation by ignoring the joint and several liability framework. Given the effectiveness of joint and several liability in protecting the taxpayer, it is hard to justify the proposed regulation even if the Proposed Rule carried only de minimis costs given the far-reaching negative consequences the regulation would create.

If BOEM had conducted the required cost-benefit analysis in the Proposed Rule, it would have revealed the substantial economic consequences that the Proposed Rule will create. In July 2023, Opportune LLP conducted a cost-benefit analysis of the Proposed Rule and determined that the Proposed Rule, if implemented, would, over a 10-year period:

- Result in a decrease in production of approximately 55 million barrels of oil equivalent from the GOM

- Destroy 36,000 high paying jobs, mostly in disadvantaged areas

- Remove $573 million in royalties that would otherwise be paid to the U.S. Treasury

- Cause a decline in Gross Domestic Product (GDP) (particularly in the Gulf Coast states) of as much as $9.9 billion[39]

And this only captures a few of the easily quantifiable consequences and does *not* include an evaluation of the degradation of the country's energy and national security or the increase in emissions that would take place with the importation of oil from countries that do not have the same environmental standards as GOM production.

Moreover, while Executive Order 12866 does not create a private right of action, this does not insulate BOEM's actions from judicial review under the Administrative Procedure Act. When, as here, "an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable" under the APA.[40] It is well settled that courts do not "tolerate rules based on arbitrary and capricious cost-benefit analyses."[41] And an

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[39] *A Cost-Benefit Analysis of Increased OCS Bonding*, Opportune LLP (July 2023), attached hereto as <u>Exhibit A</u>.

[40] *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *Cigar Ass'n of Am. v. FDA*, 480 F. Supp. 3d 256, 275 (D.D.C. 2020) (rejecting agency's "contention that because it undertook the cost-benefit analysis pursuant to Executive Orders 12866 and 13563, its reasoning is unreviewable under the APA," because an agency's "analysis is reviewable under the APA whenever the 'government relies on' the analysis in its final rule" (quoting *Council of Parent Att'ys & Advocs., Inc. v. DeVos*, 365 F. Supp. 3d 28, 54 n.11 (D.D.C. 2019))).

[41] *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007); *see also Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (vacating regulatory provisions because the cost-benefit analysis supporting them was based on an unexplained methodology).

agency rule will normally be "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency."[42] Accordingly, BOEM's failure to engage in a robust cost-benefit analysis is arbitrary and capricious in violation of the APA.[43]

In sum, the Proposed Rule imposes extensive costs and consequences on the offshore oil and gas industry and the country. These costs must be analyzed and compared to the benefits that the Proposed Rule would bring. Had BOEM engaged in a true cost-benefit analysis for the Proposed Rule, BOEM simply would not have concluded that the Proposed Rule is justified.

9. The Proposed Rule Exceeds BOEM's Authority

The Proposed Rule exceeds BOEM's statutory authority pursuant to the "Major Questions Doctrine," which the U.S. Supreme Court recently clarified and applied in *West Virginia v. EPA*. There, the Court stated that this doctrine "teaches that there are 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." And in that case, the Court concluded that EPA's promulgated rule would have had such substantial effects on the U.S. energy economy that the Court required "a clear statement . . . to conclude that Congress intended to delegate authority of this breadth to regulate a fundamental sector of the economy." Finding no such clear delegation from Congress, the Court struck down the EPA's rule. Similarly, here, the statutes BOEM cites in support of the Proposed Rule, 43 U.S.C. §§ 1334(a), 1334(b), and 1338a, simply authorize BOEM to enact rules in furtherance of leasing of the outer Continental Shelf. They do ***not*** delegate to BOEM the ability to radically alter the decommissioning process and require unprecedented financial assurance, and thereby impose significant burdens upon the U.S. economy and energy industry. BOEM's Proposed Rule thus threatens impacts of great "economic and political significance" such that a clear delegation of authority from Congress is required. Given the substantial financial, economic and national security impacts of the Proposed Rule and that Congress has not delegated that authority to BOEM, the Proposed Rule is improper and should be withdrawn.

[42] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[43] *See Sorenson Commc'ns, Inc. v. FCC*, 755 F.3d 702, 708–09 (D.C. Cir. 2014) ("Though an agency's predictive judgments about the likely economic effects of a rule are entitled to deference, deference to such judgments must be based on some logic and evidence, not sheer speculation. . .. As the Commission failed to articulate a satisfactory explanation for its action, we deem the promulgation of the . . . Rule arbitrary and capricious." (citations and quotation marks omitted)).

10. The Proposed Rule is Unworkable: The Surety Market Will Not Support the Additional Bonding

Based on our preliminary discussions with the international surety market, we have been informed that the market ***does not have capacity*** for an additional $9.2 million in bonding. The surety market has sustained significant losses over the last several years and the surety companies are increasingly reluctant to maintain the ***current*** level of bonding, with several surety companies having recently left the offshore oil and gas market entirely. The constraint is not pricing but simply a lack of capacity to issue an additional $9.2 million in bonds. Through our conversations with the international surety market, we also understand that BOEM did not engage with the surety market, despite the surety companies' effort to create a dialogue with BOEM on the practicality of any new bonding requirements. Such a dialogue would have revealed that bonding requirements imposed by the Proposed Rule simply cannot be implemented by the already struggling surety market.

In the Proposed Rule, BOEM assumes that an increase in pricing will provide adequate incentive for the surety market to add capacity to the bonding market. This is untrue. While an increase in pricing typically increases supply in most markets, this assumption does not apply to the surety market. Unlike the international insurance market, sureties ***do not pool risk***. In determining whether to write bonds and at what cost, sureties do not account for a pool of risks where liability is spread across underwriters and claimants. Instead, sureties underwrite each specific risk based on a zero-loss framework. Consequently, the surety industry will likely not provide the additional bonds without 100% cash collateral being posted by the lessee. Given that cash collateral is not unlimited and that the costs of collateral are significantly higher than the 1.75% assumed by BOEM[44], it is highly unlikely that the surety market has additional capacity, and it is even more unlikely that lessees will be able to source the necessary collateral to induce sureties to write new bonds totaling $9.2 billion. Even if both of those hurdles were cleared, the cost of both the collateral and the bonds would dwarf the actual risk to the taxpayer and would substantially erode the underlying economics of offshore development, mostly to the detriment of small businesses.

11. The Proposed Rule Should Utilize Lessee's Calculation of Decommissioning Liability for Deep Water Operations and Utilize P50 for Shallow Water Operations

Currently, for purposes of supplemental bonding, BSEE uses a proprietary probabilistic algorithm to determine decommissioning liability based on current and historical decommissioning data from actual decommissioning projects. While the probabilistic model generally works well in shallow waters on the shelf (1,000 feet and less) where BSEE has the benefit of relying on substantial data amassed over many years, the model does not work well in deep water (1,000 feet and above) where BSEE has substantially less database to rely upon. In short, BSEE existing probabilistic method of calculating decommissioning liability should be retained for shallow water but a more accurate system of calculating decommissioning in the deep water is needed.

[44] See note 33 *infra.*

Given a deep water lessee's intimate knowledge of its wells and infrastructure, for calculating deep water decommissioning liability, BSEE should use the lessee's audited asset retirement obligation ("***ARO***") calculation made in accordance with Generally Accepted Accounting Principles ("***GAAP***"). As BOEM concludes in the Proposed Rule, a lessee's financial statements made in accordance with GAAP are the most reliable documentation of a lessee's financial status:

> BOEM has concluded that audited financial statements, prepared in accordance with Generally Accepted Accounting Principles (GAAP) and accompanied by an auditor's certificate, provide an accurate representation of the company's economic position and operational performance.

88 Fed. Reg. at 42143.

There are numerous instances across the federal regulatory landscape where audited financial statements prepared in accordance with GAAP are relied upon by the agencies.[45] Lessees are also in the better position to understand the current status of wells, the unique characteristics of their deep water assets, and idiosyncratic nature of their infrastructure, which may impact the decommissioning estimates. In short, the bespoke estimates made by lessees in accordance with GAAP and audited by independent third-party audit firms are the best source for estimating decommissioning liability in the deep water.

In the shallow water, the vast database makes viable a probabilistic estimate methodology. Under such a model BSEE should utilize the P50 value for establishing the decommissioning estimate for purposes of supplemental bonding. To be clear, while the P50 value means that the actual decommissioning costs will be lower/higher than the value 50% of the time, the P50 value covers the entire amount of the total decommissioning liability scope across properties. Accordingly, P50 adequately and accurately captures a lessee's total decommissioning liability.

For both shallow water and deep water, the Proposed Rule should include an informal adjudication procedure (short of an appeal to the Interior Board of Land Appeals ("***IBLA***"), which requires the posting of an appeal bond pursuant to the Proposed Rule) in the event of a dispute between the lessee and BOEM on the estimated decommissioning liability. Because BOEM relies on BSEE decommissioning estimates, the informal adjudication process for shallow water operations should involve both BOEM and BSEE. The adjudication process should include an expeditious process based on the weight of the evidence presented by the lessee. Following the informal appeal, the lessees right to file an appeal with the IBLA should be preserved.

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[45] *See e.g.,* Royalty Valuation Regulations, 81 Fed. Reg. 43338 (July 1, 2016)(30 CFR § 1206.161(i)(1)("You must determine the processing allowance for each gas plant product based on you or your affiliate's reasonable and actual cost of processing the gas. You must base your allocation of costs to each gas plant production upon generally accepted accounting principles."); Net Profit Share Regulations, *Id.* (30 CFR § 1220.032)("Inventory shall be valued with any generally accepted accounting method used by the lessee to value the same material for financial or tax reporting purposes, provided that the method is consistently applied throughout the life of the material.").

12. BOEM Should Adopt a More Appropriate Credit Rating Threshold

BOEM has invited comments on the appropriateness of relying on lessee and grant holder credit ratings, including whether BOEM has proposed an appropriate credit rating threshold of BBB- (for S&P). The GEA believes that the Proposed Rule should be amended to lower the Tier 1 threshold to BB- (for S&P) as BOEM's analysis erroneously assumes a zero-recovery rate on any default, which materially overestimates the risk to the taxpayer.

S&P Global Ratings generally record a default on the first occurrence of payment default on any financial obligation. A debtor is considered in default unless Standard & Poor's believes that curing payments will be made within five business days of the due date in the absence of a stated grace period, or within the earlier of the stated grace period or 30 calendar days.

If a debtor is in default, the rating agency may also assess recovery, which is the likelihood that investors will recoup the unpaid portion of their principal in the event of default. The concept of default and recovery are separate and distinct. Default refers to both the timeliness of ongoing debt service, i.e., interest and amortization of principal while recovery refers to the recovery of principal upon a default.

BOEM materially overestimated the recovery risk to the taxpayer by assuming all defaults result in a zero-recovery rate for the taxpayer. BOEM cited one-year and cumulative five-year default rates for BB- ratings of 1.21% and 9.03% (versus 0.24% and 2.63% for BBB-), respectively, but failed to consider historical recovery rates. A company default does not automatically mean a total loss, which BOEM erroneously assumes in its analysis. Predecessors in the chain-of-title have resulted in an OCS recovery rate on decommissioning liability of almost 100%, with minimal loss to the taxpayer. As noted above, only 0.4% of the $7.5 billion in offshore decommissioning liabilities related to OCS bankruptcies since 2009 were not recovered, ***all of which were associated with "sole liability" properties***.

Additionally, the market capitalization for public BB- to BB+ companies in the offshore industry is nearly $200 billion. That amount of value would suggest significant credit worthiness when compared to the amount of potential decommissioning liability attributable to each company.

13. Joint Trade Proposal

We agree that the taxpayer should never be responsible for decommissioning liability. But any protective regulation should be calibrated for the actual exposure to the taxpayer and should rely on the existing regulatory framework that the offshore industry has operated under since 1953. Indeed, the Department of Interior has recognized the need for a risk-based approach for decades. In a 1993 rulemaking on bonding, the Minerals Management Service (BOEM's predecessor) correctly identified the appropriate underlying objective for bonding regulations:

> The objective of this rulemaking is to identify the appropriate level(s) of bond coverage required of OCS leases. The level should reflect an ***appropriate balance*** between ***encouraging the maximum economic recovery of natural gas and oil from Federal offshore leases*** while providing the Federal Government with an ***adequate*** level of protection in the event lessees default in their obligations…

58 Fed. Reg. 45255, 45256 (emphasis added).

We propose a bonding program that strikes this appropriate balance. Accordingly, and similar to the approach taken in the 2020 Proposed Rule, in evaluating the need for supplemental bonding, the GEA proposes the following:

- BOEM should consider the creditworthiness of all current ***and*** former owners.

- Supplemental bonds should ***not*** be required for properties where at least one current or former owner carries a BB- for S&P and Ba3 for Moody's (the credit rating threshold for bonding included in the 2020 Proposed Rule)

- BOEM should consider the existence of private bonding in place for the properties in evaluating the need for supplemental bonding, and any supplemental bonding should be reduced by the amount of private bonding on a *pro tanto* basis.

- Any new supplemental bonding issued following the Proposed Rule becoming final should be callable by BOEM ***only if***: (i) BSEE has issued decommissioning orders to all current and former owners, ***and*** (ii) all current and former owners fail to perform or pay for the decommissioning. The new supplemental bonds should be the taxpayers ***last*** line of defense. And they should protect the taxpayer, not the major oil and gas companies that sold properties to the independents.

This approach would achieve the goal of protecting the taxpayer while, at the same time, avoiding all the devastating consequences discussed *infra* at Section 8. The approach is also completely risk-based and ensures that the limited amount of supplemental bonding available in the market is targeted to the actual risk to the taxpayer. Our proposal also strikes the balance of encouraging the maximum recovery of oil and gas from the GOM while still providing appropriate protection to the taxpayer.

The latter point in the proposal accomplishes a key objective: bonds that are callable only ***after*** predecessor default are available in the surety market. Based on our preliminary discussions with the international surety market, bonds that are callable ***only after*** current and former owners' default are likely available in the market at manageable pricing.[46] The taxpayer is equally protected if the bonds are callable before predecessor default or after predecessor default. And, as stated

[46] Clearly, additional discussions with the surety market are required to confirm these preliminary discussions.

infra at Section 10, bonds that can be called immediately upon the current owner's default are not available in the surety market.[47]

In the Proposed Rule, BOEM explained its goal in the rule:

> BOEM's goal for its financial assurance program continues to be the protection of the American taxpayers from exposure to financial loss associated with OCS development, while ensuring that the financial assurance program does not detrimentally affect offshore investment or position American offshore exploration and production companies at a competitive disadvantage.

88 Fed. Reg. 42144.

Our proposal accomplishes ***all*** these goals, whereas the Proposed Rule would: (i) detrimentally affect offshore investment, and (ii) position American offshore exploration and production companies at a competitive disadvantage.

14. Conclusion

In sum, the Proposed Rule:

- Is unnecessary in light of the joint and several liability regime and lacking justification
- Is deeply flawed and mis-calibrated to the actual risk to American taxpayers
- Is unworkable given the fact that the additional bonding required by the rule is not and will not be available, and
- Exceeds agency authority and violates the Administrative Procedure Act

Accordingly, BOEM should withdraw the Proposed Rule and introduce a new proposed rule consistent with the comments contained herein and similar to the 2020 Proposed Rule.

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[47] The Proposed Rule reasoned that omitting consideration of predecessors in determining the need for supplemental bonding "simplifies potential administrative demands" because it obviates the need to track new "sole liability" wells and components. See 88 Fed. Reg. at 42141. (Predecessors are not responsible for wells drilled and infrastructure installed following the assignment of the property. *See* 30 CFR § 250.1702). However, BOEM must approve all assignments (*See* 30 CFR § 585.408) and the assignments are tracked and available to the public (*See* BOEM Serial Register database: Serial Register Page (boem.gov)) and BSEE must approve all new wells, pipelines and infrastructure. (*See* 30 CFR § 250.102) BOEM's regulations allow BOEM to request supplemental bonding when each new well is drilled or infrastructure is installed. Accordingly, BOEM could easily track potentially "sole liability" components utilizing its existing data and, if appropriate, request supplemental bonding when a new well is drilled or when new infrastructure installed.[47] In fact, BOEM is already doing this.

Respectfully Submitted,

Kevin Bruce
Executive Director
Gulf Energy Alliance

Daniel Naatz
Chief Operating Officer, Executive Vice President & Corporate Secretary
Independent Petroleum Association of America

Tim Stewart
President
United States Oil & Gas Association

Mike Moncla
President
Louisiana Oil & Gas Association

Patrick Sullivan
President
Mississippi Energy Institute
Southeast Oil & Gas Association