



As Bankruptcy Bells Ring in the Outer Continental Shelf, BSEE May Toll for You

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Why Is This Happening?

In a perfect world, parties that own and operate offshore assets would be responsible to decommission them as the need arises. Increasingly, however, lessees and operators are finding themselves without the financial wherewithal to conduct the expensive decommissioning, and either declare bankruptcy or otherwise successfully abandon their interests in uneconomical wells and related infrastructure. BSEE then is left to find alternative funding, and looks to parties with less direct interests for decommissioning so taxpayers are not left footing the bill.

The Outer Continental Shelf Lands Act (OCSLA) gives BSEE broad authority to administer offshore oil and gas leasing and production.³ Pursuant to OCSLA, BSEE regulations impose decommissioning obligations on any party that:

- Drills a well.
- Installs a platform, pipeline or other facility.
- Creates an obstruction to other users of the outer continental shelf.
- Is or becomes a lessee or the owner of operating rights of a lease on which there is a well that has not been permanently plugged[,] a platform, a lease term pipeline, or other facility or an obstruction.
- Is or becomes the holder of a pipeline right-of-way on which there is a pipeline, platform, other facility or an obstruction.
- Re-enters a well that was previously plugged.⁴

OK, But Why Is This Happening More?

In the most recent years for which data is available, BSEE has overseen the removal of, on average, more than 200 structures per year from the Gulf of Mexico alone.⁵ BSEE estimates that approximately 3,000 active platforms exist under its jurisdiction, 40 percent of which are over 25 years old and in line to be removed in the near future.⁶ As oil and gas production declines, the number of oil and gas infrastructure removals continues to rise.

Compounding the shear increase in numbers, oil and gas companies are declaring bankruptcy at rising rates with no apparent end in sight.⁷ Twenty-six North American exploration and production companies have filed for bankruptcy in 2019 to date, following two consecutive years of more than 20 bankruptcies.⁸ BSEE, meanwhile, responds to these bankruptcies by exerting its authority under OCSLA to hold non-bankrupt predecessor parties responsible for decommissioning costs, including those who operated the facilities but also those who merely held leasehold or right-of-way interests.⁹ Because the decommissioning regulations impose joint and several liability, all parties who accrue decommissioning obligations can be forced to pay these costs, regardless of the remoteness of their link to a given structure.¹⁰

So What Do I Do After (or Better Yet Before) BSEE Comes Knocking?

Although the current administration's general deregulatory stance may suggest otherwise, BSEE has given no indication that it intends to curtail its recent trend of enforcement.¹¹ If anything, it may expand its authority to new parties and maybe even new places, like the Pacific Ocean.¹² As such, any party with offshore interests in those areas should begin planning now for how to both prepare for and respond to a future Order to Decommission.

First, parties with offshore interests likely to face Orders to Decommission should assess their available legal defenses, including those based on statutes of limitations, divisibility and BSEE policy setting forth the appropriate order and priority of payees. Then, if and when an Order comes in, the party should determine the costs and benefits of an appeal. Time is of the essence in negotiating with BSEE during the highly regulated administrative appeal process. And, given the difficulty in defending these suits because of advantages the law gives to BSEE, the party should assess the availability of alternative funding sources. This may mean asserting claims for decommissioning costs in bankruptcy proceedings involving parties who hold or previously held interests in the relevant assets.

In a world with dwindling oil and gas prices and rising numbers of bankruptcies, it is critical that parties with offshore interests take commonsense steps now to protect their interests and minimize their future exposure before—and after—BSEE comes knocking.

¹ Akin Gump, *Check Your Mail: BSEE Inviting All of Its Friends to Pay for GOM Decommissioning*, Akin Gump Speaking Energy Blog (May 15, 2014), <https://www.akingump.com/en/experience/industries/energy/speaking-energy/check-your-mail-bsee-inviting-all-of-its-friends-to-pay-for-gom.html>.

² *Id.*

³ 43 U.S.C. § 1334(a).

⁴ 30 C.F.R. § 250.1702.

⁵ Bur. of Safety and Envtl. Enforcement, U.S. Dept. of the Interior, *Statistics for Decommissioned Platforms on the OCS* (Sept. 19, 2017), <https://www.bsee.gov/what-we-do/environmental-focuses/decommissioning/decommissioning-statistics>.

⁶ Bur. of Safety and Envtl. Enforcement, U.S. Dept. of the Interior, *Decommissioning*, <https://www.bsee.gov/what-we-do/research/tap-categories/decommissioning>.

⁷ Jamison Cocklin, *E&P Bankruptcies on the Rise as Operators Again Confront Low Oil, NatGas Prices*, Natural Gas Intelligence (Aug. 15, 2019), <https://www.naturalgasintel.com/articles/119296-ep-bankruptcies-on-the-rise-as-operators-again-confront-low-oil-natgas-prices>.

⁸ *Id.*

⁹ 30 C.F.R. § 250.1701.

¹⁰ *Id.*

¹¹ Oil and Gas and Sulfur Operations in the Outer Continental Shelf-Request for Information Regarding Potential Impacts of Decommissioning-in-Place of Pipeline-Related Infrastructure in

Deepwater, 83 Fed. Reg. 67343 (Dec. 28, 2018).

¹² Memorandum regarding The Bureau of Safety and Environmental Enforcement's Decommissioning Program Assignment No. 2016-EAU-062, Office of Inspector General, U.S. Dept. of the Interior (March 26, 2019), https://www.doioig.gov/sites/doioig.gov/files/CloseoutMemo_BSEEDecommissioning_040119.pdf.

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