



United States Department of the Interior

BUREAU OF OCEAN ENERGY MANAGEMENT
WASHINGTON, DC 20240-0001

March 18, 2024

MEMORANDUM

SUBJECT: Meeting Notes for the March 14, 2024, E.O. 12866 Listening Session on the Risk Management and Financial Assurance for OCS Lease and Grant Obligations Final Rule Requested by Andres Perotti, Oceana

FROM: Kelley Spence (DOI/BOEM/OOR)

To: Docket No. BOEM-2023-0027

This memorandum summarizes the E.O. 12866 listening session held by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) on March 14, 2024, via WebEx. The purpose of this listening session was to provide Oceana with the opportunity to express concerns regarding potential regulatory changes as a result of the Risk Management and Financial Assurance for OCS (Outer Continental Shelf) Lease and Grant Obligations Final Rule.

Briefing Attendees:

Ava Ibanez Amador	Earthjustice
Sarah Guy	Ocean Defense Initiative
Michael Hagan	EOP
Melissa Hearne	DOI / SOL
Clifton Horton	DOI
Hunter Jonsson	BOEM
Kati Kovacs	DOI
Rebecca Loomis	Natural Resources Defense Council
Michael Messmer	Oceana
Andres Perotti	Oceana
Mark Purdy	DOI
Kelley Spence	BOEM
Aaron Troncoso	CPO
Eric Turner	BOEM
Charles Yudson	DOI

Discussion Points:

- Oceana stated that they read the GAO report from last month and highlighted that they believe decommissioning is important for the environment, protecting the government, and making navigation safe. They further asserted that the stronger the final rule, the better for the environment it would be, and requested that BOEM ensure “industry is cleaning up its own mess.”
- Oceana highlighted seven recommendations for the proposed rule that they submitted to BOEM during the public comment period. These recommended improvements were as follows:
 - Use the highest P-value for decommissioning estimates (P90),
 - Discontinue the practice of considering predecessors,
 - Raise the credit rating threshold to include only minimally risky companies,
 - Remove the proxy credit rating provision as BOEM is not a credit agency,
 - Eliminate the 3-to-1 ratio because oil and gas prices are highly volatile,
 - Include the record of compliance when waiving supplemental financial assurance and do not waive companies with idle iron, and
 - Eliminate area-wide base bonds.

Attachments (4)

Attachment 1

March 5, 2024

Laura Daniel-Davis, Acting Deputy Secretary
Department of Interior
1849 C Street NW
Washington, D.C. 20240
laura_davis@ios.doi.gov

Elizabeth Klein, Director
Bureau of Ocean Energy Management
1849 C Street NW
Washington, D.C. 20240
elizabeth.klein@boem.gov

Re: Proposed Rule on Risk Management and Financial Assurance for OCS Lease and Grant Obligations

Dear Deputy Secretary Daniel-Davis and Director Klein,

When oil and gas companies fail to properly decommission offshore wells, platforms, and other infrastructure, and no responsible party can be identified, the U.S. public is left to pay the price. According to a recent Government Accountability Office (GAO) report, the cost of cleaning up the mess that industry leaves behind could be upwards of \$30 billion.¹ Decommissioning offshore oil and gas infrastructure is necessary to protect coastal communities, wildlife, and the environment from oil leaks and spills, and pollution from corroded metal.² Last June, the Bureau of Ocean Energy Management (BOEM) issued a proposed rule that would update requirements for supplemental bonding to protect taxpayers by better ensuring that offshore oil and gas leaseholders can meet their decommissioning obligations.³ **We urge the Bureau of Ocean Energy Management (BOEM) to hold the oil and gas industry accountable by issuing a strong final rule on financial assurance.**

Under the terms of offshore oil and gas leases, lessees agree to permanently plug wells and decommission platforms and other infrastructure within one year after the end of the lease or when those facilities are no longer useful for operations, absent approval to do otherwise.⁴ These requirements are also documented in the regulations of the Bureau of Safety and Environmental Enforcement, BOEM's sister agency.⁵

Yet the oil and gas industry has routinely failed to plug wells and decommission infrastructure on time—or at all. GAO found that, for Gulf of Mexico leases that ended in 2010 through 2022, operators missed end-of-lease decommissioning deadlines for over 40% of wells (approximately 4,700 of 10,600) and 50% of platforms (approximately 1,300 of 2,300).⁶ BSEE considered over 1,700 of end-of-lease wells and 300

¹ Government Accountability Office (GAO), “Interior Needs to Improve Decommissioning Enforcement and Mitigate Related Risks,” (hereafter, “GAO”), GAO-24-106229, at 26 (Jan. 2024), <https://www.gao.gov/assets/d24106229.pdf>.

² *Id.* at 9.

³ BOEM, Notice of proposed rulemaking and request for comment, Risk Management and Financial Assurance for OCS Lease and Grant Obligations, 88 Fed. Reg. 42,136 (June 29, 2023).

⁴ BOEM, “Oil and Gas Lease of Submerged Lands Under the Outer Continental Shelf Lands Act,” Form BOEM-2005, sec. 22, <https://www.boem.gov/sites/default/files/about-boem/Procurement-Business-Opportunities/BOEM-OCS-Operation-Forms/BOEM-2005.pdf>.

⁵ 30 C.F.R. §§ 250.1703, 250.1710, 250.1725.

⁶ GAO, at 13.

end-of-lease platforms in the Gulf of Mexico to be delinquent as of June 2023; that is, they had not been decommissioned nor approved for any exception to the deadline.⁷ Lessees must also decommission infrastructure that is idle, or no longer useful for operations.⁸ As of June 2023, there were over 1,000 delinquent idle wells and 100 delinquent idle platforms in the Gulf of Mexico.⁹ Over 800 of these 1,000 wells had been inactive for more than 10 years.¹⁰ Nearly 600 of the delinquent idle wells had not even been temporarily plugged, leaving them more prone to leaking oil.¹¹

To ensure that funding is available for cleanup, even if an oil and gas company declares bankruptcy¹² or otherwise fails to fulfill its obligations, BOEM collects bonds from lessees before they begin exploration and drilling.¹³ The agency may also require payment of supplemental financial assurance from companies that are less likely to be able to fulfill their financial obligations.¹⁴ However, the financial assurances required to date are insufficient to cover costs. According to GAO, BOEM holds around \$3.5 billion in supplemental bonds, while outstanding decommissioning costs equaled between \$40 billion and \$70 billion as of June 2023.¹⁵ The gap between bonding levels and decommissioning costs places enormous financial risk on the federal government and the public. If companies fail to meet their obligations, decommissioning costs will ultimately be borne by taxpayers. BOEM can close this gap by increasing bonding levels under the pending financial assurance rule.

Decommissioning idle and abandoned infrastructure is imperative to protect coastal communities, the offshore environment, and other ocean users. Unplugged wells can leak oil and drilling fluids into the sea, where oil is toxic to many marine wildlife and has effects ranging from impaired reproduction to disease and reduced physiological health to death.¹⁶ Idle and abandoned infrastructure also creates navigational safety hazards for other vessels transiting the area, especially if navigational aid lights have stopped working.¹⁷ Collisions with oil and gas infrastructure may put the vessel crew at risk of injury or death.¹⁸ Moreover, when oil and gas infrastructure is left in the ocean, it poses a serious risk of oil spills. Over time, tanks, pipelines, and platforms are corroded by the ocean. As it degrades, infrastructure grows increasingly vulnerable to hurricanes, which can topple or destroy platforms, potentially triggering

⁷ *Id.* at 14.

⁸ 30 C.F.R. § 250.1703. BSEE guidance defines wells as “no longer useful for operations” when they have not produced in five years and there are no plans for future operations. Platforms are “no longer useful for operations” when they have toppled, destroyed, or have not been used in the past five years for oil and gas operations. BSEE, “Notice to Lessees And Operators Of Federal Oil And Gas Leases And Pipeline Right-Of-Way Holders in the Outer Continental Shelf, Gulf of Mexico OCS Region,” NTL No. 2018-G03, at 2 (Dec. 11, 2018), <https://www.bsee.gov/sites/bsee.gov/files/notices-to-lessees-ntl/ntl-2018-g03.pdf>.

⁹ GAO, at 19.

¹⁰ *Id.*

¹¹ *Id.*

¹² Since 2009, 37 offshore oil and gas operators have filed for bankruptcy, according to the Department of Interior. GAO, at 2.

¹³ 30 C.F.R. § 556.901.

¹⁴ *Id.* § 556.901(d).

¹⁵ GAO, at 26.

¹⁶ *Id.* at 9-10 (citing National Academies of Sciences, Engineering, and Medicine, *Oil in the Sea IV: Inputs, Fates, and Effects* (Washington, D.C.: 2022)).

¹⁷ GAO, at 8.

¹⁸ *Id.*

disastrous oil spills.¹⁹ In 2004, for example, Hurricane Ivan caused a mudslide that destroyed a Taylor Energy oil platform and more than twenty wells, resulting in an oil spill that continues to this day.²⁰

Oil spills can cause serious harm to coastal communities, as we know well from the BP *Deepwater Horizon* catastrophe. The impacts of this disaster have persisted for years. For example, people involved in oil cleanup suffered from diminished blood, liver, lung, and heart function, with prolonged or even worsening symptoms seven years after the disaster.²¹ The economic costs to the region have also been significant—cumulatively, the disaster wiped out more than 16 million user days of outdoor recreation such as boating, fishing, and beachgoing.²² Finally, *Deepwater Horizon* had devastating ecological effects. The spill killed countless wildlife, including nearly twenty percent of the Rice’s whale population, a critically endangered species with fewer than 100 members living today.²³ Wide swaths of ocean and coastal habitats were contaminated with oil, including floating *Sargassum* (seaweed) mats, marshes, and beaches.²⁴ With hurricanes growing stronger and more intense due to climate change, allowing thousands of abandoned wells and platforms to degrade in the Gulf is a recipe for more harmful oil spills. Decommissioning idle and abandoned wells is imperative for advancing environmental justice as well as protecting wildlife and habitats.

To close the gap between outstanding decommissioning costs and current bonding levels, and to facilitate the decommissioning of offshore infrastructure, we urge BOEM to issue a strong financial assurance rule. As described in our comment submitted on September 6, 2023 regarding BOEM’s proposed rule,²⁵ attached, the final rule should:

- **Use the P90 estimate of decommissioning costs to establish supplemental financial assurance levels.** The proposed rule presented three probabilistic estimates of decommissioning costs for each facility on any given lease. BOEM proposed using the second-lowest cost estimate, P70, to set the amount of supplemental financial assurance it will require, which would result in only a 70% likelihood that the amount of financial assurance required will cover the full cost of decommissioning. BOEM should instead use the P90 value to set the amount of required supplemental financial assurance, which would increase the likelihood of covering the full decommissioning cost of an offshore facility to 90%.

¹⁹ *Id.* at 9.

²⁰ *Id.* at 10; NOAA, “Private, public effort contains 1 million gallons of oil at longest U.S. spill,” (July 12, 2022) <https://www.noaa.gov/news-release/private-public-effort-contains-1-million-gallons-of-oil-at-longest-us-spill>.

²¹ Mark D’Andrea & G. Kesava Reddy, “The Development of Long-Term Adverse Health Effects in Oil Spill Cleanup Workers of the Deepwater Horizon Offshore Drilling Rig Disaster,” *Frontiers in Public Health* 6 (2018): 117, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5932154/#>.

²² Deepwater Horizon Natural Resource Damage Assessment Trustees, “Chapter 4: Injury to Natural Resources,” in *Deepwater Horizon Oil Spill: Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement*, February 2016, 4–667, <https://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan>

²³ *Id.* at 4–632.

²⁴ Boufadel, M.C., et al., “Simulation of the Landfall of the Deepwater Horizon Oil on the Shorelines of the Gulf of Mexico,” *Environmental Science & Technology*, Vol. 48(16), pp. 9496–9505 (2014); Powers, S.P., et al., “Novel Pathways for Injury from Offshore Oil Spills: Direct, Sublethal and Indirect Effects of the Deepwater Horizon Oil Spill on Pelagic Sargassum Communities,” *PLoS ONE*, Vol. 8(9):e78042 (2013); Turner, R., et al., “Distribution and recovery trajectory of Macondo oil in Louisiana coastal wetlands,” *Marine Pollution Bulletin*, Vol. 87(1-2), pp. 57–67 (2014).

²⁵ Comment from Alaska Environment et al., submitted to BOEM by Ocean Defense Initiative re: Docket No. BOEM-2023-0027 (Sept. 6, 2023), available at <https://www.regulations.gov/comment/BOEM-2023-0027-1977>.

- **Omit consideration of predecessor lessees' financial strength when determining the amount of financial assurance needed from a lessee.** The proposed rule would no longer allow BOEM to consider the financial strength of predecessor lessees when determining whether to require supplemental financial assurance, or what amount to require, from lessees. We strongly support this change, which would better ensure that bonding levels will cover decommissioning needs.
- **Set a higher required credit rating for waiver of supplemental financial assurance.** The proposed rule would determine whether supplemental financial assurance should be required based on two criteria: (1) a lessee's credit rating or (2) the ratio of the value of proved reserves on the lease to the lease decommissioning liability. For the credit rating criterion, BOEM proposed to waive supplemental financial assurance if companies have an S&P credit rating of at least BBB or a Moody's credit rating of Baa3. However, S&P and Moody's describe these credit ratings, respectively, as indicating "adequate capacity to meet financial commitments"²⁶ and "subject to moderate credit risk . . . [and that which] may possess speculative characteristics."²⁷ Companies with these ratings, by definition, do not demonstrate a strong potential to meet their debt obligations, and BOEM should require a higher credit rating for waiving supplemental financial assurance.
- **Disallow use of proxy credit ratings.** The proposed rule provides that in cases where potential lessees do not have a credit rating from a recognized credit rating agency, BOEM will use a proxy credit rating based on a company's audited financial statements. However, BOEM is not a financial agency nor does it have the capacity to institute such a system, and there is no basis for substituting the agency's judgment for that of a Nationally Recognized Statistical Rating Organization as identified by the Securities and Exchange Commission. The final rule should remove the option for BOEM to use proxy credit ratings.
- **Remove value of proved reserves as a criterion for waiving supplemental financial assurance.** As noted above, the proposed rule directs BOEM to determine whether supplemental financial assurance should be required based on: (1) credit rating or (2) the ratio of the value of proved reserves on the lease to the lease decommissioning liability. Under the second criterion, when none of the lessees have an investment grade credit rating, BOEM would look to the value of the lease's proved oil and gas reserves relative to the lease's decommissioning obligations associated with the production of those reserves. However, normal fluctuations in the demand and price of oil and gas coupled with the imminent global shift away from fossil fuels to renewable energy make it likely that the value of proved oil reserves in all leases will decline over time. As a result, lessees may earn less over the life of the lease and in turn, have less capital to cover decommissioning costs. The value of proved oil and gas reserves therefore cannot be considered a reliable substitute for supplemental financial assurances, which are necessary to protect taxpayers and the environment.
- **Include consideration of a company's record of compliance when setting financial assurance.** Under existing regulations, BOEM may consider a lessee's "[r]ecord of compliance with laws, regulations, and lease terms" when determining the need for supplemental financial

²⁶ S&P Global Ratings, "A Credit Rating is an Informed Opinion," <https://www.spglobal.com/ratings/en/about/intro-to-credit-ratings> (last visited Feb. 26, 2024).

²⁷ Moody's Investors Service, "Global Long-Term Rating Scale," <https://ratings.moody's.io/ratings#:~:text=Obligations%20rated%20Baa%20are%20subject,such%20may%20possess%20speculative%20characteristics> (last visited Feb. 26, 2024).

assurance,²⁸ but the proposed rule would eliminate this criterion. We request that the final rule include “record of compliance” as a factor in determining the need for supplemental financial assurance. While violations and acts of non-compliance by oil and gas operators might not, on their own, evidence a company’s financial health, these activities do demonstrate whether a company’s practices and protocols conform to the regulatory and contractual requirements of the agencies. A company’s record of non-compliance could well signal a likelihood of future non-compliance with decommissioning requirements.

Timely and adequate decommissioning of offshore oil and gas infrastructure is vital to protect coastal communities, wildlife, and the ocean environment. Oil and gas companies, however, have repeatedly failed to plug wells, remove infrastructure, and otherwise decommission responsibly. Current financial assurance requirements have been a key reason for this failure, potentially forcing taxpayers to foot the bill to clean up the oil and gas industry’s mess. We urge BOEM to promptly issue a strong final rule that would rightfully place the costs of decommissioning on the companies who have profited from our public resources.

Sincerely,

Rebecca Loomis
Project Attorney, Oceans Sector
Natural Resources Defense Council

Valerie Cleland
Senior Ocean Advocate
Natural Resources Defense Council

Ava Ibanez Amador
Associate Attorney, Oceans Program
Earthjustice

Sarah Guy
Executive Director
Ocean Defense Initiative

Raena Garcia
Senior Fossil Fuels and Lands Campaigner
Friends of the Earth US

Joseph Gordon
Campaign Director, Climate & Energy
Oceana

Robert K. Musil, Ph.D., M.P.H.
President & CEO
Rachel Carson Council

Jason Scorse
Director
Center for the Blue Economy

Mike Scott
National Oil and Gas Campaign Manager
Sierra Club

Andrew Hartsig
Senior Director, Arctic Conservation Program
Ocean Conservancy

²⁸ 30 C.F.R. § 556.901(d)(v).

Attachment 2



September 6, 2023

Department of the Interior, Bureau of Ocean Energy Management,
Office of Regulations
Attention: Kelley Spence
45600 Woodland Road
Sterling, VA 201666

Re: Docket No. BOEM–2023–0027

To Whom It May Concern:

We appreciate the opportunity to submit this letter regarding the proposed rule by the Department of the Interior (DOI) and the Bureau of Ocean Energy Management (BOEM) concerning risk management and financial assurances for oil and gas leases on the Outer Continental Shelf (OCS). Although BOEM has stated its objective “is to ensure that taxpayers do not bear the cost of meeting the obligations of lessees and grant holders in the OCS, particularly the costs of decommissioning” by addressing some of the major omissions and deficiencies in existing regulations and requirements, the proposed rule does not sufficiently improve financial assurance requirements to ensure lessees and operators will meet decommissioning obligations.

As a steward of the nation’s public resources in the OCS, BOEM must ensure that those who benefit from the extraction of those resources comply with leasing and decommissioning requirements intended to protect coastal communities, taxpayers, and the environment. This includes requiring supplemental financial assurances for all estimated decommissioning costs using estimates that have the highest likelihood of covering all liabilities. In the absence of action to remove all waivers for financial assurances (which would be our preferred alternative), the proposed rule must be strengthened as outlined below.

Estimates of Increased Supplemental Financial Assurances: BOEM estimates that the aggregate amount of supplemental financial assurance required of lessees and grant holders under this proposed rulemaking would increase to a total of \$12.5 billion which represents just over one-quarter of all decommissioning liabilities, which is currently estimated (by BSEE) at \$42.8 billion. However, BOEM’s estimates of total decommissioning liabilities and the amount of supplemental financial assurances that the proposed rule would require are not fully explained or sufficient.

The proposed rule presents three estimates of decommissioning costs for each facility on any given lease. BOEM proposes to use the second lowest cost estimate, P70, to set the amount of supplemental financial assurance it will require, resulting in only a 70% likelihood that the amount of financial assurance required will cover the full cost of decommissioning. This amount is insufficient, and we request that BOEM instead use the P90 value to set the amount of required supplemental financial assurances, increasing the likelihood of covering the full decommissioning cost of an offshore facility to 90%. This represents a 55% increase over prior coverage and is the best option to reduce offshore decommissioning risk and cost to American taxpayers.

At the same time, we strongly support the change being made in the proposed rule, stipulating that BOEM will no longer consider the financial strength of predecessor lessees when determining the amount of required supplemental financial assurances for oil and gas operators. The agency's past reliance on this practice has contributed to the nearly \$30 billion shortfall in offshore decommissioning liabilities.

New Criteria for Determining Lessees' Financial Assurance Requirements: The proposed rule eliminates the five existing criteria used to determine whether supplemental financial assurances should be required and replaces them with two new criteria: (1) credit rating and (2) the ratio of the value of proved reserves on the lease to the lease decommissioning liability.

Credit Rating: On the first criterion, if BOEM intends to rely exclusively on a credit rating to determine whether waiving supplemented financial assurances is warranted, it must provide a much higher level of certainty that those companies will definitely comply with their decommissioning obligations. While BOEM has increased the required credit rating from its 2020 proposal, it still must set a higher credit rating threshold than what is proposed in the rule. BOEM proposes to waive supplemental financial assurances if companies have an S&P credit rating of at least BBB- or a Moody's credit rating of Baa3. However, S&P and Moody's describe these credit ratings as "adequate capacity to meet financial commitments" and "subject to moderate credit risk . . . [and] may possess speculative characteristics." BOEM should not waive supplemental financial assurances for lessees that qualify for this credit rating level because these companies, by definition, do not demonstrate a strong potential to meet their debt obligations.

Additionally, BOEM mentions that it monitors changes to company ratings throughout the year. But making this statement in the preamble of the rule is not strong enough. BOEM must include specific requirements for monitoring credit ratings in the text of the regulations to ensure that such monitoring and enforcement occurs at regular intervals throughout the year.

Finally, the proposed rule also provides that in cases where potential lessees do not have an credit rating from a recognized credit rating agency, BOEM will use a proxy credit rating based on a company's audited financial statements. This proxy credit rating should not remain in the final rule. BOEM is not a financial agency nor does it have the capacity to institute such a system, and there is no basis for substituting the agency's judgment for that of a Nationally Recognized Statistical Rating Organization, as identified by the Securities and Exchange Commission.

Value of Proved Reserves: The second proposed criterion provides that, in any case when none of the lessees have an investment grade credit rating, BOEM would look to the value of the lease's proved oil and gas reserves relative to the lease's decommissioning obligations associated with the production of those reserves. For any such lease that has proved reserves with a value of at least three times that of the estimated decommissioning cost, no supplemental financial assurance would be required under the proposed rule. We do not support this criterion and request that BOEM eliminate it from the final rule, as it does not adequately reduce the risk that decommissioning costs would be borne by the government and taxpayers.

Normal fluctuations in the demand and price of oil and gas coupled with the imminent global shift away from fossil fuels to renewable energy make it likely that the value of proved oil reserves in all leases will decline over time. As a result, lessees may earn less over the life of the lease and in turn, have less capital to cover decommissioning costs. In light of this, the value of proved oil and gas reserves cannot be considered a reliable substitute for supplemental financial assurances, which are necessary to protect taxpayers and the environment, especially in cases where none of the lessees have investment grade credit ratings.

Elimination of the Record of Compliance Criterion: The proposed rule eliminates the “record of compliance” criterion based on the conclusion by BOEM that it is “not an accurate predictor of [a company’s] financial health.” We request that this criterion not be eliminated, and instead revised in the proposed rule. As part of that revision, BOEM should commit itself to improving coordination with BSEE to strengthen the monitoring and oversight efforts of oil and gas operators. While violations and acts of non-compliance by oil and gas operators might not, on their own, evidence a company’s financial health, these activities do demonstrate whether a company’s practices and protocols conform to the regulatory and contractual requirements of the agencies.

As such, BSEE’s Incidents of Non-Compliance (INC) records and its Increased Oversight List should be regularly updated by the agency and relied upon by BOEM to determine whether oil and gas operators should retain the privilege of operating in the OCS. Actors that are found to be in non-compliance as a result of an accident or violation should not retain the right to continue to produce from their leases or be insulated from consequences. At a minimum, compliance data, including fines and violations, should be used by BOEM as a criterion for determining a company’s ability to fulfill decommissioning obligations.

Further, with respect to compliance, BOEM should stipulate that historic or current owners of abandoned or idle wells in federal waters that need decommissioning should not be eligible for new leases. Recent studies have found that there are thousands of wells in the Gulf of Mexico that will cost billions of dollars to decommission, posing major financial and environmental risks. Companies who have not complied with decommissioning requirements in the past should not be given new leases until their prior commitments have been met.

In addition to the changes in the proposed rule outlined above, we respectfully request that the Department of Interior consider whether the respective mission and structure of both BOEM and BSEE pose inherent barriers to prioritizing effective and efficient decommissioning and

determine what additional steps are needed to properly monitor, manage, and implement decommissioning requirements to protect both taxpayers and the environment.

Sincerely,

Alaska Environment
Alaska Wilderness League
CALPIRG
Climate Hawks Vote
Cook Inletkeeper
Creation Justice Ministries
Environment America
Environment California
Environment Florida
Environment Texas
Florida PIRG
Friends of the Earth
Healthy Gulf
Healthy Ocean Coalition
Inland Ocean Coalition
International Marine Mammal Project of Earth Island Institute
League of Conservation Voters
López-Wagner Strategies
Mission Blue
Mystic Aquarium
Natural Resources Defense Council
Ocean Conservation Research
Ocean Defense Initiative
Oceana
Oceanic Preservation Society
Only One
Rachel Carson Council
Sierra Club
South Carolina Aquarium
Surfrider Foundation
Sustainable Ocean Alliance
TexPIRG
The Ocean Project
The Wilderness Society
U.S. PIRG
Zero Hour

Attachment 3

**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](https://www.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](https://doi.org/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.

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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

Attachment 4

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Unified Agenda

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View EO 12866 Meeting 1010-AE14

Title: Risk Management and Financial Assurance for OCS Lease and Grant Obligations

Agency/Subagency: 1010-DOI/BOEM

Stage of Rulemaking: Final Rule Stage

Meeting Date/Time: 03/14/2024 10:30 AM

Requestor: Oceana **Requestor's Name:** Andres Perotti

Documents:

List of Documents
ENGO letter re financial assurances 03.05.24
BOEM-2023-0027-1977 attachment 1
Comment Letter - BOEM Financial Assurances 8.28.23

Attendees:

List of Attendees	Participation
<ul style="list-style-type: none">Charles Yudson - DOI	Teleconference
<ul style="list-style-type: none">Clifton Horton - DOI	Teleconference
<ul style="list-style-type: none">Kati Kovacs - DOI	Teleconference
<ul style="list-style-type: none">Eric Turner - DOI	Teleconference
<ul style="list-style-type: none">Melissa Hearne - DOI	Teleconference
<ul style="list-style-type: none">Michael Hagan - EOP	Teleconference
<ul style="list-style-type: none">Aaron Troncoso - CPO	Teleconference
<ul style="list-style-type: none">Kelly Spence - DOI	Teleconference
<ul style="list-style-type: none">Mark Purdy - DOI	Teleconference
<ul style="list-style-type: none">Hunter Jonsson - BOEM	Teleconference
<ul style="list-style-type: none">Ava Ibanez Amador - Earthjustice	Teleconference
<ul style="list-style-type: none">Sarah Guy - Ocean Defense Initiative	Teleconference
<ul style="list-style-type: none">Rebecca Loomis - Natural Resources Defense Council	Teleconference
<ul style="list-style-type: none">Andres Perotti - Oceana	Teleconference
<ul style="list-style-type: none">Michael Messmer - Oceana	Teleconference

