

August 6, 2018

Submitted via Regulations.gov
U.S. Department of the Interior
Bureau of Safety and Environmental Enforcement

RE: Proposed Rule: Oil and Gas and Sulfur Operations in the Outer Continental Shelf—Blowout Preventer Systems and Well Control Revisions (RIN 1014-AA39)

The Petroleum Equipment & Services Association (PESA) is pleased to offer comments in response to the Bureau of Safety and Environmental Enforcement's (BSEE's) Proposed Rule to revise existing regulations for well control and blowout preventer systems. PESA is the national trade association for the oilfield services sector, representing 200 companies that provide the services, technology, equipment and expertise necessary to safely and efficiently explore and produce oil and natural gas. PESA serves as the unified voice for the sector, advocating for and supporting the sector's achievements in job creation, technological innovation and economic stability.

PESA welcomes BSEE's proposal to revise the Blowout Preventer Systems and Well Control rule (Well Control Rule). A key objective of the rule is the well control safety of lessees, service providers, and safety contractors, including allocating responsibility for safety in offshore operations. PESA has joined with the American Petroleum Institute, the International Association of Drilling Contractors, the Independent Petroleum Association of America, the Offshore Operators Committee, the National Ocean Industries Association, and the U.S. Oil & Gas Association to offer technical comments on a number of operational provisions in the Well Control Rule. The proposed rule, however, does not correct BSEE's recent statements—first in an August 2012 Interim Policy Document (2012 IPD), and subsequently in rulemaking proceedings for the Well Control Rule¹ and other rules²—that the safety and environmental requirements of the Outer Continental Shelf Lands Act (OCSLA) are enforceable by BSEE directly against offshore contractors.³ Those statements and the perspective they reflect on the allocation of *legal* responsibility under OCSLA are inconsistent with the agency's statutory authority, its long-standing policy position, and recent judicial decisions specifically addressing the question in both civil and criminal proceedings. PESA respectfully requests that BSEE clarify its position to reflect that OCSLA is not enforceable by BSEE against offshore contractors.

Under OCSLA, liability for offshore safety and environmental provisions is limited to lessees and permittees:

It shall be the duty of any holder of a lease or permit under this subchapter to (1) maintain all places of employment within the lease area or within the area covered by such permit in compliance with occupational safety and health standards and, in addition, free from recognized hazards to employees of the lease holder or permit holder or of any contractor or subcontractor operating within such lease area or within the area covered by such permit on the outer Continental Shelf; (2) maintain all operations within such lease area or within the area covered by such permit in compliance with regulations intended to protect persons, property, and the environment on the outer Continental Shelf⁴

Thus, the statute does not permit liability to be imposed on a contractor that is not a lessee or permittee. Similarly, the regulations BSEE promulgated under OCSLA appropriately limit the applicability of BSEE's

¹ 81 Fed. Reg. 25,888 at 25904-25906; 81 Fed. Reg. 25,888 at 25909; 81 Fed. Reg. 25,888 at 25945.

² See 81 Fed. Reg. 46,478 at 46,501; 81 Fed. Reg. 46,478 at 46,509; 81 Fed. Reg. 46,478 at 46,513; 81 Fed. Reg. 46,478 at 46,515 ("Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf" published on July 15, 2016); 81 Fed. Reg. 61,834 at 61872 ("Oil and Gas Production Safety Systems" published on Sept. 7, 2016).

³ See Bureau of Safety and Environmental Enforcement, IPD No. 12-07, Issuance of an Incident of Non Compliance (INC) to Contractors (Aug. 15, 2012).

⁴ 43 U.S.C. § 1348(b)(1) and (2) (emphasis added).

enforcement authority to lessees. Notably, following a stylistic revision to the Part 250 regulations in 1998, the regulatory obligations belong to “You.” “You” is defined as “a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee(s), a pipeline right-of-way holder, or a State lessee granted a right-of-use and easement.” The definition does not include contractors and, thus, does not impose liability on contractors.

The statutory framework established by Congress and previously implemented by BSEE reflects the practical realities of offshore development because the lessee has ultimate control over offshore operations. The lessee dictates the timing and method of the activities performed offshore, while the contractor performs the activities under the lessee’s direction. This hierarchy of authority is well-established and facilitates safe operation as lessees possess the contextual knowledge and experience to oversee well operations as a whole. The enforcement structure provides regulatory certainty that benefits both BSEE and those conducting offshore activities.

Although BSEE long recognized that its authority to enforce safety and environmental provisions under OCSLA is limited to actions against lessees or permittees, in recent years certain regulatory actions and related explanations in preambles to rules have stated otherwise. For example, in the preamble to the original Well Control Rule, the agency broadly stated that any person actually performing an activity—including contractors—is responsible for complying with each provision of the rule:

The lessee, operator (if one has been designated), and the person that actually performs an activity (**which includes contractors**) to which a particular provision of a regulation, lease, permit, or plan applies are jointly and severally responsible for complying with that provision.⁵

This statement is reiterated in substantively similar form in the preambles of other recent regulations.⁶ Yet these statements—in particular the parenthetical—conflict with the plain language of OCSLA and with the regulations promulgated thereunder. *See* 43 U.S.C. § 1348(b)(1) and (2); 30 C.F.R. §250.146(c). These statements inject inconsistencies into the rulemaking record and undermine the regulatory certainty necessary for safe, sound offshore operations under the revised Well Control Rule and other requirements.

Judicial precedent confirms that OCSLA’s safety and environmental requirements are not enforceable against contractors in either the criminal or civil contexts. In *United States v. Moss, et al.*⁷, the U.S. Court of Appeals for the Fifth Circuit held that criminal liability under the regulations implementing OCSLA does not lie against contractors.⁸ In support of its holding, the court cited the agency’s consistent conduct prior to issuing the 2012 IPD:

The consistency of over sixty years’ prior administrative practice in eschewing direct regulatory control over contractors, subcontractors and individual employees supports the district court’s conclusion that these regulations do not apply to nor do they potentially criminalize the [contractor’s] conduct.⁹

The same is true in the civil context. Following the decision in *United States v. Moss*, the Fifth Circuit granted BSEE’s voluntary motion to dismiss its appeal of a district court ruling foreclosing civil liability for a contractor under OCSLA.¹⁰ In *Island Operating Co. Inc. v. Jewell*, the Western District of Louisiana District Court found that OCSLA’s plain language precludes enforcement against contractors:

Consequently, the statute’s plain language, when read in context, is clear, and does not embrace contractors, such as Island, within the duty created by Section 1348(b). Thus, pursuant to the language of the statute, only lease-holders and permit-holders are subject to the environmental and safety duty established by the statute, and, thus, subject to enforcement of that duty.¹¹

Together, these cases reinforce that the language and intent of OCSLA and its implementing regulations do not

⁵ 81 Fed. Reg. 25,888 at 25904 (emphasis added).

⁶ *See ops. cit. supra* at n.1.

⁷ *United States v. Moss, et al.*, 872 F.3d 304 (5th Cir. 2017).

⁸ *Id.*

⁹ *Id.* at 312.

¹⁰ *Island Operating Co. Inc. v. Zinke*, No. 17-30440 (5th. Cir. 2017).

¹¹ *Island Operating Co. Inc. v. Jewell*, 6:16-CV-00145, 2016 WL 7436665 (W.D. La. Dec. 23, 2016) at *6.

permit BSEE to enforce against contractors who are not lessees or permittees. BSEE appeared to recognize this when it dismissed its appeal in *United States v. Moss*. Accordingly, PESA respectfully requests that BSEE clearly restate this point in the context of this revision to the Well Control Rule—particularly appropriate given that the erroneous change in policy was articulated at length in the preamble to the original Well Control Rule—and PESA further requests that BSEE take appropriate measures to withdraw the 2012 IPD and conform its policies and other statements accordingly.

Sincerely,

A handwritten signature in cursive script that reads "Leslie Beyer".

Leslie Beyer
President
Petroleum Equipment and Services Association