



Institute for
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

August 6, 2018

VIA ELECTRONIC SUBMISSION

Attn: Bureau of Safety and Environmental Enforcement

Re: Comments on Proposed Rule for Oil and Gas and Sulfur Operations in the Outer Continental Shelf—Blowout Preventer Systems and Well Control Revisions, RIN 1014–AA39, Docket No. BSEE–2018–0002

The Institute for Policy Integrity at New York University School of Law¹ respectfully submits these comments to the Bureau of Safety and Environmental Enforcement (“BSEE”) on its Proposed Rule to revise regulations for well control and blowout preventer systems (“Proposed Rollback”).² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decision-making through advocacy and scholarship in the fields of administrative law, economics, and public policy.

On May 11, 2018, BSEE issued notice of its intent to roll back the Blowout Preventer Systems and Well Control Rule that the agency finalized in 2016 under the previous Administration (“Final WCR”).³ Developed after six years of extensive public involvement, the Final WCR included a range of improvements to offshore drilling operations that were meant to address many of the failures that had led to the catastrophic *Deepwater Horizon* explosion and oil spill.⁴ BSEE considered the Final WCR “necessary to reduce the likelihood and/or severity of any oil or gas blowout, which can lead to the

¹ No part of this document purports to present New York University School of Law’s views, if any.

² BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF – BLOWOUT PREVENTER SYSTEMS AND WELL CONTROL REVISIONS, 83 Fed. Reg. 22,128 (May 11, 2018) [hereinafter 2018 Proposed Rollback].

³ BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF – BLOWOUT PREVENTER SYSTEMS AND WELL CONTROL, 81 Fed. Reg. 25,887-26,038 (Apr. 29, 2016) [hereinafter 2016 Final WCR].

⁴ *Id.* at 25,888-89 (noting the multiple investigations from a range of entities, such as the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, the National Academy of Engineering, and the Department of the Interior/Department of Homeland Security Joint Investigation Team, that led to a series of recommendations to BSEE about how to improve safety offshore).

loss of life, serious injuries, and harm to the environment.”⁵ The federal government and industry conducted multiple investigations to determine the causes of the *Deepwater Horizon* incident; many of these investigations identified blowout preventer (“BOP”) performance as a concern.⁶

Less than two years after this comprehensive rule became effective,⁷ BSEE is now proposing to weaken or eliminate a number of its most critical components in response to industry concerns about regulatory burdens. We write to make the following comments:

- BSEE should not move forward with its proposed revisions to the Final WCR, and has not provided a reasoned explanation for weakening and repealing safety requirements that it found necessary in 2016; and
- BSEE must analyze all of the forgone societal benefits from rolling back the existing Final WCR, including safety and environmental risk reduction, time savings, industry cost savings, reduced fatalities, and lower externality costs.

Each of these points are addressed in turn.

I. BSEE Should Not Move Forward with the Proposed Revisions to the 2016 Final Well Control Rule, and Has Not Provided a Reasoned Explanation for Weakening and Repealing Safety Requirements That It Found Necessary in 2016.

The 2016 Final WCR sought to correct the flawed regulatory culture that gave rise to the *Deepwater Horizon* catastrophic oil spill disaster. Some of the primary elements of the Final WCR included strengthening requirements for operations and equipment used in offshore drilling, maintaining safe drilling margins, performing real time monitoring, and increasing BSEE’s oversight function. BSEE should not repeal or weaken the Final WCR, and lacks a rational basis for doing so.

Less than two years after the Final WCR became effective, BSEE proposes to roll back a number of its most critical components. BSEE states that it is seeking modification of the Final WCR to further the policy directive of “encouraging energy

⁵ BSEE, *Oil and Gas and Sulphur Operations on the Outer Continental Shelf Blowout Preventer and Well Control Revisions, Initial Regulatory Impact Analysis* 6 (2016) [hereinafter 2016 RIA].

⁶ *Id.*

⁷ The majority of the 2016 Final WCR provisions became effective on July 28, 2016, however, some key provisions had longer implementation timelines, with some provisions not yet in effect at all. *See* 2016 Final WCR, 81 Fed. Reg. at 25,893 (discussing compliance dates for (1) using BSEE-approved verification organizations – one year after BSEE published a list of such organizations; (2) real time monitoring requirements – three years after publication of the 2016 Final WCR; (3) installation of dual shear rams on subsea blowout preventers – five years after publication; and (4) installation of shear rams that center drill pipe during shearing operations – seven years after publication).

exploration and production on the OCS and reducing unnecessary regulatory burdens while ensuring that any such activity is safe and environmentally responsible.”⁸ But BSEE does not adequately explain why it is changing safety requirements that it deemed necessary in 2016.

Pursuant to the Administrative Procedure Act (“APA”), an agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁹ In addition, if an agency repeals or changes an existing rule, it must “supply a reasoned analysis for the change.”¹⁰ The agency must “display awareness that it is changing position” and “show that there are good reasons for the new policy.”¹¹ This requirement helps ensure “that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.”¹²

BSEE has not provided any support for its repeated claim that its proposed changes will not negatively affect safety and the environment. Yet, its proposed changes would repeal numerous, substantive safety requirements that were put in place after years of research, public comment, and negotiation with industry and other stakeholders.

While many of the proposed modifications seek to shift more discretion and oversight back to industry, BSEE does not provide any evidence as to why the established regulatory oversight is no longer needed to protect against possible oil spills or accidents. Just two years ago (six years after *Deepwater Horizon*), BSEE concluded that federal oversight of oil and gas development continued to be inadequate, even as industry sought to address some of the issues giving rise to *Deepwater Horizon*.¹³ BSEE’s reliance on alleged industry burdens, alone, does not justify relaxing federal oversight at a time when it remains critical to prevent OCS disasters.¹⁴

⁸ 2018 Proposed Rollback, 83 Fed. Reg. at 22,129.

⁹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1035 (10th Cir. 2002) (agency must examine “the relevant data” and articulate “a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”).

¹⁰ *State Farm*, 463 U.S. at 42.

¹¹ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹² *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982).

¹³ 2016 Final WCR, 81 Fed. Reg. at 25,890.

¹⁴ See News Release, U.S. Chem. Safety Bd., The U.S. Chemical Safety Board’s Investigation into the Macondo Disaster Finds Offshore Risk Management and Regulatory Oversight Still Inadequate in Gulf of Mexico (Apr. 13, 2016), <https://www.csb.gov/the-us-chemical-safety-boards-investigation-into-the-macondo-disaster-finds-offshore-risk-management-and-regulatory-oversight-still-inadequate-in-gulf-of-mexico/> (“Offshore regulatory changes made thus far do not do enough to place the onus on industry to reduce risk, nor do they sufficiently empower the regulator to proactively oversee industry’s efforts to prevent another disaster like the Deepwater Horizon rig explosion and oil spill at the Macondo well in the Gulf of Mexico, an independent investigation by the U.S. Chemical Safety Board (CSB) warns.”).

Further, BSEE has failed to provide a reasonable justification for proposing to roll back and weaken some of the most significant protections in the 2016 Final WCR, including (1) BOP design, operational requirements, and testing frequency; (2) safe drilling margins; (3) real-time monitoring requirements; and (4) agency-approved independent safety verification organizations. Each of these requirements are briefly addressed in turn, below.

A. BOP Requirements and Testing Frequency

The Final WCR required that BOPs be outfitted with double-shear rams designed to allow the drill pipe to be centered during shearing operations. The Final WCR also required that accumulators – which use hydraulic pressure to operate rams – be located subsea, “to provide fast closure of the BOP components and to operate all critical functions in case of a loss of the power fluid connection to the surface.”¹⁵ The Final WCR also increased the 7-day testing interval for BOPs used in workovers and decommissioning to 14 days to harmonize with a required 14-day interval for pressure testing BOPs used in drilling and completion operations. BSEE concluded that 14 days struck an appropriate balance between cost burdens and safety, and rejected a 21-day interval due to the lack of any new data that could reasonably support increasing the testing interval to 21 days.¹⁶

The Proposed Rollback states that the design requirements for shearing capability, centering requirements for shearing, and subsea accumulators are unnecessary and that following industry-defined standards is sufficient:

- **Shearing capability:** the Proposed Rollback allows industry greater flexibility to choose whatever tools it deems appropriate and that some “combination of” shear rams must be able to shear all lines.
- **Centering requirements for shearing:** BSEE claims that technological improvements make this unnecessary as does “BSEE experience with the implementation of the original WCR,” even though the requirement was not set to take effect until 2023.
- **Subsea accumulator:** the 2018 Proposed Rollback removes this requirement, deferring to industry for appropriate placement, because “implementation of the original WCR” has allowed BSEE “to better evaluate the effects of the original WCR accumulator requirements impacting subsea BOP space and weight limitations.” The requirement was not set to go into effect until 2021.

Further, the Proposed Rollback requests comment on whether the BOP testing interval should be 7, 14, or 21 days for all types of operations, including drilling, completions, workovers, and decommissioning. BSEE does not address the analysis performed in 2016, and does not refer to any new data that would justify a further increase in the testing interval.

¹⁵ 2016 Final WCR, 81 Fed. Reg. at 26,030.

¹⁶ *Id.* at 81 Fed. Reg. at 25,899; *see also* 2016 RIA at 57.

To support its proposed changes, BSEE claims that since the Final WCR was issued in May 2016, it became aware that certain provisions in that rulemaking “impose undue burdens” on oil and natural gas production operators.¹⁷ BSEE must explain what it learned after the Final WCR was finalized that it had not already learned during the comment period leading up to the Final WCR. Moreover, BSEE must provide a reasoned explanation for the technical changes that it proposes, including an explanation for why it is proposing to weaken and repeal safety requirements that it previously found to be necessary, and part of a cost-benefit justified rule. BSEE’s cursory explanations do not satisfy the legal standard.

BSEE does not provide sufficient explanation for how or why its proposed changes will provide the same level of safety or environmental protection as the currently effective WCR. Instead, it repeatedly makes the unsupported assertion that the effect on safety and the environment from each of its rollbacks will be “neutral.”¹⁸ In addition, many of the proposed modifications shift authority and discretion back to industry officials. Yet BSEE has failed to show that industry is committed to an improved safety culture that would otherwise be required under the Final WCR framework. In short, BSEE fails to provide any “good reasons” to disregard the facts and circumstances that led to its 2016 safety requirements.¹⁹

As a result of the lack of any reasonable explanation, the public has no way to verify BSEE’s assumptions or gauge the wisdom of many of these changes. Moreover, the public does not know whether the decision to amend these provisions “rests on factual findings that contradict the agency’s previous record.”²⁰ Further, the agency’s decision does not satisfy the legal standard for “a more detailed justification than what would suffice for a new policy created on a blank slate.”²¹

B. Safe Drilling Margins

The Final WCR identified a default safe drilling margin, in response to post-*Deepwater Horizon* recommendations. BSEE concluded the default margin should be that the static downhole mud weight equal a minimum of 0.5 pound per gallon (“ppg”) below the lesser of the casing shoe pressure integrity test or the lowest estimated fracture gradient.²² While BSEE recognized that 0.5 ppg was appropriate under most circumstances, operators could obtain a variance with sufficient justification for deviating

¹⁷ 2018 Proposed Rollback, 83 Fed. Reg. at 22,129.

¹⁸ BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, OIL AND GAS AND SULPHUR OPERATIONS ON THE OUTER CONTINENTAL SHELF BLOWOUT PREVENTER AND WELL CONTROL REVISIONS, INITIAL REGULATORY IMPACT ANALYSIS, RIN: 1014-AA39, at pp. 3-7, March 2018 [hereinafter “2018 RIA”].

¹⁹ *Fox*, 556 U.S. at 516.

²⁰ *Id.*

²¹ *Id.*

²² 2016 Final WCR, 81 Fed. Reg. at 25,894.

from the default number.²³ The margin struck a balance between industry concerns about economic harm, and the need for maintaining appropriate pressure to prevent loss of well control.²⁴

The Proposed Rollback would revert to the pre-*Deepwater Horizon* situation where the agency used a case-by-case approach that allows operators to set their own appropriate drilling margin, and potentially be allowed to drill without first defining any safe drilling margin at all.²⁵ BSEE justifies the potential change by noting that the agency has allowed 32 wells out of 305 total (just over 10 percent) a drilling margin less than 0.5 ppg, and that a less “prescriptive” approach would provide “increased investment certainty for the regulated community.”²⁶

The Final WCR expressly intended .5 ppg to apply “under most circumstances” and sought to maintain agency oversight “to make appropriate case-by-case decisions on specific drilling margins.”²⁷ BSEE struck a balance between setting a consistent, recommended safety margin, while permitting deviance based on a performance based approach *only* when operators demonstrated that any such deviance was justified and appropriate. The potential change contemplated here would eliminate the prescriptive safety margin in the Final WCR in favor of an approach that would remove operators’ responsibility to show that deviance from the .5 ppg norm is justified. BSEE provides no support or analysis for how or why this modification can provide the same level of safety or environmental protection as the Final WCR, nor why it should repeal this important standard. Without more than BSEE’s experience granting variances for 32 out of 305 wells, it has failed to explain why it should now abandon this important safety standard.

C. Real-Time Monitoring

The Final WCR imposed real-time monitoring (“RTM”) requirements to provide an “additional pair of eyes” to improve safety and environmental protection during ongoing well operations, as recommended by several post-*Deepwater Horizon* investigations.²⁸ As set forth in the Final WCR, the rule “reflect[d] BSEE’s intention that operators use RTM as a tool to improve their own ability to prevent well control incidents while providing BSEE with significant access to RTM information to evaluate system improvements.”²⁹ The Final WCR notes that, while this requirement does impose one of the highest costs from the final rule, it will also have one of the largest impacts in terms of reducing spills.³⁰

²³ *Id.* at 25,916.

²⁴ 2016 Final WCR, 81 Fed. Reg. at 25,916.

²⁵ 2018 Proposed Rollback, 83 Fed. Reg. at 22,134.

²⁶ *Id.* at 22,133-22,134.

²⁷ 2016 Final WCR, 81 Fed. Reg. at 25,916.

²⁸ *Id.* at 25,896.

²⁹ *Id.* at 25,897.

³⁰ *Id.* at 25,986.

The Proposed Rollback suggests removing “prescriptive real-time monitoring requirements and moving towards a more performance-based approach.”³¹ BSEE does not mention any of the findings that led it to impose this requirement in 2016. And given that the RTM requirements go into effect only in 2019, BSEE likely has no data to support a finding that the RTM requirements are unnecessary or have been overly burdensome. In fact, BSEE appears to be actively *preventing* the collection of relevant data and analysis on well inspection and monitoring. In December of last year, BSEE ordered the National Academies to stop work on a study that the agency had commissioned to improve its inspection program, which “was to include recommendations on the appropriate role of independent third parties and remote monitoring.”³²

Ultimately, BSEE fails to explain how its proposed modification eliminating the prescriptive RTM in favor of a performance-based approach can provide the same level of safety and environmental protection as provided under the Final WCR. The Proposed Rollback inserts a high degree of ambiguity as to what kind and level, if any, RTM is required of operators, and fails to guarantee that operators will obtain the standardized information deemed necessary by the prescriptive standards set forth in the Final WCR. BSEE fails to provide a reasoned explanation for eliminating the existing RTM requirements.

D. BSEE-Approved Verification Organizations

The Final WCR created a new system of BSEE-approved verification organizations (“BAVO”) to ensure that truly independent third-party experts review and verify that various key drilling operations are being performed safely. Under the Final WCR, BSEE was to publish a list of BAVOs, and within a year from that date, operators would be required to use BAVOs to witness and/or verify the performance of certain tests and inspections to help BSEE ensure that various critical equipment, such as BOPs, are adequately designed and properly maintained in order to minimize risk.³³ BSEE noted that development of the BAVO system would provide a level of safety and regulatory oversight that was not taking place with the use of third party verification organizations not approved by BSEE.³⁴

³¹ 2018 Proposed Rollback, 83 Fed. Reg. at 22,137.

³² Nat’l Acad. of Scis., *Statement on Stop-Work Order for National Academies Study on the Department of the Interior’s Offshore Oil and Gas Operations Inspection Program* (Dec. 21, 2017), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12212017> (“The U.S. Department of the Interior’s Bureau of Safety and Environmental Enforcement has ordered the National Academies of Sciences, Engineering, and Medicine to suspend all work on a study to review and update the bureau’s offshore oil and gas operations inspection program to enhance safety.”); Nat’l Acad. of Scis., *Project Information: Review and Update of Bureau of Safety and Environmental Enforcement Offshore Oil and Gas Operations Inspection Program*, PIN: TRB-SASP-16-04, <https://www8.nationalacademies.org/pa/projectview.aspx?key=49890> (last visited July 31, 2018).

³³ 2016 Final WCR, 81 Fed. Reg. at 25,948.

³⁴ *Id.*

The Proposed Rollback would eliminate the use of BAVOs. BSEE asserts that removal of the BAVO system will not affect safety because independent third parties have long been used to carry out certifications and verifications, and BSEE expected most of them to apply to become a BAVO. As a result, BSEE argues, a BAVO system imposed unnecessary procedural burdens and costs without improving safety or environmental protection.³⁵

BSEE's justification fails to explain why the additional oversight under a BAVO system is no longer necessary or how reverting back to independent third parties, who failed to provide the necessary oversight originally giving rise to the *Deepwater Horizon* disaster, would now provide the same level of safety and environmental protection as the Final WCR. BSEE's assumption contradicts the finding in the Final WCR requiring BAVOs *because* the necessary level of oversight had not been achieved through third party verification organizations. The Proposed Rollback thus fails to provide the required "factual findings that contradict the agency's previous record" or "a reasoned analysis for the change" to justify repealing this requirement.³⁶

For each of these significant changes to the 2016 Final WCR described in subsections A through D, above, BSEE has failed to provide reasoned analysis to roll back this regulation, enacted only two years ago. BSEE's cursory explanations for its proposed changes do not satisfy the APA's legal standards.

II. BSEE Must Analyze the Forgone Benefits of the 2016 Final WCR that Will Be Eliminated if the Proposed Rule Is Finalized.

BSEE fails to analyze any of the considerable forgone benefits of the Final WCR that will be eliminated if its Proposed Rollback is finalized. BSEE does not quantify these lost forgone benefits in its 2018 Regulatory Impact Analysis ("RIA") for the proposed rule, nor does it model or analyze any potential increased safety or environmental risks from eliminating and/or weakening safety requirements.

Moreover, BSEE should not move forward with this proposed rule unless it determines that it will provide net social benefits to the public. In issuing regulations, federal agencies are directed to conduct cost benefit analyses and consider whether regulations maximize net benefits, which include, among other things, potential economic, environmental, public health, and safety impacts.³⁷

In BSEE's 2016 RIA, accompanying the 2016 Final WCR, the agency prepared a detailed analysis to assess risk reduction benefits from the Final WCR; these societal benefits included: "reduced costs of injuries and fatalities, oil spill cleanup, damages to facilities and equipment, and lost tourism from an oil spill."³⁸ Benefits also included the

³⁵ 2018 Proposed Rollback, 83 Fed. Reg. at 22,138.

³⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

³⁷ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 1, 2011); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

³⁸ BSEE, 2016 RIA, *supra* note 5, at 59.

“value to society of protecting the environment (e.g., protection of animal species, preservation of the oceanic ecosystem) by reducing the risk and consequences of oil spills.”³⁹ BSEE explained in the 2016 RIA that “[w]hile these collective benefits are difficult to quantify, the Deepwater Horizon disaster provides a recent, real-world example of the scope of the potential costs to be avoided, currently in excess of \$40 billion and growing, and thus of the potential benefits to be gained by reducing the risks of major oil spills.”⁴⁰ In addition, the agency explained that the final rule “is expected to reduce the risks of smaller-scale, and more frequent, losses of well-control and oil spill events.”⁴¹

In the Final WCR, BSEE “reviewed the causes of risk without the rule and how those causes of risk would be affected by the rule.”⁴² Using the conservative assumption of a 1-percent reduction in spilled barrels of oil per year, it estimated that the final rule would result in approximately 712 fewer barrels spilled per year, equating to an annual benefit of \$2.6 million (in 2014 dollars).⁴³ In addition, BSEE analyzed and quantified reductions in fatalities projected from the Final WCR, and reported them as a monetary benefit in its 2016 RIA.⁴⁴ After considering all of the potential impacts of the Final WCR, BSEE concluded that the societal benefits, including time-savings, risk reductions, and fatality reductions, exceeded the rule’s societal costs, and would result in 10-year total net benefits of approximately \$563 million, at a 3 percent discount rate.⁴⁵

In fact, there is some evidence that the safety requirements and increased oversight from the Final WCR may have already helped reduce risks and incidents. Since the Final WCR went into effect, incidents involving lost well control declined, including zero incidents in 2017.⁴⁶ At the same time, total offshore oil production, as well as Gulf of Mexico region offshore oil production, *increased* each year between 2013 and 2017.⁴⁷ The decline in lost well control incidents came after several (but not all) of the improved oversight requirements in the Final WCR went into effect. Up until that time, as the Final WCR notes, additional industry spills and incidents continued, even after *Deepwater Horizon*.⁴⁸

³⁹ *Id.*

⁴⁰ *Id.* at 59-60.

⁴¹ *Id.* at 60.

⁴² *Id.* at 62.

⁴³ *Id.* at 64.

⁴⁴ *Id.* at 70-71.

⁴⁵ *Id.* at 67; 71

⁴⁶ BSEE, *Offshore Incident Statistics*, <https://www.bsee.gov/stats-facts/offshore-incident-statistics> (last visited August 6, 2018).

⁴⁷ BSEE, *Outer Continental Shelf Oil and Gas Production: Yearly Oil and Gas Production*, <https://www.data.bsee.gov/Production/OCSProduction/Default.aspx> (last visited August 6, 2018).

⁴⁸ 2016 Final WCR, 81 Fed. Reg. at 25,890 (“despite new regulations and improvements in industry standards and practices since the Deepwater Horizon incident, which have resulted in progress in certain areas of safety and environmental protection . . .”). The 2016 Final WCR further noted that “loss of well control (LWC) incidents are happening at about the same rate five years after that incident as they were before. In 2013 and 2014, there were 8 and 7 LWC incidents per year, respectively—a rate on par with pre-Deepwater Horizon LWC.”

In the Proposed Rollback and its accompanying RIA, BSEE fails to acknowledge any potential change in safety or environmental risk and fails to account for any of the forgone societal benefits from its proposed rollback of safety regulations. The RIA focuses narrowly on the potential total cost savings to industry of the proposed rule, estimated to be \$95 million per year, undiscounted.⁴⁹ The extent of the RIA’s discussion of environmental and safety risks is a repeated, conclusory claim that “the proposed amendments would not negatively impact worker safety or the environment.”⁵⁰ This statement is not supported by any analysis or data, and instead, is flatly contradicted by the agency’s own analysis just two years prior that found significant, monetizeable risk reduction and other benefits from the 2016 Final WCR. Similarly, a conclusory chart in the 2018 RIA lists each of the proposed changes’ impact on industry costs, but in broad strokes designates any and all “impact[s] on safety and environmental protection” as “neutral” for every single proposed change, without any further explanation and without monetizing any of these societal costs.⁵¹ This effectively treats these forgone social benefits as having zero value, which is not a rational assumption in light of the 2016 RIA and Final WCR.

The agency makes no attempt to analyze the likely increase in risk from the changes that it proposes, which eliminate many requirements—some of which are described in Part I, above—that are designed to reduce oil spills and other safety risks. The risk reduction benefits of the Final WCR are societal benefits that will be forgone if this proposed rule is adopted. BSEE does not acknowledge these lost societal benefits anywhere in its 2018 RIA. Based on BSEE’s unsupported assumptions and lack of analysis, the public cannot know whether, and to what degree, this proposal may increase risk, nor the overall net effect of the proposed rule on societal welfare, which may very well be negative. At minimum, BSEE must analyze and monetize the forgone societal benefits from its Proposed Rollback that it analyzed and monetized in 2016, including the risk reduction benefits of “reduced costs of injuries and fatalities, oil spill cleanup, damages to facilities and equipment, and lost tourism from an oil spill,” and the “value to society of protecting the environment (e.g., protection of animal species, preservation of the oceanic ecosystem) by reducing the risk and consequences of oil spills.”⁵²

In addition, BSEE also fails to model or analyze how the proposed rule will affect total oil and gas production, as well as externality costs associated with any increased production as a result of the proposed rule. BSEE may be implicitly assuming that offshore oil production will increase as a result of this proposed rule, as it is issuing this repeal to carry-out Executive Orders that seek to increase domestic energy production. Yet, the agency does not model any expected change in oil production, nor its environmental and social costs, including increased greenhouse gas emissions (which, as

⁴⁹ 2018 RIA, *supra* note 18, at ES-4.

⁵⁰ *Id.* at ES-4, 39-40.

⁵¹ *Id.* at 3-7.

⁵² 2016 RIA, *supra* note 5, at 59.

the Bureau of Ocean Energy Management indicated in 2017, should be quantified using the Interagency Working Group’s Social Cost of Carbon).⁵³

BSEE must provide “the grounds of [its] decision and the essential facts upon which the administrative decision was based.”⁵⁴ In addition, it must provide “good reasons” for its change in policy, and explain its reasons “for disregarding facts and circumstances that underlay or were engendered by” the prior rule.⁵⁵ If the agency’s new position, “rests upon factual findings that contradict those which underlay its prior policy,” the agency will need to provide “a more detailed justification than what would suffice for a new policy created on a blank slate” in order to satisfy the requirement to provide a “reasoned explanation.”⁵⁶ BSEE’s blind assumption that repealing numerous regulations—that two years ago, were part of a final rule found to provide significant societal benefits—will have no effect on societal costs and benefits is arbitrary and capricious. BSEE fails to meet the APA’s legal standards.

Sincerely,

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⁵³ *See, e.g.*, BUREAU OF OCEAN ENERGY MANAGEMENT, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE LIBERTY DEVELOPMENT AND PRODUCTION PLAN IN THE BEAUFORT SEA 3-129 (2017) (calling the social cost of carbon “a useful measure” to apply in environmental impact statements to “inform agency decisions,” and using estimates of the global social cost of carbon most recently updated in 2016 by the Interagency Working Group on the Social Cost of Greenhouse Gases).

⁵⁴ *Fox*, 556 U.S. at 515-16.

⁵⁵ *Id.*

⁵⁶ *Id.* at 515. *See also Wyoming v. U.S. Dep’t of Interior*, No. 09-CV-118J, 2010 WL 4814950, at *40 (D. Wyo. Nov. 18, 2010) (Johnson, J.) (setting aside agency’s change in position where agency could not point to “any new commercial or scientific data” to support the new policy).