EARTHJUSTICE, OCEANA, CENTER FOR BIOLOGICAL DIVERSITY, FRIENDS OF THE EARTH

August 28, 2023

VIA FEDERAL RULEMAKING PORTAL: http://www.regulations.gov

Kelley Spence
Bureau of Ocean Energy Management
45600 Woodland Road
Sterling, VA 20166

Re: Risk Management, Financial Assurance for OCS Lease and Grant Obligations; 88 Fed. Reg. 42,136 (June 29, 2023); Dkt. ID BOEM-2023-0027; RIN 1010-AE14

Dear Kelley Spence:

We, the signatories below, appreciate the opportunity to submit comments regarding a proposed rule issued by the Bureau of Ocean Energy Management ("BOEM") related to financial assurances for oil and gas lessees on the Outer Continental Shelf ("OCS"). This rulemaking is 14 years in the making, and strong changes to BOEM's financial assurance requirements are long overdue. The rule contains some positive changes from BOEM's 2020 proposal, including eliminating reliance on predecessor lessees and raising the credit rating requirement. But the proposed rule fails to fully address the significant financial risks from decommissioning for U.S. taxpayers as well as the federal government and limits the government's ability to hold oil and gas companies responsible for covering their own decommissioning costs.

BOEM has the obligation to be a responsible steward, both to the environment and to the U.S. taxpayer. Without further improvements to this rule, BOEM will not meet its responsible stewardship obligation.

The only way to fully ensure that decommissioning costs are not borne by the federal government and the taxpayer is to require bonds from all lessees in the full amount of estimated decommissioning liabilities at the highest probabilistic estimate. If, however, BOEM insists on exempting lessees from supplemental financial assurance requirements, it should do so only for companies that show significant financial strength and have met all prior decommissioning obligations.

We therefore ask that BOEM make the following changes to the proposed rule:

- Strengthen the credit rating requirement to require strong financial capacity to cover decommissioning obligations and eliminate the use of a proxy credit rating;
- Eliminate the use of the value of proven oil and gas reserves to waive supplemental financial assurances;

- Supplement the use of credit ratings with consideration of the lessee's record of compliance, including requiring supplemental financial assurances for companies that have not decommissioned idle iron; and
- Rely on the highest probabilistic estimate of decommissioning liabilities (P90) when supplemental financial assurances are required.

We also ask that BOEM raise the amount of base bonds required and eliminate or significantly increase the required amount for area-wide bonding exemptions to base bonds.

Finally, BOEM must prepare a NEPA review of the proposed rule.

According to a recent study by Mark Agerton et al., industry is sitting on nearly 10,800 unplugged wells in federal waters alone, with an estimated decommissioning cost of $42 billion.[1] Of those wells, over 7,000 are inactive, with an estimated decommissioning cost of $28.65 billion.[2] And that only accounts for unplugged wells in federal waters. In state waters, the study estimated another 7,000 wells are inactive and unplugged, but the decommissioning cost estimate is much lower, at $2 billion.[3] Oil and gas can leak from these wells and cause damage to ecosystems, particularly closer to the coast where there is a larger amount of sensitive species.[4]

To make matters worse, wells that were previously plugged and abandoned are still leaking oil and harmful gases, including methane, benzene, nitrogen oxides, and carbon dioxide,[5] due to vague and inadequate regulations when those wells were plugged. [6] And BOEM and the Bureau of Safety and Environmental Enforcement ("BSEE") do not regularly monitor the state of the wells.

Oil and gas companies that purchase leases to develop and produce fossil fuels offshore are required to safely decommission all oil and gas infrastructure after it is no longer in use to prevent serious harm to human, marine, and coastal environments.[7] BOEM's regulations require lessees to permanently plug all wells, remove all platforms and other facilities, clear the seafloor of all obstructions created by the lease, and decommission all pipelines.[8]

Unfortunately, BOEM's regulations place significant environmental and financial risks on taxpayers and the federal government for covering the costs of decommissioning oil and gas infrastructure, which are supposed to be borne by industry.

---

[1] Mark Agerton et al., *Financial liabilities and environmental implications of unplugged wells for the Gulf of Mexico and coastal waters*, NATURE ENERGY (May 8, 2023) at 5, https://doi.org/10.1038/s41560-023-01248-1.
[2] *Id.*
[3] *Id.*
[4] *Id.* at 2.
[5] Hannah Seo, *Unplugged: Abandoned oil and gas wells leave the ocean floor spewing methane*, ENV'T HEALTH NEWS (Dec. 8, 2020), https://www.ehn.org/oil-and-gas-wells-methane-oceans-2649126354 html.
[6] Torbjørn Vrålstad et al., *Plug & abandonment of offshore wells: Ensuring long-term integrity and cost-efficiency*, 173 J. PET. SCI. & ENG'G 478 (Feb. 2019), sciencedirect.com/science/article/pii/S0920410518309173.
[7] 30 C.F.R. § 250.1703.
[8] *Id.*

Under existing regulations, lessees are supposed to furnish bonds at three stages: (1) prior to issuance of the lease or assignment of an existing lease, (2) prior to commencement of exploration activities, and (3) prior to commencement of development and production activities.[9] BOEM also requires additional financial assurances above the base bonds in some cases based on the ability of operators to carry out their decommissioning obligations.[10] These financial assurances are meant to ensure funds are available to cover the costs of decommissioning in case the lessee is unable or unwilling to satisfy those financial obligations in the future. But as currently implemented, these bonds do not cover all costs of decommissioning, which can amount to hundreds of millions of dollars for each structure used for deep-water activities.[11] Not only does this shortfall pose a financial risk to the federal government and taxpayers, but it also creates a risk to the environment and communities that rely on the Gulf of Mexico.

In 2015, the Government Accountability Office ("GAO") found that BOEM's and BSEE's existing financial assurance regulations and procedures for decommissioning liability posed significant financial risks to the federal government and taxpayers, and identified several important actions to improve the system.[12]

The GAO identified three major flaws in BOEM's procedures. First, BOEM was unable to determine the actual amount of decommissioning liabilities due to limitations with its data system (TIMS) and inaccurate data.[13] Second, BOEM failed to require sufficient financial assurances to cover liabilities, primarily due to its practice of waiving supplemental bonding requirements.[14] In the Gulf of Mexico, lessees were often granted waivers from the supplemental financial assurance requirement, ultimately leading to less than 8% of an estimated $38.2 billion in decommissioning liabilities covered by financial assurance mechanisms such as bonds.[15] Third, BOEM's criteria to determine lessees' financial strength did not provide accurate information about the lessees ability to pay future decommissioning costs.[16] The GAO also noted that the absence of a deadline for reporting transfers of rights to lease production revenue can impair BOEM's ability to require necessary supplemental funding because of such transfers.[17] The GAO recommended several courses of action for BOEM to reduce risk to the federal government and U.S. taxpayers. According to the GAO, BOEM should revise its procedures to ensure that its current financial assurances are sufficient and timely to cover liabilities,[18] use alternative measures of financial strength more akin to credit ratings to "increase the amount of

---

[9] 30 C.F.R. §§ 556.900, 556.901.
[10] 30 C.F.R. § 556.901(d).
[11] Government Accountability Office (GAO), *Offshore Oil and Gas Resources: Actions Needed to Better Protect Against Billions of Dollars in Federal Exposure to Decommissioning Liabilities* (2015), https://www.gao.gov/assets/gao-16-40.pdf.
[12] *Id.*
[13] *Id.* at 23–24.
[14] *Id.* at 24–27.
[15] *Id.* at 24.
[16] *Id.* at 27–28.
[17] *Id.* at 31–32.
[18] *Id.* at 33–34.

bonding that lessees provide,"[19] and revise its regulations to set a clear deadline for lessees to report the transfer of rights to lease production revenue.[20] Interior concurred with the GAO's recommendations to address existing issues.[21]

In the same report, the GAO issued recommendations for BSEE to reduce risk to the federal government. Namely, that BSEE should establish procedures to collect accurate data and make more precise estimates of decommissioning costs. Consistent with the GAO recommendation, in April 2016, BSEE issued a Notice to Lessees providing guidance to operators on the submission of decommissioning costs.[22] Later that same year, BSEE issued a rule requiring operators to submit decommissioning cost summaries after permanently plugging a well, removing a platform or other facility, and clearing of any site.[23] Based on the data BSEE collected from operators, it developed three probabilistic estimates (P50, P70, and P90) to estimate the decommissioning costs of any given lease.[24]

In response to the GAO report, BOEM published a Notice to Lessees in July of 2016 that revised its financial assurance procedures to require additional security for sole liability lessees, including surety bonds, and to modify its evaluation of a company's financial ability to cover its decommissioning obligations.[25] Although BOEM's Notice to Lessees only addressed the use of alternative measures of financial strength, it was a necessary and incremental improvement to financial assurance procedures.

In response to President Trump's Executive Order 13,795 in 2017, BOEM delayed implementation of its new procedures and eventually rescinded the 2016 Notice to Lessees.[26] In 2020, BOEM issued a new proposed rule to modify its financial assurance procedures.[27] BOEM proposed to replace the evaluation of five criteria (financial capacity; projected financial strength; business stability; reliability in meeting obligations based on credit rating or trade references; and record of compliance with laws, regulations and lease terms) used to determine whether a lessee is required to provide supplemental financial assurances with a new rule that lessees do not need to provide supplemental financial assurances if one of two criteria are met:

---

[19] *Id.*
[20] *Id.*
[21] *Id.* at 34.
[22] Bureau of Safety and Environmental Enforcement, *Reporting Requirements for Decommissioning Expenditures on the OCS*, NTL 2016-N03 (April 27, 2016).
[23] Oil and Gas and Sulfur Operations in the Outer Continental Shelf-Decommissioning Costs for Pipelines, 81 Fed. Reg. 80,587 (Nov. 16, 2016); *see also* Bureau of Safety and Environmental Enforcement, *Reporting Requirements for Decommissioning Expenditures on the OCS*, NTL 2017-N02 (March 2, 2017).
[24] Risk Management and Financial Assurance for OCS Lease and Grant Obligations, 88 Fed. Reg. 42,136, 42,143 (June 29, 2023).
[25] Notice of Availability of Notice to Lessees and Operators of Federal Oil and Gas, and Sulfur Leases, and Holders of Pipeline Right-of-Way and Right-of-Use and Easement Grants in the Outer-Continental Shelf–Requiring Additional Security, 81 Fed. Reg. 46,599 (July 18, 2016).
[26] *BOEM Withdraws Sole Liability Orders: Further Review of Complex Financial Assurance Issues Warranted*, BUREAU OF OCEAN ENERGY MANAGEMENT (Feb. 17, 2017), https://www.boem.gov/newsroom/notes-stakeholders/boem-withdraws-sole-liability-orders.
[27] Risk Management, Financial Assurance and Loss Prevention, 85 Fed. Reg. 65,904 (Oct. 16, 2020).

(1) a lessee's credit rating (or credit proxy) is BB- or Ba3 or (2) the value of proven oil and gas reserves for the lease exceeds three times the estimate decommissioning cost associated with production of the reserves.[28] BOEM estimated that financial assurances required of lessees would decrease by about $200 million.[29] The 2020 proposed rule would have exacerbated the decommissioning problem for the federal government and U.S. taxpayers and increased risk to the environment and communities that rely on the Gulf of Mexico.

The current proposed rule mirrors many of the issues that plagued the 2020 proposed rule but does make some encouraging changes. The rule once again replaces the evaluation of the five current criteria with a waiver of supplemental financial assurances if one of two criteria are met: an investment-grade credit rating (or credit proxy) or if the value of proved oil and gas reserves on the lease is at least three times greater than the decommissioning liability associated with those reserves.[30] BOEM makes positive changes like raising the credit rating threshold for waiver of supplemental financial assurances from BB- or Ba3 to BBB- or Baa3 and eliminating reliance on the credit rating of a predecessor lessee to waive supplemental financial assurances. But BOEM must continue to strengthen the proposed rule as outlined below to ensure that threats to the coastal communities, the environment, and taxpayers are minimized.

I. BOEM Must Strengthen the Proposed Criteria it Will Use to Evaluate Whether to Waive Supplemental Bonding to Ensure a Lessee is Financially Healthy.

A. BOEM Should Strengthen its Credit Rating Requirements.

BOEM must improve its credit rating requirements to only waive supplemental financial assurances when companies have low credit risk and a strong capacity to meet their financial commitments. The change from the BB- or Ba3 credit rating requirement in the 2020 rule to the proposed BBB- or Baa3 credit rating requirement is a positive improvement. Still, BOEM should further raise the investment grade rating to ensure the risk of failing to meet decommissioning liabilities is low. BOEM should also impose strict monitoring requirements in its regulations. Additionally, BOEM should eliminate its proxy credit rating proposal because it does not have the expertise to substitute its judgement for that of credit rating agencies.

BOEM is proposing to use "investment grade" credit ratings as a threshold for waiving supplemental financial assurances, but at the BBB- and Baa3 credit ratings, companies still do not show a strong capacity to meet financial commitments. S&P describes its BBB- as "adequate capacity to meet financial commitments,"[31] and Moody's Baa3 rating is "subject to moderate credit risk and as such may possess certain speculative characteristics."[32] Going one step up on

---

[28] *Id.* at 65,910–11.
[29] *Id.* at 65,904.
[30] 88 Fed. Reg. at 42,142.
[31] *Intro to Credit Ratings*, S&P GLOBAL RATINGS, https://www.spglobal.com/ratings/en/about/intro-to-credit-ratings (last visited August 11, 2023).
[32] *Glossary,* NASDAQ, https://www nasdaq.com/glossary/b/baa3 (last visited August 28, 2023).

the credit rating scale for both S&P and Moody's would mean companies have "strong capacity to meet financial commitments"[33] and are "subject to low credit risk."[34] These would be more appropriate thresholds for waiving supplemental financial assurances. If BOEM is going to waive supplemental financial assurances, the risk of failing to meet obligations should be low. BOEM cannot put the oceans and communities at risk by waiving the supplemental bonding requirements for companies that have merely an adequate capacity to meet financial commitments and that have speculative characteristics.

BOEM could also consider different levels of supplemental financial assurance at different investment grade credit ratings and only consider full exemption from supplemental financial assurance for companies with the highest level of credit ratings. For example, there are four levels of investment grade credit ratings for S&P (BBB, A, AA, and AAA).[35] BOEM could consider requiring bonds to cover 75% of decommissioning liabilities for companies with a BBB credit rating, 50% for companies with an A credit rating, 25% for companies with an AA credit rating, and a full waiver for companies with a AAA credit rating.

Additionally, BOEM should impose clear monitoring requirements for a lessee's credit ratings. BOEM alludes to monitoring credit ratings in the preamble, but there is no mention of monitoring in the text of the regulations. To ensure that these commitments are kept, BOEM must include specific requirements for reviewing credit ratings regularly, with a requirement to reassess credit ratings at least once per year. The financial strength of companies can change quickly, particularly for companies that rely heavily on the price of oil and gas,[36] so it is imperative that BOEM regularly assess companies' credit ratings to ensure that they continue to have a strong capacity to meet their decommissioning obligations.

BOEM should also abandon its proposal to use proxy credit ratings. BOEM proposed that it will use a proxy credit rating based on a company's audited financial statements in cases where lessees do not have a credit rating from a Nationally Recognized Statistical Rating Organization. BOEM is not a financial agency, nor does it have the capacity or expertise to properly institute such a system. BOEM should instead use its resources to determine whether NRSRO credit ratings are missing any key information. For example, credit ratings account for "asset-retirement obligations" like decommissioning liabilities,[37] but it is possible that the credit ratings may not account for decommissioning liabilities on leases where the company has a minority

---

[33] S&P, *supra* note 31.
[34] *Ratings Definitions*, MOODY'S INVESTORS SERVICE, https://ratings moodys.com/rating-definitions (last visited August 11, 2023).
[35] S&P, *supra* note 31.
[36] Dyna Mariel Bade, *Rating agencies hand out downgrades as oil, gas price assumptions fall*, S&P GLOBAL (March 20, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/rating-agencies-hand-out-downgrades-as-oil-gas-price-assumptions-fall-57694240.
[37] S&P GLOBAL, *How We Rate Nonfinancial Corporate Entities* 8 (Feb. 19, 2021), https://www.spglobal.com/ratings/_division-assets/pdfs/041019_howweratenonfinancialcorporateentities.pdf.

interest, for similar reasons to why BOEM raises this as an issue for its proxy credit rating proposal.[38]

B. BOEM Should Not Use the Value of Proven Oil Reserves as a Sole Criterion to Waive Supplemental Financial Assurances.

Under the proposed rule, a lessee must only meet one of the two financial strength criteria to obtain a waiver from the supplemental financial assurance requirement.[39] In other words, if a lessee meets the 3-1 ratio criterion, BOEM can grant that lessee a waiver even when they failed to meet the credit rating criterion. BOEM should not use the 3-1 ratio of proven oil value to decommissioning cost as a sole criterion to determine whether a lessee is required to provide supplemental assurance.

Using the value of proven oil reserves does not account for the volatility in the value of oil or potential changes in the cost of decommissioning. The value of proven oil reserves is unsuitable to assess a lessee's financial health and ability to comply with its decommissioning obligations. The oil market is extremely volatile,[40] so the value of proven oil reserves is difficult to predict. In addition, the world is moving away from fossil fuels, and the United States has committed to a "clean energy future,"[41] which will continue to drive investment away from the oil industry.[42] These aspects, separately and in conjunction, highlight the volatile financial environment of the oil market and the unreliability of using the value of proven oil reserves as a sole criterion to waive a lessee's requirement to provide supplemental financial assurances to cover decommissioning costs.

Moreover, the cost of decommissioning also fluctuates with the market. The cost of decommissioning may be influenced by multiple factors, including weather conditions, the availability of vessels and other essential equipment, and whether lessees have up to date documentation on the configuration of the infrastructure to avoid unexpected events that would delay or complicate the decommissioning process.[43]

Both the value of proven oil reserves and the cost of decommissioning are influenced by complex external factors, with the value of proven oil reserves being historically volatile and

---

[38] *See* 88 Fed. Reg. at 42,147 (explaining that the use of a proxy credit rating may not adequately account for a situation where a company has a substantial amount of decommissioning liabilities associated with facilities for which it is a minority owner).
[39] *Id.* at 42,136.
[40] *See* Jesse Barnett & Jeff Barron, *Oil market volatility is at an all-time high*, U.S. ENERGY INFORMATION ADMINISTRATION (March 27, 2020), https://www.eia.gov/todayinenergy/detail.php?id=43275.
[41] *Biden-Harris Administration Announces First Ever Offshore Wind Lease Sale in the Gulf of Mexico*, U.S. DEPT. OF THE INTERIOR (July 20, 2023), https://www.doi.gov/pressreleases/biden-harris-administration-announces-first-ever-offshore-wind-lease-sale-gulf-mexico.
[42] *See Biden-Harris Administration Sets Offshore Energy Records with $4.37 Billion in Winning Bids for Wind Sale*, U.S. DEPT. OF THE INTERIOR (Feb. 25, 2022), https://www.doi.gov/pressreleases/biden-harris-administration-sets-offshore-energy-records-437-billion-winning-bids-wind.
[43] Mark J. Kaiser, *BSEE decommissioning cost estimates in the shallow water US Gulf of Mexico*, SHIPS AND OFFSHORE STRUCTURES (Oct. 3, 2022) at 5, 10.1080/17445302.2022.2126117.

predicted to decrease with the growth of renewable energy alternatives. In its proposal, BOEM does not indicate a plan to carry out any type of monitoring to ensure that the 3-1 ratio is maintained throughout the life of the lease. However, even if that were the case, the uncertain nature of these values poses financial risk to the federal government and taxpayers. For the foregoing reasons, the 3-1 proven oil reserves value to decommissioning costs criterion to assess is inadequate, and BOEM should eliminate it from consideration.

C. Eliminating Consideration of Lessees' Record of Compliance Increases Financial Risk for Taxpayers and the Government

We also have concerns with eliminating consideration of a lessee's "record of compliance" to determine whether the lessee should provide supplemental financial assurances. In the proposed rule, BOEM states that eliminating the evaluation of a lessee's record of compliance is warranted because it is not "an accurate predictor of [a lessee's] financial health."[44] BOEM explains that a company's Incidents of Non-Compliance ("INCs") are related to the size and complexity of the company and its operations, not its financial health.[45] Nonetheless, even if a company's record of compliance is not directly related to its financial health, a poor record of compliance demonstrates that a company will be less likely to comply with its decommissioning obligations.

In particular, BOEM should deny a waiver to any company that has current decommissioning obligations—any companies that own "idle iron." BSEE defines "idle iron" as infrastructure that is "not useful for lease operations and is not capable of oil, gas, or sulphur production in paying quantities."[46] No later than 3 years after a well is no longer useful for lease operations and not capable of oil production in paying quantities, the lessee must decommission that well.[47]

Currently, there are approximately 7,302 inactive wells, temporarily plugged wells, or wells on inactive leases in the US Gulf of Mexico with an estimated cost of $28.65 billion to permanently plug and abandon.[48] While not every one of these might qualify as idle iron per BSEE's definition, the sheer extent of inactive infrastructure in the water demonstrates the need to have measures in place to ensure that lessees will be compliant with decommissioning obligations. BOEM should not allow lessees that hold idle iron in the water to keep adding to these costs, endangering the environment and burdening taxpayers. BOEM should require a lessee with idle iron to pay the full estimated amount of decommissioning in supplemental financial assurances, regardless of whether the lessee meets the investor level credit rating criterion for a waiver.

---

[44] 88 Fed. Reg. at 42,143.
[45] *Id*.
[46] Bureau of Safety and Environmental Enforcement, *Idle Iron Decommissioning Guidance for Wells and Platforms*, NTL No. 2018-G03 (December 11, 2018) at 1, https://www.bsee.gov/sites/bsee.gov/files/notices-to-lessees-ntl//ntl-2018-g03.pdf.
[47] *Id*. at 2.
[48] Agerton et al., *supra* note 1.

II. The Proposed Rule Does Not Include Sufficient Information About the Probabilistic Estimates

After BOEM determines that a lessee is required to provide supplemental financial assurances, BOEM uses BSEE's decommissioning cost estimates to determine the amount of assurances the lessee must post. The proposed rule uses BSEE's probabilistic estimates (referred to as P50, P70, and P90), which BSEE developed using industry-reported decommissioning costs.[49] BOEM does not disclose BSEE's model or the industry-reported decommissioning costs in the proposed rule.

Through reverse engineering, experts have attempted to understand how BSEE calculates the decommissioning costs estimates because, as mentioned in the studies, the underlying model is not available to the public.[50] In attempts to recreate BSEE's model, experts have had to make assumptions about the parameters within BSEE's model.[51] Since reversed-engineered models make assumptions about BSEE's model, some differences between the estimates of the reversed-engineered models and BSEE's model are expected. However, the exact reason behind these differences will remain unresolved without more transparency from the agencies about the model and the parameters it considers. For instance, in Agerton et al., the authors estimate $42 billion in decommissioning liabilities accounting for the plugging and abandoning of all wells in the federal Gulf of Mexico. Specifically, Agerton et al. does not account for decommissioning platforms, subsurface equipment, or pipelines.[52] BOEM, however, estimates a cost of $42.8 billion for *all* decommissioning liabilities, including plugging and abandonments accounted for in Agerton et al. as well as decommissioning of other infrastructure. The similarity of the estimated number (approximately $42 billion) despite the difference in infrastructure accounted for between Agerton's estimate and the estimate in the proposed rule suggests that BOEM may be using an estimate from BSEE that underestimates the true cost of decommissioning liabilities.[53] In addition, BOEM concludes that using the P70 estimate will increase available funds for decommissioning by $9.2 billion,[54] which is encouraging but without more information it remains unclear whether that is a reasonable estimate. The lack of transparency makes it impossible for the public to know whether these estimates are technically and financially sound and whether BOEM, under the proposed rule, is asking for sufficient supplemental financial assurances to cover decommissioning costs. Since BOEM is applying BSEE's model to determine the amount of supplemental assurance it will require from lessees, BOEM should work with BSEE to make the probabilistic estimates model and industry-reported costs available to the public.

---

[49] 81 Fed. Reg. 80,587; *see also* Bureau of Safety and Environmental Enforcement, *Reporting Requirements for Decommissioning Expenditures on the OCS*, NTL 2017-N02 (March 2, 2017), https://www.bsee.gov/sites/bsee.gov/files/notices-to-lessees-ntl//ntl-2017-n02.pdf.
[50] Agerton et al., *supra* note 1, at 8.
[51] *Id*.; Kaiser, *supra* note 43.
[52] Agerton et al., *supra* note 1, at 8.
[53] *Id*.
[54] 88 Fed. Reg. at 42,143.

III. BOEM Should Apply the P90 Estimate

The proposed rule adopts P70 to calculate the supplemental assurances owed by a lessee. Adopting the P70 estimate means the supplemental financial assurance from a lessee would be 70 percent likely to cover the actual decommissioning costs of a facility. This also means that under the P70 estimate, there is a 30 percent likelihood that decommissioning of that facility would be underfunded. And based on the results of the Agerton et al. study, which did not account for the decommissioning of all infrastructure, the P70 total for decommissioning costs may be a significant underestimation of total decommissioning costs for all the infrastructure that needs to be decommissioned under each lease. BOEM's reasoning behind adopting the P70, instead of the P90 or the P50 estimates, is that P70 strikes a balance between the burden to industry and the risk of being underfunded.[55] BOEM does not offer any further information about this "balance," evidence about the "burden" on industry, or how it accounted for the risk of being underfunded. In its discussion about the possibility of adopting the P90 estimate, BOEM admits that it does not have information to suggest that adopting the P90 estimate would unreasonably burden industry, specifically on offshore capital expenses and investments.[56] Moreover, the burden on industry that BOEM refers to is merely complying with the decommissioning obligations that industry has always been required to comply with; safely and timely decommissioning of the wells they voluntarily drill. Moreover, oil leaks from unplugged or poorly plugged wells can have long-lasting detrimental effects on individual marine species and whole ecosystems.[57] BOEM does not specifically consider environmental damage or the burden on coastal communities impacted by environmental degradation in its balancing.

Taking all factors into consideration and, after BOEM determines that a lessee is at risk of not complying with its financial obligations, BOEM should seek to obtain as close to 100 percent of the estimated decommissioning cost as possible from the lessee, not settle for an amount that is only 70 percent likely to cover the costs. For all these reasons, BOEM should apply the P90 estimate. While using P90 does not guarantee that decommissioning costs will be fully covered, its application would meaningfully decrease the financial risks on the federal government and ensure that decommissioning processes are completed in a timely manner to prevent environmental damage.

IV. A NEPA Review is Required Because the Proposed Rule is Highly Likely to Cause Environmental Effects

BOEM states that a NEPA review is not required for the proposed rule because it falls under the Department of Interior's categorical exclusion for a rule "of an administrative, financial, legal, technical, or procedural nature."[58] BOEM also states that the proposed rule does not involve any extraordinary

---

[55] 88 Fed. Reg. at 42,144.
[56] *Id*.
[57] Agerton et al., *supra* note 1, at 2.
[58] 88 Fed. Reg. at 42,167 (citing 43 C.F.R. § 46.210(i)).

circumstances in 43 C.F.R. § 46.215.[59] Given the current state of abandoned infrastructure in the Gulf of Mexico and the potential impact of this rule on exacerbating the issue, NEPA and the Department of the Interior's regulations require that BOEM prepare a NEPA review. The rule will significantly impact public health or safety and has highly uncertain and potentially significant environmental effects.

Under the Department of Interior's NEPA regulations, BOEM cannot categorically exclude actions from NEPA review if they involve one of the extraordinary circumstances listed in the regulations.[60] Of relevance to this proposed rule, an extraordinary circumstance exists for actions that (1) "[h]ave significant impacts on public health or safety" or (2) "[h]ave highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks."[61]

BOEM and the GAO have both noted that a lack of adequate financial assurances can impact the environment and navigational safety. In its 2015 report, the GAO noted that the Department of the Interior requires lessees to decommission leases to avoid "potential safety hazards to marine vessels and environmental hazards to sea life and humans."[62] The GAO also noted that officials at the Department of Interior "identified about $2.3 billion in decommissioning liabilities in the Gulf that may not be covered by financial assurances."[63] Even more concerning is a recent report showing that 14,000 wells are non-producing but still unplugged, which can result in leaks of oil and gas and pose navigational hazards.[64]

In the proposed rule, BOEM acknowledges that without adequate financial assurance in place, decommissioning could take longer to arrange and could result in additional damage to the environment and obstacles to navigation.[65] And, despite the increase in estimated supplemental financial assurances, there is still a risk that some decommissioning liabilities will not be covered. At P70, there is a 30 percent likelihood that decommissioning liabilities for a facility are underestimated. So, even if BOEM requires supplemental financial assurance in the full estimated amount, there is still a risk that BSEE will not have sufficient funds to cover the full decommissioning costs of a lease.

V. If BOEM Intends to Allow Companies to Avoid Supplemental Financial Assurances, It Must Raise Base Bond Requirements and Eliminate Area-Wide Base Bonds

The Minerals Management Service (the precursor to BOEM) decided the current base bond amounts in 1993, which was primarily based on costs in relatively shallow waters,[66] and that amount was implemented in 1997.[67] Drilling has gotten increasingly deeper, resulting in increased decommissioning costs, but BOEM has not updated its base bond requirements. This is unacceptable. If BOEM continues to waive supplemental financial assurances, it must at least

---

[59] *Id.*
[60] 43 C.F.R. § 46.210.
[61] 43 C.F.R. 46.215(a), (d).
[62] GAO, *supra* note 11, at 2.
[63] *Id.* at 23.
[64] Agerton et al., *supra* note 1, at 7.
[65] 88 Fed. Reg. at 42,138.
[66] Surety Bond Coverage for Leasing of Sulphur or Oil and Gas in the Outer Continental Shelf (OCS), 58 Fed. Reg. 45,255, 45,256 (Aug. 27, 1993).
[67] Surety Bonds for Outer Continental Shelf Leases, 62 Fed. Reg. 27,948 (May 22, 1997).

update its base bond requirements to account for the increase in the average cost of decommissioning leases and eliminate or significantly increase the area-wide base bonds.

In the 1993 rule, the Minerals Management Service stated that the amounts set were primarily created to address decommissioning in shallow water of 0 to 200 feet with bond coverage on remaining leases being addressed on a case-by-case basis through supplemental bonds.[68] The number of deepwater wells in the Gulf of Mexico, however, has significantly increased since 1993.[69] And deepwater production is getting even deeper. There was virtually no production in ultra-deep waters in the 1990s, but by 2017, 52 percent of U.S. oil production came from ultra-deep waters.[70] As drilling has gotten increasingly deeper, decommissioning costs have also increased.

In 1993, the Minerals Management Service estimated that the cost of removing all structures and clearing entire lease sites in the Gulf of Mexico ranged from $3.2 million for leases of 0 to 50 feet water depth to $21 to 90+ million for leases of over 401 feet water depth.[71] BOEM and BSEE do not provide similar estimates for average costs of clearing entire leases, but from reviewing estimates for individual leases, it appears the costs typically exceed the estimates from 1993. The Agerton et al. study found that the average mean cost per wellbore in deep federal waters was $24 million dollars.[72] Leases sometimes have multiple wellbores in addition to other infrastructure that needs to be decommissioned.

Given the changing conditions of offshore drilling, BOEM must update its base bond amounts to account for the increased cost of decommissioning.

BOEM must also eliminate area-wide base bonds or significantly increase the total required for area-wide bonds. Companies can sometimes hold hundreds of leases,[73] yet BOEM is only requiring $1 million, or the equivalent of the base bond for five leases, at the exploration stage and $3 million, or the equivalent of the base bond for six leases, at the development and production stage.[74] It is irrational to only require bonds that would cover a small fraction of a company's leases, particularly when most of these companies are already off the hook for supplemental bonding. BOEM must end this practice by updating its regulations to eliminate area-wide leasing or increase the bonding requirements significantly.

---

[68] 58 Fed. Reg. at 45,255.
[69] GAO, *supra* note 11, at 14.
[70] National Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling* 73 (Jan. 2011) https://www.govinfo.gov/content/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf; Steven Murawski et al., *Ch. 2, Deepwater Oil and Gas Production in the Gulf of Mexico and Related Global Trends*, *In* Scenarios and Responses to Future Deep Oil Spills (Jan. 2020).
[71] 58 Fed. Reg. at 45,256.
[72] Agerton et al., *supra* note 1.
[73] *Active Leases by Designated Operator*, U.S. DEP'T OF INTERIOR: BUREAU OF OCEAN ENERGY MGMT. (Aug. 1, 2023), https://www.data.bsee.gov/Leasing/Files/1360.pdf.
[74] 30 C.F.R. § 556.901.

* * *

Despite some improvements from the 2020 proposed rule, this proposed rule still fails to meaningfully minimize financial risk to the federal government and taxpayers and does not afford the environment and coastal communities needed protections. Out of the three major flaws in BOEM's procedures that the GAO identified in its 2015 Report (inability to determine decommissioning liabilities, failure to acquire sufficient supplemental assurances to cover decommissioning liabilities, and flawed criteria to determine lessees' financial strength), BOEM only partially addresses these shortcomings by requiring lessees to have a certain level of credit rating to be granted a waiver and by adopting a new method to estimate decommissioning liabilities. For BOEM to financially protect the federal government and taxpayers the way it intends to through this proposed rulemaking, BOEM needs to make significant changes.

BOEM should require every lessee to post supplemental financial assurances to ensure decommissioning costs are covered. But if BOEM insists on granting waivers, BOEM should only waive supplemental financial assurances for lessees that have an investment credit rating higher than BBB- (S&P) or Baa3 (Moody's) and should also consider lessees' record of compliance, including whether lessees currently have idle iron. BOEM should also eliminate consideration of proxy credit ratings and the value of proven oil reserves associated with a given lease.

Once BOEM determines that a lessee is required to provide supplemental financial assurances, BOEM should use P90 to estimate decommissioning costs to minimize the risk of being underfunded. To cure the lack of transparency and uncertainty around BOEM's decision to apply BSEE's probabilistic estimates, BOEM should work with BSEE to make the probabilistic estimates model available to the public. Finally, BOEM's proposed rule presents an extraordinary circumstance as defined under NEPA regulations,[75] requiring BOEM to prepare a NEPA review. BOEM should act accordingly.

Neither the federal government nor taxpayers should be held responsible for the decommissioning costs of private entities that build infrastructure and drill into the seabed seeking profits. It is BOEM's job to manage resources in an "environmentally and economically responsible way."[76] BOEM should, therefore, ensure that lessees are held to environmentally and economically responsible standards, instead of shifting the financial burden to taxpayers or threatening the health of entire marine ecosystems.

We urge BOEM to consider the changes we propose here, which would move the currently inadequate federal offshore decommissioning framework in a positive direction.

---

[75] 43 C.F.R. § 46.215.
[76] BOEM About Page, https://www.boem.gov/about-boem (last visited Aug. 20, 2023).

Sincerely,

Ava Ibanez Amador, Associate Attorney Oceans Program
Earthjustice

Andres Perotti, Staff Attorney
Oceana

Miyoko Sakashita, Oceans Program Director
Center for Biological Diversity

Nicole Ghio, Senior Fossil Fuels Program Manager
Friends of the Earth