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Re: API and LMOGA Comments on Proposed Risk Management, Financial Assurance and Loss Prevention Rule, 85 Fed. Reg. 65,904 (October 16, 2020), RIN 1082-AA02, Docket ID: BOEM–2018–0033

Dear Mr. Meffert and Ms. Odom:

The American Petroleum Institute ("API") and the Louisiana Mid-Continent Oil and Gas Association ("LMOGA") appreciate the opportunity to submit comments on the joint Bureau of Safety and Environmental Enforcement ("BSEE") and Bureau of Ocean Energy Management ("BOEM") proposed rule entitled "Risk Management, Financial Assurance and Loss Prevention," 85 Fed. Reg. 65,904 (October 16, 2020) ("Proposed Rule"). API is the only national trade association representing all facets of the oil and natural gas industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's approximately 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of Americans. LMOGA, founded in 1923, is a trade association exclusively representing all sectors of the oil and gas industry operating in Louisiana and the Gulf of Mexico. LMOGA serves exploration and production, refining, transportation, marketing and midstream companies as well as other firms in the fields of law, engineering, environment, financing and government relations. LMOGA's mission is to promote and represent the oil and gas industry operating in Louisiana and the Gulf of Mexico by extending representation of its members in the Louisiana Legislature,

state and federal regulatory agencies, the Louisiana congressional delegation, the media, and the general public.

API, LMOGA, and their members support BSEE's and BOEM's efforts to adopt regulations ensuring that lessees of Outer Continental Shelf ("OCS") oil and gas leases, and holders of OCS right-of-use and easement ("RUE") and right-of-way ("ROW") grants, properly perform all operational lease and grant duties, including their obligation to decommission their OCS wells, pipelines, and facilities. API, LMOGA, and their members also share the agencies' goal to protect U.S. taxpayers from the burden of any default of those OCS lease and grant decommissioning obligations. Many API and LMOGA members have a keen interest in the Proposed Rule because they currently hold interests in OCS leases and grants, and they are also predecessor interest owners in other OCS properties.

Certain of BSEE's and BOEM's proposed amendments are positive changes to the decommissioning and financial assurance regulations administered by those agencies, and API supports those changes. These changes include the concept of reverse chronological order for predecessor decommissioning responsibility, simplified financial tests for demanding additional financial assurance, and increased flexibility for third-party guarantees for financial assurance. Unfortunately, however, many portions of the Proposed Rule fail its stated objectives and the agencies' duties to the industry it regulates and U.S. taxpayers. Notwithstanding the Proposed Rule's intent to streamline BOEM's financial evaluation criteria, certain of its provisions could create greater exposure for U.S. taxpayers by reducing overall financial assurance. In particular, the Proposed Rule excuses some current OCS interest owners' financial assurance and primary decommissioning responsibilities and shifts them to their predecessors in interest. This outcome is unacceptable to API and LMOGA members and should be unacceptable to other OCS stakeholders, including the agencies and especially the U.S. taxpayer.

While the Proposed Rule includes some very good additions, portions of it substantially depart from longstanding regulatory standards and have significant and far-reaching financial consequences. The Proposed Rule is also incomplete because it leaves unchanged and fails to harmonize other currently applicable regulatory provisions.

Accordingly, API and LMOGA respectfully request that BSEE and BOEM consider these comments and adopt a rule that determines financial assurance by looking to the financial capabilities of current owners and the remaining value of the lease(s) and grant(s)--instead of relying on predecessors' financial wherewithal--and makes clear that the agencies will continue to diligently pursue current interest holders for decommissioning in the first instance before looking to predecessors.

INTRODUCTION

BSEE and BOEM have related, but different, responsibilities for "non-monetary" OCS lease obligations such as decommissioning. Since the reorganization of the former Minerals Management Service ("MMS") in 2010, BSEE is the agency responsible for regulating the operational requirements for OCS leases and grants, including decommissioning. *See* Department of the Interior Manual ("DM"), 219 DM 1.1.A., and 30 C.F.R. chapter II. BOEM's delegated responsibilities for OCS leases do not include directly regulating operations or

estimating decommissioning liabilities, but relate to, among other matters, lease and grant issuance, assignment approvals, and financial responsibilities for OCS lessees and grant holders. 218 DM 1.1.A., and 30 C.F.R. chapter V.

As the Gulf of Mexico ("GOM") continues to mature and decommissioning increases,[1] BOEM in recent years has engaged in several "informal" efforts, through Notices to Lessees and other guidance documents, to address the many complex issues involving decommissioning liabilities and financial assurance for OCS leases. *See, e.g.*, NTL No. 2016–N01 (Sept. 12, 2016). These efforts created implementation uncertainty, did not allow for stakeholder input, and, in some instances, were legally problematic for the Department, as recognized by not only the current Administration but former Administrations as well. In response, API and LMOGA, other industry representatives, and non-industry stakeholders[2] have urged BSEE and BOEM to instead address these difficult issues comprehensively through notice and comment rulemaking. As BSEE and BOEM have recognized, notice and comment rulemaking is the appropriate procedure for regulatory agencies to use when creating, amending, or repealing substantive responsibilities that fall on the regulated community, which is clearly the case in this instance.

API and LMOGA therefore commend the agencies for their collective efforts to undertake a rulemaking addressing these complicated issues. However, API and LMOGA generally disagree with the agencies' approach of reducing financial assurance and decommissioning liability burdens for current OCS lease and grant interest holders and correspondingly shifting these burdens to entities that formerly held those interests. The Proposed Rule excuses some current lessees' and grant holders' existing obligations to post adequate financial assurance for their accrued decommissioning liability. It thus foreshadows the potential for agency demands of predecessors for decommissioning, while simultaneously enabling the release of already-posted financial security. It is both unreasonable and legally questionable to retroactively impose increased burdens on entities that no longer have any privity with the federal government through relying on the financial wherewithal of predecessor interest owners instead of current interest owners, and through arguably expanded imposition of joint and several liability to predecessors, which effectively may obligate them to undertake decommissioning in lieu of current lessees in the first instance.

For decades, BOEM has required the current interest owners and their operators to provide adequate bonding or other financial security as a prerequisite to authorizing their operations on OCS leases and grants. BOEM likewise has consistently required assignees of lease or grant interests to assume all duties to the lessor under the lease terms and regulations. Similarly, BSEE has always imposed its operational requirements, including the obligation to decommission, on current lease and grant holders and their operators in the first instance, and has looked to predecessors only when those current entities failed to perform. The Proposed Rule could upend this long-established paradigm and operate to shift much of these financial and operational burdens to prior lease and grant interest owners, many of whom long ago assigned

[1] BSEE currently estimates the total OCS decommissioning cost of current assets to be $38 billion, the majority of which is in the GOM OCS. *See* https://www.data.bsee.gov/Leasing/DecomCostEst/Default.aspx.

[2] https://www.federalregister.gov/documents/2017/05/03/2017-09087/implementing-an-america-first-offshore-energy-strategy. *See* Sec. 6 of Executive Order 13795.

away their interests with agency approval and in reliance on the regulatory regime existing at the time of their divestiture.

At its core, the Proposed Rule has two key deficiencies. First, BOEM's proposed changes (particularly to § 556.901(d)) significantly reduce or eliminate the responsibility of current lease and grant interest owners to meet financial assurance requirements sufficient to undertake the decommissioning required by the terms of their leases and grants. Instead, the Proposed Rule effectively converts predecessors in the chain of title into involuntary sureties for less financially capable current interest owners. Second, BSEE's proposed changes (particularly to existing § 250.1701 and new § 250.1708) could be interpreted to enable BSEE to demand performance of decommissioning by predecessors in lieu of all of the current lessees or grant owners in the first instance. At a minimum, the Proposed Rule creates confusion whether all the current lessees or grant owners still must first "fail to perform" before BSEE issues demands to predecessors, and, if so, what that trigger now entails. That is because BSEE's proposed insertion of unconditional "joint and several liability" among all current *and* predecessor interest holders may be interpreted to control over the unchanged BOEM provisions in §§ 556.710 and 556.805 and the Proposed Rule's preamble text retaining the condition precedent of "the current owners of a lease or grant fail to [perform]" or "default by the current lessee." 85 Fed. Reg. at 65,904, 65,907. As among predecessors, imposing decommissioning responsibility in "reverse chronological order" is the proper approach but, as structured in the Proposed Rule, appears illusory and voluntary for BSEE. The net result is to improperly shift significant burdens to predecessor interest owners that ended their lease or grant interests oftentimes years, or even decades, ago. The agencies' new direction also enables certain lesser-capitalized and operationally less-qualified owners and operators to obtain and continue to operate OCS lease and grant interests without adequate planning for future decommissioning, thereby needlessly increasing threats of default.

SECTION-BY-SECTION COMMENTS

The comments below follow the same organization of sections as in the Proposed Rule. API's and LMOGA's comments on the Proposed Rule are guided by four overarching principles, which BOEM and BSEE should share:

1. The OCS should remain a viable and attractive investment option through a responsible, balanced, predictable, and equitable financial assurance program.

2. Companies that obtain offshore leases should have the financial capacity to address, on a realistic timeline, all obligations legally assumed or created.

3. The financial strength of former lease or grant interest owners is not a substitute for financial assurance provided by current owners for operational and financial risks.

4. The financial assurance program should be risk-based and focused on offshore properties late in their economic life cycle. Implementation should be phased-in, allowing companies to successfully comply with any modification to the existing financial assurance program.

For ease of reading, we refer to API and LMOGA below collectively as "API."

A. BSEE Proposed 30 C.F.R. § 250.1701—"Who must meet the decommissioning obligations in this subpart?"

BSEE's proposed modification of § 250.1701(a) provides: "Lessees, owners of operating rights, *and their predecessors* are *jointly and severally liable* for meeting decommissioning obligations . . . ." (Emphasis added.) By including predecessors, and specifically extending the "joint and several" liability paradigm to predecessor interest owners who no longer hold a lease interest, this provision standing alone could be interpreted by BSEE to require *from the outset* that *any* of these parties, including one of the predecessor interest owners, perform any or all outstanding decommissioning operations on a lease or grant—not just the current interest owners. "Joint and several liability" is a term of art that should not be added without understanding its full implications on the entire set of regulations.[3]

Therefore, BSEE should modify proposed § 250.1701(a) to avoid any interpretation that BSEE may demand decommissioning from predecessors before all current interest owners fail their duty to perform. Under longstanding regulatory standards and practice, BSEE has required current interest owners to first perform decommissioning, and only pursued predecessors when all current interest owners have defaulted on their obligations. If proposed § 250.1701(a) means that BSEE could retroactively shift immediate decommissioning liability to predecessor interest owners, such a result is misguided from a policy perspective and legally indefensible as explained in greater detail throughout this letter. The proposed changes also create practical implementation problems given that no predecessor can be liable for decommissioning wells, pipelines, or facilities installed post-assignment, a limitation repeatedly recognized in the Proposed Rule yet seemingly overlooked by its financial assurance and enforcement framework.

1. <u>BSEE Should Confirm Current Interest Owners' Primary Responsibility for Decommissioning.</u>

BSEE should amend its proposal to confirm that current interest owners are primarily responsible for decommissioning the lease or grant, and predecessors incur a duty for their liabilities only if and when all the current interest owners fail to perform. Specifically, API proposes that BSEE insert a new subsection (d) stating that:

> BSEE may require former lease or grant interest owners to undertake decommissioning obligations that accrued under § 250.1702 while they held their interest in the lease or grant only if all current (or for an expired lease or grant, the most recent) lease or grant interest owners fail to perform their decommissioning obligations under this subpart for platforms, wells, pipelines, and other facilities. The procedures for BSEE to

[3] *See, e.g.*, *United States v. Fanning*, No. 00-5066, 2000 WL 1059327 at *1 (10th Cir. Aug. 2, 2000) ("By definition, being jointly and severally liable means that each individual remains responsible for payment of the entire liability, so long as any part is unpaid.") (citation omitted).

> enforce accrued decommissioning obligations against predecessors are set forth in § 250.1708.

Moreover, API suggests that BSEE renumber subsection (d) in the Proposed Rule as subsection (e), and modify it to add the following text shown in underline:

> In this subpart, the terms "you" or "I" refer to lessees and owners of operating rights, including their predecessors if they become required to undertake decommissioning under subsection (d), as to facilities installed under the authority of a lease; to pipeline right-of-way grant holders, including their predecessors if they become required to undertake decommissioning under subsection (d), as to facilities installed under the authority of a pipeline right-of-way grant; and to right-of-use and easement grant holders, including their predecessors if they become required to undertake decommissioning under subsection (d), such as former lessees of the parcel, as to facilities constructed, modified, or maintained under the authority of the right-of-use and easement grant.

These suggested changes would avoid inconsistencies between the Proposed Rule and existing regulations relating to predecessor requirements that are unchanged by the Proposed Rule. For decades, BSEE has recognized that predecessor liability is conditioned on the current interest owners' (which include the assignees of prior interest owners) failure to perform in several proposed or existing regulations. For example, in § 250.1708(a)(2) of the Proposed Rule, BSEE would pursue a predecessor for decommissioning when the assignee has "subsequently defaulted." In addition, the current BSEE definition of "lessee" in 30 C.F.R. § 250.105, relates only to entities that currently have privity of contract with the federal government lessor pursuant to a lease:

> *Lessee* means a person who has entered into a lease with the United States to explore for, develop, and produce the leased minerals. The term lessee also includes the BOEM-approved *assignee* of the lease, and the owner or the BOEM-approved *assignee* of operating rights for the lease.

(Emphasis of "assignee" added.)

Consistently, BOEM regulations provide that predecessor record title and operating rights interest owners become responsible for decommissioning liability only *if* the existing interest owners fail in their duty to perform operations—a necessary condition precedent. Existing 30 C.F.R. § 556.710 provides that "BOEM or BSEE may require you [an assignor of record title or predecessor] to bring the lease into compliance *if* your assignee or any subsequent assignee fails to perform any obligation under the lease . . . ." (Emphasis added.) Likewise, for operating rights owners, § 556.805 provides that "BOEM or BSEE may require the assignor to bring the lease into compliance *if* the assignee or any subsequent assignee fails to perform any obligation under the lease. . . ." (Emphasis added.) Also supporting that BOEM's duties fall in the first instance on current interest owners is BOEM's definition of "lessee" in 30 C.F.R. § 556.105,

which mirrors BSEE's corresponding definition of "lessee" quoted above. Finally, 30 C.F.R. § 556.710 states that "[u]ntil there is a BOEM-approved assignment of interest, you, as the assignor remain liable for the performance of all lease obligations that accrued while you held record title interest, until all such obligations are fulfilled." The corollary to this statement is that once BOEM approves the assignment, that performance obligation shifts to the assignee and no longer remains with the assignor in the first instance.

The agencies acknowledge the existing regulatory structure in the preamble to the Proposed Rule: "Those regulations [§§ 556.710 and 556.805] also provide that BOEM and BSEE can require such assignor predecessors to perform those obligations *if* a subsequent assignee fails to perform." 85 Fed. Reg. at 65,908 (emphasis added). Elsewhere in the preamble the agencies similarly and repeatedly place primary emphasis on where current interest owners "fail to perform" or default." However, any such moderating language in the preamble cannot alter the operative regulatory terms as written in the Proposed Rule.

The same primary liability applies to existing holders of a ROW. 30 C.F.R. § 1701(b). The reference to joint and several liability in current §§ 250.1701(a) and (b), which means that BSEE may require all, or any one, of those current entities to perform required decommissioning, also is among only those existing parties.

Moreover, API notes that the foundation of the Proposed Rule appears to be that the joint and several liability framework has always been in place in the OCS. But that presumption is incorrect. During the past 50 years, DOI has revised its lease language, promulgated new regulations, and issued numerous interpretations, guidance, and policies. For example, DOI modified its regulations on liability in 1997 and 2016. However, before adopting the 1997 regulatory revisions, it issued an interpretative communication regarding then existing regulations in 1988,[4] and again in 1989,[5] that specifically addressed the matter of retained assignor liability. DOI therein explained that the predecessor agency to BOEM and BSEE, the MMS, would not proceed against an assignor where its assignee failed to perform decommissioning obligations.

These historical agency positions established expectations upon which the parties at the time reasonably relied to inform their transactions. Therefore, BSEE should adopt the regulatory clarifications that API suggests in order to provide consistency among the agencies' regulations. Specifically, BSEE's regulations should eliminate any uncertainty that existing interest owners have the duty in the first instance to decommission their leases and grants, and confirm that predecessors have no decommissioning responsibilities unless all the current interest owners default on their duties, and then only to the extent those unperformed decommissioning

[4] June 6, 1988 Letter from MMS Director to Amoco Production Company ("It is our position that if the assignee is unable to fulfill its obligations to plug and abandon wells and remove facilities, that Interior will not proceed against the original lessee-assignor to perform those functions.")

[5] November 3, 1999 Memorandum re "Responsibility of Assignors and Assignees" from the MMS Associate Director for Offshore Minerals Management to the Regional Director, Gulf of Mexico Region ("Once the Secretary's designee unconditionally approves the assignment of a lease, the assignee must be looked to for the fulfillment of 'all' obligations under the lease. Thus, MMS faces the same situation when a subsequent lessee (assignee) defaults in an obligation as it would face if the original lessee defaults in an obligation.")

responsibilities accrued to the predecessor during the predecessor's ownership in the lease or grant.

2. Unqualified Joint and Several Liability Among Current and Predecessor Interest Owners Would Be Legally Unsustainable.

If BSEE's Proposed Rule seeks to make current interest owners and predecessors immediately and equally responsible for decommissioning, that changed paradigm is facially inconsistent with the existing regulatory structure and impermissibly retroactive in its effect on predecessors.

As indicated above, existing BSEE and BOEM regulations collectively underscore the primary duty of the current lease interest owners, and not any prior holders or assignors of those interests who no longer are lessees or operating rights owners, to perform decommissioning and other non-monetary lease obligations. BSEE's proposed changes to § 250.1701(a) add uncertainty and internal inconsistences to this well-understood regulatory system. It is particularly concerning to API and its members that these changes would be retroactive in their effect on the predecessor interest owners. At the time former record title and operating rights owners assigned their interests, BSEE regulations imposed the primary decommissioning obligation *only* on the current interest owners or assignees, and agency regulations described above likewise imposed a decommissioning duty on the predecessors only if the current interest owners or assignees failed to perform. If the clear, initial duty of current interest owners to decommission were eliminated, and predecessor interest owners are made equally liable to perform decommissioning through joint and several liability, the Proposed Rule would retroactively impose increased regulatory obligations on predecessor parties who assigned away any lease interest years, if not decades, earlier. This retroactive application would be particularly suspect because at the time assignors of record title and operating rights interests assigned away their interests with BOEM approval (30 C.F.R. §§ 556.700(a) and 556.800, respectively), they justifiably relied on the above-described existing BSEE and BOEM rules that imposed decommissioning burdens in the first instance on their assignees, or subsequent assignees. Their liability only could arise if their assignees or subsequent assignees failed to perform their duties on those decommissioning obligations that accrued to the assignor during the assignor's ownership in the lease or grant.

It is well-established that retroactive rulemaking is legally questionable. Imposing unanticipated new regulatory obligations upon predecessors that divested their interests long ago violates these core principles of law and good governance.

Relatedly, to properly protect the U.S. taxpayer, BSEE should clarify in its regulations that any current interest owner (or predecessor, assuming implementation of RCO (defined below)) that defaults on its decommissioning obligations following an order to perform from BSEE does not thereby evade financial liability for the decommissioning work once performed.

3. Immediate Liability of Predecessors Would Be Operationally Problematic.

It would also create operational complications for BSEE to make a predecessor equally liable with the current lease interest owners to undertake decommissioning, and not pursue its

standard practice to first enforce the decommissioning responsibility against the current interest owners and their designated operator per the requirements of BSEE's existing regulations. Even if BSEE claims that as a matter of practice it will continue to first pursue the existing lease interest owners and their operator, that current policy choice is subject to change at the discretion of the agency. Of particular concern operationally, a predecessor may have assigned its lease interest years or decades before receiving a BSEE order to decommission. It will not have, and may not even have access to, past or current information on the structural integrity of lease facilities or the operational status of wells. In addition, the predecessor will likely not have any information or data on maintenance and monitoring history, inspection results, and regulatory compliance deficiencies. A predecessor does not have any legal right to enter the property subject to bankruptcy proceedings absent permission by the current leaseholder. Additionally, the bankruptcy trustee may elect to perform on the estate's decommissioning obligations without involving a predecessor.

Also, in circumstances where BSEE's decommissioning order is for "facilities no longer useful for operations" while the lease still is in effect under 30 C.F.R. § 250.1703 (i.e., "idle iron"), it presents a multiple operator issue and a potential liability risk for a predecessor interest owner to enter and occupy the lease premises and attempt to conduct decommissioning operations on this "idle iron," including while other operations are being conducted on the lease by the current lease operator. The risk of safety or environmental incidents would increase substantially should multiple operators attempt to conduct simultaneous operations on the same lease at the same time when some of these operations could directly conflict with each other (e.g., permanently plugging idle wells on active platforms/facilities). Calling upon predecessors to decommission wells, facilities, or pipelines on active leases is administratively and operationally impractical and should be avoided.

The proposed changes to BSEE's regulations in §§ 250.1701 and 250.1702 properly continue to recognize that any prior interest owner only is responsible for well, pipeline, and other facility decommissioning obligations that "accrued" on its lease or grant at the time it held its interest. However, this limitation does not save any BSEE effort to make predecessors equally responsible with the current interest owners to decommission. For example, BSEE might argue that a predecessor interest owner is required under proposed § 250.1708 to maintain and monitor the entirety of a facility for which it has not accrued 100 percent of the unperformed decommissioning obligations. Therefore, while BSEE generally has limited a predecessor's decommissioning responsibilities only to its accrued liabilities, as a practical matter there may be circumstances under BSEE's proposal where the decommissioning duty improperly could extend beyond a predecessor's prior accrued obligations. Under such circumstances, the predecessor's operational risks and costs would increase without any guidance in the Proposed Rule, or existing regulations, as to how the predecessor would be compensated for the assumption of these additional risks and costs for which it has no liability.

Proposed § 250.1701(b) would impose BSEE's new "joint and several" decommissioning responsibility structure on pipeline ROW interest owners and their predecessors. Also, for the first time, the Proposed Rule would impose a joint and several decommissioning liability structure on RUE grant holders and their predecessors. *See* proposed §§ 250.1701(d) and 250.1702(f). All of the regulatory, legal and practical concerns described above for OCS leases thus would apply equally to ROWs and RUEs.

BSEE should not adopt the proposed changes to § 250.1701 because they could have the effect of incentivizing current owners and operators to produce remaining reserves on a lease, limit their capital and maintenance budgets, and then at lease termination try to foist the entire decommissioning duty on predecessor owners. BSEE instead should provide clarity to the liability paradigm and reaffirm its current regulatory structure placing the principal duty to decommission on the current interest owners for leases and grants.

Finally, notwithstanding the Proposed Rule or the above comments, for OCS lease assignments that occurred prior to regulatory amendments in 1997, such assignors maintain the argument that they retain no liability at all for decommissioning post-assignment. Under the U.S. Geological Survey/MMS regulations in effect before 1997 (former 30 C.F.R. §§ 256.62(d) and (e)), the assignee of an OCS lease assumed all liability for decommissioning, and the assignor retained no residual liability for decommissioning. The MMS Director confirmed this understanding in the June 9, 1988 letter to Amoco Production Company. *See supra* fn. 4. This understanding was further confirmed in the Nov. 6, 1989 letter from the MMS Associate Director, Offshore Minerals Management to the Regional Director Gulf of Mexico OCS Region. *See supra* fn. 5. The 1997 MMS regulatory amendments were the first to expressly make prior lessees residually liable subject to a condition precedent. *See, e.g.*, 30 C.F.R. § 256.62(f) (re-designated § 556.605 in 2011) ("If your assignee or a subsequent assignee, fails to perform any obligation under the lease or the regulations . . . [then] the Regional Director may require you to bring the lease into compliance to the extent that the obligation accrued before the Regional Director approved the assignment of your interest in the lease."). In the preamble to the regulation proposing that provision, MMS explained that "[w]hen an assignment occurs, the assignor continues to have residual liability should the assignee fail to fully perform obligations that accrued before assignment with respect to wells and structures in existence at the time of the assignment." 60 Fed. Reg. 63,011, 63,012 (Dec. 8, 1995). Thus, there remains a substantial question whether pre-1997 assignors retain any responsibility for decommissioning. The above-cited provisions also further support that liability among current and predecessor interest owners never was joint and several.

B. BSEE Proposed 30 C.F.R. § 250.1708—"How will BSEE enforce accrued decommissioning obligations against predecessors?"

BSEE is proposing to add an entirely new section to its regulations addressing for the first time predecessors' liability for decommissioning. While API strongly supports aspects of BSEE's approach, this section presents several practical and legal shortcomings.

1. The Proposed Rule Lacks Any Trigger for Predecessor Liability.

As explained above, for decades, current lease interest owners have been responsible in the first instance for performing lease obligations, and when a record title or operating rights interest in the lease is assigned with BOEM approval, that assignee must fulfill all of the obligations to the lessor under the lease it is acquiring. The current lease interest owner or assignee also is required to provide security to ensure it is capable of performing those obligations when required by the BOEM Regional Director. 30 C.F.R. § 556.901(d).

BSEE is proposing to add a new § 250.1708 that creates a structure for imposing decommissioning obligations on prior lease and grant interest owners. Thus, this section presents the same concern as the proposed changes to § 250.1701 relating to predecessors' risk of immediate decommissioning liability. The other major shortcoming is that even if BSEE were nominally to first pursue current interest owners, proposed § 250.1708 is silent on the extent to which BSEE has a duty to first issue them orders to perform, and then issue Notices of Incidents of Noncompliance or other penalties for their failures to comply with such orders. It also sidesteps whether the agency: (1) must wait for resolution of any administrative appeals or federal court challenges the current interest owners may pursue from any orders to perform or associated penalties; (2) must first pursue decommissioning funds from noncompliant current interest owners through any bankruptcy proceedings; or (3) must take any other actions before it may turn to the predecessors for performance. Furthermore, the Proposed Rule creates ambiguity as to whether there can be a failure to perform and complete decommissioning operations by the current interest owners before expiration of the standard one-year period after lease or grant termination, or after the periods set forth in a current or future NTL or regulation relating to "idle iron" on active leases, and relatedly whether the time limits for predecessor decommissioning actions can begin to run before expiration of the applicable period. *Compare* proposed § 250.1708(b) *with* § 250.1725 *and* NTL 2018-G03.

BSEE regulations should not remain silent on or dispense with the trigger for demands on predecessors. Consistent with API's comments above that it is legally suspect for BSEE to retroactively shift the decommissioning duty from existing lease interest owners to predecessors, BSEE concomitantly has a duty to vigorously pursue the existing interest owners before turning to the predecessors for performance. Therefore, at a minimum, BSEE's regulations instead should provide:

> BSEE may not order a former lessee or operating rights owner of a lease, or a former grant holder, to fulfill any decommissioning or other non-monetary obligations until BSEE has diligently pursued all reasonable means available to require the current (or for an expired lease or grant, the most recent) lessees, operating rights owners, or grant holders to perform those obligations first, and all of those current lessees, operating rights owners, or grant holders fail to perform.

This condition precedent is an indispensable requirement for this section. If the trigger is too light, or non-existent, the result is that BSEE is further eroding the duty of current interest owners to perform decommissioning, and correspondingly shifting that burden to predecessor interest owners. This trigger issue is so critical to the structure of subpart Q, API respectfully requests that BSEE seek additional public stakeholder input on the question of when predecessor liability is triggered.

BSEE's obligation to pursue all current interest owners before turning to predecessors also should not be dependent on the status of any individual current interest owner. The joint and several responsibilities of all the current interest owners to fulfill non-monetary lease obligations has been a staple of BSEE's regulations for decades. Thus, whether a current lease interest owner holds a majority or minority interest in a particular lease or grant, or is not a

functioning OCS operator, BSEE must pursue that party to perform decommissioning before turning to any predecessor.

In addition, parties who take an interest in leases or grants do so with full knowledge that any party to the agreements that govern the lease or grant operations have the general ability to transfer their interest to another party who is financially capable of performing future duties and obligations under the contract at the time of the transfer. A notice to the co-parties is required to support any transfer, and non-assigning co-parties typically have an opportunity to challenge a transfer to an assignee based on concerns regarding financial capacity to perform future duties and obligations under the lease or grant. Once the transfer occurs, the assignee becomes a new co-lessee or co-grant holder with the same rights, options, and responsibilities as its assignor. Where all co-lessees or co-grant owners decide to remain in a lease or grant after BOEM approves a transfer to a new party, all parties thereafter continue to enjoy the benefits of lease or grant ownership. With that benefit comes the joint and several responsibilities to fulfill non-monetary lease obligations as a current interest owner. Demanding a predecessor to undertake decommissioning obligations on a lease or grant where co-lessees are not in default of any underperformed decommissioning obligation violates the joint and several liability responsibilities for all current interest owners.

2. Reverse Chronological Order ("RCO") for Predecessor Liability Is Appropriate.

Proposed § 250.1708(a) states that "when holding predecessors responsible for performing accrued decommissioning obligations, BSEE will issue decommissioning orders to groups of predecessors who held interests in the lease or grant within the same general timeframe *in reverse chronological order.*" (Emphasis added.) RCO generally means that the more contemporaneous prior interest owners will be undertaking the decommissioning obligation when the current interest owners fail to perform. Interest owners further back in the chain of title have less risk of having to undertake decommissioning.

Conceptually, API strongly supports RCO for many reasons. While BSEE had no regulations addressing enforcement of responsibility for decommissioning should the current lease interest owners fail to perform, RCO liability for predecessors is what the BOEM regulations expressly provided before BOEM amended § 556.604(d)—without opportunity for notice and public comment—in 2016 to impose joint and several liability for decommissioning on current and former interest owners. *See* 81 Fed. Reg. 18,112, 18,132 (Mar. 30, 2016). In any event, RCO is still overall consistent with the BOEM regulations.

RCO also is the most sensible concept operationally. Recent interest owners will have responsibility for more of the wells and facilities since interest owners retain post-assignment responsibility to decommission only their *accrued* obligations, i.e., only those wells and facilities on the lease or grant that existed at the time they held their lease or grant interest. 30 C.F.R. §§ 250.1701(a), 556.604(d), 556.710. Also, recent predecessors are more likely than earlier predecessors to have access to technical information on the status of wells, pipelines and platforms, though as explained above, the on-the-ground situation may vary by lease or grant.

However, proposed § 250.1708(a) would not truly effectuate RCO. The standards in proposed § 250.1708(a) for BSEE to determine "groups of predecessors" for the RCO process are not readily determinable and should be revised. For example, the provision that BSEE will issue orders to groups of predecessors who held interests "within the same general timeframe" is facially vague. The Proposed Rule states in § 250.1708(a) in pertinent part that:

> BSEE will issue such orders to predecessors in groups organized by the following:
> (1) Changes in designated operator(s) over time (*i.e.*, all predecessors who held relevant lease or grant interests during the tenure of a particular designated operator or during the tenure of contemporaneous designated operators); and
> (2) Predecessors who assigned interests to a lessee, owner of operating rights, or grant holder that subsequently defaulted.

Subsection (a)(1) quoted above is unclear. In the preamble, BSEE explains it as meaning "BSEE would issue such [decommissioning] orders to groups of predecessors organized according to changes in the designated operator over time . . . ." 85 Fed. Reg. 65,917. This explanation provides little additional clarity as to exactly how BSEE will make these "group" determinations, particularly for the initial predecessor group. BSEE's assigned groups also might create conflicts among overlapping former operating agreement participants of which BSEE would have no knowledge. BSEE is not a party to operating agreements and typically does not receive and review these private agreements (with the exception of requiring the submittal of operating agreements to support federal offshore unitization when multiple lessees are involved).

Uncertainty as to the "group" determination process is particularly problematic because if a predecessor believes it is improperly included in a predecessor "group" and wants to challenge BSEE's decommissioning order, proposed § 250.1709 requires that the predecessor must post a surety for the specified decommissioning activities to obtain a stay of the order to decommission while it appeals its group inclusion order to the Interior Board of Land Appeals ("IBLA"). This is a heavy and unreasonable burden to impose when the standards for inclusion in a "group" are vague and subjective. It also makes little sense given that the Proposed Rule does not always require financial assurance while the current lessees or grant holders are operating. In addition, if more than one member of the predecessor "group" were to appeal its inclusion, each member of that "group" ostensibly could be required to meet the bonding obligation, resulting in BSEE being over-insured.

If BSEE retains its proposed rule structure, at a minimum BSEE should revise how it approaches "groups" of predecessors. Namely, if *all* current owners fail to perform decommissioning, then DOI should next turn to only one group of predecessors. That first group should consist of: (1) the last designated operator of record; and (2) the predecessors in the chain-of-title, starting with the predecessors positioned immediately before the current owners, and then moving in reverse chronological order in the chain of title until the first of the following occurs—(a) record title and applicable operating rights interests each equal 100 percent; or (b) there are no other predecessors in the chain of title. Only if all companies in the first predecessor group fail to comply with the BSEE-issued decommissioning order, can BSEE then create a second predecessor group by applying the same process used to create the first group.

API has additional concerns with proposed new § 250.1708. Under § 250.1708(b), when BSEE issues a decommissioning order to predecessors:

- Within 30 days predecessors must begin maintenance and monitoring. This timeframe is severely short given the negotiations that likely will occur amongst "group" members as to which entity will undertake the maintenance and monitoring process related to decommissioning;
- Within 60 days predecessors must designate a single entity to serve as operator. This step should precede the first step so that a single entity is authorized by BSEE to go onto lease facilities for maintenance and monitoring purposes;
- Within 90 days the designated operator must submit a decommissioning plan for BSEE approval; and
- Decommissioning must begin as BSEE specifies in the approved decommissioning plan.

These 30/60/90-day timeframes referenced above are uniformly too short and would implement a de facto requirement for lessees to submit requests for departure, or else potentially face enforcement action(s). Moreover, the timing for these last two steps could be problematic if, for example, the current lease interest owners and designated operator are unresponsive or inaccessible, and the newly designated operator on behalf of predecessors has no access to recent plans and diagrams of the lease facilities and wells, inspection reports, or compliance or other operational demands. In addition, predecessors will need to verify the "facility, including wells and pipelines as identified by BSEE in the order" to ascertain whether they agree the assets identified are those that actually accrued to the predecessor group. This review and interaction with BSEE takes time, which is not accounted for in the time deadlines outlined above. The Proposed Rule therefore should be revised to specifically extend the proposed time periods for all categories and provide automatic time extensions upon written request and for good cause.

It again is essential that BSEE apply the RCO process consistent with the principle that predecessors only are liable for obligations that accrued while they held their lease interests. While subsections (b) and (d) begin by referencing "accrued" predecessor liabilities, subsection (b)(1) requires monitoring and maintenance of "any facility, including wells and pipelines as identified by BSEE in the order," and subsection (b)(3) requires that the predecessors' decommissioning plan include "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. . . ." (Emphasis added.) A particular predecessor group may not have liability for 100 percent of the decommissioning obligation. BSEE should clarify these subsections to make unambiguous BSEE's re-affirmance of the long-standing principle that predecessors required to perform decommissioning only may be held responsible for decommissioning obligations that accrued while they held their interests, and not for any obligations accrued later by, for example, the defaulting current interest owners.

BSEE also has given itself several broad "outs" that render the RCO process in this section largely illusory, particularly for those in the chain of title beyond the initial group of predecessors. For example, under subsection (d) BSEE may abandon the RCO process and pursue "*any or all* predecessors" if BSEE determines there is:

- A failure of the first predecessor group to obtain an approved decommissioning plan or to perform decommissioning;
- An emergency condition, safety concern or environmental threat; or
- A BSEE determination that following the procedures in subsection (a) would "unreasonably delay decommissioning."

The first standard allows BSEE to eschew RCO beyond the first group. The last two standards are undefined and give BSEE almost unfettered discretion to abandon RCO and issue a decommissioning order to whichever of the predecessors it chooses, thereby subjecting BSEE to challenges that it acted arbitrarily and capriciously.

Finally, under subsection (f), if the recipient of a decommissioning order appeals the order to the IBLA, BSEE may proceed against "*any or all* predecessors other than the appellant . . . ." (Emphasis added.) Thus, like subsection (d), subsection (f) renders the RCO process largely illusory by immediately making any prior interest owner subject to a BSEE order to decommission.

As stated above regarding BSEE's duty to pursue the performance of outstanding decommissioning obligations against current lease and grant holders in default, the same duty should apply to predecessors who receive demands from BSEE to conduct unperformed decommissioning obligations. BSEE should vigorously pursue every proper member of the initial predecessor group for performance before turning to additional predecessors further down in the chain of title. BSEE at a minimum should include the following in the Proposed Rule as part of § 250.1708(e):

> BSEE may not order a subsequent former lessee or operating rights owner or holder in the chain of title of a lease or grant to fulfill any decommissioning or other non-monetary obligations until BSEE has diligently pursued all reasonable means available to require the initial predecessor or predecessor group to perform those obligations first, and those initial predecessors all fail to perform.

C. BSEE Proposed § 250.1709—"What must I do to appeal a BSEE final decommissioning decision or order under this subpart?

This new section would provide that if a current lease or grant interest owner or a predecessor files an appeal to the IBLA pursuant to 30 C.F.R. part 290 from a BSEE decision or order to perform any decommissioning activity, the appellant cannot seek to obtain a stay pending appeal unless it "post[s] a surety bond in an amount that BSEE determines will be adequate to ensure completion of the specified decommissioning activities in the event that your appeal is denied and you thereafter fail to perform any of your decommissioning activities." As a practical matter, it is expected that most appellants would seek a stay to avoid having their appeal mooted by the interim completion of the ordered decommissioning activities prior to an IBLA decision, which often takes years to issue.

This proposed provision is unreasonable for multiple reasons. First, for the same reasons a current lease interest owner is not required to provide BOEM additional security for its

decommissioning obligations under proposed § 556.901 if it meets certain credit rating criteria, neither a current interest owner nor a predecessor should be required to provide additional security for an IBLA appeal of a BSEE decommissioning order if that current interest owner or predecessor meets those same standards. Second, BSEE and BOEM have constructed a set of proposed provisions designed to avoid requiring current lessees to post additional security for the full amount of decommissioning liability. It therefore is incongruent for BSEE to suddenly require the posting of an indeterminate amount of security upon an appeal of a BSEE decommissioning order or decision from any predecessor no matter the financial capacity and strength of that predecessor. Moreover, BSEE decisions and orders generally are effective pending appeal to the IBLA, 30 C.F.R. § 290.7, and once an appeal is filed an appellant may seek a stay of the BSEE decision or order under the standards in 43 C.F.R. § 4.21(b). If an appellant is able to qualify for a stay under the IBLA's standards, it should not be required to post security. Also, as explained above, if more than one member of a predecessor "group" were to appeal its inclusion in the group under BSEE's vague standards, each one needlessly would be required to meet the indiscriminate bonding requirement. BSEE should not adopt this section, or at least should modify it for the reasons explained.

Lastly, the appeal to the IBLA of a decommissioning order is the recipient's *first* opportunity to have an adjudication of the agency's decision. By requiring a current lessee or grant holder or a predecessor to post a bond to stay the decommissioning order (which again, the Proposed Rule would require the lessee or grant holder to maintain and monitor the named asset(s) within 30 days) for an amount that is perhaps equal to the full costs of the decommissioning, the Proposed Rule raises serious and novel due process considerations that are unparalleled by any administrative regulations, much less regulations applicable to the OCS.

D. BOEM Proposed § 556.901—"Bonds and additional security."

The existing regulations provide BOEM authority to require additional financial assurance from current lease operators above base bonding amounts. The requirement to provide financial assurance to the government is a duty of the current interest owners, and the Proposed Rule does not state otherwise.

BOEM is proposing to amend § 556.901(d) by eliminating the existing mechanism for assessing a lease interest owner's creditworthiness for additional financial security based on multiple criteria, including its net worth. Instead, BOEM will base its decision to require additional security on the lessee's minimum credit rating from a nationally recognized statistical rating organization (BB- from S&P or Ba3 from Moody's), or a proxy credit rating (which should include reliance on unaudited financial and auditor's opinions). It is API's understanding that this section refers to the *expressly named* entity owning the interest; API supports only looking to the expressly named entities, and BOEM should clarify that it will not look to unnamed entities.

API supports BOEM simplifying its evaluation process. BOEM's existing regulations set forth a five-part framework for assessing the financial strength of an operator, which industry and the agency alike have acknowledged rests on criteria that are vague and subjective as written and burdensome to apply in practice. The Proposed Rule offers a streamlined, forward-looking approach to assessing an interest owner's financial strength by relying exclusively on its credit

rating. This approach will not only bring vital objectivity and, as BOEM acknowledges, reliability to assessing the need for additional assurance, but also will conserve both the agency's and industry's finite time and resources. In line with energy industry practice, API agrees BOEM should look to external credit rating agencies that are nationally recognized statistical organizations, which include not just S&P and Moody's, but also Fitch, or a proxy credit rating (which should include reliance on unaudited financial statements and auditors opinions). While API supports the credit rating framework, API member companies have different perspectives on the appropriate credit rating thresholds BOEM has proposed and they will respond to BOEM's request for comment on this point in individual comment letters.

If the lessee's credit rating does not meet these minimum criteria under subsection (d)(1), then BOEM will determine under subsection (d)(2) whether (i) a co-lessee has an adequate credit rating based on the same criteria; or (ii) there are proved oil and gas reserves which exceed three times projected decommissioning costs; *or* (iii) "[a] predecessor lessee liable for decommissioning *any facilities* on your lease has an issuer credit rating or a proxy credit rating that meets the criteria" of the Proposed Rule. (Emphasis added.) Thus, if a lessee does not meet the credit rating criteria of subsection (d)(1), the Regional Director still may waive the additional security requirement if any of the three options under subsection (d)(2) applies.

API is a strong advocate of using the net present value test as proposed by BOEM in its evaluation of the financial ability of the current lease owner(s) to fulfill its/their decommissioning obligations. We support using the three times "reserves-to-decommissioning cost" ratio to determine whether the value of the reserves exceeds the cost of decommissioning associated with the production of those reserves. Using this test will allow BOEM to know when a producing lease is still generating sufficient revenue to meet current and potential future lease obligations. By using this test, BOEM will be in a better position to begin a dialogue with the lease operator and ascertain the operator's plans for addressing pending decommissioning obligations. Waiting to address decommissioning until the reserves-to-decommissioning cost ratio is one-to-one would mean that the estimated value of remaining oil and gas reserves on a lease is equal to the cost of decommissioning, eliminating some of the options available to fund future decommissioning obligations.

Problematically, as written these provisions would allow BOEM to waive the need for additional security by simply checking the current interest owner's credit rating, and then jumping to the chain of title for a predecessor with an adequate credit rating (thereby bypassing subsections (d)(2)(i) and (ii)). The result is to allow current lessees to operate indefinitely on the financial strength of predecessors and without putting up security to ameliorate decommissioning liability risks acquired from others. The proposed term "any facilities" in subsection (d)(2)(iii) also ignores any differences between the accrued liability of the current interest owner for all facilities on the lease and the potentially narrower accrued liability of predecessors. The existence of predecessors' financial capacity should not allow the agency to avoid its long-standing duty to require adequate financial assurance from financially challenged current lessees or from assignees when approving assignments.[6]

[6] The Proposed Rule, including its Preamble, does not address *who* will determine present value or *how* that would be determined. For example, present value for decommissioning often includes a discount rate that is different than

BOEM's proposed new financial assurance procedures effectively mean that even if none of the current lease interest owners, nor a prospective assignee, can meet the minimal credit rating standards test, and even if there are limited oil and gas reserves remaining on the lease, BOEM still will allow those current lessees or prospective assignees to continue operating the lease without providing additional financial assurance for decommissioning and other "non-monetary" obligations, if any predecessor lease interest owner who has liability for decommissioning "any facilities" on the lease meets the new BOEM credit rating standard. This burden shift again is imposed unfairly and retroactively on entities that assigned their lease rights in reasonable reliance on agency regulations at the time that placed the additional financial assurance duty on the existing lease interest owners.

Furthermore, neither the Proposed Rule nor BSEE's and BOEM's Initial Regulatory Impact Analysis ("IRIA") actually explains how the Proposed Rule—by relying on predecessors as an involuntary surety —obviates the need for the current lessees to provide adequate financial assurance to cover their obligations. For example, there is no analysis that shows how the financial capacity and continued existence of predecessors, or whether predecessors "liable for decommissioning any facilities" (Proposed Rule, 30 C.F.R. § 556.901(d)(2)(iii)), would align with the current lessees' accrued decommissioning liabilities in such a manner as to effectively mitigate the risk to the U.S. taxpayers. As described elsewhere in this letter, the Proposed Rule simply takes for granted the existence of predecessors in the chain of title, and that the predecessors, if viable entities, have the financial capacity and operational ability to address any accrued, unperformed decommissioning obligations.

Another potential issue with BOEM's proposal is that the agency does not have the authority to require predecessor interest owners to provide their financial data. Thus, if a predecessor does not have a publicly available credit rating—and that predecessor has not been required to provide that information to BOEM for another lease or grant where it holds an active interest—BOEM will not be able to ascertain whether that predecessor allows the current lessee or grant holder to take advantage of subsection (d)(2)(iii) to avoid the need to provide additional financial assurance.

BOEM should amend its proposed changes to § 556.901(d). If BOEM determines that the current lessee (and any co-lessees) cannot meet the credit rating standards of subsection (d)(1), and that there are not oil and gas reserves adequate to meet the requirements of subsection (d)(2)(ii), then the current lessees should be required to provide additional financial assurance to cover decommissioning and other lease obligations.

Finally, API comments that the additional financial assurance standards set for current lessees and grant holders should be applied equally for sole and non-sole liability properties as well as for liabilities that accrue to the current owners after they acquire their interests, since financial assurance should look only to the current owner(s), and not predecessors.

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the discount rate used for capital investments (i.e., the discount rate to determine the net present value of the remaining proved reserves). Moreover, decommissioning costs fluctuate over time, such that inflation increases costs while improvements in execution often decreases costs. These variables are critical assumptions used in decommissioning forecasting.

E. BOEM Proposed § 556.904— "Decommissioning accounts"

API supports the changes that BOEM is proposing for this section; however API respectfully requests that BOEM seek additional stakeholder input to further clarify the structure for the creation and management of decommissioning accounts. API also supports the changes BOEM proposes for this section that would extend availability of decommissioning accounts to RUE and ROW holders and would provide more flexibility for how funds in the account must be invested.

Decommissioning accounts could be an option for current lessees who are unable to meet the proposed credit rating standards in proposed § 556.901(d)(1), or whose credit rating falls below the minimum threshold shown in subsection (d)(1), and where the value of reserves does not exceed three times the cost of the decommissioning associated with the production of those reserves. When triggering the creation of these accounts, BOEM should agree upfront with the lessees and grant holders on the mechanism to fund these accounts. Once the decommissioning account is established, the purpose should not be to require the account to be fully funded immediately, but to fund the account over time to correspond with the decommissioning of the assets. As further discussed *infra*, BOEM should amend this provision also to allow predecessors to directly access decommissioning account funds if they are required to decommission.

F. BOEM Proposed § 556.905— "Third-party guarantees"

BOEM proposes several changes to simplify and streamline its regulations in § 556.905 that allow a lessee to provide a third-party guarantee as additional financial assurance instead of an additional bond or other security under §§ 556.901(d), 550.166(d), or 550.1011(d). API supports BOEM simplifying the standards for third-party guarantors by adopting the same credit rating or proxy credit rating standards as for lessees in proposed § 556.901(d) (subject to adjustment of those standards as explained above). API also concurs with BOEM's proposal to remove the requirement in subsection (c) of the existing regulation that the third-party guarantee must ensure compliance with all the obligations of all record title owners, operating rights owners, and operators. BOEM explains in the preamble that "[t]his change would allow a guarantor to limit its guarantee to a subset of lease or grant obligations, *e.g.*, an amount sufficient to cover a percentage of the decommissioning liability in proportion to the ownership percentage of a particular lease or grant holder, a specific dollar amount, or a specific facility." 85 Fed. Reg. at 65,912. API also supports extending the third-party guarantee provisions to RUEs and ROWs in addition to leases.

Consistent with the preamble, and even though each current lease interest owner or grant holder is jointly and severally liable for the performance of all decommissioning obligations, under proposed § 556.905, the third-party guarantor could limit its guarantee to a particular dollar amount, or a percentage of a lease or grant owner's accrued liability, or specific wells or other facilities.

BOEM should make certain other modifications to this section. BOEM should add a provision specifying when the period of liability will terminate under the guarantee. Also, the guarantee should not require a third-party guarantor to perform until BSEE and BOEM have diligently

pursued all reasonable means available to obtain performance, and the beneficiary of the guarantee has failed to perform. Subsection (d)(1) should be modified to provide: "If BSEE and BOEM have diligently pursued all reasonable means available to obtain your compliance with the terms of your lease or grant, or any applicable regulation, and you fail to comply, your guarantor must either:" In addition, BOEM should add the following as a new § 556.905(e):

> (e) *Diligent Pursuit of Guarantors Before Any Predecessors.* BOEM must diligently pursue corrective action or payment from any third-party guarantors before BSEE may hold predecessors responsible for performing decommissioning obligations under § 250.1708 of this title.

G. Proposed BOEM § 556.906 "Termination of the period of liability and cancellation of a bond"

API supports the changes BOEM proposes for this section specifically extending its provisions to RUEs and ROWs. However, this provision still enables BOEM to retain security for unreasonably lengthy time periods after all lease or grant obligations have been met. BOEM should modify this provision to provide that any additional security should be released or cancelled within 120 days after the work covered by that additional security is accepted by BSEE and therefore deemed complete. The regulations also should be modified to make clear when third-party guarantees are considered cancelled and when decommissioning accounts are terminated.

Further, BOEM spends considerable time working with interest and rights owners to cancel third-party guarantees, even after all the underlying decommissioning obligations have been performed. BOEM should amend this provision to allow lease interest or grant holders to trigger the cancellation of their third-party guarantees for leases, ROWs, and RUEs in a more self-executing manner consistent with bonds—no longer than 120 days after the (decommissioning) obligations have been fulfilled or assigned.

H. BOEM Proposed § 556.907—"Forfeiture of bonds or other securities"

API supports the changes BOEM proposes for this section specifically extending its provisions to RUEs and ROWs. However, BOEM should amend this provision to provide that if the Regional Director receives funds from forfeited bonds or other securities, and neither BSEE nor BOEM will have any risk of having to perform those obligations for a particular lease or grant, the Regional Director must make those funds available proportionately to any co-lessee or predecessor that will perform the obligations covered by the bonds or other securities. The rule should further provide that the Regional Director may not use those funds for any other purpose including fulfilling decommissioning obligations on other leases, RUEs, or ROWs that the current lessee or grant holder fails to perform.

I. Additional Comments Solicited by BOEM and BSEE

In addition to the comments above, API provides the following responses to the separate requests in Section IX of the Proposed Rule's preamble. 85 Fed. Reg. at 65,922.

1. Proposed Rule's effects on existing contracts and agreements for decommissioning liabilities and other lease obligations.

The BOEM and BSEE regulations affect the relationship between the agencies and the lease interest or grant holders. Any contracts and agreements among the private parties are independent of that relationship.

BOEM's proposed changes to the additional security regulations, particularly 30 C.F.R. § 556.901, will have a significant negative impact on historical OCS transactions. Traditionally, OCS leases that were divested decades ago were sold to companies with substantial OCS assets in their portfolios, and agency regulations were in place to ensure that the buyers (i.e., the current owners) provided financial security to BOEM to safeguard compliance with their decommissioning obligations. Sellers reasonably and justifiably relied on the agency regulations requiring assignees to have adequate financial security and typically did not require private financial security as a condition of the sale. Rarely did these buyers default on their decommissioning obligations and bankruptcies were rare. Today, circumstances are different. Many OCS property buyers in the secondary market, often backed by large private equity lenders, create limited liability companies ("LLCs") to hold their leasehold interests. Often these LLCs are created only for a specific lease or field. When producing properties are sold, the purchase price generally is reduced because of the decommissioning liabilities being assumed by the purchaser. As explained above, the structure of the Proposed Rule provides a greater opportunity for these more recent purchasers to default on their decommissioning obligations, penalizing the seller by potentially requiring it to pay for decommissioning twice-- once when it sold the property at a reduced price that accounted for the buyer's expected decommissioning obligations, and a second time when the buyer defaults on its decommissioning obligations because BSEE and BOEM have set up the predecessors as involuntary sureties. Assignors would have structured their transactions differently had the proposed changes to the regulations been in place at the time. But because the Proposed Rule imposes added risk on the sellers retroactively, they had no opportunity to account for this new exposure in their sales transactions. BOEM's proposal to look to the predecessor's financial capacity to underpin the financial strength of a financially weak lessee or grant holder therefore could ultimately leave to the predecessor the financial decommissioning burden of current lessees that would not be held accountable or responsible for such costs.

2. Environmental and safety benefits of RCO.

As API explained above in its comments on proposed 30 C.F.R. § 250.1708, among the benefits of the RCO concept is that more contemporaneous predecessors will have accrued more decommissioning liabilities, and likely will be in a better position to either have or have access to recent technical information on platform and well integrity necessary to facilitate decommissioning.

COMMENTS ON REGULATORY IMPACT ANALYSIS.

BOEM did not follow through with its IRIA for the Proposed Rule (and thereby failed to ascertain proper premises) when it did not evaluate the consequences of defaults by current lessees or grant holders under the Proposed Rule. For example, under the Proposed Rule, the

former GOM OCS lessee and company known as ATP Oil & Gas Company ("ATP") still would have largely avoided having to post financial security due to the Proposed Rule's reliance on the credit rating of predecessor lessees or the remaining value of leases. Nevertheless, there were serious questions raised following ATP's default—issues raised elsewhere in this letter—such as the performance and payment of decommissioning liabilities that were unaccrued by the predecessors, the costs incurred to access and remediate potentiality unsafe legacy facilities, and the difficulty in predicting decommissioning costs over time. Instead, the agencies and the IRIA seemingly rely upon simple assertions in the Preamble that BOEM will annually review the financial status of lessees and owners, and that BSEE will better enforce outstanding decommissioning obligations.[7]

OTHER WARRANTED ADDITIONS TO THE PROPOSED RULE.

As noted above, the Proposed Rule is incomplete. API describes below some of the additional regulatory provisions that BOEM and BSEE should amend or add to ensure a comprehensive and well-functioning set of regulations.

A. Designation of Operator for Decommissioning Purposes.

Existing BSEE regulations at 30 C.F.R. § 250.145 allow the current lessee to designate an operator to perform lease operations on its behalf. BOEM has a similar regulation at 30 C.F.R. § 550.143(a) and (b) ("This designation is authority for the designated operator to act on your behalf and to fulfill your obligations under the Act, the lease, and the regulations in this part."). If a predecessor interest owner is required to perform the decommissioning obligations, it may need to perform operations or designate its own operator who needs authority to operate on the former lease, RUE, or ROW area. Therefore, both BSEE and BOEM should add a new regulation to both part 250 and part 550 that provides:

> § ____ Designation of Operator to Perform Decommissioning
>
> A former lease or operating rights interest owner that is required to undertake decommissioning activities is authorized to do so without a designation as operator from BSEE or BOEM, but at its option may request such a designation from the former lease or operating rights owner naming an appropriate party as operator, agent, or agent for decommissioning purposes only, which BSEE or BOEM may approve without consent from any former lessee.

B. Additional Amendments to § 556.902.

In the event that predecessors must undertake decommissioning obligations, BOEM must have certain prescribed responsibilities to provide those predecessors access to existing financial

[7] The DOI's Inspector General ("IG") recently audited BSEE's enforcement of its decommissioning policies and regulations. The IG found that the staff in the Gulf of Mexico Region erroneously did not believe BSEE had the authority to enforce decommissioning regulations and that "regional management's concern that enforcing the Federal regulations, by forcing operators to decommission, will push additional operators into bankruptcy." The IG determined that it would perform its review again once BSEE has the opportunity to implement decommissioning policies. https://www.doioig.gov/sites/doioig.gov/files/CloseoutMemo_BSEEDecomissioning_040119.pdf

security for decommissioning. To that end, BOEM should add three additional subsections to the end of current § 556.902 as follows:

> (g) If former lessees or grant holders are required to perform decommissioning or other non-monetary obligations for a lease, RUE, or ROW pursuant to this part and § 250.1701 of this title, the Regional Director must:
>
> (1) Make all reasonable effort to obtain funds available under bonds or other financial security from the current lessees or grant holders provided under the regulations in this part for that lease, RUE, or ROW; and
>
> (2) Make those funds available to those former lessees or grant holders in advance of performing those obligations. Any excess funds not used by the former lessee or grant holder in performing the decommissioning obligations will be returned to BOEM.
>
> (h) Unless otherwise required by court order, the Regional Director may use a bond or other financial security provided under this part solely to satisfy obligations for the lease for which it is provided, and for additional bonds or other financial security required under § 556.901(d) solely for those obligations for which the additional bond or other financial security was provided.
>
> (i) Notwithstanding subsection (h), funds available from financial security for multiple leases may be reallocated among those leases pursuant to written agreement among the Regional Director, affected lessees, former lessees, and affected sureties or guarantors of the financial security for those leases.

C. Preventing Requirements for Premature Additional Security.

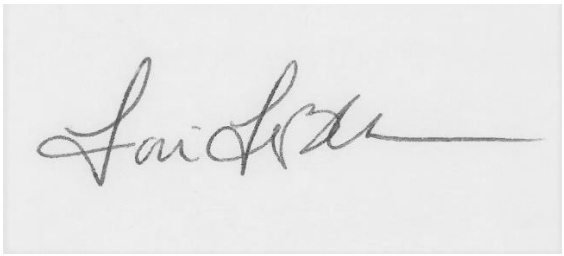
BOEM's current 30 C.F.R. § 556.901 requires additional bonding when an exploration or development plan is merely submitted, unless BOEM grants an exception. Instead, the obligation to obtain a bond and incur the associated bonding costs should be delayed, at a minimum, until the proposed activities have been conducted. Once a well is drilled, if the well is not permanently plugged and abandoned, BOEM should consider whether or not additional security is needed, and if so, demand the additional security from any lessee failing to meet the minimum credit rating threshold established in § 556.901. Once a platform/facility or pipeline is installed, it is more sensible to stagger the financial assurance requirement for financially weak lessees and delay full funding until later in the lease term. The risk of default on decommissioning obligations is minimal when lease production is at its peak. Full financial assurance for leases should be required only when production levels are in significant decline and estimated future revenues will be insufficient to cover the cost of decommissioning. Accordingly, BOEM should amend § 556.901(d) by adding a new paragraph (3) as follows:

> The Regional Director may require the lessee to provide additional security under this subsection after the lessee temporarily abandons or completes a well, installation of a platform, pipeline, or other facility, or creation of an obstruction to users of the OCS, that would be covered by the additional security.

* * * * *

In conclusion, API, LMOGA, and our members support BSEE's and BOEM's efforts to adopt regulations ensuring that lessees of OCS oil and gas leases, and holders of OCS RUE and ROW grants, properly perform all operational lease and grant duties, including their obligation to decommission OCS wells, pipelines, and facilities. Our members also share the agencies' goal to protect U.S. taxpayers from the burden of any default of those OCS lease and grant decommissioning obligations. While the Proposed Rule includes some good additions, key sections of it present a substantial departure from longstanding regulatory standards and have significant and far-reaching financial consequences. Therefore, API and LMOGA respectfully request that BSEE and BOEM consider these comments and solicit additional public stakeholder feedback on the issues raised in this letter and the Proposed Rule.

Sincerely,



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