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BOEM AND BSEE'S PROPOSED FINANCIAL ASSURANCE REGULATIONS:

Protecting the Public or Effort to Undermine Independent Oil and Gas Companies?

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THE COUNCIL TO MODERNIZE GOVERNANCE

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Executive Summary

The Department of the Interior's ("Department") Bureau of Ocean Energy Management ("BOEM") is responsible for issuing financial assurance regulations for offshore energy development. The complex set of rules require oil companies to prove their financial capacity to decommission oil wells on the Outer Continental Shelf ("OCS"). Proof typically requires a sufficient credit rating or other proof of a capacity to pay for the total cost of decommissioning. If a company (i.e., almost all independent oil and gas operators) cannot provide either, they would be required to buy surety bonds to cover the cost of decommissioning.

Historically, these regulations have been imposed to protect taxpayers and advance environmental stewardship but stop short of reducing competition and increasing barriers to entry. This may be about to change. A recent proposal by BOEM ("Proposed Rule") seeks to impose dramatic new costs on independent oil and gas operators in the OCS, at the request of major oil companies that would be effectively exempt from the law. Further, the rules are projected to strangle nearly three-quarters of the operators in the Gulf of Mexico, creating an unusual coalition of the world's largest oil companies and environmental special interests seeking an end to oil and gas development.

The specifics are complicated. By many accounts, the Proposed Rule appears intentionally vague as to the order in which the Department would collect decommissioning costs should the current lessee default. Traditionally, the Department would look to predecessor lessees of that site (those who used to operate the rig) to pay for those costs, as legally required. However, the Proposed Rule leaves unsaid whether that practice would continue. Notably, removing predecessor lessees from the liability

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chain was a primary point of concern among the largest oil companies in their interactions with senior Interior officials, according to recent media reports.[2]

The surety industry has also weighed in, arguing the ambiguity and vagueness of the Proposed Rule would make underwriting the required surety bonds extraordinarily expensive, or even unavailable on the market. This would likely raise barriers of entry for small oil companies so high as to push them out of the market despite a long record of decommissioning obligations being handled properly and without taxpayer support, outside very limited instances. Studying past liability shows single owner lessees across the life of the loan remain the only known risk to taxpayers yet make up an insignificant portion of the total burden that BOEM's rule appears to be trying to address ($1.2B[3] out of $42B[4]). The rule has the potential to kill the goose that lays the golden egg while having virtually no likelihood of improving or protecting taxpayers' pocketbooks. Environmental stewardship will also likely suffer, as small companies are forced out of the market. The immense royalties from the oil and gas industry ($121B since 2004)[5] provide substantial funding for conservation in the United States, not to mention the decommissioning obligations that typically fall on small operators. Indeed, it's difficult to comprehend how any of BOEM's traditional decommissioning objectives would be achieved under the current proposal.

History of Financial Assurance: Purpose and Legal Framework

The OCS is one of the nation's primary offshore sources of oil and gas.[6] In the 1950's oil production had become a booming industry, accounting for the second largest revenue generator for the country.[7] To regulate this industry, the United States passed the U.S. Submerged Lands Act, which gave the government title over land at three miles from the

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[2] Nick Pope, "Biden Admin Talks Tough on Big Oil, But Gave Them Regular Access to Discuss Key Regulatory Change," Daily Caller News Foundation, Oct. 27, 2023, https://dailycaller.com/2023/10/27/biden-big-oil-boem-doi-regulations/.
[3] Opportune, "A Cost-Benefit Analysis of Increased OCS Bonding," July 13, 2023, 6, https://opportune.com/assets/filesystems/general-contents/BOEM-Study-2023-Final-7.12-V6.pdf. ("Opportune Analysis").
[4] Bureau of Ocean Energy Management (BOEM), Interior, "Risk Management and Financial Assurance for OCS Lease and Grant Obligations," *Federal Register* 88, No. 124 (June 29, 2023): 42136, https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-12916.pdf ("Proposed Rule").
[5] Federal Offshore Oil & Gas Revenue Data for Gulf of Mexico, derived from the Office of Natural Resource Revenue, production by year, found at: https://revenue.doi.gov/downloads/production (GOM ONNR Data).
[6] Bureau of Ocean Energy Management, *Oil and Gas-Gulf of Mexico*, https://www.boem.gov/regions/gulf-mexico-ocs-region/oil-and-gas-gulf-mexico
[7] OCS Lands Act History, Boem.gov. https://www.boem.gov/oil-gas-energy/leasing/ocs-lands-act-history#:~:text=The%20Outer%20Continental%20Shelf%20Lands,which%20are%20under%20U.S.%20jurisdiction.

state's coastline.[8] At the same time the Outer Continental Shelf Lands Act (OCSLA)[9] was passed, giving the federal the submerged lands for regulatory purposes.[10]

Under OCSLA, authority is delegated to the Secretary of the Interior, specifically BOEM.[11] As a part of these responsibilities, BOEM regulates the decommissioning[12] activities of oil and gas lease locations within OCS.[13] As the Government Accountability Office put it in 2015, when the infrastructure from oil leases in the OCS are "no longer useful," idle, or the lease has expired, BOEM "requires oil and gas lessees to decommissioning it so that it does not pose potential safety hazards to marine vessels and environmental hazards to sea life and humans."[14] This process refers to plugging wells, removing platforms or other structures, removing or cleaning out pipelines and cleaning the sites of debris.[15] This can cost tens of millions of dollars per lease in shallow waters, and hundreds of millions of dollars in deep water.[16]

Lessees are obligated to pay for the decommissioning costs.[17] The responsible party has varied historically (to be covered below). But, historically, most of the time the oil companies have managed to cover these costs.[18] However, in 1989, a lessee declared bankruptcy, which caused the taxpayers to cover those costs.[19] In response, the Department of the Interior promulgated rules requiring some lessees to provide bonds to cover these costs.[20] Some form of financial assurance, including bonds, has remained in the federal regulations since that time.

BOEM's Approach to Financial Assurance Regulations

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[8] Ibid.
[9] 43 U.S.C. §1331 *et seq*.
[10] Ibid.
[11] 43 U.S.C. §1334(a); Hopper, Abigail Ross, *Notice to Lessees and Operators of Federal Oil and Gas, and Sulphur Leases, Holders of Pipeline Rights-of-Way and Right-of-Use and Easement Grants, and Geological and Geophysical Test Well Permits in the Outer Continental Shelf*, Boem.gov, Aug. 17, 2015, 1, https://www.boem.gov/sites/default/files/regulations/Notices-To-Lessees/2015/NTL-No-2015-N04.pdf.
[12] Decommissioning means "[e]nding oil, gas, or sulphur operations" and "returning the lease, pipeline right-of-way, or the area of the right-of-use and easement to a condition that meets the requirements of BSEE and other agencies that have jurisdiction over decommissioning activities." 30 C.F.R. §250.1700(a).
[13] 30 C.F.R. §§250.1700 *et. seq*.
[14] United States Government Accountability Office, *Offshore Oil and Gas Resources-Actions needed to Better Protect Against Billions of Dollars in Federal Exposure to Decommissioning Liabilities*, Dec. 2015, 1-2. https://www.gao.gov/assets/gao-16-40.pdf. ("GAO Report").
[15] Ibid. 2.
[16] Ibid.
[17] 30 C.F.R. §250.1701.
[18] GAO Report 2.
[19] Ibid.
[20] Ibid.

The Department of the Interior, then under BOEM's predecessor agency Minerals Management Service (MMS), first regulated financial assurance for lease and right-of-way grants in 1997.[21] The Department required bonding for oil and gas leases: specifically area/lease-specific base bonds or area-wide surety bonds in a prescribed amount.[22] The existing bonding regulations for right-of-use easements require an applicant to "meet bonding requirements."[23] The amount isn't specified and gives the Director discretion.[24] If the right-of-use involves a state lease, the applicant must provide a base surety bond of $500,000, and the Regional Director may require supplemental financial assurance.[25]

MMS and BOEM regulations have required certain criteria for determining whether financial assurance is required for leases in the past, but do not currently exist in regulations.[26]

BOEM regulations do require that predecessors and current co-lessee's are jointly and severally liable, that is, meaning all parties who have owned the lease can be held responsible for paying for decommissioning.[27] The existing regulations require five criteria[28] for the Director to weigh, but the discretion still rests with the Director.[29] Over the years, until 2016, the methodology in weighing these criteria have changed according to various notices to the lessees.[30] Those lessees who did not satisfy these criteria were required to provide additional financial assurance.[31] Any party, a current lessee or predecessor, could satisfy these criteria.[32] This is because, with joint and several liability, every company who has controlled the lease remains liable for decommissioning. It would not be necessary to require additional financial assurance unless none of the companies could prove the ability to cover the costs. Under this system where there are multiple parties potentially responsible for decommissioning, no company would have the liability specifically assigned to them, meaning companies could appear stronger than reality.[33]

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[21] Proposed Rule 42138.
[22] Ibid.
[23] 30 C.F.R. 550.160(c).
[24] 30 C.F.R. 550.166.
[25] Ibid.
[26] Proposed Rule 42138-39.
[27] 30 C.F.R. §§ 556.604(d) and 556.605(e).
[28] 1) financial capacity in excess of exiting lease and other obligations, 2) projected financial strength in excess of existing and future lease obligations, 3) business stability based upon 5 years of continuous operation, 4) reliability (credit rating or trade references) and 5) record of compliance with laws, regulations, and lease terms.
[29] 30 C.F.R. §556.901(d).
[30] Proposed Rule 42139.
[31] Ibid.
[32] Ibid.
[33] Ibid.

Strict enforcement of forcing additional financial assurance could force companies into bankruptcy, which has, at times, caused the regulations to be loosely enforced.[34] Additionally, since 2009, 30 companies have gone into bankruptcy.[35] The increase in bankruptcy led to the Department soliciting ideas to improve bonding in 2014. [36] In 2015, the Government Accountability Office (GAO) reviewed the Department's regulations and determined that revisions were needed to the financial assurance regulations.[37] In response the Department issued the most recent Notice to Lessees, NTL No. 2016-N01, which continued to use net worth as a barometer of ability to cover decommissioning.

BSEE's Role in Financial Assurance Regulations

Separate regulations exist for requiring the decommissioning itself, specifically plugging of wells, and decommissioning the platforms and pipelines. These regulations also began under MMS, starting in 2002, which was later transferred to the Bureau of Safety and Environmental Enforcement.[38]

The current framework dates back to 2012 to account for the Deepwater Horizon reports.[39] These "Subpart Q" regulations generally require that lessees and owners of the operating rights decommission when they are no longer useful for operations or within a year of the termination of a lease.[40] It also regulates the general requirements for decommissioning, including "in a manner that is safe, does not reasonably interfere with other uses of the OCS, and does not cause undue or serious harm or damage to the…environment."[41]

This regulation, too, provides that lessees and owners of operating rights are jointly and severally liable for these costs.[42] BOEM and BSEE can both assign predecessors to

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[34] Bureau of Ocean Energy Management (BOEM), Interior, "Risk Management, Financial Assurance and Loss Prevention," *Federal Register* 85, No. 201 (Oct. 16, 2020): 65904, https://www.boem.gov/sites/default/files/documents/about-boem/regulations-guidance/federal-register/proposed-rules/85-FR-65904.pdf. (2020 Proposed Rule).
[35] Proposed Rule 42139.
[36] Department of Interior, "Risk Management, Financial Assurance and Loss Prevention," *Federal Register* 79, No. 160 (Aug. 19, 2014): 49027, https://www.govinfo.gov/content/pkg/FR-2014-08-19/pdf/2014-19380.pdf.
[37] GAO Report.
[38] 2020 Proposed Rule 65908.
[39] Ibid.
[40] Ibid.
[41] 30 C.F.R. 556.1703.
[42] 30 C.F.R. §250.1701.

perform the obligations should a subsequent assignee fail to perform.[43] In 2017, the Secretary solicited comments to determine how BSEE could improve its regulations.[44]

Recent Regulatory Reform Efforts

2020 Proposed Regulatory Reform

BOEM

With its proposed rules from 2020, BOEM sought to seek a balance between protecting the taxpayer from having to foot the bill for decommissioning costs and the costs and disincentives that regulation would impose upon lessees and grant holders.[45] The proposed changes sought to modify the evaluation process for requiring additional security, streamline the evaluation criteria, and remove restrictive provisions.[46] These efforts sought to only require additional securities when a lessee or grant holder posed a substantial risk to being unable to fund decommissioning "*and"* there was no co-lessee, co-grant holder, or predecessor who could manage that cost, and the property is near the end of its productive life.[47]

BOEM's first major shift in these proposed rules was to change the focus on present ability to pay with present *and future* ability to pay.[48] Along with joint and several liability, BOEM also proposed an evaluation of the lessee, grant holder, and/or predecessor's credit rating and the value of the oil and gas reserves for the site.[49] Additional security would be required if the lessee does not have a credit rating from a nationally recognized statistical rating organization (NRSRO) that is greater than or equal to a BB (S&P) or Ba3 (Moody's), or the audited equivalent.[50] Importantly, BOEM's 2020 proposed rule was explicit as to its intent to include an evaluation of *all* interested parties, not just current lease and co-lease holders.

If the credit rating criteria is not met, then BOEM would review the lessee's obligations and the oil and gas reserves on the lease.[51] If the value of the reserves is not three times the cost of decommissioning, and no co-lessee, grant holder, or predecessor, can meet these criteria, then the Regional Director may require additional security.[52] A third-

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[43] 2020 FR 65908.
[44] Ibid. 65909.
[45] 2020 FR 65910.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid. If the company does not have a credit rating, an audited report could be filed instead.
[50] Ibid. 65911.
[51] Ibid.
[52] Ibid.

party guarantor would be evaluated under the same credit rating system, absent the valuation of oil in the lease (for which a third-party would have no interest).[53]

With this, BOEM proposed that the "business stability" (which looked to the *past* five years, not future) criterion be eliminated as a factor.[54] It also proposed to eliminate the "record of compliance" criterion, in that, it was not predictive of financial health.[55]

BSEE

Stakeholders proposed to BSEE that when a current lessee or grant holder defaults on its decommissioning obligations, that the old approach of pursuing all predecessors to pay results in confusion and inefficiency, for both BSEE and the predecessors.[56] Therefore, BSEE's portion of the proposed rules would have BSEE enforce predecessor liability in reverse chronological order.[57] An exception to this would be if the predecessor had failed to obtain approval of a decommissioning plan or if something poses a safety or environmental risk, making strict compliance with reverse chronological order unworkable.[58]

2023 Proposed Regulatory Reform[59]

BOEM repeated the factors considered from the 2020 proposed rules, specifically that it wants to balance the risk to the taxpayers with the costs and disincentives to the lease holders and grantees.[60] It also cites the desire to evaluate other parties that can be held jointly and severally liable, not just the current lessee or grant holder.[61] And, at top level, the strategy appears very similar: to emphasize the future ability to pay by evaluating credit rating (or an audited financial statement) and the same 3 to 1 value of oil to cost of decommissioning ratio.[62] And, it proposes to eliminate "business stability," "record of compliance," and "financial capacity" as factors in determining whether supplemental assurance is required.[63]

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[53] Ibid 65912.
[54] Ibid. 65911.
[55] Ibid.
[56] Ibid 65914.
[57] Ibid.
[58] Ibid. 65915.
[59] BSEE's portion of the 2020 proposed rules were finalized on April 18, 2023 and are unaffected by the 2023 proposed rule.
[60] Proposed Rule 42142.
[61] Ibid.
[62] Ibid.
[63] Ibid. at 42142-43.

The differences emerge in the details. The Department's new proposed rules would raise the required credit rating requirements to a BBB (S&P) or a Baa3 (Moody's) for either the lessee/grantee, co-lessee, or a proxy. [64] Additionally, the 2023 proposed rule removed the clear indication that it intends to look to predecessor lessees to collect decommissioning costs before turning to the financial assurances of the current lessee.

The 2023 Proposed Rule Creates Strange Bedfellows

Renewable energy proponents[65][66] and large oil companies[67] alike support the proposed rule. Perhaps this is because one effect of the rule is to impose dramatic new costs on small oil and gas operators.[68] Large oil companies lobbied the Biden administration early on to eliminate predecessor liability from their books, which if maintained in the final rule, could theoretically increase their financial strength and improve their competitive position. The unintended (perhaps) consequences could be quite different.

Small independent oil companies make up the majority of those operating in the OCS (407 small businesses, making up 76% of the businesses).[69] The negative impact on small businesses is easy to see. Even using unrealistic assumptions (BOEM assumes a borrowing cost of 1.75%), the Proposed rule would increase costs for small oil companies

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[64] Ibid 42143.

[65] The NRDC argues that "A strong revised regulation could help end the far-too common practice of allowing oil and gas companies to continue to exploit the OCS while leaving the economic, social, and environmental costs of clean-up to the public." Spence, Kelley, "Memorandum: Meeting Notes for the April 5, 2023, E.O. 12866 Listening Session on the Risk Management and Financial Assurance for OCS Lease and Grant Obligations NPRM Requested by Diane Hoskins, Oceana," United States Dept. of the Interior, April 7, 2023, Attachment 2, p. 5. (BOEM 12866 Memo).

[66] For example, the Biden administration declared that the Proposed Rule is "continue to advance the Biden-Harris Administration's federal oil and gas reform agenda, which was outlined in a report that the Department of the Interior developed in response to Executive Order 14008." Russo, Jennifer, "BOEM Proposes Stronger Financial Assurance Requirements for Offshore Oil and Gas Industry to Protect Taxpayers from Being Forced to Pay Decommissioning Costs," BOEM.gov, June 27, 2023, https://www.boem.gov/newsroom/press-releases/boem-proposes-stronger-financial-assurance-requirements-offshore-oil-and. In November 2002, the Department of Interior released a document stating that "harnessing offshore wind in public waters" is an "overdue reform agenda." Department of Interior, "Executive Order on Tackling the Climate Crisis at Home and Abroad," Nov. 2021, 4, https://www.doi.gov/sites/doi.gov/files/report-on-the-federal-oil-and-gas-leasing-program-doi-eo-14008.pdf.

[67] For example, Shell encouraged BOEM to focus on the current owners of leases for liability and financial assurance evaluations as opposed to predecessors. BOEM 12866 Memo FN 65.

[68] "Small Independents would have to provide cash collateral that their balance sheets cannot currently support due to recent asset impairments that permanently reduced their net worth." Opportune Analysis 7.

[69] Duncan, Timothy, "Risk Management and Financial Assurance for OCS Lease and Grant Obligations, RIN 1010-AE14," Talos Energy, Sept. 7, 2023, 2, https://www.regulations.gov/comment/BOEM-2023-0027-2005 . ("Talos Comment").

by $379 million per year.[70] But using a more conservative, yet still likely low, borrowing cost (5.5%, which is consistent with Treasury Rates), that number is closer to $800 million.[71] Given that it is small businesses who lack the assets and/or credit rating that would be required to avoid having to purchase bonds as financial assurance, the cost would cripple those businesses specifically.

The surety market has also delivered bad news, stating the Proposed Rule would injure small businesses disproportionately and indicating that it will not underwrite the surety bonds that BOEM's Proposed Rule would require. The Proposed Rule is, perhaps intentionally, silent and ambiguous as to whether surety bonds would be collected prior to collecting from predecessors. This ambiguity, according to underwriters, makes it either impossible or extremely cost-prohibitive to underwrite surety bonds.

The Surety and Fidelity Association of America has stated that there is too much uncertainty in how BOEM/BSEE will collect the surety bonds, that "BOEM is silent as to how and when the required financial assurance will be called upon."[72] "For sureties to adequately understand the risk they are underwriting, there needs to be consistency in the application.[73] The case-by-case analysis that BOEM would want to retain would mean that the availability of the bonds may not be "reasonably available" to the small businesses impacted by the Proposed Rule.[74] This represents a risk too great for the surety industry, who is reeling from "some of the largest OCS related surety losses in history," which has already reduced the market on sureties.[75] Without availability of bonds, these small businesses would not be capable of complying with the financial assurance demands. Assuming a financial product can be developed, the price tag would be significant, hovering around $6 billion in new costs over a 20-year period.[76]

BOEM even recognizes the problems. "BOEM recognizes that the proposed regulations may have a significant financial impact on affected companies."[77] "By increasing

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[70] Kevin Bruce et. al., "Risk Management and Financial Assurance for OCS Lease and Grant Obligations, (RIN 1010-AE14)," Gulf Energy Alliance, Sept. 7, 2023, 17, https://www.regulations.gov/comment/BOEM-2023-0027-2165. ("Gulf Energy Comment").
[71] Ibid 17-18.
[72] Alleyne, Julie, "Bureau of Ocean Energy Management Docket no. 2023-0027 Risk Management and Financial Assurance for OCS and Grant Obligations, RIN 1010-AE14," The Surety & Fidelity Association of America, Sept. 7, 2023, 7, https://www.regulations.gov/comment/BOEM-2023-0027-1998. ("SFAA Comment") .
[73] Ibid.
[74] Ibid.
[75] Hohlt, John L., "Risk Management and Financial Assurance for OCS Lease and Grant Obligations, RIN 1010-AE14," CAC Specialty, Aug. 16, 2023, https://www.regulations.gov/comment/BOEM-2023-0027-1201 ("CAC Specialty Comment"); Minarovic, Mike, "Risk Management and Financial Assurance for OCS Lease and Grant Obligations RIN 1010-AE14," Arena Energy, Sept. 7, 2023, 15, FN 37, https://www.regulations.gov/comment/BOEM-2023-0027-2096. ("Arena Energy Comment").
[76] Gulf Energy Comment 17.
[77] Proposed Rule 42148.

industry compliance costs, the regulation could adversely make the U.S. offshore oil and gas sector less attractive than regions with lower operating costs" and "depress the value of offshore assets or cause continuing production to become uneconomic sooner…."[78]

Likewise, the negative impact upon the American people is also apparent. A cost-benefit analysis performed by Opportune LLP (Opportune), demonstrated that the result of the Proposed Rule would decrease the production of oil by 55 million barrels over 10 years.[79] Opportune also projects that the Proposed Rule would eliminate 36,000 jobs, reduce federal government royalties (taxpayer benefit to oil leases) by $573 million, and cause a decline in the GDP by $9.9 billion.[80]

The 2020 proposed rule struck a better balance by considering the creditworthiness of all current *and* prior owners of the leases. It was only when the chain of title did not have *any* creditworthy party that these costly surety bonds would become necessary. Doing so allowed small businesses to enter the marketplace by negotiating with the larger companies who built the structure. But requiring the current lessee to prove financial capacity independently will create a barrier to entry that likely will serve as a deterrent for all but the largest oil companies. These "majors" will be able to satisfy the credit rating or capital requirements for financial assurance, leaving them effectively exempt from the new rules.

Notably, renewable energy is not subject to the rule.[81] The projected growth in offshore wind development, funded by several recent laws, is significant.[82] It cannot be a coincidence that renewable energy proponents would support the Proposed Rule on the precipice of such expected growth. The potential for dramatic cuts to offshore oil and gas development without negatively impacting the offshore wind industry is a win-win for many in the environmental and climate lobby, who have deep connections to many of the top officials in the Biden administration and specifically, the Interior Department.

The Moral Hazard Mirage

BOEM justifies the new rule by saying that taxpayers should not bear the "cost of facility decommissioning and other financial risks associated with OCS development, such as oil

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[78] Ibid. 42168.
[79] Gulf Energy Comment Ex. A.
[80] Ibid.
[81] As mentioned below, renewable energy has its own decommissioning financial assurance regulations, but they are not nearly as onerous.
[82] "This proposed rulemaking would not apply to renewable energy activities." Proposed Rule 42136.

spill cleanup or other environmental remediation."[83] Yet BOEM acknowledges that "the cases where taxpayers have actually paid costs for decommissioning are rare."[84]

Comments from the Proposed Rule's biggest beneficiaries – large oil companies – raise similar arguments.[85] They argue that the current regulatory scheme incentivizes moral hazard by encouraging smaller operators to pass off their decommissioning liability onto others, potentially leaving the taxpayer exposed. This lacks support in the history of liability borne by taxpayers. Incredulously, it also pretends that some of the largest and most sophisticated energy companies in the world need the federal government to protect them against known liability from smaller operators with whom they often sell their leases.

These arguments appear specious for many reasons. First, sellers (typically major oil & gas companies) have sophisticated treasury teams that weigh the risks before executing a transaction. The large oil companies, who typically are predecessor owners, sold their leases knowing that they would likely retain liability for decommissioning. This risk was negotiated into the price. The purchasing company could either purchase bonds[86] to protect the predecessor, or pay more and leave the risk with the predecessor. Regardless, joint and several liability forces sellers to perform financial due diligence on the buyers. Often, this leads to security agreements between the parties and buyers purchasing surety bonds to assure the seller of their ability to pay for decommissioning. By the time the transaction has occurred, the seller is already protected because of the complex nature and high-value of these deals.

Second, the Proposed Rule upends a system that works. Since 2009, there have been thirty-two bankruptcies of companies with decommissioning liabilities that totaled $17 billion, yet just .5% of those liabilities trickled down to the taxpayer.[87] The reduced relative risk is because companies have always[88] been subject to joint and several liability.[89] Accordingly, nearly all leases have either a current or former lease holder who retains credit-worthy credentials to cover the costs of decommissioning.

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[83] Proposed Rule 42141.
[84] Ibid. 42141.
[85] BOEM 12866 Memo.
[86] Talos Energy, for example, has posted $886 in bonds and other financial instruments to just to purchase its locations. Talos Comment 2. These resulted from companies that "understood the joint and several liability framework and required that Talos post surety bonds to protect their interests in the event Talos or a successor to Talos' interests, defaulted on the decommissioning liability…." Talos Comment 3.
[87] Arena Comment 8-9.
[88] *An Act to Amend the Act of October 11, 1951, authorizing the President to Proclaim Regulations for Preventing collisions at Sea, and for Other Purposes,"* Public Law 83- 212, U.S. Statutes at Large 157 (1953).
[89] 30 C.F.R. §556.604(d).

The net unfunded decommissioning liability borne by taxpayers to date is roughly $58 million.[90] Among those losses, all have been as a result of a sole liability lease—where no predecessors existed.[91] Framed differently, when taxpayers have borne the cost of decommissioning, it has only happened when there is no predecessor to take on that cost. These new regulations attempt to prevent a situation that has never happened and we have no reason to believe will happen.

Third, by requiring unnecessary financial risk, in crippling fashion described below, will actually make it more likely that companies fold and default on their obligations to decommission existing structures. The proposed rule requires $9.2 billion in new financial assurance coverage.[92] The compliance costs, paid by the small companies to the surety industry, would represent $2.676 billion ($252.6 million annually).[93] These are exorbitant numbers to cover a risk that has only historically amounted to $58 million.

Finally, the Proposed Rules would change the rules in the middle of the game. If anything, such a proposal would enhance the prospects of moral hazard, not diminish them. Smaller companies who had purchased a lease, under the Proposed Rule, would now be straddled with the additional financial obligations on top of what it paid during the purchase.[94] Yet this is unnecessary, seeing that the oil companies are already accounting for the costs of decommissioning when they purchase the lease from the predecessor. The Proposed Rule is attacking a "harm" that is already accounted for in settled contract negotiations between sophisticated private parties.

In total, the harmful impacts likely to result from the Proposed Rule overshadow any claimed moral hazard that may exist under today's regulatory scheme.[95]

Financial Assurance Demands Should be Relative to Actual Risk

BOEM's proposed rule cites the general proposition that decommissioning regulations are needed in order to avoid shifting liability from the oil industry to the taxpayers. The general idea is that private enterprise, which benefits from natural resources on public property, should not gain while shifting costs to the public. In its own words: "[P]rivate parties enjoying the benefit of producing the mineral resources of the OCS should not

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[90] Talos Comment 2.
[91] Arena Energy Comment 10.
[92] Ibid.
[93] Ibid.
[94] Talos Energy argues that the Proposed rule would require "double bond[ing]" for purchasing companies. Talos Comment 4.
[95] Opportune Analysis 7.

shift the cost of satisfying their contractual and environmental obligations to the public."[96]

The general policy of avoiding costs to the public is a worthwhile public policy objective. But the financial cost to the companies described herein should be relative to the risk. And, here, the public risks little, financially, by leasing its offshore land to oil companies under current rules.

As demonstrated above, sole owner liability represents the primary and arguably the only threat to taxpayers in the long term. Yet the numbers associated with sole owner liability are almost trivial. They total a mere $1.2 billion[97] of the $42.8 billion[98] listed by BOEM as the taxpayer's risk, for which $761 million is already covered in bonding. Thus, the Proposed Rule imposes $2.676 billion in new bonding costs for a potential taxpayer liability that 70 years of decommissioning history projects will top out at $391 million.[99]

The benefits of BOEM's Proposed Rule simply do not outweigh the costs .

OCS Oil and Gas Royalties Are Significant, Likely to Suffer Big Hit

The public takes in a substantial amount of revenue from OCS activity in the form of federal oil and gas royalties. For instance, taxpayers (aka the federal government) have earned royalties of over $121 billion from gulf oil leases since 2004.[100] Ironically, much of this revenue goes toward supporting parks, remediation and conservation-related activities that the public and federal government relies on year after year.

Yet the newly proposed regulatory scheme offers a potentially existential threat to nearly three-quarters of the small business operators that pay these important annual royalties. Compared to the high-end of potential liability with any serious chance of hitting taxpayers ($391 million),[101] the anticipated loss of oil and gas royalties is overwhelmingly lopsided. It also seemingly ignored by the BOEM and Interior officials who promulgated the Proposed Rule.

Financial Assurance Across Energy Sources

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[96] Proposed Rule 42137.
[97] Opportune Analysis 6.
[98] Proposed Rule 42136.
[99] Arena Comment 6.
[100] GOM ONNR Data.
[101] Arena Comment 6.

Financial assurance obligations do play a valuable role in protecting taxpayers and ensuring responsible energy development when issued with the appropriate benefit-cost balance in mind. While different energy sources present their own unique challenges, the energy arena is constantly evolving and renewed assessments on whether statutory objectives are being achieved is a worthwhile pursuit.

Toward this end, CMG recently published a paper touching upon the need for better regulations for financial assurances for nuclear energy.[102] Like with oil and gas, nuclear facilities who are non-utility owned must demonstrate that they have adequate funds to cover the costs of decommissioning.[103] In that industry, the common method of financial assurance is a trust that had been funded by ratepayers during the life of the nuclear facility.[104] But, these trusts are not regulated sufficiently, which allows the companies who hold the license to invest the trust fund money as they see fit.[105] The investments most companies are choosing are likely speculative investments, which can, and have, resulted in large losses to the trust fund balance.[106] For the 2021-2022 annual reports, nine of eleven decommissioning facilities have lost at least $20 million, five at least 100 million dollars, and one over $250 million, just in one year.[107] It seems clear that the Nuclear Regulatory Commission should seek better financial assurances by these companies performing the decommissioning activities while managing ratepayer resources.

In light of the billions of dollars flowing into renewable energy projects as part of a planned "Green Transition," it is worth reassessing the existing decommissioning regulations that govern wind and solar plants. These new projects promise to occupy a substantially larger footprint – at least 10 times per unit of power – than their traditional energy counterparts and bring several other challenges to environmental stewardship that have yet to be fully factored into federal regulations.[108]

For instance, the average wind turbine has a projected lifespan of 20 years, if maintained.[109] However, maintenance is difficult, unpredictably costly, and can greatly

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[102] Curtis Schube "Is the NRC Asleep at the Wheel? How delayed decommissioning, speculative investing and shaky financial assurances may be a perfect storm for taxpayers," Council to Modernize Governance, Oct. 2023, 9, https://modernizegovernance.org/is-the-nrc-asleep-at-the-wheel/.
[103] Ibid. 5.
[104] Ibid. 6.
[105] Ibid. 9.
[106] Schube 9.
[107] Ibid. 8.
[108] Samantha Gross, "Renewables, land use, and local opposition in the United States," Brookings Institution, Jan. 2020. https://www.brookings.edu/articles/renewables-land-use-and-local-opposition-in-the-united-states/.
[109] "How Long Do Wind Turbines Last? Can Their Lifetime be Extended?," TWI. https://www.twi-global.com/technical-knowledge/faqs/how-long-do-wind-turbines-

reduce that lifespan.[110] The relatively short lifespan is "often exacerbated by the offshore operating conditions" including "corrosion, erosion and biofouling alongside the usual materials, fatigue and wind-based factors."[111] Technological developments and tax incentives also contribute to the maintenance, deployment and replacement of wind turbines and solar panels.

While not necessarily pertinent to decommissioning, the environmental impact of these sources also remain a concerning and not fully understood aspect of their deployment. The most well-known impacts include death to birds and bats, displacement of migratory routes for birds, vibration during operation that can be damaging to fish and marine species, disturbance to sea floor, and other things.[112] While BOEM does require decommissioning for small wind turbines, the extent of the disposal procedures may be an area ripe for future review as the presence, size, and scale of these projects grow. [113][114]

Similarly, as solar energy's footprint grows, so too does the need to identify whether the taxpayer is protected and companies are planning for the responsible end of the technology's life.[115] Entire solar farms are now being erected to supply energy at a utility-scale level.[116] But, subject to climate and technology variables, solar panels are typically warrantied for 20-25 years and will reduce their output of energy over time.[117] As these panels reach their lifecycle, and replaced, "the sheer volume of discarded

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last#:~:text=A%20good%20quality%2C%20modern%20wind,correct%20maintenance%20procedures%20obeing%20followed.

[110] Wood, Sam, "Ageing Offshore Wind Turbines Could Stunt the Growth of Renewable Energy Sector," University of Kent, Feb. 15, 2021. https://www.kent.ac.uk/news/science/27849/ageing-offshore-wind-turbines-could-stunt-the-growth-of-renewable-energy-sector. The true costs do not have a track record specific enough to even have a current breakdown of those costs. Ibid.

[111] How Long Do Wind Turbines Last?

[112] "Wind Energy and Environmental Impacts," University of Maryland, Center for Environmental Science. https://www.umces.edu/wind-energy#:~:text=Impact%20of%20offshore%20wind%20developments%20on%20marine%20life&text=The%20sound%20levels%20from%20pile,species%2C%20such%20as%20endangered%20whales.

[113] Bureau of Ocean Energy Management, " Supporting National Environmental Policy Act Documentation for Offshore Wind Energy Development Related to Decommissioning Offshore Wind Facilities," accessed Oct. 11, 2023, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Decommissioning_WhitePaper.pdf.

[114] "Wind Energy End-of-Service Guide," Energy.gov, accessed Oct. 11, 2023, https://windexchange.energy.gov/end-of-service-guide#:~:text=Data%20from%20a%20limited%20review,turbines)%20of%20%24114%2C000%E2%80%93%24195%2C000.

[115] For example, Babcock Ranch, Florida, has shifted entirely to solar energy, over other forms of energy. Block, Deborah, "Solar-Powered US Town Successfully Weathers Hurricane," Oct. 16, 2022. https://www.voanews.com/a/solar-powered-us-town-successfully-weathers-hurricane/6789540.html

[116] "Solar Farms: What Are They & How Do They Work?," Chariot Energy. https://chariotenergy.com/chariot-university/solar-farms/#:~:text=A%20solar%20farm%20is%20a,consumption%20by%20customers%20like%20you.

[117] Mow, Benjamin, "STAT FAQs Part 2: Lifetime of PV Panels," NREL.gov, April 23, 2018. https://www.nrel.gov/state-local-tribal/blog/posts/stat-faqs-part2-lifetime-of-pv-panels.html.

panels will soon pose a risk of existentially damaging proportions."[118] These panels constitute hazardous waste with toxic heavy metals, making recycling, which takes specialized skill, more necessary than simply discarding them in a landfill.[119] The cost of recycling could cost as much as 30 times the cost of sending the panels to a landfill.[120] As of now, state and local governments regulate solar energy (not federal),[121] but as the industry grows, assuring that the cost of decommissioning is covered may be more suitably done by the federal government.

BOEM's Proposed Rule does not attempt to wade into these waters, explicitly stating that "This proposed rulemaking would not apply to renewable energy activities."[122] This does not change the coming need for BOEM and other regulators attention though. Current legislation[123] envisions significant growth in renewable energy. The size and scope will far exceed all projects to date. As a result, the scope of decommissioning costs will also grow and the need for financial assurances will grow with it. The federal government needs to proactively understand whether it has appropriately protected the environment and taxpayers from the coming onslaught of massive wind plants and industrial solar fields.

Conclusion

BOEM's Proposed Rule is a solution in search of a problem. It upends a system that works and replaces it with a regime projected to cause significant pain for small, independent oil companies. These small businesses represent nearly three-quarters of those operating in the OCS, who pay massive annual royalties to the federal government and heavily contribute to domestic oil and gas production. The new costs may put many of these companies out of business. The American people are likely to be the biggest losers through reduced supply, federal revenue and a less stable offshore energy industry.

Given the rarity of the taxpayer having to foot the bill under the current decommissioning regulatory scheme, the negative consequences of the Proposed Rule far outweigh any minimal benefit. Whether these effects are consequential enough to

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[118] Atalay Atasu, Serasu Duran and Luk N. Van Wassenhove, "The Dark Side of Solar Power," Harvard Business Review, June 18, 2021. https://hbr.org/2021/06/the-dark-side-of-solar-power
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Proposed Rule 42136.
[123] For example, the so-called Inflation Reduction Act is hailed as "the most significant action Congress has taken on clean energy and climate change in the nation's history." "Inflation Reduction Act Guidebook," Whitehouse.gov, Sept. 21, 2023. https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/

overcome strong support from powerful environmental special interest allies of Biden administration officials along with the major oil companies, we will have to wait to see.