



January 29, 2018

VIA ELECTRONIC SUBMISSION

Attn: Bureau of Safety and Environmental Enforcement

Re: RIN 1014-AA37; Docket No. BSEE-2017-0008; “Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Oil and Gas Production Safety Systems—Revisions”

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 amending regulations regarding offshore oil and natural gas production. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

We write to make the following comments:

- Unless BSEE can provide a reasoned explanation for weakening and repealing safety requirements that it found necessary in 2016, it should not move forward with this proposed rule;
- BSEE must analyze the potential increased safety or environmental risks and externality costs that will result from eliminating the safety requirements that it proposes, and only move forward with the proposed rule if it will deliver net social benefits; and
- BSEE must make the full text of any existing and proposed technical standards that are, or will be, incorporated by reference into BSEE’s regulations freely available for public download in a searchable format so that the public can review them.

I. Unless BSEE can provide a reasoned explanation for weakening and repealing safety requirements that it found necessary in 2016, it should not move forward with this proposed rule.

BSEE claims that the proposed rule will “fortify the Administration’s objective of facilitating energy dominance though encouraging increased domestic oil and gas production, by reducing unnecessary burdens on stakeholders while maintaining or advancing the level of safety and environmental protection.”² Yet, BSEE does not provide a

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

² Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Oil and Gas Production Safety Systems—Revisions, 82 Fed. Reg. 61703, 61704 (December 29, 2017) (hereinafter, “Proposed Rule”).

reasoned explanation for this proposed rule, or adequately explain why it is changing requirements that it deemed necessary in 2016. As such, the proposed repeal fails the legal standards of rationality, and it would be arbitrary to finalize the proposal.

BSEE proposes a number of substantive revisions to the safety standards codified at 30 C.F.R. part 250, subpart H—Oil and Gas Production Safety Systems. Its proposed changes include eliminating some of the safety requirements adopted in BSEE’s prior rule, which was finalized in September 2016.³ The 2016 Final Rule amended and updated subpart H, which had not undergone a major revision since 1988.⁴

In the 2016 Final Rule, BSEE stated that certain third party certifications “help ensure that operators meet the level of safety and environmental protection mandated under OCSLA.”⁵ Among other changes, the 2016 Final Rule amended 30 C.F.R. § 250.802(c)(1) to require that “each device be designed to function and to close in the most extreme conditions to which it may be exposed; this includes extreme temperature, pressure, flow rates, and environmental conditions.”⁶ In addition, under the 2016 Final Rule, the operator must “have an independent third-party review and certify that each device will function as designed under the conditions to which it may be exposed.”⁷

BSEE now proposes to eliminate safety requirements including requiring operators to certify through an independent third party that each device used for Safety and Pollution Prevention Equipment (“SPPE”) is designed to function in the most extreme conditions to which it will be exposed. BSEE’s proposed rule would eliminate this requirement on the basis that compliance with industry design standards “ensures that each device will function in the conditions for which it was designed.”⁸ But this statement does not provide a reasoned explanation for eliminating the existing requirement that the devices be certified by an independent third party to operate in the most extreme conditions to which they will be exposed.

In addition, BSEE proposes to revise certain requirements concerning diagrams and drawings that operators must submit to BSEE for approval. Pursuant to 30 C.F.R. § 250.842, operators must submit all of the documents listed in existing paragraph (a) of that section to BSEE for approval and those documents are required to be stamped by a registered professional engineer. BSEE would revise this provision to require operators to submit “only the most critical documents to BSEE and have those documents stamped by a PE

³ See 81 Fed. Reg. 61834 (September 7, 2017) (hereinafter, “2016 Final Rule”).

⁴ *Id.* at 61834.

⁵ 2016 Final Rule at 61845.

⁶ *Id.* at 61859.

⁷ *Id.*; 30 C.F.R. 250.802(c)(1).

⁸ Proposed Rule at 61709.

[professional engineer].”⁹ In addition, “BSEE has identified some documents that the operator would be required to develop and maintain, but that that operator would *not* be required to submit to BSEE; *nor would these documents would be required to be stamped by a PE.*”¹⁰ Moreover, some of these exempt documents appear to involve older facilities, raising concerns about human and environmental safety in the event these older facilities, which may have more wear-and-tear and be more prone to equipment problems, become under-regulated.

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.”¹¹ In addition, if an agency repeals or changes an existing rule, it must “supply a reasoned analysis for the change.”¹² The agency must “display awareness that it is changing position” and “show that there are good reasons for the new policy.”¹³ 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.”¹⁴

BSEE does not explain how or why eliminating third-party certifications, BSEE design approval, or professional engineer stamps would “advance the level of safety and environmental protection.”¹⁵ Indeed, this appears to be an illogical assertion. As such, BSEE fails to provide a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.¹⁶

Further, the proposed rule contradicts BSEE’s prior rationale for including these requirements in the 2016 Final Rule. BSEE provides merely a cursory explanation for its policy change that does not satisfy the APA’s legal standard. BSEE claims that since the 2016 Final Rule was issued—in September 2016—it became aware that certain provisions in that rulemaking created potentially “unduly burdensome” requirements to oil and natural gas production operators.¹⁷ BSEE states:

⁹ Proposed Rule at 61711.

¹⁰ *Id.* (emphasis added).

¹¹ *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. United States 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.”).

¹² *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

¹³ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁴ *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982).

¹⁵ See Proposed Rule at 61704.

¹⁶ See *State Farm*, 463 U.S. at 43.

¹⁷ Proposed Rule at 61704.

While implementing the requirements from the previous rulemaking, BSEE reassessed a number of the provisions in the original rulemaking and determined that some provisions could be revised to reduce or eliminate some of the concerns expressed by the operators, reducing the burden, while *providing the same level of safety and protection of the environment.*¹⁸

While BSEE cites unspecified “concerns” expressed by operators, it also claims that the new proposal will provide the same level of safety and protection of the environment. But, the public has no way to verify whether the same level of safety and environmental protection will result, as BSEE does not do any analysis to test or support this assumption. (See Part II, *infra*).

As a result of the lack of any explanation, the public has no way to gauge the wisdom of this proposed rule. Moreover, the public does not know whether the decision to amend the rule “rests on factual findings that contradict the agency’s previous record,” and thus cannot comment on whether the agency’s decision satisfies the standard for “a more detailed justification than what would suffice for a new policy created on a blank slate.”¹⁹ The public also does not know if there is a “good reason” to disregard at least some of the facts and circumstances underlying the 2016 Final Rule, which put many of these safety requirements into place.²⁰ BSEE must provide a reasoned explanation for this proposed rule, including an explanation for why it is now weakening and repealing safety requirements that it previously found to be necessary, and part of a cost-benefit justified rule.

II. BSEE must analyze the potential increased safety and environmental risks and externality costs from the proposed rule, and only move forward with the proposed rule if it will deliver net social benefits.

BSEE’s existing requirements for third-party certification, diagram and drawing approval, and professional engineer stamping are each designed to reduce safety and environmental risk. If BSEE eliminates and/or weakens these standards, the public will be exposed to greater risk, yet BSEE does not acknowledge, let alone analyze or quantify this change in risk. As a result, the public does not know whether this rule will provide net social benefits. BSEE should not move forward with this proposed rule unless it determines that it will provide net social benefits to the public.

The agency’s Regulatory Impact Analysis (RIA) for the proposed rule does not model or analyze any potential increased safety or environmental risk from eliminating

¹⁸ *Id.* (emphasis added).

¹⁹ *Fox*, 556 U.S. at 515.

²⁰ *Id.* at 516.

and/or weakening safety requirements. In the agency's 2016 RIA, accompanying the 2016 Final Rule, it prepared a detailed break-even analysis to assess risk reduction benefits from the Final Rule; these risk reduction benefits include "reduced costs of injuries and fatalities, oil spill cleanup, damages to facilities and equipment, and lost tourism from an oil spill."²¹ Potential benefits also included 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."²²

In the 2016 Final Rule, BSEE "reviewed the causes of risk without the rule and how those causes of risk would be affected by the rule."²³ 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).²⁴ In addition, BSEE analyzed and quantified reductions in fatalities projected from the Final Rule, and reported them as a monetary benefit of the 2016 Final Rule in the 2016 RIA.²⁵ After considering of all of the potential impacts of the Final Rule, BSEE concluded that the societal benefits of the Final Rule justified the societal costs.²⁶

In this proposed rule and its accompanying RIA, BSEE fails to acknowledge any potential change in risk, fails to conduct any break-even analysis, and fails to acknowledge the analysis that it completed less than two years ago. The RIA focuses narrowly on the potential total cost savings to industry of the proposed rule, estimated to be \$33 million per year, undiscounted.²⁷ The extent of the RIA discussion of environmental or safety risks is two conclusory sentences:

- "The proposed amendments would not negatively impact worker safety or the environment."²⁸; and
- "BSEE considers any change in risk to worker safety or the environment to be negligible."²⁹

²¹ BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF – BLOWOUT PREVENTER SYSTEMS AND WELL CONTROL REGULATORY IMPACT ANALYSIS 59 (April 11, 2016) [hereinafter, "2016 RIA"].

²² *Id.*

²³ *Id.* at 62.

²⁴ *Id.* at 64.

²⁵ *See id.* at 70-71.

²⁶ 2016 Final Rule at 61908.

²⁷ BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT, OIL AND GAS AND SULPHUR OPERATIONS ON THE OUTER CONTINENTAL SHELF OIL AND GAS PRODUCTION SAFETY SYSTEMS; INITIAL REGULATORY IMPACT ANALYSIS, RIN: 1014-AA372017, at ES-3 (Dec. 5, 2017)[hereinafter "2017 RIA"].

²⁸ *Id.* at ES-4.

²⁹ *Id.* at 26.

In addition, all “public impacts” are listed as “neutral,” without further explanation.³⁰

While this proposed rule is not purporting to repeal or modify every part of the 2016 Final Rule, the agency makes no attempt to analyze any possible increase in risk from the changes that it proposes, which eliminate many requirements that appear, on their face, to be designed to reduce risks. Based on BSEE’s unsupported assumptions and lack of analysis, the public cannot know whether, and to what degree, this proposal may increase risk. Because of this lack of analysis, the public also cannot know whether the proposed rule will deliver net social benefits.

In addition to the agency’s lack of risk analysis, 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 rule. BSEE may be implicitly assuming that oil production will increase as a result of this proposed rule, as it is issuing this repeal to carry-out Executive Orders 13783 and 13795, and Secretarial Orders 3349 and 3350, each of which seek to increase domestic energy production.³¹ 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 the Bureau of Ocean Energy Management indicated in 2017, should be quantified using the Social Cost of Carbon).³²

BSEE must provide “the grounds of [its] decision and the essential facts upon which the administrative decision was based.”³³ 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.³⁴ 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.”³⁵ The agency fails to meet this standard.

³⁰ *Id.* at 4-5.

³¹ *See* Proposed Rule at 61704-05.

³² *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).

³³ *Fox*, 556 U.S. at 515-16.

³⁴ *Id.*

³⁵ *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).

III. BSEE should make the full text of any existing and proposed technical standards that are, or will be, incorporated by reference into its own regulations freely available for public download in a searchable format so that the public can review them.

BSEE should make the full text of any existing and proposed technical standards that are, or will be, incorporated by reference into its own regulations freely available for public download in a searchable format. It currently fails to do so, preventing the public from a meaningful opportunity to participate in the notice and comment process.³⁶

BSEE states that, “All API standards that are safety-related and that are incorporated into Federal regulations are available to the public for free viewing online in the Incorporation by Reference Reading Room on API’s website at: <http://publications.api.org>.” However, all of these standards were *not* publicly-available for free viewing when Policy Integrity staff members tried to access them on several dates in January 2018. This failure is especially noteworthy, as in the RIA, BSEE specifically requests “comments that will inform our decision on updating these standards, including comments on risks and costs associated with the new [industry] editions.”³⁷

For certain API spec numbers, including Q1—which is cited repeatedly in the Proposed Rule—, an error message appears on the API website and we were unable to view the document at all.

The Proposed Rule also states that, “For the convenience of members of the viewing public who may not wish to purchase copies or view these incorporated documents online, they may be inspected at BSEE’s office, 45600 Woodland Road, Sterling, Virginia 20166, or by sending a request by email to regs@bsee.gov.” On January 3, 2018, a Policy Integrity staff member sent an email to BSEE requesting “a copy of all of the American Petroleum Institute (API) standards incorporated into BSEE’s current and proposed regulations. These include: API Spec Q1, API Spec. 14A, ANSI/API RP 14B, ANSI/API Spec. 6A, and API Spec. 6AV1.”³⁸ The staff member has not received a reply. As a result, we were unable to access a free review version of API Spec Q, contrary to the statements made in the Proposed Rule.

Moreover, the documents that were freely available for viewing on API’s website were not available for download, nor were they searchable. As a result, it was exceedingly difficult to locate relevant portions of the publicly-available API documents.

³⁶ See 5 U.S.C. § 553(c).

³⁷ See 2017 RIA at 14.

³⁸ Email on file with author.

Finally, accessing the API website to view these documents required accepting the API terms of service for the website and registering for the site. Because BSEE did not respond to our email request for documents, agreeing to the API terms of service was a requirement to view these standards. This is problematic for several reasons. Accepting the terms of service requires: (i) providing an email address to API, which the public may not otherwise wish to do for privacy reasons; (ii) accepting API's various terms for the online "read only" documents, including no copying and pasting, saving, or other uses of the documents that would make them more easily accessible to the public; and (iii) acknowledging API's "disclaimer of liability," including API's disclaimer that it "shall not be liable for "any errors or omissions in the content of the online document."³⁹ Each of these terms purports to confer benefits to API, while forgoing public benefits.

These failures to ensure that incorporated materials are reasonably available to the public violate the recommendations of the Administrative Conference of the United States, in their *Recommendation 2011-5: Incorporation by Reference*. For example, ACUS recommends that material incorporated by reference should be "easily" accessible and "reasonably available" to the public in an electronic format.⁴⁰ Web links that generate error messages are not reasonably available, and unsearchable documents are not easily accessible.

These barriers to publicly accessible information hindered the ability for the public to participate meaningfully in the notice and comment process. As such, the proposal violates the standards of the Administrative Procedure Act, 5 U.S.C. § 553, which require a sufficiently detailed description of the terms or substance of the proposed rule and a meaningful opportunity for public comment.

Respectfully,

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³⁹ See API terms of service.

⁴⁰ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 2011-5, INCORPORATION BY REFERENCE (December 8, 2011), https://www.acus.gov/sites/default/files/Recommendation-2011-5-Incorporation-by-Reference_0.pdf.