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By Electronic Submission to www.regulations.gov

DOI, BSEE:
Attention: Regulations and Standards Branch,
381 Elden Street, HE3314,
Herndon, Virginia 20170–4817

Docket ID No. BSEE–2013–0011

Re: Comments on DOI's Draft Regulations on Oil and Gas and Sulphur Operations on the Outer Continental Shelf—Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf

Harvard Law School's Emmett Environmental Law and Policy Clinic[1] (the "Clinic") welcomes the opportunity to comment on the Department of the Interior's ("DOI") proposed rule for exploratory drilling on the Arctic Outer Continental Shelf ("OCS"). Given the unique challenges posed by oil and gas exploration in the Arctic OCS, as demonstrated by Shell's troubled 2012 exploratory-drilling program in the Beaufort and Chukchi Seas, it is clear that

[1] About the Commenters: The Emmett Environmental Law and Policy Clinic works on a variety of local, national, and international projects covering the spectrum of environmental law and policy issues under the direction of Professor Wendy B. Jacobs. The Emmett Clinic has published several white papers and submitted comments to the Department of the Interior on various aspects of the regulation of offshore drilling generally and drilling in the Arctic in particular. It is the Emmett Clinic's position that rules of general applicability may not be adequately protective of the unique and sensitive Arctic marine environment. The Clinic's publications on these issues include the following: *Offshore Drilling Impacts: Strategies for Improving and Coordinating Access to Information* (Dec. 2014) (attached as Exhibit A); *Suggested Indicators of Environmentally Responsible Performance of Offshore Oil and Gas Companies Proposing to Drill in the U.S. Arctic* (Dec. 2013), *available at* http://hlsenvironmentallaw.files.wordpress.com/2014/09/indicators-paper-final_1-6-14.pdf; and *Recommendations for Improved Oversight of Offshore Drilling Based on a Review of 40 Regulatory Regimes* (June 2012), *available at* http://blogs.law.harvard.edu/environmentallawprogram/files/2013/10/Offshore-Drilling-White-Paper-FINAL_revised-10-2-13.pdf.

Arctic offshore drilling requires tailored standards.[2] We therefore support DOI's proposal to impose more stringent standards for exploratory drilling in the Arctic OCS. In particular, the Clinic agrees that it is of critical importance to require (a) that operators have prompt access to, and immediately deploy, source control and containment equipment ("SCCE"); (b) that this equipment be capable of functioning in Arctic OCS conditions; and (c) that operators maintain a relief rig in-theater. Given the extreme and unpredictable nature of the Arctic climate, these requirements are necessary to contain potential oil spills and prevent any such spills from causing catastrophic impacts.[3]

We also believe, however, that the proposed regulations can be improved in two main respects. First, a purely performance-based relief rig standard is inadequate. For low-probability, high-consequence events such as a loss of well control, it is impossible for an operator to demonstrate its ability to meet such a standard in practice before a spill occurs. The regulations should therefore mandate that a relief rig always be available within a minimum distance from the drill site, while still including a performance-based standard as a backstop. In addition, the performance-based standard should incorporate an additional time buffer to account for the uncertainties involved in responding to a spill in Arctic conditions.

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[2] U.S. DEP'T OF THE INTERIOR, REVIEW OF SHELL'S 2012 ALASKA OFFSHORE OIL AND GAS EXPLORATION PROGRAM 6–7 (2013).

[3] A reminder of the consequences of oil spills for marine environments was provided just last week, when a pipeline ruptured on the coast of California, leaking as much as 105,000 gallons of oil into the surrounding ecosystem, including 21,000 gallons into the ocean. Adam Nagourney, Richard Pérez-Peña & Clifford Krauss, *Oil Again Fouling California Coast Near Site of Historic Spill*, N.Y. TIMES, May 21, 2015, *available at* http://www.nytimes.com/2015/05/22/us/workers-race-to-clean-up-oil-spill-on-california-coast.html. Initial evaluations estimated that approximately 10 square miles of ocean were covered with an oil slick and that marine life was being seriously harmed by the oil spill, as increasing numbers of dead animals were being discovered. Brian Melley, *Choppy Slick Is Harder To Clean up; More Oily Animals Found*, ASSOCIATED PRESS, May 23, 2015, *available at* http://bigstory.ap.org/article/5d6213f79fd642648e14040a7292623b/finding-california-oil-spills-cause-could-take-months.

Second, the regulations should provide greater public access to information and opportunities for public engagement in the regulatory program. Public review of, and public access to information about, offshore drilling operations is crucially important. As the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling ("National Commission") highlighted in its report on the 2010 Deepwater Horizon oil spill, failures in the environmental review process played a significant role in leading to the disaster.[4] The National Commission therefore recommended the development of "procedures to facilitate review and input from the scientific community—for example, by encouraging disclosure of underlying methodologies and data."[5] Thus, we identify three specific areas where transparency and public involvement should be improved:

(1) The proposed rules should be revised to clarify that the existing regulations require BSEE and BOEM to apply a presumption of public access to documents submitted by regulated entities except as specifically provided otherwise.

(2) The proposed rules should be revised to provide an opportunity for public comment on oil spill response plans ("OSRPs").

(3) The proposed rules should be revised to ensure public access to American Petroleum Institute ("API") and International Organization for Standardization ("ISO") standards that could be incorporated into the regulations.

I. The SCCE Requirement is Critically Important.

Proposed section 250.471 requires operators to have access to a capping stack, a cap and flow system, and a containment dome as forms of SCCE. In addition, the proposed rule requires that the SCCE be suitable for Arctic OCS conditions. We strongly support these requirements. It is necessary that operators have prompt access to SCCE for Arctic OCS drilling because it will

[4] NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING: REPORT TO THE PRESIDENT 260 (2011) [hereinafter NAT'L COMM'N REPORT TO THE PRESIDENT] (concluding that "the breakdown of the environmental review process for OCS activities was systemic").

[5] *Id.* at 268.

limit the need for other forms of oil spill response, which have limited demonstrated effectiveness in Arctic conditions.

Without SCCE, operators would be forced to rely to a greater extent on response tactics such as chemical dispersants, in-situ burning, and mechanical recovery to clean up a spill. However, for each of these tactics, there are significant "response gaps"—periods in which "a particular response tactic could be expected to be ineffective or impossible to deploy based on historic environmental conditions."[6] In a study funded by BSEE, it was found that dispersants, in-situ burning, and mechanical recovery were viable options only 82%, 66%, and 57% of the time, respectively, even during the summer months.[7] During the winter months, the only viable option would be in-situ burning.[8]

Regarding chemical dispersants in particular: even if they could be deployed, there is no guarantee that they would be effective. As we indicated last winter in our comments on the Draft Second Supplemental Environmental Impact Statement for Lease Sale 193, the use of dispersants to respond to an oil spill in the Arctic OCS is not safe or environmentally appropriate for at least three reasons.[9]

First, there are significant gaps in the literature and doubts within the scientific community regarding dispersant effectiveness, especially in the Arctic and other cold-water environments. Despite an increase in research on dispersants since the Deepwater Horizon oil

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[6] NUKA RES. & PLANNING GRP., ESTIMATING AN OIL SPILL RESPONSE GAP FOR THE U.S. ARCTIC OCEAN ii (Sept. 10, 2014), *available at* http://www.nukaresearch.com/files/140910_Arctic_RGA_Report_FNL.pdf.

[7] *Id.* at iii.

[8] *Id.*

[9] *See* Comments on BOEM's Draft Second Supplemental Environmental Impact Statement for the Chukchi Sea Planning Area, OCS Oil and Gas Lease Sale 193, Docket No. BOEM-2014-0078-0001 (Dec. 2014) (attached as Exhibit B).

spill, in response to which dispersants were used in unprecedented quantities, the effectiveness of dispersants on real oil spills at sea is still poorly understood.[10] Further, many of the studies that have been conducted contain systematic errors, including ignoring the evaporation of volatile compounds, the use of poor analytical methods, and incomplete recovery of floating oils, all of which "introduce a positive bias in the estimates of dispersant effectiveness."[11] With regard to Arctic conditions in particular, the Government Accountability Office ("GAO") has noted that "dispersants are currently designed for temperate or tropical climates, and there is reason to believe that these formulations will be less effective in the Arctic because of environmental conditions such as cooler temperatures and the presence of ice."[12] For instance, the presence of ice diminishes the frequency and magnitude of waves, which could lead to a lower mixing energy and make dispersants less effective.[13]

Second, even if dispersants could break up an oil spill in Arctic waters, it remains an open question whether the dispersed oil would be effectively biodegraded.[14] Dispersants can reduce the impacts of oil spills if the dispersion accelerates the biodegradation of the oil by marine microorganisms;[15] otherwise, the dispersant is just moving oil from one part of the

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[10] *See* Merv Fingas, *A Review of Literature Related to Oil Spill Dispersants 2011-2014* 4 (2014) (noting that laboratory tests "may not be representative of actual conditions" and that field tests "at this time [are] best viewed as [] estimate[s]").

[11] Merv Fingas, *Oil Spill Dispersants: A Technical Summary*, *in* Oil Spill Science and Technology 435, 454 (Merv Fingas ed., 2011); *see also* NAT'L RES. COUNCIL, OIL SPILL DISPERSANTS: EFFICACY AND EFFECTS 78 (2005).

[12] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-585, OIL DISPERSANTS: ADDITIONAL RESEARCH NEEDED, PARTICULARLY ON SUBSURFACE AND ARCTIC APPLICATIONS 24 (2012).

[13] *Id.*

[14] *See* Kelly M. McFarlin et al., *Biodegradation of Dispersed Oil in Arctic Seawater at -1° C*, 9 PLOS ONE e84927, at 1 (2014) (Biodegradation "has not been thoroughly studied in the Arctic, and questions remain as to whether biodegradation is a significant process in cold conditions." (citation omitted)).

[15] *See id.* ("Biodegradation is generally believed to be the dominant process that removes petroleum compounds from the environment. . . . [Dispersants] increase[] the surface area available for microbial colonization and can significantly increase biodegradation." (citations omitted)).

ecosystem to another. Two recent studies from the same research team shed light on the potential rate of biodegradation in the Chukchi Sea compared to warmer waters.[16] The first study examined the biodegradation of Alaska North Slope crude oil in water collected from the Chukchi Sea maintained at 1°C while the second involved a similar experiment using New Jersey seawater kept at 8°C. While the dispersants used in New Jersey seawater exhibited an 82% biodegradation of the hydrocarbons after 41 days,[17] those in the Chukchi Sea seawater only showed a 61% biodegradation after 63 days.[18] Further, even these numbers may be misleadingly optimistic. The Chukchi Sea biodegradation followed a logarithmic curve—54% biodegraded after the first 28 days, and only 7% biodegraded over the next 35 days[19]—suggesting that the time necessary for complete biodegradation would be extremely lengthy. In addition, the methods used in the Chukchi Sea study "indicate[] only the initiation of the biodegradation process—commonly known as primary biodegradation—not their ultimate biological oxidation to water and CO_2."[20] Finally, these studies only look at the biodegradation of hydrocarbons, and do not address other compounds present in crude oil such as resins and asphaltenes.[21]

Third, there is a significant and growing body of evidence that the use of chemical dispersants is harmful to wildlife, and consequently, the indigenous communities who depend on that wildlife for subsistence and other purposes. Dispersants contain multiple compounds that

[16] *See id.*; Roger C. Prince, et al., *The Primary Biodegradation of Dispersed Crude Oil in the Sea*, 90 CHEMOSPHERE 521 (2013).

[17] Prince et al., *supra* note 16, at 523.

[18] McFarlin et al., *supra* note 14, at 3.

[19] *Id.*

[20] *Id.*

[21] Prince et al., *supra* note 16, at 524; *see also* McFarlin et al., supra note 14, at 5.

are known to be toxic,[22] and have been shown in toxicity studies to be harmful to marine life.[23] Further, dispersants increase the number of oil droplets in the water and thus the bioavailability of toxic compounds found in petroleum to marine organisms.[24] While there is a significant gap in research on the effects of dispersants on Arctic species,[25] a recent study has shown that dispersed oil is acutely toxic to three representative Arctic species: the copepod *Calanus glacialis*, Arctic cod, and larval sculpin.[26] Finally, little is known about the long-term effects of dispersant exposure, because virtually all toxicity studies analyze only acute effects.[27]

In summary, since oil spill response methods are either only sporadically available or not proven to be reliable in Arctic conditions, emphasizing and requiring source control and containment is absolutely critical.

II. It is Essential that Operators Maintain a Relief Rig In-Theater; the Performance-Based Standard Should Be Supplemented by Prescriptive Geographic Limitations.

The Clinic supports the requirement that operators maintain relief rigs in-theater because it takes into account the unique conditions of the Arctic and the necessity of quickly managing any potential oil spills in order to avoid disaster. Further, this requirement adds needed protection against the possibility of a spill not being contained before the encroachment of sea

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[22] Toxipedia Consulting Services & Earthjustice, *The Chaos of Clean-Up: Analysis of Potential Health and Environmental Impacts of Chemicals in Dispersant Products* 11 (2011) (listing compounds found in Corexit 9500 and 9527 as confirmed animal carcinogens and known toxins).

[23] NAT'L RESEARCH COUNCIL, AN ECOSYSTEM SERVICES APPROACH TO ASSESSING THE IMPACTS OF THE DEEPWATER HORIZON OIL SPILL IN THE GULF OF MEXICO 82 (2013) ("There is some evidence that chemically dispersed oil and some dispersant compounds are toxic to some marine life, especially those in early life stages.").

[24] Fingas, *supra* note 10, at 10.

[25] William W. Gardiner, et al., *The Acute Toxicity of Chemically and Physically Dispersed Crude Oil to Key Arctic Species Under Arctic Conditions During the Open Water Season*, 32 ENVTL. TOXICOLOGY & CHEM. 2284, 2284 (2013).

[26] *Id.* at 2297–98.

[27] Fingas, *supra* note 10, at 15.

ice, which would result in the spill continuing unabated over the long winter season in the Arctic.[28] However, we believe that the performance-based approach in the proposed regulations would not sufficiently meet these objectives and that BSEE should add a layer of prescriptive standards.

A. A Prescriptive Standard for Relief Well Operations Is Needed Because the Regulated Activity Involves Low-Probability, High-Consequence Events.

Proposed section 250.472(b) requires operators to have a second drill rig in-theater to satisfy a performance-based requirement that a relief well could be completed within 45 days of a loss of well control. While the use of performance-based standards has the benefit of allowing industry the opportunity to innovate and meet the standard in the most cost-effective manner, such standards also lack the predictability and consistency afforded by prescriptive standards.[29] As a result, performance-based standards are not appropriate for regulating low-probability, high-consequence events like oil spills because "performance cannot be directly measured for rare and catastrophic events" as it can be for repeated, continuous harms like air pollution.[30] Instead, performance for such events "must be predicted, making implementation more difficult."[31] Thus, as recently noted by a senior official at the Department of Transportation in the context of the shipment of crude oil by rail, for performance-based rules to be effective,

[28] We also note that there is precedent for imposing such a requirement for drilling in Arctic conditions. Specifically, Greenland mandates a "dual drilling rig vessel presence policy." Greenland Bureau of Minerals and Petroleum, *Exploration Drilling Guidelines* 6 (2011), *available at* http://www.govmin.gl/images/stories/petroleum/110502_Drilling_Guidelines.pdf.

[29] Peter J. May, *Performance-Based Regulation and Regulatory Regimes* 5 (Nov. 2003) (citing NEIL GUNNINGHAM & RICHARD JOHNSTONE, REGULATING WORKPLACE SAFETY, SYSTEMS AND SANCTIONS (1999)), *available at* http://www.ircc.info/pdf/1-03.pdf.

[30] Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 712 (2003).

[31] *Id.*

"there needs to be performance data, analysis of the data, and a commitment by regulated entities to be transparent in their performance data."[32]

In the present context, these requirements for creating effective performance-based standards will almost certainly not be met. For rare events like oil spills, it would be impossible to gather enough actual performance data to get an accurate picture of the capabilities of any regulated entity. Indeed, the proposed regulations do not provide BSEE with any meaningful way to verify *ex ante* that operators will be able to meet their stated relief well capabilities—only *ex post* liability for failing to meet the 45-day standard. Since the value in regulating catastrophic events is preventative, *ex post* liability is simply not enough, particularly in the Arctic OCS, given its unique and valuable marine ecosystem.

Reliance on performance-based standards without any *ex ante* way of ensuring performance is especially problematic when operators are not submitting accurate projections. As DOI concluded regarding Shell's 2012 Arctic offshore drilling program, "Shell consistently underestimated the length of time required to complete each step of its drilling operations."[33] This problem is exacerbated by the proposed regulations, which incentivize operators to underestimate the amount of time they need to complete relief well operations. Section 550.220(c)(6) requires an operator's projected end-of-season date to be consistent with its relief well capabilities, meaning that the length of an operator's drilling season depends on how quickly it says it can complete relief well operations. Given that provision—and the fact that BSEE will not be able to confirm that stated relief operation timelines are achievable in

[32] Rachel Leven, *Performance-Based Rules May Have Future in Crude-by-Rail Efforts: DOT*, DAILY ENV'T REP. (Mar. 25, 2015) (paraphrasing a statement by Peter Rogoff, Undersecretary for Policy at the Department of Transportation).

[33] U.S. DEP'T OF THE INTERIOR, *supra* note 2, at 23 ("The timelines provided by Shell proved to be unrealistic and did not provide for complications and delays that should be budgeted for when operating in the Arctic").

practice—operators may overstate their relief well capabilities in order to maximize the length of their drilling season.

To avoid these problems and the resulting potential devastation of the Arctic OCS, BSEE should adopt a geographic prescriptive standard, as mentioned in the preamble to the proposal,[34] and require operators to maintain a relief rig within a certain distance of their drilling operation. The current performance-based standards should still be maintained as a backstop in order to impose liability on any operator that fails to drill a relief well in a timely manner even while compliant with the prescriptive standards.

B. The Performance-Based Standard Should Incorporate a Time Buffer Between the Operator's Relief Well Capabilities and the End-of-Season Date.

Due to the previously described problems in ensuring operators are able to meet their stated projections, BSEE should require operators to include a buffer period, preferably of at least 10 days, in projecting end-of-season dates.[35] For instance, if an operator has demonstrated that it can complete relief well operations within 38 days, it should be required to end its drilling season 48 days before the encroachment of sea ice. Currently, the proposed regulations suggest that no buffer period would be required.[36]

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[34] 80 Fed. Reg. at 9940.

[35] Given that conditions in the Arctic OCS can suddenly and dramatically deteriorate, and that such poor conditions can then last for a significant amount of time, it is not clear that even a 10-day buffer period is adequate. For example, during its ill-fated 2012 drilling season, Shell had to suspend drilling at its Burger A drilling site in the Chukchi Sea for two weeks to allow a large ice floe to pass the site. U.S. DEP'T OF THE INTERIOR, *supra* note 2, at 22-23. In light of the difficulty of establishing any appropriate time frame for drilling during the brief open-water season, the Clinic has serious reservations about allowing drilling in the Arctic OCS at all. Notably, Total SA, an oil supermajor, has spoken out against oil drilling in the Arctic region. "Christophe de Margerie, Total's chief executive, told the Financial Times the risk of an oil spill in such an environmentally sensitive area was simply too high." Guy Chazan, *Total Warns Against Oil Drilling in Arctic*, FINANCIAL TIMES, Sept. 25, 2012, *available at* http://www.ft.com/intl/cms/s/0/350be724-070a-11e2-92ef-00144feabdc0.html.

[36] The preamble to the proposed rule states multiple times that 45 days is the maximum period of time the proposed end-of-season date would be before the theoretical date. 80 Fed. Reg. at 9940 ("The actual length of th[e] [drilling season] limitation would depend on the operator's plans for staging and deploying

Not requiring a buffer period ignores the reality that relief well operations are complex and can take much longer than expected—a key takeaway from the Deepwater Horizon disaster. After the loss of well control on April 20, 2010, it took BP 87 days to stop the spill, during which time 4.9 million barrels of oil poured into the Gulf of Mexico, and 153 days for the well to officially be pronounced dead.[37] Although regulations have tightened and operations have improved since Deepwater Horizon, the fact that unexpected impediments can—and will—occur in offshore drilling operations has not changed.

The uncertainty will only be exacerbated in the extreme climate of the Arctic, as demonstrated by Shell's experiences in 2012. Two incidents in particular "highlight[] the inherently unpredictable nature of working in the Arctic."[38] First, on September 9, 2012, Shell was forced to suspend drilling at the Burger A drill site in the Chukchi Sea for two weeks in order to allow an ice floe to pass the site.[39] Second, in December of 2012, one of Shell's drilling rigs, the Kulluk, ran aground in stormy seas in the Gulf of Alaska.[40] In both of these cases, major setbacks occurred despite the fact that Shell was not facing the full brunt of Arctic OCS conditions: the former occurred during the summer drilling season, and the latter occurred several hundred miles south of the Chukchi and Beaufort Seas. In the event of a well failure near the end of the drilling season, there would only be greater difficulties in relief well operations.

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a relief rig and could extend up to 45 days before the [theoretical] end of the drilling season (e.g., the projected return of sea ice)."); *id.* at 9949 ("[T]he proposed rule would impose a maximum period of 45-days for a relief rig to deploy and complete a relief well, and, thus, a maximum of 45-days during which work below the surface casing would not occur.").

[37] Henry Fountain, *U.S. Says BP Well Is Finally "Dead"*, N.Y. TIMES (Sept. 19, 2010), *available at* http://www.nytimes.com/2010/09/20/us/20well.html.

[38] U.S. DEP'T OF THE INTERIOR, *supra* note 2, at 23.

[39] *Id.* at 22–23.

[40] *Id.* at 29.

Further, there would be devastating consequences if a spill that begins near the end of the season were not contained in a timely manner. For instance, if loss of well control happened on September 16th, and relief well operations were not completed before November 1st, then the spill could continue all through the long winter season. Relief well operations would likely not be able to be completed until a month after the beginning of the next open water season, or around mid-August. A spill lasting for eleven months, from mid-September to mid-August, would be catastrophic.[41]

Thus, it is imperative that an adequate time buffer is built into the proposed end-of-season dates to allow for unforeseen circumstances. Mandating a 10-day buffer period would help mitigate the risk of relief well operations not being completed before the encroachment of winter sea ice, and avoid the disastrous consequences of a spill continuing until the following open water season.

III. BSEE and BOEM Should Take Steps To Improve and Expand Public Access to Information.

The proposed regulations impose several new information-submission mandates on operators, including: real-time well monitoring, weather forecasting, detailed descriptions of source control and containment equipment ("SCCE") capabilities, the newly created integrated operation plans ("IOPs"), and Arctic-specific requirements for exploration plans ("EPs") and oil-spill response plans ("OSRPs"). We commend DOI for including these requirements. However, under BSEE and BOEM's current information-disclosure regimes, public access to this information could be hampered by interpretive and logistical roadblocks, thus limiting the

[41] In contrast, as previously noted, the Deepwater Horizon spill lasted only 87 days, or one quarter of the time of this hypothetical spill. Fountain, *supra* note 37, and accompanying text.

effectiveness of the new regulations. Such roadblocks are not hypothetical, as illustrated by the Clinic's experience described below.

A. BSEE's Information-Disclosure Regime in 30 C.F.R. § 250.197 as Applied to Arctic OCS Drilling Should Be Amended To Include a Presumption in Favor of Public Disclosure.

The catchall provision governing public access to information reported to BSEE, 30 C.F.R. § 250.197, does not include a presumption of public access to information or definitively give the public access to information BSEE uses to assess threats to safety and the environment.[42] Section 250.197 contains three parts:

> Paragraphs (a) and (b) . . . describe what data and information will be made available to the public without the consent of the lessee, under what circumstances, and in what time period. Paragraph (c) . . . describes what data and information will be made available for limited inspection without the consent of the lessee, and under what circumstances.[43]

Paragraph (a) provides that information submitted on BSEE forms will be available to the public upon submission, and lists several exceptions for categories of information that are withheld for specified periods of time. Paragraph (b) addresses public access to lease and permit data and information that is submitted to BSEE in a format other than on a BSEE form. Such information is accessible according to a table identifying nine scenarios, each of which stipulates specific categories of information BSEE may release and the amount of time BSEE may delay access to the information. With respect to the scope of information at issue, in all but two of the scenarios the enumerated information that BSEE will release is limited to geophysical and geological data or information. Finally, paragraph (c) provides limited public access to "G&G data and information" that BSEE uses to "[p]romote operational safety" or "[p]rotect the environment."

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[42] For further elaboration, see EMMETT ENVTL. LAW & POLICY CLINIC, OFFSHORE DRILLING: COORDINATING AND IMPROVING ACCESS TO INFORMATION 6–8 (2014) (attached as exhibit A).

[43] 30 C.F.R. § 250.197. BOEM has an equivalent regulation, 30 C.F.R. § 550.197, and our recommendations apply equally to it as well.

Taken altogether, section 250.197 does not explicitly address non-geophysical and geological data that are reported outside of a BSEE form, such as the information in Safety and Environmental Management Systems ("SEMS") audit reports and resulting Corrective Action Plans ("CAPs"). These documents must, however, be presumed to be publicly available, subject to any FOIA exemptions. A blanket withholding of such documents that is not tied to a specific FOIA exemption would be a violation of the statute.[44] Any limitation BSEE places on public access to information should be tied to specific FOIA exemptions, such as the exemption for geological and physical information and data[45] or the protection of trademarks and confidential business information.[46]

Even when information is described as available to the public under section 250.197, the actual disclosure of some information related to safety and environmental issues is contingent on determinations by BSEE as to whether public access is "necessary." For instance, under subparagraph (b)(2), "[d]ata or information [that] is collected with high resolution systems . . . to comply with safety or environmental protection requirements" will be disclosed only "if the Regional Supervisor deems it necessary." However, the regulations never define or establish any criteria to determine what is "necessary." Another example can be found in paragraph (c), which limits inspection of "G&G data and information" used by BSEE to "[p]romote operational safety" or "[p]rotect the environment" to "persons with a direct interest." Again, the regulation lacks a clear definition of what constitutes "G&G data and information" and who are considered

[44] *See, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7–8 (2001) ("Upon request, FOIA mandates disclosure of records held by a federal agency . . . unless the documents fall within enumerated exemptions . . . . '[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act,' . . . '[c]onsistent with the Act's goal of broad disclosure, these exemptions have consistently been given narrow compass.'") (internal citations omitted).

[45] 5 U.S.C. § 552(b)(9).

[46] *Id.* § 552(b)(4).

"persons with a direct interest." Without a stated presumption in favor of disclosure, these unclearly defined provisions can be misinterpreted, thus restricting and delaying public access to non-protected safety and environmental information.

The result of all of these problems is that a member of the public who requests information from BSEE can face significant delays and inconsistent responses. As described in our paper *Offshore Drilling: Coordinating and Improving Access to Information*, the Clinic communicated with nine different points of contact at BSEE and BOEM over a six-week period in the fall of 2013 regarding an informal request for copies of hydrogen sulfide contingency plans; at the end of that period, BSEE informed the Clinic that the plans were not "releasable" under FOIA.[47] Subsequent formal FOIA requests to BSEE's three regional offices resulted in the disclosure of several documents, but inconsistent responses, the last of which did not occur until four months after the request was made.[48]

BSEE should therefore amend section 250.197 to include an explicit default presumption in favor of disclosure.[49] This change would align the text of the regulation to established objectives and standards. A 2009 Presidential Memorandum directed that "[a]ll agencies should adopt a presumption in favor of disclosure."[50] Similarly, BSEE has stated that its objectives, as articulated in an agency manual, include "[a]dminister[ing] the FOIA with a clear presumption in

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[47] EMMETT ENVTL. LAW & POLICY CLINIC, *supra* note 42, at 10-11.

[48] *Id.*

[49] Alternatively, these information-disclosure problems may be addressed through two methods that do not require amendment of the regulations. First, BSEE can issue guidance that confirms that section 250.197 contains a presumption in favor of disclosure. Secondly, BSEE can amend the forms to contain a line item asking operators to attach, or reference, any information related to safety or environmental protection submitted in the relevant reporting period. This change would put all safety and environmental protection information under paragraph (a), which contains a presumption in favor of disclosure, rather than the nebulous paragraph (b).

[50] Memorandum from President Barack Obama to the Heads of the Exec. Dep'ts & Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009).

favor of disclosure" and making "information available to the public even before a request is made."[51]

Given the great risks and uncertainties inherent in exploratory drilling in the Arctic OCS, BSEE should take this opportunity to amend the information-disclosure regime as to those activities. In addition, when BSEE next amends its general offshore drilling regulations, it should also consider amending section 250.197 as it applies to all offshore drilling.

B. DOI Should Take Steps To Ensure that IOPs, EPs, and OSRPs Will Be Immediately Available for Public Access.

The preamble to the proposed rule explains that part of the reasoning behind the new IOP requirement is that it gives the public an early opportunity to examine an operator's proposed exploratory drilling program to make up for the relatively short amount of time available for public review of EPs.[52] Thus, it is critical that the public receives timely access to IOPs and EPs and that BOEM take tangible steps to achieve this goal. For example, while the proposed rule notes that BOEM plans to post IOPs to its website, this process could be streamlined by amending section 550.206(b) to require electronic submission of IOPs and EPs instead of merely allowing it.[53] This requirement would allow BOEM to immediately upload public-information

[51] Dep't of Interior, *Bureau of Safety and Environmental Enforcement Manual*, Version No. 002, Administrative Series, Part 383, Chapter 15 (Feb. 27, 2015), *available at* http://www.bsee.gov/WorkArea/DownloadAsset.aspx?id=36507222308.

[52] 80 Fed. Reg. at 9927 ("[IOP requirement] responds to stakeholder concerns that BOEM does not provide the public with sufficient time to participate meaningfully in BOEM's administrative process for proposed exploratory drilling activities on the Arctic OCS.").

[53] This suggestion includes both public-information and proprietary copies. Electronic submission of the latter would have benefits for information sharing within the interagency coordination efforts that are crucial to the success of the regulatory process. *See* DEP'T OF INTERIOR, *supra* note 2, at 5–6 ("The Federal government . . . engaged in a robust and unprecedented level of interagency coordination, information sharing and cooperation related to the regulatory approval process and oversight of Shell's 2012 program. This process . . . led to the more efficient and effective reviews of permits and approvals, stronger oversight of Shell's operations, better communications with local communities, greater awareness by Federal agencies of activities potentially impacting their areas of responsibility, and more efficient use of limited Federal resources.").

copies of EPs and IOPs without the intermediate step of itself reformatting the operator's submissions. In addition, BSEE could also take a similar step by amending section 254.7 to require electronic submission of OSRPs.

IV. BSEE Should Require Public Comment on OSRPs for Arctic Drilling.

The proposed regulations impose several significant Arctic-specific requirements for OSRPs, including, but not limited to: incorporating the SCCE required by the proposed section 250.471 into oil-spill response planning, addressing the influence of adverse weather conditions on responders' health and safety during spill response activities, updating the oil-spill response plan between each drilling season, and including descriptions of ice intervention practices. However, the regulations currently do not mandate that OSRPs be available for public comment.[54]

Thus, we recommend that BSEE require a public comment period for OSRPs. There is precedent for this approach, as prior to Shell's 2012 exploratory-drilling program in the Arctic OCS, BSEE solicited public review on Shell's OSRP before issuing final approval.[55] Indeed, DOI's report on Shell's experiences in 2012 highlighted public engagement as a key aspect of the regulatory review process and recommended that it continue into the future.[56] Further, public review of OSRPs was explicitly recommended by the report of the National Commission on the BP Deepwater Horizon Oil Spill.[57]

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[54] Indeed, no opportunity for public comment was provided for Shell's most recent revised OSRP in 2014.

[55] U.S. DEP'T OF THE INTERIOR, *supra* note 2, at 14.

[56] *Id.* at 6 ("Public engagement by Federal agencies, including providing as much transparency and opportunity for public input as reasonably possible, is also important. This is an area of success from the 2012 experience that should be carried forward and improved upon in the future.").

[57] NAT'L COMM'N REPORT TO THE PRESIDENT, *supra* note 4, at 267 (OSRPs should "be made available for a public comment period prior to final approval . . . .").

Public review is necessary to ensure that OSRPs serve their purposes and meet the requirements set out in the Clean Water Act and the implementing regulations. As noted in the legislative history of the Oil Pollution Act, which, in reaction to the Exxon-Valdez oil spill, amended the Clean Water Act to require OSRPs, "a paper plan without benefit of serious independent review, without standards, and public review [does] not protect Alaska or Alaskans."[58] In the context of Arctic drilling, public participation may be invaluable: for instance, local groups can provide unique insight on the operational difficulties particular to the Arctic.

While these comments are limited to the proposed rules on Arctic OCS drilling, the benefits of public comment on OSRPs for offshore drilling are not unique to the present context. BSEE should also require public comment for all offshore drilling OSRP approvals when it next considers the nationwide OSRP regulations.

V. It is Premature to Incorporate Draft API Standards by Reference; If Either API or ISO Standards are Incorporated by Reference, They Should Be Made Publicly Available at No Cost.

BSEE proposes to incorporate by reference a private standard developed either by the American Petroleum Institute ("API") or the International Organization for Standardization ("ISO"). In particular, the proposed rule would incorporate by reference portions of API RP 2N, Third Edition, *Recommended Practice for Planning, Designing, and Constructing Structures and Pipelines for Arctic Conditions*. BSEE has also requested comment on whether it should incorporate by reference ISO 19906, *Petroleum and Natural Gas Industries Arctic Offshore Structures*, or ISO 19905-1, *Petroleum and natural gas industries—Site-specific assessment of mobile offshore unites—Part 1: Jack-ups*.

[58] 135 Cong. Rec. H8241-07 (Nov. 9, 1989) (statement of Mr. Sikorski).

The proposed incorporation by reference is problematic in two respects. First, the proposed rule does not adequately "[s]ummarize, in the preamble of the proposed rule, the material it proposes to incorporate by reference," as required by the federal regulations governing incorporation by reference.[59] Second, the materials proposed for incorporation by reference are not "reasonably available" to interested parties.[60]

A. The Proposed Rule Does not Provide Adequate Summaries of the Private Standards that DOI Is Considering Incorporating by Reference.

Under recently-revised regulations promulgated by the Office of the Federal Register ("OFR"), any federal agency, "when proposing a rule, . . . must: . . . [s]ummarize, in the preamble of the proposed rule, the material it proposes to incorporate by reference."[61] The preamble here does not provide an adequate summary of the API and ISO standards that might be incorporated by reference. Consider first API RP 2N, which BSEE is proposing for incorporation. The preamble provides the title of this document, *Recommended Practice for Planning, Designing, and Constructing Structures and Pipelines for Arctic Conditions*, and mentions that it "address[es] the unique Arctic OCS Conditions that affect the planning, design, and construction of systems used in Arctic and sub-Arctic environments" and that it "would be appropriate for certain aspects of drilling operations, such as accounting for the severe weather and thermal effects on structures, maintenance procedures, and safety."[62] At a later point, the preamble refers to "the derrick, plumbing, pipes, tubing, and pumps" that are covered by the standard and are subject to BSEE jurisdiction rather than Coast Guard jurisdiction.[63] Other than

[59] 1 C.F.R. § 51.5(a)(2).

[60] 5 U.S.C. § 552(a).

[61] 1 C.F.R. § 51.5(a)(2).

[62] 80 Fed. Reg. at 9932.

[63] *Id.* at 9938.

these cursory statements, the preamble says nothing about the substance or details of the API standards that BSEE proposes to adopt. Moreover, even these statements are scattered throughout the preamble. Such isolated, tangential references to the API standard do not constitute a "summary" of the standard and as such do not satisfy the regulatory mandate.[64]

BSEE's discussion of the ISO standards is even more inadequate. Beyond the titles of the documents, the preamble states only that these standards refer to "structural components for jack-up rigs" or the "structural requirements for the use of a jack-up rig in Arctic conditions."[65] These passing references do not even purport to be a complete or thorough summary of the standards and hence do not satisfy OFR's regulations.

B. The Proposal Does not Make the Materials to be Incorporated by Reference Reasonably Available to Interested Parties.

OFR's regulations also require that a federal agency must "[d]iscuss, in the preamble of the proposed rule, the ways that the materials it proposes to incorporate by reference are reasonably available to interested parties or how it worked to make those materials reasonably available to interested parties."[66] This regulation implements the statutory requirement that such materials must be made "reasonably available to the class of persons affected thereby."[67]

DOI has not met that standard here. Most fundamentally, a private standard cannot be reasonably available when it has not even been finalized at the time an agency proposes to incorporate it by reference. Here, API RP 2N, Third Edition, which BSEE proposes to adopt, was still in draft form when the proposal was published in the Federal Register in February 2015.

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[64] Ironically, the preamble includes significantly more detail about the aspects of the standards that it *does not* propose to incorporate by reference—identifying the sections that BSEE proposes to exclude and the topics covered by many of those sections. *Id.* at 9937.

[65] *Id.* at 9938.

[66] 1 C.F.R. § 51.5(a)(1).

[67] 5 U.S.C. § 552(a).

It was therefore impossible for interested persons to obtain the standard upon which BSEE proposed to rely, because that standard, in its final form, did not yet exist. DOI therefore should not incorporate by reference API RP 2N at this time.

In addition, DOI must do more to make any materials proposed for incorporation by reference available to the public during comment periods on its proposed rules. Notably, neither the ISO nor the API standards proposed for potential incorporation are at this time "reasonably available" to the public. To obtain copies of the ISO standards, one must either purchase them from ISO or travel to the Washington, DC, area, or one of four BSEE offices.[68] API RP 2N, Third Edition, has been unavailable for free online access for a significant portion of this comment period. Although the preamble describes the draft of API RP 2N as being available through the API balloting website, it is no longer available on that site, nor is it available on the site that DOI has identified as containing free versions of API's finalized standards. Instead, since the beginning of April, it has only been available to purchase for $199.[69] This limited availability imposes too great a burden on the interested public.

DOI should instead only consider standards for incorporation by reference if they are freely available to the public online. One option would be for DOI itself to post the text of the proposed standards on its website. In the preamble, BSEE states that "[w]hen a copyrighted industry standard is incorporated by reference into our regulations, BSEE is obligated to observe and protect that copyright."[70] It is doubtful, however, that once a private standard is adopted as a binding law or regulation by a governmental entity, it is copyrightable. As the *en banc* Fifth

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[68] *See* 80 Fed. Reg. at 9933 & n.6.

[69] *See* API, *API Recommended Practice 2N*, http://www.api.org/publications-standards-and-statistics/standards/whatsnew/publication-updates/new-exploration-and-production-publications/api_rp_2n (last visited May 27, 2015).

[70] *Id.* at 9933.

Circuit held in *Veeck v. Southern Building Code Congress International, Inc.*,[71] "'the law,' whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law."[72]

Even if DOI does not itself make the standards freely available, it should adopt standards only from organizations that do so themselves. One option would be for the organization to provide free, read-only, non-printable online access. API already takes this approach for all of its standards that are incorporated into federal regulations.[73] In addition, during OFR's recent rulemaking, several private standards organizations, including Underwriters Laboratories, ASTM International, and the National Fire Protection Association, indicated that they make their standards available in this manner.[74] DOI should require at a minimum this level of accessibility for all standards that it proposes for incorporation by reference, and it should require that the standards be available throughout the comment period on a proposed rule.

In sum, we urge DOI not to incorporate by reference a draft standard that has not been subject to public comment in its final form and to ensure in future rulemakings that it provides thorough summaries of standards proposed for incorporation in its notice of proposed rulemaking and that such standards are available for free public reading online.

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It is essential that the final rule include the SCCE and relief rig requirements included in the proposed rule. The latter should be revised to add a prescriptive geographic limitation on

[71] 293 F.3d 791 (5th Cir. 2002).

[72] *Id.* at 800.

[73] *Id.*

[74] *See* OFR-2013-0001-0025; OFR-2013-0001-0028, OFR-2013-0001-0035.

relief rig location. In addition, DOI should improve the public's access to information and ability to participate in regulatory decisions in the Arctic OCS as described above.

Thank you for your consideration of these comments. We welcome the opportunity to discuss this important matter with you at any time. Please direct follow up communications to Shaun Goho, 617-496-5692 (sgoho@law.harvard.edu), or Wendy Jacobs, 617-496-3368 (wjacobs@law.harvard.edu).

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