

PUBLICATION

OCS Operators and Lenders Beware - Comment Period Ending on BOEM Risk Management, Financial Assurance and Loss Prevention Notice of Proposed Rulemaking

Authors: Edward Arnold
November 14, 2014

Monday, November 17, 2014, is the last day to provide comments to the Bureau of Ocean Energy Management (BOEM) in connection with its Advance Notice of Proposed Rulemaking (ANPR) with respect to risk management, financial assurance and loss prevention associated with Outer Continental Shelf (OCS) leases. 79 Fed. Reg. 49027, 79 Fed. Reg. 61041. The ANPR invites industry comments with respect to BOEM's need to develop a comprehensive program to assist in identifying, prioritizing and managing the risk associated with industry activities on the OCS. BOEM has identified and requested comment on four major topics: 1) identification of pertinent risks/liability, 2) risk monitoring and risk management, 3) demonstrating financial assurance over project lifestyles, and 4) financial assurance, bonding levels and requirements. The ANPR continues the trend of increased regulatory oversight in the wake of the Macondo disaster previously discussed in this blog. BOEM specifically notes that it will coordinate and consult with other federal agencies, including Bureau of Safety and Environmental Enforcement and the Office of Natural Resources Revenue.

Lenders and owners of economic interest in OCS leases should note that ANPR includes several topics which would affect them. Questions posed to potential respondents include:

- Should BOEM require prior approval of all types of assignments between companies and/or lenders, including, but not limited to, assignment of overriding interest, royalty interest, net profits, production payments or other types of lease interest?
- Even if BOEM does not approve all transfers of all types of rights and obligations between companies and/or lenders, should BOEM require evidence of such transfers to be filed with BOEM in order to maintain an accurate repository of records of all transfers?
- To what extent should BOEM monitor debt obligations?
- Should BOEM require the recording and/or approval of all transfers of purely "economic interest"?

While not mentioned in the ANPR, these questions appear to be in response to issues raised in the ATP Oil & Gas Corporation bankruptcy, No. 12-36187, pending in the Southern District of Texas. In that case, the Department of the Interior (DOI) filed a Memorandum of Law on Treatment of OCS leases in which the DOI asserted that OCS leases and overriding royalty interest (ORRI) therein are limited contractual rights under federal law and are not real rights under state law. The DOI further argued that state law cannot apply as surrogate federal law under the OCS because state law is inconsistent with federal law. These positions took many practitioners by surprise and appear contrary to several previous court decisions on related issues. If surrogate state law were to be displaced, it is unclear what law would apply to the transfer of ORRI, mortgages of OCS leases and where to file to perfect a mortgage on an OCS lease or transfer of ORRI. No definitive rulings have been made in the ATP case. The uncertainty over the transfer of ORRI and the financing and perfection of mortgages affecting OCS leases is not viewed favorably by the capital markets which may adversely affect the access to capital for operators, lease holders, service companies and vessel operators.

Economic interest owners, operators and lenders should continue to monitor the ATP case and consider commenting on the ANPR.