

# **REGULATORS MAY BE PLANNING SIGNIFICANT CHANGES TO HOW THEY OVERSEE DECOMMISSIONING IN THE GULF OF MEXICO**

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## **I. Introduction**

Oil and gas wells that are no longer economical must eventually be plugged and abandoned, associated infrastructure must be decommissioned, and the wellsite must be cleared. The obligation to perform this work is a function of the mineral lease and the applicable regulations; and for companies operating in the Gulf of Mexico, this means a mineral lease granted by the U.S. government and compliance with all current and future federal regulations. These regulations generally require that all wells be permanently plugged and abandoned, and all platforms and pipelines be decommissioned within one year of the lease's termination or sooner if the well is no longer useful. Today, there are approximately 8,000 wells and 1,600 platforms offshore, and nearly half of these presently need to be decommissioned or will need to be decommissioned soon.<sup>1</sup>

The current lessee(s) and operator have the primary responsibility to satisfy these decommissioning obligations, but if they fail to timely perform these obligations, the regulators can order all predecessors-in-interest to the lease to perform any decommissioning obligation that accrued during their period of ownership. This is often referred to as "predecessor liability" or "boomerang liability" because the current lessee's default causes the liability to boomerang back to the predecessors.

A series of recent bankruptcies involving offshore operators that were unable or unwilling to satisfy decommissioning obligations on hundreds of leases have caused Congress, environmental groups, and other stakeholders to re-examine whether the current regulations can adequately manage the task at hand. This, combined with the Biden administration's emphasis on the energy transition away from fossil fuels, has set the stage for a flurry of activity from key offshore regulators in 2024 and 2025.

## **II. Recent Bankruptcies Have Highlighted the Extent of Aging Oil & Gas Infrastructure in the Gulf of Mexico**

The bankruptcies of significant companies can bring public attention to an industry. The offshore oil and gas sector is no different. While bankruptcies in the oil patch are nothing new, a few recent bankruptcy cases involving companies with significant assets have tested the regulators' ability to respond and, in turn, have caused significant decommissioning liabilities that should have been addressed years ago to boomerang back to companies that had long since sold the assets to what they believed to be a responsible operator.

In 2012, ATP Oil & Gas Corp. (ATP) filed for bankruptcy. This set off contentious litigation in the courts and with the regulators before the Interior Board of Land Appeals as the regulators, co-lessees, and predecessors litigated who would ultimately bear the significant costs to decommission ATP's assets. This bankruptcy was remarkable because of the extent of ATP's operations in the Gulf of Mexico and the impact it had on its co-lessees and predecessors. But ATP's bankruptcy case was merely a precursor of what was to come. More recently in 2020,

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<sup>1</sup> The U.S. General Accounting Office's report to congressional requesters GAO-24-106229.

Fieldwood Energy, Inc. (Fieldwood)—which was then the largest operator of assets on the Outer Continental Shelf (OCS)—filed for bankruptcy protection. The Fieldwood bankruptcy involved a mix of shallow-water OCS leases and deepwater leases. The Fieldwood bankruptcy also involved hundreds of wells, platforms, and pipelines that were long-overdue to be abandoned or decommissioned. This triggered significant regulatory action and the need for predecessors-in-interest to the Fieldwood leases to perform the work that Fieldwood should have performed. Then, in 2023, Cox Oil (Cox)—another significant operator on the shallow water OCS—filed for bankruptcy. In addition to the same issues that resulted from the ATP and Fieldwood bankruptcies, the Cox bankruptcy left numerous wells and platforms with no other viable party to decommission. As it stands now, the U.S. government is left abandon and decommission these assets at a cost potentially in excess of \$50 million.

The fact that these companies had avoided decommissioning so many wells, platforms, and other infrastructure, and were financially incapable of doing so, has caused various groups to examine whether the regulations and enforcement of those regulations are adequate to ensure compliance with decommissioning obligations.

### **III. Calls for Change**

In January 2024, the U.S. General Accountability Office (GAO) issued a report to Congress (GAO-24-106229) that responded to lawmakers' requests to review the Department of the Interior's oversight of the decommissioning of offshore oil and gas infrastructure. This report was largely critical of the two primary agencies responsible for overseeing decommissioning and ensuring that companies have the financial ability to perform the work: the Bureau of Safety and Environmental Enforcement (BSEE) and Bureau of Ocean Energy Management (BOEM). The Report found, among other things, that “[w]hile BSEE has regulations, guidance, and enforcement tools to define decommissioning expectations for end-of-lease infrastructure and compel compliance by operators, we found that BSEE’s enforcement contributed to widespread decommissioning delays and the resulting backlog [of idle infrastructure].” BSEE officials conceded in interviews with the GAO that their administrative tools were ineffective to compel timely decommissioning, which the GAO concluded was made worse by how BSEE chose to implement those tools.

The GAO similarly criticized BOEM for failing to adequately ensure that an operator has the financial ability or has provided adequate security to the U.S. government to assure its performance of its lease obligations, including decommissioning obligations. The GAO observed that as of June 2023 BOEM held about \$3.5 billion in bonds to secure between \$40 billion and \$70 billion of decommissioning costs.

Several environmental groups immediately seized on the GAO Report and filed a Petition for Oversight Reform on Offshore Oil & Gas Decommissioning with the Department of the Interior. The environmental groups argued that new rulemaking was warranted by the criticism levied in the GAO Report while also arguing that “the climate emergency means that Interior must also exercise its existing authority to phase out fossil fuels.” Tying these two arguably disparate issues together, the Petition’s underlying premise is that “rapidly retiring and decommissioning offshore oil and gas infrastructure is an essential part of ending fossil fuel production.”

#### IV. What Does This All Mean for Future Decommissioning in the Gulf of Mexico?

BSEE and BOEM largely agree with the criticism levied in the GAO Report; and in doing so have agreed with the GAO Report's recommendations on several issues that may significantly impact how companies manage their decommissioning liabilities in the not-so-distant future.

- Recommendation 1: BSEE agreed to assess the effectiveness of its enforcement tools to incentivize compliance. Put another way, BSEE will consider whether the current system of issuing Incidents of Non-Compliance (INCs) and, eventually, civil penalties is adequate. BSEE will also identify and implement regulatory or policy changes to establish clear timelines or other criteria to trigger the use of existing enforcement tools, while also identifying additional enforcement tools.
- Recommendation 2: BSEE agreed to propose a new rule that revises its decommissioning regulations to, among other things, clarify decommissioning criteria and ensure the timely decommissioning of idle assets. BSEE is targeting December 2024 to publish this proposed rule.
- Recommendation 3: BOEM agreed that the proposed rule regarding "Risk Management and Financial Assurance for OCS Lease and Grant Obligations" should be timely completed. This proposed rule was published for comment in June 2023 and BSEE anticipates publishing the final rule in 2024.
- Recommendation 4: BOEM agreed to revise the qualification procedures for a company to operate in the Gulf of Mexico to account for an operator's decommissioning capability and compliance history. Importantly, this includes developing a new "Fitness to Operate" standard for companies in the Gulf of Mexico that evaluates a company's history and ability to meet their safety, environmental, and financial responsibilities.

These recommendations, if acted upon, would arguably be the most significant regulatory changes in the Gulf of Mexico since the changes implemented after the *DEEPPWATER HORIZON* tragedy. The financial assurance rulemaking has been in the works for several years and it now appears imminent. This, by itself, has the potential to significantly influence who operates in the Gulf of Mexico and how they operate. But it may be dwarfed by a proposed rule that imposes new decommissioning timelines, enhances BSEE's enforcement tools, and creates a Fitness to Operate standard. BSEE can effect significant regulatory change within these three broad categories, and these changes have the potential to impact more than decommissioning and could change which companies are even allowed to operate offshore. Also, importantly, these changes may impact more than just the current lessees, as new regulations may alter how and when predecessors are ordered to satisfy decommissioning obligations. While the contemplated rulemaking is unlikely to result in new regulations until later 2024 for the financial assurance rule and 2025 and beyond for a new decommissioning rule, companies should not assume that BSEE and BOEM will maintain the status quo in the interim.

The GAO's recommendation that BSEE implement *policy* changes could result in a significant short-term impact. These policy changes could be reflected in Notices to Lessees that clarify or expound on regulations in place, or they could occur more subtly. BSEE's Regional Offices currently have significant discretion in granting extensions of time to remedy INCs and abandon and decommission assets. There is a risk, however, that BSEE may more subtly change

how it applies its current enforcement tools or become less accommodating for extension requests. This potential change in BSEE's exercise of its discretion can occur without prior notice to companies and have significant consequences.

## **V. Conclusion**

The data shows that there is a significant amount of aging infrastructure in the Gulf of Mexico that must be decommissioned. The oil and gas industry believes this can occur in tandem with continued exploration and development. Other groups, however, believe this is an opportunity to accelerate the energy transition. While regulatory reform is highly likely to occur, it remains to be seen where any new regulations or policy changes will fall on this spectrum.